

# Estate Planning for Lawyers

By Patti S. Spencer

*The shoemaker's children have no shoes.*

**E**state planning attorneys are familiar with avoidance behavior on the part of clients. Who likes to think about mental incapacity and death? But how much more avoidance do we find among the attorneys themselves?

When a lawyer dies or becomes incapacitated without plans in place for the continuance or closure of his or her practice, serious harm to clients and the lawyer's family can result. If the lawyer is part of a firm, often the transition is seamless—other attorneys take over within the firm—but what about solos? Without proper planning there may not be anyone ready, willing, and able to step in for a lawyer who suddenly cannot carry on his or her practice.

The goals for a lawyer's estate plan are generally the same as the goals for any client:

- Planning for incapacity or disability (avoiding guardianships and conservatorships)
- Avoiding intestacy
- Reducing estate and inheritance taxes
- Providing financial management
- Caring for and protecting beneficiaries
- Choosing agents, executors, and trustees
- Maintaining privacy
- Reducing opportunities for disputes

An additional consideration for the estate of a lawyer is the fiduciary duty owed to clients. A lawyer's ethical and professional obligations to clients include a duty to protect clients' interests in the event of the lawyer's death or disability. A client could face significant prejudice or damages if left suddenly high and

dry. There could be missed court dates, expired statutes of limitation, and missed filing deadlines. Plus, the obligations may fall on the lawyer's family, causing additional stress no one would wish on loved ones.

Several states' rules of civil procedure make provisions for court appointment of lawyers to take responsibility for a deceased lawyer's clients files and property. The American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 92-369, December 7, 1992, Disposition of Deceased Sole Practitioners' Client Files and Property, provides:

To fulfill the obligation to protect clients files and property, a lawyer should prepare a future plan providing for the maintenance and protection of those client interests in the event of the lawyer's death. Such a plan should, at a minimum, include the designation of another lawyer who would have the authority to review client files and make determinations as to which files need immediate attention, and who should notify the clients of their lawyer's death.

When preparing your estate plan, be sure to include the following:

- Make arrangements for a lawyer or law firm to continue, close, or transfer your practice on your behalf. Some malpractice insurers require that a sole practitioner have such an arrangement in place.
- Have the appropriate powers of attorney in place so that the assisting lawyer(s) can step in to run your practice. They will need to be able to sign checks, handle the interest on lawyers trust accounts (IOLTA), manage employees, and generally conduct business on your behalf. Consider having a limited power of attorney specifically for the lawyer who will take over as successor.
- Consider naming at least one executor in your will who is a lawyer to be charged with the responsibility of selling or closing the practice.

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## Your estate plan should include a review of the financial plan for your family.

- Maintain an easily understandable system of client records to help the successor lawyer to carry out his or her responsibilities.

Any arrangement to take over the lawyer's practice must include appropriate protections for client confidentiality. The lawyer taking over must beware of conflicts and must safeguard confidential information. It is a good idea to introduce this lawyer to office staff. Staff need to know how to contact the assisting lawyer in the event of disability or death and where any agreements or powers of attorney are located. Family members and the executors should be advised of the arrangements that have been entered into. Instruction letters could be invaluable. An office procedure manual would be ideal.

The arrangement you make with the backup attorney should establish the scope of the backup attorney's duty. Will the backup attorney be the personal attorney for the deceased or incapacitated lawyer? This can be an important distinction. If the backup attorney personally represents the deceased or incapacitated lawyer, in the event he or she discovered malpractice or ethical violations in any cases, the backup attorney would not be able to inform the clients. Also, in that event, the backup attorney could not represent the clients. If it is intended that the backup attorney take over representation, then he or she would not be the personal counsel for the deceased or incapacitated attorney and must obtain each client's consent to representation.

The compensation of the backup attorney should be addressed, as should the matter of staff support to assist the backup attorney in performing his or her duties and arrangements to pay for these services.

Another consideration for the estate plan of a lawyer is the provision applicable to his or her exit from practice if part of a firm. Although client matters may be taken care of if the deceased or incapacitated lawyer is part of a firm, the lawyer's own financial status may not be so clear.

What is the lawyer owed if he or she becomes disabled? What is owed to his or her estate if death occurs? Does employment simply terminate? What about the firm's

assets, receivables, good will? Most lawyers would scream bloody murder if a client wanted to enter into a business relationship without a written agreement covering these eventualities, but how many law firms do not have written partnership or shareholder agreements? This is absolutely crucial to the estate plan. It's also an appropriate time to review the choice of entity for the practice with an eye to liability protection and income tax results for the owners.

The lawyer's estate plan should include a review of the financial plan for the attorney's family. Is there adequate life insurance? Is the life insurance in an irrevocable life insurance trust (ILIT)? Does the attorney have adequate disability insurance? What would be the financial condition of the lawyer and the lawyer's family if the lawyer cannot work?

Are there significant retirement benefits in a pension, profit-sharing, 401(k), or IRA? These assets require special attention because of their exposure to both income tax and estate and inheritance taxes. The proper designation of beneficiaries is crucial to the beneficiaries being able to realize the value of the plans rather than seeing them consumed by taxes.

Lawyers, like other professionals, can accumulate significant assets over the course of their career and have high risk of liability owing to their professional practice. An estate plan for a lawyer must also take into consideration the lawyer's exposure to professional liability. Estate planning strategies that seek to protect assets from liabilities are appropriate to consider.

If a lawyer is retiring, or if another lawyer is closing a deceased or incapacitated lawyer's practice, it is very important to buy a "tail." A tail is a malpractice insurance policy that will cover claims made against the lawyer after cessation of practice. The harsh reality is that many elderly lawyers experience declining capacity. Age, illness, or dementia can cause the lawyer to make errors that can leave the lawyer's family defending malpractice claims brought against the estate or against the incapacitated attorney. Potential malpractice liability can continue for a long time, and closing the estate does not protect the beneficiaries from transferee liability of unbarred claims. **ESOLO**