

Lawyer Succession Planning

November 2023

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Kansas Credit – If you are seeking Kansas credit, you will need to enter the two Attendance Verification Words and your Kansas Bar information into the Program Survey

- Please complete the Survey **this week**, so we can ensure you receive proper credit

Certificate of Completion – Available also through the Program Survey

Three ways to access Program Survey:

1. Link available in the **CHAT** (right now)
2. Link at the **end of the slides** (here or at www.DowneyEthicsCLE.com)
3. Link sent to you in an **email within 30 minutes** of program ending

Preliminary Question

If you unexpectedly disappeared at 5 PM today, what would happen to your clients?

Leaving Clients

Not authorized by any Rule

Can lead to lots of headaches

- Ethics violations – duty to provide competent (Rule 4-1.1) and diligent (Rule 4-1.3) representation
- Duty not to terminate representation and cause material adverse effects to clients (Rule 4-1.16(b)(1))
- Duty to safeguard property (Rule 4-1.15)
- Malpractice claims
- Claims against Client Security Fund
- *And many more . . .*

Reasons for Succession Plan

- Protection against expected and unexpected events
- Providing services during transition periods
- Executing a long-term (business) strategy
- Risk management including for professional liability insurance
- Retirement planning

Missouri Rule 4-1.3 cmt [5]

To prevent neglect of client matters in the event of a practitioner's death or disability, the **duty of diligence may require that each 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. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement . . . and Rule 5.26.

General Lack of Succession Planning

Approximately **80% of lawyers in private practice firms** of ten lawyers or fewer don't have a succession plan or aren't sure if their firm does.

Illinois ARDC

Obstacles to Planning

- Lack of information – what do people plan to do
- Fear of starting the succession conversation
- Too busy to plan
- Too selfish to plan

Outline of Program

- Failure to plan – court-appointed trustee/receiver
- Important background ethics rules – Rule 4-5.4(a) and 4-5.6(a)
- Voluntary approaches to succession
 - Sale of firm
 - Merge to succession
 - Closure of firm

If a Lawyer Fails to Plan . . .

Missouri Rule 5.26 (Trustee)

Kansas Rule 235 (Counsel)

Illinois Rule 756 (Receiver)

Missouri Rule 5.26(b)

Designation of Trustee.

- (1) [At the time of completing the annual enrollment statement required by Rule 6.01](#), a lawyer may designate a trustee by specifying the name and the bar number of the trustee and certifying that the trustee has agreed to the designation in a writing in possession of both the lawyer and the trustee. The designation of a trustee shall remain in effect until revoked by either the designated trustee or the lawyer designating the trustee, or the designated trustee is disqualified due to suspension, disbarment, disability, or death. The lawyer who designates the trustee shall notify the Clerk of this Court of any change of designated trustee within 30 days of such change. The Clerk shall keep a list of designated trustees and their addresses.
- (2) At the time of completing the annual enrollment statement required by Rule 6.01, a lawyer practicing in a fiduciary entity shall state the name and address of the fiduciary entity. Because of the ongoing responsibility of the fiduciary entity to the clients of the lawyer, no trustee shall be appointed for a lawyer practicing in a fiduciary entity.
- (3) A lawyer not practicing in a fiduciary entity who does not designate a trustee pursuant to Rule 5.26(b)(1) will be deemed to designate a suitable person licensed to practice law in this state in good standing appointed by an authorized court to perform the duties of a trustee under this Rule 5.26.

Missouri Rule 5.26(c)

Appointment of Trustee. A circuit court in the circuit where the lawyer maintained an office, through the presiding judge or a judge of the circuit designated by the presiding judge, **on motion or sua sponte**, may appoint the **trustee designated by the lawyer** or, if no trustee has been designated by the lawyer in the lawyer's annual enrollment statement, **may appoint one or more persons licensed to practice law in this state to serve as the trustee(s)** for a lawyer upon a showing that:

- (1) The lawyer is unable to properly discharge the lawyer's responsibilities to clients due to disability, disappearance, or death; or
- (2) The lawyer failed to comply with Rule 5.27 after disbarment or suspension.

Notice of the trustee's appointment shall be given by the clerk of the court to the Chief Disciplinary Counsel who shall monitor and assist the work of the trustee as necessary and appropriate.

