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YOUR ROADMAP TO SUCCESSFUL RETIREMENT:

Succession Planning (Professional Conduct)

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SUCCESSION PLANNING: A Comprehensive Review of the Ohio Board of Professional Conduct Succession Planning Guide

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I. INTRODUCTION

Succession Planning is a multi-faceted process for practicing attorneys. This session will look at the steps an attorney will take to appoint a successor attorney in the event of unexpected disability, death, disappearance or discipline. The resource for this is the **Ohio Ethics Guide: Succession Planning** issued in March 2017 by the Ohio Board of Professional Conduct.

The *Ethics Guide* states that failure to plan adequately for unexpected disability, death, disappearance or discipline can result in harm to clients and confusion and hardship for the lawyer's family, staff and professional colleagues.

The *Ethics Guide* highlights that developing a succession plan in advance:

- Ensures the orderly transfer of a client's affairs and files to a new lawyer
- Ensures the orderly return of moneys held in trust
- Satisfies the lawyer's ethical obligation to provide competent and diligent representation

The *Ethics Guide* states that it is a preventative tool to assist the Ohio bar in developing a succession plan. The *Ethics Guide* charts a path for a lawyer to facilitate the transition of open client matters to new lawyers or a successor lawyer appointed in advance by the affected lawyer. Of course, the *Ethics Guide* cannot address every conceivable situation of an untimely death or disability of a lawyer. Specific questions that are not addressed in the *Ethics Guide* may be directed to the legal staff of the **Ohio Board of Professional Conduct**.

The *Ethics Guide* also indicates that it does not address the issues inherent in the sale of a law practice that occurs before or after the death or disability of a lawyer. (For information on sale of a law practice, see **Succession Planning for Ohio Attorneys**)

A NOTE in the *Ethics Guide* indicates: Ethics Guides address subjects on which the staff of the Ohio Board of Professional Conduct receives frequent inquiries from the Ohio bench and bar. The Ethics Guides provide nonbinding advice from the staff of the Ohio Board of Professional Conduct and do not reflect the views or opinions of the Board of Professional Conduct, commissioners of the Board, or the Supreme Court of Ohio.

Terminology

The Ethics Guide defines these terms:

➤ **Affected Lawyer**

A lawyer whose:

- Death
- Temporary disability
- Permanent Disability
- Disappearance
- Discipline

will trigger the need for services of successor lawyer.

These events are referred to in the Ethics Guide as “death or disability”

➤ **Successor Lawyer**

A lawyer chosen in advance by affected lawyer to:

- Transition practice after death or disbarment
- Manage practice during disability or disappearance.

➤ **Immediate Protective Action**

A form of limited scope representation Ohio Rules of Professional Conduct, Rule 1.2) undertaken by the successor lawyer to safeguard the interests of affected lawyer’s clients.

Tasks may include:

- Obtaining extensions of time from opposing counsel
- Filing motions for continuances with courts and administrative agencies
- Filing notices, motions, and pleadings on behalf of affected lawyer’s clients with their prior consent

II. REQUIREMENT FOR SUCCESSION PLAN

Ohio Rules of Professional Conduct do not specifically mandate a succession plan.

However, several rules, read in conjunction, strongly suggest a succession plan is necessary to protect clients from adverse consequences of death or disability.

Succession plan is continuation of lawyer's duties in:

➤ Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation *reasonably* necessary for the representation.

➤ Rule 1.3 Diligence

A lawyer shall act with *reasonable* diligence and promptness in representing a client.

Comment [5] 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
- determine whether there is a need for immediate protective action

See Supreme Court Rules for the Government of the Bar of Ohio Rule V. Disciplinary Procedure, Section 26. Appointed Attorney to Inventory Files.

(A) Appointment.

When an attorney dies, is suspended pursuant to Section 15 of this rule, fails to comply with Section 22 of this rule, or otherwise abandons his or her client files and no partner, executor, or other responsible party capable of conducting the attorney's affairs is available and willing to assume appropriate responsibility, disciplinary counsel or the chair of a certified grievance committee may appoint one or more attorneys to

inventory the files of an attorney and take action, including the actions set forth in Section 22, as is necessary to protect the interest of clients of the attorney. An attorney is considered to have abandoned client files if the attorney has had no contact with the files or has not responded to inquiries about the files and either is incapacitated, has disappeared and, through reasonable efforts, cannot be found or contacted, or has been deported.

