SUCCESSION PLANNING: PREPARING FOR THE UNTHINKABLE

Handbook

The State Bar of Arizona gratefully acknowledges the Washington State Bar Association's generous permission to use its publication *Planning Ahead Handbook* as the basis for this handbook. We also gratefully acknowledge the pioneering work done by the Oregon State Bar Professional Liability Fund in this area, and its publication, *Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death*, as the basis for the materials developed by the Washington State Bar.

This handbook was adapted from Washington's *Planning Ahead Handbook*. The Washington State Bar and the State Bar of Arizona adapted their materials from the Oregon State Bar Professional Liability Fund handbook *Planning Ahead: A Guide to Protecting Your Clients' Interests in the Even of Your Disability or Death*, Copyright 2013. All rights are reserved except that members of the State Bar of Arizona and other attorneys licensed in Arizona may use this material for assistance with their own law practice or to help another attorney close his or her office. This material may also be reproduced for classroom instruction or for use by a not-for-profit organization, provided that such use is for informational, non-commercial purposes only and any reproduction of the handbook or portion thereof acknowledges original publication of the handbook by the Oregon State Bar Professional Liability Fund and notes if the material was adapted with permission of the Oregon State Bar Professional Liability Fund.

These materials are intended for use and reference only by members of the State Bar of Arizona and are not intended to constitute legal advice. Each situation is different and those using these materials are advised to seek legal advice about their own personal circumstances and practices.

The forms provided with this handbook are intended for use and reference only by members of the State Bar of Arizona and are not intended to constitute legal advice. Members utilizing these forms should conduct their own inquiry as to the current state of the law and applicability to the issues addressed by these forms.

Publication of the State Bar of Arizona

SUCCESSION PLANNING
State Bar of Arizona

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Sample Forms may be found at:
https://www.azbar.org/professionaldevelopment/practice20/successionplanning/

Chapter 1

PREPARING FOR THE UNTHINKABLE

We do not like to think about unexpected events that could cause us to abruptly cease practicing law. However, events such as accidents, unexpected illnesses, and untimely death regularly occur. Each lawyer, whether working in a firm or as a solo practitioner, has an obligation to consider the impact on your clients should the unthinkable happen and plan to protect the interests of their clients. This handbook was prepared to help you start immediately to protect your interests and those of your clients.

A lawyer has a duty of competent representation pursuant to the Rules of Professional Conduct. See Rule 42, Ariz. R. S. Ct., ER 1.1, et seq. This includes making arrangements that will safeguard the client's interests (including the integrity of any trust moneys, confidentiality of information, and the continuing viability of the client's legal matter) in the event of the lawyer's death, disability, impairment, or incapacity. ABA Formal Op.92-369. The majority of malpractice carriers require that the lawyers they insure make arrangements for the appropriate disposition of client matters in the event of the insured lawyer's death or disability. The State Bar of Arizona (SBA) is offering this handbook to assist you in planning for an orderly transfer of responsibility for your clients' affairs in the event of a crisis in your life.

An additional resource, which is always available to you, is the State Bar's practice management program, Practice 2.0. (For information, go to http://www.azbar.org/professionaldevelopment/practice20 or contact Practice 2.0 at 602-340-7332.) In planning for the unthinkable, you want to make sure that the client will promptly receive his or her file so that the client's rights are not jeopardized and so that the client can take it to the new attorney. You must also arrange for any moneys in the client's trust account to be promptly returned.

Terminology

The term "Successor Counsel" is used throughout this handbook. It refers to the lawyer(s) you have made arrangements with to close down your practice or to handle it while you are incapacitated.

The term "Authorized Signer" is used to refer to the person you have authorized as a signer on your lawyer trust account.

The term "Affected Attorney" refers to you, your estate, or your personal representative.

Implementing the Plan

First, you must find one or more attorneys to close your practice in the event of your death, disability, impairment, or incapacity.

The arrangements you make for closure of your office, or the temporary takeover of your practice, should include a signed consent form authorizing one or more Successor Counsel(s) to contact your clients for instructions on transferring their files, authorization to obtain extensions of time in litigation matters when needed, and authorization to provide all relevant people with notice of closure of your practice.

The agreement should also include provisions that give the Successor Counsel authority to: wind down your financial affairs; provide your clients with a final accounting and statement; collect fees on your behalf; and liquidate or sell your practice. Arrangements for payment by you or your estate to the Successor Counsel for services rendered can also be included in the agreement.

At the outset of your negotiations with the Successor Counsel, it is important for the two of you to nail down the scope of the Successor Counsel's duties to both you and your clients. If the Successor Counsel is representing your interests as your attorney, he or she may be prohibited from also representing your clients on some, or possibly all, matters. Under this arrangement, the Successor Counsel would owe his or her fiduciary obligations to you. For example, the Successor Counsel could not inform a client of your legal malpractice or ethical violations, unless you consented in writing. However, if the Successor Counsel is expected to represent your clients, he or she may have an ethical obligation to inform the client of your errors or omissions.

