



LAWYER TO LAWYER MENTORING PROGRAM

WORKSHEET AA

PLANNING FOR RETIREMENT, DEATH OR DISABILITY

Worksheet AA is intended to facilitate a discussion about the importance of planning ahead for how a lawyer's practice should be handled in the event of the lawyer's retirement, death or disability.

WHAT WENT WELL?

Start by sharing with each other a brief story of something that went well in your practice this week:

Share your reflection by on one of these questions: What caused the good event? What does it mean? How did you contribute? Others? How can you have more such events in the future?

ACTIVITIES FOR TODAY

- Discuss the importance of planning ahead for one's practice if an unexpected absence such as disability or death occurs, including relevant considerations such as a lawyer's duty not to prejudice his or her clients' cases by making sure they have access to their files. See American Bar Association Formal Opinion 92-369, attached.
- If mentoring in-house (particularly in a small firm), discuss what plan is in place for firm lawyers to take over the cases of clients of a firm lawyer who unexpectedly has a long-term illness, dies, or becomes incompetent or otherwise disabled.
- Discuss a lawyer's obligation to colleagues and to the profession to assist with the inventorying of clients' files when an attorney in a solo practice dies or becomes incompetent or otherwise disabled, including relevant ethical considerations such as an inventorying attorney's duty to allow a colleague's clients to choose their own counsel.
- Discuss the importance of planning for disaster, different types of disasters which could realistically affect a practice, and specific ways to plan for disaster. Review and discuss the attached articles. Dan Pinnington, *Would You and Your Practice Survive These Common Disasters?*, LAW PRACTICE TODAY, Oct. 2005; Ellen Freedman, *Protect Your Clients; Yourself: Prepare for Disaster Before it Happens*, LAW PRACTICE TODAY, Oct. 2005; and John D. Kitch, *Preparing for Disability, Disaster, and Death*, GPSOLO (2010).



- Discuss specific ways to plan for death, disability, and retirement, as well as specific steps that should be taken by the lawyer who is inventorying the files of the deceased, disabled or disappeared colleague. Review the attached checklists published by the Washington State Bar Association.

ACTION STEPS

End the session by discussing what action steps you can take to either improve or set yourself up for future success based on today's discussion. Discuss how one or more of your Signature Strengths can help you achieve success in these steps.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 92-369
Disposition of Deceased Sole
Practitioners' Client Files and Property

December 7, 1992

To fulfill the obligation to protect client files and property, a lawyer should prepare a future plan providing for the maintenance and protection of those client interests in the event of the lawyer's death. Such a plan should, at a minimum, include the designation of another lawyer who would have the authority to review client files and make determinations as to which files need immediate attention, and who would notify the clients of their lawyer's death.

A lawyer who assumes responsibility for the client files and property of a deceased lawyer must review the files carefully to determine which need immediate attention. Because the reviewing lawyer does not represent the client, only as much of the file as is needed to identify the client and to make a determination as to which files need immediate attention should be reviewed. Reasonable efforts must be made to contact all clients of the deceased lawyer to notify them of the death and to request instructions in accordance with Rule 1.15.

The committee has been asked to render an opinion based on the following circumstances. A lawyer who has a large solo practice dies. The lawyer had hundreds of client files, some of which concern probate matters, civil litigation and real estate transactions. Most of the files are inactive, but some involve ongoing matters. The lawyer kept the active files at his office; most of the inactive files he removed from the office and kept in storage at his home.

This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility and opinions promulgated in the individual jurisdictions are controlling.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, 541 North Fairbanks Court, 14th Floor, Chicago, Illinois 60611-3314 Telephone (312) 988-5300 – CHAIR: David B. Isbell, Washington, DC □ Daniel Coquillette, Newton, MA □ Ralph G. Elliot, Hartford, CT □ Lawrence J. Fox, Philadelphia, PA □ Margaret C. Love, Washington, DC □ William C. McClearn, Denver, CO □ Richard McFarlain, Tallahassee, FL □ Truman Q. McNulty, Milwaukee, WI □ CENTER FOR PROFESSIONAL RESPONSIBILITY: George A. Kuhlman, Ethics Counsel; Joanne P. Pitulla, Assistant Ethics Counsel

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The questions posed are two:

- 1) What steps should lawyers take to ensure that their clients' matters will not be neglected in the event of their death?
- 2) What obligations do lawyers representing the estates of deceased lawyers, or appointed or otherwise responsible for review of the files of a lawyer who dies intestate, have with regard to the deceased lawyer's client files and property?

