

MCLE ON THE WEB (\$15 PER CREDIT HOUR)  
TEST #10  
1 HOUR CREDIT  
LEGAL ETHICS (Part 1)

To earn 1 hour of MCLE credit in the special category Legal Ethics, read the substantive material, then download the test, answer the questions and follow the directions to submit for credit.

## **The Disabled Practitioner**

California Joan returns with sound advice on what to do when an attorney is stricken suddenly

By Ellen Peck

"Cali, I know you are an expert in the law of lawyers . . . I need your help for a real tragedy!" California Joan had received this plea from her best friend in law school, Theodore Best. After law school, Best had returned to his home town, Chico, and was doing quite well with his general civil solo practice. "Best, we're friends. I'll help in any way I can," Cali quickly replied.

"Strong N. Fitt is a Chico sole practitioner with a thriving workers' compensation practice. My wife and I socialized with Strong and his wife, Laura, who have three adult children, two of whom are in college. Strong's physical fitness at 55 is legendary here in Chico. He's never sick, he jogs and works out with weights every day and he's always competing in local charity sports events. Two days ago, Strong was skiing and hit a tree. He's in a coma, the doctors don't know if he'll ever come out of it." Cali could hear the grief in her friend's voice.

"I used to tell Strong he should have an estate plan for his death or disability. He would laugh and say that with his good health, his estate plan was to practice another 10 years, sell his practice and then sail around the world. His wife, Laura, who is not a lawyer, is terrified. She has asked me to help her with Strong's practice. Can you tell me what I need to do to protect the clients, deal with the trust accounts and any professional standards relating to disabled lawyers' practices," Best inquired.

"Best, beginning Jan. 1, 1999, new legislation adopting a comprehensive statutory scheme specifically to manage the practices of dead or disabled lawyers became effective. (Prob. Code §2468 [practice administrator - disabled lawyers' practices]; §9764 [practice administrator - dead lawyers' practices]; §17200 (b) (22)-(23) [practice administrator - law practice economic interest transferred to a trustee]; Bus. & Prof. Code §6185 [practice administrator powers].) Let's talk about your and Laura's options under existing and new laws and some steps you should take," Cali began.

**Enrollment as an active member:** First, since Strong is likely to be disabled for some time, he can be enrolled as an inactive member of the State Bar until he recovers. (B&P §6004) You can call the State Bar's membership records department concerning how to accomplish his enrollment. During the period of inactivity, he can pay a lower fee, is not required to take any MCLE courses and, of course, cannot practice law.

**Options for protecting clients and assets of the practice:** Second, in terms of the management of Strong's practice, for the protection of existing clients and the assets of the practice, there are two options: (1) You can petition the superior court for assumption of jurisdiction of Strong's practice pursuant to Article 12 of the State Bar Act (B&P §6190 et seq.) and have someone appointed to oversee his practice, or (2) Laura can petition the probate court for the appointment of a practice administrator pursuant to new Probate Code §2468. Let me describe the process of both.

**Alternative 1: Superior Court Assumption of Practice of a Disabled Lawyer**

Whenever a lawyer is incapable of devoting time and attention to his or her law practice or providing the quality of service necessary to protect the interest of the clients due to excessive use of alcohol or drugs or physical or mental illness, other infirmity or cause, and there is no other active member of the State Bar who, with the consent of the client has agreed to assume responsibility for the practice, the courts have jurisdiction over that practice. (B&P §6190)

If Strong were capable of consenting to the assumption of jurisdiction of his practice, then the State Bar itself, a client or any interested person or entity could apply to the court for assumption of jurisdiction. (B&P §6190.1(b)) Since Strong is in a coma and is incapable of consenting, only the State Bar could apply to the court. (B&P §6190.1(c).) However, because of funding problems, the State Bar is still struggling to undertake application for jurisdiction of the courts if the member cannot give consent or if there was no one else to do it. Another option is to have a conservator appointed over Strong's estate who could apply to the court. That will result in delay which will not help clients.