In either event, the Successor Counsel must be aware of conflict of interest issues and must check for conflicts if he or she (1) is providing legal services to your clients or (2) must review confidential file information to assist in transferring clients' files. Because conflicts of interest may prevent the Successor Counsel from carrying out your plan, it is wise to have more than one Successor Counsel. If the Successor Counsel is going to review confidential client information, the conflicts check must occur before the file review. For assistance in determining whether or not the Successor Counsel has a conflict of interest, you or they may wish to consult private counsel or may consult the SBA's Ethics Hotline at 602-340-7284. Calls to the Ethics Hotline must concern the inquiring lawyer's own prospective ethical conduct and are confidential.

Not only do you need to have at least one Successor Counsel, you also need to recruit an Authorized Signer who can sign on your trust account under these circumstances. This may be someone other than the Successor Counsel. Using someone other than the Successor Counsel will provide for checks and balances, since two people will have access to your records and information. It also avoids the potential for any conflicting fiduciary duties that could arise if the trust account does not balance.

This planning process, which is intended to protect your clients' interests in the event of your disability or death, involves some difficult decisions, including: the type of

access that the Successor Counsel and/or Authorized Signer will have; the conditions under which they will have access; and who will determine when those conditions are met. These are difficult decisions and should be made only after thoughtful consideration.

For example, if you are incapacitated, you may not be able to give consent to someone to assist you. Have you determined under what circumstances you want someone to assert the right to help you or take over your practice? Who decides that you are incapacitated and what criteria will be used?

One suggested approach is to give the Successor Counsel and/or the Authorized Signer access during a specific time period or after a specific event and to allow the Successor Counsel and/or the Authorized Signer to determine whether the contingency has occurred. Another approach is to have someone else (such as a spouse, trusted friend, or family member) keep the applicable documents (such as a limited power of attorney for the Successor Counsel and/or the Authorized Signer) until he or she determines that the specific event has occurred. A third approach is to provide the Successor Counsel and/or Authorized Signer with access to records and accounts at all times.

If you want the Successor Counsel and/or the Authorized Signer to have access to your accounts contingent on a specific event or during a particular time period, you have to decide how you are going to document the agreement. You may wish to consult the SBA's Trust Account Manual on this issue (*see*, https://www.azbar.org/professionaldevelopment/practice20/trustaccounting/) Depending on where you live and the bank you use, some approaches may work better than others. Some banks require only a letter signed by both parties granting authorization to sign on the account.

You and the Successor Counsel and/or the Authorized Signer may want to sign a limited power of attorney. Most banks prefer a power of attorney. Signing a separate limited power of attorney increases the likelihood that the bank will honor the agreement. It also provides you and the Successor Counsel and/or the Authorized Signer with a document limited to bank business that can be given to the bank. (The bank does not need to know all the terms and conditions of the agreement between you and the Successor Counsel and/or the Authorized Signer.)

If you choose this approach, consult the manager of your bank. When you do, be aware that the power of attorney forms *provided by the bank* are generally unconditional authorizations to sign on your account and may include an agreement to indemnify the bank. Get written confirmation that the bank will honor *your* limited power of attorney or other written agreement. Otherwise, you may think you have taken all necessary steps to allow access to your accounts, yet when the time comes the bank may not allow the access you intended.

If the access is going to be contingent, you may want to have someone (such as your spouse, family member, personal representative, or trusted friend) to hold the power of attorney until the contingency occurs. This can be documented in a letter of understanding, signed by you and the trusted friend or family member. Then, when the event occurs, the trusted friend or family member provides the Successor Counsel and/or the Authorized

Signer with the power of attorney.

If the authorization will be contingent on an event or for a limited duration, the terms must be specific and the agreement should state how to determine whether the event has taken place. For example, are the Successor Counsel and/or the Authorized Signer authorized to sign on your accounts only after obtaining a letter from a physician that you re disabled or incapacitated? Is it when the Successor Counsel and/or the Authorized Signer, based on reasonable belief, says so? Is it for a specific period of time -- for example, a period during which you are on vacation? You and the Successor Counsel and /or the Authorized Signer must review the specific terms and be comfortable with them.

The same issues apply if you choose to have a family member or friend hold a general power of attorney until the events or contingency occurs. All parties need to know what to do and when to do it. Likewise, to avoid problems with the bank, the terms should be specific, and it must be easy for the bank to determine whether the terms are met.

