



Succession Planning

A Malpractice Insurance Company's Perspective

Authors:

Michelle M. Lore
Ben Mulligan

Executive Editor:

Timothy J. Gephart

Editorial Board:

Eric T. Cooperstein
Linda J. Hay
Charles E. Lundberg
Vincent A. Thomas



MINNESOTA LAWYERS MUTUAL
INSURANCE COMPANY

PROTECTING YOUR PRACTICE IS OUR POLICY.™

Succession Planning

A Malpractice Insurance Company's Perspective

PUBLISHED BY:

Minnesota Lawyers Mutual
333 South Seventh Street
Suite 2200
Minneapolis, MN 55402
www.mlmins.com
Phone: (800) 422-1370
Fax: (800) 305-1510

Learn how MLM can protect your practice.

Connect with Our Dedicated HelpLine Staff

When you have claims avoidance or coverage questions,
call our dedicated HelpLine staff.

HELPLINE
(855) 692-5146

Apply Today

Not an MLM Insured? Get a quote today.
Our process is fast, convenient, and confidential.

www.mlmins.com
(800) 422-1370

ABOUT THE SERIES

There are literally hundreds of books and articles covering just about every aspect of law practice management. So why write another one? And why should you read it?

Minnesota Lawyers Mutual has been in the risk management business for over 30 years and we've seen plenty of well-planned, well-crafted and wonderfully maintained risk management materials. Unfortunately, we've also "paid the price" in instances where an insured attorney simply wasn't familiar with a particular risk management concept or didn't know "where to go" to find that information.

So Minnesota Lawyers Mutual has developed a Law Practice Management Booklet Series written from the perspective of an errors and omissions insurance company. Our goal is to provide a single source of accurate, practical information and best practices for everything from conflicts of interest, to client communications, to the collection of fees, with the additional commitment to keep it current and accessible. By compiling all this information into checklists, avoidance tips and examples, we've turned a mountain of material into convenient, simple-to-use "chunks" of information organized by topic. In addition, you'll find reasonably detailed real-life experiences to ponder. Using the tools in these booklets will help you "cover all the bases" from a risk management perspective.

Use the checklists and tips as guidelines, not requirements set in stone. At the same time, understand that each of the items is included for a particular reason. Hopefully, you'll be able to match your needs with our materials and in doing so, avoid potential malpractice claims.

Booklet Series Managing Editor:

Jayne M. Harris, Vice President of Business Development

Booklet Series Creative Designer:

Emily R. Ward, Office Administrator

No part of the booklet series may be transcribed or reproduced without the prior written consent of Minnesota Lawyers Mutual. Discounts are available for booklets ordered in bulk. Special consideration given to state and local bars, CLE programs, and other bar-related organizations. Inquire with Jayne Harris at jharris@mlmins.com.

ABOUT THE BOOKLET

AUTHORS:

Michelle M. Lore

Michelle M. Lore, J.D., joined Minnesota Lawyers Mutual as a claim attorney in 2011. Before joining MLM, Michelle spent 11 years as an associate editor for Minnesota Lawyer, a publication that serves the state's legal community. Prior to joining Minnesota Lawyer, she was an attorney in private practice. From 1994-1997 and again from 1999-2000, Ms. Lore was employed with the Twin Cities firm of Horton and Associates, where she litigated employment discrimination claims. From late 1997 through much of 1998, Ms. Lore worked for Colosimo Patchin Aronson and Kearney in Virginia, MN, defending personal injury matters, handling employment issues and defending municipality against a condemnation claim. Ms. Lore attended William Mitchell College of Law in St. Paul, MN, and obtained her law degree in 1994.

Ben Mulligan

Ben Mulligan, a third-year student at the University of Minnesota Law School, joined MLM in May 2016. He earned his B.A. in English and Philosophy *magna cum laude* from Doane College in May 2014. Before joining MLM, Mr. Mulligan clerked in a Minneapolis family law practice and served as a research assistant to a professor at the University of Minnesota Law School. Mr. Mulligan is currently a member of the University of Minnesota Employment Law Clinic, where he handles unemployment insurance appeals.

EXECUTIVE EDITOR:

Timothy J. Gephart, Vice President Claims

Timothy J. Gephart, has served as Vice President of Claims at Minnesota Lawyers Mutual since 1985. He is an adjunct professor at the University of Minnesota School of Law, where he teaches a course on legal malpractice. Mr. Gephart served two three-year terms on the Minnesota Lawyers Professional Responsibility Board and two three-year terms on the Minnesota State Board of Legal Certification. He is a past chair of the National Ethics Committee for the Society of Chartered Property Casualty Underwriters and of the National Association of Bar Related Insurance Companies Claim Education Committee. Mr. Gephart is a member of the Minnesota State Bar Association (MSBA) Life and the Law Committee and was a recipient of the 2003 MSBA President's Award as a member of the task force on the ABA Model Rules of Professional Conduct.

EDITORIAL BOARD

Eric T. Cooperstein, *Eric T. Cooperstein Ethics Consulting & Representation*



Mr. Cooperstein, the “Ethics Maven,” has a solo practice devoted to representing and consulting with lawyers in a wide variety of legal ethics and law practice conundrums. Eric defends lawyers against ethics complaints, provides advice and expert opinions, and represents lawyers in fee disputes and law firm break-ups. Eric is a frequent CLE presenter, webcaster, and moderator in Minnesota and nationwide on legal ethics and practice management. Eric currently is a Director on the boards of Minnesota Continuing Legal Education and Minnesota Lawyers Mutual Insurance Co., as well as a Trustee of First Universalist Church. Eric previously served as President of the Hennepin County Bar Association in 2013-14 and served as chair of the Minnesota State Bar Association’s Rules of Professional Conduct Committee from July 2009 through June 2012.

Linda J. Hay, *HeplerBroom, LLC*



Ms. Hay is a partner with the law firm of HeplerBroom, LLC, in the Chicago office. Ms. Hay actively defends professional liability cases. She has tried numerous cases to successful verdict and has also handled numerous appeals in this area. Ms. Hay regularly presents seminars on risk and claim management of professional liability cases and regularly publishes in the field as well. Ms. Hay is a past member of the Board of Directors of the Illinois Association of Defense Trial Counsel, active in numerous professional liability and bar associations, both national and regional, past editor-in-chief of the IDC Quarterly, the legal journal of the Illinois Defense Bar (2005-2006), and a current editor for the IDC Survey of Law. Ms. Hay has been named a Super Lawyer, and Leading Lawyer in the professional liability areas past and present.

Charles E. Lundberg, *Lundberg Legal Ethics*



Mr. Lundberg is recognized nationally as a “lawyer’s lawyer” and a leader in the fields of legal ethics and professional liability. He served for twelve years on the Minnesota Lawyers Professional Responsibility Board, including six years as Board Chair. He has served as President of the Association of Professional Responsibility Lawyers and Chair of the Professional Liability Committee of the International Association of Defense Counsel, and is currently a liaison to the ABA Standing Committee on Lawyers Professional Liability. Chuck is an adjunct professor at the University of Minnesota Law School, where he teaches a class in Legal Malpractice Law and Professional Responsibility. For many years, he has been recognized as a Top 100 Super Lawyer and one of The Best Lawyers in America in the fields of Appellate Law and Legal Malpractice Law. In 2015 Chuck retired after 35 years as a partner with the Minneapolis trial firm of Bassford Remele and now consults with lawyers and law firms on matters involving legal malpractice, legal ethics, and other areas of the law of lawyering through Lundberg Legal Ethics.

Vincent A. Thomas, *Minneapolis Community and Technical College*



Mr. Thomas serves as a member of Minnesota Lawyers Mutual’s Board of Directors. He previously served as a member of the Minnesota Lawyers Board of Professional Responsibility for eight years, the last four as vice-chair. Mr. Thomas practiced law for nine years at Briggs and Morgan in the areas of public finance and municipal law. He left Briggs and Morgan in 1995 to become Assistant Dean of Students, and Adjunct Professor of Law at Hamline University School of Law. He taught Professional Responsibility at Hamline from 1996-2005. In 2006, Mr. Thomas joined the University of St. Thomas School of Law administration and served UST as Assistant Dean for Student and Multicultural Affairs and Adjunct Professor of Law for four years. Mr. Thomas currently serves as the Dean for Continuing Education and Workforce Development and as an Academic Dean for Minneapolis Community and Technical College in Minneapolis, Minnesota.