If you were able to apply to the superior court, here is the process:

Your application should be made to the superior court in the county where Strong practiced. (B&P §6190.1(a)) The application must be verified and has to contain the following information:

There is probable cause to believe that the court has jurisdiction under §6190 to take over the practice. Competent medical evidence by way of affidavit or declaration regarding Strong's medical condition and prognosis will meet this requirement.

The interest of the applicant. Strong's estate interest in insuring that the clients' interests are cared for during Strong's disability is a sufficient statement of interest.

That there was probable cause to believe that the interests of the client or of an interested person or entity will be prejudiced if the §6190 proceeding was not maintained. (B&P §6190.1(a); §6190.2; see also 1 TRG Prof.Resp., pp. 1-49-1-50)

You are required to serve both Strong and the State Bar with the application and set the matter for hearing. (B&P §6190.3) Given the process for notice and hearing, it can be a few months before the court assumes jurisdiction over a practice. The court can appoint a lawyer to go over Strong's files; notify clients of the events; protect the clients' cases from prejudice by performing whatever emergency services need to be provided; assist the clients to obtain other counsel; give notice to any third parties about the state of Strong's practice; arrange for the surrender or delivery of clients' papers and property; arrange for the appointment of a receiver to take possession of all bank accounts regarding the practice, including the trust account and the office account, or any other acts ordered by the court. (B&P §§6190.34; 6190.4 and 6180.5)

It is difficult to get volunteer lawyers to accept appointments from the court in these types of cases, since they serve without compensation, except in extraordinary circumstances. (B&P §6180.12) While a person initiating court jurisdiction over a law practice under either

§6180 or §6190 is immune from liability for the initiation of the action, lawyers appointed to provide services under either act may not be immune from liability. (See B&P §6180.11.)

Once the court assumes jurisdiction over a practice and a lawyer and/or receiver is appointed to manage and wind up the law practice, the lawyer, if alive but impaired, and the heirs of the lawyer lose control over the process.

However, claims repair can occur which may preserve the lawyer's estate from liability:

If a client's statute of limitations runs after the application is filed, the client has an additional six months to file the action. (Code of Civ. Proc. §353.1)

In certain circumstances, the client or the appointed attorney have an additional six months to obtain relief from a judgment, order or other proceeding taken against a party (including dismissals of actions pursuant to Code of Civ. Proc. §§581 and 583.110.)

When the court assumes jurisdiction over the practice, Strong will be enrolled as an inactive member of the bar by the State Bar. (B&P §6007(b)(2)) In order to return to practice, if he recovers, Strong will have to petition the State Bar Court to terminate the inactive enrollment and prove, through competent evidence, that he is physically able to return to practice. (B&P §6007(b)(3); Rules of Procedure of the State Bar of California, rules 530 et seq.; 2 TRG Prof. Resp. at pp. 11-169 ff) This process typically can take about six months or longer.

If Strong recovers and is able to practice again, and the practice is not sold or wound up, in order to resume practice on any remaining cases, Strong would have to apply to the superior court to terminate the jurisdiction of the court. (B&P §6190.6) Again, this can be an expensive and lengthy process.

### **Alternative 2: Appointment of a Practice Administrator (Probate Code §2468)**

Effective Jan. 1, 1999, new Probate Code §2468(a) permits the conservator of the estate of a disabled lawyer or other person interested in the estate to petition the probate court for appointment of an active member of the State Bar of California to take control of the files and assets of the practice of the disabled member.

One of the advantages of the new probate process is that the court can dispense with ordinary filing and notice requirements to protect the interests of the clients. Section 6248(b) provides that petition may be filed and heard on such notice that the court determines is in the best interests of the persons interested in the estate of the disabled member. If the petition alleges that the immediate appointment of a practice administrator is required to safeguard the interests of the estate, the court may dispense with notice provided that the conservator is the petitioner or has joined in the petition or has otherwise waived notice of hearing on the petition.