Another approach is to allow the Successor Counsel and/or the Authorized Signer access at all times. With respect to your bank accounts, this approach requires going to the bank and having the Successor Counsel and/or Authorized Signer sign the appropriate cards and paperwork. When the Successor Counsel and/or Authorized Signer are authorized to sign on your account, he or she has complete access to the account. This is an easy approach that allows the Successor Counsel and/or Authorized Signer to carry out office business even if you are just unexpectedly delayed from vacation. Adding someone as signer on your accounts allows him or her to write checks, withdraw money, or close the account at any time, even if you are not dead, disabled, impaired, or otherwise unable to conduct your business affairs. Under this arrangement, you cannot control the signer's access. These risks make it an extremely important decision. If you choose to give another person full access to your accounts, it had better be an attorney and your choice of signer is crucial to the protection of your clients' interests, as well as your own. Remember, you are responsible for your client's funds.

See Forms 4.1, 4.2, 4.3, and 4.4.

Access to the Trust Account

As mentioned above, when arranging to have someone take over or wind down your financial affairs, you should also consider whether you want someone to have access to your trust account. If you do not make arrangements to allow someone access to the trust account, your clients' money will remain in the trust account until a court orders access and/or grants a conservatorship. For example, if you become physically, mentally, or emotionally unable to conduct your law practice and no access arrangements were made, your clients' money will most likely remain in your trust account until the court takes jurisdiction over your practice and your accounts. In many instances, the client needs the money he or she has on deposit in the lawyer's trust account to hire a new lawyer, and the delay puts the client in a difficult position. This is likely to prompt ethics charges, Client Protection Fund claims, malpractice complaints, or other civil suits.

On the other hand, as emphasized above, allowing access to your trust account is a serious matter. You must give careful consideration to whom you give access and under what circumstances. If someone has access to your trust account and that person misappropriates money, your clients will suffer damages and you will be held responsible.

There are no easy solutions to this problem, and there is no way to know absolutely whether you are making the right choice. There are many important decisions to make. Each person must look at the options available to him or her, weigh the relative risks, and make the best choices he or she can.

Adding a Successor Counsel or an Authorized Signer to your general or lawyer trust account is permitted regardless of the form of entity you use for practicing law.

Client Notification

Once you have made arrangements with a Successor Counsel and/or Authorized Signer, the next step is to provide your clients with information about your plan. The easiest way to do this is to include the information in your fee agreements and engagement letters. This provides clients with information about your arrangements and gives them an opportunity to object. Your client's signature on a fee agreement provides written authorization for the Successor Counsel to proceed on the client's behalf, if necessary. See Form 4.5. In addition, you will find a sample of suggested language for inclusion in your fee agreement or engagement letter on Practice 2.0's portion of the SBA website, http://www.azbar.org/professionaldevelopment/practice20/forms .

Other Steps That Pay Off

You can take a number of steps while you are still practicing to make the process of closing your office smooth and inexpensive. These steps include: (1) making sure that your office procedures manual explains how to produce a list of client names and addresses for open files; (2) keeping all deadlines and follow-up dates on your calendaring system; (3) thoroughly documenting client files; (4) keeping your time and billing records up to date; (5) familiarizing your Successor Counsel and/or Authorized Signer with your office systems; (6) renewing your written agreement with the Successor Counsel and/or Authorized Signer each year; and (7) making sure you do not keep clients' original documents, such as wills or other estate plans. See Form 4.14.

If your office is in good order, the Successor Counsel will not have to charge more than a minimum of fees for closing the practice. Your law office will then be an asset that can be sold and the proceeds remitted to you or your estate. An organized law practice is a valuable asset. In contrast, a disorganized practice requires a large investment of time and money and is less marketable.

Death of a Sole Practitioner: Special Considerations

If you authorize another lawyer to administer your practice in the event of death,

disability, impairment, or incapacity, that authority terminates when you die. The personal representative of your estate has the legal authority to bring your practice to a close. He or she must be told about your arrangement with the Successor Counsel and/or Authorized Signer and about your desire to have the Successor Counsel and/or Authorized Signer carry out the duties of your agreement. The personal representative can then authorize the Successor Counsel and/or Authorized Signer to proceed.

It is imperative that you have an up-to-date will nominating a personal representative (and alternates if the first nominee cannot or will not serve) so that probate proceedings can begin promptly and the personal representative can be appointed without delay. If you have no will, there may be a dispute among family members and others as to who should be appointed as personal representative. A will can provide that the personal representative shall serve without bond. Absent such a provision, a relatively expensive fiduciary bond will have to be obtained before the personal representative is authorized to act. See Form 4.4.

For many sole practitioners, the law practice will be the only asset subject to probate. Other property will likely pass outside probate to a surviving joint tenant, usually the spouse. This means that unless you keep enough cash in your law practice bank account, there may not be adequate funds to retain the Successor Counsel and/or Authorized Signer or to continue to pay your clerical staff, rent, and other expenses during the transition period. It will take some time to generate statements for your legal services and to collect the accounts receivable. Your accounts receivable may not be an adequate source of cash during the time it takes to close your practice. Your Successor Counsel and/or Authorized Signer may be unable to advance expenses or may be unwilling to serve without pay. One solution to this problem is to maintain a small insurance policy, with your estate as the beneficiary. Alternatively, you surviving spouse or other family members can be named as beneficiary, with instructions to lend the funds to the estate, if needed.

