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WSSFC 2024

Quality of Life/Ethics Track – Session 1

From Inceptions to Succession Series: Succession Planning

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About the Presenters...

Brian C. Anderson is Director of Claims for Wisconsin Lawyers Mutual Insurance Company, a professional liability insurance carrier in Madison, Wisconsin. He works with lawyers in resolving malpractice claims made against policyholders. He enjoys the challenge of helping place policyholders at ease during a time of stress, when they are facing a legal malpractice claim or grievance. Before joining Wisconsin Lawyers Mutual in 2003, Anderson practiced personal injury law and served as legal counsel for an insurance company in Madison. He began his career in general practice in Janesville. Mr. Anderson has written and lectured on legal topics relating to law firm risk management and legal malpractice. He earned his J.D. in 1992 from the University of Wisconsin-Madison Law School and his B.S. in 1989 also from the University of Wisconsin-Madison. He is a member of the State Bar of Wisconsin and the Wisconsin Defense Counsel. He serves on the content planning committee for the State Bar of Wisconsin's Solo/Small Firm Conference.

Brent J. Hoeft is the Practice Management Advisor for the State Bar of Wisconsin's Practice411™ Practice Management Program. He guides State Bar members on increasing law practice productivity and efficiency and advises on all things law practice management, including legal technology, information security and privacy practices, technology competence, employee management, policy and systems implementation, business development and marketing, and improving client relationship management. Prior to his time at the State Bar, Brent was in private practice since 2006. In 2010, he founded Hoeft Law LLC, Wisconsin's first completely web-based virtual law firm providing legal services in business law, cybersecurity & privacy, and estate planning. Brent also founded FirmLock Consulting, LLC, a cybersecurity behavior consulting firm focusing on assisting solo and small law firms with cybersecurity training, education, and implementation of policies and procedures to better protect law firm data. Brent graduated from Cleveland State University College of Law (J.D., 2006) and University of Wisconsin-Eau Claire (B.A., Psychology, 2002). He lives in the Madison area with his family, where he enjoys mountain biking, camping, photography, and all things Wisconsin sports.

From Inception to Succession Series: Succession Planning

State Bar of Wisconsin Solo and Small Firm Conference
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I. Planned Transition

A. Planned Retirement, leaving the practice of law to pursue another career.

1. Have a logical plan in place to accomplish a logical transition.

a. If possible, allow at least 2-3 years during which you can beef up your in-house risk management (especially client file) procedures, alert co-workers, prepare clients and phase down.

b. Limit or stop taking on new work (i.e., refer). If you can't reasonably expect to finish the retainer on your schedule, send it elsewhere.

c. Tell clients in time for them to make other arrangements. If you are selling your practice, introduce to buyer; if part of a firm, transition work to others. But remember: The client has the right to decide who does the work!

d. Get court approval to withdraw from litigation. (More than client approval is necessary.)

e. Make arrangements to return files to clients or keep secure and confidential.

2. Files need to be in good shape: ORGANIZE!

a. Ready for someone else to take over. Spell out current status; copy files for clients—with receipts acknowledging the file was delivered.

b. Calendar, client lists, accounts receivable and unbilled time records up-to-date and accessible.

c. Arrangements made for review, return to clients (can you find them?) And storage.

B. File Storage and Management

1. Lawyers have a tendency to keep everything, and regret it later when the reality of the responsibility and difficulties of storage become clear.

2. The client owns the file, not the lawyer.

a. The client selects the lawyer (even in firm breakup situations) and can control to which lawyer the file goes.

b. Even mid-stream, and even if the client decides to discontinue the relationship. Keeping a file until the lawyer is paid is not permitted in Wisconsin.

C. When Client Asks for a File, What Do You Turn Over?

If an attorney asks for your file, get written client consent first.

1. Easy decision (yes) as to documents given to the attorney by the client, documents obtained by attorney on behalf of client, and finished work product; and (no) where documents used to prepare a client document contain information in which another client has a right to non-disclosure (a trust done for another client used as a form) or "personal attorney work product" (conflicts checks, personnel assignments, lawyer's notes of personal impressions about the business of representing the client). The distinctions in the latter category are factually specific to each situation.