Please also note paragraph (C) Recovery of Costs. (emphasis added)

If the attorney whose files are inventoried has been disciplined or has resigned with discipline pending, the director or disciplinary counsel may certify the fees and expenses incurred in connection with the inventory to the Supreme Court and request that the Court issue an order directing the attorney to repay the fees and expenses incurred. If the attorney whose files are inventoried has died, the director or disciplinary counsel may file a claim, with the assistance of the Attorney General, against the estate of the deceased attorney to recover the fees and expenses incurred in connection with the inventory. Any moneys repaid or recovered pursuant to this division shall be deposited in the Attorney Services Fund.

Having a succession plan will:

- Safeguard client's legal interests
- Protect and account for client funds and property held in trust
- Maintain confidentiality of information related to representation

III. KEYS TO SUCCESSION PLANNING: GOOD LAW OFFICE MANAGEMENT PRACTICES

The *Ethics Guide* states that several law office management best practices will assist successor lawyer, former office staff and affected lawyer's family in transitioning clients to new lawyers and closing the affected lawyer's office.

In the event of death, disability or other events that temporarily interrupt a law practice, here are the best practices lawyers are encouraged to follow

Office Procedures Manual

Create and regularly maintain this manual. It will serve as a guide for successor lawyer to:

- run practice temporarily, or
- assist in the eventual closure of the practice.

What to include in Office Procedures Manual:

- Determination of conflicts of interest
- The use of the office calendaring system
- How to generate a list of active client files, including
 - client names
 - addresses
 - phone numbers
- Where and how client ledgers are maintained
- How the open/active files are organized
 - where closed files, if any, are stored
- The firm's client file retention and destruction policy
- Log-in and password information for
 - office computers
 - mobile devices
 - voicemail
 - cloud storage
 - billing systems
 - calendaring system
 - email (including server addresses and passwords)
 - online banking
 - other websites the law office relies upon on a daily basis
- Time and billing procedures and software
- The names and contact information for
 - office personnel
 - financial institutions
 - accountants
 - landlords
 - vendors

- insurance agents/brokers.

Calendaring System

Maintain a calendaring system with all court and filing and follow-up dates.

NOTE: Your CLE presenter suggests:

- Use “double entry” concept to docket all court dates and filing deadlines
- Have “tickler” dates to handle preparation issues
- Use automatic follow up dates so calendar entries can't be avoided

Document Client Files

Thoroughly document client files.

NOTE: CLE presenter suggests:

- Use checklist to be sure procedures are followed
- Include chronology of file from conflict check to file closing
- Use appropriate client communication

- See OfficeKeeper Sample Letters
 - Engagement Letter
 - Non-engagement Letter
 - Disengagement Letter
 - Appointment Letter
 - File Closing Letter

Maintain Current Time and Billing Records

NOTE: CLE Presenter suggests:

- Comply with Rule 1.5 Fees and Expenses
- Follow Rule 1.15 Safekeeping Funds and Property
 - Be sure to perform and maintain monthly reconciliation
- Use appropriate software

Routinely backup all digital records of the practice

NOTE: CLE Presenter suggests:

- Variety of options available
- Cloud backup allowable
 - See OSBA Informal Advisory Opinion 2013-03
- Just do it! Be sure to backup “early & often”!

Properly Maintain IOLTA Records and Ledgers

NOTE: CLE Presenter suggests:

- See Rule 1.15
- For additional IOLTA information see Ohio Legal Assistance Foundation

Follow Firm's Client File Retention and Destruction Policy

NOTE: CLE Presenter suggests, see:

- Ethics Guide: Client File Retention
- **Malpractice Alert** What do I do with Closed Client Files?

