

**Planning Ahead: Why You May Want to Designate a Trustee Pursuant to
Amended Rule 5.26**

By: Shannon L. Briesacher

Missouri Office of Chief Disciplinary Counsel

It can be difficult to imagine that an accident, disability or even untimely death may leave you unable to continue in your law practice. However, in the year 2016, the Office of Chief Disciplinary Counsel undertook approximately 10 matters wherein the attorney in question was incapacitated and it was necessary to seek the appointment of a trustee to protect the clients' interests. Pursuant to Rule 5.26, when an attorney is unable to discharge his or her duties due to discipline, disability, disappearance or death, the Office of Chief Disciplinary Counsel may seek to have a trustee appointed through the circuit court of the attorney's practicing jurisdiction. The trustee takes whatever action is reasonably necessary to protect the client's interests.

While useful, putting a trustee in place after the incapacitation of an attorney can be accompanied by its own set of issues. On December 20, 2016, the Missouri Supreme Court repealed the current Rule 5.26 and added a provision to encourage those attorneys who may want to put a plan in place *prior* to any unforeseen circumstance. Effective July 1, 2017, a lawyer may designate a trustee at the

time of completing the annual enrollment statement by specifying the name and bar number of the trustee and certifying that the trustee has agreed to the designation in a writing possessed by both parties.¹ While the designation of a trustee is a permissive act left to the discretion of the attorney, there are many reasons why the designation of a trustee is in furtherance of the attorney's interests.

Why a Succession Plan Matters

Most attorneys spend the better part of their careers building a positive reputation and establishing a practice built on professionalism. It stands to reason that these same attorneys would like their reputations and good names left intact should they unexpectedly leave their practice. By arranging in advance for the temporary management or closure of your practice, your client matters will be handled in a timely manner and it is less likely that clients will suffer missed court dates, unreturned phone calls or neglect of their cases. In turn, those clients are far less likely to generate complaints with disciplinary authorities.

Additionally, arranging for a successor trustee in advance means that

there is less chance that third parties are left burdened by the demands of managing your practice upon your temporary leave or untimely exit. In one matter encountered by the Office of Chief Disciplinary Counsel, the family of an area attorney began noticing that the attorney was suffering serious symptoms of dementia.ⁱⁱ The family members repeatedly attempted to encourage the attorney to close his practice, but the attorney was in denial that his faculties had been compromised. The attorney would show up to work, take retainers from new clients, and then forget that he had agreed upon the new representation. The attorney mishandled client trust funds and routinely missed court dates. Faced with angry clients and the fear of her husband's tarnished reputation, the attorney's wife cleaned out their savings account in order to repay the clients in question. Further, she expended a great deal of time and energy attempting to manage her husband's practice by organizing the office, returning files, and trying to notify clients of her husband's situation. When that failed, she hired a private attorney, who charged a regular, hourly rate to wind up the practice. The wife of the incapacitated attorney ultimately spent thousands of dollars attempting to facilitate her husband's exit from the practice. Much of this could have been avoided with a succession plan in place.

Putting a Trustee in Place

The first step is to find an attorney who is willing to take over your practice in the event of an untimely exit. Rule 5.26 requires that upon designating a trustee at the time of the annual enrollment statement, the lawyer must certify that the trustee has agreed to the designation in a writing that is possessed by both the lawyer and the trustee. While the Rule requires only that your agreement confirm that the trustee agree to the designation, the benefit of advanced planning is that you may participate in determining how your practice is handled upon your incapacitation. Therefore, you may want put a more detailed document in place.

The Missouri Bar Law Practice Management Committee in conjunction with the Legal Ethics Counsel, the Office of Chief Disciplinary Counsel and The Bar Plan Mutual Insurance Company has put together a handbook to guide practitioners in succession planning.ⁱⁱⁱ The handbook suggests that an agreement with a trustee or successor lawyer first contain signed authorizations for things like consent to contact your clients for instructions on transferring their file, authorizations to obtain extensions of time in litigation, powers of attorney for access to the trust account and authorizations to provide all relevant people with notice of closure of your law practice.

The handbook then suggests that you provide your clients with information about your plan. The easiest way to do this may be to include the information in your written fee agreement and engagement letters.^{iv} Next, you may want to take steps to make the closing of your office as smooth and as inexpensive as possible. This includes making sure that your office procedures manual explains how to produce a list of all current clients and contact information; keeping all deadlines on your calendaring system; keeping all billing records up to date; familiarizing the successor attorney with your office systems; and renewing your written agreement with the successor attorney each year. The idea is that if your office is in good order, the successor attorney will expend less energy winding up your practice and will not have to charge more than a minimum of fees.

Note that in the event of your untimely death, the authority of the successor trustee to act is terminated. The personal representative of your estate has the authority to administer your practice. However, if you have informed your personal representative of your arrangement with the successor attorney, the personal representative can authorize the successor attorney to proceed.^v

What is Required of a Trustee

The duties of the trustee will depend largely on whether the outgoing attorney's incapacitation is temporary or permanent. Ultimately, however, Rule 5.26 provides that a trustee will take whatever action is indicated to protect the interests of the clients and other affected parties, including:

- (1) Inventory active files and make reasonable efforts to distribute them to clients;
- (2) Deliver any undistributed active client files and any inactive client files to the chief disciplinary counsel;
- (3) Take possession of and review the lawyer trust and business accounts;
- (4) Make reasonable efforts to distribute identified trust funds to clients or other parties;
- (5) Dispose of any remaining funds and assets as directed by the court after obtaining an order of the court; and
- (6) Initiate any legal action necessary to recover or secure any client funds or other property.^{vi}

The trustee shall also file written reports with the clerk of the appointing court describing the nature and scope of the work accomplished, as well as a final report including an accounting for any funds, the disposition of cases and requests for files and property.

Should you decide to put a detailed succession plan in place, the *Planning Ahead* handbook contains extensive guidance, as well as sample forms to help in the process. Even if you choose not to put a detailed plan into place, designating a trustee pursuant to the new Rule 5.26 will allow you to choose someone that you trust to take over your law practice upon your exit or absence. Starting and implementing a succession plan may be the best step that you can take in protecting your firm assets,

ⁱ See the Missouri Supreme Court's December 20, 2016 Order.

ⁱⁱ Due to the confidential nature of the medical conditions discussed, all specific references to this matter have been omitted.

easing your mind during a difficult transition and unburdening your family and others in the process.

ⁱⁱⁱ *Planning Ahead: A Guide to Protect Your Clients' and Your Survivors' Interests in the Event of Your Disability or Death.*

^{iv} *Id.* at pg. 3.

^v *Id.* at pg. 4.

^{vi} See Rule 5.26(d).