

Q&A

LAWYER LIABILITY AND ETHICS



Attorney Succession Planning and Thinking About the Future



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You have all of your bases covered: life insurance, an estate plan, a succession plan. Wait, a succession plan? The attorney population in the United States, like the population at large, is aging. The median age of attorneys in the U.S. in 2005 was 49 and although that statistic itself has aged, one can imagine that it will only continue to rise. No one wants to contemplate their own death or disability and now it seems that fewer attorneys want to even contemplate their own retirement. However, best practices suggest that lawyers (of all ages) should, at a minimum, create a succession plan to cover their own death or disability and would be wise to create a broader plan for when they may retire or otherwise leave the practice of law.

Rule 41(i), Rules of the Supreme Court of Arizona, requires attorneys to plan “for the lawyer’s termination of or inability to continue a law practice, either temporarily or permanently.” Further, your malpractice insurance carrier or your firm may also require you to create a succession plan.

Protect the Money. Ethical Rule 1.15 requires lawyers to safeguard client funds and property. Paramount in any succession plan is leaving instructions for a successor to administer your trust account. State Bar of Arizona Ethics Opinion 04-05 discusses a number of ways that an attorney can plan to have a successor administer his or her client trust account.

Protecting Your Clients and Your Practice. Just as building client relationships takes time and energy, so does constructing a meaningful succession plan. Like an estate plan, there is not one succession plan that works for every type of legal practice. If you practice at a firm, part of developing your succession plan may mean working with firm management to identify who your successor will be at the firm and then taking concrete steps to ensure that the successor attorney is preparing to take over your practice at either your retirement or whenever it may become necessary. If you are a solo practitioner or practice at a small firm, it may be deciding if you want to sell your practice and considering how you may go about that. Ethical Rule 1.17 sets forth the conditions precedent to the sale of a law practice which includes a requirement that the selling attorney cease practicing law or cease practicing in the area of law that he or she is selling. As the comments to ER 1.17 state, clients are not commodities to be purchased and sold at will. Making sure your clients know and are comfortable with your successor counsel not only protects your clients’ interests, but strengthens your practice, which is likely one of your most valuable assets.

Improving the Legal Profession. Unintended positive consequences are one benefit

you may create by engaging in meaningful succession planning. The Preamble to the Rules of Professional Conduct states in part that a lawyer “should strive to...improve the law and the legal profession.” Succession planning allows more seasoned attorneys to mentor less experienced attorneys. It is no secret that firms have a difficult time retaining millennial attorneys (the reasons for which could fill an entire article). Imagine if firms implemented a formal succession planning process that included millennial attorneys as successor counsel (where appropriate) not just in name, but in practice. If this new generation of attorneys were expressly told that the firm would like them to be a part of the future of the firm and then were mentored by more seasoned attorneys, there would most certainly be an improvement in the practice of law and the legal profession.

In the spirit of New Year’s resolutions, maybe now is the time to consider when and how you plan to step away from the practice and develop a strategy to do so. It is important to undertake the (hopefully not unpleasant) task of planning for an unexpected departure from the practice of law in order to protect your clients and your business. The State Bar of Arizona has compiled a Succession Planning Handbook complete with sample forms which is available on the State Bar’s website. ■

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Breaking a Bad Comma Habit



A reader recently asked me about the hardest writing habit to “unteach.” I have the same answer now as I had when I first started teaching sixteen years ago: strange comma placement. More specifically, the habit of “placing a comma where you take a breath” is the bad habit I see most. For every example someone gives me where this habit works, I can usually find another example where it does not – and usually within the same paragraph! In other words, the breath/comma habit results in inconsistencies.

Specifically, I see these inconsistencies most in sentences using a present-tense participial phrase. Simply put, a present-tense participial phrase is a modifying phrase that begins with an -ing word. The phrase operates as an adjective. If the phrase starts a sentence, the writer must place a comma after the phrase. And to be grammatically correct, the word after the comma should be the noun that the phrase is modifying. The breath/comma

rule works for phrases at the beginning of a sentence.

Arriving late to court, the file was lost because the assistant was in a rush. (not grammatically correct)

Arriving late to court, the assistant lost the file in his rush. (grammatically correct)

The breath/comma habit does not work well, however, if the phrase occurs in any other part of the sentence. Here, the writer only uses a comma if the phrase is not essential to the meaning of the sentence (a non-restrictive phrase). Phrases at the end of a sentence are particularly tricky because a writer may add that phrase as an afterthought and forget to include a necessary comma. One tip I give to students is to see if the noun being modified is located right before the phrase. If it is, the phrase is most likely necessary for meaning (a restrictive phrase), and no commas are needed.

The lawyer *taking the deposition* is a partner in my firm.

I watched the officer *explaining the rules to her*.

I watched the officer who sat with the lady in the corner, *explaining the rules to her*. She told the reporter her story, *taking her time to get the detail right*. ■

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