Creating a Formal Succession Plan

BY JONATHAN "JON" WHITE AND DAVID SESERMAN

This is the second article in our succession planning series. The first article explained why succession planning is important to your well-being and offered a few basic steps to get started.[1] This article discusses the matter more in-depth, beginning with who might wind down your practice in the event of your death or disability. For additional assistance, ask your professional liability insurer for resources or check out the Office of Attorney Regulation Counsel's guide to succession planning.[2]

Successor Counsel versus Inventory Counsel

There are two categories of lawyers who can wind down the law practice of an attorney who unexpectedly dies, ends up on disability inactive status, or is otherwise unable to practice law: successor counsel and inventory counsel. Successor counsel is an assisting attorney who agrees in advance to take over for the attorney should the unexpected happen, while inventory counsel is appointed by the court after the disabling or disqualifying event through a procedure established in CRCP 251.32(h). A critical distinction between successor counsel and inventory counsel is that a contract defines a successor counsel's scope of work, whereas Rule 251.32(h) defines inventory counsel's scope of work, and the court supervises that work. Accordingly, the primary benefit of entering into a successor counsel agreement is that you can define the scope of successor counsel's duties to include, for example, dissolving the firm.

The Limited Role of Inventory Counsel

Under Rule 251.32(h), when there is no successor counsel plan in place, Attorney Regulation Counsel can petition the chief judge of the judicial district where the deceased or disabled lawyer had his or her registered address to appoint inventory counsel. This appointment creates a civil district court case, allowing the court to enter orders to facilitate inventory counsel's work. This might involve, for example, entering an order authorizing destruction of unclaimed client files. Inventory counsel's appointment is for limited purposes, such as inventorying client files, returning them to clients, and disbursing funds in the lawyer's COLTAF account. Rule 251.32(h) does not contemplate inventory counsel assuming client representation, nor does inventory counsel typically handle the business aspects of law firm dissolution.

The minimum step you can take toward having a succession plan is to identify another lawyer to be your appointed inventory counsel should you be unable to practice law. That lawyer could then be nominated in a petition by Attorney Regulation Counsel to be your court-appointed inventory counsel. However, due to the limited role of inventory counsel, attorneys should consider creating a formal successor counsel agreement with another attorney as part of their succession plan.

Successor Counsel Agreements

Successor counsel agreements can range from simple to complex. At a minimum, successor counsel can carry out the same limited functions as a Rule 251.32(h) inventory counsel. However, if something unexpected happens to you, there will be additional matters for your loved ones, employees, and clients to attend to. Accordingly, an effective successor counsel agreement might address the following:

- undertaking representation of the deceased or disabled lawyer's clients with the clients' consent;
- concluding business aspects of the law firm;
- disposing of or distributing tangible property associated with the practice; and
- being an authorized signer on trust and operating accounts.

On the last point, having signature authority in place before it is needed to dissolve a firm can greatly assist successor counsel's work. If full signature authority is not viable, consider a limited power of attorney allowing successor counsel signature authority and access to trust and operating accounts only after the occurrence of some contingency.

When devising a successor counsel agreement, it's important to keep the Colorado Rules of Professional Conduct in mind. Especially important are lawyers' duties of confidentiality and avoiding conflicts of interest with current and former clients. Before entering into an agreement, both parties should evaluate whether successor counsel might have conflicts of interest due to representation of opposing parties in related litigation or transactions.

Lastly, serving as successor counsel can be time-consuming. An agreement can, and should, address compensation for successor counsel's time and expenses. It may be mutually beneficial to ask a colleague to take on this responsibility and offer to be a successor counsel designee for that lawyer.

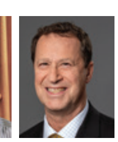
Considerations for the Digital Era

The electronic devices and software that enable our practices to be efficient and nimble can present numerous challenges to successor or inventory counsel. The assisting attorney will need to identify all the devices and accounts where client files and bookkeeping records are stored electronically, and then access the information stored on those devices and in those accounts. Thus, a succession plan should (1) specify all the electronic devices and cloud storage accounts that contain firm and client data, (2) identify the custodians of firm and client electronic files, and (3) establish a method for obtaining device and account passwords.

To avoid problems down the line, it's advisable to keep law firm client and business data separate from personal data. One risk of not doing so is that well-intentioned family members may try to retrieve personal data off electronic devices, leading to inadvertent disclosure of confidential client information, a data breach, or the compromise of electronic data integrity. Further, at the end of their engagement, inventory or successor counsel, as part of their obligation to protect the confidentiality of client files, will consider how to erase the information footprint created by electronically stored information. This may mean wiping data from all electronic devices where client files were stored, including phones and tablets. If personal data is commingled with client and firm data, personal data may be lost in the process.

Final Thoughts

While certain states require lawyers to have some type of succession plan, Colorado does not. Comment 5 to Colo. RPC 1.3 states that the duty of diligence "may" require a lawyer who is a solo practitioner to create a plan, but there is no mandate. In the absence of a mandate, recognize that your actions will help your family members, your clients, and your personal representative in a difficult moment. It may also take one thing off your worry list, which alone is a good reason to consider creating a succession plan. Finally, if you are struggling with complex emotions and/or stressors that may arise, contact COLAP at info@coloradolap.org or (303) 986-3345 for a free and confidential well-being consultation. CL

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NOTES

1. White, "Succession Planning: Turning Angst into Action" 49 *Colo. Law.* 25 (Oct. 2020), https://cl.cobar.org/departments/succession-planning.
2. http://www.coloradosupremecourt.com/Current%20Lawyers/SuccessionPlanning.asp.