You should check the current law to determine the extent of the personal representative's power to continue a decedent's business to preserve its value, to sell or wind down the business, and to hire professionals to help administer the estate. However, for the personal representative's protection, you may want to include language in your will that expressly authorizes that person to arrange for closure of your law practice. The appropriate language will depend on the nature of the practice and the arrangements you make ahead of time. For an instructive and detailed will for a sole practitioner, see Thomas G. Bousquet, *Retirement of a Sole Practitioner's Law Practice*, 29 LAW ECONOMICS & MANAGEMENT 428 (1989).

It is important to allocate sufficient funds to pay an Successor Counsel and/or Authorized Signer and necessary secretarial staff in the event of disability, incapacity, or impairment. To provide funds for these services, consider maintaining both a disability insurance policy and a life insurance policy in amounts sufficient to cover these projected office closure expenses in the event of your unanticipated disability, impairment, incapacity, or death.

Start Now

We encourage you to immediately: select an attorney to assist you; follow the procedures outlined in this handbook; call Practice 2.0 for assistance; and forward the name and contact information of your Successor Counsel to a designated personal representative for your estate. See Forms 4.1, 4.2, 4.4, 4.5, and 4.14.

This is something you can do now, at little or no expense, to plan for your future and protect your assets and your clients. Don't put it off – read this handbook and start the process today.

Chapter 2

WHAT IF?
ANSWERS TO FREQUENTLY ASKED QUESTIONS

If you are an attorney planning to close your office (the Affected Attorney) or if you are an attorney considering helping a friend or colleague close his or her practice (the Successor Counsel), in the event of death or disability, there are numerous issues to resolve. The first may well be drafting the agreement that you should both sign. How you structure your agreement will determine what the Successor Counsel must do if the Successor Counsel finds: (1) errors in the files, such as missed time limitations; (2) errors in the Affected Attorney's trust account; or (3) misappropriation of client funds.

Discussing these issues at the beginning of the relationship with your friend or colleague will help to avoid misunderstandings later when the Successor Counsel interacts with the Affected Attorney's former clients. If these issues are not discussed, the Affected Attorney and the Successor Counsel may be surprised to find that the Successor Counsel has an obligation to inform the Affected Attorney's clients about a potential malpractice claim or report an ethical violation, *see* ER 8.3.

The best way to avoid these problems, as noted above, is for the Affected Attorney and the Successor Counsel to have a written agreement and, when applicable, for the Successor Counsel to have a written agreement with the Affected Attorney's former clients.

If there is no written agreement clarifying the obligations and relationships, a Successor Counsel may find that the Affected Attorney believes that the Successor Counsel is representing the Affected Attorney's interests. At the same time, the former clients of the Affected Attorney may also believe that the Successor Counsel is representing their interests. It is important to keep in mind that an attorney-client relationship can be established by the reasonable belief of a would-be client. *See, e.g., In re Petrie,* 154 Ariz. 295, 742 P.2d 796 (1987).

This section reviews some of these issues and the various arrangements that the Affected Attorney and the Successor Counsel can make. All of these frequently asked questions, **except #9**, are presented as if the Successor Counsel is posing the questions.

1. Must I notify the former clients of the Affected Attorney if I discover a potential malpractice claim against the Affected Attorney?

The answer is largely determined by the agreement that you have with the Affected Attorney and the Affected Attorney's former clients. If you do not have an attorney-client relationship with the Affected Attorney, and you are the new lawyer for the Affected Attorney's former clients, you must inform your client (the Affected Attorney's former client) of the error, and advise him or her to submit a claim to the professional malpractice insurance carrier of the Affected Attorney, unless the scope of your representation of the client excludes actions against the Affected Attorney. If you want to limit the scope of your representation, do so in writing and advise your clients to get independent advice on the issues.

In fact, as a general rule, always tell the Affected Attorney's former clients that they have the right to seek a second opinion. You should also consider the requirements of ER 8.3, that make mandatory reporting to the State Bar (the "appropriate professional authority") if you know of conduct that "raises a substantial question as to (that) attorney's honesty, trustworthiness or fitness as a lawyer in other respects.":

If you are the Affected Attorney's lawyer, and not the lawyer for his or her former clients, you should discuss the error with the Affected Attorney and review his or her obligation to inform the client and malpractice insurance carrier of the error. Under these circumstances, you would not be obligated to inform the Affected Attorney's client of the error.

