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Expecting the Unexpected: Ethical Considerations In Succession Planning

I. Introduction and Scope

This opinion examines a lawyer's ethical obligations, along with best practices, for developing a succession plan for an unexpected event that prevents the lawyer from practicing law. For purposes of this opinion, a succession plan is defined as those things a lawyer should take into account when developing a plan for an unexpected event that precludes the lawyer from practicing, such as the lawyer's incapacity, disability, or untimely death. Succession planning is not only a practical consideration for lawyers, but also is consistent with a lawyer's duty of diligence in Colorado Rule of Professional Conduct (Colo. RPC or Rule) 1.3.

The opinion details fundamental considerations that a lawyer (the planning attorney) should prepare for prior to the unexpected happening to protect client interests, many of which pertain to client files and property. Quite a few of these considerations flow from basic compliance with certain Colorado Rules of Professional Conduct.

The opinion also details best practices for another lawyer (the assisting attorney) to consider when implementing the succession plan after the unexpected event occurs, such as continuing representation of the planning attorney's clients and returning files and property. For purposes of this opinion, best practices are those practices which may be

beneficial to the planning attorney in the succession planning process and the assisting attorney in carrying out the succession plan, and which the Committee encourages lawyers to consider. They are not, however, ethical obligations pursuant to the Colorado Rules of Professional Conduct, nor are these best practices intended to establish a legal duty or standard of conduct.

The opinion additionally outlines procedures behind inventory counsel appointment pursuant to Colorado Rule of Civil Procedure 244. This opinion does not discuss succession planning in regard to transferring client responsibilities within a firm when an unexpected event occurs, nor does it address short-term absences due to an unexpected event.

II. Syllabus

The Colorado Rules of Professional Conduct do not formally call for succession planning. They do suggest that having a succession plan comports with a lawyer's duty of diligence in Colo. RPC 1.3. Comment [1] to Colo. RPC 1.3 explains a lawyer should "take whatever lawful and ethical measures are required to vindicate the client's cause or endeavor." To meet this requirement, a lawyer should develop a specific plan for an unexpected event that renders a lawyer unable to practice law to mitigate adverse impacts on clients.

The Rules expressly support the inclusion of succession planning in certain lawyers' duty of diligence in Comment [5] to Colo. RPC 1.3. That comment provides:

> 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.

Comment [5] to Colo. RPC 1.3 emphasizes the need for solo practitioners to have a succession plan. Succession planning is vital for solo practitioners because clients will not be able to turn to a lawyer in the same firm to continue their cases. Without a succession plan for guidance, another lawyer is unlikely to have the institutional knowledge about the solo practitioner's procedures with respect to managing cases and other administrative aspects of the practice to efficiently assist clients, including facilitating the important task of returning client property.

The American Bar Association's Standing Committee on Ethics and Professional Responsibility opined that "[a]s a precaution to safeguard client interests, the sole practitioner should have a plan in place that will ensure insofar as is reasonably practicable that client matters will not be neglected in the event of the sole practitioner's death." ABA Comm. on Ethics and Prof. Resp., Formal Op. 92-369, "Disposition of Deceased Sole Practitioners' Client Files and Property" (1992), p. 2. This guidance from three decades ago remains pertinent.

The danger of neglected client matters, and associated liability risks, can exist in firms of any size as well, since each lawyer may have their own way of organizing their cases, keeping their calendars, and contacting clients. Therefore, the Committee encourages all lawyers think about and formulate a plan to protect current and past clients if the unexpected happens.

III. Analysis

A. Why Attorneys Should Have a Succession Plan

Not planning for the unexpected can have serious and undesirable consequences for the planning attorney's clients. Clients who have active cases with upcoming transactional or limitations deadlines, scheduled events or meetings, court appearances or trials, may be harmed if those deadlines or appearances pass without someone taking steps to protect the client's interests. All clients will need their files promptly returned to them or transferred to another lawyer. Clients with active matters will also need unearned fees refunded to them in order to retain new counsel in their ongoing legal matters.

