

Handling an Attorney's Death, Disability or Disappearance

by

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The tragic events of Sept. 11, 2001, remind us that no one is immune to life's unexpected turns. An attorney's duty to his or her clients includes protecting those clients' interests in the event of the attorney's death, disability or disappearance. Rules 1.1 and 1.3 of the Minnesota Rules of Professional Conduct require that attorneys act competently and diligently in representing clients. Competent and diligent representation includes adequate preparation for sudden practice interruption.

A subcommittee of the Minnesota State Bar Association (MSBA) Rules of Professional Conduct Committee is working on a planning booklet with sample documents to assist attorneys in preparing for unexpected practice interruption. It is also considering whether to petition the Supreme Court for a rule requiring attorneys to certify that they have such a planning agreement in place. The subcommittee is chaired by an attorney from the Office of Lawyers Professional Responsibility. Its membership includes attorneys from various practice areas and the general and solo practice section of the MSBA. The attorneys come from the Twin Cities, Mankato, St. Cloud, Bemidji and Redwood Falls.

At present, if an attorney dies or is temporarily unable to practice without a plan in place to handle or close his or her practice, the court may appoint a trustee under Rule 27 of the Rules on Lawyers Professional Responsibility. [Ftn 1](#) More often, another attorney steps in informally to deal with the practice and to assist the clients as best he or she can. [Ftn 2](#) In either case, the burden of handling or closing a practice where there has been no planning for practice interruption is substantial. One volunteer assisting attorney found that all of the deceased attorney's calendar and file information was on his personal computer and that no one knew the access codes. Volunteer attorneys and the Office of Lawyers Professional Responsibility have spent hundreds of hours in winding up practices where the attorney never planned for a sudden departure from practice.

What must responsible attorneys do? First, partnership agreements or assisting attorney agreements for solo practitioners should be negotiated which define the nature and scope of the contingent circumstances under which an assisting attorney would handle or close client files. The agreement should define the nature and scope of the assisting attorney's role and determine the compensation and method of payment for the assisting attorney. Before drafting such an agreement the planning attorney will need to decide:

- whether the assisting attorney will serve as counsel or as an agent; [Ftn 3](#)
- whether the assisting attorney will become a signatory on trust and/or business accounts, or be given a power of attorney upon the happening of a specific event; [Ftn 4](#) and
- how cases on which the assisting attorney has conflicts will be handled.

Clients should be informed about the existence of a planning agreement, perhaps as part of an engagement

letter or the retainer agreement.^{Ftn 5} In addition, the planning attorney should have a written office manual that contains key details regarding the practice such as: (a) names, addresses, phone numbers and job descriptions of support and other key personnel (office sharers, of counsel attorneys, office manager, secretary, bookkeeper, accountant, landlord, malpractice carrier and other insurance brokers – disability, life and property), the personal representative and other important contacts; (b) location, account numbers and signatory name(s) for business and trust accounts; (c) location and access information for safety deposit box and/or storage facilities; (d) computer and voice mail access codes; and (e) location of important business documents such as leases, maintenance contracts, business credit cards, client ledgers and other books and records relating to the business and trust accounts, etc.

The manual should also have an explanation and description of the conflicts system, calendaring system and backup, time billing records, accounts receivable/payable, active client file inventory, and closed file storage location and inventory. The manual should be complete enough for the assisting attorney to be able to promptly identify those client matters needing immediate attention and any matter on which he or she might have a conflict of interest.

Preparing to protect clients in the event of sudden absence from practice is a professional responsibility. It requires thought and care, but, in the press of work, is too easily put off until another day.

1 Rule 27 reads: Trustee Proceeding

(a) Appointment of Trustee. Upon a showing that a lawyer is unable to properly discharge responsibilities to clients due to disability, disappearance or death, or that a suspended, disbarred, or resigned or disabled lawyer has not complied with Rule 26, and that no arrangement has been made for another lawyer to discharge such responsibilities, this Court may appoint a lawyer to serve as the trustee to inventory the files of the disabled, disappeared, deceased, suspended, disbarred or resigned lawyer and to take whatever other action seems indicated to protect the interests of the clients and other affected parties.

(b) Protection of Records. The trustee shall not disclose any information contained in any inventoried file without the client's consent, except as necessary to execute this Court's order appointing the trustee.

2 See, Frederic (Fritz) Knaak, "Managing an Impaired Lawyer's Practice and Files During Recovery," GPSolo, July/August 2001, pp. 54-57.

3 If the assisting attorney represents the planning attorney, he or she may be prohibited from representing the planning attorney's clients on some or possibly all matters. The assisting attorney would be prohibited, without consent, from informing clients of any legal malpractice or ethical violations. If the assisting attorney is not representing the planning attorney, he/she may be able to become the successor attorney for some or all client matters and may have an ethical obligation to advise clients of any malpractice or ethical problems discovered in winding up or handling the practice.

4 When and under what circumstances should the assisting attorney have access to your trust account in order to disburse client money? If the assisting attorney has signatory power on the trust account, client consent to this arrangement would need to be obtained. Conflicts issues may also make this a difficult or unworkable option. If authorization is only upon the occurrence of an event and for a limited time (using a power of attorney), there will need to be an agreement regarding who will determine whether the planning attorney is disabled, incapacitated or otherwise unable to conduct business affairs and for how long the power of attorney will last. A close relative and/or the personal representative of the planning attorney's estate should be made aware of the agreement and the planning attorney should consult his or her bank regarding these documents.

5 The Oregon Bar has provided the following sample paragraph for inclusion in client retainer agreements: "Attorney may appoint another attorney to assist with the closure or temporary management of the Attorney's law office in the event of Attorney's death, disability, impairment, or incapacity. In such event, Client agrees that the assisting attorney can review Client's files to protect Client's rights." Sample language for an engagement letter: "My objectives are to provide you with excellent legal services and to protect your interests in the event of my unexpected death, disability, impairment or incapacity. In such event, my office staff or the assisting attorney will contact you and provide you with information about how to proceed."