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CHAPTER 3

Preparing for the Unexpected: Ethical Consequences of Lacking a Succession Plan

The simple fact is that solo practitioners, as well as partners in law firms, all own a small business—the law practice. And studies regularly document that small business owners do not plan well for the future of their businesses. In fact, a survey several years ago by the Family Firm Institute and MassMutual Financial showed that fewer than half of small business owners expecting to retire soon had selected a successor—and almost one-third had no plans to ever retire.

Unlike other business owners, however, lawyers face significant ethical consequences for failing to plan for a practice's future. Failure to plan for how clients will be taken care of as a lawyer approaches retirement age can, according to some authorities, be construed as reckless disregard for client welfare—a true ethical violation.

In addition, some states provide for state bar or court intervention if a practice must be wound down due to the death or incapacity of the lawyer without a succession plan in place. Such intervention will be at the expense of the lawyer's estate or assets. And, in some cases, the court will reach into the grave and hold the lawyer (and, thus, the estate) liable for negligence for not taking care of the client by providing a plan to ensure that client matters would be taken care of properly, not "if" but "when" the lawyer died.

Clearly, anticipating the unexpected needs to be an integral element of every lawyer's succession planning process.

To begin with, the ABA's Commentary 5 on Model Rule of Professional Conduct 1.3 ("Diligence") states:

> To prevent neglect of client matters when the lawyer dies or if he or she becomes disabled, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action.

The ethical implications of failing to plan for a practice's future when the lawyer retires or dies are so severe that some state bar associations are also now taking action to "protect" the public. For example, the State Bar of California considered a requirement in 2010 for lawyers to have an "estate plan for the law practice" providing for succession in the event of a lawyer's death or disability. While the bar declined to act then, the issue may return for reconsideration in another form. However, even without this provision, the rules already command the lawyer to protect clients' interests, even after the lawyer's death.

As another example, in 2007 the Indiana Supreme Court approved Rule 23, which encourages solo lawyers making their annual registration with the state bar to designate another lawyer to act as an "attorney surrogate" in the event of death or disability. Other states have a similar emphasis on the topic.

Consider the Maine Board of Overseers of the Bar, too, which has prepared a special handbook for receivers of the practice of a disabled, missing, or deceased attorney. The handbook quotes Maine Professional Ethics Commission Opinion No. 143 to this effect: "It is obvious that the solo practitioner should adopt a plan in advance…. It is obviously too late to wait until death or disability to let unprepared successors deal with an impossible situation. Spontaneous improvisation when the crisis occurs is unacceptable."

Such reactions have been prompted by the real-life consequences of lawyers failing to plan for the unexpected. A case in point: Some years ago, a Maine lawyer died and was buried with his estate probated. Suddenly, the estate was sued for

malpractice by a former client because the plaintiff-former client's matter was lost owing to the passage of a statutory time limit that occurred subsequent to the lawyer's death. The court held the lawyer's estate liable because, it reasoned, he should have known that death was possible (even though he was in good health) and taken steps to protect his clients in the event tragedy struck.

In other words, he failed to have an estate plan for his law practice, his client was injured as a result, and his estate was therefore liable for damages.

For bar associations that believe "protecting the public" (versus serving lawyers) is their top task, it is obvious that such protection can reach the grave. Even insurance carriers are now asking the question: "Who will take care of your practice in your absence?" Failure to provide an answer may be sufficient reason for refusing to issue a malpractice insurance policy; rejecting insurance coverage after the fact, resulting from false statements on the insurance applications; or, at the very least, causing a higher premium.

More Stories of the Perils That Arise

I have been called in on occasion to help a widow, a widower, or an adult child of a disabled or deceased attorney untangle their loved one's law practice, and I can say from firsthand experience that the management and financial entanglements can be horrendous. The challenges to protect the clients can be uniquely daunting when there is no one left in the office who knows what the status of each of the pending matters may be.

