SUCCESSION PLANNING: PREPARING FOR THE UNTHINKABLE

HANDBOOK

The State Bar of Arizona gratefully acknowledges the Washington State Bar Association's generous permission to use its publication *Planning Ahead Handbook* as the basis for this handbook. We also gratefully acknowledge the pioneering work done by the Oregon State Bar Professional Liability Fund in this area, and its publication, *Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death*, as the basis for the materials developed by the Washington State Bar.

practice 2.0

ACKNOWLEDGEMENT AND REPRINT PERMISSION

This handbook was adapted from Washington's *Planning Ahead Handbook*. The Washington State Bar and the State Bar of Arizona adapted their materials from the Oregon State Bar Professional Liability Fund Handbook *Planning for the Unexpected*, Copyright 2023.

These materials are intended for use and reference only by members of the State Bar of Arizona and are not intended to constitute legal advice. Each situation is different and those using these materials are advised to seek legal advice about their own personal circumstances and practices.

The forms provided with this handbook are intended for use and reference only by members of the State Bar of Arizona and are not intended to constitute legal advice. Members utilizing these forms should conduct their own inquiry as to the current state of the law and applicability to the issues addressed by these forms.

Publication of the State Bar of Arizona

SUCCESSION PLANNING

State Bar of Arizona

TABLE OF CONTENTS

The following sample forms may be found at: Succession Planning (azbar.org)

Forms:

CHAPTER 1

PREPARING FOR THE UNTHINKABLE

It is not a fun topic. People do not like thinking about unexpected events that could abruptly force them to stop practicing law. Yet every single day people suffer from accidents, unexpected illnesses or even untimely death. All lawyers, whether in a firm or working as a solo practitioner, have an obligation to consider the impact on their clients should the unthinkable happen. All lawyers are required to plan and to protect the interests of their clients. This handbook was prepared to help you start immediately to protect your interests and those of your clients. An additional resource, always available to you, is the State Bar's practice management program, Practice 2.0. Visit us at https://www.azbar.org/for-legal-professionals/practice-tools-management/practice-2-0/or call 602.340.7332.

Lawyers are required to protect their clients' interests.

> Ariz. R. S. Ct., Rule 41(b)(9) provides:
>
> The duties and obligations of members, including affiliate members, shall be:. . . to protect the interests of current and former clients by planning for the lawyer's termination of or inability to continue a law practice, either temporarily or permanently.

Lawyers also owe a duty of competent representation pursuant to the Rules of Professional Conduct. *See* Rule 42, Ariz. R. S. Ct., ER 1.1, et seq. Similarly, lawyers are required to act with "reasonable diligence and promptness in representing a client." *See* Rule 42, Ariz. R. S. Ct., ER 1.3. This includes making arrangements to safeguard the client's interests and avoid delay in the event of the lawyer's death, disability, impairment, or incapacity. Lawyers must protect moneys held in trust and plan such that the client will be able to timely access his or her funds. Lawyers are also required to protect confidential information subject to ER 1.6, which protects more information and is far broader than the attorney client privilege. Lawyers must also avoid jeopardizing their clients' pending legal matters; clients need access to their files without delay.

Arizona Ethics Opinion 04-05 and ABA Formal Op. 92-369 offer guidance. Ariz. EO 04-05 notes that consistent with ER 1.15, "it is prudent for a lawyer to develop a plan to ensure that funds in his or her client trust account are properly

administered and distributed if the lawyer dies or becomes disabled." It states: "*First*, a lawyer should choose a means that is not only legally effective, but also fair to, and expeditious for, the clients who are entitled to the funds in the account. . . . *Second*, a lawyer should plan for both death and disability. . . . *Third*, a lawyer's plans for the disposition of his or her client trust account should be made in concert with a broader plan for the disposition of the lawyer's practice in the event of his or her death or disability." (Emphasis in original). Without evaluating the legal sufficiency of the options, the opinion notes there are a number of ways to accomplish these ends, including: (1) executing an agreement with a lawyer obligating him/her to assume responsibility in the end of death or disability; (2) using a contingent power of attorney if the lawyer becomes disabled; (3) appointing a designee in a will to either administer and distribute funds, or to hire a lawyer for that purpose; and (4) requesting someone be prepared to seek the appointment of a conservator if the lawyer dies or is disabled.

ABA Formal Op. 92-369 similarly calls upon lawyers to prepare a plan to protect clients' interests. At a minimum the plan should specify who notifies the clients in the event of the lawyer's death and who has authority to review client files to take any immediate protective actions.

Having a plan protects you, your family, and the business you have built.

A thorough succession plan protects you from bar charges should your inability to practice be temporary. It also protects your family. In the absence of a plan, your grieving family may otherwise feel overwhelmed and helpless in the face of your physical and/or electronic filing cabinets. Having a plan also protects your business, including the reputation and good will of your firm. Further, the majority of malpractice carriers require that the lawyers they insure make arrangements for the appropriate disposition of client matters in the event of the insured lawyer's death or disability.

Start now!

Terminology

"Affected Attorney" – the planning attorney, the planning attorney's estate or personal representative.

"Authorized Signer" – the person authorized by the Affected Attorney as a signer on the Affected Attorney's trust account.

"Successor Counsel" – the lawyer(s) who have agreed to close Affected Attorney's practice or to run it while Affected Attorney is incapacitated.

