



**ILLINOIS STATE  
BAR ASSOCIATION**

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July 17, 2018

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Committee Secretary  
Supreme Court Rules Committee  
222 N. LaSalle Street  
13<sup>th</sup> Floor  
Chicago, IL. 60601

Re: ISBA Proposal to Adopt a New Supreme Court Rule regarding Succession Planning

Dear Committee Secretary:

On behalf of its more than 29,000 lawyer members, the Illinois State Bar Association (“ISBA”) respectfully submits to the Supreme Court Rules Committee a proposal to adopt a new Supreme Court Rule and Committee Comments related to lawyer succession planning. The proposed new rule is attached. The ISBA urges the Committee to review it and recommend its adoption to the Court.

The proposed rule: (1) requires all active Illinois lawyers engaged in the private practice of law in Illinois to designate a lawyer (or other entity) to carry out certain authorized activities in the event of the designating lawyer’s disability *or*, in the alternative, certify that the lawyer has corporate or estate documents in place authorizing someone to carry out those activities; (2) requires lawyers to maintain a readily available list of passwords and security protocols to access the lawyer’s electronic files; (3) identifies a number of limited activities that the designated representative is authorized, but not required, to undertake in the event of the designating lawyer’s inability to continue practicing law; (4) provides legal protections for the designated representative when acting under the rule’s limited authority; (5) makes clear that a lawyer’s existing succession or corporate documents control the disposition of that lawyer’s practice; and (6) makes clear that the authorized activities under the proposed rule are limited, and that a designated representative’s role is not to take over a practice.

As the lawyer population ages, the need for proper succession planning is becoming more important. However, it is also important to have procedures in place to address unplanned life events impacting a lawyer’s practice. During the development of this proposal, many lawyers

shared their experiences about working with a colleague (or his or her family) who unexpectedly was unable to carry out his or her responsibilities. The proposal directs lawyers' attention to the importance of establishing a formal succession plan and, if it does not result in the formation of such a plan, identifying a lawyer who will be able to temporarily assist in dealing with a lawyer's practice when the lawyer is incapable of doing so. With respect to a designated representative, the proposed rule would grant the representative the authority to take limited action in a fiduciary capacity on behalf of the designating lawyer in the event the designating lawyer dies, becomes disabled, disappears, or otherwise abandons his or her practice. Exercising these limited actions where needed will act as a temporary safety net until a permanent solution to the designating lawyer's unavailability or incapacity can be developed. The proposed rule does not compel a designated representative to serve if it is too burdensome, nor does it compel a designated representative to act in a certain way. But it does give a designated representative the tools and protections necessary to safeguard and preserve client rights and interests, as well as a lawyer's business interests.

These issues are not new to the profession. Two Supreme Court rules currently touch upon succession issues. Illinois Rule of Professional Conduct 1.3, Comment [5] 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. See Illinois Supreme Court Rule 776, Appointment of Receiver in Certain Cases.

Notwithstanding the Comment's guidance, few lawyers have prepared a succession plan. According to the ARDC, of the 49,444 active status lawyers currently engaged in the private practice of law (this includes active Illinois registered lawyers in and outside Illinois), only 17% of lawyers identifying as sole practitioners (13,798) report that they have a written succession plan. In private practice law firms with 2 to 10 lawyers (13,282), 25% report that their law firm has a written succession plan. As firms become larger, the percentage of those lawyers reporting that they have succession plans increases. For example, at firms with more than 100 lawyers, 58% of lawyers reported having a succession plan.

The second rule related to succession planning is Supreme Court Rule 776. That Rule establishes a procedure whereby a court can appoint a receiver in the event a lawyer can no longer discharge his or her duties to clients. In 2017 (the last year for which data is available) the ARDC initiated 29 formal receiverships under Supreme Court Rule 776 (31 in 2016). Unfortunately, no statistics exist as to how many times lawyers act in such a capacity on a pro bono basis without invoking the Rule, its guidance, or its protections. The authority granted, and liabilities imposed, under Rule 776 are in many instances mirrored in the ISBA's proposed rule.

Finally, the issue of lawyer succession planning is being addressed in other states as well. The ISBA has identified six states with succession rules. (This does not include states with a version of Model Rule of Professional Conduct 1.3 encouraging lawyers to have a succession

plan in place as a measure of lawyer diligence.) The rules vary. For example, Iowa (Ct. R. 39.18 (eff. January 1, 2018)); Maine (Bar R. 1(g)(12)); and Florida (R. Regulating Fla. Bar 1-3.8) have mandatory requirements for identifying a successor lawyer. Others states such as Tennessee, Indiana, and South Carolina provide for voluntary identification. Many other states that do not have specific rules governing succession issues nevertheless address such issues through bar association publications and information. In reference to action by other states, the ISBA believes the mandatory approach best serves the interests of clients and Illinois lawyers.

