

SUCCESSION PLANNING & TRUSTEESHIPS

By

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Reprinted from *Bench & Bar of Minnesota* (April 2010)

Is it just me, or was it only yesterday that we were worrying about and then celebrating New Year's Day 2000? I've been told that as I get older, time supposedly "speeds up." Well, that last decade sure went by quickly. And now we have to worry about 2012! I guess the point is how easily time can get away from all of us; meanwhile, our plans to do—whatever it was (fill in your own blank)—keep getting put off until another day. Then that "another day" arrives very unexpectedly. Two of my former law firm colleagues—both younger than I am—have died unexpectedly in the past few months.

Much has been written in the past few years about what is often called succession or successor planning, especially for solo practitioners.[Ftn 1](#) All lawyers *should* make arrangements for the handling of their practice in case of illness, disability, or death (or even an extended vacation, which lawyers ought to take once in a while). Law firms should have plans in the event of a partner's death or retirement. Our office has been asked to make several CLE presentations in the past few years on this topic, especially to solo and small-firm lawyer groups.

Okay, but what happens when an attorney does not have such a successor plan in place? Perhaps they had meant to, but as noted, "another day" may have arrived well before it was believed possible. Then what? All too often the answer has been that the Director of Lawyers Professional Responsibility is appointed as a trustee over the lawyer's files and/or trust account pursuant to Rule 27, Rules on Lawyers Professional Responsibility (RLPR). Indeed, there have been 17 such trusteeships since 2000, almost twice as many as in either of the previous decades. One to two active trusteeships per year may not seem like a major undertaking, but our office's paralegals and support staff would beg to differ.

Trusteeship Authority

Even before the Minnesota Supreme Court adopted the current more-specific rule authorizing the appointment of this office as a trustee, the court had employed Rule 15(b), RLPR, to appoint a trustee over the files of suspended attorney Dennis Peck.[Ftn 2](#) That rule provides that “when a lawyer is disciplined or permitted to resign, this [c]ourt may issue orders as may be appropriate for the protection of clients or other persons.” This authority has been employed quite rarely. As to future trusteeships, the court recognized that circumstances such as disability or death, for which trusteeships may be required, might not be covered. Thus, Rule 27 was adopted shortly after the *Peck* decision.

One of the key elements of Rule 27 that must be considered before appointing the Director’s Office as trustee is whether “no arrangement has been made for another lawyer to discharge such responsibilities.” In many situations, of course, when the lawyer is a member of a firm, others in that firm will take on the departed lawyer’s tasks: notifying clients, handling ongoing matters, or returning files and refunding unearned fees if the firm will not or cannot continue the representation. For solo practitioners, a successor lawyer plays this same role. When the director is alerted to a situation that could result in a trusteeship, the first consideration is whether someone else is either already in place to handle these tasks or can be requested to do so. Especially in greater Minnesota, a local attorney may be far better able to deal with local clients and courts than is our office in St. Paul.

The cost of undertaking this role will be burdensome in some instances, which can dissuade a private practitioner from agreeing,[Ftn 3](#) although many attorneys have been willing to act as trustee “pro bono” as a service to the profession. In some limited situations, an attorney for the personal representative of a deceased lawyer has handled these duties informally as part of the estate administration. Ultimately, however, someone must inventory the files of the lawyer and, at a minimum, notify all clients with open matters, opposing counsel or parties, and courts. Although the Director’s Office most often also attempts to contact clients with closed files, there is some discretion that must be employed. Such files still must be inventoried for possible original documents of value, such as wills or abstracts. In some instances, very old files are destroyed at the onset of the trusteeship; at the end of the trusteeship the director may hold those files that remain for a period of time and then be permitted to destroy them. As may now be imagined, trusteeships can cause a significant drain on our resources.[Ftn 4](#)

Trustee for a Firm?

With the supreme court's blessing, the Director's Office recently has been discussing the possibility of being appointed trustee over the files of Centro Legal, the legal aid-type agency that represented people of Hispanic origin until its closing last year. Centro Legal has hundreds (perhaps thousands) of closed files in storage. No one former Centro Legal lawyer is or can be responsible for maintaining those files and returning them to clients upon request. While there were some funds remaining when the agency closed, these have been used to pay for the storage facility and they are running out. Thus the Director's Office has been asked to step into the breach. With access to Centro Legal's file index, the Director's Office officially can assist individuals who may need their file. The plan is to at least publicize in Spanish-language sources that former Centro Legal clients can still obtain their files from the Director's Office for some period of time. Perhaps a dedicated phone line in Spanish can be established on which clients can leave information. Former Centro Legal staff may still be needed to retrieve specific files from storage, perhaps on a weekly basis, thus limiting the commitment of the former staff, which has already soldiered admirably under difficult circumstances.

This possible trusteeship obviously is unusual, principally because the director has not used the Rule 27 trusteeship authority to assist law firms to date. Rather, our office has used this authority only where an individual lawyer has died, become disabled or abandoned their practice, either after a disbarment or suspension or sometimes by just "walking away."

In a few situations, a more limited trusteeship over a trust account has been employed. In these situations, the director, upon order from the supreme court, obtains signatory power over the lawyer's trust account, attempts to determine whose funds remain in the account, and returns unearned funds to former clients. This too can be a difficult task if the attorney has not properly maintained trust account books and records. Nevertheless, it is vital as claims against the Client Security Fund have been averted or minimized by several such trusteeships.

Notes

1 See, e.g., Cole, "Growing Old Together," 65 *Bench & Bar of Minnesota* 4 (April 2008); Shaw, "Handling an Attorney's Death, Disability or Disappearance," *Minnesota Lawyer* (10/08/01); Cleary, "Disability and Death: Ethical Concerns When Tragedy Strikes," 55 *Bench & Bar of Minnesota* 7 (Aug. 1998). For additional information on this topic, see, Bolan, "Exit, Stage Left! A Succession Planning Checklist for Lawyers," *Law Practice*

Today (Mar. 2010) (ABA online at <http://www.abanet.org/lpm/lpt/articles>); Evans, "Planning for an Orderly Transition," *Michigan Bar Journal* (Sept. 2009), p. 52.

2 *In re Peck*, 302 N.W.2d 356, 360-61 (Minn. 1981).

3 Also, when the director is appointed trustee, the court extends immunity protection to the trustee's actions.

4 For example, our office currently rents extra storage space in our building plus an extra office space just for sorting and processing the files of a lawyer currently under trusteeship.