ABOUT MINNESOTA LAWYERS MUTUAL

Founded in 1982 by members of the Minnesota State Bar Association, Minnesota Lawyers Mutual Insurance Company (MLM) provides professional liability insurance and risk management services for the legal community. MLM is committed to being an efficient, accountable and permanent practice management resource. Additionally, we have returned a dividend to policyholders every year since 1987.

If you are searching for a stable provider of legal malpractice insurance and useful practice management information, Minnesota Lawyers Mutual is the resource you need. Visit our website at www.mlmins.com or call us at (800) 422-1370 to learn more.

Minnesota Lawyers Mutual Board Members 2017

Paul M. Ablan - President/CEO, Minneapolis, MN

R. Bertram Greener - Chair, Minneapolis, MN

Steven G. Brady - Stillwater, MN

John Bowden - Minneapolis, MN

Ted Collins - St. Paul, MN

Eric Cooperstein - Minneapolis, MN

Roger Fellows - Brooklyn Park, MN

Roger Frommelt - Minneapolis, MN

Andrea Geraghty - Pittsburgh, PA

Harold Goldner - Blue Bell, PA

Joan Hackel - St. Paul, MN

A. Patrick Leighton - Inver Grove Hgts., MN

Elisabeth S. Reynoldson - Osceola, IA

Barbara Runchey - Marshall, MN

Clinton A. Schroeder - Minneapolis, MN

Ronald L. Seeger - Rochester, MN

David Stowman - Detroit Lakes, MN

Vince Thomas - Minneapolis, MN

Bob Guzy - Minneapolis, MN

Founding Emeritus Director

TABLE OF CONTENTS

INTRODUCTION	1
PLANNING FOR THE UNEXPECTED	3
Why Have a Succession Plan?	3
Developing a Succession Plan	4
Share the Plan	12
Maintain an Organized Office	13
PLANNING FOR PARTNERS – COGNITIVE IMPAIRMENT	14
Recognizing the Signs	14
Taking Firm Responsibility	15
Addressing the Impairment	17
PLANNING AN EXIT	20
Winding Up/Downsizing	20
Sale of a Practice	22
Transition	23
Merger	25
CONCLUSION	26
APPENDICES	27
Appendix I: ABA Model Rules of Professional Conduct	27
Rule 1.1 Competence	27
Rule 1.3 Diligence	27
Rule 1.15 Safekeeping Property	27
Rule 1.16 Declining or Terminating Representation	28
Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer	29
Rule 1.17 Sale of Law Practice	29

TABLE OF CONTENTS (continued)

Appendix II: Directory of Lawyer Assistance Programs30
Appendix III: Checklist to Closing a Practice.....31
Appendix IV: Sample Back-Up Attorney Letter to Client32
Appendix V: State Rules Regarding a Sale of a Law Practice.....33

INTRODUCTION

Succession planning is essential to every lawyer's practice, proactively protecting clients and colleagues in the event of the lawyer's death or disability, including cognitive impairment.

The American Bar Association's 2015 Lawyer Demographics Survey shows the beginning of a shift in the law profession. The average attorney age is increasing as fewer attorneys are retiring from practicing, and there are fewer people 29 and younger entering law than ever.

According to the U.S. Census Bureau, the nation's 65-and-older population grew from 44.7 million in 2013 to 46.2 million in 2014, which is approximately 14.3% of the total population. By the year 2030, it is expected that 20% of the U.S. population will be over age 65. This group now contains the oldest four years of the baby boom generation (born between 1946 and 1964). With an aging population comes a rising incidence of dementia and other age-related illnesses. It is estimated that dementia in one form or another affects 1% of people between the ages of 60 and 64, and as many as 25% to 50% of people over age 85. As of 2016, an estimated 5.4 million Americans of all ages have Alzheimer's disease. Worldwide, 44 million people have Alzheimer's or related dementia, and only one in four have been diagnosed. While lawyers may not want to think about it, it is important for them to be prepared in the event that they unexpectedly fall ill and are no longer able to serve their clients. There is no reason to believe that lawyers are immune to these diseases or other age-related cognitive impairments.



While lawyers may not want to think about it, it is important for them to be prepared in the event that they unexpectedly fall ill and are no longer able to serve their clients.

Early planning is a must for all firms and all lawyers. Lawyers should make sure firm policies and procedures are in place before problems arise. Firms should consider implementing a policy of regular medical exams and guidelines for how succession decisions are made. Individuals should also create and implement a written succession plan for their personal practices that addresses everything from computer passwords to docketing to where client files are stored. An up-to-date succession plan is vitally important, particularly for solo practitioners, because it provides security to attorneys and their clients that assures clients will be represented if something unforeseen occurs. Some states even require that lawyers practicing within the jurisdiction have a succession plan in place. Moreover, some insurance carriers require small firm and solo attorneys to have a succession plan in place, which must be disclosed and explained on their insurance application.

Unfortunately, many lawyers are in denial and think they'll practice forever. In reality, however, any one of us could become ill, incapacitated through a health event or accident, be suspended or disbarred from the practice or, worst case scenario, die unexpectedly. Solo and small firm attorneys in particular must be prepared for such an event. Whether you are 30 or 60, healthy or ill, if you represent clients you need to put together a succession plan now.

Similarly, it is important to plan ahead for an expected leave from the practice of law, whether due to retirement or simply a desire to do something else. A happy, effective transition can't be accomplished in a few months, however, but rather should be started as early as possible, even years ahead of time. Ideally, the transition should take five to seven years, but it can be done in two to three. Having an effective, well thought-out succession plan in the case of an expected departure allows you to comply with your ethical duties, protect your clients and hopefully avoid the loss of the potential value of your practice.

This booklet is designed to help lawyers through whatever transition is in their future.

WHY HAVE A SUCCESSION PLAN?

The ethical and malpractice implications of a legal career that is suddenly and unexpectedly over due to a lawyer's cognitive impairment, death or disability can be catastrophic. Although no one wants to think about dying or becoming disabled to a point where working is impossible, planning for such an eventuality is an ethical requirement for lawyers.

Failure to implement a plan that will protect client interests, even in the case of disability or death, raises ethical and malpractice issues that could fall on law partners, staff or family members who are already likely feeling a sense of worry or loss, and may not understand what needs to be done or the ethical issues involved in handling client matters. Without a plan in place, there is the potential for missed deadlines, uncompleted tasks, or missed insurance premiums, which means coverage may lapse and all of the lawyer's clients are unprotected. Having an effective succession plan will drastically reduce the confusion, questions, and costs that arise if something unexpected should happen to the attorney.



Without a plan in place, there is the potential for missed deadlines, uncompleted tasks, or missed insurance premiums, which means coverage may lapse and all of the lawyer's clients are unprotected.

While these concerns may seem most pressing to solo practitioners, who may not have a broad support network to fall back on, lawyers working in firms must not simply assume that their clients will be protected should something happen to them. Similarly, younger attorneys are less likely to consider the ramifications of an unanticipated inability to work. The truth is that the questions and suggestions that follow should be considered by all attorneys, regardless of the size of their practice or their age. Firms and solo practitioners alike should consider making succession planning training mandatory for new associates and support staff. Formulating strategies for the worst contingencies, while they may seem unnecessary, will result in safer attorneys and safer clients.

