

**DISABILITY AND DEATH:
ETHICAL CONCERNS WHEN TRAGEDY STRIKES**

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When a lawyer becomes disabled or dies, a whole host of concerns arise for those responsible for the lawyer's affairs. These concerns are quite different depending upon a number of variables including whether the lawyer is a solo practitioner or a partner in a large firm; whether the lawyer is disabled or dies; and whether the death is sudden or the result of a lingering illness.

The scenario that causes the most concern is the sudden death or disability of a solo practitioner with a large practice who has not taken the necessary steps to ensure an orderly transition of his client files. On the other hand, in large law firms, these issues are often less serious since most cases are handled by more than one lawyer and the situation lends itself to a more orderly transition. In any case, the suddenness of the event, whether it be death or a disabling illness, often creates a very stressful situation for all concerned, particularly the clients of the deceased or disabled lawyer.

THE DISABLED LAWYER

Rule 28 of the Rules on Lawyers Professional Responsibility (RLPR) provides for the transfer to disability inactive status of a lawyer whose "physical condition, mental illness, mental deficiency, senility, or habitual and excessive use of intoxicating liquors, narcotics, or other drugs prevents the lawyer from competently representing clients."^{Ftn 1} This transfer may take place as a result of a judicial proceeding, finding the lawyer to be mentally ill, mentally deficient, incapacitated, or inebriate; or the transfer may take place as the result of a lawyer asserting disability in defense or mitigation in a disciplinary proceeding.^{Ftn 2} In that instance, a referee may order an examination or evaluation of the lawyer as the referee so designates. If the disability is alleged to be taking place during the investigation or the proceeding, it is the obligation of this office to inform the Court of the allegation and our position regarding the allegation. The Court then has a number of options in handling the situation.^{Ftn 3}

Once transferred to disability inactive status, a lawyer has a number of duties under RLPR 26. These duties include:

- notifying each client represented in a pending matter "other than litigation or administrative proceedings" of the lawyer's disability;
- separate notice of the lawyer's disability to each client, opposing counsel, and the tribunal involved in pending litigation or administrative proceedings;

- making arrangements to deliver to each client represented in a pending matter, litigation, or administrative proceeding any papers or other property to which the client is entitled;
- keeping and maintaining records of actions taken in compliance with RLPR 26 and filing an affidavit within 15 days of the effective date of the Court's order with this Office demonstrating completion of the duties mandated by Rule 26.^{Ftn 4}

Finally, under RLPR 28(d), the Court may reinstate a lawyer to active status upon a showing that the lawyer is fit to resume the practice of law. A petition for reinstatement is deemed a waiver of the doctor-patient privilege and must set forth detailed information regarding treatment and care in the interim.

Under Rule 5.1 of the Minnesota Rules of Professional Conduct (MRPC), specific responsibilities ensue for a partner or supervisory lawyer as it regards "making reasonable efforts" to ensure that the lawyer supervised conforms to the Rules of Professional Conduct.^{Ftn 5} Lawyers in a supervising capacity are therefore put in a situation where, once on notice, they should take steps to protect clients that may be at risk as a result of the actions or inactions of an attorney who is disabled. As a practical matter, firms should have their own procedures for this situation, if no other reason than to avoid serious malpractice consequences. Finally, supervising attorneys should be aware of Rule 8.4(h) regarding the committing of a discriminatory act, since it is conceivable, under federal, state or local statutes or ordinances, that a disabled attorney may claim discrimination depending on the way the matter is handled.^{Ftn 6}

SUDDEN DEATH

In recent months, the American Bar Association has been urging state and local jurisdictions to develop effective procedures for the protection of clients' interests and property and the ethical closure or disposition of a law practice in the event of the lawyer's death.^{Ftn 7}

Minnesota has a number of provisions that address such a situation. RLPR 27 provides for the appointment of a trustee upon the death of a lawyer to inventory the files and "to take whatever other action seems indicated to protect the interests of the clients and other affected parties."^{Ftn 8} Since confidentiality is always a concern in such cases, RLPR 27(b) provides that a trustee shall not disclose any information contained in any inventoried file without the client's consent, except as necessary to execute the court's order appointing the trustee.

