## Ethical Obligations/Practical Reasons for Advance Planning by Louisiana Lawyers

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### a. Consideration of Immediate and Long-Term Challenges

- **Rule 1.1** of the Louisiana Rules of Professional Conduct, in pertinent part:

  *…(a) A Lawyer shall provide competent representation to a client. Competent representation requires the* ***legal knowledge****,* ***skill****,* ***thoroughness*** *and* ***preparation*** *reasonably necessary for the representation.…*

- **Rule 1.3** of the Louisiana Rules of Professional Conduct:

  *…A lawyer shall act with* ***reasonable diligence*** *and* ***promptness*** *in representing a client.…*

- **Rule 1.16(a)** of the Louisiana Rules of Professional Conduct, in pertinent part:

  *…(a) Except as stated in paragraph (c), a lawyer shall not represent a client* ***or, where representation has commenced, shall withdraw from the representation of a client*** *if:*

  *…(2) the* ***lawyer's physical or mental condition materially impairs the lawyer's ability*** *to represent the client.…*

- **Rule 3.2** of the Louisiana Rules of Professional Conduct:

  *…A lawyer shall* ***make reasonable efforts to expedite litigation*** *consistent with the interests of the client.…*

On an **immediate** level, depending upon the type/extent of disability/impairment, can the lawyer still provide competent, diligent representation for all of the lawyer's clients? Is there anyone else—i.e., another lawyer—available/willing/competent to assist and/or take over?

On a **long-term** level, will the lawyer's disability/impairment diminish or increase in severity and effects? Will the lawyer be able—ever—to resume personally providing competent, diligent representation?

**b. <u>Arranging for a "Back-up" Lawyer</u>**

Given the possibility of sudden, unexpected/unanticipated disability and/or impairment (or even death) for anyone, a lawyer arguably has an ethical obligation—especially lawyers who practice as sole practitioners—to plan for the on-going, continued/uninterrupted care/representation of the lawyer's clients. Simply put, what will happen to the clients, their cases, files and funds if something unexpected but serious suddenly happens to the lawyer?

- **Rule 1.16(d)** of the Louisiana Rules of Professional Conduct:

  …*(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. Upon written request by the client, the lawyer shall promptly release to the client or the client's new lawyer the entire file relating to the matter. The lawyer may retain a copy of the file but shall not condition release over issues relating to the expense of copying the file or for any other reason. The responsibility of the cost of copying shall be determined in an appropriate proceeding…*

  If the lawyer experiences/falls victim to a sudden/unexpected disability or impairment (or dies), will the interests of the lawyer's clients be properly cared for?

  Will the lawyer's representation of those clients be effectively/constructively terminated as a consequence of that sudden disability or impairment (or death)?

  And, if so, will there be someone knowledgeable/competent available/ready/willing/able—i.e., another competent lawyer—to take the place of the disabled/impaired/deceased lawyer, taking steps to the extent reasonably practicable to protect the interests of the clients of the suddenly disabled/impaired/deceased lawyer?

  Will that "back-up lawyer" know enough/be prepared enough quickly enough to be able to perform/assist with the performance of the impaired/disabled/deceased lawyer's obligations under Rule 1.16(d), i.e., giving clients reasonable notice regarding the lawyer's impairment/disability/death and perhaps the need to seek/obtain a new lawyer (immediately) to take over legal matters/cases for those clients; allowing the clients reasonable time to find and obtain their respective new lawyers—and, if necessary, doing whatever is reasonably necessary in order to afford those clients sufficient time to do so without prejudice or damage to their interests [e.g., perhaps, in the interim, seeking/obtaining continuances in litigated matters, scheduled meetings/depositions/conference calls, etc.]

As every licensed lawyer has been required to attend and graduate from law school, as well as study for, take and pass the bar exam, and, as a result—even if the lawyer is now a fairly isolated/introverted sole practitioner with limited on-going contact/relationships with other local lawyers —that lawyer should still know/be able to reach out to some other lawyers (i.e., friends/acquaintances from law school) with regard to serving as "back-up lawyer", perhaps even in a reciprocal arrangement (i.e., each serving as "back-up lawyer" for the another).

However, if law school acquaintances/friends have "faded away" or are very limited/non-fruitful, the lawyer should strongly consider joining and/or getting somewhat involved in a local/specialty bar association, if for no other reason but to develop/foster new friendships/relationships with some other local lawyers, if nothing else but for the goal/benefit of finding/securing a "back-up lawyer". Those lawyers, of course, will very likely also serve to provide a useful support network for practice/quality of life issues regardless of sudden disability/impairment.

## c. The "Plan"

### i. Durability

Like Powers of Attorney for Healthcare Decisions (i.e., "Advance Medical Directives") and for Financial Decisions (i.e., "Living Wills"), the lawyer should strongly consider having a "back-up lawyer" designated in writing, with a written/signed/notarized acceptance by the "back-up lawyer", along with details/guidelines regarding a variety of tasks/duties that the "back-up lawyer" will likely need to perform in the event of the drafting lawyer's sudden disability/impairment/death. The written "back-up plan" should contain specific language/conditions regarding when/how the plan may be triggered and **noting that the plan survives the incapacity/death of the drafting lawyer (i.e., is "durable"),** so as to avoid legal questions/complications/hurdles that might otherwise be raised if the plan is silent/omits such details/contingencies.