IV. CORE ELEMENTS OF A SUCCESSION PLAN

Written succession plan will include detailed instructions to:

- Members of lawyer's immediate family
- Designated successor lawyer
- Lawyer's nominated executor or personal representative
- Key office staff

Written Agreement with Designated Successor Lawyer

- Columbus Bar Association Advance Succession Registry
- Cleveland Metropolitan Bar Association What If Preparedness Program

Information on Status of Open Client Matters

- Should include location and status of client files
Include both open and closed files

Copy of Firm's Client File Retention Plan

- Include where to find files
- Indicate how to access Receipts for Files received by clients

Details of financial records:

- IOLTA
- Operating accounts

- Client ledgers

Location of login and password information for:

- Office computers
- Mobile devices
- Voicemail
- Cloud storage
- Billing systems
- Calendaring system
- Email (including server addresses and passwords)
- Online banking
- Other websites

Location of accounts payable and receivable and billing/collection practices

Contact information for office personnel and key vendors

- Keep list up-to-date
- May keep electronically

Detailed information needed to physically close and wind up law practice

- Leases
- Insurance policies
- Taxes
- Sale of building

Up-to-date Office Procedures Manual

See Section III

Yearly review

- At least once a year have review and discussion about succession plan and contents with persons responsible for implementing and carrying out succession plan.

Corporate Entity Considerations

- If affected lawyer is sole member of LLC or LPA, corporate entity must:

- Pre-authorize someone other than the sole member to act on behalf of the entity and carry out the succession plan in event of member's death or disability
- Have the appropriate resolution in place that states when and how successor lawyer may act on behalf of entity, after death or disability of affected lawyer

V. REASONS TO DESIGNATE A SUCCESSOR LAWYER

- Should be included in succession plan to designate competent and diligent lawyer as successor lawyer
- Some malpractice insurance carriers may require
- Successor lawyer typically granted authority to inventory affected lawyer's files and determine client matters for immediate protective action
- Successor lawyer typically responsible for notifying affected lawyer's clients of affected lawyer's death or disability
See ABA Adv Op 92-369
- If not designated in advance, any willing and able lawyer may be approached, pursuant to Gov. Bar Rule V. Section 26, to fulfill the role by:
 - Affected lawyer's family
 - Local bar association
 - Disciplinary counsel
 - Law Office Staff
- Designation of successor lawyer will ensure client confidentiality.
- Designation of successor lawyer will prevent malpractice if lawyer is temporarily disabled.
- Successor lawyer may take on variety of other tasks agreed upon in advance with affected lawyer.
- Successor lawyer designated in advance will be someone affected lawyer knows and trusts.
 - The most effective successor lawyer will be one who practices in the same fields or specializes as the affected lawyer.
 - A suitable candidate may be someone with whom the affected lawyer co-counseled or to whom affected lawyer has referred matters.

VI. HOW TO DESIGNATE A SUCCESSOR LAWYER

- Have a written agreement between affected lawyer and successor lawyer to:
 - Memorialize arrangement
 - Designate duties and responsibilities of successor lawyer
- At a minimum, agreement should authorize and direct successor lawyer to:
 - Promptly inventory and promptly review client files (within 24-48 hours after death or disability)
 - Determine those matters that need immediate protective action
- Other key provisions in the written agreement:
 - Appointment of the successor lawyer with the legal authorization to undertake and accomplish all the actions contemplated by the agreement. The appointment will become effective only upon the affected lawyer's death or disability. (approval is not required by Supreme Court of Ohio rules)
 - The steps necessary for the successor lawyer to be notified by the affected lawyer's family or personal representative in the event of the affected lawyer's death or disability
 - A provision concerning confidentiality to authorize the successor lawyer to review and inventory client files; inclusion of a confidentiality provision furthers support the implied disclosure authorized by Ohio Rules of Professional Conduct, Rule 1.6(a)
 - Authority to carry out immediate protective action on behalf of clients including communicating with courts and opposing counsel
 - Authority to notify clients of the death or disability of the affected lawyer (a draft letter can be prepared in advance for the successor lawyer to utilize for this purpose)
 - Authority for the successor lawyer to access and serve as a signatory on the law practice's operating account and IOLTA during disability or in the event of death
 - Authority to assume possession of client files for the purposes of inventorying and reviewing the files