The absence of a plan for the unexpected may also have undesirable consequences for the assisting attorney who will have to figure out on their own how to protect the planning attorney's clients. In the absence of a succession plan, the assisting attorney may not be able to take the first step of logging onto the planning attorney's devices and accounts without knowing the passwords. The assisting attorney may not even know where to find the devices, or what cloud drive the planning attorney used for file management, without some type of advance instruction. The assisting attorney may be fielding calls from clients about their cases or the status of advance payments. Without diligent bookkeeping by the planning attorney, determining what funds the planning attorney held, and for whom, may be a formidable obstacle. A succession plan is a roadmap for the assisting attorney to tend to the planning attorney's clients' needs efficiently and effectively.

Not planning for the unexpected may also have undesirable consequences for a multi-person practice by impacting the firm's overall productivity. Dealing with the practice-wide ramifications of a lawyer's unplanned withdrawal from a firm can greatly consume time and resources. This may negatively impact the other lawyers' ability to continue to work on existing client matters.

Having a succession plan lessens the risks described. It is also a helpful way to organize and streamline an existing practice. Creating a succession plan involves thinking about how to direct the assisting attorney step-by-step. A planning attorney must think about how information is accessed and stored, how deadlines are calendared, how client files are organized and where they are kept, whether client ledgers are up-to-date, and the availability of accounting records.

Outside the various legal risks and issues created by not having a plan in place, the absence of a succession plan can significantly burden the planning attorney's spouse, family members, or other loved ones at a difficult time. Without a succession plan, the responsibility to transition clients, distribute property, and wind-down a practice could fall on the planning attorney's personal representative or close family. These persons will already be navigating grief and uncertainty. Thus, developing a succession plan to have an assisting attorney to handle these matters protects not only clients, but also loved ones. It also avoids situations where a non-lawyer third party accesses confidential client information.

Last, attorneys should consider the financial implications of not having a succession plan. File disposal, including shredding and mailing files, as well as potentially paying an

assisting attorney for his or her time to wind down a practice, are all potential costs. Determining how these expenses will be paid as part of a succession plan may result in cost savings, as opposed to leaving these decisions to an assisting attorney, personal representative, or inventory counsel to deal with on an urgent basis.

B. Considerations for Planning and Assisting Attorneys

A lawyer's duty of diligence and obligation to protect client interests should compel development of a plan for an unexpected event that results in a lawyer's disability, death, or incapacity. For many lawyers, particularly those in solo practice, this means creating a formal succession plan. This opinion approaches the issue, and embedded ethical considerations, by looking first at the need to protect client files. It then turns to protecting client funds in the event of the unexpected. From there, this opinion details the importance of a planning attorney's regular communication with clients. This opinion then explores the unique considerations involved for those assisting attorneys who assume representation of the planning attorney's clients.

C. Protecting Clients: Client Files

1. Maintaining Client Files

As a best practice, planning attorneys should maintain client files in an orderly fashion. This includes making one client's file distinguishable from others, regardless of the format used to store client files. It also includes keeping client files in a secure location. Doing so is consistent with a lawyer's duty of confidentiality. Colo. RPC 1.6(a) outlines a lawyer's duty to keep information related to the representation of a client confidential,

absent client consent to disclosure of information. Colo. RPC 1.6(b) lists circumstances where disclosure of client confidences may be permissible. Colo. RPC 1.6(c) mandates lawyers "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Last, Colo. RPC 1.9(c)(2) explains a lawyer shall not "reveal information relating to the representation" of a former client. Accordingly, a foundational step in creating a succession plan is to have an organized system for maintaining client files to safeguard confidential information in them.

Planning attorneys should be vigilant not to intermingle documents related to different client matters in the same file, whether that file is a tangible, physical file, or one kept electronically. Keeping files distinct reduces the risk of inadvertent disclosure when returning the file. Planning attorneys should similarly be mindful of storing client files in locations where other individuals could potentially access the files and information in them. For example, storing files on shared devices, or in storage along with other personal documents and items, risks the inadvertent disclosure of confidential information. These best practices comport with all lawyers' duties to protect client confidences. Further, organized client files will lessen an assisting attorney's workload.

The question arises of what papers must be retained as part of a client file. Comment [1] to Colo. RPC 1.16A instructs that: "[a] client's files, within the meaning of Rule 1.16A, consist of those things, such as papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice." Elaborating on what constitutes a client file, the Committee opined in Formal Opinion 104 that a client's file:

> ...includes, but is not limited to: those documents and other property the client provided; originals and copies of other papers and documents the lawyer possesses relating to the representation that the client reasonably needs to protect the client's interest, and documents in electronically accessible and editable format….[1]

Planning attorneys should be mindful of what documents must be retained in a file both during the course of active client representation and upon conclusion of the matter.