### ii. Unfettered Access to Your Law Practice - Office, Computers, Client Files, Calendar(s), Bank Accounts/Statements, Financial Records (Accounts Receivable/Accounts Payable), Safe Deposit Box(es), Practice-Related Insurance Coverage/Policies, etc.

The plan should provide adequate details/instructions/directives as to such practical considerations as:

- Office keys/keycards/access/security alarm procedures/codes
    - Contact information for office landlord/building management (if applicable)
- Computer passwords/Email Passwords/Office Bank Account Passwords (or, at least, instructions as to who/where the "backup lawyer" may find/contact/look for those passwords, e.g., the trusted spouse/significant other/child/relative/friend of the disabled/impaired lawyer who has been entrusted with those passwords)
- Location/access to ALL physical (i.e., "paper") client files (if applicable)—active, inactive and closed, as well as any off-site storage and/or cloud/digital/electronic storage/back-ups
    - Planning Lawyer should strongly consider maintaining a "master file" or "master list" of clients files, effectively detailing and identifying all

client files—open/active, inactive and closed—in one organized folder, file, spreadsheet, list, etc.

- Location/access to all professional calendar(s) utilized/kept by the lawyer, i.e., pending court dates, teleconference dates, client meetings, scheduled depositions, prescription dates, etc.

- Location/access to all law firm bank accounts (operating and client trust accounts, real estate closing/title company escrow accounts, etc.), blank checks, bank statements, endorsement stamps, deposit slips, etc.

    - Strongly Consider making "backup lawyer" a signatory on those accounts, including client trust account(s), in order to avoid delays/problems with client/third-party access to funds held in client trust account(s). But Planning Lawyer must develop/have absolute confidence/trust in the unwavering honesty/integrity of that "backup lawyer" before making the "back-up lawyer" a signatory.

- Location/access to all law firm financial records, including office lease(s), accounts payable (i.e., law firm bills, such as rent, office electricity/utilities, staff payroll, third-party providers, court reporters, etc.) and accounts receivable (i.e., client billings for fees and costs)

- Location/Access to any/all office safe(s), safe deposit boxes, storage facility(ies), etc.

- Location/Access to any/all practice-related insurance coverage(s)/policies

The Planning Lawyer may strongly wish to consider trying to create a "law office procedure manual", i.e., a "how-to-run-and-do-everything-in-this-law-office" set of step-by-step instructions/explanations/information, which would be of invaluable assistance to the "back-up lawyer" suddenly faced with that task in the event that the "back-up plan" is triggered/effectuated by the Planning Lawyer's impairment/disability/death. It should be prepared from the perspective of "what would a lawyer who knows very little about what happens day-to-day in this office need to know in order to be able to step in tomorrow and keep things running somewhat smoothly for a while, especially if I'm not available to answer questions/help".

Such a "law office procedure manual" would also serve as a useful training guide/reference for training new staff members and/or associates who might join the lawyer's office, regardless of the lawyer's sudden impairment/disability/death.

Naturally, the Planning Lawyer should also make efforts at keeping both the "back-up plan" and the "law office procedure manual" up-to-date/current, as equipment, passwords, processes, day-to-day tasks/responsibilities and/or staff might be changed subsequent to the initial drafting of those documents.

**iii. Preparation and Role of Office Staff, if any**

If the lawyer has any office staff/assistants (full-time, part-time or contract workers), the lawyer should take/make the time to introduce/familiarize the staff with the designated "back-up lawyer", letting them know that the "back-up lawyer" is so designated and that the staff will be expected to assist the "back-up lawyer", to the extent reasonably practicable, with carrying out the duties/responsibilities detailed within the "back-up plan" if/when the "back-up plan" should ever be triggered and activated.

Office staff should also be aware of/knowledgeable (to the extent practicable/reasonable) with the "law office procedure manual".

The drafting lawyer should also, of course, inform/acquaint/familiarize the lawyer's close family member(s)/friends with the existence and identity of the "back-up lawyer", the "back-up plan" and the "law office procedure manual".