I. Sole practitioner's obligations with regard to making plans to ensure that client matters will not be neglected in the event of the sole practitioner's death

The death of a sole practitioner could have serious effects on the sole practitioner's clients. *See Program: Preparing for and Dealing with the Consequences of the Death of a Sole Practitioner*, prepared by the ABA General Practice Section, Sole Practitioners and Small Law Firms Committee, August 7, 1986. Important client matters, such as court dates, statutes of limitations, or document filings, could be neglected until the clients discover that their lawyer has died. As a precaution to safeguard client interests, the sole practitioner should have a plan in place that will ensure insofar as is reasonably practicable that client matters will not be neglected in the event of the sole practitioner's death.

Model Rules of Professional Conduct 1.1 (Competence) and 1.3 (Diligence) are relevant to this issue, and read in pertinent part:

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.

Furthermore, the Comment to Rule 1.3 states in relevant part:

A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety...

According to Rule 1.1, competence includes "preparation necessary for the representation," which when read in conjunction with Rule 1.3 would indicate that a lawyer should diligently prepare for the client's representation. Although representation should terminate when the attorney is no longer able to adequately represent the client,¹ the

¹ See Model Rule of Professional Conduct 1.16 ("...a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of the client if:...2) the lawyer's [2Nov04 Rev 1/99] -2- PROFESSIONAL LIABILITY FUND (ABA FORMAL OPINION 92-369.doc)

lawyer's fiduciary obligations of loyalty and confidentiality continue beyond the termination of the agency relationship.²

Lawyers have a fiduciary duty to inform their clients in the event of their partnership's dissolution.³ A sole practitioner would seem to have a similar duty to ensure that his or her clients are so informed in the event of the sole practitioner's dissolution caused by the sole practitioner's death. Because a deceased lawyer cannot very well inform anyone of his or her death, preparation of a future plan is the reasonable means to preserve these obligations. Thus, the lawyer ought to have a plan in place which would protect the clients' interests in the event of the lawyer's death.⁴

physical or mental condition materially impairs the lawyer's ability to represent the client...")

² See *Murphy v. Riggs*, 213 N.W. 110 (Mich. 1927) (fiduciary obligations of loyalty and confidentiality continue after agency relationship concluded); *Eoff v. Irvine*, 18 S.W. 907 (Mo. 1892) (same).

³ See *Vollgraff v. Block*, 458 N.Y.S. 2d 437 (Sup. Ct. 1982) (breach of fiduciary duty if partnership's clients not advised of dissolution of partnership). A state bar association is considering creating an "archive form" - indicating the location of client files - which lawyers would complete and file with the state bar association in the event they terminate or merge their practice, thus enabling clients to locate their files. See *ABA ETHICSearch*, September 1992 Report. Such a form would be consistent with the duty discussed in *Vollgraff*, as simply informing a client of a firm's dissolution without telling the client where the client's files are located would be tantamount to saying "your files are no longer here."

⁴ The Fla. Bar, Professional Ethics Comm., Op. 81-8(M) (Undated) discussed the obligations of a lawyer who was terminally ill with regard to client files:

After diligent attempt is made to contact all clients whose files he holds, a lawyer anticipating termination of his practice by death should dispose of all files according to his client's instructions. The files of those clients who do not respond should be individually reviewed by the lawyer and destroyed only if no important papers belonging to the clients are in the files. Important documents should be indexed and placed in storage or turned over to any lawyer who assumes control of his active files. In any event, the files may not be automatically destroyed after 90 days.