- Any compensation that will be paid or costs reimbursed to the successor lawyer by the affected lawyer's estate or practice
- Indemnification of the successor lawyer by the practice or the estate
- Termination of the agreement
- Other provisions in the written agreement may include:
 - Winding down the business affairs of the law practice, including paying business expenses, collecting outstanding fees, terminating malpractice insurance, and purchasing a tail policy
 - Informing the Office of Disciplinary Counsel or local bar association where the affected lawyer's closed files and or original documents will be stored and the name, address, and phone number of a person able to retrieve the files

VII CLIENT NOTIFICATION

Client Notification of the Succession Plan

- At the outset of any client representation, the affected lawyer should notify clients that the lawyer has arranged for a successor lawyer to transition the practice in the event of death or disability.
 - The affected lawyer should indicate in the initial fee or retainer agreement that a successor lawyer has been designated who will undertake immediate protective action until new counsel is retained by the client.
- Immediate protective action undertaken by the successor lawyer should be explained to the client so the client is aware of what type of action may be taken on his or her behalf.
- The affected lawyer should obtain the advance written consent from each client to the limited representation by the successor.

Client Notification Upon Implementation of the Plan

- Upon completing a review and inventory of the affected lawyer's closed and active client files, the successor lawyer should promptly contact each active client of the affected lawyer to notify him or her of the incapacity of the lawyer.
- The written notification to clients from the successor lawyer should contain at a minimum:

- The status of the active client matter and any pending deadlines or time limitations;
- An accounting of any funds or property held in trust;
- The status of any outstanding fees owed by the client;
- A request for specific instructions from the client as to the disposition of the file. Ohio Rules of Professional Conduct, Rule 1.15(d)
 - The options should include:
 - directing that the file be sent to a new lawyer
 - advising the client how to retrieve the file
 - asking the successor lawyer for assistance in obtaining new counsel
- While conducting the inventory of client files and reviewing the law firm calendar, the successor lawyer may encounter situations where immediate protective action should take precedence over notifying the client of their lawyer's death and requesting the client's directions about file retrieval or transfer.

For example: A motion hearing scheduled 24 hours after death of the affected lawyer would necessitate the successor lawyer preparing for and attending the hearing before any formal notification is initiated.

VIII. POTENTIAL CONFLICTS OF INTEREST

- The written agreement between affected lawyer and successor lawyer should delineate whether the successor lawyer will be representing:
 - The interests of the affected lawyer
 - Some or all of the clients
 - Neither affected lawyer or client(s)
- The possibility of a conflict of interest exists depending upon how the "client" is identified in the written agreement with the affected lawyer.
 - If the successor lawyer is designated in the written agreement as representing the affected lawyer, the successor lawyer may not inform a client about potential legal malpractice or ethical violations discovered during the representation, without the affected lawyer's prior and informed written consent. Ohio Rules of Professional Conduct, Rule 1.6.

- On the other hand, if the lawyer is permitted to represent the affected lawyer's clients, he or she may have an ethical obligation to inform a client of errors or omissions discovered during the inventorying of the file. See *"Handling an Attorney's Death, Disability or Disappearance,"* Shaw, Betty M., *Minnesota Lawyer* (October 8, 2001).
- Because the successor lawyer will have access to confidential client information during the file inventory process, the written agreement should direct the successor lawyer to check for conflicts of interest before beginning the file inventory.
 - Conflicts of interest can be checked by comparing a list of the affected lawyer's clients with those of the successor lawyer.
 - If the successor lawyer determines that a conflict of interest exists, another lawyer, named by the affected lawyer in advance, should review the file.
 - Additionally, the designated successor lawyer and affected lawyer should periodically review their respective active client matters to determine obvious conflicts that would require the designation of another lawyer to review certain client files.

Solicitation of Affected Lawyer's Clients

- If permitted by the written agreement, representation of the affected lawyer's clients should commence only after the former client has approached the successor lawyer about representation.
- A successor lawyer should not actively or formally solicit the former clients of the affected lawyer. Prof.Cond.R. 7.3.
 - However, the successor lawyer is free to respond to inquiries from clients regarding representation, absent any conflicts.

IX. ACCESS TO IOLTA AND OPERATING ACCOUNTS OF AFFECTED LAWYER

- Advanced planning can avoid issues that may arise concerning the successor lawyer's need to access the trust accounts.