2. Harder decisions as to notes, internal memos, research, etc. Some states have said this is work product of the attorney and does not need to be turned over. But that is a minority view.

3. Majority view: Attorneys are mere agents or fiduciaries of a client and must give up everything in the file.

4. The U.S. Supreme Court has characterized the attorney/client relationship as principal-agent. Commentators guess that if this issue were raised there, the decision would be that the client is entitled to everything in the file.

5. In Wisconsin, a lawyer must turn over everything that's "reasonably practicable to protect a client's interests" [SCR 20:1.16(d)]. Especially for current matters, this goes a long way to getting him/her everything.

6. Who pays for copying the file?

    a. If file belongs to client (and it does), the attorney must pay to copy what he/she wants to retain. See Wisconsin ethics opinion E-82-7.

    b. Attorney can charge for copies which have been routinely sent to client during the course of the representation, "especially where client cannot show he lost these items."

7. What if the client asks for electronically stored documents?

    a. Client's right applies only to documents that are that client's property—not software programs that generate, store or allow manipulation.

    b. Same decision on who pays as for written documents (E-82-7).

D. Where, Why and How Long Should You Keep Client Files?

1. Where:

    Per SCR 20:1.15(b) (1), "a lawyer shall hold in trust, separate from the lawyer's own property, that property of clients and third parties that is in the lawyer's possession in connection with the representation."

    a. Consider: Files in car trunk parked on a public street; left open on a lawyer's desk overnight; in lawyer's damp basement in boxes.

b. Files should be safe, confidential, secure.

2. Why:

Your file is your best defense in a legal malpractice claim. Some clients think their lawyers are the best keeper of the clients' important papers.

3. How long?

a. OLR grievances have a 10-year "statute of repose." Statute of limitations for legal malpractice is six years but the discovery rule applies. The six years runs from the date the client discovered or should reasonably have discovered the error or omission. How long is the information helpful to the client?

b. Pay attention to what kind of file it is: estate planning files should be kept at least until the death of the testator, plus six years; files regarding minors must be kept at least six years after the period during which the minor could make a claim; litigation files could probably be destroyed sooner.

c. What to keep?

i) Some lawyers say keep everything. Today's realities probably make that impossible, so well-reasoned decisions must be made.

ii) Drafts are often important, especially if they contain notes about what you changed and why. (*Note*: If you keep drafts on disk, you may need to keep old software so you can continue to access as you upgrade your systems.)

iii) What kind of client do you have? You may need to keep more, longer, for more demanding/difficult clients.

iv) Try <u>not</u> to keep client originals: copy and return, with a cover letter or receipt kept in your file. This

makes cleaning out at the end of the representation easier and protects you against claims for lost documents.

v) If you have practiced with different law firms, both you and the old firm have an interest in the file in the event of a malpractice claim. Consider getting an agreement for reciprocal access in the event of later ethics or legal malpractice questions and consider an agreement on file destruction policy as well.

4. What happens to files when a lawyer leaves a firm, retires or a firm breaks up?

a. The "traditional" solution for a retiring lawyer has been to find a younger lawyer to take over the files.

b. Any plan for the files must both protect the clients' interests and confidentiality.

c. Both the lawyer who leaves and the firm retaining the files have joint responsibility to hold the files in a responsible manner. See E-98-1 and E-84-5.

d. If files are destroyed, the lawyer or firm should keep an index of the files destroyed; if files are returned to clients, keeping some kind of a receipt is a good idea.

5. What about files lost by an event (fire, flood) beyond lawyer's control?

a. Obligation is to "appropriately safeguard" client files, not to guarantee absolute safety.

b. What to do if files are destroyed:

i) Notify current clients as soon as possible.

ii) Figure out whether you can still provide diligent and competent representation. If you can't, must withdraw.

iii) For closed files, notify clients (or make a good faith effort to notify) as soon as reasonably possible.

E. Storing Electronic Client Files

1. Nothing in Wisconsin's Rules of Professional Conduct (Rules) prohibits lawyers from maintaining client files in electronic format.

a. Remember, though, a lawyer is required to protect and preserve open and closed client files, but the Rules do not prescribe the form in which client files must be preserved.

b. For example, the Rules permit a lawyer to keep a client's file, to the extent possible, in an electronic format from the start of a representation by scanning paper documents and retaining them in the firm's computer system, provided certain precautions are followed.

c. Similarly, and again provided that precautions are followed, the Rules permit a lawyer to convert closed client files to electronic format for ease of storage.