Some jurisdictions, operating under the Model Code of Professional Responsibility, have found lawyers to have violated DR 6-101(A)(3) when the attorneys have neglected client matters by reason of ill-health, attempted retirement, or personal problems.⁵ The same problems are clearly presented by the attorney's death, thus suggesting that a lawyer who died without a plan for the maintenance of his or her client files would be guilty of neglect. Such a result is also consistent with two of the three justifications for lawyer discipline.⁶ Sanctioning of lawyers who had inadequately prepared to protect their clients in the event of their death would tend to dissuade future acts by other lawyers, and it would help to restore public confidence in the bar.⁷

Although there is no specifically applicable requirement of the rules of ethics, it is fairly to be inferred from the pertinent rules that lawyers should make arrangements for their client files to be maintained in the event of their own death. Such a plan should at a minimum include the designation of another lawyer who would have the authority to look over the sole practitioner's files and make determinations as to which files needed immediate attention, and provide for notification to the sole practitioner's clients of their lawyer's death.⁸

II. Duties of lawyer who assumes responsibility for deceased lawyer's client files

This brings us to the second question, namely the ethical obligations of the lawyer who assumes responsibility for the client files and property of the deceased lawyer. Issues commonly confronting the lawyer in this situation involve the nature of the lawyer's duty to inspect client files, the need to protect client confidences and the length of time the lawyer should keep the client files in the event that the lawyer is unable to locate certain clients of the deceased lawyer.

At the outset, the Committee notes that several states' rules of civil procedure make provision for court appointment of lawyers to take responsibility for a deceased lawyer's

⁵ See *In re Jamieson*, 658 P.2d 1244 (Wash. 1983) (neglect due to ill-health and attempted retirement); *In Re Whitlock*, 441 A.2d 989 (D.C. App. 1982) (neglect due to poor health, marital difficulties and heavy caseload); *Committee on Legal Ethics of West Virginia State Bar v. Smith*, 194 S.E.2d 665 (W. Va. 1973) (neglect due to illness and personal problems).

⁶ See *In Re Moynihan*, 643 P.2d 439 (Wash. 1982) (three objectives of lawyer disciplinary action are to prevent recurrence, to discourage similar conduct on the part of other lawyers, and to restore public confidence in the bar).

⁷ Obviously, sanctions would have no deterrent effect on deceased lawyers.

⁸ Although the designation of another lawyer to assume responsibility for a deceased lawyer's client files would seem to raise issues of client confidentiality, in that a lawyer outside the lawyer-client relationship would have access to confidential client information, it is reasonable to read Rule 1.6 as authorizing such disclosure. Model Rule of Professional Conduct 1.6(a) ("A lawyer shall not reveal information relating to representation of a client...except for disclosures that are impliedly authorized in order to carry out the representation.") Reasonable clients would likely not object to, but rather approve of, efforts to ensure that their interests are safeguarded.

client files and property.⁹ Since the lawyer's duties under these statutes constitute questions of law, the Committee cannot offer guidance as to how to interpret them.¹⁰

A. Duty to inspect files

Many state and local bar associations have explored the issues presented when a lawyer assumes responsibility for a deceased lawyer's client files.¹¹ The ABA Model Rules for Lawyer Disciplinary Enforcement also address some aspects of the question.¹² A lawyer

⁹ See, e.g., Illinois Supreme Court Rule 776, Appointment of Receiver in Certain Cases:

Appointment of Receiver. When it comes to the attention of the circuit court in any judicial circuit from any source that a lawyer in the circuit is unable properly to discharge his responsibilities to his clients due to disability, disappearance or death, and that no partner, associate, executor or other responsible party capable of conducting that lawyer's affairs is known to exist, then, upon such showing of the presiding judge in the judicial circuit in which the lawyer maintained his practice, or the supreme court, may appoint an attorney from the same judicial circuit to perform certain duties hereafter enumerated Duties of Receiver. As expeditiously as possible, the receiver shall take custody of and make an inventory of the lawyer's files, notify the lawyer's clients in all pending cases as to the lawyer's disability, or inability to continue legal representation, and recommend prompt substitution of attorneys, take appropriate steps to sequester client funds of the lawyer, and to take whatever other action is indicated to protect the interests of the attorney, his clients or other affected parties.