- Ohio does not provide a procedure by court rule for successor lawyers to petition the Supreme Court or other court for an order transferring a deceased lawyer's IOLTA to another lawyer for disbursement and account closing purposes.
 - Neither the Board of Professional Conduct, Office of Disciplinary Counsel, nor certified grievance committees are authorized to issue any correspondence requesting that a successor lawyer be given access to an IOLTA and operating accounts.
 - Ethics authorities in some jurisdictions recommend having a second signatory on the IOLTA in the event of disability or death. However, the potential for client financial harm increases if multiple signatories are present on an IOLTA and consequently this method is not recommended.
- The affected lawyer should contact his or her bank in advance to determine what documentation it will accept for transfer of the IOLTA and operating account to the successor lawyer.
- Methods of documentation that may be acceptable for transfer of accounts include:
 - a durable power of attorney
 - a copy of the written agreement between the affected lawyer and the successor lawyer
 - a probate court order
 - pre-signed designation forms provided by the bank.
- Pursuant to the written agreement, the successor lawyer should make every reasonable effort to attempt to identify clients who have funds in the trust account and contact those clients to return any funds to which they are entitled.
- If funds remain in the IOLTA after distribution or a client cannot be located, the successor lawyer is required to transfer the remaining funds to the Ohio Department of Commerce, Division of Unclaimed Funds. Ohio Revised Code 169.01(B)(1), 169.03(A)(1) and Ohio Board of Professional Conduct Opinion 2008-3.

X. CONCLUSION

By following the path charted in the *Ohio Ethics Guide: Succession Planning*, members of the Ohio bar can appoint a successor lawyer to provide for the orderly disposition of their clients' matters and files. Further, designating the successor lawyer can provide peace of mind for the affected lawyer as well as office staff, professional colleagues, friends and family.

Lawyers in every type of practice, at any stage of their careers are urged to make it a priority to take the time to activate a succession plan. If you have any questions or need additional information, you may contact :

Your CLE Presenter:

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Ohio Board of Professional Conduct



OHIO ETHICS GUIDE SUCCESSION PLANNING

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Succession Planning

The premature closing of a law office can result from the **unexpected disability, death, disappearance, or discipline of a lawyer**. The failure to plan adequately for the unexpected can result in harm to clients and in confusion and hardship for the lawyer's family, staff and professional colleagues. Developing a succession plan in advance ensures the orderly transfer of a client's affairs and file to a new lawyer, as well as the return of moneys held in trust, and satisfies the lawyer's ethical obligation to provide competent and diligent representation.

This ethics guide is a preventative tool to assist the Ohio bar in developing a succession plan.

The guide charts a path for a lawyer to facilitate the transition of open client matters to new lawyers or a successor lawyer appointed in advance by the affected lawyer. This guide addresses many common issues and offers measures that may be taken in advance of death or disability, but does not address every conceivable consequence of an untimely death/disability of a lawyer. Specific questions not addressed by this ethics guide may be posed to the legal staff of the Board of Professional Conduct.

This ethics guide does not address the issues inherent in the sale of a law practice that occurs before or after the death or disability of a lawyer.

Terminology

Terms used in this ethics guide include:

Affected Lawyer → A lawyer whose death, temporary or permanent disability, disappearance, or discipline will trigger the need for the services of a successor lawyer. These events are collectively referred to in the ethics guide as "death or disability."

Successor Lawyer → A lawyer chosen in advance by the affected lawyer to transition his or her practice after death or disbarment or manage the practice during disability or disappearance.

Immediate Protective Action → A form of limited scope representation undertaken by the successor lawyer to safeguard the interests of the affected lawyer's clients. Tasks may include obtaining extensions of time from opposing counsel, filing of motions for continuances with courts and administrative agencies, and filing notices, motions, and pleadings on behalf of the affected lawyer's clients with their prior consent.

Am I Required to Develop a Succession Plan?

The Ohio Rules of Professional Conduct do not specifically mandate that a lawyer create a succession plan. However, several rules, when read in conjunction with their related comments, strongly suggest that a succession plan is necessary to protect clients from the adverse consequences arising from the lawyer's death or disability. A succession plan safeguards the client's legal interests, protects and accounts for client funds and property held in trust, and maintains the confidentiality of information related to the representation.