2. While electronic files are permissible under the Rules, it is important to keep in mind the following principle: *the file is the property of the client which the lawyer is obligated to safeguard and provide to the client upon request*.

3. Keeping in mind this principle, the following are suggested guidelines for lawyers who wish to keep client files in electronic format:

a. A lawyer must protect important original documents from destruction or loss.

- Lawyers must retain any original documents that have an economic, legal, evidentiary, personal or other value in their original form. Retaining an electronic or other non-original copy of such documents is not sufficient.

  Examples:

  - originals of wills,

- documents of title,
- birth records,
- some contracts, and
- personal photographs.

b. As to non-original documents or original documents having no value as originals, a lawyer who maintains such documents electronically may destroy those documents upon making a stored electronic copy.

- In many circumstances, this may mean that an entire client file (pleadings, correspondence, the lawyer's notes, e-mails, etc.) may exist solely in electronic form.

c. Lawyers who maintain electronic client files must be able to provide the file to the client in a format usable by the client.

d. A lawyer must take reasonable steps to protect the confidentiality of electronically stored client files. (SCR 20:1.1 and 20:1.6)

- Many clients today may wish, or even demand, to receive documents on disk or as e-mail attachments, but some clients may not have a computer or may prefer hard copies. A lawyer must have the necessary software and hardware to retrieve both open and closed files at the client's request.

- A lawyer updating computer systems must be certain that such an update will still allow the lawyer to access and produce closed electronically stored files.

F. Electronic File Storage on Third-Party or Internet Servers – Can I Do That?

1. No current Wisconsin Ethics Opinion offers specific guidance yet, but in Wisconsin Ethics Opinion E-00-03, the Ethics Committee of the State Bar of Wisconsin implicitly recognized that electronic client files may be appropriate.

2. In other states, ethics opinions have been issued in which lawyers providing an online file storage and retrieval system should:

a. take reasonable precautions to protect the security and confidentiality of client documents and information,

b. include reasonable measures such as firewalls, password protection schemes, encryption and ant-virus measures,

c. store client information on a server or device that is not exclusively in the lawyer's control, provided that the lawyer:

i. exercises reasonable care in the selection of the third party contractor, such that the contractor canbe reasonably relied upon to keep the information confidential; and

ii. has a reasonable expectation that the information will be kept confidential; and

iii. instructs and requires the third-party contractor to keep the information confidential and inaccessible.

3. A lawyer cannot, and is not required to, absolutely guarantee the confidentiality of client information, but…

a. must act competently to preserve that confidentiality

b. may store electronic client files on a computer system accessible via the internet or a server owned by a third party, provided that the lawyer uses reasonable care to ensure confidentiality.

4. Conclusion:

a. A lawyer may store client files, both open and closed, in electronic format, provided that the lawyer:

i. Retains, when necessary, important documents and other client property in their original format; and

ii. Maintains the necessary hardware and software to provide the file to the client in a format usable by the client; and

iii. Uses reasonable care to ensure the confidentiality of electronically stored client files, including ensuring that any security measures are reviewed periodically so that such measures are reasonably current.

5. In the cases where a third-party, such as an ISP, may be able to access the files, the lawyer should:

- Ensure that the third-party understands the lawyer's obligation to keep the information confidential; and

- Ensure that the third-party is itself obligated to keep the information confidential; and

- Ensure that reasonable measures are employed to preserve the confidentiality of the files.

6. What Steps Should a Lawyer Take Before Using a Third-Party Internet Service Provider?

   a. Be aware of the need to become knowledgeable about the rudiments of digital security or recognize the need for outside expertise.

      In order to fulfill the duty to act competently to preserve the confidentiality of client information when using a third-party service provider, the lawyer must at least know enough to ask the right questions. This does not mean that the lawyer must become a computer expert to review the security measures. Rather, the lawyer should make reasonable inquiry into security measures and be satisfied with the answers.

   b. Be mindful of the type of information being stored**.**

      Lawyers should remember that particularly sensitive client information may require extra security measures from a third-party provider.

   c. Be aware of the actual terms-of-service of the third-party provider.

