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Planning for the Inevitable: Easing the Burden on Your Heirs in the Event of Your Death

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The best time to plan for eternity is today. Planning for your sudden death should include a plan for the disposition of your law practice. While advance planning cannot save loved ones from their grief over their loss, it can remove a source of tension from your stricken family and lessen the risk of potential liability to your estate.

In the event of your death, California law requires your personal representative to provide notice of the cessation of your practice to your clients, opposing counsel, and all courts in which you are acting as an attorney of record.¹ This requirement can create quite a burden for a grieving spouse, parent, or child.

For example, your personal representative may be unable to compile a list of clients, counsel, and courts to be notified. In the absence of a current list of open files or of competent staff willing to forego other, more secure, employment possibilities and remain on payroll, your death may cast your survivors on a sea of uncertainty.² 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.³ 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 require monitoring activity on your part (e.g., a settlement to be performed over time or a judgment to be renewed before expiration).

Your personal representative is also required to notify your professional liability carrier of your death.⁴ If you maintain a separate file with insurance information, this notification may be a simple task. Even so, your survivor will have to consider the purchase of an extended reporting period⁵ 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. If your policy is due for renewal 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 survivor and before any funds in your office account are made available.

Another potential source of confusion for your survivor is your accounting records. Unless your survivor is an attorney, your survivor will be unable to obtain signatory authority over your trust account. In addition, your survivor will want to send out final bills to your clients soon after your death to increase the likelihood that these bills are paid. If your time records are not current or are kept on scraps of paper or in your head, this valuable information may be lost.

Your survivor will also have to prepare for an orderly transition of your files to your clients' new counsel. While the ethical obligation to promptly comply with a client's request for the release of all papers and property at the termination of representation⁶ does not apply to nonlawyers,⁷ your file is your client's property.⁸ Your survivor will have to identify all of the client's "correspondences, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation,"⁹ including all

electronic files and e-mails.¹⁰

Faced with all of these complications, your survivor may be forced to choose between two statutory forms of administering your practice. Your survivor can ask the Superior Court to assume jurisdiction over your practice.¹¹ Under this scenario, the State Bar has discretion to compensate an attorney appointed to close the practice for “extraordinary time and services” and must reimburse the appointed attorney for necessary expenses incurred; the State Bar can then seek reimbursement from your estate.¹² The advantage to this approach is that the appointed attorney is immune from liability for any acts taken while under the supervision of the court.¹³ Alternatively, your survivor can ask the Probate Court to appoint a practice administrator.¹⁴ This approach permits the court to compensate the administrator from the estate assets and requires the filing of a surety bond.¹⁵

These potential problems can be avoided with some advanced planning. The State Bar has an approved Agreement to Close Law Practice in the Future¹⁶ by which you can designate a trusted colleague to act as your practice administrator in the event of your death or incapacity, and authorize this colleague to have access to your office, take possession of your property, review your files, and become the signatory on your accounts. The use of this agreement and periodic consultations with your selected administrator regarding the status of your practice, along with maintaining orderly paper and electronic files, can make your sudden passing a bit easier on your survivors.

¹ Bus. & Prof. Code §§6180, 6180.1.

² This uncertainty is compounded if you are among the increasing number of attorneys who maintain a paperless office with no staff.

³ You may want to consider keeping copies of all retainer agreements in separate files in a readily accessible area in your office to ease the task of identifying your open matters.

⁴ Bus. & Prof. Code §6180.1.

⁵ Also known as a “tail” policy.

⁶ See Cal. R. of Prof'l Conduct R. 3-700.

⁷ See Cal. R. of Prof'l Conduct R. 1-100.

⁸ Eddy v. Fields, 121 Cal. App. 4th 1543, 1548 (2004).

⁹ *Id.*

¹⁰ State Bar of Cal., Standing Comm. on Prof'l Responsibility & Ethics, Formal Op. 2007-174.

¹¹ Bus. & Prof. Code §6180.2.

¹² Bus. & Prof. Code §6180.12.

¹³ Bus. & Prof. Code §6180.11.

¹⁴ Prob. Code §9764.

¹⁵ *Id.*

¹⁶ <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=wZ53KKqfe9A%3D&tabid=2795>

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