

Planning for an Orderly Transition

By Dawn M. Evans

Most lawyers identify the importance of having a will and developing a personal financial contingency plan when planning for retirement. Unfortunately, many are less diligent in developing and maintaining a contingency plan for winding down a law practice in the event of disability or death. In a multi-member law firm, other attorneys may immediately step in to ensure that client matters are handled in the event of the death or disability of an attorney. Because solo practitioners do not have that built-in backup system, it is vitally important for all solo practitioners to have a plan in place to deal with the possibility of death or disability.

In the absence of a plan, a lawyer who is suddenly disabled or dies without having previously identified someone to step in and wind down the practice may leave clients unaware of the need to retain new counsel or retrieve records, courts unaware that the lawyer is unable to appear in court, clients and third parties unable to access escrowed funds,¹ and surviving family members vulnerable to lawsuits from unhappy now-former clients.

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—JoAnn Hathaway and Diane Ebersole,
Practice Management Advisors

While an increasing number of states require lawyers to identify a lawyer who will act as an “inventory attorney” in winding down the practice of a disappeared, disabled, or deceased attorney, the only provision currently in effect in Michigan that deals with the death or disability of an attorney is Michigan Court Rule 9.119(G), which states in pertinent part:

If an attorney...disappears or dies, and there is no partner, executor or other responsible person capable of conducting the attorney's affairs, the [grievance] administrator may ask the chief judge in the judicial circuit in which the attorney maintained his or her practice to appoint a person to inventory the attorney's files and to take any action necessary to protect the interests of the attorney and the attorney's clients. The person appointed may not disclose any information contained in any inventoried file without the client's written consent. The person appointed is analogous to a receiver operating under the direction of the circuit court.

Pursuant to MCR 9.119(G), if an attorney dies or becomes otherwise incapacitated, the grievance administrator must ask the chief judge in the judicial circuit where the attorney maintains an office to appoint a receiver to step in. Some local bar associations have programs to manage the death or disability of an attorney, but there is no

formal statewide program. While this procedure exists, relying solely on its operation guarantees delay for clients and courts. This delay could be avoided if the lawyer selects a successor in advance and provides sufficient documentation and information in the form of a succession plan to empower that successor to step in immediately if the operative circumstances occur.

One critical element of a succession plan is an up-to-date policy and procedure manual for the law firm containing the following information:

- How to perform conflict checks;
- How to use the calendaring system;
- How to locate a list of active client files and how open/active files are organized;
- Where client ledgers are kept;
- Policies regarding billing;
- Where closed files are kept, how they are organized, and how to access them;
- Policy on keeping clients' original documents and where they are kept;
- Record retention policy, records identifying destruction dates for specific files, and notifications to clients regarding destruction policy;
- Location of the safe deposit box (if any) and how to access it;
- Information regarding all bank accounts and trust accounts, including bank name, address, signatories, and account numbers;

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- Location of all bank account and trust account records; and
- How to access computers, e-mail, voice mail, answering machines, etc., including necessary passwords and access codes.

This information should be presented in a manner that is understandable to someone completely unfamiliar with the firm's protocols, which may be the case for the person identified as a successor.

In determining whom to select as a successor (also called an assisting attorney) to wind down a practice, a lawyer should be mindful of the important role this person will play in allaying clients' fears that the handling of their matters will be jeopardized by the original lawyer's departure. The assisting lawyer should be competent, trustworthy, ethical, and capable of being as committed to the clients as the original attorney. It is a choice that should be discussed with the prospective assisting attorney ahead of time so that he or she is aware of the responsibilities being asked of him or her.

Once an agreement has been reached, a written agreement should be drafted setting forth the terms of the relationship, describing the assisting attorney's role, and stating under what circumstances the assisting attorney will step in. It must be determined and spelled out in both the advance planning agreement and in retainer agreements whether the assisting attorney represents the attorney or the attorney's clients.