In accordance with S. Ct. Rule 3(d) and Administrative Order MR No. 10549, the ISBA requests that the suggested revisions be forwarded to the Rules Committee or other appropriate committee for review and appropriate action.

The ISBA appreciates the opportunity to submit this proposal. If you require any additional information about the proposal, please do not hesitate to contact me.

Very truly yours,



Charles J. Northrup  
General Counsel

enclosure

Cc: Jan Zekich (via email)

## ISBA PROPOSED NEW RULE AND COMMENTS (071718)

### RULE 781 DESIGNATED ATTORNEY REPRESENTATIVE IN THE EVENT OF DEATH, DISABILITY, OR PRACTICE ABANDONMENT

**(a) Purpose.** The purpose of this Rule is to provide a designated representative to act on a limited and short term basis to protect the rights and interests of lawyers and lawyers' clients in the event of an attorney's death, disability, disappearance, practice abandonment, or any other similar event.

**(b) Designation.** Attorneys registering as active under Rule 756 who are engaged in the private practice of law in Illinois must designate each year during the registration process: (1) an active Illinois attorney in good standing, an Illinois law firm, or an established state, county, or municipal bar association that includes active Illinois attorneys with an established program to act as a designated representative, to serve as the registering attorney's designated representative for the purposes of carrying out the authorized activities set out below; or (2) certify that they have identified a designated representative capable of carrying out the authorized duties listed below in appropriate will, trust, partnership, corporate documents, or succession plan.

**(c) Practice Information.** In addition to the records required to be maintained under Rule 769 relating to client identity and financial records, all attorneys registering as active who are engaged in the private practice of law must maintain a list of passwords and other security protocols necessary to access the attorney's electronic business files, calendar, and other law office related records in a location known and accessible by the attorney's designated representative or office personnel.

**(d) Client Protection.**

(1) The designated representative shall be bound by the obligations of confidentiality imposed by the Rules of Professional Conduct with respect to information acquired by the designated representative while acting in that capacity and performing the authorized activities under this Rule.

(2) While performing the authorized activities under this Rule, the designated representative may not examine any documents or acquire any information that raise real or potential conflicts of interest with the designated representative's client(s). Should any material information be acquired inadvertently, the designated representative must protect the privacy interests of the disabled, deceased, disappeared, or abandoned attorney's clients by promptly ceasing any further review or examination of files and seeking out another lawyer to provide notice to the client.

(3) Nothing in this Rule shall restrict a client from seeking and retaining substitute counsel for their legal matter.

**(e) Designated Representative Authority.** Whenever an attorney dies, abandons a practice, disappears, suffers an unanticipated leave of absence due to military service, or becomes disabled due to a catastrophic illness or injury, the attorney's designated representative is authorized to act in a fiduciary capacity to:

(1) discuss with the attorney's office personnel, family members, or other attorney representatives (such as a guardian or executor) to obtain information as may be necessary to accomplish the purposes of this Rule;

- (2) take reasonable steps to secure the lawyer's files, office, client property, and accounts;
- (3) review the lawyer's files, calendar, and records to identify litigation or time sensitive matters;
- (4) notify clients of attorney's death or disability, including making arrangements for the return of client files or obtaining substitute counsel;
- (5) notify courts and other tribunals in which client matters are pending, and seek stays of proceedings as may be warranted to preserve client rights or interests;
- (6) if necessary, and upon petition to, and grant of authority by, a court of proper jurisdiction, serve as successor signatory for any client trust or operating accounts maintained by the lawyer;
- (7) if necessary, and subject to the grant of authority identified in (e)(6) above, utilize the attorney's operating accounts to manage the office, including retention of staff or others pending sale or closure;
- (8) if necessary, audit and distribute, subject to the grant of authority identified in (e)(6) above, client funds held in trust;
- (9) if necessary to carry out any of the authorized activities hereunder, a designated representative may seek an order from the chief judge of the judicial circuit in which the attorney practiced confirming the death, disability, disappearance, or practice abandonment of the attorney;
- (10) if necessary, seek the appointment of a receiver under Rule 776;
- (11) consult with the attorney's office personnel, family members, or other representatives (such as a guardian or executor) as may be appropriate to wind down, sell, or close the attorney's practice;

The designated representative's role is temporary and limited. The designated representative is authorized, but not required, to undertake any or all of the above activities.

