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TEST #11

1 HOUR CREDIT

LEGAL ETHICS (Part 2)

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 develops a checklist of issues for you to discuss with your estate planning lawyer

By Ellen Peck

About a month after California Joan counseled her former law school classmate, Theo Best, on managing the solo law practice of a local attorney who suddenly had become disabled, Best called her again. "Cali," Best started, "my experiences with Strong N. Fitt's sudden disability and the subsequent scrambling to obtain authority to manage his practice and assist his clients has been a wake-up call to me. I'd like to retain you to assist me in creating an estate plan for my solo practice so this does not happen to my clients and my family."

Cali felt that uncomfortable, uneasy, helpless feeling rise in her throat - she knew nothing about estate planning or trust or probate. "Best, I'd like to help you. However, I can't advise you about how to create the documents appropriate for estate planning for your law office because I do not practice in that area. You need to consult a trust, estate planning and probate lawyer for that advice."

Best chuckled at his friend's caution. "Cali, Estelle Planner, my estate planning lawyer, is going to walk me through it and prepare all the documents. But I need your counsel and advice about the professional responsibility and practice issues that are relevant to the estate planning issues." Cali, sighing with relief, agreed to help Best create a checklist of issues to discuss with his estate planning lawyer.

"Cali, I'm worried about legal malpractice actions against my estate. Suppose I don't have an estate plan for my law practice and a client claims damages due to lack of assistance after my death or disability. Can the client sue my estate for not having a safety net after my death or disability?" Best asked.

"Best, I have found no published California state court 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," Cali admitted. "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 [6:23].) It's not a big stretch for a plaintiff's legal malpractice counsel to argue that disability or death are foreseeable events which create a lawyer's duty of care to protect their clients from the aftermath of disability or death," Cali opined. "Risk management is important. But most of us are motivated by our

genuine concern that our clients not suffer through absolute chaos if we are suddenly disabled or die. We are also motivated by our desire to protect our loved ones from headaches and the worry of winding up a law practice at a time when they may be feeling emotionally and financially vulnerable, are grieving or are incapable of making business decisions."

"OK, Cali. What general issues should I and Ms. Planner consider in creating an estate plan for my office?" Best queried. "Here is a general checklist," Cali said. "You will want to add individual refinements tailored to your practice, your geographic area, your personality, your financial issues and other similar issues."

Checklist: Ethics issues in estate planning for your practice

1. Find a "buddy" to act as trustee or law practice administrator over your practice

What's a buddy system? Solo practitioners should consider implementing an informal "buddy" system to cover for them in the event of an emergency, a vacation or a short-term disability. A buddy system can be formalized and become a trustee or law practice administrator over your practice in the event of a longer term disability or death.

Who should be a buddy? One of your trusted friends, who is a lawyer, may be willing to serve as trustee over your practice during your disability or after your death, or even when you take that much-needed vacation. You and your buddy may have a reciprocal "you cover me, I'll cover you" arrangement. A group of solo practitioners in an office-sharing arrangement or who know and respect each other may want to create a buddy pool. You may have one buddy who is willing to serve informally and another buddy who is willing and able to serve as a trustee or law office administrator for your law practice "estate plan."

What are the qualifications necessary for a buddy/trustee?

The buddy should be a licensed member of the California State Bar in good standing.

Ideally, the buddy should have expertise in your practice area and be less likely to have conflicts of interest with your client base. (Thus, it is probably not a good idea for an insurance defense lawyer and a plaintiff's personal injury lawyer to enter into a buddy arrangement, since there is always the possibility of conflict.)

Your designated buddy should have the qualities of competence, trustworthiness and accountability that you would want to have as a lawyer for your clients.

2. Creating a written estate plan for your practice

Superior court supervision of your practice: Probate Code §§2468 and 9764 permit a superior court to appoint and supervise a law practice administrator who will manage your practice in the event of your disability or death. Your estate plan can simply create the necessary documentation and instructions to enable your personal representative to invoke these sections. This alternative involves the superior court appointment of a practice administrator designated by you.

Trust instruments to avoid superior court supervision: You and your estate planning lawyer should determine whether it is practical and appropriate to create trust agreements which avoid superior court supervision of your practice or probate of your assets. This alternative involves your designation of a trustee or buddy to operate and manage your law practice subject to the authority granted by you.

3. Probate court documentation

Designate a personal representative in your estate planning documentation. If you have health care documents in the event of your disability, make sure that they are broad enough to empower your personal representative to speak for you respecting your law practice without the appointment of a conservator.

A personal representative is important to the timing of the appointment of a law practice administrator and the continued operation of your law practice. If the personal representative petitions for the immediate appointment of a law practice administrator, notice can be waived. (Prob. Code §§2468(b), 9764(b).)

Give instructions to the personal representative regarding the following:

Designate the circumstances when your personal representative will have the authority to petition the superior court to appoint a law practice administrator in the event of your disability. (Prob. Code §2468(a).)

Nominate the law practice administrator you would like the court to appoint. Both Prob. Code §9764(f) [death] and §2468(f) [disability] require the superior court to appoint the attorney nominated by you in a writing, 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 deceased or disabled member.