However, you must be careful to avoid making any misrepresentations. *See, e.g.,* ERs 4.1 and 8.4(c). This situation could arise if the Affected Attorney refuses to fulfill his or her obligation to inform the client – and also instructs you not to tell the client. Thus, for example, if the Affected Attorney had previously told the client a complaint had been filed, but the complaint had not actually been filed, you should not say or do anything that would lead the client to believe the complaint had been filed. In any event, keep in mind that the Affected Attorney's malpractice insurance carrier should be notified as soon as you become aware of any error or omission that may be a potential malpractice claim in order to prevent denial of coverage under the policy due to a "late notice" provision.

If you are the Affected Attorney's lawyer, an alternative arrangement you can make with the Affected Attorney is that you may inform the Affected Attorney's former clients of any malpractice errors. This would not be permission to represent the former clients on malpractice actions against the Affected Attorney. Rather, it would authorize you to inform the Affected Attorney's former clients that a potential error exists and that they should seek independent counsel. If you undertake to represent the Affected Attorney's former clients while acting as the Successor Counsel, avoiding conflicts will be problematic at best.

See Forms 4.1 and 4.2.

2. I know sensitive information about the Affected Attorney. The Affected Attorney's former client is asking questions. What information can I give the Affected Attorney's former client?

Again, the answer depends on your relationship with the Affected Attorney and the Affected Attorney's clients. If you are the Affected Attorney's lawyer, you would be limited to disclosing any information that the Affected Attorney authorizes you to disclose. You would, however, want to make clear to the Affected Attorney's clients that you do not represent them and that they should seek independent counsel. If the Affected Attorney suffers from a condition of a sensitive nature and does not want you to disclose this information to the client, you cannot do so.

See Forms 4.1 and 4.2.

3. Because the Affected Attorney is no longer practicing law, does the Affected Attorney have malpractice coverage?

This depends on the type of coverage the Affected Attorney had. Most malpractice

policies include a short automatic extended reporting period of 60 or 90 days, which provides the opportunity to report known or potential malpractice claims when a policy ends and will not be renewed. In addition, most malpractice policies provide options to purchase an extended reporting period endorsement for longer periods of time (often called a tail). These extended reporting period endorsements do not provide ongoing coverage for new errors, but they do provide the opportunity

to lock in coverage under the expiring policy for errors that surface after the end of the policy, but within the extended reporting endorsement timeframe. This may pose a significant conflict for the Successor Counsel, unless there is a provision in the agreement between the attorneys that allows the Successor Counsel to alert the former client in this circumstance, because otherwise the former client will not know of the error within the reporting period.

4. What protection will I have under the Affected Attorney's malpractice insurance coverage if I participate in the closing or sale of the office?

You must check the definition of "Insured" in the malpractice policy form. Most policies define "Insured" as both the firm and the individual lawyers employed by or affiliated with the firm. This typically is broadened to include past employees and "of counsel" attorneys. In addition, most lawyers' professional liability policies specifically provide coverage for the "estate, heirs, executors, trustees in bankruptcy and legal representatives" of the Insured as additional insureds under the policy. However, the best insurance is the Successor Counsel's own malpractice policy.

5. In addition to transferring files and helping to close the Affected Attorney's practice, I want to represent the Affected Attorney's former clients. Am I permitted to do so?

Whether you are permitted to represent the former clients of the Affected Attorney depends on: (1) whether the clients want you to represent them; and (2) who else you represent.

If you are representing the Affected Attorney, you are unable to represent the Affected Attorney's former clients on any matter in which there would be a conflict of interest with the Affected Attorney. This would include, but not be limited to, representing the Affected Attorney's former client on a malpractice claim, ethics complaint, or fee claim against the Affected Attorney.

If you do not represent the Affected Attorney, you are limited, as you would be with any new potential client, by conflicts of interest arising from your other cases and clients. You must check your client list for possible client conflicts before undertaking representation or reviewing confidential information of an Affected Attorney's former client. You should also keep in mind that you may have a conflict of interest based on your own personal interest. You should review the ERs pertinent to conflicts in making this assessment, much as you would with any new potential client. *See*, ERs 1.7 – 1.13.

Even if a conflict check reveals that you are permitted to represent the client, you might be wise to refer the case. A referral is advisable if the matter is outside your area of expertise, or if you do not have adequate time, financial resources, or staff to handle the case. In addition, if the Affected Attorney is a friend, bringing a legal malpractice claim or fee claim against him or her may make you vulnerable to the allegation that you didn't zealously advocate on behalf of

your new client. To avoid this potential exposure, you should provide the client with names of other attorneys, or refer the client to an appropriate lawyer referral service.

See Form 4.9.

