

Gone Solo: Protecting Your Practice (& Clients) in Case of Your Death

No one likes to think about their own death. As solo practicing attorneys, it is our obligation to protect our clients, and that includes what will happen to our practice and clients' cases in the unlikely event of our unexpected demise.

I recall someone talking about an attorney who had just passed away, and how they were trying to figure out how to locate the attorney's client files and other business documents. My thoughts immediately envisioned a scenario where some stranger was coming into my home office to get client files, and my grieving teenage son was having to navigate that, all because I chose to have my office in our home. I really did not want that to be a scenario that my son (or any family member or friend) ever had to deal with.

As of 2018, 30% of attorneys in California who were in private practice were sole practitioners.¹ Typically, these attorneys do not work closely with anyone else, don't share office space, and sometimes do not even have any support staff.

Each of these solo practicing attorneys needs to know how to protect their practice and their clients in the event of their death.

An Estate Plan for Your Practice

Just as you should have a will or trust for your personal estate, the best practice for your law firm is to have an estate plan specifically for your practice. It is imperative that you tell someone about this plan.

One of the goals in preparing your plan is to protect your estate from being sued for malpractice after your death. The first inquiry should be to your malpractice insurance provider. Does your malpractice insurance include "tail" coverage? Tail insurance extends your malpractice coverage after your policy's end date, and it is offered by many companies.

As a solo practicing attorney, you need to take the time to make an estate plan to ensure that your clients are protected. Further, your planning will spare your loved ones the stress of having to deal with your business/practice when they are grieving their loss of you. It is a loving gift for your family and friends.

Procedures Manual

Part of the plan should be to create and keep an office procedures manual. This manual should include all the information that would be needed by someone else who must step in to help during any unplanned, even if only temporary, absence from your practice.² Taking the time to create an office procedures manual while you are healthy will prove invaluable if the worst-case scenario happens.

An office procedures manual can be kept in any format that is easy for you (printed out in a binder, or stored electronically), but it must be something that can easily be accessed in case of an emergency. Make sure to tell someone where it is and keep the information updated regularly. I've chosen to keep mine electronically, and print out a copy if any changes are made.

Important information to keep in your manual:

- List of all companies you do business with (insurance, banking, case management software, CPA, etc.)
- Passwords
- Account numbers
- Location of client files (both open cases and closed files)
- Personal emergency contacts
- Name and contact information of designated attorney to handle your practice in case of incapacity or death

Office Organization

It is always a good idea to keep your office organized. If you suddenly pass away, you would not want either your non-lawyer family member or friend to have to go through and try to make sense of a disorganized office. These are some steps you can take to ensure that your office is organized:

- Keep an updated office procedures manual, in an easy-to-find location
- Ensure that keys to your office and filing cabinets are easy to locate—include in your office procedures manual the name of each individual who has a copy of each key, and their contact information
- Make sure your calendar is up to date
- Keep an up-to-date client list (including case numbers)
- When you close a case, promptly move it to your closed case file storage
- Keep your client billing up to date
- Keep your accounting/bookkeeping records up to date
- Reconcile your bank account(s)
- Keep your IOLTA account balanced and reconciled (if you have one)

Designate an Attorney or Practice Administrator

When an attorney becomes incapacitated in some way, or dies, then someone else has to step in. If the attorney has not designated an attorney to step in, and no attorney volunteers, then the court will have to step in and appoint someone.

The ABA Model Rules address the requirement of planning for your own unexpected demise as a requirement of diligence. Comment 5 to Rule 1.3 states, “To prevent neglect of client matters in the event of a sole practitioner’s death... 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... and determine whether there is a need for immediate protective action...”³

Although California has not adopted this rule, it is logical to look at the California Rules of Professional Conduct Rule 1.3, which also discusses the diligence requirement.

“A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client.”⁴

As a solo practicing attorney who is beginning to do your estate planning for your practice, you will need to designate an attorney who will step in upon your death and close your practice.

This task can seem as daunting as thinking about your own death. You need to find an attorney you trust, and one that practices the same area of law as you do. You need to find an attorney who will agree to be your designated attorney.

However, when thinking about reducing the probability of conflict of interests for your clients, it is best to choose an attorney that does not practice in the same county where you primarily practice. Why? Because the chances for conflict of interest are increased when selecting an attorney in your close legal circle.

You can assign certain tasks to a non-lawyer family member or friend, but any tasks relating to your actual legal services must be carried out by a licensed attorney.

Once you have found an attorney that agrees to be designated to step in, you will need to clearly define the details about when that attorney should step in. Only upon your death? Should they step in if you are incapacitated? What if you are only temporarily incapacitated? You and your designated attorney would be best served in drafting an agreement to close your practice, which will define and clarify all these details. You can find an Agreement to Close Practice on the State Bar website.⁵

What Happens if You Do Not Designate an Attorney to Step In?

Generally, when an attorney dies and does not designate a lawyer to be responsible for closing down their practice, the State Bar or local county bar association may provide assistance in closing down the law practice after obtaining authorization from the superior court. The court may appoint a practice administrator to handle these duties. When the court appoints an attorney to perform these tasks, they are generally not compensated for their time, unless that attorney has devoted “extraordinary time” to winding up the practice.⁶

Ethical Considerations

You have a duty to your clients, and that continues even upon your death or incapacity. This duty must remain your top priority, and as such, it is imperative that you get a plan in place that will look after your clients if the worst-case scenario happens.