Missouri Rule 5.26(d)

Duties of Trustee. The trustee shall take whatever action seems indicated to protect the interests of the clients and other affected parties, including:

- (1) **Inventory** active and inactive client files and make reasonable efforts to distribute them to clients consistent with the requirements of Rule 4-1.22;
- (2) **Deliver any undistributed active client files** and any inactive client files to the Chief Disciplinary Counsel for action as required by this Rule 5;
- (3) Take possession of and **review the lawyer's trust and business accounts**;
- (4) Make reasonable efforts to **safekeep and distribute identified trust funds** to clients or other parties (other than the lawyer) in accordance with Rule 4-1.15 and maintain records of such efforts;
- (5) **Preserve and maintain trust account records** in accordance with Rule 4-1.15;
- (6) After obtaining an order of the court, dispose of any remaining funds and assets as directed by the court; and
- (7) Initiate any legal action necessary to recover or secure any client funds or other property.

The lawyer, to the extent possible, shall cooperate and promptly respond to reasonable requests for information from the trustee.

Missouri Rule 5.26(e)

Protection of Client Information. The trustee shall be bound by the Rules of Professional Conduct pertaining to client confidentiality with regard to the records of individual clients.

The trustee shall not disclose any information contained in any file under this Rule 5.26 without the informed, written consent of the client to whom the file relates except as necessary to:

- (1) Carry out the order of appointment; or
- (2) Comply with any request from an appropriate disciplinary authority.

The trustee shall report professional misconduct on the part of the lawyer as required by Rule 4-8.3.

Missouri Rule 5.26(f)

Reports to the Court. The trustee shall file written reports with the clerk of the appointing court:

- (1) Within 120 days of appointment;
- (2) Prior to being discharged if later than 120 days of appointment; and
- (3) At such other times as directed by the appointing court.

The reports shall describe the nature and scope of the work accomplished and to be accomplished under this Rule 5.26 and the significant activities of the trustee in meeting the obligations under this Rule 5.26.

The final report must include accountings for any trust and business accounts, the disposition of active and inactive case files, and any requests for disposition of remaining files and property.

The trustee may apply to the appointing court for instructions whenever necessary to carry out or conclude the duties and obligations imposed by this Rule 5.26.

Missouri Rule 5.26(h) to (j)

(g) **Immunity.** All trustees appointed pursuant to this Rule 5.26 shall be immune from liability for conduct in the performance of their official duties in accordance with Rule 5.315. This immunity shall not extend to employment under Rule 5.26(h).

(h) Acceptance of Clients. **With the consent of any client, the trustee may, but need not, accept employment to complete any legal matter.**

(i) Legal Responsibility of Lawyer. **The lawyer for whom a trustee has been appointed or the estate of a deceased lawyer for whom a trustee has been appointed is liable to the trustee for all reasonable fees, costs, and expenses incurred by the trustee** as approved by the appointing court. To the extent that the approved trustee's fees, costs, and expenses are paid by the disciplinary authority or other third party, the lawyer or the estate shall be liable to make reimbursement to the disciplinary authority or other third party for such payment.

Missouri Rule 5.26(j)

Fees, Costs, and Expenses. Application for allowance of fees, costs, and expenses shall be made by affidavit to the appointing court, which **may enter a judgment in favor of the trustee and against the lawyer or the estate of a deceased lawyer** for whom a trustee has been appointed. The application shall be made on notice to the Chief Disciplinary Counsel, the lawyer or, if deceased, to the lawyer's personal representative, or heirs. For good cause shown, an interim application for fee, costs, and expenses may be made.

As approved by the appointing court, the trustee shall be entitled to reimbursement from the lawyer or the deceased lawyer's estate for:

- (1) **Reasonable expenses** incurred by the trustee for costs, including, but not limited to, clerical, paralegal, legal, accounting, telephone, postage, moving, and storage expenses; and
- (2) **Reasonable attorney fees.**

In the absence of other funding sources, the **Chief Disciplinary Counsel may pay the approved fees, cost, and expenses from the Advisory Committee Fund.**

Planned Transfers, Succession, or Retirement

Rule 4-5.4(a)

A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
- (2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer;
- (3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 4-1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
- (4)

Rule 4-5.6

- A lawyer shall not participate in offering or making:
 - (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
 - (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

"Benefits Upon Retirement"

Courts will examine whether provision constitutes "retirement" or "non-compete" clause

- Total cessation of practicing law (except perhaps some pro bono)
- Cannot distinguish based upon competing/non-competing law practice
 - Example – permits if retired, or if law professor, judge, public defender, corporate counsel, or the like

Preservation of Files

Normally required to keep trust account-related files 6+ years after representation ends or final transaction – Rule 4-1.15(f)

Must also keep other files 6+ years unless clients give informed consent to a shorter period – Rule 4-1.22

Rule 4-1.15(f)

Complete records of client trust accounts shall be maintained and preserved for a period of at least six years after the later of:

- (1) termination of the representation, or
- (2) the date of the last disbursement of funds.

