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# SUCCESSION PLANNING: WHAT BETTER TIME THAN NOW?

For many lawyers, the COVID-19 pandemic has brought into focus the importance of succession planning. Succession planning is obviously important for dealing with the possibility of unexpected illness or death, but it is also important for ensuring smooth transitions as lawyers near retirement. There are many reasons to engage in succession planning, and just as many options. In recent years, firms have been experimenting with multiple approaches, and although there does not appear to be any predominant approach in the legal industry, what is clear is that succession planning is not something that should be put on the back burner.

### Reasons for Succession Planning:

There are plenty of incentives for lawyers to think about succession planning. A good succession plan is financially beneficial to both retirees and their successors. It also helps a firm hold onto to clients and matters. And for solo lawyers, good succession planning can prevent the lawyer's spouse/personal representative (often a non-lawyer) from having the nightmare task of winding up a law practice.

But there is also a risk management aspect to succession planning. Poor planning can result in tort liability, and can implicate the Rules of Professional Conduct governing competence (e.g. ABA Model Rule 1.1), diligence (ABA Model Rule 1.3) and confidentiality (ABA Model Rule 1.6), among others. Indeed, many states have taken the extra step of enacting rules that specifically require or encourage lawyers to have a succession plan, for example:

- [South Carolina RPC 1.19](#)
- [Ariz. Sup. Ct. R. 41\(i\)](#)
- [Va. Rules of Professional Conduct 1.3, comment \(5\)](#)
- [Florida RPC 1-3.8](#)

Most of these rules are relatively new, and many other states are considering adopting similar rules. This increased emphasis on the duties associated with succession planning can be attributed in large part to the fact a disproportionately large percentage of lawyers are nearing retirement age. *See* Brian McMahon, *How Law Firms Can Prepare for Partner Retirement Facing the Realities of an Aging Partner Population*, Bench & B. Minn., November 2017, at 18.

And just as regulators have been proactive in addressing this issue, lawyers and firms faced with the same generational shift have been experimenting with succession planning options.

### **Methods of Succession Planning:**

Developing an appropriate succession plan will always be practice-specific. And even though lawyers who work in larger firms may see succession planning as an issue reserved for solo practitioners or small firms, planning in some form is crucial for every type of lawyer. *See* V. Nicole “Nici” Comer & C. Pierce Campbell, *Succession Planning: A Joint Primer for the GC and Outside Lawyer*, ACC Docket, July/August 2016. Unsurprisingly, a solo lawyer succession plan will necessarily be very different than a large firm succession plan.

### **Small Firms / Solo Lawyers:**

If and when a solo lawyer unexpectedly dies or becomes incapacitated, an immediate flood of issues will confront the person(s) who have to deal with client files and matters, including: who will handling ongoing matters? And what will be done with closed client files?

The keys to tackling these issues involve appointing a particular attorney to tend to ongoing client files and making sure that that attorney has what is needed to step in as seamlessly as possible. Lawyers who have been willing to adopt basic technological innovations will be at an advantage. It will be much easier for a successor to take the reins if there is practice management software in place that tracks clients, matters, dates/deadlines, and file materials.

One particularly helpful resource is the ABA Center on Professional Responsibility (CPR), which has gathered a number of resources to help lawyers develop succession plans, including the following basic list of considerations that can be weighed as part of drafting a succession plan:

- Written instructions concerning how and where client information is stored, including bank and other account details (e.g., operating and trust account information );
  
- Information concerning disposition of closed client files, information about law office equipment leases or other contracts;
  
- Information regarding payment of current liabilities;
  
- Instructions to gain access to computer and voicemail passwords; and
  
- Information detailing how the successor will be compensated.

*See* Succession Planning, [https://www.americanbar.org/groups/professional\\_responsibility/resources/lawyersintransition/successionplanning/](https://www.americanbar.org/groups/professional_responsibility/resources/lawyersintransition/successionplanning/).

### **Larger Firms:**

The main issues larger firms must plan for are declining competence and transitioning certain practices to more junior lawyers. The latter issue has multiple facets, including transitioning client relationships and transitioning substantive knowledge.

A key first step is gathering information about lawyer demographics and combining that with information about business development. If a high percentage of the firm's originations are coming from lawyers nearing retirement age, or if senior lawyers

appear to be hoarding work, succession planning should be a top priority. Assessing these issues is another task that will be made infinitely easier with appropriate practice management software that can track the appropriate metrics.

One relatively recent succession planning strategy at some large firms has involved mandatory retirement ages. But that approach comes with many potential problems, both legal and practical. Such policies can even backfire by inspiring prominent lawyers to take their book of business to a new firm.

A more nuanced approach involves phased retirement, which can take many forms. The basic idea behind a phased retirement is that benchmarks and timelines are used to adjust a lawyer's financial arrangement with the firm (billable expectations, salary, equity stake, etc.), while the lawyer's goals are also adjusted to encourage: mentoring, moving clients and matters to younger lawyers, and any other non-billable tasks that add value and which are of interest to the retiring lawyer.

Of course, there are lawyers in other situations as well (e.g., in-house counsel) where different succession planning approaches will be warranted. But in almost any scenario, lawyers who have kept up to date with basic practice management innovations will have a head start in their succession planning work, and regardless of circumstances, all lawyers should make succession planning a priority.

### Footnotes

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