A succession plan can be viewed as a continuation of a lawyer's duty of competent and diligent representation. Prof. Cond. R. 1.1 and 1.3. In fact, Comment [5] to Prof. Cond. R. 1.3 addresses the steps a lawyer should undertake to prevent the neglect of client matters.

The comment provides that the duty of diligence may require that the lawyer prepare a succession plan that designates another competent lawyer to:

- Review client files;
- Notify each client of the lawyer's death or disability;
- Determine whether there is a need for immediate protective action.

Although representation normally will terminate when the lawyer is no longer able to adequately represent the client, the lawyer's fiduciary obligations of loyalty and confidentiality continue beyond the termination of the agency relationship. ABA Formal Op. 92-469.

What Are the Core Elements of a Succession Plan?

Every solo or small firm practitioner should prepare a written succession plan for the practice that includes detailed instructions to members of the lawyer's immediate family, a designated successor lawyer, the lawyer's nominated executor or personal representative, and key office staff.

The following are the recommended core elements of a comprehensive plan:

- A written agreement with the designated successor lawyer. *See page 4.*
- Information regarding the status of open client matters, including the location and status of client files (both closed and opened);
- A copy of the practice's client file retention plan;
- Details concerning IOLTA and operating accounts and client ledgers;
- The location of log-in and password information for office computers, mobile devices, voicemail, cloud storage, billing systems, calendaring system, email (including server addresses and passwords), online banking, and other websites upon which the law office relies;
- The location of accounts payable and receivable information and billing/collection practices;
- Contact information for office personnel and key vendors;
- Detailed information (leases, insurance, taxes, sale of building) needed to physically close and wind up a law practice, if applicable;
- An office procedures manual. *See page 7.*

A review and discussion about the succession plan and its contents should be undertaken at least once a year with those persons responsible for implementing and carrying out the succession plan.

Corporate Entity Considerations

If the affected lawyer is the sole member of a LLC or LPA, the LLC or LPA must pre-authorize someone other than the sole member to act on behalf of the entity and carry out the succession plan in the event of the member's death or disability. The corporate entity must have the appropriate resolution in place that states when and how the successor lawyer may act on behalf of the entity, after the death or disability of the affected lawyer.

Why Designate a Successor Lawyer?

The succession plan should include the designation of a competent and diligent lawyer as the successor lawyer. Some malpractice insurance carriers may require the designation of a successor lawyer. A successor lawyer typically is granted authority by the affected lawyer to inventory the affected lawyer's files and make determinations as to which client matters need immediate protective action. In addition, the successor lawyer is typically responsible for notifying the affected lawyer's clients and the of the death or disability affected lawyer. See ABA Adv. Op. 92-369.

If a successor lawyer was not designated in advance, any willing and able lawyer may be approached by the affected lawyer's family, the local bar association, Disciplinary Counsel, or law office staff to fulfill the role. Gov.Bar R. V, Sec. 26.

The designation of a successor lawyer will ensure client confidentiality and prevent malpractice if a lawyer is temporarily disabled. In addition to the inventorying and transferring of client files, the successor lawyer may take on a variety of other tasks agreed upon in advance with the affected lawyer.

In addition to being someone the affected lawyer knows and trusts, the most effective successor lawyer will be one who practices in the same fields or specialties as the affected lawyer. A suitable candidate may be someone with whom the affected lawyer has co-counseled or to whom the affected lawyer has referred matters.

How Do I Designate a Successor Lawyer?

A written agreement between the affected lawyer and the successor lawyer is essential to memorialize the arrangement and designate the duties and responsibilities of the successor lawyer. At a minimum the agreement should authorize and direct the successor lawyer to promptly inventory and promptly review the client files (within 24-48 hours after death or disability) and determine those matters that need immediate protective action. Other key provisions in the written agreement include:

- Appointment of the successor lawyer with the legal authorization to undertake and accomplish all the actions contemplated by the agreement. The appointment will become effective only upon the affected lawyer's death or disability. (approval is not required by Supreme Court of Ohio rules);
- The steps necessary for the successor lawyer to be notified by the affected lawyer's family or personal representative in the event of the affected lawyer's death or disability;