Implementing the Plan in 8 Steps

Step 1: Start Now with Good Office Practices

Someone may have to step into your shoes tomorrow; streamline the process for them and for your clients today.

- Keep all files current, including appropriately filing documents, keeping your billing entries up to date and maintaining your file work product.
- Maintain one calendar.
- Maintain your contacts list with current information.
- Enforce your file retention policy.

Step 2: Understand What You Are Planning For and What It Takes

Your plans may change depending on your age, life circumstances and goals. At a minimum you need a plan for both temporary and permanent practice disruptions. Your succession plans should be reevaluated yearly.

Plans to both temporarily manage your office or to close your practice involve two primary duties: (1) updating clients and managing client matters; and (2) managing or closing the firm. This includes:

1. Contacting clients and managing their matters:
    - Identifying active v. closed files.
    - Contacting active clients for instructions on transferring the files and effectuating the transfers.
    - Accessing active client files to determine if any extensions, continuances, or other steps are necessary to protect the client's interest.
    - Overseeing withdraw motions and obtaining orders necessary.

- Contacting former clients as needed to manage closed files subject to a retention policy.
- Reviewing trust account records to determine the balance of each client's funds.
- Providing clients final accountings and/or refunds as appropriate.
- Provide all relevant people notice of Affected Attorney's temporary or permanent unavailability to practice.

2. Managing or closing the firm:
    - Contacting Affected Attorney's malpractice carrier.
    - Provide all relevant people notice of Affected Attorney's temporary or permanent unavailability to practice.
    - Run or wind down financial affairs.
    - Collect fees owed to the firm.
    - Oversee management or closure of the trust account.
    - Manage or cancel business services including phone, email and leases.
    - Liquidate or sell the firm.

Step 3: Choose a Successor Counsel and an Authorized Signer

Select a competent attorney you trust who is willing and able to assist you. You might consider a backup person as well and you should routinely reassess your decision. Talk with the Successor Counsel and Authorized Signer to discuss your objectives and needs. Create your own task list based on Step 2 to memorialize your understanding.

A Successor Counsel may have one of two roles: (1) he or she may be Affected Attorney's personal attorney or (2) he or she may transition Affected Attorney's clients, or become their subsequent counsel.

- Successor Counsel as Affected Attorney's personal attorney: the Successor Counsel represents Affected Attorney and therefore, may not be able to represent Affected Attorney's clients. Successor Counsel owes fiduciary duties to Affected Attorney; Successor Counsel must act in your

best interest. For example, without Affected Attorney's informed consent, Successor Counsel would not be able to notify your clients of ethical violations or malpractice.

- Successor Counsel as transition or subsequent counsel: client consent to this arrangement should be sought in advance. In the event of a qualifying event, Successor Counsel could actively step in and temporarily, or permanently, take over the Affected Attorney's files. Of course, the client is free at any time to terminate this relationship and to choose his or her counsel. Successor Counsel does not represent Affected Attorney and may have his or her own obligations to notify the clients of any errors.

As you can see, how you structure your agreement will determine what Successor Counsel must do if her or she finds: (1) errors in the files, such as missed time limitations; (2) errors in the Affected Attorney's trust account; or (3) misappropriation of client funds. Either way, Successor Counsel must be aware of conflict of interest issues and must check for conflicts if he or she (1) is providing legal services to your clients or (2) must review confidential file information to assist in transferring clients' files. Because conflicts of interest may prevent the Successor Counsel from carrying out your plan, it is wise to have more than one Successor Counsel. If the Successor Counsel is going to review confidential client information, the conflicts check must occur before the file review. For assistance in determining whether or not the Successor Counsel has a conflict of interest, you or they may wish to consult private counsel or may consult the SBA's Ethics Hotline at 602-340-7284. Calls to the Ethics Hotline must concern the inquiring lawyer's own prospective ethical conduct and are confidential.

Successor Counsel may also be an Authorized Signer, or you may designate a separate person for that role. The Authorized Signer will have access to your bank records and accounts. Choosing someone other than Successor Counsel provides a check and balance as two people will have access to your records. Having a separate person act as Authorized Signer may also help avoid conflicts of interest regarding the Affected Attorney's trust account.

Step 4: Decide When and What Access Successor Counsel and Authorized Signer Have

This step requires you to establish what type of access Successor Counsel and/or Authorized Signer will have; the conditions under which they will have access; and who will determine when those conditions are met. These are difficult decisions and should be made only after thoughtful consideration.

For example, if you are incapacitated, you may not be able to give consent to someone to assist you. Now is the time to determine when you want someone to assert the right to help you or take over your practice. Now is the time to establish what criteria will be used. For example, does Successor Counsel need a physician's opinion to confirm incapacitation, or will his/her reasonable belief suffice? Consider these approaches:

- Give Successor Counsel and/or the Authorized Signer access during a specific time period or after a specific event. Allow the Successor Counsel and/or the Authorized Signer to determine whether the contingency has occurred.
- Identify a third person, such as a spouse, family member or trusted friend, who maintains your appointing documents (such as a limited power of attorney) until he or she determines that the contingency has occurred.
- Give Successor Counsel and/or the Authorized Signer access to records and accounts at all times.

Each option has pros and cons. For example, if you do not correctly plan for an Authorized Signer, your clients' money will remain in the trust account until a court orders access and/or grants a conservatorship. This may harm clients who need access to their money to hire a new attorney; it may further delay the case and put the client in an untenable position. This may prompt a bar charge, malpractice claim or other civil suits.

