

Succession Planning for Solo and Small Firm Practitioners

by Jill A. Snyder, Esq.
Law Office of Jill A. Snyder, LLC
410-864-8788; jill@snyder-law.net

This article highlights the importance of succession planning for solo and small firm practitioners and provides guidance regarding the implementation of an effective succession plan.

Necessity of Succession Planning

There are several factors that make law firm succession planning unique, complex, and absolutely necessary. Below are some of the most critical issues that arise when disaster strikes solo or small firm practitioners without a succession plan in place.

1. Ethical Considerations

The Maryland Rules of Professional Conduct (“MRPC”) §1.3 requires that a lawyer act “with reasonable diligence and promptness in representing a client.” Whether this means that an attorney is guilty of neglect if she fails to protect her clients from the adverse consequences which could result from her death or disability is not settled in Maryland. However, Comment 5 to MRPC §1.3 states that “the duty of diligence may require each sole practitioner to prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer’s death or disability, and determine whether there is a need for immediate protective action.” The American Bar Association has issued Formal Opinion 92-369 affirmatively stating that a lawyer should designate another attorney “to fulfill the obligation to protect client files and property...in the event of a lawyer’s death.” Accordingly, a solo practitioner practicing without a succession plan may be endangering her hard-earned reputation, placing her clients in jeopardy, and subjecting herself or her estate to a malpractice claim in the future.

2. Client Confidentiality

MRPC §1.6 requires that a lawyer maintain the confidentiality of client information in the absence of informed consent or certain proscribed exceptions. In most instances, a review of client files by the Personal Representative of a deceased attorney or the Power of Attorney for an incapacitated attorney would clearly violate this rule. This is especially true where such person is not an attorney. However, even disclosure of

client information to another designated attorney may not be authorized without a client's consent in the absence of a court order. Therefore, I recommend that each solo practitioner designates an attorney who will review her client files in the event of disaster, informs her clients that such designation has been made, and obtains the consent of her clients to such disclosure in her client engagement letters.

3. Conflict of Interest

Pursuant to MRPC §1.7, a lawyer shall not represent a client if the representation involves a conflict of interest unless such representation falls within one of the exceptions set forth in the rule. There are two ways in which a conflict of interest may arise if a solo practitioner dies or becomes incapacitated. First, if the solo practitioner's succession plan provides that another attorney shall contact her clients and provide options to them regarding continued representation, the designated attorney must ascertain whether representation of any of the solo practitioner's clients would create a conflict of interest with any of the designated attorney's clients. Second, if the solo practitioner's succession plan designates one attorney to both represent her or her estate and potentially continue to represent her clients, then a conflict of interest may arise if the successor attorney identifies mistakes made by the solo practitioner in the representation of her clients. Therefore, it may be prudent for a solo practitioner to designate one attorney to represent her or her estate and another attorney to offer services to clients in her place.

4. Attorney Trust Accounts

Funds in attorney trust accounts are, by definition, not the property of the attorney. Maryland Rule 16-602 defines an attorney trust account as "an account, including an escrow account, maintained in a financial institution for the deposit of funds received or held by an attorney or law firm on behalf of a client or third person." Therefore, a Personal Representative or Power of Attorney would lack authority to access or make distributions from these trust accounts absent a court order. This is especially true when the person is not an attorney. Therefore, it is important for every solo practitioner to designate another attorney as a signatory on her attorney trust accounts and to advise her clients of this arrangement. If a solo practitioner fails to do so, then Bar Counsel is authorized by Maryland Rule 16-777 to petition to appoint a conservator in the circuit court in any county where deceased or incapacitated attorney maintained a law office. This failure to plan could be quite costly because a conservator is entitled to payment from the attorney's assets or estate for reasonable hourly fees and reimbursement for expenditures.

5. Document Retention

Any attorney who comes into possession of a deceased or incapacitated attorney's files will ultimately need to address the issue of retention of such files. The Maryland Bar Association Committee on Ethics has addressed this issue in Ethics Docket 89-58 and has advised that the attorney in possession of the files is under a duty (a) to notify the client if she has funds or property of such client, and then (b) to deliver such funds or property to the client. In addition, this opinion reinforces an earlier ethics opinion (Ethics Docket 85-77), which states that there is no specific time period for which an attorney in Maryland must preserve client files. However, recently enacted Maryland Rule 16-606.1 requires that all financial statements and related records pertaining to client or third party funds shall be maintained for a period of at least five years after the date the record was created.

6. Sale of Law Practice

Maryland Rule 1.17 specifically authorizes the sale of a law practice, but such practice could quickly be rendered valueless or even a liability if no succession plan is in place for such practice. Furthermore, Maryland Rule 5.4 specifically allows an attorney who either purchases a deceased or incapacitated attorney's practice or takes over her active client files to pay the purchase price or a portion of the total compensation without violating the prohibition against an attorney sharing legal fees with a non-attorney. Therefore, a solo practitioner who fails to establish a succession plan is diminishing a potentially valuable asset of her estate.

Implementation of a Succession Plan

The process of preparing and implementing a succession plan for a law practice could be daunting, especially in instances in which the office is not well organized and information is not well documented. A solo or small firm practitioner should prepare an emergency casualty manual and should take additional steps to enable the emergency plan to be properly implemented.

The manual should contain:

- Formal authorization for the successor attorney to enter the law office, access all files, and obtain medical information about the planning attorney;
- Instructions to the custodian of the emergency casualty manual and release of liability if the custodian acts prematurely or fails to act because she is not informed of a triggering event;

- Instructions to the successor attorney outlining responsibilities specific to the practice and addressing issues such as dual representation, conflicts of interest, and client confidentiality;
- Agreements or guidelines regarding compensation to the successor attorney, sale of practice, and fee sharing for active client matters;
- Keys, codes, or passwords to enable the designated attorney to access the law office, computer databases, client files and contact information, conflict of interest systems, calendaring systems, voicemail, email, tax and accounting records, billing software, and business and trust bank account records;
- Detailed instructions to enable the successor attorney to quickly identify active client files, time-sensitive matters, and client property in the attorney's possession;
- Descriptions of how the law practice classifies, organizes, and stores files and information, handles billing, and other information necessary for the designated attorney to effectively take control in the event of emergency; and
- Information regarding the existence of maintenance or service contracts, professional liability and other insurance, and ongoing office expenses.

In addition to preparing the manual, the following steps should be taken:

- Have the successor attorney added as an authorized signer on the firm's business bank account and IOLTA account;
- Add a paragraph to client engagement letters outlining the firm's succession plan and giving clients the opportunity to object to access to their client file by the successor attorney; and
- Send a client newsletter or other communication to former clients outlining the firm's succession plan and giving former clients the opportunity to object.

Conclusion

In addition to significantly reducing liability exposure, increasing client satisfaction, and enhancing the value of her law practice, a solo practitioner will find that the process of preparing a succession plan will improve the day-to-day operation of her business. If a solo practitioner finds that she is unable to describe a system for handling certain aspects of her law practice or that her instructions are particularly onerous or inefficient, she will quickly recognize the need to make some modifications to her practice.