Ethical Obligations

An impaired lawyer has the same obligations as other lawyers with respect to professional conduct and the responsibility to provide clients with competent and diligent representation. Therefore, having a succession plan in place for the unexpected departure from practice should be seen as an ordinary response to a lawyer's most basic ethical responsibilities. **ABA Model Rule 1.1**, the very first rule, mandates that lawyers provide competent representation to clients, and describes competence as "preparation necessary for [client] representation." When read in conjunction with **ABA Model Rule 1.3**, which requires lawyers to act with diligence and promptness in representing clients, it is clear that

a lawyer should diligently prepare for the client’s representation – under all circumstances.

Notably, **Comment 5 to Rule 1.3** states:

To prevent neglect of client matters in the event of a sole practitioner’s death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with the 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.



Review ABA Model Rule 1.1 and 1.3 on page 27.

In 1992, the ABA Standing Committee on Ethics and Professional Responsibility issued **Formal Opinion 92-369**, titled “**Disposition of Deceased Sole Practitioners’ Client Files and Property.**” The opinion, recognizing that the death of a sole practitioner could have a serious effect on the sole practitioner’s clients, states:

To fulfill the obligation to protect client files and property, a lawyer should prepare a future plan providing for the maintenance and protection of those client interests in the event of the lawyer’s death. Such a plan should, at a minimum, include the designation of another lawyer who would have the authority to review client files and make determinations as to which files need immediate attention, and who would notify the clients of their lawyer’s death. A lawyer who assumes responsibility for the client files and property of a deceased lawyer must review the files carefully to determine which need immediate attention. Because the reviewing lawyer does not represent the client, only as much of the file as is needed to identify the client and to make a determination as to which files need immediate attention should be reviewed. Reasonable efforts must be made to contact all clients of the deceased lawyer to notify them of the death and to request instructions in accordance with **Rule 1.15**.



Review ABA Model Rule 1.15 on page 27.

Important client matters, such as court dates, statutes of limitations, or document filings, could be neglected until the clients discover that their lawyer has died or become disabled.

As a precaution to safeguard client interests, **ABA Formal Opinion 92-369**

states that 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.

Avoiding Malpractice and Disciplinary Complaints

Failing to develop and implement a plan to protect clients' interests in the event of death, disability, or cognitive impairment not only raises ethical issues but can also can result in increased exposure to malpractice and disciplinary complaints. Missed deadlines and the failure to complete tasks in a timely manner will certainly lead to claims. The same problems that lead to those missteps can also lead to a failure to timely pay insurance premiums, leaving the lawyer uninsured.

Ironically, the death or disability of an attorney may not always shield that professional from disciplinary matters. There are many examples where lawyers have been disciplined for the neglect of client matters owing to the ill health or personal problems of the lawyer. In rare cases, even deceased lawyers have been sanctioned.

Lawyers who have failed to make preparations to protect their client's interests in the event of the lawyer's death or disability are sometimes sanctioned, both in the hope of encouraging other lawyers to make such preparations, and to restore confidence in the bar, though the sanctions would obviously have no deterrent effect on deceased lawyers.

Protection of Clients, Family, Law Partners and Staff

A succession plan is really a form of risk management. Absent an effective plan, a lawyer's unexpected inability to practice may damage or prejudice clients, cause immense stress for law partners who will scramble to cover the lawyer's files, and leave already grief-stricken loved ones unprotected. Instead, having a plan in place for winding down the practice can drastically reduce the confusion, questions, and costs that arise if something unexpected should happen.

While most states don't currently require lawyers to have a written succession plan in place, some jurisdictions require attorneys to, at a minimum, designate a successor attorney, surrogate or receiver in the case of their death or disability. That information must be revealed as part of the attorney registration process. Other states, through court rules or comments to the rules of professional conduct, strongly recommend or encourage attorneys to implement a plan or designate a "back-up" or successor attorney.



Some jurisdictions require attorneys to, at a minimum, designate a successor attorney, surrogate or receiver in the case of their death or disability.

Absent implementation of a succession plan, most states do have “caretaker” rules in place to protect the clients of a deceased or disabled lawyer. In Minnesota for example, the Supreme Court will appoint the director of the Office of Lawyers Professional Responsibility as trustee of an attorney’s files or trust accounts when no one else is available to protect the lawyer’s clients. Regardless, clearly the better practice – and the one that will provide the most protection for clients – is for lawyers to create and implement their own comprehensive succession plan to fit their needs and the needs of their law practice.

Staff in the office need to know that if there is a disruption, illness, or problem, that they can come forward without rebuke. Staff should be encouraged to raise and voice concerns, and, depending on the particular practice, i.e., a solo practice, who the next contact (i.e. caretaker) is and to make contact. A team atmosphere of addressing, and not burying or hiding problems, whether well-intended or not, increases risk.

DEVELOPING A SUCCESSION PLAN

It is important for attorneys to make a thorough review of applicable state ethical rules and opinions regarding succession planning before creating and implementing their plan. There may be specific guidance on an appropriate way to make a succession plan for a particular jurisdiction. Many states have adopted the language from the ABA Model Rules, which are also instructive for creating an appropriate plan. A particular jurisdictions’ ethics opinions can be obtained from most state bar associations or disciplinary boards.

Find a Buddy

The most important aspect of an effective succession plan is ensuring that someone is available – a partner in the case of a small firm or a trusted colleague for solos – to step in and protect the clients’ interests if the lawyer is no longer able to do so. The arrangement can, and probably should, be reciprocal, where each attorney agrees to take on the role of assisting the other’s firm in the event that the lawyer suffers from a catastrophic illness or death.

Local bar associations can be a source for locating a back-up attorney. In some remote locations, finding a qualified attorney who could usher through one’s incomplete case files in the event he or she becomes incapacitated may not always be an easy thing. By being active in their local bar association, however, lawyers will greatly increase their odds of meeting a competent attorney who may be willing to engage in an agreement to oversee each other’s needs during a time of emergency.

When considering who would be best suited for administering the lawyer's case files when he or she is no longer able to do so, the lawyer must consider qualifications. The following are some qualifications that may be considered:

- Someone who is able to come in, take control of the files, and protect the interests of the clients;
- Someone who is trustworthy and dependable;
- Someone with a similar practice and with good management skills;
- Someone who may be willing and able to take over all or some of the files if the clients choose, or refer clients to other capable attorneys.

Lawyers should determine ahead of time whether their successor lawyer is interested or able to take over all or some of their client files. If so, it's a good idea to have a sample letter drafted that explains the choice to clients and specifically explains that they do not have to stay with the designated successor attorney.

While the person chosen does not need to take over the disabled or deceased lawyer's entire practice, and in fact that may not be realistic, in general the back-up or successor attorney should be prepared to:

- Contact clients to tell them that their lawyer is incapacitated or deceased and cannot attend scheduled hearings;
- File appropriate notices to advise the court of the lawyer's unavailability;
- Send statements to private-pay clients;
- Pay office rent and other expenses that are due;
- Field calls from clients and potential clients seeking legal help.

When arranging a succession plan, note that the successor attorney could be conflicted out of representing some of the clients. The conflict issue is crucial to understand, especially in view of the fact that the successor attorney will most likely have to review confidential information when transferring files. Therefore, the successor attorney should be instructed to perform a thorough conflicts check of all the files he or she will be handling at the time the succession plan is put into action. Maintaining a readily available and updated list or searchable database for the successor attorney which allows for such a conflict check expeditiously, is critical.

Put it in Writing

It's a good idea to have the plan and agreement with successor or back-up counsel memorialized in writing. Document detailed information about the arrangement, including the scope of the attorney's duties, address trust account issues, and instruct the lawyer regarding conflicts checks. Include important and necessary information such as a power of attorney clause that gives the successor attorney signatory rights on trust and business accounts. Creating a power of attorney in the event of incapacitation conveys to the back-up attorney all authority necessary to wind down the law firm.