¹⁰ Lawyers who act as administrators of estates have fiduciary duties to all those who have an interest in it, such as beneficiaries and creditors. Questions involving the lawyer's fiduciary responsibility to the estate of a deceased lawyer are also questions of law that this Committee cannot address. See, e.g., *In Re Estate of Halas*, 512 N.E.2d 1276 (Ill. 1987); *Aksomitas v. Aksomitas*, 529 A.2d 1314 (Conn. 1987).

¹¹ See, e.g., Md. State Bar Ass'n, Inc., Comm. on Ethics, Op. 89-58 (1989); State Bar of Wis., Comm. on Professional Ethics, Op. E-87-9 (1987); Miss. State Bar, Ethics Comm., Op. 114 (1986); N.C. State Bar Ass'n, Ethics Comm., Op. 16 (1986); Ala. State Bar, Disciplinary Comm'n., Op. 83-155 (1983); Bar Ass'n of Nassau County (N.Y.), Comm. on Professional Ethics, Ops. 89-43 and 89-23 (1989); Ore. State Bar, Ethics Comm., Op. 1991-129 (1991).

¹² ABA Model Rules for Lawyer Disciplinary Enforcement (1989), Rule 28 states in relevant part:

APPOINTMENT OF COUNSEL TO PROTECT CLIENTS' INTERESTS WHEN RESPONDENT IS TRANSFERRED TO DISABILITY INACTIVE STATUS, SUSPENDED, DISBARRED, DISAPPEARS, OR DIES.

A. Inventory of Lawyer Files. If a respondent has been transferred to disability inactive status, or has disappeared or died, or has been suspended or disbarred and there is evidence that he or she has not complied with Rule 27, and no partner, executor or other responsible party capable of conducting the respondent's affairs is known to exist, the presiding judge in the judicial district in which the respondent maintained a practice, upon proper proof of fact, shall appoint a lawyer or lawyers to inventory the files of the respondent, and to take such action as seems indicated to protect the interests of the respondent and his or her clients.

B. Protection for Records Subject to Inventory. Any lawyer so appointed shall not be permitted to disclose any information contained in any files inventoried without the consent of the client to whom the file relates, except as necessary to carry out the order of the court

who assumes such responsibility must review the client files carefully to determine which files need immediate attention; failure to do so would leave the clients in the same position as if their attorney died without any plan to protect their interests. The lawyer should also contact all clients of the deceased lawyer to notify them of the death of their lawyer and to request instructions, in accordance with Rule 1.15.¹³ Because the reviewing lawyer does not represent the clients, he or she should review only as much of the file as is needed to identify the client and to make a determination as to which files need immediate attention.¹⁴

B. Duty to maintain client files and property

Questions also arise as to how long the lawyer who assumes responsibility for the deceased lawyer's client files should keep the files for those clients he or she is unable to locate. ABA Informal Opinion 1384 (1977) provides general guidance in this area. We believe that the principles set out in that opinion are applicable to the instant question. Informal Opinion 1384 states as follows:

A lawyer does not have a general duty to preserve all of his files permanently. Mounting and substantial storage costs can affect the cost of legal services, and the public interest is not served by unnecessary and avoidable additions to the cost of legal services.

But clients (and former clients) reasonably expect from their lawyers that valuable and useful information in the lawyers' files, and not otherwise readily available to the clients, will not be prematurely and carelessly destroyed to the clients' detriment.

Informal Opinion 1384 then lists eight guidelines that lawyers should follow when deciding whether to discard old client files. One of these guidelines states that a lawyer should not "destroy or discard items that clearly or probably belong to the client. Such items include those furnished to the lawyer by or in behalf of the client, and original documents." Another suggests that a lawyer should not "destroy or discard information that the lawyer knows or should know may still be necessary or useful in the assertion or defense of the client's position in a matter for which the applicable statutory limitations period has not expired."

There is no simple answer to this question. Each file must be evaluated separately. Reasonable efforts must be made to contact the clients and inform them that their lawyer

which appointed the lawyer to make the inventory.