On the other hand, if you give Authorized Signer complete access at all times, your clients will not suffer from delay. But the Authorized Signer could write checks, withdraw money, or close the account at any time, even if you are not dead, disabled, impaired, or otherwise unable to conduct your practice. Under this arrangement, you cannot control the signer's access. These risks make it an extremely important decision. If you choose to give another person full access

to your accounts, recognize your choice is crucial to the protection of your clients' interests, as well as your own. You are responsible for your clients' funds. You must give careful consideration to whom you give access and under what circumstances. If someone has access to your trust account and that person misappropriates money, your clients will suffer damages and you will be held responsible.

There are no easy solutions to this problem, and there is no way to know absolutely whether you are making the right choice. There are many important decisions to make. Consider the options available to you, weigh the relative risks, and make the best choices you can.

Step 5: Documentation to Effectuate Your Intent

Part of practicing law is choosing your words carefully; you must do the same now. Prepare written agreements and authorization paperwork necessary to effectuate your intent. Be clear on who decides and what the process is to determine your incapacitation. Be clear on the scope of services your Successor Counsel and Authorized Signer have. Set forth the terms of compensation. If authorization is temporary, clearly set forth when the scope of services is completed, for example, when you are returning from a vacation.

Determining the best way to document your agreement requires some substantive legal knowledge. It is also prudent to consult your bank to ensure you have the appropriate documentation to grant access to your Authorized Signer; you may need to go down to the bank with your Authorized Signer. Some banks may honor a signed letter of understanding, some may require a limited power of attorney, and others may require their own forms be used. Use caution: bank forms are generally unconditional authorizations to sign on your account and may include an agreement to indemnify the bank. Get written confirmation that the bank will honor *your* limited power of attorney or other written agreement.

Broadly, consider the following types of documents: a limited power of attorney, signed letter of understanding or agreement and provisions in a will. Depending on your plan, you may want to use a signed letter of understanding reflecting that a trusted person will hold a power of attorney until he or she renders a decision on your incapacity. Or, you and your Successor Counsel and/or Authorized Signer may have your own agreements. You may also wish to include language in your will authorizing your personal representative to hire a successor counsel,

or specifically appointing Successor Counsel. Below are links to forms to help get you started:

- Agreement to Close Law Practice – Full Form
- Agreement to Close Office – Short Form
- Will Provisions
- Notice of Designated Successor Counsel

Step 6: Client Notification

Once you have made arrangements with a Successor Counsel and/or Authorized Signer, provide your clients with information about your plan. The easiest way to do this is to include the information in your fee agreements and engagement letters. This provides clients with information about your arrangements and gives them an opportunity to object. Your client's signature on a fee agreement provides written authorization for the Successor Counsel to proceed on the client's behalf, if necessary. See the following forms on Practice 2.0's webpage:

- Succession Planning Language for Engagement Letter and Fee Agreement
- Letter Advising That Lawyer is Unable to Continue in Practice
- Letter Advising that Letter is Closing His/Her Office

Step 7: Prepare Pertinent Information

Take steps to equip your Successor Counsel and/or Authorized Signer. Create and maintain an office procedures manual or letter to Successor Counsel explaining:

- Software programs you use for case management, file management, calendaring, conflicts, time/billing, trust accounting, general accounting and the login and password for each program.
- Instructions on generating a list of active cases with client name and contact information.
- Login information for your computer, email, voicemail and other equipment that requires a password.
- Locations of open and closed files.

- Instructions on your file retention policy, confidential destruction procedures and status of closed files.
- Locations of all banks, post office boxes, or other service contracts the firm has.
- Locations of trust account records, including information on how to generate reports, or obtain balances from your software program.
- Prepare a list of relevant non-case related contacts, including the name and contact information for: your family, your personal representative, your malpractice carrier, office staff, landlord, bookkeeper, other important contacts.
- Review and renew your written agreement with the Successor Counsel and/or Authorized Signer each year; and
- Make sure you do not keep clients' original documents, such as wills or other estate plans.

If your office is in good order, the Successor Counsel will not have to charge more than a minimum of fees for closing the practice. Your law office will then be an asset that can be sold and the proceeds remitted to you or your estate. An organized law practice is a valuable asset. In contrast, a disorganized practice requires a large investment of time and money and is less marketable.

Step 8: Review Annually

As mentioned herein, set aside time each year to review your written agreements and reevaluate your choice of Successor Counsel and/or Authorized Signer in light of your changing practice. If you make any changes, be sure you also review and update your fee agreements or engagement letters. Make an effort to be sure your succession plan is adequate for your changing firm.

Death of a Sole Practitioner: Special Considerations

If you authorize another lawyer to administer your practice in the event of death, disability, impairment, or incapacity, that authority terminates when you die. The personal representative of your estate is legally authorized to bring your practice to a close. He or she must be told about your arrangement with the Successor Counsel and/or Authorized Signer. The personal representative may then authorize the Successor Counsel and/or Authorized Signer to proceed.

It is imperative that you have an up-to-date will nominating a personal representative (and alternates if the first nominee cannot or will not serve) so that probate proceedings can begin promptly and the personal representative can be appointed without delay. If you have no will, there may be a dispute among family members and others as to who should be appointed as personal representative. A will can provide that the personal representative shall serve without bond. Absent such a provision, a relatively expensive fiduciary bond will have to be obtained before the personal representative is authorized to act. See Sample Will Provisions found on the Practice 2.0 webpage. Worse if you don't have a probate proceeding and you have not made appropriate arrangements, your family will be left scrambling.