**iv. IOLTA Issues**

- **Rule 1.15(f)** of the Louisiana Rules of Professional Conduct:

*…Every check, draft, electronic transfer, or other withdrawal instrument or authorization from a client trust account* ***shall be personally signed by a lawyer*** *or, in the case of electronic, telephone or wire transfer, from a client trust account, directed by a lawyer or, in the case of a law firm, one or more lawyers authorized by the law firm. A lawyer shall not use any debit card or automated teller machine card to withdraw funds from a client trust account. On client trust accounts, cash withdrawals and checks made payable to "Cash" are prohibited…*

**d. <u>Informed Consent of Clients / Conflicts of Interest</u>**

- **Rule 1.2** of the Louisiana Rules of Professional Conduct, in pertinent part:

  *…(a) Subject to the provisions of Rule 1.6 and to paragraphs (c) and (d) of this Rule, a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.* ***A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation…***

  *…(c) A lawyer may* ***limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent****…*

- **Rule 1.4** of the Louisiana Rules of Professional Conduct, in pertinent part:

  *…(a) A lawyer shall:…*

  *…(1)* ***promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules****; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3)* ***keep the client reasonably informed about the status*** *of the matter; (4) promptly comply with reasonable requests for information; and (5)* ***consult with the client*** *about* ***any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct*** *or other law…*

  *…(b) The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued…*

- **Rule 1.6(a)** of the Louisiana Rules of Professional Conduct:

  *...(a) A lawyer shall not reveal information relating to the representation of a client* ***unless the client gives informed consent****, the* ***disclosure is impliedly authorized in order to carry out the representation*** *or the disclosure is permitted by paragraph (b)…*

Given that the drafting lawyer will, by necessity, be revealing and giving to the "back-up lawyer" unfettered access to confidential information of clients, prudence would suggest that the drafting lawyer seek/obtain informed consent, in writing, from the drafting lawyer's clients regarding the existence and possibility of the needed activation of the lawyer's "back-up plan" and the lawyer(s) designated therein as "back-up lawyer(s)".

While that informed consent—arguably—may not be required, since this planning/contingency may be **impliedly authorized** in order for the lawyer to carry out—at least a portion/segment of—the representation in the event of sudden/unexpected disability/impairment/death, seeking/obtaining the informed consent, in writing, of all clients well in advance (best practice would be to do so at the time of initial engagement) would very likely/probably help to avoid a number of issues/concerns/questions/problems for the "back-up lawyer" if/when the "back-up plan" is ever triggered [e.g., clients wondering/worried/distrustful about the sudden appearance/involvement of some other lawyer whom they have never heard of/met/been informed about by the drafting lawyer].

Given that the "back-up lawyer" very likely may not intend to assume/take on full/complete/permanent professional responsibility for all of the drafting lawyer's clients and their legal matters—but, instead, may only be interested in/willing to do whatever is needed/necessary to allow them to transition to new/different lawyers (i.e., serving merely as a "temporary transitional lawyer")—it is very important that the drafting lawyer make an effort to include, as part of the lawyer-client contract/engagement agreement(s) for all of that drafting lawyer's clients, **a limited scope representation clause effectively limiting the scope of the representation to be provided by the "back-up lawyer" if/when the "back-up plan" is ever needed/triggered.** In other words, the clients indicate that they understand, agree and acknowledge in writing that the "back-up lawyer" will serve primarily/strictly only as a "temporary stand-in/transitional lawyer" for purposes of allowing time/affording an opportunity to those clients to transition to new/different lawyers. And, if for some reason the client and "back-up lawyer" might choose, instead, to continue in a more permanent/on-going client-lawyer relationship, a separate, brand-new lawyer-client contract/engagement agreement will then need to be executed by them, independent of the "back-up plan" and original lawyer-client agreement executed between that client and the now-impaired/disabled/deceased lawyer.

- **Rule 1.7(a)** of the Louisiana Rules of Professional Conduct:

  *...(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:…*

  *…(1) the representation of one client will be directly adverse to another client; or…*

  *…(2) there is a significant risk that the representation of one client will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer…*

While the drafting lawyer and "back-up lawyer" will not be able to anticipate every possible/potential conflict of interest that may exist and/or arise between the "back-up lawyer" and clients acquired by the drafting lawyer subsequent to drafting/executing the "back-up plan", it is prudent and incumbent upon the drafting lawyer to attempt to identify/note any/all conflicts

at the inception of the drafting lawyer's acquisition of each new client, i.e., checking with the prospective client to see if the prospective client has any known issue(s)/conflict(s) with the "back-up lawyer" (or any other lawyer in the "back-up lawyer's" law firm, if the "back-up lawyer" is not also a sole practitioner – see Rule 1.10 of the Louisiana Rules of Professional Conduct).

If any such conflicts or potential conflicts are discovered, the drafting lawyer may wish to consider options to try and avoid/anticipate such conflicts of interest for the "back-up lawyer" in the event that the "back-up plan" is ever triggered/effectuated: 1) consider perhaps declining representation of this prospective client (or, at least—if possible/appropriate—this particular matter for this prospective client); 2) consider whether the conflict can be properly waived/consented to by the informed consent in writing of the prospective client (and all other affected clients) and "back-up lawyer"; or 3) consider whether an alternate/additional "back-up lawyer" for this conflict and/or other conflicts may be available/possible (i.e., a "conflicts back-up lawyer").

Once again, any/all obvious/apparent conflicts with regard to the prospective client and the "back-up lawyer" should be specifically noted and, if informed consent thereto is permissible/obtainable, included within the written lawyer-client agreement/engagement agreement between the drafting lawyer and prospective client prior to or at the beginning of that representation by the drafting lawyer.