Why Should A Solo Practitioner Do Succession Planning?

By Jayne Tyrrell

Clients deserve protection against adverse consequences of unforeseen events. A lawyer's family needs protection against avoidable financial injury. Of course, no one likes to think about unexpected events that could cause us to abruptly cease practicing law. Unfortunately, accidents, illnesses, and untimely deaths do happen. Think about it for a moment. If you had an accident and had to be in the hospital for eight weeks, what would happen to your practice? What would happen to your clients and their matters? What about your staff, your rent, or that hearing on Wednesday?

What is a succession plan?

A succession plan is a written list of steps to be taken to temporarily or permanently fulfill your duties to clients in the event that you are unable to carry out your duties as a lawyer. It explains what should happen to clients' cases if a lawyer suddenly becomes cognitively disabled or dies. It is an essential section of a good office manual. A comprehensive plan also sorts out the financial effects of such events, including the lawyer's share of present and future earnings and client trust funds.

What are the Rules?

The Rules of Professional Conduct provide guidance on how to manage many aspects of the questions that may arise. The Rules identify the scope of the lawyer's duties but not the practical solutions.

In Massachusetts, SJC Rule 4:01,Section 14 provides for the appointment of a Commissioner to protect clients' interests when a lawyer disappears or dies, or is placed on disability or inactive status. Some states go further and impose specific ethical obligations on attorneys to plan for disability or death. Still other states require a written plan designating a primary and alternative active attorney who agrees in writing to review the lawyer's client files, notify each client of the lawyer's unavailability and determine in the first instance if any protective actions are necessary to protect the interests of the clients.

Who needs a succession plan?

Every lawyer with responsibilities to clients needs a plan. The content of the plan will vary depending on the practice situation:

Succession plans of sole practitioners –For years, professional articles have encouraged lawyers, particularly sole practitioners, to plan for the possibility of their unexpected death or even more likely disability. The fact that this advice is largely ignored makes this a problem.

Succession plans of lawyers sharing office space – Lawyers sharing office space are not partners. Unless formal agreements have been entered into, such lawyers are not legally authorized to enter into their office-mate's files or finances. Perhaps part of the reluctance to enter into succession plans is attributable to a false belief that in the event of death the office-mate will naturally assume responsibility for the orphaned cases.

Lawyer who is closing his or her practice – A successor plan is also helpful when a lawyer retires or otherwise leaves the practice of law. All the same issues need to be addressed.

What should a succession plan cover?

The more efficiently and professionally a law office is run, the more easily it will be to write and execute a succession plan. The attorney who steps into the absent lawyer's shoes will be far better able to do this job in a well-run firm. It will be important that an office procedures manual exists and explains how to produce a list of client names and addresses for open files, that all deadlines and follow-up dates are promptly entered on the calendaring system, that time and billing records are up to date and that it is easy to identify any original client documents that have been kept.

The plan needs to emphasize the importance of promptness in returning the client's file, so that the client's rights are not jeopardized and the client can take the file to a new attorney. Obviously, any money in the client's trust account also must be promptly returned.

The key task in creating a successor plan is the choice of successor who can competently and responsibly take over and conclude the practice. The arrangement with the successor attorney can be established through a limited power of attorney, a comprehensive agreement with detailed powers, or a short form authorization and consent form to close or manage a law practice. The plan should be based on trust. The planning attorney should talk to the successor candidate to see whether she is comfortable serving as back up and understands the duties that will be involved and the principles within which the practice has been conducted.

If an attorney is authorized to administer another attorney's practice in the event of disability, impairment, or incapacity, that authority terminates when the attorney dies. The administrator of the estate has the legal authority to bring the practice to a close. The administrator should be fully aware of the terms of the successor agreement and is free to authorize the successor attorney to proceed.

Clients of an incapacitated or deceased attorney will eventually move their matters to replacement counsel that they choose, and often pay only a fraction, if anything, of the outstanding bills owed to the former lawyers. All the unbilled time related to work in progress is usually lost. Consequently, the value of the receivables and client work is considerably less than the attorney may have anticipated. In the meantime, there are continuing office expenses. This affects cash flow to the attorney's family.

Other states have created some useful reference material on succession planning. For example, New Mexico, New York and Colorado have published succession planning handbooks for lawyers.

The New York State Bar Association's Guide is entitled *"Planning Ahead: Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death."* The Guide outlines a 4 Step Plan for Exiting a Law Practice, as follows:

Step 1: Designation of an Assisting Attorney;
Step 2: Preparation of Written Instructions for the Assisting Attorney, family, executor, and staff;
Step 3: Discussion of the Advance Exit Plan with the people listed in Step 2; and
Step 4: Description of the financial arrangements made with the Assisting Attorney, which may include medical authorizations to determine incapacity to continue to practice, and authorizations to notify others about the closure of the practice or to obtain extensions of time in active litigation matters.