      The way that the lawyer actually acts competently to preserve confidentiality when using a third-party service provider is by taking reasonable steps to ensure that the third-party service provider can and will act competently to preserve confidentiality.

      - This means that the lawyer should review the terms of

service contract (not just promotional materials) to make sure that the above criteria are satisfied. Consider things such as a vendor's ability to back up data adequately, a vendor's policies regarding ownership of stored data, ability to access the data using easily accessible software, policies for notifying customers of security breaches, data encryption.
If the terms of service contract cannot offer reasonable assurances with respect to the above referenced issues, that should serve as a red flag for that service provider.

d. Be aware of client notification/consent requirements:

There is currently no definitive answer as to whether a lawyer must obtain a client's informed consent to use a third-party provider for storage of client information. However, lawyers should at least consider placing an explanation of the fact that a lawyer uses such providers, that the lawyer believes such information to be secure and inviting the client to discuss any concerns with the lawyer.

Client notification: If a lawyer learns that a client's information has been accessed or acquired by an unauthorized user:

- Wisconsin SCR 20:1.4 requires that the lawyer notify the client of the breach and its foreseeable consequences, and

- Wis. Stat. 895.507 Wisconsin Data Breach Notification Law requires notice to a consumer of a security breach that is not encrypted or redacted. This includes social security numbers, driver's license or state ID numbers, and financial account information.

4. Arrange to clear out current trust accounts. Refund unearned fees; return client property.

5. Arrange to be around for a while during transition.

6. If you are a solo and haven't sold your practice, make arrangements with another attorney to close down your practice.

a. Draft an agreement clarifying responsibilities (dealing with tangible assets, client files, checking and trust accounts, insurance carriers, paying liabilities and collecting accounts) and establishing whether the lawyer coming in to close your practice is representing you—or your clients. A power of attorney may be helpful, as may some kind of signatory or authority on accounts.

b. Be aware this lawyer may have a responsibility to report legal malpractice or ethical violations.

c. Let your clients know—in advance—to assist with conflict questions and authority. (See E - 87- 9).

d. Prepare your Will that includes a draft of written instructions (and discuss, as appropriate), to your family, explaining who will be closing your practice, giving information about how to access information and explaining your duties, especially regarding file confidentiality and safe storage and with regard to the trust account. This prevents a non-lawyer family personal representative from exceeding authority.

e. Draft instructions to your staff. These people are the most likely to know where things are and facilitate the transition.

II. Unplanned Transition (Death or Disability)

A. Never too early to begin retirement planning; much of what is listed above applies here as well. Realize each day is an opportunity and no one has a guarantee of tomorrow.

B. Planning for the unexpected is important for all attorneys in private practice as doing so protects the rights of clients and their matters should the attorney unexpectedly become incapacitated, die, or is unavailable. For sole practitioners this is especially important as it provides the client with clarity that in the event that something unexpected happens to the solo attorney that there is a plan in place for a named attorney to protect that client's rights.

C. Duties to Clients and Best Practices: Ethical Rules and Considerations

1. SCR 20:1.1 Competence: Some jurisdictions are adding wellness provisions to their rules or comments. For example, California's rule 1.1(b) states that competence in legal services includes, "mental, emotional, and physical ability reasonably necessary for the performance of such service."

2. SCR 20:1.3 Diligence: ABA Comments [3] and [5] address the harm that can be caused by delay and suggest that the duty of diligence may require attorneys to make a succession plan.

    a. ABA Comment [3] (adopted by WI) recognizes ways in which a client's interests can be adversely affected by delay: "Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, ***unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.*** A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client." (emphasis added)

    b. ABA Comment [5] (adopted by WI) "***To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, 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.*** Cf. Model Rules for Lawyer Disciplinary Enforcement R. 28 (2002) (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer)"

3. SCR 20:1.4 Communication;

4. SCR 20:1.6 Confidentiality and 20:1.7 Conflicts;

5. SCR 20:1.16(d) Declining or Terminating Representation: Requires that files and unearned fees be turned over to the client at the end of the representation. ABA Comment [1] states that an attorney should not accept a representation they cannot ethically take to completion.