- A provision concerning confidentiality to authorize the successor lawyer to review and inventory client files; inclusion of a confidentiality provision furthers support the implied disclosure authorized by Prof.Cond.R. 1.6(a);
- Authority to carry out immediate protective action on behalf of clients including communicating with courts and opposing counsel;
- Authority to notify clients of the death or disability of the affected lawyer (a draft letter can be prepared in advance for the successor lawyer to utilize for this purpose);
- Authority for the successor lawyer to access and serve as a signatory on the law practice's operating account and IOLTA during disability or in the event of death;
- Authority to assume possession of client files for the purposes of inventorying and reviewing the files;
- Any compensation that will be paid or costs reimbursed to the successor lawyer by the affected lawyer's estate or practice;
- Indemnification of the successor lawyer by the practice or the estate;
- Termination of the agreement.

Other provisions in the written agreement may include:

- Winding down the business affairs of the law practice, including paying business expenses, collecting outstanding fees, terminating malpractice insurance, and purchasing a tail policy;
- Informing the Office of Disciplinary Counsel or local bar association where the affected lawyer's closed files and original documents will be stored and the name, address, and phone number of a person able to retrieve the files.

How Are Clients Notified?

Client Notification of the Succession Plan

At the outset of any client representation, the affected lawyer should notify clients that the lawyer has arranged for a successor lawyer to transition the practice in the event of death or disability. The affected lawyer should indicate in the initial fee or retainer agreement that a successor lawyer has been designated who will undertake immediate protective action until new counsel is retained by the client. Immediate protective action undertaken by the successor lawyer should be explained to the client so the client is aware of what type of action may be taken on his or her behalf. The affected lawyer should obtain the advance written consent from each client to the limited representation by the successor.

Notification Upon Implementation of the Plan

Upon completing a review and inventory of the affected lawyer's closed and active client files, the successor lawyer should promptly contact each active client of the affected lawyer to notify him or her of the incapacity of the lawyer. The written notification to clients from the successor lawyer should contain at a minimum:

- The status of the active client matter and any pending deadlines or time limitations;
- An accounting of any funds or property held in trust;

- The status of any outstanding fees owed by the client;
- A request for specific instructions from the client as to the disposition of the file. Prof.Cond.R. 1.15(d). The options should include ❶ directing that the file be sent to a new lawyer, ❷ advising the client how to retrieve the file, or ❸ asking the successor lawyer for assistance in obtaining new counsel.

While conducting the inventory of client files and reviewing the law firm calendar, the successor lawyer may encounter situations where immediate protective action should take precedence over notifying the client of their lawyer's death and requesting the client's directions about file retrieval or transfer.

For example: A motion hearing scheduled 24 hours after death of the affected lawyer would necessitate the successor lawyer preparing for and attending the hearing before any formal notification is initiated.

What About Potential Conflicts?

The written agreement with a successor lawyer should delineate whether the successor lawyer will be representing ❶ the interests of the affected lawyer, or ❷ represent some or all of the clients, or ❸ neither.

The possibility of a conflict of interest exists depending upon how the "client" is identified in the written agreement with the affected lawyer. If the successor lawyer is designated in the written agreement as representing the affected lawyer, the successor lawyer may not inform a client about potential legal malpractice or ethical violations discovered during the representation, without the affected lawyer's prior and informed written consent. Prof.Cond.R. 1.6. On the other hand, if

the lawyer is permitted to represent the affected lawyer's clients, he or she may have an ethical obligation to inform a client of errors or omissions discovered during the inventorying of the file. See "*Handling an Attorney's Death, Disability or Disappearance*," Shaw, Betty M., *Minnesota Lawyer* (October 8, 2001).

Because the successor lawyer will have access to confidential client information during the file inventory process, the written agreement should direct the successor lawyer to check for conflicts of interest before beginning the file inventory. This can be accomplished by comparing a list of the affected lawyer's clients with those of the successor lawyer.

If the successor lawyer determines that a conflict of interest exists, another lawyer, named by the affected lawyer in advance, should review the file.

In addition, the designated successor lawyer and affected lawyer should periodically review their respective active client matters to determine obvious conflicts that would require the designation of another lawyer to review certain client files.

