

NATIONAL CONFERENCE OF BAR PRESIDENTS

AMERICAN BAR ASSOCIATION

2013 Annual Meeting

Friday, August 9, 2013

11:20 a.m.-12:20 p.m.

Hilton San Francisco Hotel

Anthony Robert Palermo,
Of Counsel

Woods Oviatt Gilman LLP

700 Crossroads Building

Rochester, New York 14614

Direct Telephone: 585/987-2882

E-mail: apalermo@woodsoviatt.com

Transitioning Out of Practice

Interactive Discussion about Law Practice Continuity and Providing Client Protection When Lawyer Voluntarily Retires From Practice, Unexpectedly Dies, Becomes Disabled, or is Unable to Practice Law

Advance Planning for Client Protection
In Event of Unplanned or Planned Contingencies,
e.g., If Lawyer Dies, Becomes Disabled, Retires,
or is Otherwise Unable to Practice Law

OVERVIEW

This brief electronic overview is provided as a reference tool for state and local bar leaders to access general information which may assist them in helping their members and other lawyers who wish to plan ahead for a smooth transition from the practice of law when needed or desired, in both voluntary and involuntary situations.

Lawyers of all ages and in all practice settings ought to periodically consider and plan ahead for what happens when they are unable to practice law as a result of contingencies, such as, physical, medical, mental disability or incapacity, death, retirement, disciplinary suspension or disbarment.

While this topic may be of greater interest to solo and small-firm lawyers, especially older, seasoned, experienced practitioners, (sometimes referred to as “senior lawyers”), the issues and concerns which must be addressed in transition situations are equally important to all lawyers of any age in any-sized firm or practice setting. Moreover, all lawyers who have been admitted to the bar and enjoy a special license to practice law and serve clients as members of the ancient and honorable profession of law, should have enormous interest in client transition issues because of their individual ethical responsibilities to clients and their shared inherent obligation to preserve and protect the image of the legal profession.

Hopefully, the materials referenced in this presentation will provide useful information, guidance, tips and practical suggestions for lawyers who want to plan in advance of unanticipated or unplanned contingencies to protect their clients, themselves, their families, their estates, the legal profession, and the community in general from potential adverse consequences.

The question is: What happens when an attorney is unable to continue his or her practice of law because of a broad range of possible temporary or permanent contingencies? Consider what might happen in various situations if a lawyer has no advance plan for transition, and, (1) becomes involved in an accident which causes personal injuries which temporarily or permanently disable him or her from practicing law; or, (2) has a medical or mental condition which disables the lawyer from practicing law; or, (3) experiences a work-place disaster, such as fire, flood, building explosion or other event which deprives the lawyer of access to his or her files, law office and support facilities?

In the event of any such contingency, lawyers are confronted with multiple issues and concerns, both ethical and practical, which need to be promptly identified and addressed. In such situations, we can probably agree that it is better to have an advance plan than to start from scratch to develop a plan only after being confronted with an emergency or a crisis.

If an advance plan exists, it must be located, evaluated and implemented expeditiously. To begin with, adequate steps must be taken in advance of any contingency to inform key persons in the lawyer's professional and personal life of the existence of the plan. Key individuals, e.g., staff, spouse, colleagues, must know that there is such a plan, where it is located, and whatever other information is needed to protect the interests of clients and the lawyer. The more thorough and specific the planning process is performed periodically on a regular basis, the greater the chances are that advance efforts to protect all concerned will be successfully executed.