D. Designating a Successor and the Planning Process

1. Choose. Act. Register. Plan. Educate. (C.A.R.P.E.)

    a. Choose an attorney to act as your successor

        i. Decide who to ask. The more familiar your successor is with your law practice, areas of focus, and location in which you practice the better.

        ii. Needs to be someone you would trust to handle the affairs of your firm right now.

        iii. Review After All, You Are Only Human: The Solo Practitioner's Handbook for Disability and Death for insights into obligations, information on the succession process, and forms for recommended succession documents

    b. Ask the attorney about willingness to do so

        i. Approach the attorney to discuss the request and the reasons that you are choosing that particular attorney.

        ii. Offering to return the favor and be that attorney's successor in return is a great way to pay back the favor.

    c. Register the attorney with the State Bar of Wisconsin Successor Registry

        i. Once you have asked an attorney and they have agreed to take on this role should the need arise, the next step is to register that attorney with the State Bar of Wisconsin Succession Planning Registry.

        ii. Instructions (text and video can be found at Succession Resources (wisbar.org))

a. Select a potential attorney willing and able to serve as your successor and discuss with that attorney to determine their willingness to serve in that role.

b. Log in to your myStateBar account.

c. Navigate to the myProfile tab and click on the "Successor Registry" link which will take you to that section in your Advanced Profile.

d. Enter the name(s) of your successor(s).

e. Check the box to acknowledge that you've discussed the necessary details with your successor(s).

f. Scroll down and click the "Submit Advanced Profile" button to save changes.

iii. Once saved an email will be sent out to you and your successor attorney confirming that a successor attorney has been registered and recommended next steps and links to the After All, You Are Only Human: The Solo Practitioner's Handbook for Disability and Death.

d. Plan succession documents, access instructions, and client notices

i. The successor attorney will need to be able to access your computers and anywhere client files and documents, case deadlines, or information necessary to manage or wrap up the firm as the case may be.

ii. After All, You Are Only Human: The Solo Practitioner's Handbook for Disability and Death has many forms and recommendations for this process including:

a. Sample Will provision

b. Sample Springing Power of Attorney for Management of Law Practice

c. Sample Client file tracking charts

d. Checklist of obligations and tasks for successor attorney

e. Educate successor attorney, employees, clients, and family about plan.

i. Employees, Family, and Clients should be notified who the individual that will handle affairs of the law practice in the event of attorney's death, incapacity, or unavailability.

a. Clients should be notified in the representation agreement that a successor attorney has been registered with the State Bar and in the event of an unexpected event happening to their attorney, client should contact the State Bar

ii. Also should report to malpractice insurance provider (this is often a section on the application)

2. Duties of Successor Attorney

a. 2 main objectives

i. First is protect the clients (case, property, money)

a. Review and assess client files for urgency

b. Reasonable efforts to contact all clients to notify them of attorney death or incapacity and request client instructions

ii. Second is to manage the firm (if temporary incapacity or unavailability) or manage the winding down and closing of the firm in the event of attorney's death

iii. See SCR Chapter 12 Client Protection

E. Failing to Plan - Client Protection SCR Chap. 12.02 and 12.03 – Appointment of Trustee Attorney Client Protection Procedures in Cases involving Medical Incapacity, Death and Disappearance

1. Allows for the appointment of a trustee attorney when an attorney had become incapacitated, died, or disappeared and had no succession plan in place. For more information and forms see the Trustee Manual and also After All, You Are Only Human: The Solo Practitioner's Handbook for Disability and Death for more information

2. When might a Chap. 12 trustee be appropriate?

    a. When there is no succession plan;

    b. When there is a succession plan but the successor attorney believes court orders might be necessary to fulfill their duties;

    c. When a successor attorney wishes to be compensated for their time and costs; and

    d. When the successor attorney believes the process might benefit from court supervision for other reasons.

    e. Office of Lawyer Regulation, per 12.01 (if lawyer has had license revoked or suspended) (or interested person or attorney in case of sole practitioners (12.02(1)(a)) can file petition with circuit court).