Of course, a personal succession plan is not a guarantee against ethical problems. A potential issue in solo practices, for example, is that aging lawyers may leave their clients emotionally long before they close their doors. That can result in less-effective representation well before the lawyer retires, with malpractice claims a potential risk. Also, too many older lawyers are behind the technology curve, even not using email. That potentially exposes them to charges of malpractice for not meeting the standard of care practiced by other lawyers and law firms in their community. It also diminishes the value of the practice if the lawyer wishes to sell it and retire because the purchasing lawyer has to invest in the technology to get the practice up to speed.

In multi-partner firms, be they large or even small firms, such issues are far less likely occur. More typically, the older lawyer simply receives the designation of "special counsel" or emeritus partner, and another attorney in the firm takes over the practice. Or, in the event of a lawyer's sudden disability or death, the lawyer's caseload is quickly transferred to another member of the firm. There may be glitches in the smoothness of these transfers, to be sure, but seldom is there a catastrophe rising to the level of malpractice.

For the solo practitioner, though, deciding how and by whom the practice is to be closed in the event of unexpected death or incapacity is harder to face. However, the attorney who has not taken the possibility of his untimely death or disability into account in planning a practice's future is creating a tremendous burden for loved ones left behind—one that may bring unwelcome intervention by powerful outside entities.

Several of my clients have taught me the lessons that flow from not adequately planning in advance for one's succession. Here are some examples: Do you find yourself in any of these pictures?

- A woman attorney in a Northeast state wanted me to help her father sell his law practice in another nearby state; he had been diagnosed with terminal cancer. The best solution in this instance was for the daughter to take over her aging father's practice and either grow it or sell it at her pace, without the pressure of a "fire sale." She didn't want to move back to the father's state, though, since she had her own practice as well as other family needs. Within six months, without having taken any action to sell his practice or otherwise provide for his clients, the father died. As mentioned elsewhere, one need not "give away to strangers" the substantial value that the goodwill of one's practice represents. It is unfair to all concerned, your clients, your heirs, and the reputation of lawyers in general.
- In another matter, where I was called in to provide expert testimony, a lawyer was diagnosed with a terminal disease two months before dying. He quickly put together a plan to sell and, on his deathbed, believed he had sold the practice to an associate and thereby taken care of his widow and his clients. But, failing to have the appropriate professional expertise representing him before he died, the result was that a contract of sale hadn't

been executed and the presumptive buyer walked away from the transaction. In what I believe to be a rare lawsuit concerning a transaction of sale of a law practice, the estate and the presumptive buyer have told very different versions of the story. Litigation is never inexpensive, either in terms of dollars or emotions. The lesson: Save your heirs the turmoil resulting from such poor planning.

- In addition, I recently received a call from the son of a woman lawyer who had just died unexpectedly. The son wanted to sell his mother's practice; but he knew virtually nothing about the practice itself or its clients, including whether his mother had any referral arrangement with another lawyer to take care of clients. He had even less of an idea about who to turn to for help in making the sale, and had not even begun to take his mother's estate, including the practice, through probate. As a first step, I advised the bereaved son who called me to go to the website of his late mother's state bar association and search for the phrase "death of a lawyer." As in Maine, many state bars have provisions for appointment of a personal representative or conservator, or will actually assume responsibility for action and seek both reimbursement and compensation from the lawyer's estate or assets. This is undesirable, but likely inevitable.

These are tragic situations—and hardly unique ones. There is also the well-known tale of the widow of a California attorney who sought to work through the problem of closing her husband's practice after his death. He had not given her any direction prior to his death or left any written instructions for her to follow. She ended up hiring a practice management attorney who cost a great deal of money but provided unsatisfactory service, to the extent that the state bar threatened intervention. Winding down the practice was difficult and stressful for her, clearly, and both the family and the clients of the deceased lawyer were at risk in the process.