PLANNING AHEAD FOR LAWYER RETIREMENT, DEATH, DISABILITY

There is a bountiful [menu of resources](#) available from the ABA Center for Professional Responsibility. Among the Resource Topics, find "Planning For Lawyer Retirement, Death or Disability," where you may explore a host of references to relevant national and state materials, such as: information on the ABA policy on advance designation of a caretaker or surrogate lawyer; a Chart of State by State Caretaker Rules When Lawyer Disappears, Dies or is Declared Incompetent; How to Sell and/or Close a Law Firm; Being Prepared: A Lawyer's Guide to Dealing with Disability or Unexpected Events, plus detailed references to state materials, including planning ahead guides produced by at least ten different state bar associations, including those published in Oregon, New York and Virginia. Because I am most familiar with materials published in the NYSBA Guide and its history, I may refer to that plan during my presentation, with acknowledged gratitude to the many state and local bar associations and individuals who are contributing to ongoing developments in this important area of client protection.

ABA POLICY

VOLUNTARY ADVANCE DESIGNATION OF TRANSITION ATTORNEY

In August 2007, the ABA House of Delegates adopted a Resolution, known as Recommendation # 105 initiated by the ABA Senior Lawyers Division (SLD), which urges bar associations and courts in every jurisdiction to develop mechanisms to encourage and enable lawyers to plan ahead for law practice contingencies in the event of disability, retirement or death. This policy promotes voluntary advance designation of a transition or successor attorney to protect clients' interests and assist in the transition of their matters and files.

Adopted Resolution # 105 reads as follows:

“RESOLVED, That the American Bar Association urges bar associations and courts to develop, adopt, promote and implement programs and procedures to encourage and enable lawyers to plan for law practice contingencies by designating in advance another lawyer who is willing and able to assume the lawyer's practice or to assist in the transfer of client matters and papers and electronic files, in the event that the lawyer has any physical or mental disability that significantly impairs the lawyer's ability to practice law, or the lawyer has died, disappeared, been suspended or disbarred, or otherwise been restricted from the practice of law. The designee shall be in good standing in the jurisdiction where the lawyer is practicing law, and not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction.”

Background information relating to ABA Resolution # 105 and the complete SLD Report submitted in support of the Resolution may be found at the [Senior Lawyers Division website](#). You may also obtain information about Resolution # 105 by contacting SLD Director, Judith Legg at telephone 312/988-5583 or e-mail Judith.Legg@americanbar.org.

In pursuit of the aspirational, educational and practical goals and purposes of ABA policy urging voluntary advance designation of a transitional attorney, the Monroe County Bar Association in Rochester, New York has established and is implementing a Law Practice Registry Program which enables lawyer members and non-members to file and store confidential information identifying another attorney who is designated by a registering lawyer to act as temporary transitioning attorney for clients in the event contingencies prevent the registering lawyer from performing legal services. Information regarding the details of this Program, including sample Forms, Overview and Guidelines for the Program and how it operates are available at the [MCBA web site](#).

You may also contact MCBA Executive Director, Mary Loewenguth at telephone 585/546-1807 or e-mail at: mloewenguth@mcba.org

NYSBA PLANNING AHEAD GUIDE

In 2005, The New York State Bar Association (NYSBA) published Planning Ahead: A Guide For Solo Practitioners, containing many suggested forms and check lists, which remains available for free downloading at the NYSBA web site as a public service. This publication is currently being revised with content and also updated with appropriate references to applicable New York State Court Rules which have recently been finally adopted in Model Rule format. Re-publication is expected by the end of this year. The printed outdated edition of Planning Ahead is no longer available for purchase, but an electronic version of the entire original publication, with forms as PDFs, continues to be available free at the [NYSBA web site](#). Those wishing to know more about this publication may contact Katherine Suchocki, Esq., Director, Law Practice Management, by telephone at 518/487-5590, or e-mail at ksuchocki@nysba.org.

INDIANA ATTORNEY SURROGATE RULE

In response to a request for updated information regarding Indiana Rules of Practice relating to the subject of law practice continuity, John A. Holtaway, Lead Senior Counsel, ABA Client Protection and Policy Implementation, kindly referenced me to [Indiana Attorney and Discipline Rule 23, Section 27](#), which has been in effect since 2008.