    f. Upon clear, satisfactory and convincing evidence of medical incapacity of sole practitioner, **if no other satisfactory arrangements have been made**, local court can appoint trustee attorney (SCR 12.02(b))

    g. Sole practitioners; death or disappearance (12.03): Applies if no satisfactory arrangements have been made; becomes effective 21 days after abandonment or disappearance occurs. Procedure for appointing attorney to engage in "winding up" activities

3. General Duties of a Chapter 12 Trustee

    a. Protect the clients' rights, files, and property;

    b. Promptly notify all clients with open matters of appointment of trustee;

c. Deliver client files and property upon request;

d. Collect fees, costs, and expenses; return unearned fees; resolve disputes over fees;

e. Assist with the management, sale, termination, winding up, or suspension of firm; and

f. Comply with the applicable Rules of Professional Conduct.

III. "Tail" coverage, or "Extended Reporting Period" Endorsement

A. Professional liability policies are claims-made, not occurrence policies.

1. To have coverage, you must have an insurance policy in place when you first learn of the claim and give notice to the carrier.

2. It may take years for an attorney's error to be discovered. The critical issues for coverage are the dates a reasonably prudent lawyer should have know there could be a claim and written notice is given to the carrier. Both of these events must occur during the same policy period. If there is no policy in effect at that time, there is no coverage.

3. Most professional liability policies are one-year policies. These policies are written as new policies for each period of coverage. When a policy expires, no claims may be made under that policy unless you have an extended reporting period endorsement ("tail").

B. Tail insurance equals an extended reporting period endorsement.

1. Extended reporting may be a right you have under your policy or, in some policies, the tail is underwritten and not automatic. This distinction could be very important to a firm, especially after a large claim.

2. Needed when a firm breaks up or changes carrier (firm tail).

3. Also when a lawyer ceases practice for any reason: becomes a judge, changes careers, retires, dies (individual tail).

4. The effect is to extend the one-year reporting period for the length of the tail issued: e.g., 1, 3, 6 years or an unlimited time.

C. Tail coverage is an endorsement to an existing policy. You cannot purchase a tail separately or increase the limits for the tail. It must be purchased within the time limits set in the policy or the opportunity is lost.

D. If the policy contains a retroactive date for the firm or lawyer, that date will continue to apply. That is, there is no coverage under the tail endorsement for any legal work performed prior to the retroactive date of insurance.

E. A lawyer must continue to provide the carrier with written notice of any claim during the tail policy as soon as possible.

F. Important Questions to Consider

1. How can you reduce your risk of negligence in your legal representation if you are unable to practice?

2. Can a client who is harmed by your failure to plan for your own absence claim malpractice?

3. How can you make sure that client matters will not be neglected after you retire?

4. Can you retire with peace of mind concerning the legal service you provided during your years in practice? (Statute of limitation for legal malpractice is six years, however, the discovery rules apply.)

G. Why bother with insurance at all?

1. You consider yourself a professional and part of your professional duty is to protect your clients from your errors.

2. You want to protect your peace of mind and best performance.

3. Mistakes really do happen—even by excellent lawyers (the average lawyer will face three legal malpractice claims in a career).

IV. Conclusion

You consider yourself a professional. Part of your professional duty is to protect your clients from your errors. A professional liability policy will do that for you and it will give you peace of mind. Another important risk management tool is to make sure that you have a well thought out succession plan in place to protect your clients, prior to transitioning your law practice. A succession plan does not only represent good client service but is also a requirement under the Wisconsin Supreme Court Rules.

From Inception to Succession Series: Succession Planning

State Bar of Wisconsin Solo and Small Firm Conference

1

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Brian works with lawyers in resolving malpractice claims made against WILMIC policyholders. He enjoys the challenge of helping place policyholders at ease during a time of stress, when they are facing a legal malpractice claim or grievance.

Before joining Wisconsin Lawyers Mutual in 2003, Anderson practiced personal injury law and served as legal counsel for an insurance company in Madison. He began his career in general practice in Janesville.

Mr. Anderson has written and lectured on legal topics relating to law firm risk management and legal malpractice.

He earned his J.D. in 1992 from the University of Wisconsin-Madison Law School and his B.S. in 1989 also from the University of Wisconsin-Madison. He is a member of the State Bar of Wisconsin and the Wisconsin Defense Counsel. He serves on the content planning committee for the State Bar of Wisconsin's Solo/Small Firm Conference.