A final consideration for file maintenance in the context of succession planning is Colo. RPC 1.16A's instructions regarding client file retention. RPC 1.16A(b) establishes a baseline that lawyers in private practice must keep client files for ten years following termination of the representation of a client matter if the client has not been given notice of the lawyer's intent to destroy the client's file. After that decade, the lawyer may destroy the file provided the lawyer does not know of any "pending or threatened legal proceedings" and the lawyer has not agreed to otherwise maintain the file.

Colo. RPC 1.16A(a) provides that lawyers in private practice may not need to keep a client file for ten years if:

- The lawyer delivers the file to the client.
- The client authorizes destruction of the file in a writing signed by the client and the lawyer is not aware of any pending or threatened legal proceedings.
- The lawyer gives written notice to the client of the lawyer's intention to destroy the file after a specific date in the notice and there is a minimum of thirty days between the date of the notice and the date of destruction and provided, again, there are no known or threatened legal proceedings the lawyer is aware of.

[1] CBA Formal Op. 104, "Surrender of the File to the Client Upon Termination of the Representation" (2018).

The Committee encourages planning attorneys to focus on the possibilities suggested by the third point, as well as Colo. RPC 1.16A(d) which explains that lawyers may satisfy the notice requirements to clients of their file retention policies by providing notice in a fee agreement or other writing delivered to a client. Developing a policy for how long a lawyer will keep files, and communicating the policy to clients during the course of the representation, allows the lawyer to destroy files after a certain period of time. Such a policy also avoids having to find clients and obtain their permission to destroy a file years after the representation ends. It also avoids undesirable situations of physical client files stacking up in storage facilities, basements, attics, or offices. In the context of succession planning, minimizing a lawyer's practice footprint by destroying files after a set date will reduce the amount of work an assisting attorney must undertake to wind down the planning attorney's practice.

Lawyers who represent clients in criminal defense matters should familiarize themselves with Colo. RPC 1.16A(c), which has specific requirements for the amount of time a file must be maintained depending on the nature of the client's conviction and, in many circumstances, whether or not the sentence was appealed.

Planning attorneys developing a file retention policy should consider other relevant rules and statutes related to the maintenance and destruction of client files. Colo. RPC 1.16A(e) explains that the rule does not "supersede or limit a lawyer's obligations to retain a client's file that are imposed by law, court order, or rules of a tribunal." For example, Colo. RPC 1.15D(a) requires that a lawyer maintain copies of invoices or fee agreements in the client's file for a period of seven years; a requirement discussed in greater detail later

in this opinion. C.R.C.P. 121 Section 1-26(7) requires lawyers to keep copies of documents filed electronically in Colorado state courts for two years. Planning attorneys should also take into account the limitation periods for malpractice actions or attorney misconduct complaints.

2. Distributing Files

One of the assisting attorney's primary duties is to distribute client files. Depending on how the client choses to move forward with their case, the file will be given to the client directly, forwarded to the client's new counsel, or destroyed. To help in this process, planning attorneys should, as a best practice, make essential information about client whereabouts readily accessible. Storing contact information with a client file, or in a client list, will make this process easier.

An assisting attorney will also want to determine if immediate action needs to be taken in discrete matters. This helps the assisting attorney prioritize which clients to contact immediately and those with less urgency. This can be accomplished by checking the planning attorney's calendar, docket, or case files. A succession plan with instructions on how to view and access this information will save the assisting attorney time and effort. To facilitate file return, planning attorneys should include in their succession plan information on where to locate passwords to access electronically-stored files as well as digitally-maintained calendars.

If the assisting attorney determines that a client matter requires immediate attention, the assisting attorney should promptly contact the client and notify them of the situation and explain options for moving forward. The assisting attorney will likely need to arrange

to quickly return the file to the client or forward it to successor counsel. Doing so may incur costs. Accordingly, planning attorneys may want to outline in a succession plan how the assisting attorney can access funds to pay these costs.

If the assisting attorney plans to assume representation of the planning attorney's clients, the assisting attorney may not need to return a file, but should be prepared to ask for continuances or extensions of time as necessary, as well as to file substitutions of counsel. If the assisting attorney does not intend to assume client representation, the assisting attorney may nonetheless want to mention to clients the desirability of informing the court of the situation in those matters where there is ongoing litigation.

