FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR
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THE ETHICAL REQUIREMENT OF CONTINGENCY MEASURES FOR PANEL ATTORNEYS

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Planning for the Expected and the Unexpected

What are the ethical obligations of an attorney in planning for their expected (e.g. a long vacation) or unexpected (e.g. sudden temporary or long-term incapacity) unavailability?

There do not appear to be any statutes or rules in California that directly dictate how attorneys should prepare for their unavailability. Rule 3-110 of the California Rules of Professional Conduct, however, is a starting point. That rule governs "Failing to Act Competently," and requires "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." (Rule 3-110(A).)

Vacationing attorney. Complying with rule 3-110(A), i.e. providing competent representation, would seem to require that during an attorney's absence there is no risk that deadlines would be missed or that time-sensitive inquiries from opposing counsel, the Court, or others (e.g. the appellate project) would go unanswered for an undue length of time.

In preparing for such a planned absence, several options are available. Some attorneys might prefer to rely primarily on remotely monitoring emails and phones messages. However, as long as snail mail is still part of the practice, there would still be the need to have the assistance of someone to open mail and communicate the contents to the vacationing attorney. Other attorneys might arrange for a backup attorney to provide more full coverage, with authority to file extension requests, and possibly other pleadings. The backup attorney should have some emergency contact information for the vacationing attorney for those unusual circumstances that require the vacationing attorney's judgment or involvement.

For short vacations, e.g. those of a length that no deadlines would be missed and no important inquiries unanswered, less coverage would be required.

Unexpected Unavailability. Planning for the unexpected is more difficult, but no less important. For short-term and/or partial unexpected unavailability/disability, the attorney may be able to use some of the same backup systems as a vacationing attorney, such as asking a colleague to monitor mail and messages for some discrete period of time.

For more serious situations, a "practice administrator" might be needed. Under Probate Code sections 2468 and 9764, the superior court can appoint and supervise a law practice administrator. If the attorney has designated the practice administrator the superior court must appoint that individual "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 or deceased] member." (Probate Code § 2468(f) (disabled), 9764(f) (deceased).)

A solo practitioner might consider reaching an agreement with a "Practice Administrator," i.e. another attorney who would have the authority to help in an instance of unexpected unavailability due to incapacity or even death.

The California State Bar Surrogacy Program provides a model "Agreement to Close Law Practice in the Future" for the designation of an attorney to administer a lawyer's law practice in the event that the lawyer becomes disabled or incapacitated. The model agreement details the typical responsibilities of the lawyers involved and is intended to facilitate compliance with Business and Professions Code Section 6185 and the Probate Code. The model agreement's "General Power and Appointment of Practice Administrator as Attorney-In-Fact" provides that "Upon the determination that Planning Attorney is unable to continue the practice of law by reason of death, disability, incapacity or other inability to act as provided herein, and is unable to close his/her own practice, Planning Attorney consents to and authorizes the Practice Administrator to take all necessary actions to become appointed as Practice Administrator in an estate proceeding and to proceed to take control and dispose of Planning Attorney's practice." The model agreement also lists specific powers the practice administrator could exercise, including, but not limited to, opening mail, inventorying files, notifying clients, seeking extensions, notifying courts, and collecting fees.

While most attorneys, thankfully, do not face these sorts of situations, they do happen and preparing for them does ease the transition for the clients, the courts, and the attorney's family.

CURRENT RULES

Rules of Professional Conduct

Rule 3-110 Failing to Act Competently

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Discussion:

The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., Waysman v. State Bar (1986) 41 Cal.3d 452; Trousil v. State Bar (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; Palomo v. State Bar (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; Crane v. State Bar (1981) 30 Cal.3d 117, 122; Black v. State Bar (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; Vaughn v. State Bar (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; Moore v. State Bar (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances. (Amended by order of Supreme Court, operative September 14, 1992.)

AGREEMENT TO CLOSE LAW PRACTICE IN THE FUTURE

This Agreement is entered into by and between _ ("Planning Attorney"), an individual admitted and licensed to practice as an attorney in the courts of the State of California and whose office for the practice of law is located at the address on the signature page, and ("Practice Administrator"), an individual admitted and licensed to practice as an attorney in the courts of the State of California and whose office for the practice of law is located on the signature page. This Agreement shall be effective as of the date it is signed by the last party to sign it. Planning Attorney, Practice Administrator and Successor Practice Administrator are referred to as a "party" or collectively "parties."

RECITALS

WHEREAS, Planning Attorney is an attorney engaged in the practice of law in California; and

WHEREAS, Planning Attorney recognizes the importance of protecting the interests of his/her clients, family and staff in the event that he/she is unable to practice law by reason of his/her death, disability, incapacity or other inability to act; and

WHEREAS, Planning Attorney wishes to plan for the orderly disposition or closing of his/her law practice if he/she is unable to practice law for the above stated reasons; and

WHEREAS, Planning Attorney has requested Practice Administrator to act as his/her agent to take all necessary actions to close Planning Attorney's practice and Practice Administrator has consented to this appointment; and

WHEREAS, Planning Attorney and Practice Administrator are entering into this Agreement to define their rights and obligations in connection with the disposition or closing of Planning Attorney's practice.

THEREFORE, it is agreed that:

1. **Implementation Date**. This Agreement shall be implemented only upon Planning Attorney's death, disability, incapacity or other inability to act, as established by paragraph 3. The appointment and authority of Practice Administrator shall thereafter remain in full force and effect as long as it is necessary or convenient to carry out the terms of this Agreement, or unless sooner terminated under paragraphs 9 or 11.

2. **Practice Administrator.** The Practice Administrator shall comply with and act in accordance with Business & Professions Code §6185. Practice Administrator shall file a petition with the Probate Court to be appointed practice administrator if (a) a conservator is appointed for Planning Attorney (Probate Code §§ 2469 or 17200(b)(23)) or, (b) Planning Attorney dies (Probate Code §§ 9764 or 17200(b)(22)). Practice Administrator shall file an application with the superior court in the county in which Planning Attorney has his/her principal office for the practice of law to be appointed practice administrator in the event Planning Attorney (a) ceases to practice law requiring compliance with Business & Professions Code § 6180, or (b) is incapacitated (Business & Professions