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Brent manages Practice411 assisting members in managing the business aspects of their law practice, implementing technology and security, and in making smart choices about everything impacting the day-to-day operations of a law practice.

Prior to joining the State Bar, Brent was in private practice for over 16 years and founded a consulting firm providing solo and small law firms with cybersecurity behavior training, education, policy, and day-to-day operational security best practices.

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Planned Transition

Unplanned Transition

Malpractice Insurance

- "Tail Coverage"

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Planned Retirement, leaving the practice of law to pursue another career

Logical Plan, for a logical transition

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5

Planned Retirement, leaving the practice of law to pursue another career

Files

- Organize
- File Storage and Management
  - Where, why, and for how long
  - What happens to files when a lawyer leaves a firm, retires or a firm breaks up?
  - Storing Electronic files

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6

Unplanned Transition
(Death, Disability, or Unavailability)

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What Happens When A Lawyer Passes Away Without A Plan?

- Attorney's loved ones are not equipped to wind up the practice.
- Clients are unsure how to proceed. They might not find out about their attorney's death until a scheduled hearing at which the attorney fails to appear. They may need money sitting in the deceased attorney's trust account to hire successor counsel. They might not be able to obtain their client file.
- Opposing counsel and courts are unsure how to proceed.
- Taken together, the death places undue stress on all those involved. The affected parties often call OLR, the Bar, and BBE, agencies that can offer little help.

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ETHICAL RESPONSIBILITIES

Attorneys licensed to practice law in Wisconsin are NOT required to create a succession plan, although it is mandatory in some jurisdictions (AZ, FL, IA, ME, MI, and under consideration in PA).

ABA Formal Ethics Op. 92-369: "Although there is no specifically applicable requirement of the rules of ethics, ***it is fairly to be inferred from the pertinent rules that lawyers should make arrangements for their client files to be maintained in the event of their own death***." *(emphasis added)*

That being said, succession planning addresses an attorney's ethical duties in three areas:

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SCR 20:1.1 **Competence**: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary to the representation.

Some states have added "wellness" provisions to their competence rules or the comments thereto. For example, California's rule 1.1(b) states that competence in legal services includes, "mental, emotional, and physical ability reasonably necessary for the performance of such service."

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SCR 20:1.3 **Diligence**: A lawyer shall act with reasonable diligence and promptness in representing a client.

ABA Comment [3] (adopted by WI) recognizes ways in which a client's interests can be adversely affected by delay:

"Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, ***the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.*** A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client." (emphasis added)

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ABA Comment [5] (adopted by WI): "To prevent neglect of client matters in the event of ***a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan***, in conformity with applicable rules, 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…." (emphasis added)

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SCR 20:1.16(d) **Declining or Terminating Representation:** Upon termination of representation, ***a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.*** The lawyer may retain papers relating to the client to the extent permitted by other law. (emphasis added)

ABA Comment [1]: ***A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion***. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. (emphasis added)

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Best practices: To fulfill their ethical and fiduciary duties to their clients, a lawyer should develop of a plan to reasonably protect their clients' interests in the event of the lawyer's death, disappearance, or incapacity.

ABA Formal Ethics Op. 92-369:The plan should, at a ***minimum***, include designating another lawyer with authority to:

- Review client files;
- Determine which files require immediate attention; and
- Notify clients of lawyer's death.
- **Footnote 8**: It is reasonable to read Rule 1.6 as authorizing such disclosure. Model Rule of Professional Conduct 1.6(a) ("A lawyer shall not reveal information relating to representation of a client ... except for disclosures that are impliedly authorized in order to carry out the representation.") Reasonable clients would likely not object to, but rather approve of, efforts to ensure that their interests are safeguarded.

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Designating a Successor and Planning Process

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SUCCESSION PLANNING PROCESS

- **Choose** an attorney to act as your successor
- **Ask** the attorney about willingness to do so
- **Register** the attorney with the State Bar of Wisconsin Successor Registry
- **Prepare** succession documents, access instructions, and client notices
- **Educate** successor attorney, employees, clients, family about the plan

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CHOOSE AND ASK A SUCCESSOR

Decide who to ask.