The petition can request that a practice administrator, pursuant to B&P §6185, be appointed to take control and manage the practice of the disabled lawyer, and the petition must specifically list the powers requested to be given in the order appointing the practice administrator. (Prob. Code §2468(c))

"What's a practice administrator?" Best inquired.

Cali continued: "A practice administrator must be an active member of the State Bar, must be appointed by a superior court order pursuant to §§2468, 9764, or paragraph (22) or (23) of the subdivision (b) of §17200 of the Probate Code and can be empowered to take control of the practice of a deceased or disabled member of the State Bar of California, and have one or more of the following powers, as ordered, pursuant to B&P Code §6185:

Take control of all operating and client trust accounts, business assets, equipment, client directories, and premises that were used in the conduct of the deceased or disabled member's practice. (B&P §6185(a)(1))

Take control and review all client files of the deceased or disabled member. (B&P §6185(a)(2))

Contact each client of the deceased or disabled member who can be reasonably ascertained and located to inform the client of the condition of the member and of the appointment of a practice administrator. The practice administrator may discuss various options for the selection of successor counsel with the client. (B&P §6185(a)(3))

In each case that is pending before any court or administrative body, notify the appropriate court or administrative body and contact opposing counsel in the cases under the control of a deceased or disabled member and obtain additional time for new counsel to appear for the affected client. (B&P §6185(a)(4))

Determine the liabilities of the practice and pay them from the assets of the practice. If the assets of the practice are insufficient to pay these obligations or for the expenses incurred by the practice administrator to carry out the powers ordered, the practice administrator shall apply to the personal representative to obtain the additional funds that may be required.

If the personal representative and the practice administrator are unable to agree on the amount that is necessary for the practice administrator to undertake the duties ordered pursuant to this paragraph, either party may apply to the court having jurisdiction over the estate of the deceased or disabled member for an order requesting funds from the estate. (B&P §6185(a)(5))

Employ any person, including but not limited to the employees of the deceased or disabled member, who may be necessary to assist the practice administrator in the management, winding up, and disposal of the practice. (B&P §6185(a)(6))

Create a plan for disposition of the practice of the deceased or disabled member to protect its value as an asset of the estate of the member. Subject to the approval of the personal representative of the estate, agree to the sale of the practice and its good will. (B&P §6185(a)(7)) The requirements and procedures for selling a law practice, including compensation for good will, are governed by rule 2-300, Rules of Professional Conduct of the State Bar of California.

Subject to the approval of the personal representative of the estate, reach agreements with successor counsel for division of fees for work in process on the cases of the deceased or disabled member. (B&P §6185 (a)(8))

Subject to the prohibitions against soliciting cases, the practice administrator may act as successor counsel for a client of the deceased or disabled member. (B&P §6185(a)(9))

If the practice administrator has concerns concerning how best to protect the practice and/or the clients, the practice administrator has authority to apply to the superior court that has jurisdiction over the estate of the deceased or disabled member for instructions. (B&P §6185(a)(2))"

"Can I serve as a practice administrator for Strong's practice?" Best queried again. Cali pointed out that if Best represented Laura in obtaining a conservatorship over Strong's estate and then petitioned the court for appointment of a practice administrator, Probate Code §2468(e) expressly prohibits Best from also being the practice administrator. Cali then pointed out several other issues regarding the qualifications of a practice administrator: "But even if you don't represent Laura as conservator, are you the right person to serve as practice administrator? In order to adequately safeguard client interests as well as the assets of the practice, the practice administrator should have special expertise in the field of Strong's practice (i.e., workers' compensation) and be less likely to have conflicts of interest with Strong's client base (i.e., a workers' compensation attorney who has recently represented applicants rather than insurers or employers). If Strong had a legal malpractice insurance policy, the insurer, as a matter of claims

prevention, is sometimes willing to assist in the appointment and compensation of qualified and competent special administrators."