For many sole practitioners, the law practice will be the only asset subject to probate. Other property will likely pass outside probate to a surviving joint tenant, usually the spouse. This means that unless you keep enough cash in your law practice bank account, there may not be adequate funds to retain the Successor Counsel and/or Authorized Signer or to continue to pay your clerical staff, rent, and other expenses during the transition period. It will take some time to generate statements for your legal services and to collect the accounts receivable. Your accounts receivable may not be an adequate source of cash during the time it takes to close your practice. Your Successor Counsel and/or Authorized Signer may be unable to advance expenses or may be unwilling to serve without pay. One solution to this problem is to maintain a small insurance policy, with your estate as the beneficiary.

Alternatively, your surviving spouse or other family members can be named as the beneficiary, with instructions to lend the funds to the estate, if needed.

You should check the current law to determine the extent of the personal representative's power to continue a decedent's business to preserve its value, to sell or wind down the business, and to hire professionals to help administer the estate.

However, for the personal representative's protection, you may want to include language in your will that expressly authorizes that person to arrange for closure of your law practice. The appropriate language will depend on the nature of the practice and the arrangements you make ahead of time. For an instructive and detailed will for a sole practitioner, see Thomas G. Bousquet, *Retirement of a Sole Practitioner's Law Practice*, 29 LAW ECONOMICS & MANAGEMENT 428 (1989).

It is important to allocate sufficient funds to pay your Successor Counsel and/or Authorized Signer and necessary secretarial staff in the event of disability, incapacity, or impairment. To provide funds for these services, consider maintaining both a disability insurance policy and a life insurance policy in amounts sufficient to cover these projected office closure expenses in the event of your unanticipated disability, impairment, incapacity, or death.

Start Now

We encourage you to immediately: select an attorney to assist you; follow the procedures outlined in this handbook; call Practice 2.0 for assistance; and forward the name and contact information of your Successor Counsel to a designated personal representative for your estate.

This is something you can do now, at little or no expense, to plan for your future and protect your assets and your clients. Don't put it off – start the process today.

CHAPTER 2

WHAT IF?
ANSWERS TO FREQUENTLY ASKED QUESTIONS

Questions the Affected Attorney May Have:

- **Why is it important to establish and clarify the scope of the Successor Counsel and/or Authorized Signer at the outset?**

  There are many issues for both the Affected Attorney and the Successor Counsel and/or Authorized Signer to consider as part of a succession plan. Drafting the agreement, structuring the agreement, clarifying expectations of both Affected Attorney and Successor Counsel is essential. It will determine what the Successor Counsel must do if he or she finds: (1) errors in the files, such as missed time limitations; (2) errors in the Affected Attorney's trust account; or (3) misappropriation of client funds.

  Discussing these issues at the beginning of the relationship with Affected Attorney's friend or colleague will help to avoid misunderstandings later when the Successor Counsel interacts with the Affected Attorney's former clients. If these issues are not discussed, the Affected Attorney and the Successor Counsel may be surprised to find that the Successor Counsel has an obligation to inform the Affected Attorney's clients about a potential malpractice claim or report an ethical violation. See ER 8.3.

  The best way to avoid these problems, as noted above, is for the Affected Attorney and the Successor Counsel to have a written agreement and, when applicable, for the Successor Counsel to have a written agreement with the Affected Attorney's former clients.

  If there is no written agreement clarifying the obligations and relationships, a Successor Counsel may find that the Affected Attorney believes that the Successor Counsel is representing the Affected Attorney's interests. At the same time, the former clients of the Affected Attorney may also believe that the Successor Counsel is representing their interests. It is important to keep in mind that an attorney-client relationship can be established by the reasonable belief of a would-be client. See, e.g., *In re Petrie*, 154 Ariz. 295, 742 P.2d 796 (1987).

Just as you are required to have a clear statement of the scope of services in your fee agreements with clients, you are well served to have a clear scope of services in your succession plan and the accompanying documents.

- **What resources exist to help with succession planning?**

  Please see the Practice 2.0 webpage or call us at 602.340.7332 with questions. Also available is the State Bar's ethics hotline at 602.340.7284. Both Practice 2.0 and the Ethics Hotline are free, confidential and may be mitigating.

  You may also wish to review Arizona Ethics Opinion 04-05 and/or ABA Formal Op. 92-369

  Click here to explore CLE topics on succession planning, selling a firm and leaving a practice.

  Consider a Lawyer Down the Hall Mentor. All lawyers are required to have a succession plan. Lawyer Down the Hall lets you connect with another practitioner to ask them general questions, including how they put together their succession plan.

  Join a Section. The State Bar or Arizona offers 30 sections reflecting various practice areas. This is a forum for you to communicate with practitioners in your area of law and exchange information on your experiences with succession planning. Again, succession planning is not retirement planning; all lawyers, no matter their age or practice area, are required to have a succession plan.

  Consider calling your malpractice carrier. Although it is likely your carrier will require you to have a plan, you should look into what resources your carrier has to help you improve and refresh your plan.

- **What are the pros and cons of granting access to my trust account?**

  The most important "pro" of authorizing someone to sign on your trust account is the convenience it provides for your clients. If you suddenly become unavailable or unable to continue your practice, an Authorized Signer is able to transfer money from your trust account to pay appropriate fees, disbursements, and costs, to provide your clients with settlement checks, and to refund unearned fees. If these arrangements are not made, the clients' money must remain in the trust account until a court allows access. This delay

may leave your clients at a disadvantage since they may need settlement funds or unearned fees held in trust.