6. What procedures should I follow for distributing the funds that are in the Affected Attorney's trust account?

If your review or the Authorized Signer's review of the Affected Attorney's trust account indicates that there may be conflicting claims to the funds in the account, must be sure the claimants to the funds have been notified. ER 1.15 requires that third parties with claims on the funds be notified in writing of the intent to distribute the funds and be given 90 days to take action to claim the funds. If an action is filed within 90 days, you must continue to hold the funds. Otherwise, you may distribute the funds but should discuss with the client the possibility that notwithstanding the distribution of those funds to the client they may still be liable to the third party for payment. If there is a clear shortfall in the available funds, you may need to involve the State Bar of Arizona as discussed below.

7. If there is an ethical violation, must I tell the Affected Attorney's former clients?

The answer depends on the relationships and the circumstances. If the Affected Attorney has violated an ethics rule and you are his or her lawyer, you are not obligated, and in many cases not permitted, to inform the Affected Attorney's former clients of such violations if your knowledge of the misconduct is confidential information of your client, the Affected Attorney. However, under the ethics rules, disclosure is mandatory to the extent you reasonably believe necessary to prevent death or substantial bodily harm (ER 1.6(b)(1). You may reveal information when your client intends to commit a crime and the information is necessary to prevent the crime, or to the extent you believe is reasonably necessary to prevent your client from committing a crime or fraud that is reasonably certain to result in substantial financial injury to the financial interests or property of another, or to mitigate or rectify substantial injury to the financial interests or property of another that has resulted or is reasonably certain to result from the client's commission of a crime or fraud. (ER 1.6(c), ER 1.6(d)(1) and (2). You may also reveal otherwise confidential information to the extent necessary to secure legal advice about your own compliance with the ethical rules (ER 1.6(d)(3)).

You may have other responsibilities as well. For example, if you discover that some of the client funds are not in the Affected Attorney's trust account as they should be, you, as the attorney for the Affected Attorney, should discuss this matter with the Affected Attorney and encourage the Affected Attorney to correct the shortfall. If the Affected Attorney does not correct the shortfall, and you believe the Affected Attorney's conduct violates the disciplinary rules, you should resign. *See* ER 1.2(d); 8.4(a); 8.4(c).

If you are the attorney for the Affected Attorney, and the Affected Attorney is deceased, you should contact the personal representative of the estate. If the Affected Attorney is alive but unable to function, you (or the Authorized Signer) may have to disburse the amounts that are available and inform the Affected Attorney's former clients that they have the right to seek legal advice.

If you are the Affected Attorney's lawyer, you should make certain that former clients of the Affected Attorney do not perceive you as their attorney. This may include informing them in writing that you do not represent them. *See* ER 4.3.

If you are not the attorney for the Affected Attorney, and you are not representing any of the former clients of the Affected Attorney, you may still have a fiduciary obligation (as an Authorized Signer on the trust account) to notify the clients of a shortfall in the trust account. You should also report any notice of a potential claim to the Affected Attorney's malpractice insurance carrier in order to preserve coverage under the Affected Attorney's malpractice insurance policy. Further, the reporting requirements of ER 8.3 would dictate that you notify the SBA of the shortfall notwithstanding the fact that any overdrafts will automatically be reported.

If you are the attorney for a former client of the Affected Attorney, you have an obligation as a fiduciary to inform the client of ethical violations by the Affected Attorney that are relevant to that client's interests. *See* ER 1.4. If you are a friend of the Affected Attorney, this is a particularly important issue.

You may wish to limit, *in advance,* the scope of your representation by informing your clients (the former clients of the Affected Attorney) that you do not intend to inform them about ethics violations, or potential ethics violations, of the Affected Attorney. A limited representation must be reasonable under the circumstances, and the clients must give informed consent, preferably in writing. ER 1.2(c). Because the client must give informed consent, you should be mindful of the definition of informed consent contained in ER 1.0(e). You should also advise the client, in writing, to seek independent representation on these issues and provide them sufficient time to do so before making a decision.

Nevertheless, there are situations in which such a limitation will not be reasonable and you will be obligated ethically and legally to inform your clients of an Affected Attorney's ethical violation, notwithstanding the agreement limiting the representation. For example, if you discover a shortfall in the trust account, you must inform the client about the shortfall and advise him or her of available remedies. These remedies may include pursuing the Affected Attorney for the shortfall, filing a claim with the Affected Attorney's malpractice insurance carrier, and filing a charge with the SBA's Lawyer Regulation Office.

See Forms 4.1 and 4.2.

8. If the Affected Attorney stole client funds, do I have exposure to professional discipline against me?

You will not be disciplined for stealing the money unless: (1) in some way you aided or abetted the Affected Attorney in the unethical conduct (ER 8.4(a)), or (2) the Affected Attorney was your client and you counseled or assisted him or her in such criminal or fraudulent conduct (ER 1.2(d)). Whether you have an obligation to inform the Affected Attorney's former clients and the SBA of the defalcation depends on your relationship with the Affected Attorney and with the Affected Attorney's former clients. (See #7 above.)

