



Ohio Board of Professional Conduct



# OHIO ETHICS GUIDE **SUCCESSION PLANNING**

## Succession Planning

The premature closing of a law office can result from the **unexpected disability, death, disappearance, or discipline of a lawyer**. The failure to plan adequately for the unexpected can result in harm to clients and in confusion and hardship for the lawyer's family, staff and professional colleagues. Developing a succession plan in advance ensures the orderly transfer of a client's affairs and file to a new lawyer, as well as the return of moneys held in trust, and satisfies the lawyer's ethical obligation to provide competent and diligent representation.

This ethics guide is a preventative tool to assist the Ohio bar in developing a succession plan.

The guide charts a path for a lawyer to facilitate the transition of open client matters to new lawyers or a successor lawyer appointed in advance by the affected lawyer. This guide addresses many common issues and offers measures that may be taken in advance of death or disability, but does not address every conceivable consequence of an untimely death/disability of a lawyer. Specific questions not addressed by this ethics guide may be posed to the legal staff of the Board of Professional Conduct.

This ethics guide does not address the issues inherent in the sale of a law practice that occurs before or after the death or disability of a lawyer.

## Terminology

Terms used in this ethics guide include:

**Affected Lawyer** → A lawyer whose death, temporary or permanent disability, disappearance, or discipline will trigger the need for the services of a successor lawyer. These events are collectively referred to in the ethics guide as “death or disability.”

**Successor Lawyer** → A lawyer chosen in advance by the affected lawyer to transition his or her practice after death or disbarment or manage the practice during disability or disappearance.

**Immediate Protective Action** → A form of limited scope representation undertaken by the successor lawyer to safeguard the interests of the affected lawyer's clients. Tasks may include obtaining extensions of time from opposing counsel, filing of motions for continuances with courts and administrative agencies, and filing notices, motions, and pleadings on behalf of the affected lawyer's clients with their prior consent.

## Am I Required to Develop a Succession Plan?

The Ohio Rules of Professional Conduct do not specifically mandate that a lawyer create a succession plan. However, several rules, when read in conjunction with their related comments, strongly suggest that a succession plan is necessary to protect clients from the adverse consequences arising from the lawyer's death or disability. A succession plan safeguards the client's legal interests, protects and accounts for client funds and property held in trust, and maintains the confidentiality of information related to the representation.

A succession plan can be viewed as a continuation of a lawyer's duty of competent and diligent representation. Prof. Cond. R. 1.1 and 1.3. In fact, Comment [5] to Prof. Cond. R. 1.3 addresses the steps a lawyer should undertake to prevent the neglect of client matters.

The comment provides that the duty of diligence may require that the lawyer prepare a succession plan that designates another competent lawyer to:

- Review client files;
- Notify each client of the lawyer's death or disability;
- Determine whether there is a need for immediate protective action.

Although representation normally will terminate when the lawyer is no longer able to adequately represent the client, the lawyer's fiduciary obligations of loyalty and confidentiality continue beyond the termination of the agency relationship. ABA Formal Op. 92-469.

## What Are the Core Elements of a Succession Plan?

Every solo or small firm practitioner should prepare a written succession plan for the practice that includes detailed instructions to members of the lawyer's immediate family, a designated successor lawyer, the lawyer's nominated executor or personal representative, and key office staff.

The following are the recommended core elements of a comprehensive plan:

- A written agreement with the designated successor lawyer. *See page 4.*
- Information regarding the status of open client matters, including the location and status of client files (both closed and opened);
- A copy of the practice's client file retention plan;
- Details concerning IOLTA and operating accounts and client ledgers;
- The location of log-in and password information for office computers, mobile devices, voicemail, cloud storage, billing systems, calendaring system, email (including server addresses and passwords), online banking, and other websites upon which the law office relies;
- The location of accounts payable and receivable information and billing/collection practices;
- Contact information for office personnel and key vendors;
- Detailed information (leases, insurance, taxes, sale of building) needed to physically close and wind up a law practice, if applicable;
- An office procedures manual. *See page 7.*

A review and discussion about the succession plan and its contents should be undertaken at least once a year with those persons responsible for implementing and carrying out the succession plan.

### ***Corporate Entity Considerations***

If the affected lawyer is the sole member of a LLC or LPA, the LLC or LPA must pre-authorize someone other than the sole member to act on behalf of the entity and carry out the succession plan in the event of the member's death or disability. The corporate entity must have the appropriate resolution in place that states when and how the successor lawyer may act on behalf of the entity, after the death or disability of the affected lawyer.

## **Why Designate a Successor Lawyer?**

The succession plan should include the designation of a competent and diligent lawyer as the successor lawyer. Some malpractice insurance carriers may require the designation of a successor lawyer. A successor lawyer typically is granted authority by the affected lawyer to inventory the affected lawyer's files and make determinations as to which client matters need immediate protective action. In addition, the successor lawyer is typically responsible for notifying the affected lawyer's clients and the of the death or disability affected lawyer. See ABA Adv. Op. 92-369.