On the other hand, the most important "con" of authorizing access is your inability to control the person who has been granted access. An Authorized Signer with unconditional access can write trust account checks, withdraw funds, or close the account at any time, even if you are not dead, disabled, impaired, or otherwise unable to conduct your business affairs. It is very important to carefully choose the person you authorize as a signer, and when possible, to continue monitoring your accounts.

- **Do I need to provide the State Bar of Arizona with a copy of my succession plan?**

  No. The SBA does not collect and cannot gold stamp your succession plan.

- **Thinking about having someone else step into my shoes at my office tomorrow has made me realize I need to streamline some of my internal practices. Are there resources to help?**

  Please see the Practice 2.0 or call us at 602.340.7332 with questions. You might also check with your carrier to see what suggestions they have.

Questions Successor Counsel and/or Authorized Signer May Have:

- **Must I notify Affected Attorney's former clients if I discover a potential malpractice claim against the Affected Attorney?**

  The answer is largely determined by the agreement that you have with the Affected Attorney and the Affected Attorney's former clients. If you do not have an attorney-client relationship with the Affected Attorney, and you are the new lawyer for the Affected Attorney's former clients, you must inform your client (the Affected Attorney's former client) of the error, and advise him or her to submit a claim to the professional malpractice insurance carrier of the Affected Attorney, unless the scope of your representation of the client excludes actions against the Affected Attorney. If you want to limit the scope of your representation, do so in writing and advise your clients to get independent advice on the issues.

  In fact, as a general rule, always tell the Affected Attorney's former clients that they have the right to seek a second opinion. You should also consider the requirements of ER 8.3, to make mandatory reporting to the State Bar

(the "appropriate professional authority") if you know of conduct that "raises a substantial question as to (that) attorney's honesty, trustworthiness or fitness as a lawyer in other respects."

If you are the Affected Attorney's lawyer, and not the lawyer for his or her former clients, you should discuss the error with the Affected Attorney and review his or her obligation to inform the client and malpractice insurance carrier of the error. Under these circumstances, you would not be obligated to inform the Affected Attorney's client of the error.

However, you must be careful to avoid making any misrepresentations. *See, e.g.,* ERs 4.1 and 8.4(c). This situation could arise if the Affected Attorney refuses to fulfill his or her obligation to inform the client – and also instructs you not to tell the client. For example, if the Affected Attorney had previously told the client a complaint had been filed, but the complaint had not actually been filed, you should not say or do anything that would lead the client to believe the complaint had been filed. Keep in mind that the Affected Attorney's malpractice insurance carrier should be notified as soon as you become aware of any error or omission that may be a potential malpractice claim in order to prevent denial of coverage under the policy due to a "late notice" provision.

If you are the Affected Attorney's lawyer, an alternative arrangement you can make with the Affected Attorney is that you may inform the Affected Attorney's former clients of any malpractice errors. This would not be permitted to represent the former clients on malpractice actions against the Affected Attorney. Rather, it would authorize you to inform the Affected Attorney's former clients that a potential error exists and that they should seek independent counsel. If you undertake to represent the Affected Attorney's former clients while acting as the Successor Counsel, avoiding conflicts will be problematic at best.

See Agreement to Close Law Practice – Full Form and Agreement to Close Office – Short Form

- **I know sensitive information about the Affected Attorney. The Affected Attorney's former client is asking questions. What information can I give the Affected Attorney's former client?**

  The answer depends on your relationship with the Affected Attorney and the Affected Attorney's clients. If you are the Affected Attorney's lawyer, you

would be limited to disclosing information that the Affected Attorney authorizes you to disclose. You would, however, want to make clear to the Affected Attorney's clients that you do not represent them and that they should seek independent counsel. If the Affected Attorney suffers from a condition of a sensitive nature and does not want you to disclose this information to the client, you cannot do so.

See Agreement to Close Law Practice – Full Form and Agreement to Close Office – Short Form

- **Because the Affected Attorney is no longer practicing law, does the Affected Attorney have malpractice coverage?**

  This depends on the type of coverage the Affected Attorney had. Most malpractice policies include a short automatic extended reporting period of 60 or 90 days, which provides the opportunity to report known or potential malpractice claims when a policy ends and will not be renewed. In addition, most malpractice policies provide options to purchase an extended reporting period endorsement for longer periods of time (often called a tail). These extended reporting period endorsements do not provide ongoing coverage for new errors, but they do provide the opportunity to lock in coverage under the expiring policy for errors that surface after the end of the policy, but within the extended reporting endorsement timeframe. This may pose a significant conflict for the Successor Counsel, unless there is a provision in the agreement between the attorneys that allows the Successor Counsel to alert the former client in this circumstance, because otherwise the former client will not know of the error within the reporting period.

- **What protection will I have under the Affected Attorney's malpractice insurance coverage if I participate in the closing or sale of the office?**

  Check the definition of "Insured" in the malpractice policy form. Most policies define "Insured" as both the firm and the individual lawyers employed by or affiliated with the firm. This typically is broadened to include past employees and "of counsel" attorneys. In addition, most lawyers' professional liability policies specifically provide coverage for the "estate, heirs, executors, trustees in bankruptcy and legal representatives" of the Insured as additional insureds under the policy. However, the best insurance is the Successor Counsel's own malpractice policy.