You should not nominate your personal representative as the law practice administrator since both §§9764(e) and 2468(e) prohibit the personal representative being appointed as a law practice administrator.

Law office administrator recommended powers:

The superior court is not required to follow the instructions of the disabled or dead lawyer. However, since the personal representative must indicate the powers of the law practice administrator in the petition, your wishes are more likely to be followed.

The court may authorize a law practice administrator to exercise the following potential powers pursuant to Business & Professions 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.

Take control and review all client files of the deceased or disabled member.

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.

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 the deceased or disabled member and obtain additional time for new counsel to appear for the affected client.

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 pursuant to this section, 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.

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.

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 goodwill.

Subject to the approval of the personal representative of the estate, reach agreements with successor counsel for division of fees for work in progress on the cases of the deceased or disabled member.

Subject to the prohibitions against soliciting cases, the practice administrator may act as successor counsel for a client of the deceased or disabled member.

It is important to designate the disposition of your practice in the event of your death. Do you wish your practice to be wound down or sold?

It is also important for you to designate the disposition of your practice in the event of your disability. If your disability is of short duration, you may wish to have your practice managed and operated until you are able to resume your practice. However, you also may wish to designate the circumstances in which your personal representative should dissolve and wind down your practice or sell it.

4. Transferring the management and operation of your practice to a trustee

You and your estate planning lawyer may create the necessary trust instruments and other documents to transfer the management, operation and economic interest of your law practice to a trustee in the event of your death or disability. If you leave something out or unanticipated events occur, your trustee may also petition the superior court for the appointment of a law practice administrator pursuant to Probate Code §17200(b)(23) & (24).

What is the scope of the buddy's or trustee's power?

The scope of your law office trustee's powers should cover the circumstances in which the buddy has authority to manage your practice; the limits or expanse of the trustee's authority; and how that authority fits in with other estate planning tools and authority. Some of the general issues are:

When does the law office trustee step in?

Your death

Disability

a. Any disability that is likely to last more than [30, 60, 90] days in the opinion of your primary care physicians.

b. After a certain period as designated by your personal representative or your primary care physicians.

c. To be designated by someone else.

Your incapacity

Illness

a. After what period of time

b. When someone else designates

c. Some triggering event to be determined by medical doctors

Vacations

What authority will the law firm trustee have?

1. How should the law firm trustee's powers interrelate to other representatives of your estate or family members? [Remember a non-lawyer representative cannot practice law and cannot control your practice. See rule 1-600(A), Rules of Professional Conduct.]

2. Handling client matters:

Do you want the buddy to handle your client matters:

- a.** Short-term
- b.** Long-term
- c.** Until you are able to return to practice
- d.** Until the practice is wound up
- e.** Until the practice is sold
- f.** Discuss various options for the selection of successor counsel with the client.

Take control and review all client files of the deceased or disabled member.

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 lawyer.

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 the deceased or disabled member and obtain additional time for new counsel to appear for the affected client.

If the buddy/trustee is going to work on client matters, consider adding a clause to new client fee agreements and adding an addenda to existing clients' fee agreements advising them:

a. Under what circumstances the buddy/trustee is authorized to work on client matters to protect their interests, if you are unable to act.

b. The compensation arrangement, if any, you have made with the buddy/trustee. (Rule 2-200, Rules of Professional Conduct.)

3. Client trust account matters: When deposits or disbursements need to be made to clients' trust accounts, someone must have authority to handle. Experience tells us that potential abuses and theft can occur when left in the hands of non-lawyers. There are two ways of handling the trust account issue:

The buddy/trustee can become a signatory on your clients' trust account. The advantage is that your buddy will then be able to handle any client trust account matter at any time that you are not available. One disadvantage is that the buddy may want to intervene in your trust account affairs when you do not need him or her.

Create a power of attorney that authorizes the buddy/trustee to take control of all operating and client trust accounts, in certain designated circumstances. This method will enable you to run your business without interference but provide authority of the buddy to act when you are unable to act.

4. Take control of all business assets, equipment, client directories, and premises that were used in the conduct of the deceased or disabled member's practice.

5. 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 buddy/trustee to carry out the authority of the member, the trustee or buddy 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.

6. Employ any person, including but not limited to the employees of the deceased or disabled member, who may be necessary to assist the trustee/buddy in the management, winding up, and disposal of the practice.

7. Subject to the approval of the personal representative of the estate, reach agreements with successor counsel for division of fees for work in progress on the cases of the deceased or disabled member.

8. Subject to the prohibitions against soliciting cases, the buddy/trustee may act as successor counsel for a client of the deceased or disabled member.

9. The disposition of your practice if you are unable to make decisions:

Leave the discretion to someone else (e.g., your spouse, other representative, buddy/trustee, etc.).

