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## Featured Articles

### Easing the Burden on Your Heirs in the Event of Your Death

by David L. Brandon and Brian S. Ginter



As countless advertisements for cemeteries and funeral homes remind us, the best time to plan for eternity is today. Many people plan for the inevitable by creating estate documents to ensure their heirs' financial security and to minimize estate taxes. They also often choose their final resting place, decide on the preferred method of interment (cremation or burial) and even go so far as to plan the memorial service. Quite often, the payment for final disposition is made in advance,

to avoid burdening loved ones from the need to make those selections or incur financial obligations upon the decedent's death.

For attorneys, particularly sole practitioners, advance estate planning should include a plan for the disposition of your law practice in the event of your sudden death. While advance planning cannot save your loved ones from their grief over losing you, it can remove a source of tension from your stricken family and lessen the risk of potential liability to your estate.

What follows is a list of steps that you can take to facilitate an easy transition for your heirs, as well as a discussion of the requirements that may be imposed by several states either on your heirs upon your death, or that are imposed on you while still alive.

#### Identification and Transfer of Client Files

Your clients have entrusted you with (and may very well have paid for) some of the most important aspects of their lives: representation in important litigation, negotiation and documentation of contracts and business transactions, preparation and maintenance of estate planning documents, evidence and strategies to shield them from criminal liability, etc. In the event of your sudden death, your clients will need to retain new counsel and arrange for a transfer of their file materials. Some of your client matters may face immediate deadlines: statutes of limitations may be running, discovery responses may be pending, trial dates approaching, contract performance may be required, etc.

Will your heirs be able to identify the totality of your individual client files (including paper files, electronic files and e-mails), much less arrange for their transfer to new counsel, in the immediate aftermath of your sudden death? For example, are parts of the file in the file cabinet, in notebooks on a shelf and/or scanned materials on your computer? Furthermore, as discussed, *infra*, some states require notification of the cessation of your practice to be provided to courts and opposing counsel. Will your heirs be able to compile a list of counsel and courts to be notified?

You may be relying on your staff to provide assistance to your heirs in the event of your death, particularly in the area of identifying clients and their file materials. This reliance may be misplaced, because even the most loyal staff members may be compelled by the need for financial security to seek out and obtain new employment in the immediate aftermath of your sudden death. So your heirs may be on their own.

In the absence of competent staff willing to remain on payroll or work for free, your death may cast your survivors on a sea of uncertainty, an uncertainty that will be compounded if you are among the increasing number of attorneys who maintain a paperless office. The task of identifying active matters may require the review of a large number of paper or computer files, which may not be segregated between open and closed matters. Even a comprehensive review of your files may miss some client matters, such as a new

client who sought your advice in the days before your death or an old matter that appears closed but may have required monitoring activity on your part, such as a settlement to be performed over time or a judgment to be renewed before expiration.

In order to avoid this eventuality, you might want to consider the creation of a file containing a list of all open matters, the client's identifying information and the name of the matter. If the matter is a litigated case, the list could include a copy of the caption with case number and a copy of the proof of service list. For transactional representation, the list could contain identifying information for the attorneys with whom you have been negotiating. The retainer agreements on all open matters could be kept in individual files, separate from the larger client file and adjacent to the list of open file matters. These files should be kept in a particular area in your office, perhaps in a file drawer clearly labeled or an envelope in your desk labeled as being important in the event of your death. This list should be updated on a regular basis, or as client matters are closed and sent to storage.

### Disposition of Closed Client Files

You may have a large inventory of closed client files in storage. Perhaps they are at an off-site retrieval facility; perhaps they are in a self-storage facility; perhaps they are in boxes in your office. Unless you have been periodically destroying older client files, and unless you keep a current list of closed files, your heirs will be left with the unenviable task of sorting through those files to determine their age and whether they may be properly destroyed.

The maintenance of client estate planning documents such as wills or trusts may create some additional difficulties for your heirs. Your clients or their heirs may need these documents as time passes. Unless client estate planning files are segregated from other client files, your heirs may accidentally destroy these files as part of an overall file destruction procedure. You should consider keeping these files segregated and clearly marked.

### Professional Liability Insurance

State law may require your heirs to notify your professional liability insurer of your death. (See *e.g.*, Cal. Bus. & Prof. Code § 6180.1.) If you maintain a separate file with insurance information, this notification may be a simple task. Even so, your heirs will have to consider the purchase of an extended reporting period (also known as a "tail" policy) to protect your estate from any claims for malpractice that may be filed after your death. This coverage can be expensive; depending on the length of the extended reporting period purchased, the cost can be several multiples of your current annual premium. (The length of the "tail" policy may be dependent on the relevant statute of limitations against decedents in your jurisdiction.) If your policy is due to expire soon after your death, the purchase of this coverage may require a large cash outlay in the immediate future, before any life insurance benefits are paid to your heirs and before any funds in your office account are available to them.

### Accounting Information

Another potential source of confusion for your heirs is your accounting records and bank accounts. Unless one of your heirs is an attorney, your heirs may be unable to obtain signatory authority over your trust account. The funds in your trust account may be funds recovered on behalf of a client, to be distributed to the client, to lien holders or to your estate (for payment of fees or reimbursement of costs). The funds may also be earned or unearned retainers for fees; to the extent any retainer funds are unearned, the funds will need to be returned to your clients, who may need them in order to obtain new counsel. Unless your trust account records are accurate and current, it may be extremely difficult for your heirs to determine whose money is in the trust account, even with the (expensive) aid of a forensic accountant.