The Prudent Strategy: An "Estate Plan" for the Practice

To avoid such problems, every solo or small firm practice with partners over the age of 50—at a maximum—should be thinking of how to meet client needs in the event of partner death or disability. A key element in this is enlisting a practice colleague, successor, or purchaser who can step up in the event of emergency,

disability, or unexpected tragedy.

All lawyers should also follow these steps:

- First, prepare a client list containing all current contact information and status of matters/cases being handled. This listing should be maintained on a current basis.
- Second, create a memo for each file so that any lawyer who assumes the file will know the strategy developed, the outcome planned, and the tactics anticipated.
- Third, create a buddy system by arranging with a colleague to review all this information and either take on the cases or provide for other representation without using a state bar conservator paid by the estate. A better alternative is grooming a successor brought on board as an associate or a lateral partner. Ideally, matters can be transitioned to the new lawyer over several years, through ongoing conversations with key clients about the upcoming transition as the successor forges new ties and gets up to speed on what the client needs and expects. Such preparation assures continuation of the firm's reputation, embodied in the client list and the ongoing nature of the practice (with staff and systems in place). Transitioning a successor from inside the firm eliminates ethical concerns and succession worries.

Another alternative for solos is identifying a purchaser for the practice. A strong client base and professional reputation are assets that can set the selling price for a firm. Usually even the smallest and most personal practices are salable for the right price and under the right terms. Prospective buyers include law firms that are well run and free of debt, and that may themselves be run by successful lawyers positioned to take advantage of the opportunities afforded by purchasing other practices. It's a win-win situation for both parties, made possible by Model Rule 1.17 allowing for sale of all or part of a practice. But no matter whether a colleague, successor, or purchaser ultimately takes responsibility, proper planning will give any lawyer peace of mind that ethical snares will not diminish the value of a practice built during decades of hard work.

Other steps in the plan will be driven by your jurisdiction's rules, so be sure to consult them when developing an estate plan for your law practice—especially

since the particular ethical issues can directly involve a lawyer's state bar association.

For example, the code of professional responsibility in every U.S. state requires that when a practice is closed, including through death or disability, it requires formal notification to clients, opposing counsel, courts and agencies where the firm may have had pending matters, errors and omissions insurers, and the state's bar association. In California, and likely in other states as well, if a practice must be closed due to an attorney's death or incapacity, application must be made by a personal representative, guardian, or conservator. If there are cases or other matters not completely closed, the state bar can intervene, assume responsibility for action—and seek both reimbursement and compensation from the lawyer's estate or assets.

So Who Will Step In at the Needed Time?

Some lawyers may say that succession planning is more bother than it is worth and that they intend to stay in practice until they "die with their boots on." Such an attitude is extremely shortsighted, and a bit cavalier, as the foregoing examples suggest.

The fact is that every solo or small firm practice should have an "estate plan." Such a plan has both public and personal significance. On the public (client) side, it addresses the practical and ethical importance of ensuring that client matters are effectively transitioned to a successor lawyer or firm when you are no longer able or willing to handle them. On the personal side, an estate plan for the law practice is perhaps the most important element in your financial estate plan.

The process for effectively securing such protection begins with a list of assets and liabilities. In this case, for the lawyer, assets also include a client list and a vendor list. The client list should contain all current contact information as well as a status report on the matters being handled by the attorney. This contact and status listing should be maintained regularly, updated no less frequently than every quarter.

Second, you'll want to create a strategy memo for each file so that any lawyer who inherits the file will know the strategy that was adopted originally, the projected outcome, and the tactics designed to get the result contemplated.

Third, using the "buddy system" mentioned earlier, arrange with another attorney to enter the practice and assist either with its sale or closing and transfer of files to respective clients. In either event, the new attorney should review the files to ensure that the clients' interests are not prejudiced by the passage of time. Don't allow the lawyer's estate to blow a statute of limitations!

With estate plans in place, older solo and small firm lawyers should have the confidence to remain in practice as long as they desire, knowing that their practices, clients, and families are protected should the worst occur. A completed plan also alleviates the danger that an estate plan will be imposed from the outside.