Best inquired further as to the procedure for appointment of a practice administrator and was advised:

The Probate Code §2468 petition must allege the value of the assets that are to come under the control of the practice administrator, including but not limited by the amount of funds in all accounts used by the disabled member. (Prob. Code §2468(d))

A surety bond in the amount of the value of the personal property must be filed with the court by the practice administrator and no action can be taken by the practice administrator unless the bond has been duly filed with the court. (Prob. Code §2468(d))

The court is required to appoint as a practice administrator any attorney nominated in writing (i.e., will, trust instrument, etc.) by the disabled member unless the court concludes that the appointment of the nominated person would be contrary to the best interests of the estate or would create a conflict of interest with any of the clients of the disabled member. (Prob. Code §2468(f))

"Can the practice administrator be compensated?" asked Best. "Yes, by order of court based upon the reasonable value of necessary services. However, compensation is paid from the assets of the law practice, unless the assets are insufficient. In that case, the compensation of the practice administrator shall be charged against the assets of the estate as a cost of administration. The practice administrator shall also be entitled to reimbursement of his or her costs (Prob. Code §2468(g))," Cali replied. "A potential additional source of funding is any legal malpractice insurer, which has an interest in malpractice avoidance during the disability."

After the completion of services, the practice administrator is required to render an accounting and petition for its approval by the superior court making the appointment. Upon settlement of the accounting, the practice administrator can be discharged and the surety on any bond exonerated. (Prob. Code §2468(h))

If Strong recovers and is able to resume his law practice, the court can terminate the appointment of a practice administrator and Strong can be restored to his or her practice. (Prob. Code §2468(i))

**Sale of Strong's law practice:** If Laura believes, based upon his doctor's advice, that Strong is unlikely to return to practice, Laura can sell Strong's workers' compensation practice. Rule 2-300, California Rules of Professional Conduct, permits (1) the sale of substantially all of the law practice of a living member; (2) the selling price to include good will of the practice; (3) the personal representative of Strong's estate (presumably Laura) or the practice administrator pursuant to B&P Code §6185 could sell Strong's practice.

However, even if Laura finds a buyer immediately, rule 2-300 requires that the sale cannot proceed until after a 90-day notice period in which either Strong's representative or the purchaser would have to notify the clients in writing of the matters specified in rule 2-300(B)(1)(a) and other procedural conditions for the protection of clients.

Because of the time required to comply with rule-2-300, someone has to run the day-to-day practice to protect clients and the assets of the firm during the sale process. There are good things about selling a law practice under rule 2-300. Once the notice goes out, the potential purchaser handles any problems with individual client's cases, through client express written agreement or, if there was potential prejudice to the client, in the absence of client objection. (Rule 2-300 (B)(1)(a), Rls. Prof. Cond.)

"Thanks, Cali, I knew you would have some answers." Best added, "I will talk over the options with Laura. I may need to consult with you again."

A few weeks later, Best called. Nearing the end of the conversation, Best gingerly opened a new subject with his friend. "Cali, this has been a wake-up call to me as a sole practitioner. I want to do something before I'm disabled or dead for my family and my practice."

Cali agreed. "No one wants to think about their own untimely, sudden or unexpected death or disability. Yet every week we read in the legal newspapers or hear about the sudden, unexpected, untimely death or disability of a local lawyer. We all hope that it will never happen to us, but what if it does?"

There are, as yet, no cases or ethics opinions describing any duty of care on the part of a sole proprietor regarding planning for the care of client matters during short- or long-term disability or sudden or unexpected death. In the larger sense, however, we all owe a fiduciary and legal duty of competence to our clients to protect their interests and perform legal services competently. (*Stanley v. Richmond* (1995) 35 Cal.App. 4th, 1070, 1092) Competence includes the mental and physical ability to perform legal services competently. (Rule 3-110(B), Rules of Professional Conduct; 1 TRG Prof.Resp., p. 6-4 [paragraph 6:23])

Strong's case demonstrates some of the risks attendant to doing nothing. Our clients, for whom we have worked so hard, deserve something better than absolute chaos if we are suddenly disabled or die. Our loved ones do not deserve the headaches and worry of winding up a law practice at a time when they may be feeling emotionally and financially vulnerable, grieving or themselves incapable of handling the stress of business matters. Next time we talk, Best, I will outline an 'estate plan for a solo practice.'"