Discuss what being a successor attorney means.

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REGISTER: SUCCESSOR REGISTRY

State Bar of Wisconsin maintains a registry where lawyers are able to designate a successor attorney to protect clients.

It is the professional responsibility of the solo attorney to identify a potential successor attorney and have a discussion and plan for the unexpected

Visit the State Bar of Wisconsin's Succession Resources page (www.wisbar.org/successionresources)

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NAMING A SUCCESSOR ATTORNEY

1. Identify a protentional successor attorney and ask if they are willing and able to act in that capacity.
2. Register that successor attorney with the State Bar of Wisconsin's Successor Registry by following these steps:
   - Go to www.wisbar.org and login to your account.
   - On the homepage click on "myStateBar"
   - By default this will take you to "myProfile"
   - Click on the "Successor Registry" link
   - You will be directed to the location within your Advanced Profile where you can enter a Primary Successor and if you wish a Secondary Successor
   - After inputting the name of your successor(s), mark the check box that your successor is willing and able to perform these duties.
   - IMPORTANT – Scroll down and click on "Submit Advanced Profile" or your changes will not be saved!

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NAMING A SUCCESSOR ATTORNEY

Once saved an email will be sent out to you and your successor attorney confirming that a successor attorney has been registered and recommended next steps and links to the Handbook.

Next step….. Prepare

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PREPARE

After All, You Are Only Human:
The Solo Practitioner's Handbook for Disability and Death

- Planning documents – Will provision, Durable POA (personal), Springing POA (law firm successor)
- Planning Access for Succession Attorney
  - Access to computer system and/or practice management system
  - Updated client files – clearly indicating open and closed matters
  - Written instructions for the successor - Where to find critical information and passwords
- The Fee Agreement - tips for dealing with brief illness or incapacity
- Sample Forms and Checklists

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EDUCATE INTERESTED PARTIES ABOUT THE PLAN

Educate successor attorney, employees, family and clients about the plan

Employees, Family, and Clients should be notified who the individual that will handle affairs of the law practice in the event of attorney's death, incapacity, or unavailability

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DUTIES OF SUCCESSOR ATTORNEY

- 2 main objectives
  - First is protect the clients (case, property, money)
    - Review and assess client files for urgency
    - Reasonable efforts to contact all clients to notify them of attorney death or incapacity and request client instructions
  - Second is to manage the firm (if temporary incapacity or unavailability) or manage the winding down and closing of the firm in the event of attorney's death
- See SCR Chapter 12 Client Protection

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Failing to Plan

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SCR Chap. 12 Trustee Attorney

When a lawyer becomes medically incapacitated (SCR 12.02), or disappears or dies (SCR 12.03), any interested party or person licensed to practice law in Wisconsin can petition the circuit court to appoint a Trustee Attorney to handle the affairs of the practice and protect the clients. **NOTE**: A person cannot serve both as personal representative, or any other representative capacity, and Trustee Attorney. A personal representative or a person serving in any other representative capacity can petition for the appointment of a trustee and nominate someone else.

- For more information and forms see Trustee Manual along with the Succession Resources at www.wisbar.org/successionresources

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When Might A Chap. 12 Trustee Be Appropriate?

- When an attorney hasn't left a succession plan.
- When an attorney has left a succession plan, but the successor attorney believes that court orders may be necessary to fulfill their duties (i.e. an order to disburse funds, an order to enter the office, and order to destroy remaining client files).
- When a successor attorney wishes to be compensated for their professional services and reasonably necessary costs.
- When the successor attorney believes the process might benefit from court supervision for other reasons.

See Trustee Manual

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General Duties of a Chapter 12 Trustee

- Protect the clients' rights, files, and property.
- Promptly notify all clients with open matters of appointment of trustee
- Deliver client files and property upon request.
- Collect fees, costs, and expenses; return unearned fees; resolve disputes over fees
- Assist with the management, sale, termination, winding up, or suspension of firm
- Comply with the applicable Rules of Professional Conduct.

Source: SCR Chapter 12 , Lawyer Death or Disability: Who Will Protect Your Clients? and Trustee Manual

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Malpractice Insurance
"Tail Coverage" / "Extended Reporting Period Endorsement"

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