**(f) Liability of Designated Representative.** Based upon the designated representative's limited and temporary role, a designated representative serving solely in that capacity pursuant to this Rule shall:

- (1) not be regarded as having an attorney-client relationship with the clients of the disabled, absent or deceased attorney;
- (2) have no liability to the clients of the disabled, absent, or deceased attorney except for injury to such clients caused by intentional, willful or gross neglect in the performance of the authorized activities under this Rule;
- (3) except as herein provided, be immune to separate suit brought by or on behalf of the disabled, absent, or deceased attorney;
- (4) not be required to file an appearance in any pending matter before a tribunal in order to provide notice to the court or opposing counsel of an attorney's death, disability, disappearance, or abandonment of practice.

**(g) Designated Representative Unwilling or Unable to Serve.** In the event a designated representative is unwilling or unable to serve, or for any reason cannot carry out the authorized activities under this Rule, the designated representative or office personnel or family member of the disabled, disappeared,

or deceased attorney may seek out any Illinois active status lawyer to serve as the designated representative. Alternatively, with the consent of the disabled, disappeared, or deceased attorney's designated representative or family member, any lawyer member of the attorney's firm, partnership, or other formal business entity may serve as designated representative. If no designated representative can be identified, Supreme Court Rule 776 (Appointment of Receiver in Certain Cases) becomes applicable and the presiding judge in the judicial circuit in which the lawyer maintained a practice may appoint a receiver or designated representative as appropriate.

**(h) Succession Plan.** In the event an attorney to whom this Rule applies has made adequate written provision for the protection of his or her clients through a succession plan including the identification of a designated representative, corporate resolutions, partnership agreements, estate documents, or otherwise that complies with this Rule, the terms and provisions of such documents shall govern the disposition of the attorney's law practice. To the extent appropriate, the authorizations and protections provided to the designated representative under this Rule shall apply to the identified representative under such plans and documents.

Adopted \_\_\_\_\_, effective \_\_\_\_\_.

#### Committee Comments

The purpose of this Rule is to ensure that a lawyer's clients are not prejudiced in the event of a lawyer's unanticipated death, disability, or other event that makes a lawyer's continued representation of a client reasonably unlikely or impossible. It is a safety net for a lawyer's clients as well as for the lawyer who, under the authorities of this Rule, acts in good faith to preserve the subject lawyer's and client's interests. It is limited and designed to provide for common sense, short-term triage measures to protect a lawyer's clients and does not envision the takeover of a practice. Rather, it can fill the gap between the time of an unanticipated event and a potential court supervised disposition of a lawyer's business assets, such as through the probate process, succession plan, appointment of a receiver, or other plan. It may also have the salutary effect of providing guidance to nonlawyer staff or family members who may not be qualified to assess the state of the lawyer's law practice or answer client questions. While this Rule is particularly important to solo practitioners, it has benefits for lawyers in all size practices.

The authorized activities under this Rule are limited, and service as a designated representative is correspondingly limited and not meant to be burdensome. Nevertheless, each situation may be different. The designated representatives may serve with or without compensation. There is no prohibition on receiving reasonable compensation for performing the tasks contemplated under this Rule. In complying with this Rule, lawyers are encouraged to discuss and make arrangements, preferably in writing, with the designated representative for reasonable compensation or parameters on the exercise of authority.

As noted, the purpose of this Rule is to protect client interests by establishing a reasonable procedure and process for addressing the immediate needs of a practice in the event of a lawyer's unanticipated death, disability, or other event that makes a lawyer's continued representation of a

client reasonably unlikely or impossible. The specific authority granted under this Rule should be limited to achieving that goal. The authority granted does not extend into perpetuity, but rather should be exercised reasonably, sparingly, timely, and concluded as quickly as possible. This Rule does not require nor authorize the designated lawyer to take over a practice, substitute himself or herself as the lawyer for a client (unless the client consents), or otherwise act on behalf of a client.

Compliance with this Rule should not end a lawyer's responsibility to his or her clients. While the Rule does not make it a mandatory requirement, attorneys registering as active under Rule 756 who are engaged in the private practice of law *should* prepare a detailed, and readily accessible, written succession plan specifying the steps to be taken in the event of their disability or death. See Illinois Rules of Professional Conduct 1.3, Comment [5]. A succession plan should identify a designated representative or representatives, include at a minimum, the authorities described in Rule paragraph (e), and provide the designated representative all the authority needed to carry out the plan. A succession plan should also document the information identified in this Rule including but not limited to: the location of records and client files, passwords and security protocols, bank account information, income information, office and equipment leases, utility information, and other day to day business information. Finally, a succession plan should authorize a designated representative(s) to: collect fees, pay firm expenses and client costs, compensate staff, terminate leases, liquidate or sell the practice, or perform other law firm administrative tasks. While this Rule is intended to provide reasonable protections to clients in the event of an unanticipated event, it is not a substitute for the flexibility and detail that can be included in a formal succession plan.

Adopted \_\_\_\_\_, effective \_\_\_\_\_.