- **In addition to transferring files and helping to close the Affected Attorney's practice, I want to represent the Affected Attorney's former clients. Am I permitted to do so?**

  It depends on: (1) whether the clients want you to represent them; and (2) who else you represent.

  If you are representing the Affected Attorney, you are unable to represent the Affected Attorney's former clients on any matter in which there would be a conflict of interest with the Affected Attorney. This would include, but not be limited to, representing the Affected Attorney's former client on a malpractice claim, ethics complaint, or fee claim against the Affected Attorney.

  If you do not represent the Affected Attorney, you are limited, as you would be with any new potential client, by conflicts of interest arising from your other cases and clients.

  You must check your client list for possible client conflicts before undertaking representation or reviewing confidential information of an Affected Attorney's former client. You should also keep in mind that you may have a conflict of interest based on your own personal interest. You should review the ERs pertinent to conflicts in making this assessment, much as you would with any new potential client. *See*, ERs 1.7 – 1.13.

  Even if a conflict check reveals that you are permitted to represent the client, you might be wise to refer the case. A referral is advisable if the matter is outside your area of expertise, or if you do not have adequate time, financial resources, or staff to handle the case. In addition, if the Affected Attorney is a friend, bringing a legal malpractice claim or fee claim against him or her may make you vulnerable to the allegation that you didn't properly advocate on behalf of your new client. To avoid this potential exposure, you should provide the client with names of other attorneys, or refer the client to an appropriate lawyer referral service.

  See Letter From Firm Offering to Continue Representation.

- **What procedures should I follow for distributing the funds that are in the Affected Attorney's trust account?**

  If your review or the Authorized Signer's review of the Affected Attorney's trust account indicates that there may be conflicting claims to the funds in the account, must be sure the claimants to the funds have been notified. ER 1.15 requires that third parties with claims on the funds be notified in writing of

the intent to distribute the funds and be given 90 days to take action to claim the funds. If an action is filed within 90 days, you must continue to hold the funds. Otherwise, you may distribute the funds but should discuss with the client the possibility that notwithstanding the distribution of those funds to the client they may still be liable to the third party for payment. If there is a clear shortfall in the available funds, you may need to involve the State Bar of Arizona as discussed below.

- **If there is an ethical violation, must I tell the Affected Attorney's former clients?**

  The answer depends on the relationships and the circumstances. If the Affected Attorney has violated an ethics rule and you are his or her lawyer, you are not obligated, and in many cases not permitted, to inform the Affected Attorney's former clients of such violations if your knowledge of the misconduct is confidential information of your client, the Affected Attorney. However, under the ethics rules, disclosure is mandatory to the extent you reasonably believe necessary to prevent death or substantial bodily harm (ER 1.6(b)(1)). You may reveal information when your client intends to commit a crime and the information is necessary to prevent the crime, or to the extent you believe is reasonably necessary to prevent your client from committing a crime or fraud that is reasonably certain to result in substantial financial injury to the financial interests or property of another, or to mitigate or rectify substantial injury to the financial interests or property of another that has resulted or is reasonably certain to result from the client's commission of a crime or fraud. (ER 1.6(c), ER 1.6(d)(1) and (2)). You may also reveal otherwise confidential information to the extent necessary to secure legal advice about your own compliance with the ethical rules (ER 1.6(d)(3)).

  You may have other responsibilities as well. For example, if you discover that some of the client funds are not in the Affected Attorney's trust account as they should be, you, as the attorney for the Affected Attorney, should discuss this matter with the Affected Attorney and encourage the Affected Attorney to correct the shortfall. If the Affected Attorney does not correct the shortfall, and you believe the Affected Attorney's conduct violates the disciplinary rules, you should resign. *See* ER 1.2(d); 8.4(a); 8.4(c).

  If you are the attorney for the Affected Attorney, and the Affected Attorney is deceased, you should contact the personal representative of the estate. If the Affected Attorney is alive but unable to function, you (or the Authorized Signer) may have to disburse the amounts that are available and inform the

Affected Attorney's former clients that they have the right to seek legal advice.

The circumstances under which some amounts might be available to disburse include the Affected Attorney having more than one trust account where one account can be fully reconciled and the owner(s) of the funds determined with certainty, but the other account appears to be missing client funds.

If you are the Affected Attorney's lawyer, you should make certain that former clients of the Affected Attorney do not perceive you as their attorney. This may include informing them in writing that you do not represent them. *See* ER 4.3.

If you are not the attorney for the Affected Attorney, and you are not representing any of the former clients of the Affected Attorney, you may still have a fiduciary obligation (as an Authorized Signer on the trust account) to notify the clients of a shortfall in the trust account. You should also report any notice of a potential claim to the Affected Attorney's malpractice insurance carrier in order to preserve coverage under the Affected Attorney's malpractice insurance policy. Further, the reporting requirements of ER 8.3 dictate that you notify the SBA of the shortfall notwithstanding the fact that any overdrafts will automatically be reported.

If you are the attorney for a former client of the Affected Attorney, you have an obligation as a fiduciary to inform the client of ethical violations by the Affected Attorney that are relevant to that client's interests. *See* ER 1.4. If you are a friend of the Affected Attorney, this is a particularly important issue.