¹³ Model Rule of Professional Conduct 1.15(b) ("Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person.")

¹⁴ Again, while issues of client confidentiality would appear to be raised here, a reasonable reading of Rule 1.6 suggests that any disclosure of confidential information to the reviewing attorney would be impliedly authorized in the representation. *See* note 8, *supra*.

has died, such as mailing letters to the last known address of the clients explaining that their lawyer has died and requesting instructions.¹⁵

Finally, questions arise with regard to unclaimed funds in the deceased lawyer's client trust account. In this situation, reasonable efforts must be made to contact the clients. If this fails, then the lawyer should maintain the funds in the trust account. Whether the lawyer should follow the procedures as outlined in the applicable Disposition of Unclaimed Property Act that is in effect in the lawyer's state jurisdiction is a question of law that this Committee cannot address.¹⁶

¹⁵ Responding to a recent inquiry, the Committee on Professional Ethics of the Bar Association of Nassau County suggested that an attorney assuming responsibility for a deceased attorney's client files has an ethical obligation to treat the assumed files as his or her own. Bar Ass'n of Nassau County (N.Y.), Comm. on Professional Ethics, Op. 92-27 (1992).

¹⁶ There are at least 27 state and local bar opinions that discuss a lawyer's obligations when the lawyer cannot locate clients who have funds in lawyer trust accounts. *See, e.g.*, State Bar of S.D., Ethics Comm., Op. 91-20 (1991); State Bar of Ariz., Comm. on Rules of Professional Conduct, Op. 90-11 (1990); R.I. Sup. Ct., Ethics Advisory Panel, Op. 90-21 (1990); Alaska Bar Ass'n, Ethics Comm., Op. 90-3 (1990); Md. State Bar Ass'n, Inc., Comm. on Ethics, Op. 90-25 (1990); Bar Ass'n of Nassau County (N.Y.), Comm. on Professional Ethics, Op. 89 (1990).

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Preparing for Disability, Disaster, and Death

By John D. Kitch

Misfortune comes to all men.
—Chinese Proverb

Hurricane Katrina slams into the Gulf Coast, destroying homes and businesses, including lawyers' offices. A tornado devastates the downtown area of Clarksville, Tennessee, effectively putting the entire legal community out of business. A lawyer rides his bicycle over a railroad track and wakes up in the hospital with a brain injury, no memory of the accident causing it, and a long road to recovery ahead. Another attorney with no history of health problems dies from a sudden heart attack.

None of us will get out of this alive. Many of us will become disabled before we die. Many will face life-threatening surgeries, terrible accidents, floods, earthquakes, fires, or hurricanes. And yet, surprisingly few lawyers take the time to plan ahead with even the most elementary precautions to protect their clients, their families, and themselves for the inevitable turmoil surrounding death, disability, or disaster. Too often we are the cobblers whose children go barefoot, and sometimes the shoes we build for our clients won't withstand the rough road of our own unforeseen misfortune.

Find a Backup Lawyer

Rule 1.3 of the American Bar Association Model Rules of Professional Conduct states that "A lawyer shall act with reasonable diligence and promptness in representing a client." Comment 5 to that Rule states, in part:

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.

Although the Comment is not binding, it is instructive to the diligent lawyer. Each and every solo or small firm lawyer should have one or more backup lawyers in place for each area of his or her practice to protect clients. Each chosen backup should be competent in the

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designated area of practice, and the diligent lawyer's contract with clients should contain a clause permitting the use of the backup and permitting the backup's access to the clients' otherwise confidential information for the limited purpose of protecting the clients' immediate interests. Of course, clients are free to take their business elsewhere if they so choose, but at least this prevents the loss of the clients' rights (and prevents a potential malpractice case against the unfortunate lawyer or his or her estate). It may also preserve the diligent lawyer's practice for when he or she is able to return. Further, the careful lawyer will make arrangements for someone to have the ability to access the lawyer's bank accounts, including the trust account, if disaster strikes. The trust account holds the clients' money; if they want it, there needs to be a mechanism for them to get it.

