

The Best-Laid Plans

Lawyers Duty Includes Preparing Their Practices For Incapacity

by Jane Rabe

None of us likes to think about our own mortality. However, a lawyer's duty of competent representation includes planning ahead to safeguard clients' interests in the event of unexpected illness, incapacity or death. There are a number of steps to consider in preparing for others to carry on without you.

Find Backup

The first step is to select someone to take charge. It is preferable to find an attorney. If you are in a firm, the logical person is a partner or perhaps an associate. However, if you are a sole practitioner, or do not have an associate who can or will manage your practice, then you will need to find an outside backup attorney. She should be someone you trust, who understands the issues of managing a law practice. Choose the backup attorney wisely since she may have access to your clients' funds.

Your arrangement with the backup attorney may require, or be facilitated by, a durable power of attorney that takes effect in the event of incapacity. For example, unless there is another signatory on the account, the bank may deny access to client funds without a POA. However, upon your death, the backup attorney's authority terminates unless your executor or administrator authorizes her to proceed. It is thus critical that you have an up-to-date will and that your executor be aware of the arrangement with the backup attorney.

Establish Backup's Duty

The second step for sole practitioners is to establish the scope of the backup attorney's duty to you and your clients. Have an agreement with the backup attorney that outlines the responsibilities involved in closing or selling your practice. For example, the backup attorney will need to contact your clients for instructions regarding their files and may need to obtain extensions in pending legal matters. Mass. R. Prof. C. 1.16(e) provides that files be made available to clients within a reasonable time. Note, however, that except to obtain information necessary to contact the client, the backup attorney cannot review the contents of the files unless the clients have consented.

Your agreement may also authorize the backup attorney to provide your clients with a final accounting and statement, to collect fees on your behalf and, in the event of incapacity where there is no court-appointed fiduciary, to liquidate or sell your practice pursuant to Mass. R. Prof. C. 1.17. You should also agree as to whether or not you will compensate the backup attorney for this work and what the compensation will be. Renew the agreement with the backup attorney every year.

Establishing the scope of duty includes deciding whether the backup attorney will also be your personal attorney. If she does represent you, then even if the clients request representation, the backup attorney may not be able to represent your clients on some matters. As your attorney, the backup attorney would owe a fiduciary duty to you. In the event that she discovered malpractice or ethical violations in any of your cases, the backup attorney would not be able to inform your clients'; although obviously she cannot mislead them as to what has occurred. And clearly, in that case, the backup attorney would not be able to represent your clients.

If the backup attorney does not represent you, then the agreement with the backup attorney may specify that she can inform the client of possible errors, such as a missed time limitation, and advise the client to seek new counsel. If your intent is that the backup attorney take over representing your clients on their pending cases, she must obtain each client's consent to the representation and check for conflicts of interest before providing services to your clients or reviewing their confidential files. If the backup attorney is not your counsel, she will still be bound by Mass. R. Prof. C. 8.3 to report serious professional misconduct to the Board of Bar Overseers.

Access To Your Accounts

Another decision to consider is whether or not you want the backup attorney to have access to your client funds account, and under what circumstances this access should occur. You should decide whether to allow the backup attorney to have general access or access contingent upon a certain event. You may want the backup attorney to decide whether the contingency has occurred, or you may decide to have a spouse or friend hold the power of attorney until the spouse or friend determines that the specific event has occurred. In order to avoid problems with the bank that holds the account, the terms should be specific, and it should be easy for the bank to determine whether the terms are met. You and the backup attorney should review the terms and be comfortable with them. If you do not make arrangements to allow someone access to your client funds account, your clients' money will remain in the account until a court takes jurisdiction. In many cases, your client will need the funds on deposit to hire a new attorney or to complete a transaction. A delay could harm the client's ability to go forward.

Familiarize With Your Procedures

The next step in planning ahead is to familiarize the backup attorney with your office procedures and systems. When possible, avoid keeping your clients' original documents, such as wills or estate plans. Introduce the backup attorney to your office staff and be sure that your staff knows how to contact her in case of an emergency. If your staff does not have this information, show the backup attorney where to find computer passwords, how to access your voice mail system, and how to generate a list of your current clients with their addresses and telephone numbers.

Keep an updated calendar system with all deadlines and show the backup attorney or a staff member how to access your calendar. Maintain current time and billing records and make sure either the backup attorney or a staff member knows where your client ledgers are kept. If your staff does not have this information, explain your system of filing documents and where your original client documents are kept.

Alternatively, and whether or not a staff member is familiar with your office systems, you might find it preferable to maintain an office manual detailing the procedures and information set forth in the previous paragraph. Of course, in order for the backup attorney to make use of this information, you should adhere to your own procedures.

Basic Business Matters

There are also basic business matters that must be addressed. Some of these include making arrangements for "tail coverage" for professional liability insurance, termination of occupancy and liability for office space, staff support to assist the backup attorney to perform her duties, and arrangements to pay for all of these services. Now is the time to plan and not leave family, colleagues and clients to scramble in the event of your sudden death or disability.

Additionally, consider providing your clients with information about these plans. If that is not feasible, the backup attorney at a minimum should arrange for telephone coverage or a forwarding telephone number if something does happen to you. In this way, your clients will not call and learn that your number is disconnected and be unsure about where to call for information.

These are steps to comply with fundamental ethical obligations to clients. Planning and attention to detail are required to anticipate the sudden death or disability of an attorney without significant adverse consequences for clients. Although none of us may want to admit it, we are all mortals.

Jane Rabe is an Assistant Bar Counsel with the Board of Bar Overseers. She acknowledges and refers the reader to *Planning Ahead: A Guide To Protecting Your Clients*.

Interests In the Event Of Your Disability Or Death, by Barbara S. Fishleder, Oregon State Bar Professional Liability Fund, April 1999.

Please direct all questions to webmaster@massbbo.org.

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