The assisting attorney who intends to take over client representation should plan to review the file and contact the opposing party or third parties when imminent action is needed. In these situations, the assisting attorney should check the case file to ascertain whether the person is represented by counsel, in which case Colo. RPC 4.2 may prohibit direct communication with the opposing party or third party.

Paramount to client file distribution is maintaining the confidentiality of information in the file. To accomplish this, and as an additional best practice, a planning attorney might consider informing clients at the outset of the representation of the name of their assisting attorney so that clients understand who might contact them if an unexpected event leads to the planning attorney's incapacity. As part of informing clients, planning attorneys may wish to have clients consent to having their files returned by the identified assisting attorney.

Meanwhile, to protect the confidentiality of information in client files, if an assisting attorney has unclaimed files that clients do not wish to receive, or where the client has not responded to communications seeking to return the file, assisting attorneys should securely destroy the information in the file. This may be accomplished by shredding physical files. Electronic devices should be overwritten or electronically recycled, permanently destroying client data. These steps will also require the assisting attorney have access to funds to accomplish the tasks, highlighting the need for a planning attorney to consider how the assisting attorney will pay for the costs involved in winding up a practice. The Colorado Rules of Professional Conduct do not affirmatively require client files be disposed of in a certain way. Regardless, the duty to protect client confidences should guide a planning attorney or assisting attorney's when disposing of client files.

3. Conflicts of Interest

As discussed, an essential step an assisting attorney will take implementing a succession plan is to return files. This will most likely necessitate reviewing files. Planning attorneys and assisting attorneys should be particularly mindful of potential conflicts of interest that might arise for an assisting attorney in this process. Even if an assisting attorney does not intend to represent clients of the planning attorney, if the assisting attorney has a conflict, he or she should avoid reviewing information in a file that may compromise the client interests during the file return process, as a best practice. This is especially so if the assisting attorney has reason to suspect the interests of the client whose file the assisting attorney is reviewing are adverse to interests of a current or former client of the assisting attorney.

Colo. RPC 1.7 sets forth when a conflict of interest exists. Colo. RPC 1.7(a)(2), in conjunction Colo. RPC 1.9(c), extends conflict of interest protection to former clients, third persons, and when the lawyer has a personal interest in the matter. Assisting attorneys who intend to assume representation of client matters need to run a conflicts check as though these are new clients of the assisting attorney's firm. If a conflict of interest emerges, then the assisting attorney should ask another lawyer to handle the case.

Meanwhile, planning attorneys should consider potential conflicts in speaking to colleagues who might serve as an assisting attorney. They should evaluate the risk that the assisting attorney's practice might feature representation adverse to clients of the planning attorney or vice-versa. The more likely that conflicts will arise, then the planning attorney might want to approach another colleague to serve as assisting attorney.

D. Protecting Clients: Client Property

Protecting clients' property is an essential duty under multiple Colo. RPCs. Proper trust account reconciliation and appropriate record keeping as required by the rules facilitates the effective winding down of a law practice, as does putting in place procedures that enable an assisting attorney to distribute funds held in trust.

1. Trust Account Reconciliation

Careful adherence to obligations related to trust account reconciliation will be important in the event of a lawyer's death, disability, or incapacity. Colo. RPC 1.15C(c) provides that lawyers shall reconcile their trust account no less than quarterly as to both individual clients, and in the aggregate, using bank statements. This task may be delegated to a non-lawyer under a lawyer's supervision. Trust account reconciliation enables the

lawyer to determine that the balance in trust reflects that shown in individual client ledgers. If an incapacitating event takes a planning attorney away from practice, it will be incumbent upon the assisting attorney to ascertain ownership of funds in trust and make appropriate disbursements. Regular trust account reconciliations as required by Colo. RPC 1.15C(c) will facilitate the assisting attorney's work.

2. Keeping Records Related to the Trust Account

Rules related to those records that must be maintained in association with a trust account are of immeasurable importance to reducing harm to clients and liability risks if a lawyer unexpectedly suffers a disability, becomes incapacitated, or passes away.