Designate your intended disposition of your practice:

a. Keep the office going as much as possible in the event that you are partially disabled or incapacitated but it appears that you might return to practice.

b. Under what circumstances [which you should list], should the buddy/trustee transfer the responsibility for the files, with the clients' permission, to someone else (e.g., a designated attorney, the buddy/trustee, any competent attorney who is willing to receive them)?

c. Under what circumstances should the buddy/trustee sell the practice?

d. Under what circumstances should your personal representative/buddy/trustee petition the superior court for the appointment of a law practice administrator pursuant to Probate Code §§2468, 9764, 17200(b)(22) & (23) and B&P §6185?

Compensation

a. Under what circumstances will your buddy/trustee be compensated?

b. What is the rate of compensation for your buddy/trustee?

c. From what funds will be buddy/trustee be recompensed (e.g., receivables, settlement, future billings to clients, your estate, etc.)?

d. How will the compensation agreement relate to payments to you or your estate for the value of work performed on the file?

Note: Rule 1-320, Rules of Professional Conduct, prohibits fee splitting between a lawyer and non-lawyers, including the deceased member's family or estate. However, rule 1-320(a)(2) permits a member undertaking unfinished legal business of a deceased member to pay the estate of the deceased member or other person legally entitled thereto that proportion of the total compensation which fairly represents the services rendered by the deceased member.

Payments of the proportion of the total compensation which fairly represents the services rendered by a disabled member before a disability, to the estate of the disabled lawyer, would not be fee-splitting with a non-lawyer since the disabled lawyer is still alive. Depending upon the arrangement, the successor lawyer may be required to comply with rule 2-200.

e. What authority does the buddy/trustee have to be compensated? It would be appropriate to add a provision in future fee agreements and existing fee agreements in which the client authorizes the payment of compensation to the buddy/trustee under the circumstances set forth in the agreement.

If your compensation agreement includes any fee-splitting agreement, rule 2-200(A) requires that the agreement be approved by the client after full disclosure and prohibits increase of the fee due solely to the fee sharing with the buddy/trustee.

After reviewing the checklist with Cali, Best closed their conference. "Cali, you've given me a number of alternatives and choices. I really don't want to think about, much less plan for, my own demise or disability. But you've demonstrated that with a little care and planning, I can create a safety net for myself, my family, my clients and my practice in the event that the worst

happens. I hope other solo practitioners will engage in estate planning for their practices before it is too late."

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. A solo practitioner who does not have an estate plan for his or her law practice is engaging in professional malpractice.
2. True/False. The duty of competence includes the mental and physical ability to perform legal services competently.
3. True/False. A trustee or "buddy" designated to manage your law practice does not need to be a lawyer.
4. True/False. The superior courts can supervise a dead or disabled lawyer's law practice.
5. True/False. The designation of a personal representative can result in immediate appointment of a law practice administrator to preserve the assets of the law practice.
6. True/False. A solo practitioner's wishes as to the appointment of a law practice administrator are irrelevant.
7. True/False. A lawyer may nominate one lawyer to serve as the estate's personal representative and law practice administrator.
8. True/False. If a solo practitioner transfers the economic interest of a practice to a trustee and the lawyer is disabled or deceased, the trustee may not seek the assistance of the superior court.
9. True/False. In creating trust documents for the operation and management of a solo practice in the event of disability, it is important to set a time for the law office trustee's powers to commence.
10. True/False. Lawyers who undertake unfinished legal business of a disabled or deceased lawyer may not allow any third person to interfere with the member's independence of professional judgment.
11. True/False. If a buddy/trustee is going to work on client matters, it may be helpful to disclose under what circumstances the buddy/trustee is authorized to work on client matters to protect their interests and the compensation arrangement.
12. True/False. It is unnecessary to appoint a trust to take control over a client's trust account since any one can be a signatory on the client's trust account.

13. True/False. Having a buddy/trustee as a signatory on your client's trust account will enable the buddy/trustee to handle any client trust account matter at any time that the sole practitioner is not available, including when the practitioner is on vacation.
14. True/False. There are no disadvantages to having another lawyer as a co-signatory on a client's trust account of a sole practitioner.
15. True/False. A power of attorney that authorizes a buddy/trustee to take control of all operating and clients' trust accounts in certain designated circumstances is another means of providing for the management of a sole practice if a lawyer dies or is disabled.
16. True/False. If a lawyer dies, the practice must be wound down.
17. True/False. A personal representative/buddy/trustee may petition the superior court for the appointment of a law practice administrator pursuant to Probate Code §2468, §9764, §17200(b)(22) & (23) and Bus. & Prof. C. §6185 or for the superior court to assume jurisdiction over the practice pursuant to Bus. & Prof. C. §§6180 and 6190 et seq.
18. True/False. Rule 1-320, Rules of Professional Conduct, which prohibits fee splitting between a lawyer and non-lawyers, prohibits a lawyer from paying legal fees to a deceased lawyer's estate.
19. True/False. Rule 1-320, Rules of Professional Conduct, which prohibits fee splitting between a lawyer and non-lawyers, prohibits a lawyer from paying legal fees to a disabled lawyer's estate.
20. True/False. A law practice administrator may agree to the sale of a law practice and its good will for any price he or she believes is appropriate.

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.

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1 HOUR CREDIT

LEGAL ETHICS (Part 2)

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