Solicitation of Affected Lawyer's Clients

If permitted by the written agreement, representation of the affected lawyer's clients should commence only after the former client has approached the successor lawyer about representation. A successor lawyer should not actively or formally solicit the former clients of the affected lawyer. Prof.Cond.R. 7.3. However, the successor lawyer is free to respond to inquiries from clients regarding representation, absent any conflicts.

Keys to Succession Planning: Good Law Office Management Practices

Several law office management best practices will assist the successor lawyer, former office staff, and the affected lawyer's family in transitioning clients to new lawyers and closing the office. Lawyers are encouraged to follow these best practices in the event of death, disability or other events that temporarily may interrupt a law practice:

- Creating and maintaining an office procedures manual used by legal and administrative staff (see below);
- Maintaining a calendaring system with all court and filing deadlines and follow-up dates;
- Thoroughly documenting client files;
- Maintaining current time and billing records;
- Routinely backing up all digital records of the practice;
- Properly maintaining IOLTA records and ledgers;
- Following the firm's client file retention and destruction policy. [Client File Retention Guide](#).

Ohio lawyers can participate in succession planning programs currently offered by the Columbus Bar Association or the Cleveland Metropolitan Bar Association, even if they are not association members. Both bar associations allow lawyers to designate a successor lawyer either electronically or in writing. The services are without charge and assist clients or other lawyers in ascertaining the existence and identify of a successor lawyer.

Should I Prepare an Office Procedures Manual?

As part of the preparation for the implementation of a succession plan, every lawyer should create and regularly maintain an office procedure manual. The manual will serve as a guide for a successor lawyer to run a practice temporarily, or to assist in its eventual closure. An office procedure manual should include documentation concerning:

- Determination of conflicts of interest;
- The use of the office calendaring system;
- How to generate a list of active client files, including client names, addresses, and phone numbers;
- Where and how client ledgers are maintained;
- How the open/active files are organized and where closed files, if any, are stored;
- The firm's client file retention and destruction policy;
- Log-in and password information for office computers, mobile devices, voicemail, cloud storage, billing systems, calendaring system, email (including server addresses and passwords), online banking, and other websites the law office relies upon on a daily basis;
- Time and billing procedures and software;
- The names and contact information for office personnel, financial institutions, accountants, landlords, vendors, and insurance agents/brokers.

How Will the Successor Lawyer Access My IOLTA and Operating Accounts?

Advanced planning can avoid issues that may arise concerning the successor lawyer's need to access the trust accounts. Ohio does not provide a procedure by court rule for successor lawyers to petition the Supreme Court or other court for an order transferring a deceased lawyer's IOLTA to another lawyer for disbursement and account closing purposes. Likewise, neither the Board of Professional Conduct, Office of Disciplinary Counsel, nor certified grievance committees are authorized to issue any correspondence requesting that a successor lawyer be given access to an IOLTA and operating accounts.

Ethics authorities in some jurisdictions recommend having a second signatory on the IOLTA in the event of disability or death. However, the potential for client financial harm increases if multiple signatories are present on an IOLTA and consequently this method is not recommended.

The affected lawyer should contact his or her bank in advance to determine what documentation it will accept for transfer of the IOLTA and operating account to the successor lawyer. Methods of documentation that may be acceptable for transfer of accounts include ❶ a durable power of attorney, ❷ a copy of the written agreement between the affected lawyer and the successor lawyer, ❸ a probate court order, or ❹ pre-signed designation forms provided by the bank.

Pursuant to the written agreement, the successor lawyer should make every reasonable effort to attempt to identify clients who have funds in the trust account and contact those clients to return any funds to which they are entitled.

If funds remain in the IOLTA after distribution or a client cannot be located, the successor lawyer is required to transfer the remaining funds to the Ohio Department of Commerce, Division of Unclaimed Funds. R.C. 169.01(B)(1), 169.03(A)(1) and Adv. Op. 2008-3.

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Patti S. Spencer, *Estate Planning for Lawyers*, ABA GPSolo Magazine, Jan-Feb. 2011.

The Basic Steps to Ethically Closing a Law Practice, Illinois Attorney Registration & Disciplinary Commission