



EXPECT THE BEST, BUT PLAN FOR THE WORST

Ellen Freedman, CLM
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There was a phone message on the hot line last week that was unfortunate, but not unusual. A solo practitioner in a small PA town died suddenly of a heart attack. She was only 49 years old. She had no known history of illness.

The call was from her cousin. He was the only living relative. He was not an attorney. He was referred to me by the executive director of the deceased attorney's county bar. Thank goodness he was prepared to do what was necessary to handle her affairs, because the list was long.

The deceased attorney had not anticipated or planned for the possibility of her demise. She left behind no will, no estate plan, no Power of Attorney, and no helpful information regarding her practice. Her loyal secretary of several decades was unnecessarily burdened with the stress of notifying clients, trying to intervene with deadline-driven emergencies, locating a relative, and trying to determine just what her role should be in the timely closing of the practice, the care of the clients, and even whether or not she would get paid for her efforts.

I've always found it ironic that so many attorneys fail to handle their own affairs with even a small measure of the diligence they advise clients to utilize. Yes, the cobbler's children run barefoot. I get it: facing one's own mortality is difficult at best. Most people, not just lawyers, avoid finding themselves in a dark room with only their thoughts, as it is during these times the mind is forced to confront these issues.

Thinking and planning for the worst eventualities is not going to earn you any money. In fact, it is a distraction which can get between you and billable hours for some brief period of time. Why bother? Especially if, like the deceased solo, you don't have children to worry about? (Keep in mind that I get the same calls from distraught family members.) So is advance planning for death or disability just something you **should** do? Or is it something you **must** do?

Rule 1.3 [Diligence] states that "A lawyer shall act with reasonable diligence and promptness in representing a client." That doesn't seem to mean much in this

context, until you specifically review Comment 5 which states in part, “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.”

I know some of you are thinking, so what? If I'm dead, what can anyone do about it? Well, for one thing, a lack of planning on your part may well lead to a malpractice claim which could alter your estate. That could affect your family. And if you're disabled, you may recover only to find you have no practice remaining. But these are minor issues in my mind.

As I travel around the state presenting seminars, and am privileged to meet so many of you, I am constantly reminded of the high ethical standards most of you aspire to maintain in every facet of your lives. The economic rewards for solos in small towns has proved less rewarding than anticipated by many, and I hear about that a lot. However, I rarely hear disappointment about living to a higher standard of integrity than most of the population. This aspect of the profession is still personally rewarding, despite the challenges. I only wish the general population really understood it.

But it's enough that you and I understand it. It's enough that your fellow attorneys understand it. And therefore it should be enough to motivate you to do the small amount of work required to ensure your legacy reflects what you worked so hard throughout your career to establish: your integrity and your dedication to your clients' best interests.

There are just a few things you need to do to properly plan for the worst. The good news is that I have valuable resources to assist you in completing these tasks in record time. [Send an email request to lawpractice@pabar.org asking for my “Practicing Dead or Alive” resource.] An appreciative tip of the hat goes to Pittsburgh attorney Virginia Cook for creating these resources many years ago, to serve as a handout for a seminar with the same name as the resource, which we presented together. It has been over a decade, and these materials still serve the purpose.

Here are the few things you need to do:

1. **Create a simple will.** If you don't have one, you will find a slightly moldy sample in the resource. Fill in the blanks, and have it reviewed by one of your peers.



2. **Make an agreement** (handshake or simply written) with another solo you know, to step in under an emergency situation to assist in keeping the other's practice operating, or take it through an orderly closing or sale. The attorney doesn't have to be in your local community, but you don't really want someone on the other side of the state, either. That would create an undue burden.
3. **Make your intentions known.** Whether it's a handwritten note, an email, a written document, or an Advanced Healthcare Directive, make sure someone knows what you want. Do you want life support? Do you want burial or cremation? Do you want your practice closed or sold? I know it seems ghoulish, but you will take a tremendous burden off those who care for you by simply making your preferences known.
4. **Create a Power of Attorney.** If you don't have one, you will find a sample in the resource. You need to make sure that if you are disabled or die, someone can write checks to keep your practice running until it can be closed or sold. That includes writing checks on your trust account, as well as paying your loyal staff. Their continued role will be critical.
5. **Keep your trust account reconciled.** Every single month, without fail, you should be able to reconcile the bank statement to your client account. You should also be able to reconcile individual client ledgers to the total in your trust account. In other words, you should be able to account for every single penny in the trust account by identifying exactly how much belongs to each client.