*Ellen Peck is the 1998-99 chair of the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee and a member of the State Bar Committee on Professional Responsibility and Conduct. She is a co-author of Vapnek, Tuft, Peck & Weiner (1997) "The Rutter Group California Practice Guide - Professional Responsibility." Her private practice in Malibu is devoted to serving lawyers in all aspects of their professional responsibilities and ethics.*

## **Test — Legal Ethics**

### **1 Hour MCLE Credit**

This test will earn 1 hour of MCLE credit in Legal Ethics.

1. True/False. California has no statutory method of protecting clients whose lawyers die or become incapable of practicing law.
2. True/False. A disabled lawyer enrolled as an inactive member is required to complete MCLE courses and may practice law.
3. True/False. Only the State Bar of California can assume responsibility for the law practice of a lawyer who is incapable of practicing law.
4. True/False. The superior court may not assume jurisdiction of a law practice due to the lawyer's excessive use of alcohol.
5. True/False. If a disabled lawyer is incompetent to give consent to the superior court's assumption of jurisdiction over the practice, only the State Bar may petition the superior court to assume such jurisdiction.
6. True/False. If a disabled lawyer is capable of consenting to the assumption of jurisdiction of his practice, a client could apply to the court for assumption of jurisdiction.
7. True/False. Because of client confidentiality, all affected clients must authorize anyone the court appoints to go through their files.
8. True/False. Any lawyer accepting appointment by a court pursuant to Bus. & Prof. Code §§6190 et seq. can receive compensation for all activities.
9. True/False. A person who initiates a court action to assume jurisdiction over a disabled lawyer's practice is immune from liability.
10. True/False. If a client's statute of limitations runs after the application pursuant to Bus. & Prof. Code §6190 is filed, the client has an additional six months to file the action.
11. True/False. When the court assumes jurisdiction over a disabled lawyer's practice, the lawyer is involuntarily enrolled as an inactive member of the bar by the State Bar and may only return to practice after filing a petition with the State Bar Court to terminate the inactive enrollment, proving through competent evidence that he or she is capable to return to practice and obtaining an order from the State Bar Court for termination of the inactive enrollment.

12. True/False. After Jan. 1, 1999, any person interested in the estate of a disabled lawyer is permitted to petition the probate court for appointment of a practice administrator to take control of the files and assets of the practice of the disabled member.
13. True/False. The probate court cannot act on an expedited basis and without notice to all affected parties.
14. True/False. A practice administrator appointed pursuant to §§2468, 9764, or paragraph (22) or (23) of subdivision (b) of §17200 of the Probate Code can be a non-lawyer.
15. True/False. Unless he or she has a power of attorney, a practice administrator cannot take control of all operating and client trust accounts, business assets, equipment, client directories, and premises that were used in the conduct of the deceased or disabled member's practice.
16. True/False. A practice administrator may take control and review all client files of the deceased or disabled member without client consent.
17. True/False. The practice administrator may act as successor counsel for a client of the deceased or disabled member.
18. True/False. The lawyer of the conservator of the estate of a disabled lawyer is in the best position to serve as a practice administrator.
19. True/False. The practice administrator need not prove financial responsibility for his or her acts.
20. True/False. An appointing court need not appoint the practice administrator nominated by the disabled attorney.

### **Certification**

- This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour, of which one hour will apply to legal ethics.
- The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

**MCLE ON THE WEB (\$15 PER CREDIT HOUR)**

**TEST #10**

**1 HOUR CREDIT**

**LEGAL ETHICS (Part 1)**

- Print the **answer form only** and answer the test questions.
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