

# Responsible Succession Planning

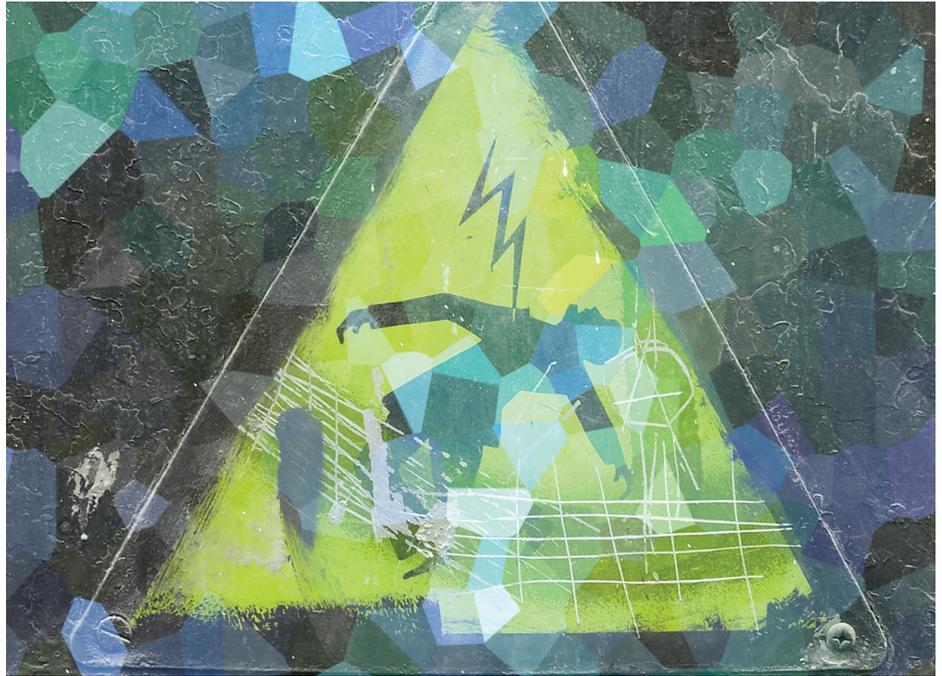
## *Ethically Planning for Death & Disability*

**A**ttorneys assist clients by helping them plan for the future, including death and disability. Yet many attorneys never plan for the possibility that they may become disabled or die. If and when the unthinkable happens, the consequences can be devastating not only for the attorney's family but also for the firm, any other attorneys employed by the firm and the firm's clients.

This is exactly what happened in 2007, for example, when an attorney with whom I grew up suddenly passed away, leaving a wife and 1-year-old twins. The attorney had a thriving intellectual property practice, but no contingency plan in case of death or disability. As a result, when he died unexpectedly, there was no succession plan for his firm and no attorney was authorized to either continue or wind down the practice and collect outstanding fees. With the attorney's passing, the practice simply stopped. The firm's website was shuttered, his staff furloughed and all client funds were returned to the clients. Equally tragic, there were no provisions for allowing his wife and young family to receive the fees he had earned.

While it is easy to ignore the possibility of death or disability, attorneys should recognize that it may occur. Against this backdrop, the Philadelphia Bar Association Professional Guidance Committee issued Opinion 2014-100 ("Planning for termination of practice through death or disability")<sup>1</sup>, that concluded that although an attorney has no ethical duty to create a succession plan, "the potential adverse consequences to clients of an unanticipated closing of a practice ... may result in violations of several [Rules of Professional Conduct]." This opinion emphasizes the particular need for solo or small-firm practitioners to engage in succession planning.

Although the Professional Guidance Committee noted that "succession



planning for attorneys practicing in the Commonwealth of Pennsylvania is not mandatory under the Pennsylvania Rules of Professional Conduct," attorneys, especially those in solo or small firms, should consider Comment [5] to Pennsylvania Rule of Professional Conduct 1.3. The comment reminds attorneys that "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 applicable rules, that designates another competent attorney to review client files, notify each client of the attorney's death or disability, and determine whether there is a need for immediate protective action."

The Professional Guidance Committee's analysis focuses on the "successor attorney" concept, i.e., an attorney trying to anticipate the possibility of disability or sudden death should consider the appointment of a "backup attorney," also commonly called

a "successor attorney." The successor attorney can represent either the attorney or the attorney's client, but not both, and can serve many functions. The opinion offers possible "best practices," including:

- Preparing a written office manual containing key details of the practice such as:
  - Names, addresses, phone numbers and job descriptions of support and key personnel;
  - The location, account numbers and signatory names for business and trust/IOLTA accounts;
  - The location and access information for safe deposit boxes and other storage facilities;
  - Computer and voicemail access codes; and
  - The location of important business documents, including leases, maintenance contracts, credit cards, client ledgers and

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other financial records.

- Consulting with your bank to ensure that it will honor any backup agreements relating to the firm's bank accounts;
- Ensuring that the staff and/or firm software can produce an accurate list of clients and their contact information;
- Ensuring that the staff and/or firm software can produce an accurate list of deadlines in pending matters;
- Maintaining complete and up-to-date billing and trust account records;
- Consolidating and indexing all original client documents, e.g., wills, or returning them to clients; and
- Explaining the manner of how files are retained in engagement letters and fee agreements.

The Philadelphia Bar Opinion also cites "Contingency Planning for Closing of a Law Practice," published in 2011 by the State Bar of Texas. A version of that guide, "How to Protect Your Clients and Firm in the Event of Death, Disability, Impairment, or Incapacity,"<sup>2</sup> appears on the State Bar of Texas' website and is an excellent resource.

The State Bar of Texas also summarized issues attorneys should consider when employing an successor attorney, including:

- The scope of the successor attorney's duties and obligation to the attorney and/or to clients;
- The type of event that will trigger the successor attorney to enter and/or start winding down a practice, and who will determine that this event has occurred; and
- The need for a written agreement authorizing the successor attorney to perform the agreed-upon tasks and certain tasks.

There is no one-step process for designating a successor attorney because every situation is different. Rule 23 of

the Indiana Rules for Admission to the Bar and the Discipline of Attorneys does provide some "best practice" considerations for the tasks the successor attorney should agree to do, including:

- Taking possession of and examining the files and records of the law practice;
- Obtaining information about any pending matters that may require attention;
- Notifying persons and entities who appear to be clients of the attorney that it may be in their best interest to obtain replacement counsel;
- Applying for extensions of time pending employment of replacement counsel by the client;
- Filing notices, motions and pleadings on behalf of the client where jurisdictional time limits are involved and other legal counsel has not yet been obtained;
- Giving notice to appropriate persons and entities who may be affected, other than clients, that the successor attorney has been appointed;
- Arranging for the surrender or delivery of clients' papers or property;
- Delivering files to clients;
- Making referrals to replacement counsel with the agreement of the client; and/or
- Accepting representation of the client with the agreement of the client.

In conclusion, attorneys should plan for those circumstances when they are no longer able to practice. Otherwise, as Salman Rushdie said, "One of the extraordinary things about human events is that the unthinkable becomes thinkable." ■

<sup>1</sup> [http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion2014-100\\_21.pdf](http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion2014-100_21.pdf)

<sup>2</sup> <https://www.texasbar.com/Content/NavigationMenu/ForAttorneys/ResourceGuides1/ClosingLawPractice/ProtectYourClients.htm>

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