

IADC Professional Liability Roundtable  
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**Lawyer Succession Planning: Best Practices, Pitfalls, and Risk  
Management**

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**Summary:** This panel will discuss ethics, liability, and risk management issues focused on succession planning. The panel discussion will include practical examples and the increased involvement from state bar associations and regulators.

**Ethics rules**

The ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 92-369 in 1992 (**Attach. 1**). Formal Opinion 92-369 focuses on solo practitioners, noting: “As a precaution to safeguard client interests, the sole practitioner should have a plan in place that will ensure insofar as is reasonably practicable that client matters will not be neglected in the event of the sole practitioner’s death.” Formal Op. 92-329 notes that there is no specific requirement in the ethics rules, but connects this recommendation to Rule 1.1- Competence and Rule 1.3 – Diligence.

**ABA Model Rule 1.1:** A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

**ABA Model Rule 1.3:** A lawyer shall act with reasonable diligence and promptness in representing a client.

That plan, at minimum, should include the designation of another lawyer who would have authority to review files to determine which files need immediate attention and to provide notice to the clients.

A lawyer's ethical obligations to engage in succession planning also implicates other rules:

**ABA Model Rule 1.4(a)(3)**: A lawyer shall keep the client reasonably informed about the status of the matter.

**ABA Model Rule 1.4(b)**: A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

**ABA Model Rule 1.15**: Regarding safekeeping client funds and property.

**ABA Model Rule 1.16(d)**: Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred . . .

**ABA Model Rule 1.4(a)(3)**: A lawyer shall keep the client reasonably informed about the status of the matter.

Law firm partners and managers also have a duty to ensure that all lawyers in a firm conform to the Rules of Professional Conduct. (ABA Model Rule 5.1(a)).

### **Involvement by state bar associations & regulators**

Although the ABA Model Rules do not specifically require successor planning, several states have implemented rules covering this issue.

Several states mandate successor planning; many states recommend having a plan; and several other states have no rules in place.

States that have implemented mandates include:

**Michigan**: In 2022, the Michigan Supreme Court issued an order amending the rules governing the State Bar of Michigan, as well as the Michigan Court Rules, mandating succession planning (**Attach. 2**). The new rule requires all attorneys to designate an Interim Administrator who, among other things, would have duties to take custody of files and records, accounts, review files to identify pending matters, and notify clients, courts, and opposing counsel of the appointment of the Interim Administrator in the event an affected attorney is unable to practice law. The rule also requires identification of a “person with knowledge” to locate and access the lawyer’s files.

**Arizona**: Arizona amended its rules in 2016 to specify lawyers have a duty to “protect current and former client interests by planning for the lawyer’s termination of or inability to continue a law practice, either temporarily or permanently”. (**Attach. 3**). The rule requires lawyers to designate another lawyer to review files, identify whether any files require immediate attention, and to identify someone to notify clients of the circumstances regarding the lawyer’s inability to continue to practice.

Other states, including Florida, Iowa, and Maine, enacted similar mandates in the years following ABA Formal Op. 92-329. See Fl. Rule 1-3.8 (2006); Iowa Court Rule 39.18 (2017); Me. Bar R. (1)(g)(12) (2015).

Many other states recommend the preparation of a succession plan, but do not mandate the practice.

## **Best practices & risk management**

As of 2022, nearly 14% of lawyers were 65 or older. (**Attach. 4**, ABA Profile of the Legal Profession). By contrast, only about 7% of workers in the U.S. are 65 or older.

Mandated succession plans provides benefits to lawyers and their clients by eliminating risk, avoiding confusion, and encouraging diligence and organization. (**Attach. 5**, “Should States Require Private Attorneys to Maintain Succession Plans?”, Emily Schmidt, University of Cincinnati Law Review, Nov. 13, 2021).

Many professional liability insurance carriers require certain categories of law firms and practices to have arrangements in place for contingencies including office closures, disability, or death.

At minimum, insurers recommend designating an assisting attorney in the event of incapacity, death, or other circumstances rendering a lawyer unable to continue practicing law. Recommended best practices include a succession agreement with a designated assisting attorney to cover various duties, including:

- Attending to active and inactive client matters.
- Transferring active matters to other attorneys.
- Managing bank accounts.
- Collecting accounts receivable.
- Coordinating with a firm’s accountant, paying staff, and reconciling other liabilities.
- Addressing potential malpractice claims.
- Notifying the lawyer’s professional liability insurer.
- Liquidating and selling the practice.

In addition, insurers may recommend including in client engagement agreements a disclosure that a designated assisting attorney will have access to client files in the event of the lawyer’s incapacitation. (**Attach. 6**,

“Expecting the Unexpected: Succession Planning for Lawyers,” CNA Professional Counsel Guide for Lawyers and Law Firms, Matthew Fitterer, 2016).