If a successor lawyer was not designated in advance, any willing and able lawyer may be approached by the affected lawyer's family, the local bar association, Disciplinary Counsel, or law office staff to fulfill the role. Gov.Bar R. V, Sec. 26.

The designation of a successor lawyer will ensure client confidentiality and prevent malpractice if a lawyer is temporarily disabled. In addition to the inventorying and transferring of client files, the successor lawyer may take on a variety of other tasks agreed upon in advance with the affected lawyer.

In addition to being someone the affected lawyer knows and trusts, the most effective successor lawyer will be one who practices in the same fields or specialties as the affected lawyer. A suitable candidate may be someone with whom the affected lawyer has co-counseled or to whom the affected lawyer has referred matters.

## **How Do I Designate a Successor Lawyer?**

A written agreement between the affected lawyer and the successor lawyer is essential to memorialize the arrangement and designate the duties and responsibilities of the successor lawyer. At a minimum the agreement should authorize and direct the successor lawyer to promptly inventory and promptly review the client files (within 24-48 hours after death or disability) and determine those matters that need immediate protective action. Other key provisions in the written agreement include:

- Appointment of the successor lawyer with the legal authorization to undertake and accomplish all the actions contemplated by the agreement. The appointment will become effective only upon the affected lawyer's death or disability. (approval is not required by Supreme Court of Ohio rules);
- The steps necessary for the successor lawyer to be notified by the affected lawyer's family or personal representative in the event of the affected lawyer's death or disability;

- A provision concerning confidentiality to authorize the successor lawyer to review and inventory client files; inclusion of a confidentiality provision furthers support the implied disclosure authorized by Prof.Cond.R. 1.6(a);
- Authority to carry out immediate protective action on behalf of clients including communicating with courts and opposing counsel;
- Authority to notify clients of the death or disability of the affected lawyer (a draft letter can be prepared in advance for the successor lawyer to utilize for this purpose);
- Authority for the successor lawyer to access and serve as a signatory on the law practice's operating account and IOLTA during disability or in the event of death;
- Authority to assume possession of client files for the purposes of inventorying and reviewing the files;
- Any compensation that will be paid or costs reimbursed to the successor lawyer by the affected lawyer's estate or practice;
- Indemnification of the successor lawyer by the practice or the estate;
- Termination of the agreement.

Other provisions in the written agreement may include:

- Winding down the business affairs of the law practice, including paying business expenses, collecting outstanding fees, terminating malpractice insurance, and purchasing a tail policy;

- Informing the Office of Disciplinary Counsel or local bar association where the affected lawyer's closed files and or original documents will be stored and the name, address, and phone number of a person able to retrieve the files.

## How Are Clients Notified?

### *Client Notification of the Succession Plan*

At the outset of any client representation, the affected lawyer should notify clients that the lawyer has arranged for a successor lawyer to transition the practice in the event of death or disability. The affected lawyer should indicate in the initial fee or retainer agreement that a successor lawyer has been designated who will undertake immediate protective action until new counsel is retained by the client. Immediate protective action undertaken by the successor lawyer should be explained to the client so the client is aware of what type of action may be taken on his or her behalf. The affected lawyer should obtain the advance written consent from each client to the limited representation by the successor.

### *Notification Upon Implementation of the Plan*

Upon completing a review and inventory of the affected lawyer's closed and active client files, the successor lawyer should promptly contact each active client of the affected lawyer to notify him or her of the incapacity of the lawyer. The written notification to clients from the successor lawyer should contain at a minimum:

- The status of the active client matter and any pending deadlines or time limitations;
- An accounting of any funds or property held in trust;

- The status of any outstanding fees owed by the client;
- A request for specific instructions from the client as to the disposition of the file. Prof.Cond.R. 1.15(d). The options should include ❶ directing that the file be sent to a new lawyer, ❷ advising the client how to retrieve the file, or ❸ asking the successor lawyer for assistance in obtaining new counsel.

While conducting the inventory of client files and reviewing the law firm calendar, the successor lawyer may encounter situations where immediate protective action should take precedence over notifying the client of their lawyer's death and requesting the client's directions about file retrieval or transfer.

***For example: A motion hearing scheduled 24 hours after death of the affected lawyer would necessitate the successor lawyer preparing for and attending the hearing before any formal notification is initiated.***

## What About Potential Conflicts?

The written agreement with a successor lawyer should delineate whether the successor lawyer will be representing ❶ the interests of the affected lawyer, or ❷ represent some or all of the clients, or ❸ neither.