The arrangement with the back-up attorney should include a variety of features and documents. See the **Back-Up Attorney Agreement Checklist** for what should be included:

Back-Up Attorney Agreement Checklist

- A signed consent form authorizing the attorney to contact clients for instructions on transferring their files;
- Authorization to obtain extensions of time in litigation matters where needed;
- Authorization to provide all relevant people with notice of closure of the law practice.
- An agreement which includes instructions as to:
 - The disposition of closed files;
 - The disposition of office furnishings and equipment;
 - Drawing checks on the office account and trust accounts;
 - Payment of current liabilities of the office;
 - Billing for and collecting fees on open files;
 - Collecting accounts receivable;
 - Access (passwords) to computers.
- An agreement which includes provisions that give the attorney authority to:
 - Wind-down the lawyer's financial affairs;
 - Provide clients with a final accounting and statement;
 - Collect fees owed;
 - Liquidate or sell the law practice.
- An agreement which includes any arrangements for payment to the successor attorney for services rendered.

It is recommended that attorneys review and renew their written agreement with the successor attorney annually. This annual review should trigger updates in lists, systems, and contacts within clients, family or staff that may not have known of the plan prior.

Work Out Trust Account Issues

As noted above, trust account issues also must be addressed in the succession planning agreement. Care should be taken to insure compliance with the rules regarding the handling of trust funds. Clients should be made aware of the plan. Once arrangements with the successor attorney have been finalized, consider inserting a paragraph in the retainer agreement that includes information about the succession plan.

Failure to arrange for a back-up attorney to have access to trust accounts and operating accounts means that client funds will remain there until a court orders access. This could cause harm to clients, and at the very least inconvenience them. On the other hand, an attorney must be very considerate and careful in deciding who has access to the trust accounts and authority to disperse those funds.



Stop and consult ABA Model Rules 1.15 and 1.16 on page 27.

While it may seem simple and easy to just go to the bank and add a back-up attorney to the account, thereby giving that lawyer general access, it may not be prudent because of the risk it creates by giving someone outside of the firm general access and signing authority. Also, many attorneys would be unwilling to serve as a back-up attorney under this scenario, because they don't want the risk/liability of having their name on another lawyer's account absent the need for them to become involved with winding down the practice.

A better way to go about this is to use a plan that incorporates the safeguard of a triggering event. Upon the occurrence of the event (death, incapacity or disability), a person selected by the lawyer – such as spouse or other family member – holds the power-of-attorney until he or she makes the determination that the specific event has occurred. It is recommended that if the authorization for access to an account is contingent upon an event, or for a limited duration, the terms should be specified in a written agreement, and it should be discussed with the bank manager to confirm that the bank will honor the agreement. Also remember that because a power of attorney expires at death, lawyers who create a power of attorney that conveys to their back-up attorney all authority necessary to wind down the law firm, they will need to reaffirm in their will or codicil their desire to have the named back-up attorney wind down the law practice.

**Tip!**

Use a plan that incorporates the safeguard of a triggering event.

Create a Contingency File

All small firms, but especially solo firms, should have a contingency file that provides written instructions in the event of an unexpected inability to continue practicing. In addition to the documents to give the successor attorney the proper authority to manage the firm and clients, several other items should be prepared for the successor lawyer.

**Tip!**

Firms should have a contingency file that provides written instructions in the event of a lawyer's unexpected inability to continue practicing.

Client Files

A list of open files, indexed in a manner that explains which deadlines are coming up, should be prepared. If the list is not in the file itself, provide instructions on how to access the attorney's calendar and docket control system, whether on paper or on the computer. Obviously, the clearer the calendar, the easier it is for the back-up attorney to come in and "decode" it. Firms should encourage standardized file set up, organization, calendaring and billing so that another firm member can back up.

Closed files should be indexed, including the retention period and respective dates of destruction. A list of cases in which the attorney and the back-up lawyer have conflicts, should also be included. Staff can help update this list periodically.

Office Procedure Manual

It's important to have a thorough and up-to-date office procedure manual that includes information on:

- How to check for conflicts of interest;
- How to use the calendaring system;
- How to generate a list of active client files, including client names, addresses and phone numbers;
- Where client ledgers are kept;
- How the open/active files are organized;
- How the closed files are organized and assigned numbers;
- Where the closed files are kept and how to access them;

- What is office policy on keeping original documents of clients;
- Where original client documents are kept.

Keeping all of the above information current and up-to-date on a regular basis, is crucial to the successful transition.

Contact List

Prepare a list for the back-up attorney that includes pertinent contact information and other important details such as:

- Where the safe deposit box is located and how to access it;
- The bank name, address, account signers, and account numbers for all law office bank accounts;
- The location of all law office bank account records (trust and general);
- Where to find, or who knows about, the computer passwords;
- How to access voicemail (or answering machine) and the access code numbers; and business and personal insurance policies with contact information for brokers and insurance companies.

Insurance Information

Lawyers need to be sure to understand their malpractice insurance policy notice requirements and the extended coverage endorsement (tail) provision on the policy in effect at the time of their death or disability. The lawyer's successor attorney may need to know how to buy tail coverage to protect the lawyer or his/her estate from potential claims that may arise upon the lawyer's disability or death. The majority of malpractice policies contain strict notice requirements within which the attorney or an agent on his/her behalf must notify the carrier of the attorney's desire to purchase a tail or receive a free tail where applicable. The name and phone number of the malpractice carrier, a copy of the current policy, the name of the underwriter, and the time period within which the lawyer or his successor attorney must contact the carrier about tail coverage should be noted.



The majority of malpractice policies contain strict notice requirements within which the attorney or an agent on his/her behalf must notify the carrier of the attorney's desire to purchase a tail or receive a free tail where applicable.

In planning for unexpected death, lawyers should also consider purchasing a life insurance policy in an amount appropriate to cover overhead expenses (such as staff salary for at least one person and the back-up attorney's salary) while winding down the practice. Name the personal representative as beneficiary of the policy so that he/she can have immediate access and use it to wind down the practice.

Finally, lawyers should identify other types of insurance policies that may affect the closing of the office. They should have a file set up with copies of all insurance policies and a list of basic information, identifying various types of coverage including:

- Replacement cost of office space;
- Current inventory of office equipment, computer hardware and software, valuable papers, library and office furnishings;
- Loss of income and extra expense;
- Business interruption due to disaster;
- Crime insurance;
- Fidelity bond and/or other types of bonds.

SHARE THE PLAN

Lawyers should make staff, family members and heirs aware of their succession plan and the name of the back-up attorney. Regular updates should be provided annually. These individuals should also be encouraged to raise problems or questions as they become aware in the event the lawyer cannot, has not or has difficulty responding. These individuals must be aware that problems have to be addressed, and not ignored.

It may seem unusual to treat personal estate matters separate from agreements relating to the continuation of a law practice; however, in the case of a lawyer's death, the successor attorney would be working on behalf of the estate and thus, the lawyer's heirs should be aware of the agreed upon relationship. Therefore, lawyers must leave information with their heirs about how to contact the successor attorney and request that they immediately notify the successor of their death.

Lawyers must provide the same back-up attorney information to their staff and make sure that they are aware of the existence and location of the plans they have formulated that will provide guidance to those who will be administering the lawyer's caseload.

It is also recommended that sole practitioners discuss in their initial engagement letter with clients that they have a back-up attorney who will assist in the event anything happens to them. The engagement letter or retainer should include a sentence that the client agrees to release confidential information to the back-up attorney in the event something should happen to the lawyer. Explain that this will best protect his/her legal rights and decrease the chance that their case would be neglected in the event of an emergency.

MAINTAIN AN ORGANIZED OFFICE

A discussion about succession planning would not be complete without at least mentioning the importance of maintaining an organized office with procedures in place to avoid missing deadlines.

Lawyers should consider whether if they were no longer be able to show up to work due to an unfortunate sudden illness, would an attorney taking over their matters be able to navigate through their current open files? An important step to carrying out a successful succession plan is making sure that client matters are continuously maintained in a way that is neat and presentable. (Not to mention the fact that keeping things like client files neat and orderly could prevent a host of other potential malpractice and ethical hazards from occurring.)



