

What Comes Next? Succession Planning for Civil Litigators

For lawyers with civil litigation practices, putting together a succession plan is akin to reading a book with alternative endings: The lawyer must anticipate a variety of outcomes, prepare for the unexpected, and determine who is best suited to help clients if the lawyer dies or otherwise is unable to bring matters to completion.

BY MATTHEW M. BEIER

When I was growing up, R.A. Montgomery's "Choose Your Own Adventure" (CYOA) books were always the first ones off the shelf from the school library. I have fond memories of reading the several different endings to *The Cave of Time* and *The Abominable Snowman*.¹ The concept of the series is simple: giving readers an interactive choice in the outcome of the story.

Engaging in succession planning for a lawyer is akin to a reader navigating a CYOA book. Both involve anticipating various outcomes and preparing for future scenarios. Both require strategic thinking and adaptability. While reading a CYOA book, readers explore different choices, learning to navigate uncertainty. In succession planning, a lawyer prepares for the firm's future, safeguarding its legacy and client trust.

Succession planning is a vital aspect of managing any law practice, and it holds particular significance in the civil-litigation practice area. The May 2024 issue of *Wisconsin Lawyer* contains a terrific article by Brent Hoeft, focusing on the nuts-and-bolts of putting a succession plan together, including a step-by-step guide.² In this article, I explore why it is important for civil litigators to engage in succession planning, including ethical duties and responsibilities to manage litigation, maintenance of client relationships, and the continuous provision of excellent legal services.

Ethical Duties Managing Litigation

The Wisconsin Rules of Professional Conduct provide guidelines for lawyers, including direction related to succession planning. A well-executed succession plan will help avoid legal

malpractice claims and grievances alleging ethical violations due to missed filing deadlines or hearings, delayed proceedings, poor communication, breaches of confidentiality, and other harms to clients.

SCR 20:1.1 – Competence. Lawyers must demonstrate the necessary skill, knowledge, and thoroughness in their practice. For succession planning, this involves ensuring that successor lawyers are adequately prepared and qualified to handle ongoing litigation competently. Typically, when Wisconsin Lawyers Mutual Insurance Co. (WILMIC)



Matthew M. Beier, U.W. 2000, is senior vice president at Wisconsin Lawyers Mutual Insurance Co., Madison. Access the digital article at www.wisbar.org/wl.
matt.beier@wilmic.com



addresses issues related to competence, it is in the context of lawyers “dabbling” to represent clients in unfamiliar practice areas, which WILMIC advises against.

It is a logical extension of WILMIC’s advice to lawyers to “stay in your lane” when it comes to selecting a lawyer to be successor counsel (sometimes referred to as an “outsider”).³ It is important for the litigation counsel to select another lawyer with litigation experience. The successor counsel needs to be someone whom litigation counsel trusts to assume the litigation counsel’s role or someone to whom the litigation counsel gives adequate direction and authority to find another to take their place in the event of death, disability, or unexpected absence from the practice of law.

SCR 20:1.3 – Diligence. As Hoefl indicated in his article, SCR 20:1.3 – Diligence, ABA Comment [5] requires sole practitioners to prepare a succession plan “to prevent neglect of client

matters in the event of a sole practitioner’s death or disability....”⁴ Lawyers are required to act with diligence and promptness in representing their clients. Effective succession planning ensures that client litigation matters are handled without delay or disruption, even during a lawyer’s unexpected departure or incapacity.

SCR 20:1.4 – Communication. A lawyer must promptly inform clients of decisions or circumstances surrounding their representation, including explanations, “to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” In succession planning, this includes discussing potential transitions to other attorneys and reassuring clients about the continuity of their representation. In other words, when a lawyer experiences an unexpected absence from practice, the lawyer should either have already informed the client of the plan for transition of representation or

instruct successor counsel how to accomplish the same.

SCR 20:1.6 – Confidential Information. Lawyers must protect client confidentiality and ensure that sensitive information is not disclosed without consent. The lawyer-client relationship is “fiduciary and confidential in character demanding a high degree of trust and confidence.”⁵ Moreover, a lawyer must not reveal information related to the litigation without the “informed consent”⁶ of the client. Succession planning should include measures to securely transfer client files and information to successor lawyers, maintaining confidentiality throughout the process. In the rapidly changing circumstances of civil litigation – especially if a trial date has been set – the litigation counsel might be tempted to divulge too much information to potential successor counsel without the permission of the client. It is important to have a plan regarding confidentiality, which can often be an extension of a lawyer’s or firm’s existing confidentiality policy, and the consent of the client for continued representation.

SCR 20:5.3(b) – Responsibilities Regarding Nonlawyer Assistance. Lawyers must ensure that employees who are not lawyers act in accordance with professional obligations. This rule highlights the importance of integrating staff into succession planning, ensuring they are prepared to support the transition and maintain compliance with ethical standards.