In addition, your heirs will want to transmit final bills to your clients soon after your death to increase the likelihood of payment. If your time records are not current, or are kept on scraps of paper or in your head, this valuable information may be lost. Furthermore, the status of aged accounts receivable may be unclear; if you have determined to refrain from pursuing an aged receivable (either due to concern about a cross-complaint for malpractice, a realization that recovery of the receivable is unlikely or because you have resolved a disputed fee) but have failed to delete that receivable from your billing software, your heirs may take steps to pursue receivables that are better ignored.

## Advance Planning for the Inevitable: Selection of Authorized Successor Counsel

The Model Rules of Professional Conduct do not specifically deal with an attorney's obligation to plan for his or her own death. However, ABA Formal Opinion 92-369 asserts that your duty to protect client files and property requires you to make arrangements for the disposition of client files in the event of your death. Such arrangements should include, at a minimum, formally designating a specific attorney to review the client files and make determinations as to which files need immediate attention, and to notify the clients of your death.

Some states, such as New York, Pennsylvania and New Hampshire, adopt the ABA's position on this issue. None of the rules of professional conduct of these three states specifically deal with the responsibility to make arrangements for the disposition of client files after death. But the comments to each state's rules regarding attorney diligence almost mirror the argument of ABA Formal Opinion 92-369. For example, comment 5 to Rule 1.3 of the New York Rules of Professional Conduct states "a sole practitioner is well advised to prepare a plan that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action." (See also, Pennsylvania Rules of Professional Conduct, Rule 1.3, comment 5; New Hampshire Rules of Professional Conduct, Rule 1.3, comment 5.)

Other states, such as Oregon, Minnesota and California, provide methods by which you can engage an "assisting attorney." Under such an arrangement, you can contract with another attorney to review your files and notify your clients of your death. The scope of the assisting attorney's role is negotiated like any other contract, including whether the assisting attorney will be a co-signatory to your trust account or will only become a signatory upon your death and, of course, any compensation. Attorneys are encouraged to notify clients of this arrangement beforehand. The Oregon State Bar has provided the following sample paragraph to include in retainer agreements: "Attorney may appoint another attorney to assist with the closure or temporary management of the Attorney's law office in the event of Attorney's death, disability, impairment, or incapacity. In such event, Client agrees that the assisting attorney can review Client's files to protect Client's rights." ([www.osbar.org](http://www.osbar.org)) California's State Bar has a suggested form of agreement available on its website. ([www.calbar.ca.gov](http://www.calbar.ca.gov)). Provided the assisting attorney has agreed to perform all necessary tasks in the event of your death and that you have advised your heirs of this arrangement, your heirs' only task in the event of your death may be to notify the assisting attorney of your passing.

Florida goes a step further and *requires* you to take steps to deal with your possible sudden death. Rule 1-3.8(e) of the Rules Regulating the Florida Bar provides that every member of the Florida Bar *shall* designate another member of the Florida Bar who has agreed to serve as an inventory attorney. The inventory attorney's duties include inventorying files and taking "such action as seems indicated to protect the interests of clients." Thus, in Florida, your heirs (provided you have not designated any of your heirs as your inventory attorney) are not required to recognize the need to engage another attorney in assisting with winding up your practice or seek the court's intervention to appoint a conservator over your trust account. Their focus can be where it should be: healing their heartache and remembering you fondly.

The selection of authorized successor counsel, whether required by local law or performed voluntarily by you as advance planning, deserves careful consideration. If your spouse or child is an attorney, you might be tempted to name him or her to take on this responsibility. But you should consider that such a close relative may be stricken with grief at your passing, as well as occupied with other issues upon your death: consoling children and other close family members, arranging for your funeral and memorial service, dealing with friends and relatives who may be flying in for your memorial, etc. The ability of a close relative to assume the added responsibility of administering your practice in the immediate aftermath of your death is questionable.

You may decide to entrust a close attorney friend or respected professional colleague with this task. If so, you should consider the type of practice that your chosen administrator maintains and determine its compatibility with your practice. A civil litigator may not be the best administrator of a criminal defense practice and a transactional attorney may not be the best choice to administer a litigation practice. Similarly, someone who is "old school" and relies heavily on paper files may not be the best choice to administer your modern "paperless" practice.

## Repercussions of Failing to Consider Advance Planning

If you do not select an attorney to administer your practice upon your death, the courts may do so for you. In some jurisdictions, the court can appoint an administrator over your practice. (See *e.g.*, Nevada Supreme Court Rules, Rule 118; Cal. Bus. & Prof. Code § 6180.2.) Although the administrator may perform this service *pro bono*, your state bar association may have the discretion to compensate the administrator for extraordinary services and reimburse the administrator for costs, and may then seek reimbursement from your estate. (See *e.g.*, Nevada Supreme Court Rules, Rule 118; Cal. Bus. & Prof. Code § 6180.12.) If your heirs seek court administration, they may have some influence over the selection of the administrator. But if the application for appointment of an administrator is made by one of your clients (see *e.g.*, Cal. Bus. & Prof. Code § 6180.2), your heirs may have no influence over the administrator appointed by the court.

#### Conclusion

While no one likes to consider their own mortality, no one lives forever. Advance planning for the disposition of your law practice can remove a source of tension for those you leave behind.

David L. Brandon and Brian S. Ginter  
Morris Polich & Purdy LLP  
Los Angeles, California  
[DBrandon@mpplaw.com](mailto:DBrandon@mpplaw.com)

[BGinter@mpplaw.com](mailto:BGinter@mpplaw.com)

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