Heed the following suggestions regarding a law practice in general:

- **Have a detailed office procedures manual;**
- **Be diligent about calendaring all important dates;**
- **Thoroughly document client files;**
- **Keep time and billing records up to date;**
- **Familiarize the successor attorney with the office and update date him or her when necessary;**
- **Don't keep any clients' original documents or tangible items.**

An office with solid procedures set out in a document that is regularly updated will not only be able to undergo a smooth transition should the death or disability of an attorney occur, it also will be a better risk in terms of malpractice exposure. The key to avoiding the problems associated with an unexpected disability or the death of an attorney is to have a plan.

Aging lawyers are not immune to dementia or cognitive impairment, so an increasing concern among law firm members is what to do when they see their partners slipping, either due to advanced age or health problems. Because of a lawyer's immense responsibilities to clients, the consequences of ignoring the problem can be severe. Moreover, it can be a large hit to a firm's bottom line if a lawyer unexpectedly departs the practice due to age or health-related problems, so it's best for law firms to have a plan in place for dealing with these situations when they first begin to arise.

RECOGNIZING THE SIGNS

Impairment among legal professionals is generally defined as the inability to practice law with the skill required to ensure the safety and protection of the public. One option that may avoid the issue of age-related impairments altogether is adopting a mandatory retirement policy. But most experts who have looked at enforced retirement policies based solely on age don't think they are necessarily the best solution. Such policies can be perceived as unfair and may actually hurt a firm by requiring retirement of attorneys who are still extremely able and productive, and who bring irreplaceable experience to the firm. Competence matters, not age, if a lawyer is still healthy.

Aging lawyers who are experiencing signs of cognitive impairment often exhibit warning signs. Those may include:

- Memory lapses or short-term memory problems, including forgetting conversations, details of cases, events;
- Speech irregularities;
- Inability to pay attention;
- Disorganized thought processes;
- Poor decision making;
- Mood swings;
- Disturbance in executive functioning, including judgment, planning and organization;
- Diminished emotional expression.

The degree of impairment can range from “normal” forgetfulness and age-associated memory impairment to mild cognitive impairment to dementia. More outward signs that a lawyer may be suffering from cognitive impairment include deteriorating work performance, such as:

- Being poorly prepared;
- Inattention to details and not keeping current on developing law;
- Missed appointments/appearances;
- Making mistakes on files/cases;
- Difficulty/inability to effectively represent or articulate a client's interest/position;
- Difficulties managing one's practice;
- Committing ethical violations;

- Failures to communicate or respond to clients, opposing counsel or the courts.
- Failure to return telephone calls or reply to emails;
- Failure to produce work product that has been promised;
- Irregular office hours;
- Inappropriate dress, poor grooming or hygiene.

In addition, staff may voice concerns about the lawyer, and dissatisfied clients may start to call.

Often the signs are not obvious or are shrugged off by law partners. It may take a series of small events – like losing one’s place during a deposition or forgetting a client meeting – or one serious incident such as a poor performance at a trial, for it to become apparent that the lawyer is experiencing a problem. Sometimes firm members may not become aware of the problem until they receive a complaint from a client, or a concern expressed by a judge or a colleague from outside the firm. When that happens, it is important to take a serious look at the lawyer’s behavior, and if necessary, take appropriate action.

TAKING FIRM RESPONSIBILITY

The necessity of addressing a colleague’s age-related or other health issues stems, at least in part, from the rules of professional conduct. **ABA Model Rule 5.1** offers some guidance in terms of the responsibilities of partners, managers and supervisory lawyers in law firms to ensure compliance with the ethical rules.

The rule requires that partners and lawyers with managerial authority in a law firm make reasonable efforts to ensure that the firm has measures in effect that reasonably assure that all lawyers in the firm conform to the jurisdiction’s rules of professional conduct.

Similarly, a lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the ethical rules. **Rule 5.1** warns that a lawyer shall be responsible for another lawyer’s violation of the ethical rules if:

The lawyer orders or knows about the specific conduct and ratifies it or, importantly, the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The rule rests on a law firm's paramount obligation to protect client interests. Firm members who fail to take action to address an impaired lawyer risk exposing themselves to ethical complaints or legal malpractice claims brought by clients who may have been harmed by the impaired lawyer's work.



Review ABA Model Rule 5.1 on page 29.

In 2003, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion on a law firm's responsibilities to address impaired lawyers within a law firm. **Formal Opinion 03-429**, titled **"Obligations with Respect to Mentally Impaired Lawyer in the Firm,"** addresses three sets of obligations arising under the Model Rules of Professional Conduct with respect to mentally impaired lawyers. The opinion states:

If a lawyer's mental impairment is known to partners in a law firm or a lawyer having direct supervisory authority over the impaired lawyer, steps must be taken that are designed to give reasonable assurance that such impairment will not result in breaches of the Model Rules. If the mental impairment of a lawyer has resulted in a violation of the Model Rules, an obligation may exist to report the violation to the appropriate professional authority. If the firm removes the impaired lawyer in a matter, it may have an obligation to discuss with the client the circumstances surrounding the change of responsibility. If the impaired lawyer resigns or is removed from the firm, the firm may have disclosure obligations to clients who are considering whether to continue to use the firm or shift their relationship to the departed lawyer, but must be careful to limit any statements made to ones for which there is a factual foundation. The obligation to report a violation of the Model Rules by an impaired lawyer is not eliminated by departure of the impaired lawyer.

As noted in the opinion, unfortunately lawyers who suffer from an impairment may be unaware of, or in denial of, the fact that the impairment has affected their ability to represent clients. When impaired lawyers are unable or unwilling to deal with the consequences of their impairment, the firm's partners and the impaired lawyer's supervisors have an obligation to take steps to assure the impaired lawyer's compliance with the model rules. Therefore, it is advisable for law firms to develop strategies for helping colleagues identify times when they should alter their practice, and have them in place should the need arise.

ADDRESSING THE IMPAIRMENT

So what should the colleagues and partners of impaired lawyers do?

Partners or supervising lawyers that suspect one of the firm's lawyers is impaired should carefully observe the person and address the potential risk of ethical violations by the lawyer, including but not limited to competence in handling client matters. When the time is right, they should talk with the lawyer and express concern, without being accusatory or critical. It will undoubtedly be a complicated and difficult discussion.

The specific response depends in large part on the degree of the impairment.

MILD COGNITIVE IMPAIRMENT: For an attorney at the beginning of his or her decline, it may be possible to facilitate the continuation of a modified practice so as to ensure a dignified eventual exit. This could include actions such as:

- Limiting the type of work the attorney handles;
- Having the lawyer associate with other counsel;
- Finding ways other than the traditional attorney-client relationship for the lawyers to impart his or her wisdom and advice.

For attorneys experiencing mild cognitive impairment who wish to continue practicing law, there are also a range of technological tools available, including mobile apps that may allow them to continue to work. Support networks can be created to help integrate those tools in the lawyer's practice.

SEVERE COGNITIVE IMPAIRMENT: In cases of more severe cognitive impairment, where it is necessary for the lawyer to step away from practice in a relatively short time frame, it's important to work toward a transition out of practice that preserves the lawyer's reputation and dignity while protecting clients. The process should include individuals who are trusted by the lawyer and who have observed the lawyer's behaviors, and raise concerns about his or her continued competence to practice. It may be helpful for family members of the affected lawyer to be involved in this process.

The first step is to have a non-confrontational meeting with the lawyer and concerned individuals. Open the discussion with words such as:

I am concerned about you because...

We have worked together a long time, so I hope you won't think I'm interfering when I tell you I am worried about you...

I've noticed you haven't been yourself lately, and I'm concerned about how you are doing...

Get the lawyer to talk, and then listen, don't lecture. While listening, add responsive and reflective comments. Express concern with gentleness and respect.

Participants in the discussion should share firsthand observations of the lawyer's objective behavior that raises questions or causes concerns. Review the lawyer's good qualities, achievements and positive memories. Approach the lawyer as a respectful and concerned colleague, not an authority figure. Act with kindness, dignity and privacy; do not go into crisis mode.