Client trust account records may be maintained by electronic, photographic, or other media provided that they otherwise comply with Rules 4-1.145 to 4-1.155 and that printed copies can be produced.

These records shall be readily accessible to the lawyer.

Upon dissolution of a law firm or of any legal professional corporation, the partners shall make reasonable arrangements for the maintenance of client trust account records. Upon the sale of a law practice, the seller shall make reasonable arrangements for the maintenance of client trust account records.

Rule 4-1.22

A lawyer shall securely store a client's file for six years after completion or termination of the representation absent other agreement between the lawyer and client through informed consent confirmed in writing.

Such informed consent confirmed in writing may be made between the lawyer and the client at any point during the six years after completion or termination of the representation.

If the client does not request the file within six years after completion or termination of the representation, the file shall be deemed abandoned by the client and may be destroyed.

(Plus additional provisions and limitations)

Internal Succession

Applicable Ethics Rules

- No special rules
- Some rules to consider
 - Rule 4-1.5 – fees cannot be unreasonable
 - Rule 4-1.16 – ability of client to terminate lawyer
 - Rule 4-5.1 – duty to supervise subordinate lawyers
 - Rule 4-5.6 – permits non-compete as part of "retirement"

Issues

- Appropriate candidate
 - Entrepreneurial versus risk-adverse
 - Can they "make rain"
- Client comfort/consent

“Partnering” to Succession

- Very hard to find "right person"
- Possible problems with internal "candidates"
- Reduce issue of client consent
- Rule 4-5.6(a) limits amount of post-retirement payout

“Merger” to Succession

- Merger of smaller practice into firm
- Then internal succession to lawyers at the firm

External Sale – Entire Practice (or Portion Thereof)

Rule 4-1.17

“A lawyer or a law firm may sell or purchase a law practice, or an area of practice, including good will, if the following conditions are satisfied . . .”

Rule 4-1.17 – Summary

- Allows transfer of practice without approval from each affected client
- Seller must cease practice in area/jurisdiction sold
- Entire practice or area of practice must be sold
- Adequate notice to clients (on next slide)
- Fees cannot be increased “by reason of the sale”
 - But purchaser can refuse to represent client if client does not accept purchaser’s (regular) fee

Notice to Client

- Proposed sale
- Client's right to choose other counsel or take possession of file
- Warning that if client does not take action, **consent to transfer will be presumed in 90 days**
- If client cannot be notified, court order must be sought

Non-Compete Requirement

Rule 4-1.17(a) **The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in the geographic area in which the practice has been conducted, as defined by the agreement between the parties to the sale.**

ABA Ethics 2000 Changes Rule

- Allows firm or practice to be sold
 - But **no cherry-picking of best clients**
- Allows multiple buyers
- Removed right of lawyer to refuse to continue representation if clients would not accept higher fees
 - Seen as inconsistent with ordinary contract law
 - New comment intended to provide that buyer steps into shoes of the seller with regard to fee and contract issues

Transition of Practice to Purchaser?

ABA Formal Ethics Opinion 468 (2014) clarified that the "the transition of pending or active client matters from a selling lawyer or firm to a purchasing lawyer or firm **need not be immediate or abrupt.**"

- Selling lawyer could "for a reasonable period of time after the closing of the sale, ...assist in the transition of active client matters."
- Appropriate period of time would "necessarily depend on the circumstances, including the rules and rulings of courts or other tribunals in pending matters."

Points of Emphasis

- Lawyers don't own clients
- Clients are not "commodities" to be sold
- Rule must be carefully followed – or clients may be left in limbo

- Unanticipated return to practicing law normally does not constitute unethical conduct

"Sale"

- Advantages
 - Orderly process
 - Client consent presumed
 - Non-compete provision allowed
- Disadvantages
 - Complicated process
 - Hard to evaluate practice

Case-by-Case Transfer

Transferring Clients

- Need to refer them to competent counsel
- May be able to share in the fee
 - Rule 4-1.5(e) A division of a fee between lawyers who are not in the same firm may be made only if:
 - (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
 - (2) the client agrees to the association and the agreement is confirmed in writing; and
 - (3) the total fee is reasonable.