The California Rules of Professional Conduct, Rule 1.1 states that you must always be competent in performance of your legal services.⁷

California Rules of Professional Conduct, Rule 1.4 requires that you shall “keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.”⁸ This requirement of communication with your client is also found in Business and Professions Code section 6068(m).

The court has held that “by failing to communicate to her clients, petitioner breached her professional responsibility.”⁹ And have further stated, “[f]ailure to communicate with, and inattention to the needs of, a client may, standing alone, constitute grounds for discipline.”¹⁰

This requirement of communication with your client is also found in Business and Professions Code section 6068(m), which provides: “it is the duty of an attorney... [t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.”

It is imperative that you have some sort of estate plan in place, including a designated attorney, to ensure that if you are incapacitated or have passed away, your clients and loved ones will not be left in the dark, and wondering what to do.

Helpful Resources

When you begin to think about your estate plan for your law practice, you should review the California State Bar website.¹¹ This link provides a document that includes a thorough checklist of 56 items that are required to close a law practice. You can use this checklist to draft your office procedures manual, and to ensure that you’ve thought about or have planned for some or all of the items on that checklist. On this page, you will also find some sample agreements to draft between yourself and your designated attorney.

If you would like to learn more about this topic, there is a self-paced MCLE on the Sonoma County Bar Association website titled, “Planning for the Inevitable: Ethical Obligations and Best Practices in the Planning and Execution of Closing a Law Practice.” This MCLE is presented by Robin Estes.

Notes:

1. 2018 Solo & Small Firm Tech Report, January 2019
https://www.americanbar.org/groups/law_practice/publications/techreport/abatechreport2018/solosmallfirm/
2. Winding Up Your Practice: From Temporary Vacations to More Permanent Leaves of Absence
https://capcentral.org/procedures/case_manag/docs/winding_up_your_practice.pdf
3. ABA Model Rules 1.3, comment 5:
https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence/
4. California Rules of Professional Conduct, Rule 1.3(a).
5. Closing a Law Practice:
<https://www.calbar.ca.gov/Portals/0/documents/ethics/Publications/guidelines-for-closing-or-selling-a-law-practicev.1.pdf>
6. Planning for the Inevitable (handouts from the SCBA MCLE presented by Robin Estes)
7. California Rules of Professional Conduct, Rule 1.1(b)
8. California Rules of Professional Conduct, Rule 1.4(a)(3)
9. *Martin v. State Bar* (1978) 20 Cal.3d 717, 722
10. *Layton v. State Bar* (1990) 50 Cal.3d 889, 903-904
11. Closing a Law Practice, supra.

By Beki Berrey

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HOW TO RECEIVE ONE HOUR OF SELF-STUDY MCLE CREDIT in Legal Ethics

Below is a true/false quiz. Submit your answers to questions 1-20, indicating the correct letter (T or F) next to each question, along with a \$25 payment to the Sonoma County Bar Association at the address below. Please include your full name, State Bar ID number, and email or mailing address with your request for credit. Reception@ SonomaCountyBar.org • Sonoma County Bar Association, 3035 Cleveland Ave., Ste. 205, Santa Rosa, CA 95403.

1. 30% of California attorneys in private practice (as of 2018) were sole practitioners. (T)
2. Your estate cannot be sued for malpractice after your death. (F)
3. "Tail" insurance extending malpractice coverage beyond the end date of the policy is offered by many insurance companies. (T)
4. The ABA Model Rules are silent on whether a sole practitioner should prepare a plan in the case of their unexpected death. (F)
5. Any estate plan for your law practice should address what will happen in the event of either death or incapacitation. (T)
6. Your office procedures manual must be kept in paper copy only. (F)
7. Keeping your business finances up to date is an important part of your office organization. (T)
8. You can designate a non-lawyer family member to wind up all aspects of your law practice. (F)
9. A non-lawyer family member is permitted to complete tasks related to the winding up of your law firm so long as those tasks do not relate to actual legal services. (T)
10. You should designate an attorney from a different county and the same area of law to wind up your practice in the event of your death or incapacity. (T)
11. You should try to designate an attorney where there is a reduced chance of conflicts of interest. (T)
12. You do not need to tell anyone who you decide to make your designated attorney. (F)
13. If you do not designate an attorney to close your practice in the event of your death or incapacity, the court will appoint an attorney. (T)
14. An attorney appointed by the court to close your practice will be reimbursed for their services in all cases. (F)

15. An attorney appointed by the court to close your practice will only be reimbursed for their services if the matter requires the devotion of “extraordinary time” in winding up a law practice. (T)

16. It is part of your ethical obligation to your clients to ensure that you are competent in the performance of your legal services. (T)

17. The California Rules of Professional Conduct set forth specific requirements that a solo practitioner must satisfy with regard to an estate plan for a legal practice. (F)

18. Failure to communicate with your clients may be grounds for disciplinary action. (T)

19. Each law practice must draft their own written agreement with the attorney they designate to wind up their practice; templates used for this purpose are *per se* invalid. (F)

20. An attorney’s duties to their clients are terminated by the death of the attorney. (F)