If the lawyer is not persuaded that his or her level of professional functioning has declined or is impaired, suggest assessment by a specific professional, and have contact information ready. When appropriate, offer assistance and make recommendations for a plan providing oversight, either short term or long term. Alternatively, it may be appropriate to propose a voluntary transfer of attorney status to an available option such as taking "inactive," "retired" or "emeritus" status.



To the extent possible, let the lawyer think that winding down or retiring is his or her idea; get the lawyer to focus on what is best for the lawyer's clients. Remember, this is a process, not a one-time event.

In a growing number of states, lawyer assistance programs, traditionally focused on addressing substance abuse and other mental health matters, are increasingly now addressing age-related cognitive impairment issues. **A list of lawyer assistance programs can be found on page 30.**

Colleagues of impaired lawyers may turn to these programs, as they may also be able to help aging attorneys deal with cognitive impairment issues. The assistance programs are good about identifying health care professionals in a community that have the expertise to evaluate attorneys.

PLANNING FOR PARTNERS - COGNITIVE IMPAIRMENT

The Dos and Don'ts When Addressing Impairment

Dos	Don'ts
Be direct, specific, and identify the problem	Ignore and do nothing
Speak from personal observations and experience; state your feelings	Attempt to diagnose
Report what you actually see	Insist or threaten if lawyer directs you to back off; attempt to discuss it again at a later date
Be respectful and treat with dignity	
Be cautious when including family members	
Act in a non-judgmental, non-labeling, non-accusatory manner	
Offer to call the lawyer's doctor with observations	
Refer for evaluation, have resources at hand	
Suggest alternative status such as inactive status or disability leave	
Suggest the potential consequences for inaction: malpractice or disciplinary	

Source: The Senior Lawyer, Transitioning with Dignity: ABC's of Helping the Senior Lawyer, Texas Lawyers' Assistance Program (2015)

There are many reasons a lawyer may decide to leave the practice of law. Planned retirement is, of course, the eventual goal for most practitioners, but some lawyers find themselves in need of a strategy to help them move on from their practice, or when transitioning to a new firm or a new profession entirely. There are a few options available when making a planned exit from an established practice, each of which requires careful consideration to be most effective and none of which is a substitute for planning for the various emergencies that may impact a practice. While knowing how to plan to get out of the practice of law won't be enough to protect lawyers in all eventualities, it can help them to steer their practice prudently as they navigate its last stages.

WINDING UP/DOWNSIZING

For many attorneys in solo and small firm practices, a successful career means establishing a solid client base and remaining financially prosperous until retirement. Many lawyers therefore choose to slowly stop taking clients, finish up their final pending matters, and eventually close up shop.

While not an uncommon way to handle retirement, downsizing without a concrete timeline is a common way that lawyers lose value on their practice. Without a timeline, the process can be unpredictable and protracted. It is not atypical for lawyers to take much longer than anticipated to conclude their final few matters, all the while continuing to spend money on office space and services for the benefit of only their last few clients. Many lawyers are also unable to anticipate exactly when they will want to retire, and as a result find themselves in the middle of a large number of matters that require winding down, all on different timetables, just as it dawns on them that they are ready to get out of practice. These factors can be expensive and stressful, and may lead to inattentiveness or mistakes which, while inauspicious at any point in a career, can be particularly vexatious to a lawyer trying to retire. Therefore, lawyers who plan to downsize should consider whether they are doing so because it is their best option or because it is the only option they've considered, and should approach downsizing with the same careful planning as any other exit strategy.

When done correctly, downsizing occurs gradually over the years leading up to a planned retirement date. This is where many lawyers go wrong, assuming that downsizing is their only (or easiest) option and beginning the process whenever they start to tire of their work. Most attorneys do this by slashing their hours at the office and rapidly cutting back on caseloads. This is rarely the most efficient way to put a downsizing plan into action, however. A lack of planning usually results in a significant loss of income for the downsizing lawyer, who may suddenly find that he or she has less work to bill while still incurring the same office overhead costs.



When done correctly, downsizing occurs gradually over the years leading up to a planned retirement date.

A more effective downsizing approach for a lawyer with retirement on the horizon is to begin the process years beforehand. By gradually becoming more selective in the quality of cases the lawyer chooses to handle and increasing fee rates, lawyers can price out some clients and try to ensure that the cases they do take remain manageable. Additionally, overhead costs can be proportionally reduced as the retiring lawyer winds down, such as by reducing the hours worked by clerks or assistants and cutting back on recurring fees from subscription services. Increasing fees and reducing overhead costs can help mitigate the loss of earnings a lawyer leaving the practice will inevitably endure, making for a smoother transition than the sudden drop-off experienced by those without a plan in place.

A common error brought on by lack of adequate planning is trying to rush old cases. Hurrying to wrap up existing matters can lead to costly errors and is never recommended. Legal malpractice claims or ethics complaints are never good news to any attorney, and this is particularly true for attorneys on their way out of the practice. Legal malpractice claims are protracted, stressful and expensive affairs – the last thing a lawyer trying to enjoy retirement needs. Given this, lawyers should think carefully about the potential timelines of new matters and their willingness to see each case through to the end before they accept new clients. Downsizing works best when planned from the start of new representation, not when the lawyer tires of current work, so lawyers planning to wind down their practice should be thoughtful about how the cases they accept will play into their long-term plans.



Another common error brought on by lack of adequate planning is trying to rush old cases.

What happens if a solo lawyer chooses a date for retirement and discovers that all pending matters cannot be completed by that date? If the lawyer is still set on retiring as expected, clients and support staff will have to be made aware of the impending closing of the firm so that they can make arrangements. Clients should be given enough time to retain another lawyer to take over from the retiring attorney, and support staff should be given appropriate time to start the search for other employment.

In light of the disadvantages in simply closing a practice, it is important to investigate and consider other possible alternatives. The options with the greatest financial opportunities for lawyers leaving their practice are a sale or

merger. While planning for one of these retirement strategies 5 or 10 years in advance may seem like a burden to busy practitioners at the time, planning and patience are often essential to leaving the practice of law effectively.



Review the checklist for Closing a Law Practice on page 31.

SALE OF A PRACTICE

If a law firm is successful, it is possible that young lawyers looking to enter an established practice may be interested in purchasing a retiring lawyer's firm. **ABA Model Rule 1.17** provides that a lawyer may sell his or her practice, subject to certain conditions.



Review ABA Model Rule 1.17 on page 29.

Be careful to check your local rules: some jurisdictions permit a sale only if the entire practice is sold, and conditions on the sale may vary. While there are many factors that make a firm desirable to buyers, including the firm's location and reputation, the most important factor for buyers is almost always a steady book of business. For reasons discussed below, while outright purchase and immediate transition from seller to buyer is the most obvious option, there are other ways to make a sale work for both the seller and buyer.



Review states with an adopted version of ABA Model Rule 1.17 on page 29.

A firm's resale value is usually found in the clients that the seller is able to forward on to the buyer. Understandably, a buyer may be concerned about longtime clients taking their business elsewhere once the retiring lawyer has left the practice – after all, many clients choose a firm based on a relationship with their attorney and may feel little loyalty to the firm once their attorney has moved on. Without the assurance of continued business, potential buyers may be wary of paying top dollar for even the most successful practice. On the other hand, some firms' marketing strategy utilizes a memorable web address or phone number, rather than a particular lawyer's face and name, to attract new clients. In such cases, accumulating new business after the sale may be more stable and predictable. These factors, and others, combine to make valuing a law practice very difficult.



A firm's resale value is usually found in the clients that the seller is able to forward on to the buyer.

Making a law practice a desirable purchase goes beyond location, clients and reputation – even if all of these tangible and intangible qualities are favorable, the sale price and process must still be structured in a way that is attractive to prospective buyers. Many sellers opt to reduce their asking price in exchange for a percentage of future fees earned from clients the seller originated. While the future amounts earned are less certain than a concrete sale price, this strategy can prove to be lucrative if the buyer maintains the practice's success after the seller's departure, especially in practice areas such as estate planning where long-term or repeat clients are common. This arrangement may also be appealing to buyers for reasons beyond the reduction in sticker price; arrangements like these incentivize the retiring lawyer to choose a successor he or she believes will be a good fit for the firm's long-term clients. Keeping both attorneys fully invested in the firm as long as possible is advantageous to all involved.