Colo. RPC 1.15D(a)(1)(A) is a detailed rule related to trust account record keeping that planning attorneys should carefully review. The rule says a lawyer shall have a record keeping system "identifying each separate person for whom the lawyer or law firm holds funds ... and adequately showing" the following:

- The date and amount of each deposit in trust.
- The name and address of each payor of the funds deposited.
- The name and address of each person for whom the funds are held and the amount held for the person.
- A description of the reason for each deposit.
- The date and amount of each charge against the trust account and a description of the charge.
- The date and amount of each disbursement.
- The name and address of each person to whom the disbursement is made and the amount disbursed to the person.

The rule provides that lawyers must keep this information for a period of seven years. Lawyers can comply with this rule by maintaining a general trust account ledger and an individual client ledger. Regardless of how a lawyer chooses to comply with this rule, these records will be indispensable for an assisting lawyer's work identifying the owners of funds in trust if a lawyer cannot do so because of death, disability, or some other incapacitating event.

The importance of keeping information required by Colo. RPC 1.15D(a)(1)(A) cannot be understated in the succession planning process. Clients who have paid advance fees will need any unearned fees returned if they wish to hire new counsel. These clients usually will also need the unearned fees returned promptly so they can obtain new representation. Those clients expecting disbursement of settlement proceeds will also look to the assisting attorney to make sure they receive their settlement proceeds if the planning attorney has not already disbursed the proceeds. Third parties, such as lienholders with an interest in funds in a lawyer's trust account, also will need these funds turned over to them. Accordingly, planning attorneys must scrupulously maintain these records, as the rule requires. They also need to explain to an assisting attorney where to find these records as a component of a succession plan.

Other record retention rules that may prove consequential include the mandate in Colo. RPC 1.15D(a)(3) that lawyers keep copies of fee agreements for a period of seven years. Continuing with this series of rules, lawyers should be mindful of Colo. RPC 1.15D(a)(4). This rule requires lawyers to keep "[c]opies of all statements to clients and

third persons showing the disbursement of funds or the delivery of property to them or on their behalves" also for a period of seven years. Additionally, Colo. RPC 1.15D(a)(5) requires lawyers to keep copies of all bills issued to clients for seven years. Meanwhile, Colo. RPC 1.15D(a)(7) requires maintenance, in either paper or electronic format, of all bank statements and all cancelled checks, also for a seven-year period. A lawyer's compliance with these several provisions of Colo. RPC 1.15D(a) will allow another lawyer who is called upon to determine the disposition of funds in trust to do so with precision.

There are many scenarios that might cause an assisting attorney to rely on these records. The assisting attorney may need to consult the fee agreement to determine the exact amount of a refund if the client ledger is not up to date as to the point in time where the planning lawyer stopped practicing. Without these records, the lawyer charged with winding down the practice of a lawyer who cannot practice confronts a daunting task of recreating an accounting for the trust account in the absence of accurate information. Having procedures to comply with Colo. RPC 1.15D's record keeping requirements protects client interests in the event of a lawyer's inability to practice.

3. Distributing Funds from Trust

As a best practice, a planning attorney should consider how to facilitate an assisting attorney's disbursal of funds from the planning attorney's trust account. A planning attorney may want to consult with the financial institution where the planning attorney's trust account is located to understand what procedures apply and what forms might be needed. A planning attorney may also wish to designate the assisting attorney as an authorized signer on the planning attorney's trust account effective upon the planning

lawyer's death, disability, or other incapacity. Planning attorneys should bear in mind when considering who might serve as an assisting attorney the instruction in Colo. RPC 1.15C(b) that "[o]nly a lawyer admitted to practice law in this state or a person supervised by such lawyer shall be an authorized signatory on a trust account."

Assisting attorneys charged with disbursing funds from the planning attorney's trust account should familiarize themselves with Colo. RPC 1.15B(k), which provides instructions on what to do with funds in trust where the owner of the funds cannot be identified or located. Colo. RPC 1.15B(k) specifically provides that if reasonable efforts to identify or locate the owner of the funds are unsuccessful, these unclaimed funds should remain in trust or may be remitted to the Colorado Lawyer Trust Account Foundation (COLTAF) by following instructions available from that organization.[2]

E. Protecting Clients: A Planning Attorney's Duty to Communicate

Planning attorneys should remember their duty to communicate with clients. Colo. RPC 1.4(a)(3) requires lawyers keep clients reasonably informed about the status of the matter. Keeping clients updated regarding case developments, deadlines, and obligations that arise in the course of representation, such as discovery requirements or mandatory disclosures, will help clients be better informed should something unexpectedly happen to a planning attorney. Having procedures in place to regularly update clients on the status of their case, even if it is to explain that there are no new developments, accords with a

[2] Information on how to remit unclaimed funds to COLTAF, as well as an unclaimed funds remittance sheet, may be found at www.coltaf.org.

lawyer's obligations under Colo. RPC 1.4(a). This protects clients should an unplanned event lead to a lawyer's inability to practice.