If the successor attorney represents the disabled or deceased lawyer, he or she will have a fiduciary relationship with the lawyer or the lawyer's estate and, therefore, may be prohibited from representing the clients on certain matters, such as legal malpractice issues related to the former attorney. On the other hand, if the assisting attorney represents the clients, he or she may be required to disclose ethical violations under certain circumstances or report errors or negligence that resulted in malpractice to the clients. Upon execution of an agreement, family members and employees should be informed to ensure a smooth transition should the assisting attorney's services be required.

Additionally, once an agreement is in place, clients should be informed at the time they retain the lawyer's services about the existence of the advance planning agreement to resolve any potential issues regarding confidentiality and to shed light on any potential conflicts of interest between the client and the assisting attorney. With that notification in place, clients can be assured that they will be promptly notified of the death or disability of their attorney to allow them to make appropriate decisions to protect their interests in the event the advance planning agreement becomes operational.

When an attorney's practice is in the form of a professional service corporation (PC) or professional limited liability company (PLLC), the attorney must ensure that proper corporate resolutions are in place to give the assisting attorney appropriate authority to act. This can be accomplished by having a resolution in place that sets forth the manner and the circumstances in which the assisting attorney can act.

Also, the lawyer's will should clarify the personal representative's role in winding down the practice, if any, to prevent a potential conflict between the role of the personal representative of the lawyer's estate and the assisting attorney. Specifically, any funds in the lawyer's trust account when he or she ceases to practice due to unforeseen circumstances should be handled in a manner consistent with the provisions of the agreement to close the practice.

Finally, Rule 1.17 of the Michigan Rules of Professional Conduct allows for the sale of a law practice. This option should be explored when planning for winding down a practice and may provide an alternative to a process that essentially involves an orderly return of the files to the clients.²

Planning for an orderly transition upon disability or death—which is particularly important for solo practitioners—is a way of assuring family, staff, and clients that their respective concerns and interests have been addressed at a time when decisions about who will handle their matters during the transition can be made dispassionately. Having such a plan in place also eliminates a significant source of stress for the lawyer.³ ■



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FOOTNOTES

1. All attorneys in Michigan receiving funds in connection with a representation in which a client or third person claims an interest are required to deposit such funds into an IOLTA or non-IOLTA account separate from the lawyer's own property. See Rule 1.15 of the Michigan Rules of Professional Conduct. State Bar of Michigan Informal Ethics Opinion RH-107 opines that "signatories on a law firm's IOLTA trust account must be lawyer members or employees of the law firm." Because solo practitioners do not have other attorneys in their firms to act as signatories on IOLTA accounts, the death or disability of a solo practitioner can create enormous problems with regard to trust account access if the solo practitioner is the only signatory on the account. The only remedy for this situation is for the chosen successor attorney, the personal representative of the estate, or the court-appointed receiver to obtain a court order giving him or her access to the trust account. This may cause unavoidable delay in accessing the account upon the lawyer's death or disability and may conflict with the requirements of MRPC 1.15(b)(3), which requires the lawyer to "promptly pay or deliver any funds... that the client or third person is entitled to receive..." Unfortunately, there is no alternative for solo practitioners at this time. Attorneys practicing in multi-member firms should ensure that at least two attorneys are named as signatories on the firm trust account to facilitate seamless access to the account at all times.
2. In accordance with MRPC 1.17(c), "actual written notice of a pending sale shall be given at least 91 days prior to the date of the sale to each of the seller's clients..." The notice required by section (c) must include:
 - (1) notice of the fact of the proposed sale;
 - (2) the identity of the purchaser;
 - (3) the terms of any proposed change in the fee agreement permitted under paragraph (b) [of MRPC 1.17];
 - (4) notice of the client's right to retain other counsel or to take possession of the file; and
 - (5) notice that the client's consent to the transfer of the client's file to the purchaser will be presumed if the client does not retain other counsel or otherwise object within 90 days of receipt of the notice.
3. For more extensive information on this topic, see O'Connell, *Sudden Death or Disability: Is Your Practice—And Your Family—Ready for the Worst*, available at <<http://www.michbar.org/seniorlaw/pdfs/death-disability.pdf>> (accessed August 6, 2009).