Just as with downsizing, sale of the law practice carries responsibilities to others beyond the retiree. Clients and support staff must be made aware of the impending sale at some stage. Many lawyers are taciturn when gauging the market, keeping most details about the practice out of listings and preferring to discuss a deal only with interested buyers. Eventually, however, the time will come when clients and support staff must be notified of the sale. Most lawyers will want to be thoughtful about how and when they reveal their plans – after all, clients and staff must be able to come to terms with the change and make their own preparations for the future.

On the other hand, lawyers may not want to make their retirement plans public until after a sale has been agreed upon, or at least until a successful agreement seems likely. While considerations for support staff and clients are not as pressing during a sale as when closing down a practice, it is important to take them into account before making any major changes.

It is also worth noting that a small percentage of practices will be of interest to larger firms looking to expand their market share in niche fields. Typically, larger firms will be most interested in solo practitioners with unusually good financial results or a specialization in a cutting-edge practice area.

TRANSITION

Sometimes, an outright sale is inappropriate or unworkable, especially if the selling attorney hopes to continue to receive a percentage of fees on client matters after retirement. There is, after all, no guarantee that clients will want

to remain with the firm once the attorney they've come to know and trust has retired and passed the practice on to a relative stranger. Even if the retiring attorney does not hope to receive future fee percentages, however, the success of the purchasing attorney may still be important.

An attorney who sells his or her practice to a buyer under a long-term payment plan will surely want assurances that the buyer will be a successful enough practitioner to continue to make payments. One solution to this concern is to bring the purchasing attorney on as an associate in the practice instead of performing an immediate sale and transfer. This approach has the dual benefits of inoculating existing clients to the prospective buyer and giving the seller the opportunity to evaluate the buyer's potential success. In this scenario, the purchaser slowly assumes greater responsibility over existing client files as the selling attorney proportionally reduces his or her role in the practice. A common way of executing this strategy involves the retiring attorney agreeing to sell equity in the practice to the associate over time, assuming that certain benchmarks or performance standards are met, culminating in complete ownership of the practice by the buyer after two to four years.



Some lawyers may decide to bring the purchasing attorney on as an associate in the practice instead of performing an immediate sale and transfer.

Transitioning a practice to the purchasing attorney also has the benefit of allowing the retiring lawyer to gradually transition into an of-counsel or similar advisory role before departing completely from the practice. Similarly, it provides the opportunity to continue to grow the practice into the seller's later years, rather than winding down, which can be a major financial incentive for both parties. A multi-year transition plan can also serve as a screening process or extended interview, provided the seller builds in protections to allow cancellation of the sale plan if the purchasing attorney is a bad fit or if the seller lacks confidence in the buyer's ability to maintain the practice's success after the seller is phased out.

Be warned though: a transition can be difficult, and finding the right buyer is not guaranteed. Differences in approach can result in solo practitioners, who often work best alone, butting heads. Additionally, many lawyers looking to purchase a practice and book of business from an established attorney will be freshly-admitted to the bar and unable to produce the funds necessary to purchase the practice. Further complications can arise if the purchaser comes on as an associate but the practice does not grow. Another complication can arise if the style and philosophy of client and file handling between the

retiring and purchasing attorney are vastly different. Discussions and ongoing communications can help prevent or correct problems. In such instances, it may be difficult for both attorneys to live happily on the fees collected on existing files, and to seamlessly transition the practice.

MERGER

A merger with another pre-existing firm may be viewed as a type of sale, but there are important differences between a sale and a merger to consider. As with a sale of a practice to a larger law firm, mergers are generally only available to firms with a share in a niche market or an outstanding reputation. Mergers most often occur between firms practicing in the same area and with substantial prior knowledge of one another. Mergers between firms with no pre-existing personal relationship are generally rare. This has its benefits, of course. A prior relationship with attorneys at the merging firm may increase fairness and candidness during negotiations, makes it easier for the retiring lawyer to anticipate the clients' reactions to the change, and helps the retiring lawyer assess the newly-merged firm's financial and reputational success. Even more than when transitioning a practice to a newer attorney, the relationship between the parties is crucial.



As with a sale of a practice to a larger law firm, mergers are generally only available to firms with a share in a niche market or an outstanding reputation.

As in a sale, lawyers working on a merger with another firm should consider negotiating for a percentage of fees billed to clients they originated even after retirement. However, most of the value to come from a merger is based on the retiring lawyer's continuing work and client contributions to the merged firm. In a merger, all the constituent lawyers generally remain active members of the practice for some time to help consolidate the business and retain clients. The main advantage of this arrangement to a retiring lawyer is the ability to taper off practicing slowly without suffering the financial hardships that traditionally accompany downsizing. As a result, a merger is one of the longest-term succession plans.

There is no single "best" way for a lawyer to decide to leave the practice. There are simply too many variables involved for one type of plan to be successful for everyone. Knowing the options available will help lawyers as they consider their own personal and professional goals to determine which method is best for them. No matter what method is chosen for a planned departure from the practice of law, lawyers should begin planning as soon as possible to ensure a smooth transition into the next phase of their lives.

CONCLUSION

The time and the effort needed to review and set up an effective succession plan in the event of unexpected illness or death, or in the case of an expected departure from the practice, is worth it. Not only will it give lawyers peace of mind now, it will protect their clients, and perhaps even their staff and family, later.

Start devising a plan now. It's never too early.



Note: Some of the information for this practice management booklet was gathered from various articles and pamphlets previously prepared by MLM personnel. Credit is also given to "NAELA and Twilight Lawyers" by Kristi Vertri, Esq. and H. Amos Goodall, Jr., CELA, published in NAELA News October/November 2014, and to the Texas Lawyer Assistance Program's "The Senior Lawyer: Transitioning with Dignity - ABC's of Helping the Senior Lawyer in Need."

ABA RULES OF PROFESSIONAL CONDUCT

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.15 Safekeeping Property

- (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.
- (b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.
- (c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.
- (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
- (e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Rule 1.16 Declining or Terminating Representation

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
 - (1) the representation will result in violation of the rules of professional conduct or other law;
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
 - (3) the lawyer is discharged.

- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
 - (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
 - (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
 - (3) the client has used the lawyer's services to perpetrate a crime or fraud;
 - (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
 - (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
 - (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
 - (7) other good cause for withdrawal exists.

- (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

- (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. The lawyer may retain papers relating to the client to the extent permitted by other law.

Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer

- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
- (c) A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if:
 - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 1.17 Sale of Law Practice

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

- (a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted;
- (b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;
- (c) The seller gives written notice to each of the seller’s clients regarding:
 - (1) the proposed sale;
 - (2) the client’s right to retain other counsel or to take possession of the file; and
 - (3) the fact that the client’s consent to the transfer of the client’s files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

- (d) The fees charged clients shall not be increased by reason of the sale.

