Virginia State Bar
Informational Brochures

PLANNING AHEAD:
Protecting Your Clients' Interests in the Event of Your Disability or Death

Prepared by the Ethics Department of the Virginia State Bar

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It is hard to think about events that could render you unable to continue practicing law. Unfortunately, freak accidents, unexpected illness and untimely death do occur, and if they happen to you, your clients' interests may be unprotected.

While the Virginia Rules of Professional Conduct do not require lawyers to make arrangements for protecting their clients' interests in the event of their death, disability, impairment, or incapacity, Comment [5] to Rule 1.3 states: "A lawyer should plan for client protection in the event of the lawyer's death, disability, impairment, or incapacity. The plan should be in writing and should designate a responsible attorney capable of making, and who has agreed to make, arrangements for the protection of client interests in the event of the lawyer's death, impairment, or incapacity."

The information in this brochure was designed to assist you in fulfilling these ethical responsibilities.

Have a Plan

STEP 1: Find someone, preferably an attorney, to close your practice in the event of your death, disability, impairment or incapacity.

STEP 2: Draft written instructions to your family, the attorney and your office staff containing:

- Information and guidance to help minimize uncertainty, confusion, and possible oversights;
- Instructions pointing the way to specific detailed information stored elsewhere. These letters of instruction should be updated and reviewed periodically to be certain they are complete and current.

STEP 3: Discuss these items with the appropriate persons to avoid confusion or delay of actions in the event of your death or disability.

STEP 4: The arrangement you enter into with the attorney should include a variety of features:

- A signed consent form authorizing the attorney to contact your 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 your law practice.

The agreement should also include instructions as to:

- the disposition of closed files;
- the disposition of your office furnishings and equipment;
- drawing checks on the office and trust accounts;
- payment of current liabilities of the office;
- billing for and collecting fees on open files;
- collecting accounts receivable;
- access (password) to your computer.

The agreement could also include provisions that give the attorney authority to:

- wind down your financial affairs;
- provide your clients with a final accounting and statement;
- collect fees on your behalf;
- liquidate or sell your practice.

Also, any arrangements for payment by you or your estate to the attorney for services rendered can be included in this agreement.

Conflicts of Interest and Confidentiality

As to the issue of client confidentiality with client files, Rule 1.6(b)(4) clarifies that: "such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence." Therefore, the assisting lawyer can review client files and matters to assist in acquiring successor counsel or disposition of the files. Remember that if the attorney discovers evidence of legal malpractice or ethical violations, he or she may have an ethical obligation to inform your clients of your errors.

The attorney must also be aware of conflict of interest issues and must do a conflicts check if he or she is either providing legal services to your clients or reviewing confidential file information to assist with referral of clients' files.

The Trust Account

If you do not make arrangements to allow someone access to the trust account, your clients' money will remain in the trust account until a court orders access. This is likely to cause delay and put a client in a difficult position. On the other hand, allowing access to your trust account is a serious matter. If you give access to your trust account and that person misappropriates money, then your clients will suffer, and you may be held responsible. There is no simple answer to this and many important decisions to make.

If you do want to allow access to your trust account, there are many alternatives varying from general access to access contingent upon the occurrence of an event (disability, incapacity or some other reason you are unable to conduct your business affairs). This second approach also involves selecting someone (such as spouse or other family member) to hold the power of attorney until they make the determination that the specific event has occurred. If you are going to have the authorization for access to your trust account contingent upon an event or for a limited duration, the terms should be specified in a written agreement, and you should consult with your bank manager for confirmation that the bank will honor the agreement.

If you determine to allow access to your trust by the attorney all of the time, then you can authorize the attorney as a signer on your accounts and contact the bank to sign all appropriate cards and paperwork. This allows easy access on the part of the attorney in the event that, for example, you are unexpectedly delayed on a trip; however, it opens the door to a host of other risks, as you are unable to control the signer's access. These risks make this an extremely important decision.

Include Family and Staff

As mentioned earlier, this plan should also include written letters of instruction to your family and office staff. These letters should ease the settlement of your estate by telling your survivors what you have, where it is, how to get it, and what to do with it. Your family, the designated attorney and your office staff need to share information and coordinate their activities in the event of your death or disability. Generally, these instructions should cover:

- all pertinent personal and family information and financial information;
- identification and location of all estate planning documents;
- location of personal insurance records, among other things.

Guidance to your staff should include directions as to:

- notifying your professional liability carrier;
- notifying all courts, boards and administrative agencies where you practiced;
- closing your office;
- reviewing all depositories, including trust accounts and safe contents;
- coordinating with your accountant.

In a sense, you are creating a system for the settlement of your own estate and the orderly winding up of your law practice.

Other Steps

There are a number of other steps that you can take while you are still practicing to make the process of closing your office smooth and inexpensive. These steps include:

1. making sure that your office procedures manual explains how to produce a list of client names and addresses for open files;
2. keeping all deadlines and follow-up dates on your calendaring system;
3. thoroughly documenting client files;
4. keeping your time and billing records up-to-date;
5. familiarizing the attorney with your office systems;
6. renewing your written agreement with the attorney every year;
7. periodically purging old and closed files (see LEO 1305);

8. making sure you do not keep clients' original documents, such as wills or other estate plans.

If your office is in good order, the attorney will be able to close your practice with a minimum of time and costs. Your law office will then be an asset to be sold and the proceeds remitted to you or your estate.

Special Considerations

If you simply authorize another attorney to administer your practice in the event of death, disability, or incapacity, that authority generally terminates when you die. The personal representative of your estate has the legal authority to administer your practice. He or she should be told about the appointed attorney and your desire to have them carry out the duties of your agreement. The personal representative can then authorize the attorney to proceed.

It is imperative that you have an up-to-date will nominating a personal representative so that probate proceedings can begin promptly and the personal representative can be appointed without delay, avoiding a dispute with family members and others.

For many sole practitioners, the legal practice may be the only asset subject to probate. Other property will likely pass outside probate directly to a surviving joint tenant. This means that unless you keep enough cash in your law practice bank account, there may not be adequate funds to retain the attorney or continue to pay staff and other expenses during this transition period. One solution to this problem may be to maintain a small insurance policy with your estate as the beneficiary, or your surviving spouse or other family member can be named as beneficiary, with instructions to lend funds to the estate if needed. The issue of having sufficient funds occurs in the event of disability and incapacity as well. In order to prevent this problem, you may want to maintain disability insurance in an amount sufficient to allow for expenses incurred in closing your law practice.

Generally, a personal representative has broad powers to continue a decedent's business to preserve its value, sell or wind down the business, and hire professionals to help administer the estate. However, for the personal representative's protection, you may want to include language in your will that expressly authorizes that person to arrange for closure of your law practice.

Start Now

We encourage you to select an attorney to assist you and follow these basic guidelines. This is something you can do now, at little or no expense, to plan for your future and protect your assets. Don't put if off—start the process today.

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