F. Unique Considerations for the Assisting Attorney – Continuing Client Representation

Lawyers should keep in mind that once the unexpected event occurs, the focus of ethical considerations turns from those regarding the planning attorney toward those imposed on the assisting attorney. The assisting attorney plays a crucial role in the implementation of a succession plan. The assisting attorney takes on various responsibilities to ensure the protection of clients and the winding down of the planning attorney's practice. A significant benefit of having a succession plan in place is to help guide the assisting attorney and prevent them from stumbling over ethical issues.

As discussed above, a fundamental part of a succession plan is for the assisting attorney to inform clients of the planning attorney's inability to continue representation due to the occurrence of the unexpected event. By designating an assisting attorney in the succession plan, there is an additional benefit for both the client and the assisting attorney in that the assisting attorney can offer to continue to represent the planning attorney's clients. The client benefits by having a solid referral from the planning attorney to a lawyer who has at least a general familiarity with the planning attorney's practice, making the transition to a new lawyer smoother. The assisting attorney benefits from obtaining a new

client without concern for violating the ethical rules regarding soliciting potential clients known to have pending legal matters.[3]

It is always within the client's discretion whether to retain the assisting attorney to continue the representation. Colo. RPC 1.17(c)(2) requires lawyers selling a practice to notify clients of their right to retain other counsel. The same principle applies when an assisting attorney offers to assume representation of the planning attorney's clients. Further, the assisting attorney needs to keep in mind that if a client wants to hire them for legal services, the assisting attorney must comply with Colo. RPC 1.5's requirements concerning provision of a fee agreement and the content of a fee agreement.[4] Assisting attorneys should also, as mentioned, be sure to perform a conflicts check before taking over the representation.

G. Agreement to Close Practice

The foremost best practice for a successful succession plan is for the plan to be in writing, often called an Agreement to Close Practice.[5] Such an agreement begins by

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[3] Colo. RPC 7.3(a) defines solicitation in the context of providing legal services. Colo. RPC 7.3(b) prohibits a lawyer from soliciting legal services to a potential client by person-to-person communication, except as otherwise provided. However, the prohibition does not apply to a person who has a prior professional relationship with the lawyer. The designation of an assisting attorney in a succession plan exempts the assisting attorney from the prohibition on soliciting new clients in this manner.

[4] CBA Formal Op. 143, "Foundations of a Fee Agreement" (2021), provides guidance on the structure and suggested terms of a lawyer's fee agreement.

[5] The Office of Attorney Regulation Counsel offers a handbook regarding succession planning, including template forms. It is PLANNING AHEAD, A GUIDE TO PROTECTING YOUR CLIENTS' INTERESTS IN THE EVENT OF YOUR DEATH OR INCAPACITY (2019). It may be found at: https://www.coloradosupremecourt.com/PDF/Regulation/Closing_Practice.PDF. It includes checklists for planning and assisting attorneys, along with various template forms.

designating the parties in the succession plan (planning attorney, assisting attorney, and authorized signors for trust accounts). A basic agreement gives consent to the assisting attorney to close the practice, and it outlines the specific duties the assisting attorney is authorized to take, such as accessing the planning attorney's office and computers, contacting the courts and others regarding the unexpected event, and examining and distributing client files.

A comprehensive agreement to close a practice will contain additional provisions to manage the closure of the planning attorney's practice, beginning with direction on who will make the determination of the planning attorney's disability or incapacity and defining the criteria to use to determine disability or incapacity. It would authorize the assisting attorney to provide clients with final accounting statements and to reconcile and distribute funds for trust accounts and potentially operating accounts. Such an agreement may indemnify the assisting attorney. It may also explicitly allow the assisting attorney to offer to continue representation of clients.