You need to have a current list of clients with a brief description of the subject of the representation, together with the suggested backup person. Your staff or the backup must be able to contact all clients, tell them of the circumstances, and arrange an immediate consultation for discussion of any necessary immediate action to preserve their position. You also need a list of judges before whom you have matters pending and a list of counsel with whom you have current matters; staff or backup also must contact these people to let them know what has happened. The collegiality of the bench and bar will, in most instances, allow for a reasonable period of time for the backup lawyer to take the necessary steps to protect the client's interests.

Protect Your Data

I cannot stress enough the need for another kind of backup—backup for your computer data. If your computer were stolen over the weekend or if the hard drive were to crash—and it will—you must have the ability to recreate everything. Your data is the key. Think about having an on-site backup as well as one off-site. It doesn't make sense to have just one backup sitting next to the computer it backs up; both would go up in smoke in the case of a fire. You can use external USB hard disk drives, or for that matter even thumb drives, depending on the amount of data, and you should rotate them between on-site and off-site, always making sure that each is current. There also are several good companies you can use to back up your data online, but you need to be sure that confidentiality of client files will be maintained. Prudent lawyers back up once a day, but even once a week is better than nothing. The question is simply how much data you are willing to lose.

DISABILITY INACTIVE STATUS

Tennessee Supreme Court Rule 9 governs the discipline of lawyers licensed in the state. Section 21 of that rule provides for placing an attorney on disability inactive status when the

lawyer is judicially declared incompetent or involuntarily committed on grounds of incompetency or disability. A lawyer also may be placed on disability inactive status when addiction to drugs or intoxicants causes his or her incapacity. Such status prohibits the lawyer from practicing law until and unless he or she is restored to active status. Section 22 of the rule provides that in the case of transfer to disability inactive status, suspension, or disbarment, or if the lawyer has died, and no one capable of conducting the lawyer's affairs is known to exist, the presiding judge of the judicial district where the lawyer practiced will appoint a lawyer to inventory the lawyer's files and take the necessary steps to protect the lawyer's clients' interests.

Check the corresponding rule in your jurisdiction and take the necessary steps to protect your own clients in the event of such an occurrence in your own life.

Another computer issue concerns your passwords. Most of us use passwords for accessing our computers and for other related matters. Please, please, password protect everything that needs to be kept confidential, and change your passwords frequently. Don't use your child's birthday or your pet's name; those are too easy to determine. Don't put a sticky note with the password near the computer. However, make sure someone else has your passwords in the event of your illness or death; that backup lawyer we talked about above will need to get into your computer to serve your clients if you can't.

Get a Will and Health Care Directives

Do you have a will? In my home jurisdiction of Davidson County, Tennessee, our probate judge reports that fewer than 40 percent of the lawyers whose estates came before him in the last three years had a will. He also reports that this failure to prepare for death prolonged the court proceedings, cost a great deal more money than if there had been a will, and in some cases generated serious battles and destroyed relationships among family members.

If you don't have a will, most states have one for you—it's called the law of intestate succession. Intestate succession generally will pass your assets as you would wish, but it might not. What if you are divorced and have a child with a disability? What about charities to which you might like to make a postmortem gift? What about avoiding fights among your family members over who gets what piece of your jewelry or antique furniture? Good estate planning and writing a clear, detailed will can go a long way to avoid the problems attendant to its absence.

A health care power of attorney and living will are also necessary. These documents tell your family and your health care providers who is to make health care

decisions and/or end-of-life decisions if you cannot, as well as informing them of your wishes ahead of time. You should include relevant HIPAA language regarding access to medical records and permitting communications with health care professionals for those doctors who insist on seeing such language before disclosing any information.

You also need a durable power of attorney in case you become incompetent or otherwise unable to sign legal documents, and I would suggest including HIPAA language in that as well. Assume you are in a coma and your spouse needs to access the equity in your home to pay bills. He or she will not be able to do so without your power of attorney. The power can be springing, such that it only can be used if you are disabled and will be revoked if you cease to be disabled, or it can be general. Regardless, you need one just in case.