"Transfer"

- Advantages
 - Recover investment in case
 - Simple
 - Easy risk allocation
- Disadvantages
 - Need client permission to transfer files
 - Remain responsibly (to some degree) for client matters, unless paid based upon prior work

Bottom Line on Case-by-Case

- Easy to value cases
- Requires client consent
- Seller remains responsible

The Sales Process

Internal "Sale"

- Modification/execution of partnership or shareholder agreement
- Use of buy-sell agreement

External Sale – Basic Steps

- Preliminary discussions (usually pretty vague)
- Confidentiality agreement
- Exchange of preliminary information
- Term sheet negotiated and accepted
- Additional information shared
- Final contract prepared
- Notice to clients prepared
- Closing

Setting a Price

- Normally some portion – or multiple – of gross revenues
 - Law firm "profits" are different
- Depends upon methods of payment and financing
 - How quickly will seller receive money
 - How much money is guaranteed

Confidentiality Agreement

- Obtain commitment of confidentiality at outset
 - Protects seller and seller's practice if deal is not consummated
 - Demonstrates protection for clients if information is somehow released
 - Also may be used to limit competition if sale falls through
 - but beware potential Rule 4-5.6(b) violation

Presale Negotiations

Often begin with a conflict check and disclosure of financial information

- How will purchaser finance
- How much does practice really make

Pre-Sale Disclosure of Client Information

- Required for sale to progress
- Consider what information must be disclosed
- Look also at Rule 4-1.17 and 4-1.18 and ABA Formal Opinion 09-455

Client Consent to Sale

- Not required for sale under rule 4-1.17
- May be appropriate to secure, particularly where a few key clients

Fees for Transferred Clients

- Normally follow pre-sale agreements, at least for a time
- May not increase due to sale
- Lawyer may decline representation if new clients will not accept fees paid by pre-existing clients

Obligations to Purchased Clients

- Competent, diligent and ethical representation
- Must be conflict-free

Elements of Sales Contract

- Recitals – often best if quite detailed
 - Designed to protect buyer, seller, and clients
- Price and payments
- Non-competition agreement
 - Generally lawyers cannot enter non-competition agreements
 - Exception when a law practice is sold: in such circumstances, many states require that the selling lawyer cease practicing
- Fee sharing arrangements (if necessary)
- Dispute resolution

Elements of Sales Contract (continued)

- Indemnification provisions
- Requirements to procure insurance
 - Consider insurance or assignment of responsibilities for past representations
 - Also consider business operations insurance
- Trust accounts
 - Generally funds need to be transferred to buying lawyer
 - Buyers beware of historic headaches . . .
 - Seller should make sure adequate assurances of safe transfer are provided

Price Term

- Single payment from buyer (Lump Sum)
 - May be an adjustment later – usually 1-2 years (Look Back)
 - Often caps
 - Adjustment may be dollar-for-dollar or adjusted
- Collection Pricing – seller receives portion of fees collected
 - May want guarantees for both parties
- Seller Financing

Factors to Consider for Price

- Location and type of practice
- Inventory of present legal work – and who will receive fees
- Return business/consistent customers
- Rates and rate structure
- Business generation channels
- Personalization of practice
- Clients lost due to conflicts
- Changes in regulatory environment
- Need and availability of key resources and employees
- Current contact information and website
- Other firm assets (desks, furniture, etc.) – normally at steep discounts

Rough Thumb Valuations

- (Non law-firm) Small businesses sell for roughly 2.4 times net revenues
- Law firms normally cannot be sold on profits
 - "Profits" are what partners make
 - Variations based on how lawyers treat expenses
- Clients have greater mobility

Bottom Line on Valuations

- Often ½ to 1.5 times annual gross fees (for period of several years)
- Higher price
 - Likelihood of return business
 - Strength of name/goodwill
 - Anticipated supply of cases
 - Delay in payments (risk to seller)

Preparing for Sale of Practice

Gather Relevant Documents

- Bank statements for trust and operating accounts – approximately 12 months
- Income (profit and loss) statements for last three years
- Current balance sheet
 - Tax returns – for last three years
 - Copies of all leases, contracts, and the like
 - List of all current furniture, fixtures, and equipment

Prepare to Shut Down Practice

- End unnecessary contracts
- Handle closed files
 - Or transfer them in the sale – for which buyer should be wary
- Consider tail insurance

Rule 4-1.15(f) – Handle Client Files

"Upon dissolution of a law firm or of any legal professional corporation, the partners shall make reasonable arrangements for the maintenance of client trust account records. Upon the sale of a law practice, the seller shall make reasonable arrangements for the maintenance of records."