Don't leave your money lingering in the trust account. I know that some of you like to leave it in there as a reserve for when cash flow is tight. However, that's a violation of ethical rules by comingling funds. It's also a violation of tax rules by deferring income into another tax period.

Down the road your audit trail may not clearly point to the fact that the "excess" is yours, and absent clear proof, it can't just be "taken" as fees at that point. It will likely have to be turned over to the State under the Escheat Rules. But only after keeping the account open for an extended period of time first.

6. **Document critical aspects of your practice.** There are two categories to what should be documented. The first is client-related information. That includes client/matter descriptions, contact information, trust balances, receivable balances, unbilled time and cost

balances, and especially deadlines. If you have a time & billing program, and/or case management program, chances are pretty good this is already done. If you're the type of person who carries this information in your head, or in a physical book which you carry in your briefcase or in your shirt pocket, you're got some work to do.

Remember that you would not want to step in for someone else and find a total mess where it took you days upon days just to figure out where the ticking time bombs are. You and the person you have a reciprocal agreement with must agree to have at least a certain level of information readily available.

The second aspect to document regards the business side of your practice. It is particularly in this area that the resource I have available is of great value. It is a fill-in-the-blank form which prompts you to include all relevant information regarding such things as bank account numbers, retirement plans, insurance plans, tax ID numbers, computer passwords, file organization and storage, and much more.

It's wonderful if you have a long-tenured and knowledgeable employee. But that doesn't mean you can count on him/her to provide all this information in your absence. First, they may predecease you. Coincidence undoes some of the best-laid plans. Second, they may be suffering from PTSD, depending on the circumstances related to your death or disability, and therefore be too impaired to be a sufficient resource. And in all likelihood, even if they are alive and emotionally intact, they probably know a lot less about the business aspects of your practice than you give them credit for.

7. **Get necessary signatures on file.** A Power of Attorney does a lot, but it doesn't take care of everything necessary. For example, a retirement plan often must have a designated signature on file in advance. If you are seriously disabled and your family needs to make an emergency withdrawal from your retirement account to help pay for your care, having that signature on file in advance will allow the person holding the Power of Attorney to take appropriate action.

Right now you may not know what signatures you need. But as you fill in the form which documents the business aspects of your practice, it should prompt you to pick up the phone and call the agent or plan administrator to find out. If an advance signature must be on file, they can provide you



with the appropriate form and instructions.

Ok, that isn't so bad is it? A few hours here and there and you're done. Review details once a year or so to update for changes, and you can take a deep rewarding breath knowing you have taken reasonable steps to ensure the best interests of your clients, as well as that of employees and family. It's the right thing to do.

In closing, I need to reach out to those of you who are **not** solo attorneys. Perhaps you think this article does not apply to you, since you have partners or other attorneys in the firm who will step in should the unthinkable happen. While that's true for the business aspects of the practice, you still want to make sure you have your personal affairs in order. So take a look at points 1, 3, and 4.

Finally, with respect to point 6 . . . I have seen so many attorney offices which look like superfund sites! Condos of files all over the floor and every available horizontal surface. Papers stacked everywhere in no discernible order. If something happens to you, it will fall upon one of your peers to clean up that mess, in a desperate attempt to serve clients and protect the firm. So would it hurt you to at least start getting all the deadlines into the computer, the backlogged filing up to date, and generally leave some semblance of a trail of bread crumbs to the important information? Hey, I'm just sayin'!

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