You may wish to limit, *in advance,* the scope of your representation by informing your clients (the former clients of the Affected Attorney) that you do not intend to inform them about ethics violations, or potential ethics violations, of the Affected Attorney. A limited representation must be reasonable under the circumstances, and the clients must give informed consent, preferably in writing. ER 1.2(c). Because the client must give informed consent, you should be mindful of the definition of informed consent contained in ER 1.0(e). You should also advise the client, in writing, to seek independent representation on these issues and provide them sufficient time to do so before making a decision.

Nevertheless, there are situations in which such a limitation will not be reasonable and you will be obligated ethically and legally to inform your clients of an Affected Attorney's ethical violation, notwithstanding the agreement limiting the representation. For example, if you discover a shortfall

in the trust account, you must inform the client about the shortfall and advise him or her of available remedies. These remedies may include pursuing the Affected Attorney for the shortfall, filing a claim with the Affected Attorney's malpractice insurance carrier, and filing a charge with the SBA's Lawyer Regulation Office.

See Agreement to Close Law Practice – Full Form and Agreement to Close Office – Short Form.

- **If the Affected Attorney stole client funds, do I have exposure to professional discipline against me?**

  You will not be disciplined for stealing the money unless: (1) you aided or abetted the Affected Attorney in the unethical conduct (ER 8.4(a)), https://azbar.org/media/szillqa3/ltr-atty-closing-office.docxor (2) the Affected Attorney was your client and you counseled or assisted him or her in criminal or fraudulent conduct (ER 1.2(d)). Whether you have an obligation to inform the Affected Attorney's former clients and the SBA of the defalcation depends on your relationship with the Affected Attorney and with the Affected Attorney's former clients. (See above.)

  If you are the new attorney for a former client of the Affected Attorney, and you fail to advise the client of the Affected Attorney's ethical violations, you may be exposed to the allegation that you have violated your ethical responsibilities to your new client.

- **The Affected Attorney wants to authorize me as a trust account signer. Am I permitted also to be the attorney for the Affected Attorney?**

  Not if there is a conflict of interest. As an Authorized Signer on the Affected Attorney's trust account, you would have a duty to properly account for the funds belonging to the Affected Attorney's former clients. This duty could conflict with your duty to the Affected Attorney if: (a) you were hired to represent him or her on issues related to the closure of his or her law practice, and (b) there were defalcations in the trust account. Because of this potential conflict of interest, it is best *either* to choose to be an Authorized Signer *or* to represent the Affected Attorney on issues related to the closure of his or her practice, but not both. (See above.)

CHAPTER 3
CHECKLISTS

I. CHRONOLOGY OF CLOSING A LAW OFFICE AS A RESULT OF DEATH, DISABILITY, IMPAIRMENT, OR INCAPACITY

First Two Weeks

- Check the calendar and active files. Determine which items are urgent and/or scheduled for hearings, trials, depositions, court appearances, and so on.
- Contact clients with active files, advising them that they need to retain new counsel. Inform clients about time limitations and time frames important to their cases. Explain how and where clients can pick up copies of their files and set a deadline for doing this. See Letter Advising That Lawyer Is Unable to Continue in Practice and Letter Advising That Lawyer is Closing His/Her Office.
- For cases with pending court dates, depositions, or hearings, discuss with the clients how to proceed. When appropriate, contact courts and/or opposing counsel to request extensions, continuances, and resetting of deadlines. Send written confirmations of these extensions, continuances, and resets to opposing counsel and your client.
- For cases before administrative bodies and courts, obtain the clients' permission to submit a motion and order to withdraw as attorney of record.
- Open and review all unopened mail, emails and voicemail. Review all mail and email that is not filed and match it to the appropriate files.
- Look for an office procedure manual. Determine whether anyone has access to a list of clients with active files.

Within First Month

- Arrange for clients to pick up their files and original documents; in Arizona the file belongs to the client. See, e.g., Arizona Ethics Opinions 08-02 and 09-02, regarding obligations regarding client files. Decide whether it is necessary or advisable to make and retain copies of client files. All clients should either pick up their files (and sign a receipt acknowledging that they received them) or sign an authorization for you to release the files to their new attorneys.

- Inform clients and former clients where their closed files will be stored and whom they should contact to retrieve them. Remind former clients of the retention schedule established by Affected Attorney, if applicable, or obtain clients' permission to destroy the files after approximately **5** years. If a closed file is to be stored by another attorney, get the client's permission to allow the attorney to store the file and provide the client with the attorney's name, address, and phone number.
- If the Affected Attorney is a sole practitioner, ask the telephone company for a new phone number to be given out when the disconnected phone number is called. This eliminates the problem created when clients call the prior phone number and get a recording stating that the number has been disconnected.
- Contact the Affected Attorney's Malpractice Insurance carrier and the Successor Counsel's excess carrier, if applicable, about extending reporting coverage.

Throughout the Process

- You are not required to be a robot. If you were a friend of the Affected Attorney, give yourself time to adapt to the Affected Attorney's disability or incapacitation, or to mourn the Affected Attorney's death.
- You also must manage your own caseload and be sure you devote appropriate time to your own practice.
- Finally, although hopefully you already review and update your own succession plan annually, perhaps your involvement as Successor Counsel and/or Authorized Signer informs your own plan warranting an update. If you find this to be the case, you might share that experience with your peers.