Build Value of Firm

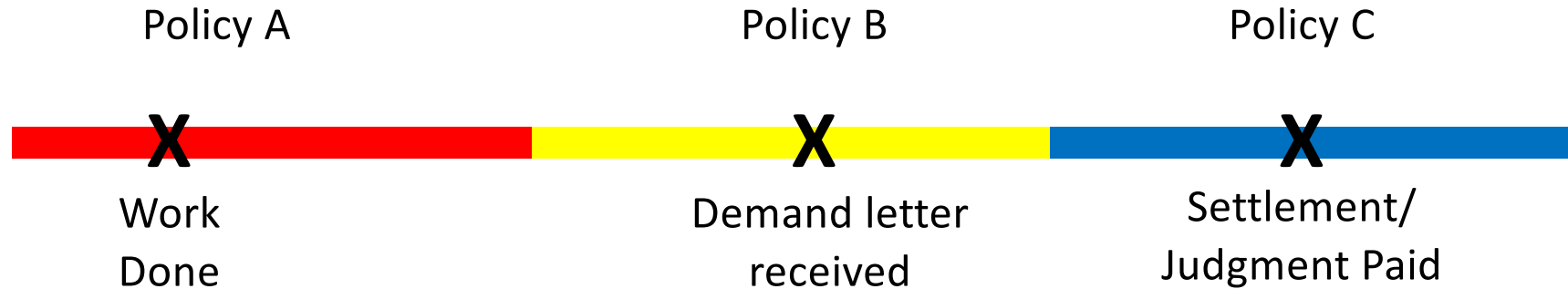
- Get things in order (such as trust account, closed files, etc.)
- Evaluate methods for generating work
- Consider "valuable real estate"

Insurance After Practice Ends

LPL Policies – "Claims Made"

- "Occurrence" – must have insurance at the time of the occurrence
- "Claims made" – must have coverage at the time when the claim is made

"Claims"-Made Policies



- Claims v. Circumstances
- "Tail policies"

How Much Coverage?

- Per claim and aggregate
- "Self-insured retention" (not a deductible)
- "Wasting" or "burning" policy – coverage limit is for defense and resolution

Emergency Plan

Emergency Plan

- Copy of bank's forms for trust account access for the Emergency Attorney.
- Power of Attorney authorizing the Emergency Attorney to run the business as needed, including as trust account signatory.
- List of passwords for computer, email, smartphones, and online bank accounts.
- Updated list or spreadsheet of all client files that need to be transferred or closed. Instructions for family and personal representative of your estate about the responsibilities of the Emergency Attorney.
- Contact information for the Emergency Attorney. Updated list of firm contacts such as clients, employees, vendors, insurers, etc.
- Draft of letters to clients re notification about deceased lawyer and authorizing release of client file to the Emergency Attorney.

- Copy of bank's forms for trust account access for the Emergency Attorney.
- Client and matter details related to the type of case, matter status, fee agreement, and invoicing status
- Passwords, logins, and multi-factor authentication for devices, software, and online accounts
- All firm financial data, including business accounts, client trust accounts, and firm credit cards
- Information related to the firm's malpractice insurance
- External vendor information, including account numbers, payment data, and contact person
- Physical office information, such as mortgage company or leasing information

Conclusory Matters

- **Questions** – If you have questions after the program, please email them to Paige Tungate at ptungate@DowneyLawGroup.com
- **Post-Program Survey** – A survey will be emailed to you about 30 minutes after this program. Also, here is the survey link:

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Future Programs – Free CLEs

December 7 - Thursday at 12:00 Noon CT - *Trust Account Operations and Record Keeping*

December 20 - Wednesday at 12:00 Noon CT - *Risk and Ethics of Using Artificial Intelligence*

January 11 - Thursday at 12:00 Noon CT - *Legal Ethics Update 2024 - Part I*

January 24 - Wednesday at 12:00 Noon CT - *Addressing Bias - Age Discrimination and Generational Issues*

February 8 - Thursday at 12:00 Noon CT - *Commonly Misunderstood Legal Ethics Obligations*

February 20 - Tuesday at 3:00 PM CT - *Legal Ethics and Litigation Discovery*

February 29 - Thursday at 12:00 Noon CT - *Legal Ethics for In-House Counsel*

March 13 - Wednesday at 12:00 Noon CT - *Ethical Rules for Getting Paid*

March 27 - Wednesday at 12:00 Noon CT - *Addressing Bias - Age Discrimination and Generational Issues*



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