If you are the new attorney for a former client of the Affected Attorney, and you fail to advise the client of the Affected Attorney's ethical violations, you may be exposed to the

allegation that you have violated your ethical responsibilities to your new client.

9. I am doing succession planning, so I will be the Affected Attorney: What are the pros and cons of allowing someone to have access to my trust account? How do I make arrangements to give my Authorized Signer access?

The most important "pro" of authorizing someone to sign on your trust account is the convenience it provides for your clients. If you suddenly become unavailable or unable to continue your practice, an Authorized Signer is able to transfer money from your trust account to pay appropriate fees, disbursements, and costs, to provide your clients with settlement checks, and to refund unearned fees. If these arrangements are not made, the clients' money must remain in the trust account until a court allows access. This delay may leave your clients at a disadvantage, since settlement funds or unearned fees held in trust may be needed by them to hire a new lawyer.

On the other hand, the most important "con" of authorizing access is your inability to control the person who has been granted access. An Authorized Signer with unconditional access has the ability to write trust account checks, withdraw funds, or close the account at any time, even if you are not dead, disabled, impaired, or for some other reason unable to conduct your business affairs. It is very important to carefully choose the person you authorize as a signer, and when possible, to continue monitoring your accounts.

If you decide to have an Authorized Signer, you must decide if you want to give: (a) access only during a specific time period or when a specific event occurs (e.g., incapacity), or (b) access all the time.

10. The Affected Attorney wants to authorize me as a trust account signer. Am I permitted also to be the attorney for the Affected Attorney?

Not if there is a conflict of interest. As an Authorized Signer on the Affected Attorney's trust account, you would have a duty to properly account for the funds belonging to the Affected Attorney's former clients. This duty could conflict with your duty to the Affected Attorney if: (a) you were hired to represent him or her on issues related to the closure of his or her law practice, and (b) there were defalcations in the trust account. Because of this potential conflict of interest, it is probably best EITHER to choose to be an Authorized Signer OR to represent the Affected Attorney on issues related to the closure of his or her practice, but not both. (See #4 above.)

Chapter 3

CHECKLISTS

3.1 CHRONOLOGY OF CLOSING A LAW OFFICE AS A RESULT OF DEATH, DISABILITY, IMPAIRMENT, OR INCAPACITY

First Two Weeks

Check the calendar and active files to determine which items are urgent and/or scheduled for hearings, trials, depositions, court appearances, and so on.

Write to clients with active files, advising them that they need to retain new counsel. Your letter should inform them about time limitations and time frames important to their cases. The letter should explain how and where they can pick up copies of their files and should give a time deadline for doing this. See Forms 4.6 and 4.7.

Contact courts and opposing counsel immediately for files that require discovery or court appearances. Obtain resets of hearings or extensions which necessary. Confirm extensions when necessary.

For cases with pending court dates, depositions, or hearings, discuss with the clients how to proceed. When appropriate, request extensions, continuances, and resetting of hearing dates. Send written confirmations of these extensions, continuances, and resets to opposing counsel and your client.

For cases before administrative bodies and courts, obtain the clients' permission to submit a motion and order to withdraw as attorney of record.

Open and review all unopened mail. Review all mail that is not filed and match it to the appropriate files.

Look for an office procedure manual. Determine whether anyone has access to a list of clients with active files.

Within First Month

Arrange for clients to pick up their files; be mindful that in Arizona the file belongs to the client. *See, e.g., Arizona Ethics Opinions* 08-02 and 09-02, regarding obligations regarding client files. Decide whether it is necessary or advisable to make and retain copies of client files. All clients should either pick up their files (and sign a receipt acknowledging that they received them) or sign an authorization for you to release the files to their new attorneys. If a client is picking up the file, return original documents to the client.

Tell all clients where their closed files will be stored and whom they should contact to retrieve them. Remind clients of the retention schedule established by Affected Attorney, if applicable, or obtain clients' permission to destroy the files after approximately

10 years. If a closed file is to be stored by another attorney, get the client's permission to allow the attorney to store the file for you and provide the client with the attorney's name, address, and phone number.

If the Affected Attorney is a sole practitioner, ask the telephone company for a new phone number to be given out when the disconnected phone number is called. This eliminates the problem created when clients call the prior phone number and get a recording stating that the number has been disconnected.

Contact the Affected Attorney's Malpractice Insurance carrier and the Successor Counsel's excess carrier, if applicable, about extending reporting coverage.

3.2 CHECKLIST FOR LAWYERS PLANNING TO PROTECT CLIENTS' INTERESTS IN THE EVENT OF THE LAWYER'S DEATH, DISABILITY, IMPAIRMENT, OR INCAPACITY

These matters need to be attended to by a responsible attorney planning for death, disability, impairment of incapacity.