Maintaining Client Relationships

A well-executed succession plan is a must for civil litigation lawyers to minimize disruptions and to maintain the continuity of client relationships. Client trust is one of the pillars of a successful law practice, particularly in civil litigation in which clients often rely on lawyers to overcome stressful and contentious situations. There is no question that all legal work demands precision, consistent communication,



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and the trust of clients. Lawyers are paid to think of things that clients do not (or won't) think about.

Civil litigation involves long-term, difficult cases that require continued attention and detailed knowledge of related facts and applicable law. Unexpected absences because of illness, retirement, or career changes can disrupt the normal functioning of a law firm, leading to potential missteps in representation. The sudden absence of a lawyer without a succession plan can lead to a loss of client confidence, whereas a well-executed succession plan will reassure clients

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about transitions and introduce them to the successor counsel well in advance.

Another aspect of management of client relationships is protecting the clients. Legal malpractice insurance should be in place for the lawyer and the successor counsel. Lawyers should consider malpractice insurance that continues after the insured individual has ceased practice because of incapacity, retirement, or death.

Most malpractice insurance carriers, including WILMIC, provide "tail coverage" at no additional cost. Tail coverage refers to what is technically known as an "extended reporting period endorsement" (ERP). The ERP endorsement extends the time in which someone can make a claim. Having an ERP will help protect the client and preserve a lawyer's

assets and estate in the event of death or disability. The endorsement attaches to the most recent policy on which an attorney is identified as an insured.

Continuous Provision of High-Quality Legal Services

The preparation necessary to create and implement a succession plan for a civil litigator helps maintain a lawyer's workflow and avoids pitfalls that could negatively affect ongoing cases. Planning reassures clients that their interests are protected and that they will always have the level of service they expect. By

ensuring that there is always a capable lawyer ready to take over, the firm can continue its operations smoothly, regardless of unforeseen changes.

I would be remiss if I did not mention the most common error WILMIC sees in civil litigation – missed deadlines.⁷ Civil litigation includes many due dates and deadlines, and missing a deadline can have severe consequences, including the dismissal of a case or loss of legal rights. A comprehensive succession plan ensures that successor lawyers are aware of the posture and stage of ongoing cases and the crucial timelines involved. Preparing will help make it more likely that deadlines will be met, even in the litigation counsel's absence. The plan should include a detailed calendar and transition procedures to ensure

that successor lawyers have all the necessary information to manage cases effectively and keep them on track.

The last point in this article is, perhaps, best captured by the character Simon Wilder (played by Joe Pesci) in the movie *With Honors* (1994), when he is asked about the "genius" of the U.S. Constitution: "The genius of the Constitution is that it can always be changed. ... Because [the founding fathers] knew one thing that all great men should know: that they didn't know everything." Situations and circumstances change, creating different needs and challenges and requiring new and creative solutions. As a lawyer's circumstances and needs change, so should the lawyer's succession plan.

Conclusion

Succession planning for civil litigation lawyers is akin to navigating a "Choose Your Own Adventure" book, requiring foresight and adaptability. A solid succession plan ensures seamless transitions, confirms client trust, and maintains the continuity of excellent representation even during unexpected absences. Adhering to ethical standards, including competence, diligence, communication, and confidentiality, is crucial. Effective succession planning mitigates risks, preserves the firm's reputation, and reassures clients that their cases will be handled competently. Ultimately, a well-prepared succession plan secures a stable and ethical practice, ensuring the firm's and clients' futures are safeguarded against unforeseen changes. **WL**

ENDNOTES

¹For those of you with school-aged children wondering whether the books are still published, they are! You can find the classic titles and newer books at <https://www.cyoa.com/>.

²Brent Hoeft, *Spring Cleaning for Lawyers: Protect Your Clients Through Planning*, Wis. Law. (May 2024).

³The term "outsider" refers to "a lawyer who will be willing to step into your office and take over in case of an emergency." See State Bar of Wis., Solo/Small Firm & General Practice Section, *After All, You Are Only Human: The Solo Practitioner's Handbook for Disability and Death*, <https://www.wisbar.org/formembers/practicemanagement/Documents/After%20All,%20You%20Are%20Only%20Human%20Version%20131028.pdf>.

⁴Hoeft, *supra* note 2.

⁵Dean Dietrich & Edward Hannon, *A Lawyer's Fiduciary and Ethical Obligations When Exiting the Practice of Law, in Winding Down: Considerations for Exiting the Practice of Law*, WILMIC & State Bar of Wis. Senior Laws. Div., <https://wilmic.com/wp-content/uploads/2024/03/Succession-Planning-Guide.pdf>.

⁶SCR 20:1.0(f). "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

⁷Matthew Beier, *Whoosh! There Goes Another Deadline*, Wis. Law. (Oct. 2023). **WL**