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## New Ethics Rules

# Succession Planning and the Duty of Diligence

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Succession planning will make things easier for those who have to wind up your practice if you die or become disabled. More than that, though, it's probably part of your ethical duty of diligence.

Rule 1.3 is short and direct: "A lawyer shall act with reasonable diligence and promptness in representing a client." But the Committee Comments provide additional guidance and insight. Comment 5 to Rule 1.3 addresses the unique challenges to a sole practitioner and the related duty to have a plan in place to cover sudden death or incapacity. It reads as follows:

To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner 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. See Illinois Supreme Court Rule 776, Appointment of Receiver in Certain Cases.

While no one likes to dwell on it, fate is capricious, and it is foreseeable that a sole practitioner could suffer a mishap or misfortune. It is also foreseeable that clients could suffer great harm if no forethought is given to how to advise them. They must be told to consult with another attorney for any ongoing matters and otherwise advised how to minimize harm to their interests. While comment 5 is addressed to sole practitioners, all lawyers would do well to review their plans for dealing with a partner's or associate's death or incapacity.

Such planning is in keeping with the highest calling of our profession to promote and protect the welfare of our clients. It also reflects our natural desire to help grieving family and friends, who would otherwise have to close a law practice with no written directions. This article offers a partial checklist of things to do.

Checklist of topics for a sole practitioner to discuss with a designated successor

A solo should enter into an agreement with another lawyer or law firm to perform the functions described in Comment 5. It is probably best to agree with another sole practitioner to help each other if either dies or becomes incapacitated.

Client list. Instruct family members or support staff in writing how to generate a list of client names and addresses. Also, he or she should be able to generate a list of open matters and closed matters.

In this regard, Supreme Court Rule 769, *Maintenance of Records*, is useful. It has two parts. The first requires attorneys to maintain records that contain the name and last known address of each client and say whether the representation is ongoing or concluded. That allows the attorney to review all matters subject to the duty of care and diligence. Attorneys should keep the telephone numbers of all clients in pending matters so someone can quickly inform them they need to speak to another lawyer promptly.

The second part of Rule 769 provides that an attorney maintain all practice-related financial records for not less than seven years, including but not limited to bank statements, time and billing records, checks, check stubs, journals, ledgers, audits, financial statements, tax returns, and tax reports.

Computer records. Leave written instructions, including passwords, that describe how to access a calendar or computer program listing all pending matters and due dates on all cases. Time-sensitive ongoing proceedings are highest priority, and any plan should therefore identify the name, title, and case number of any pending litigation matters, along with the client's name, address, and telephone number. This would allow someone

to inform clients of the bad news and invite them to retrieve the file and to speak to another attorney.

Trust accounts. Prepare careful instructions about any client trust or escrow account, identifying the financial institution where it is located along with its title and the account number. He or she should also describe where client trust account records are located.<sup>1</sup>

Voice mail. Explain in writing how to retrieve messages from and change the greeting on the voice mail system. This notifies callers and refers them to a contact person.

Closed files. Describe where closed files are stored and how they are organized. Instructions should identify any file that may contain an original will, deed, or trust agreement that may have to be returned to the former client.

Informing clients. Consider referring to the contingency plan in any attorney-client agreement with new clients. The statement could be as simple as including language to the effect that your office has made arrangements for attorney John Smith to review files and notify clients and take other action in case of your illness or death.

Time devoted to planning for death or incapacity will give sole practitioners and their loved ones peace of mind. Such a plan could lower the cost of administering the deceased attorney's estate and make efforts to sell his or her law practice pursuant to the provisions of Rule 1.17 more feasible.

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1. The Attorney Registration and Disciplinary Commissions' *Client Trust Account Handbook*, which describes the basics of maintaining and reconciling a client trust account, is online at [www.iardc.org/toc\\_main.html](http://www.iardc.org/toc_main.html).