The possibility of a conflict of interest exists depending upon how the "client" is identified in the written agreement with the affected lawyer. If the successor lawyer is designated in the written agreement as representing the affected lawyer, the successor lawyer may not inform a client about potential legal malpractice or ethical violations discovered during the representation, without the affected lawyer's prior and informed written consent. Prof.Cond.R. 1.6. On the other hand, if

the lawyer is permitted to represent the affected lawyer's clients, he or she may have an ethical obligation to inform a client of errors or omissions discovered during the inventorying of the file. See *"Handling an Attorney's Death, Disability or Disappearance,"* Shaw, Betty M., *Minnesota Lawyer* (October 8, 2001).

Because the successor lawyer will have access to confidential client information during the file inventory process, the written agreement should direct the successor lawyer to check for conflicts of interest before beginning the file inventory. This can be accomplished by comparing a list of the affected lawyer's clients with those of the successor lawyer.

If the successor lawyer determines that a conflict of interest exists, another lawyer, named by the affected lawyer in advance, should review the file.

In addition, the designated successor lawyer and affected lawyer should periodically review their respective active client matters to determine obvious conflicts that would require the designation of another lawyer to review certain client files.

## ***Solicitation of Affected Lawyer's Clients***

If permitted by the written agreement, representation of the affected lawyer's clients should commence only after the former client has approached the successor lawyer about representation. A successor lawyer should not actively or formally solicit the former clients of the affected lawyer. Prof.Cond.R. 7.3. However, the successor lawyer is free to respond to inquiries from clients regarding representation, absent any conflicts.

## Keys to Succession Planning: Good Law Office Management Practices

Several law office management best practices will assist the successor lawyer, former office staff, and the affected lawyer's family in transitioning clients to new lawyers and closing the office. Lawyers are encouraged to follow these best practices in the event of death, disability or other events that temporarily may interrupt a law practice:

- Creating and maintaining an office procedures manual used by legal and administrative staff (see below);
- Maintaining a calendaring system with all court and filing deadlines and follow-up dates;
- Thoroughly documenting client files;
- Maintaining current time and billing records;
- Routinely backing up all digital records of the practice;
- Properly maintaining IOLTA records and ledgers;
- Following the firm's client file retention and destruction policy. [Client File Retention Guide](#).

Ohio lawyers can participate in succession planning programs currently offered by the Columbus Bar Association or the Cleveland Metropolitan Bar Association, even if they are not association members. Both bar associations allow lawyers to designate a successor lawyer either electronically or in writing. The services are without charge and assist clients or other lawyers in ascertaining the existence and identify of a successor lawyer.

## Should I Prepare an Office Procedures Manual?

As part of the preparation for the implementation of a succession plan, every lawyer should create and regularly maintain an office procedure manual. The manual will serve as a guide for a successor lawyer to run a practice temporarily, or to assist in its eventual closure. An office procedure manual should include documentation concerning:

- Determination of conflicts of interest;
- The use of the office calendaring system;
- How to generate a list of active client files, including client names, addresses, and phone numbers;
- Where and how client ledgers are maintained;
- How the open/active files are organized and where closed files, if any, are stored;
- The firm's client file retention and destruction policy;
- Log-in and password information for office computers, mobile devices, voicemail, cloud storage, billing systems, calendaring system, email (including server addresses and passwords), online banking, and other websites the law office relies upon on a daily basis;
- Time and billing procedures and software;
- The names and contact information for office personnel, financial institutions, accountants, landlords, vendors, and insurance agents/brokers.

## How Will the Successor Lawyer Access My IOLTA and Operating Accounts?

Advanced planning can avoid issues that may arise concerning the successor lawyer's need to access the trust accounts. Ohio does not provide a procedure by court rule for successor lawyers to petition the Supreme Court or other court for an order transferring a deceased lawyer's IOLTA to another lawyer for disbursement and account closing purposes. Likewise, neither the Board of Professional Conduct, Office of Disciplinary Counsel, nor certified grievance committees are authorized to issue any correspondence requesting that a successor lawyer be given access to an IOLTA and operating accounts.

Ethics authorities in some jurisdictions recommend having a second signatory on the IOLTA in the event of disability or death. However, the potential for client financial harm increases if multiple signatories are present on an IOLTA and consequently this method is not recommended.

The affected lawyer should contact his or her bank in advance to determine what documentation it will accept for transfer of the IOLTA and operating account to the successor lawyer. Methods of documentation that may be acceptable for transfer of accounts include ❶ a durable power of attorney, ❷ a copy of the written agreement between the affected lawyer and the successor lawyer, ❸ a probate court order, or ❹ pre-signed designation forms provided by the bank.

Pursuant to the written agreement, the successor lawyer should make every reasonable effort to attempt to identify clients who have funds in the trust account and contact those clients to return any funds to which they are entitled.

If funds remain in the IOLTA after distribution or a client cannot be located, the successor lawyer is required to transfer the remaining funds to the Ohio Department of Commerce, Division of Unclaimed Funds. R.C. 169.01(B)(1), 169.03(A)(1) and Adv. Op. 2008-3.

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