Make a list of everything you own, where it is, and who the contact person is. This list should include life insurance policies, pensions and retirement plans, IRAs, 401Ks, lockboxes, securities, bonds and other investments, bank accounts, and any other items of significant value. Life insurance companies hold an untold number of policies on which payments have been made for a long time but which are not accessed upon the insured's death, simply because no one knew they existed. Make a list of your law office accounts payable, and more importantly your accounts receivable. Your family will need money if you are incapacitated, and you need a plan to pay the bills while you're out. Do not automatically assume your loyal secretary will stick around to help; he or she may be looking for another job unless you have provided for him or her so that it is easier or more advantageous to remain.

Insure Yourself and Your Practice

Insurance of any kind is costly but necessary. You must have professional liability insurance to protect you and your family from losing all your hard-earned assets in the event of disaster, disability, or death. Don't think that a statute of limitations would be tolled because of an unanticipated surgery or that an aggrieved client would hesitate to sue your estate. Make sure the insurance is in an amount sufficient to cover any claims that could arise—otherwise, your family could be left with nothing.

Life insurance is a necessity as well. It provides reasonably ready cash for your family at a time when they need it, and probating your estate can take a long time. Also think about a policy on yourself payable to your assistant at the office, both to reward loyalty over the years and to avoid his or her need to abandon your practice to find another job; your family and your backup lawyer will need the help to transition your practice to wherever it needs to go. Further, consider a life insurance policy on your critical staff members payable to you. One catastrophe I haven't yet mentioned is the death of the assistant who knows everything about your office that you don't, and a life insurance policy on his or

her life can give you the necessary wherewithal to hire temps until you locate a suitable long-term replacement.

Health insurance is a must. Anyone who practices bankruptcy law will tell you that the high cost of health care is a big factor in many people's insolvency. Even if you recover from a traumatic injury or debilitating illness, the cost of hospitals and doctors can put you back on your heels for a long time to come. Also consider disability insurance. It is costly, but having it may keep the lights on while you are out.

I recommend business interruption insurance. If your office is destroyed by fire or flood or your computer crashes, it will take some time for you to recover, during which time you won't be doing much work for or generating income from your clients. Business interruption insurance will at least pay something while you reconstruct, perhaps enough to cover regular expenses and a little more. Finally, a good umbrella policy can be useful in case any of your other coverage turns out to be insufficient to make you whole.

Make a Contact List

Whom do you want told of your disability or death? Friends, colleagues, your college or university, your place of worship or contemplation? Lawyers are by nature gregarious. We know many people and belong to many organizations that mean something to us. It is sad when people die and those they knew well are unaware, simply because no one told them. Make the list.

Make Your Final Wishes Known

It is wise to give your family direction about your final wishes. What lawyer would you want to have handle your estate? Tell your significant other so he or she will know where to turn. Do you want to be buried, cremated, or have your remains donated to science? What about organ donation? Do you want to have a funeral or simply a memorial service? Don't leave people guessing at this stressful time in their lives. Tell them what you want, and they will be comforted in carrying out your wishes.

By now you may wish you hadn't begun reading this article. Thinking about the unpleasant things that may befall you is not a source of joy. Nonetheless, I can assure you that if you take these steps to prepare for misfortune, you will experience a sense of comfort and relief that you have done what you could do to protect those about whom you care. The well-known business writer and commentator Peter F. Drucker once said, "Long-range planning does not deal with future decisions but with the future of present decisions." Make those present decisions you need to make, and make them now.

- **John D. Kitch has been a sole practitioner in**

Nashville, Tennessee, since receiving his law degree in 1976. He is a faculty member at the Nashville School of Law, where he teaches law office management. In 1997 he was selected as the ABA Sole Practitioner of the Year. He may be reached at jdkitch@edge.net. The author wishes to acknowledge the Harry Phillips American Inn of Court's January 2010 team program as the motivation behind this article.

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Law Practice TODAY

Protect Your Clients and Yourself: Prepare for Disaster Before it Happens

by Ellen Freedman, CLM

October 2005

Disasters come in many forms. There are those that affect the firm principal(s), those that affect the firm as a whole, and those that affect an entire region.