II. CHECKLIST FOR LAWYERS PLANNING TO PROTECT CLIENTS' INTERESTS IN THE EVENT OF THE LAWYER'S DEATH, DISABILITY, IMPAIRMENT, OR INCAPACITY

These matters need to be attended to by a responsible attorney planning for death, disability, impairment, or incapacity.

1. Use fee agreements that state you have arranged for a Successor Counsel to close your practice in the event of death, disability, impairment, or incapacity. Sample language is below:

Succession Planning

My goal is to provide you with excellent legal services. I also want to protect your interests in the event of my unexpected death, disability, impairment, or incapacity. In order to accomplish this, I have arranged with another attorney to assist with closing my practice in the event of my 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.

This language can also be found in Sample Miscellaneous Fee Agreement Provisions.

2. Have a thorough and up-to-date office procedure manual that includes information on:
   a. How to check for a conflict of interest;
   b. How to use the calendaring system;
   c. How to generate a list of active client files, including client names, addresses, and phone numbers;
   d. Where client ledgers are kept;
   e. How the open/active files are organized;
   f. How the closed files are organized and assigned numbers;
   g. Where the closed files are kept and how to access them;
   h. The office policy on keeping original client documents;
   i. Where original client documents are kept;
   j. Where the safe deposit box is located and how to access it;
   k. The bank name, address, account signers, and account numbers for all law office bank accounts;
   l. The location of all law office bank account records (trust and general);
   m. Where to find, or who knows about, the computer passwords;
   n. How to access your voice mail (or answering machine) and the access code numbers; and

o. Where the post office or other mail service box is located and how to access it.

See generally Law Office List of Contacts.

3. Make sure all your file deadlines (including follow-up deadlines) are calendared.

4. Document your files.

5. Keep your time and billing records up-to-date.

6. Have a written agreement with an attorney who will close your practice (the "Successor Counsel") that outlines the responsibilities involved in closing your practice. Determine whether the Successor Counsel will also be your personal attorney. Choose a Successor Counsel who is sensitive to conflict-of-interest issues. See Agreement to Close Law Practice – Full Form and Agreement to Close Office – Short Form.

7. If your written agreement authorizes the Successor Counsel to sign general account checks, follow the procedures required by your bank. Decide whether you want to authorize access at all times, at specific times, or only on the happening of a specific event. In some instances, you and the Successor Counsel will have to sign bank forms authorizing the Successor Counsel to have access to your general account.

8. If your written agreement provides for an Authorized Signer for your trust account checks, follow the procedures required by your bank. Decide whether you want to authorize access at all times, at specific times, or only on the happening of a specific event. In most instances, you and the Authorized Signer will have to sign bank forms providing for access to your trust account. Choose your Authorized Signer wisely; he or she will have access to your clients' funds.

9. Familiarize your Successor Counsel with your office systems and keep him or her apprised of office changes. See Law Office List of Contacts.

10. Introduce your Successor Counsel and/or Authorized Signer to your office staff. See Notice of Designated Successor Counsel. Make certain your staff knows where you keep the written agreement and how to contact the Successor Counsel and/or Authorized Signer if an emergency occurs before or after office hours. If you practice without regular staff, make sure that Successor Counsel and/or Authorized Signer knows whom to contact (the

landlord, for example) to gain access to your office. See Law Office List of Contacts.

11. Inform your spouse or closest living relative and the personal representative of your estate of the existence of this agreement and how to contact the Successor Counsel and/or Authorized Signer. This can be done in a Notice of Designated Successor Counsel, or as a provision in your will.
12. Fill out the Law Office List of Contacts and update it annually, or as changes are made. Make sure your Successor Counsel has a copy or knows where you keep it.
13. Review and renew your written agreement with your Successor Counsel and/or Authorized Signer annually.
14. Review your fee agreement each year to make sure that the name of your Successor Counsel is current.

III. CHECKLIST FOR CLOSING YOUR OWN OFFICE

1. Create a timeline, using your target closure date as the starting point.
2. Finalize as many active files as possible and stop taking new clients when appropriate.
3. Write to clients with active files that cannot be resolved before the closure of your office. Advise them that you are unable to continue representing them and that they need to retain new counsel. Your letter should inform clients about time limitations and time frames important to their cases. The letter should explain how and where they can pick up copies of their files. Give clients a time deadline for doing this. See our Succession Planning Forms for sample letters.
4. For cases that have pending court dates, depositions, or hearings, discuss with the clients how to proceed. Where appropriate, request extensions, continuances, and resetting of hearing dates. Send written confirmations of these extensions, continuances, and resets to opposing counsel and to your client.
5. For cases before administrative bodies and courts, obtain the clients' permission to submit a motion and order to withdraw as attorney of record.
6. In cases where the client is obtaining a new attorney, be certain that a Substitution of Counsel is filed.

7. Pick an appropriate date and check to see if all cases either have a Motion and Order allowing your withdrawal as attorney of record or have a Substitution of Counsel filed with the court.
8. All clients should either pick up their files (and sign a receipt acknowledging that they received them) or sign an authorization for you to release the files to their new attorneys.
9. If you are a sole practitioner, ask the telephone company for a new phone number to be given out when your old phone number is called. This eliminates the problem created when clients call your phone number, get a recording stating that the number is disconnected, and do not know where else to turn for information.
10. Celebrate! Reflect on your amazing accomplishments and enjoy your new adventures.

Please see our Succession Planning Forms and Checklists found on our website. Don't hesitate to call Practice 2.0 at 602.340.7332 for quick questions or a consultation about succession planning.