1. Use fee agreements that state you have arranged for a Successor Counsel to close your practice in the event of death, disability, impairment, or incapacity. An example of language you should incorporate into your fee agreement is available in the sample fee agreements available on the SBA website.

2. Have a thorough and up-to-date office procedure manual that includes information on:

   a. How to check for a conflict of interest;
   b. How to use the calendaring system;
   c. How to generate a list of active client files, including client names, addresses, and phone numbers;
   d. Where client ledgers are kept;
   e. How the open/active files are organized;
   f. How the closed files are organized and assigned numbers;
   g. Where the closed files are kept and how to access them;
   h. The office policy on keeping original client documents;
   i. Where original client documents are kept;
   j. Where the safe deposit box is located and how to access it;
   k. The bank name, address, account signers, and account numbers for all law office bank accounts;
   l. The location of all law office bank account records (trust and general);
   m. Where to find, or who knows about, the computer passwords;
   n. How to access your voice mail (or answering machine) and the access code numbers; and
   o. Where the post office or other mail service box is located and how to access it.

See generally Form 4.14.

3 Make sure all your file deadlines (including follow-up deadlines) are calendared.

4. Document your files.

5. Keep your time and billing records up-to-date.

6. Have a written agreement with an attorney who will close your practice (the "Successor Counsel") that outlines the responsibilities involved in closing your practice. Determine whether the Successor Counsel will also be your personal attorney. Choose a Successor Counsel who is sensitive to conflict-of-interest issues. See Forms 4.1 and 4.2.

7. If your written agreement authorizes the Successor Counsel to sign general account checks, follow the procedures required by your local bank. Decide whether you want to authorize access at all times, at specific times, or only on the happening of a specific event. In some instances, you and the Successor Counsel will have to sign bank forms authorizing the Successor Counsel to have access to your general account.

8. If your written agreement provides for an Authorized Signer for your trust account checks, follow the procedures required by your local bank. Decide whether you want to authorize access at all times, at specific times, or only on the happening of a specific event. In most instances, you and the Authorized Signer will have to sign bank forms providing for access to your trust account. Choose your Authorized Signer wisely; he or she will have access to your clients' funds.

9. Familiarize your Successor Counsel with your office systems and keep him or her apprised of office changes. See Form 4.14.

10. Introduce your Successor Counsel and/or Authorized Signer to your office staff. See Form 4.3. Make certain your staff knows where you keep the written agreement and how to contact the Successor Counsel and/or Authorized Signer if an emergency occurs before or after office hours. If you practice without regular staff, make sure that Successor Counsel and/or Authorized Signer knows whom to contact (the landlord, for example) to gain access to your office. See Form 4.14.

11. Inform your spouse or closest living relative and the personal representative of your estate of the existence of this agreement and how to contact the Successor Counsel and/or Authorized Signer. See Forms 4.3 and 4.4.

12. Review and renew your written agreement with your Successor Counsel and/or Authorized
Signer annually. See Forms 4.1 and 4.2.

13. Review your fee agreement each year to make sure that the name of your Successor Counsel is current. See Form 4.5.

14. Fill out the Law Office List of Contacts practice aid provided in this handbook and update it annually, or as changes are made. (Form 4.14). Make sure your Successor Counsel has a copy or knows where you keep it.

3.3 CHECKLIST FOR CLOSING YOUR OWN OFFICE

Materials and checklists are available on the SBA website at https://www.azbar.org/professionaldevelopment/practice20/packets/

1. Create a timeline and finalize as many active files as possible.

2. Write to clients with active files, advising them that you are unable to continue representing them and that they need to retain new counsel. Your letter should inform them about time limitations and time frames important to their cases. The letter should explain how and where they can pick up copies of their files and should give a time deadline for doing this.

3. For cases that have pending court dates, depositions, or hearings, discuss with the clients how to proceed. Where appropriate, request extensions, continuances, and resetting of hearing dates. Send written confirmations of these extensions, continuances, and resets to opposing counsel and to your client.

4. For cases before administrative bodies and courts, obtain the clients' permission to submit a motion and order to withdraw as attorney of record.

5. In cases where the client is obtaining a new attorney, be certain that a Substitution of Counsel is filed.

6. Pick an appropriate date and check to see if all cases either have a Motion and Order allowing your withdrawal as attorney of record or have a Substitution of Counsel filed with the court.

7. All clients should either pick up their files (and sign a receipt acknowledging that they received them) or sign an authorization for you to release the files to their new attorneys.

8. If you are a sole practitioner, ask the telephone company for a new phone number to be given out when your old phone number is called. This eliminates the problem created when clients call your phone number, get a recording stating that the number is disconnected, and do not know where else to turn for information.

FORMS referred to in this Handbook are located at:

https://azbar.org/for-legal-professionals/practice-tools-management/succession-planning/