APPENDIX II

Directory of Lawyer Assistance Programs

ALABAMA	Lawyer Assistance Program	334-269-1515
ALASKA	Lawyer Assistance Committee	907-272-7469
ARIZONA	Member Assistance Program	602-252-4804
ARKANSAS	Arkansas Judges and Lawyers Assistance Program	501-907-2529
CALIFORNIA	State Bar of California LAP	877-527-4435
COLORADO	Colorado Lawyer Assistance Program	303-986-3345
CONNECTICUT	Lawyers Concerned for Lawyers	860-563-4900
DELAWARE	Delaware Lawyers Assistance Program (DE-LAP)	302-777-0124
DC	DC Bar Lawyer Assistance Program	202-347-3131
FLORIDA	Florida Lawyers Assistance, Inc.	800-282-8981
GEORGIA	Georgia Lawyer Assistance Program	800-327-9631
HAWAII	Hawaii Attorneys and Judges Assistance Program	808-531-2880
IDAHO	Idaho Lawyer Assistance Program	208-334-4500
ILLINOIS	Lawyers' Assistance Program, Inc.	312-726-6607
INDIANA	Judges and Lawyers Assistance Program	866-428-5527
IOWA	Lawyers Assistance Program	800-243-1533
KANSAS	Kansas Lawyers Assistance Program	888-342-9080
KENTUCKY	Kentucky Lawyer Assistance Program	502-564-3795
LOUISIANA	Judges and Lawyers Assistance Program, Inc.	866-354-9334
MAINE	Maine Assistance Program for Lawyers and Judges	800-530-4627
MARYLAND	Lawyer Assistance Program	443-703-3041
MASSACHUSETTS	Lawyers Concerned for Lawyers, Inc.	800-525-0210
MICHIGAN	Lawyers and Judges Assistance Program	517-346-6348
MINNESOTA	Lawyers Concerned for Lawyers	651-646-5590
MISSISSIPPI	Lawyers and Judges Assistance Program	800-593-9777
MISSOURI	Lawyer Assistance Program	800-688-7859
MONTANA	Lawyer Assistance Program	406-683-6525
NEBRASKA	Nebraska Lawyers Assistance Program	402-475-6527
NEVADA	Lawyers Concerned for Lawyers	775-322-2154
NEW HAMPSHIRE	New Hampshire Lawyers Assistance Program	877-224-6060
NEW JERSEY	Lawyer Assistance Program	800-246-5527
NEW MEXICO	Lawyers and Judges Assistance Program	800-860-4914
NEW YORK	Lawyer Assistance Program	800-255-0569
NORTH CAROLINA	North Carolina Lawyer Assistance Program	704-892-5699
NORTH DAKOTA	State Bar of North Dakota Lawyer Assistance Program	701-255-1404
OHIO	Ohio Lawyers Assistance Program, Inc.	800-348-4343
OKLAHOMA	Lawyers Helping Lawyers	800-364-7886
OREGON	Oregon Attorney Assistance Program	503-226-1057
PENNSYLVANIA	Lawyers Concerned for Lawyers Helpline	888-999-1941
RHODE ISLAND	Confidential Assistance Program	401-421-5740
SOUTH CAROLINA	Lawyers Helping Lawyers	866-545-9590
SOUTH DAKOTA	Lawyers Concerned for Lawyers	605-624-4449
TENNESSEE	Tennessee Lawyers Assistance Program	877-424-8527
TEXAS	Texas Lawyers' Assistance Program	800-343-8527
UTAH	Lawyers Helping Lawyers	800-530-3743
VERMONT	Lawyer Assistance Program	800-525-4352
VIRGINIA	Lawyers Helping Lawyers	877-545-4682
WASHINGTON	Lawyer Assistance Program	855-857-9722
WEST VIRGINIA	Lawyer Assistance Program	304-529-2391
WISCONSIN	Lawyer Assistance Program	800-543-2625
WYOMING	Lawyer Assistance Program	307-996-6834

Checklist for Closing a Law Practice

Checklist for Closing a Law Practice

- Finalize as many files as possible.
- Write to clients with active files, advising them that you are unable to continue representing them and that they need to retain new counsel. Your letter should inform them about time limitations and time frames important to their cases. The letter should explain how and where they can pick up copies of their files and should give a time deadline for doing this.
- For cases that have pending court dates, depositions, or hearings, discuss with the clients how to proceed. Where appropriate, request extensions, continuances, and resetting of hearing dates. Send written confirmations of these extensions, continuances, and resets to opposing counsel and to your client.
- For cases before administrative bodies and courts, obtain the client's permission to submit a motion and order to withdraw as attorney of record.
- In cases where the client has chosen a new attorney, be certain that a Substitution of Counsel is filed.
- Pick an appropriate date and check to see if all cases either have a Motion and Order allowing your withdrawal as counsel or a Substitution of Counsel filed with the court.
- Makes copies of files for clients. Retain your original files. All clients should either pick up their files (and sign a receipt acknowledging that they received them) or sign an authorization for you to release the files to their new attorneys. If a client is picking up a file, original documents should be returned to the client and copies should be kept in your file.
- All clients should be told where their closed files will be stored and whom they should contact in order to retrieve them. Obtain all clients' permission to destroy the files after approximately 10 years or acceptable guidelines as set out in your local jurisdiction. If a closed file is to be stored by another attorney, get the client's permission to allow the attorney to store the file for you and provide the client with the attorney's name, address and phone number.
- If you are a sole practitioner, ask the telephone company for a new phone number to be given out when your old number is called. This eliminates the problem created when clients call your phone number, get a recording stating that the number is disconnected, and do not know where else to turn for information.
- Call the membership department at your local Bar Association and update all membership records as to status and contact information.

NOTE: This material is intended as only an example, which you may use in developing your own form. It is not considered legal advice and as always, you will need to do your own research to make your own conclusions with regard to the laws and ethical opinions of your jurisdiction. In no event will Minnesota Lawyers Mutual be liable for any direct, indirect, or consequential damages resulting from the use of this material.

Sample Back-Up Attorney Letter to Client

Dear [Client's Name]:

I am writing to you as the administrator of [Deceased/Disabled Attorney's Name] who passed away on [Date] OR [Who due to a recent illness will be unable to continue representing you in the above referenced matter.] As you may be aware, [First Name] was a solo practitioner and upon his/her death [Or Disability] it has become necessary to close his/her practice.

No further legal services will be provided by this office, and all clients will need to make immediate arrangements to retain new legal counsel. In that regard, arrangements have been made with [Attorney and Firm Name], who is willing to accept any of [Deceased/Disabled Attorney's Name]'s clients who would like to retain him/her. Alternatively, you can select a new attorney of your choosing and may contact the State Bar's referral service for assistance. If you decide to retain [Referred Attorney's Name], you must contact us in writing or by phone to give us your consent to transfer your existing file to him/her.

If you choose other counsel you will need to come to the office and pick up your file.

Your attention to this matter should be immediate and prompt, but no later than [Date], as any delay could negatively affect your legal rights and remedies.

[Also enclosed is a final billing statement for expenses and legal services performed to date by [Deceased/Disabled Attorney's Name]. As I am trying to close out his/her practice, your prompt payment of this statement would be appreciated.] OR [Also enclosed is a final billing statement for expenses and legal services performed to date by [Deceased/Disabled Attorney's Name]. Enclosed is a check refunding you the amount of [Dollar Value] for expenses and fees you advanced that have not been incurred.

Please contact me if you have any questions concerning the contents of this letter. I can be reached at: [Administrator's Contact Information.]

Sincerely,

State Rules Regarding a Sale of a Law Practice

The chart provides the rule, if one exists, for each state and the District of Columbia that allows for the sale of a law practice.

State	Rule	State	Rule	State	Rule	State	Rule
AL	None	IN	1.17	NE	None	TN	1.17
AK	1.17	IA	32:1.17	NH	None	TX	None
AZ	1.17	KA	226	NJ	1.17	UT	1.17
AR	1.17	KY	SCR 3.130(1.17)	NM	16-117	VT	1.17
CA	2-300	LA	1.17	NY	2-111	VA	1.17
CO	1.17	ME	3.14	NC	1.17	WA	EO 192
CT	1.17	MD	1.17	ND	1.17	WV	1.17
DE	1.17	MA	1.17	OH	2-111	WI	20:1.17
DC	EO 294	MI	1.17	OK	1.17	WY	1.17
FL	4-1.17	MN	1.17	OR	1.17		
GA	1.17	MS	1.17	PA	1.17		
HI	1.17	MO	4-1.17	RI	1.17		
ID	1.17	MT	1.19	SC	1.17		
IL	1.17	NE	2-111	SD	1.17		

(2016)



MINNESOTA LAWYERS MUTUAL
INSURANCE COMPANY

PROTECTING YOUR PRACTICE IS OUR POLICY.™

Print Publication
MLM Policyholders \$7.95
General Public \$14.95