Since in many of these cases a law practice is eventually sold, the provisions of Rule 1.17 of the MRPC must also be considered. These provisions, as the Comment to Rule 1.17 notes, are applicable to a representative of the deceased lawyer as well as to a living lawyer. Confidentiality concerns occur with the sale of a law practice as well, since under Rule 1.6 the amount and type of information that the selling lawyer may give to a potential buying lawyer during negotiations is limited. Thus, before the prospective buyer is allowed to see the client files, the selling lawyer should obtain a waiver of confidentiality in writing from the affected clients.^{Ftn 9}

As a practical matter, there are a number of steps practitioners should take in anticipation of lingering illness or death. First and foremost, an attorney, particularly a solo practitioner, should designate another lawyer as his or her representative to have the authority, in the event of the lawyer's death, to review client files and to make determinations as to which files need immediate attention. This representative would, upon the death of the lawyer, undertake the notification of clients. ABA Formal Opinion 92-369 notes that "although there is no specifically applicable requirement of the rules of ethics, it is fairly to be inferred from

the pertinent rules that lawyers should make arrangements for the clients' files to be maintained in the event of their own death."^{Ftn 10}

Initially, the representative should determine which files are active and which are inactive, after which he or she should mail letters to the clients notifying them of the lawyer's death. Thereafter, monitoring the status of the files, while awaiting communications from the clients, generally constitutes the initial obligations of the representative. In addition to holding the files for the appropriate length of time, the representative may have the option (and may wish to exercise it) of extending the reporting endorsement on the professional liability insurance of the deceased attorney, protecting both the deceased attorney's estate and the clients at risk.^{Ftn 11}

The duties of the trustee, or the lawyer designated by the deceased attorney, include the duty to inspect client files, the obligation to protect client confidences, and the need to make a decision as to how long the client files should be kept in the event that the clients of the deceased attorney cannot be located. After careful review of the files and notice to clients of the deceased lawyer, the trustee or designated representative must make his or her own determination as to how long the files should be held. While each file should be evaluated separately, obvious obligations include returning any items that belong to the client (including original documents) and maintaining information that may be useful in the assertion or defense of the client's position when the applicable statute of limitations has not run out.^{Ftn 12}

For those attorneys facing disability or terminal illness, taking precautionary steps to ensure the proper handling of their practice when the time comes should be approached much as one approaches estate planning, with one difference. Attorneys, and those that supervise them or are designated as their representatives, have an ethical obligation to limit the risk, presented by the death or disability of attorneys, to their clients.

For attorneys who become disabled, help in any form, whether from partners or other practitioners, is crucial. For attorneys who confront their own mortality, and plan accordingly, the protection of clients is perhaps the final act of a responsible professional towards members of the public.

NOTES

¹ Rule 28(a) (RLPR).

² Rule 28(b), (c) (RLPR).

³ Rule 28(e) (RLPR).

⁴ Rule 26 (RLPR).

⁵ 5.1(b) (MRPC): "(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."

⁶ 8.4(h) (MRPC): "(h) commit a discriminatory act, prohibited by federal, state, or local statute or ordinance, that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including (1) the seriousness of the act, (2) whether the lawyer knew that it was prohibited by statute or ordinance, (3) whether it was part of a pattern of prohibited conduct, and (4) whether it was committed in connection with the lawyer's professional activities."

⁷ ABA Resolution, approved May 21, 1997, sponsored by Senior Lawyers Division.

⁸ Rule 27(a) (RLPR).

⁹ Comment to Rule 1.17 (MRPC) states in part: "A representative of a deceased . . . lawyer may sell the lawyer's law practice under the same restrictions as imposed by this Rule . . ." Rule 1.6 on Confidentiality of Information limits the amount and type of information that the selling lawyer may give to the potential buying lawyer during negotiations. Before the prospective buyer could see the clients files the selling lawyer would be required to obtain from the affected client a waiver of confidentiality.

¹⁰ ABA Formal Opinion 92-369: Disposition of Deceased Sole Practitioner's Client Files and Property.

¹¹ See "When A Lawyer Dies, The Practice Does Survive," Mathison, MLM View, January 1994.

¹² ABA Formal Opinion 92-369; see also "What Happens When a Lawyer Dies?" Experience, Vol. 7, No. 4, 1997.