An agreement to close a practice makes the process straightforward for the assisting attorney. Nonetheless, the implementation of a succession plan requires work and thought by the assisting attorney. The duties associated with closing a practice are legal services for which the assisting attorney may receive payment. A best practice is for the planning attorney and assisting attorney to address the issue of compensation directly in the agreement. A planning attorney has options for guaranteeing compensation, including possibly obtaining a specific life insurance policy with the assisting attorney as beneficiary

or maintaining a savings account naming the assisting attorney as a signee when the succession plan goes into effect.

A succession plan sets forth a roadmap for the assisting attorney to follow if an unexpected event occurs that renders the planning attorney unable to continue to practice law. A best practice is for the planning attorney to also supply specific directions on how to implement the succession plan – from how to access information, such as the planning attorney's calendar and active case files – to how to distribute client files. The planning attorney can provide this instruction by creating a manual in conjunction with developing his or her succession plan. The instruction should contain specific, step-by-step procedures for implementing the plan. Simply put, it is easier to wind-down an organized practice than an unorganized practice.

The more inclusive and detailed an Agreement to Close Practice is, the easier it will be for the assisting attorney to know when his or her work is complete. In this respect, an Agreement to Close Practice should address essential administrative issues, such as directing the assisting attorney to contact an internet service provider and cancel the service, shut down a firm's website, and provide information on phone services so that those may be terminated. Similarly, the agreement might instruct the assisting attorney to notify the U.S. Postal Service of the closure of the law office. The agreement may also provide information on any office space lease so that the assisting attorney may terminate that at the appropriate time.

I. Inventory Counsel – C.R.C.P. 244

In the absence of a formal succession plan, Colorado Rule of Civil Procedure 244 provides a mechanism for winding down a lawyer's practice through the court appointment and supervision of a lawyer to return client files and client property. The appointed lawyer is often referred to as "inventory counsel." Inventory counsel takes possession of files and funds and carries out protective measures to safeguard clients' interests.

C.R.C.P. 244.3(a) and (b) explain that in the event of a lawyer's death, transfer to disability inactive status, general disappearance, or where there are exigent circumstances that require the protection of client files, Attorney Regulation Counsel may seek protective appointment of counsel to take possession of files and funds, as well as law office management documents. Attorney Regulation Counsel may seek this protective appointment by filing a petition for appointment of protective counsel ("inventory counsel") with the chief judge of the judicial district where the lawyer in question maintained an office, or where client files and property may be found. Such petitions identify a lawyer to be appointed to gather client files and property and take protective measures, such as returning the files or destroying them depending on their age and whether the files are active.

Filing of a petition for inventory counsel appointment creates a civil case at the district court-level for the chief judge or designated judicial officer to oversee appointed inventory counsel's actions. This enables inventory counsel to file motions enabling them to obtain access to trust account records (if necessary), to disburse trust account funds, and to take other protective actions, such as obtaining court authorization to destroy unclaimed

or inactive client files. Once inventory counsel has completed returning client files and disbursing client funds, they may seek an order discharging their appointment.

A lawyer's compliance with the Colorado Rules of Professional Conduct identified in this opinion, including those related to trust account reconciliation and recordkeeping, will make appointed inventory counsel's work easier.

C.R.C.P. 244 does not contemplate inventory counsel overtaking client representation, nor other tasks that might be incorporated in an Agreement to Close Practice, such as the administrative wind-up of a lawyer's practice. Colorado lawyers developing a succession plan may view identification of an attorney colleague to serve as court-appointed inventory counsel as a minimum step prior to developing a more detailed succession plan. Inventory counsel appointment does not require development of a succession plan. Court supervision enables inventory counsel to accomplish many of the tasks that might otherwise be formally spelled out in a succession plan, such as accessing trust account records maintained by a bank, disbursal of funds in trust, and authorization to destroy files. Thus, in the absence of an actual succession plan, having a colleague willing to step-in to be inventory counsel is a basic way to protect clients if something unexpected happens to a lawyer.

IV. Conclusion

By addressing the key considerations outlined in this opinion, such as file organization and retention, trust account management and record keeping, assisting attorney responsibilities, and the creation of a comprehensive Agreement to Close Practice, lawyers can ensure the continuity of their clients' interests and a smooth transition in the

event of death, disability, or incapacity. As a minimum step, lawyers should consider identifying a colleague to serve as court-appointed inventory counsel in the absence of a formal succession plan. Ultimately, a well-crafted succession plan provides peace of mind for lawyers, safeguards clients' interests, and eases the burden on loved ones during challenging times.