One generally thinks of disaster in terms of fire or flood. Certainly, we have seen a significant increase in Pennsylvania recently in occurrences of flood and hurricane damage. Maybe it is encroaching age which makes catastrophic events stand out in my mind, but I believe we have also seen an increase in other natural calamities such as twisters, lightning strikes, snowstorms and gale winds. These are the types of disasters which can affect not just the firm, but our employees, and even the region as a whole, making it even more difficult to recover as emergency resources are both diverted and strained to the limit.

Disasters can also come in unusual ways too, such as a sewer backup. I once worked for a firm which experienced a sewer main break, which inundated the building with festering foul liquid, cresting at five feet. Believe me, it was a true disaster, with all the associated disruption and loss, in every sense of the word. Even an extended power outage when a deadline is looming large can have a severe adverse impact on the firm's ability to render timely service to its clients.

Another type of disaster affects firm principals. These include events such as stroke, heart attack, or even an accident resulting in coma. For the solo or small firm, these events can be as crippling as a hurricane.

When it comes to disaster, reaction after the fact is no substitute for planning beforehand. I am constantly amazed at the number of attorneys who do not practice the most elementary form of disaster prevention — backing up the critical information on their computer system daily and taking that back-up off-site every night. The purpose of this article is to identify some of the areas of vulnerability, and to provide some options which you can implement to minimize disruption and hasten recovery. Foresight and planning can make the difference between your practice surviving a disaster, or not.

Let's deal first with disaster which affects your entire firm, or maybe even your region. These include events like hurricane, blizzard, flood, fire and so forth. Here are some of the things you need to think about:

1. **Notification to clients, employees and vendors:** without access to your office, do you have the names, addresses and phone numbers of your clients handy? Can you quickly get in touch with all your employees to keep them informed and make sure they're ok too? Can you contact your vendors for emergency assistance? If you use something like Outlook or GroupWise personal productivity software for all your contacts, or a case management package which has a Palm interface, like TimeMatters, you can keep the information on a hand-held device for quick access,

Law Practice TODAY

Would You and Your Practice Survive These Common Disasters?

by Dan Pinnington

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None of us like to think about disasters, and most of us have an “it won’t happen to me” attitude. This short quiz will help you determine your ability to survive some common “disaster” scenarios.¹

1. If all of the computers in your office were stolen over the weekend, do you have all the serial numbers of the equipment, the original cost of the equipment, the value of the equipment, and the ability to recreate all of the data on the computers?
2. If your office was completely destroyed by fire, how long would it take you to contact all of your clients, recreate all your computer data, contact your insurance company, process invoices, contact opposing counsel and generally get your practice operational again? Who would be responsible for performing each of these functions?
3. If you had a heart attack tonight, are your files organized so that someone could pick up your caseload without your clients suffering any disadvantage?
4. If you could suddenly not come into the office on Monday, have you designated the person who could pick up your caseload? Even if you have a partner, how much does he/she really know about your caseload?
5. If you were unable to come into the office for a few days or weeks, could anyone actually find anything on your desk or in your files? Does the answer change if your assistant was off sick or away on vacation at the same time?
6. If your secretary/legal assistant/bookkeeper suddenly quit, do you know their filing systems so that you can find information in their desks, in their (or your) files, or on their computers? Do you have copies or know where they keep the keys for filing cabinets, etc.? Do you know all their respective passwords (including voice mail, computer login, e-mail, the accounting package and any other software applications they use)?
7. If one of your staff members disappeared with client trust funds, would you have sufficient records to determine what was taken and when?
8. If you have a partner/associate who was suddenly disabled, do you or someone in your office know his/her schedule for the next three months? Do you or someone in your office know the status of all matters in your office?
9. If you or a partner in your firm were disabled for an extended period of time, will you be able to draw a salary? If so, how much and for how long? If you are a sole practitioner and the only rainmaker, how will expenses of the firm be paid while you are out and unable to make rain?
10. 10. If you were to die or be completely unable to return to work, what would your desk, client files, and office organization say about you to anyone who would have to step in to assume responsibility? What burdens would this place on your partners and spouse? Is this the way you