Under the referenced Court Rule, lawyers admitted to practice in Indiana, who do not practice as an employee of a partnership, limited liability company (LLC), professional corporation (PC), limited liability partnership (LLP), another lawyer, or as an organization not engaged in the private practice of law, **may** designate on their annual registration statements a surrogate attorney to serve in the event the lawyer is unable to practice law “due to death, disappearance, disability, suspension, or disbarment”. The term “disabled” means that a “Lawyer has a physical or mental condition resulting from accident, injury, disease, chemical dependency, mental health problems or age that significantly impairs the Lawyer’s ability to practice law.”. In the absence of such voluntary designation, the Indiana Court Rules provide that the term “Attorney Surrogate” means a senior judge certified by the Indiana Judicial Nominating Commission or another member of the bar of Indiana, in good standing, who has been appointed by a court of general jurisdiction in the county in which a Lawyer maintains or has maintained a principal address, to act as an attorney surrogate for a lawyer. Mr. Holtaway may be reached by telephone at 312/988-5298 and e-mail at John.Holtaway@americanbar.org

Detailed information describing the functioning of the Indiana Attorney Surrogate Rule and Best Practices and Forms which may be used in connection with this Attorney Surrogate Rule are found in a [2010 publication of the Indiana State Bar Association](#).

Further explanation of the purpose and operation of this Rule, are found in separate articles written in the Indiana State Bar publication *Res Gestae*, by Donald R. Lundberg, Executive Secretary of the Indiana Supreme Court Disciplinary Commission, one found at pages 2-28 of the October 2007 issue entitled: “The graying of the legal profession”, and the other found at page 29 of the May 2008 issue entitled: ‘My brother’s keeper: the new attorney surrogate rule’. Mr. Lundberg is currently Deputy General Counsel, Barnes & Thornburg LLP, Indianapolis, IN 46204, who may be contacted by telephone at 317/236-6427 and e-mail at Donald.Lundberg@btlaw.com.

PROFESSIONAL LIABILITY INSURANCE COVERAGE CONCERNS

Most professional liability policies, covering acts, errors or omissions of insureds providing legal services, are written on a “claims-made and reported” basis. Under such coverage, claims must be first made against the insured lawyer and reported to the insurance company during the policy period, unless the policy specifically provides for extending the reporting period, such as “within a reasonable time” or “as soon as practicable”. See [Report of ABA Standing Committee on Lawyer’s Professional Liability Report of April 2013 on “Extended Reporting \(“Tail”\) Coverage](#) for a discussion of the issues and implications involved in providing adequate legal malpractice coverage which is of great interest to lawyers transitioning in or out of the practice of law.

The Standing Committee Report highlights the importance of addressing this subject as follows:

“This topic may be important to you if any of the following occur during your legal career:

- You change firms;
- A law firm you work for merges with another firm;
- The lawyers in your firm decide to dissolve the firm; or
- You retire from practice, or permanently leave the practice of law.”

Understandably, there is no “one size fits all” answer to these matters, which should be addressed factually and carefully on an individualized basis. See the Standing Committee Report for relevant factors and possible approaches to be considered in different factual situations, such as: when a lawyer leaves one law firm for employment with another law firm, and when a lawyer leaves a law firm and does some limited work as a solo practitioner.

TONY TIPS

LAWYER ADVANCE PLANNING FOR TRANSITION OUT OF THE PRACTICE OF LAW.

PERSONAL RETIREMENT ANALYSIS (“PRA”) & AN ADVANCE EXIT PLAN (“AEP”)

Preparing for any planned or unplanned absence from the practice of law, including partial or full-time retirement, is a many-faceted, long-term undertaking, which should be started very early in one’s professional life. Advance planning and the formulation of a personalized comprehensive plan for future action, combined with frequent updating, is required if one seeks to achieve a successful outcome. This planning activity deserves top priority on every lawyer’s “To Do” list. Timely implementation of specific steps identified in each plan will determine whether a lawyer will achieve the desired personal, professional and financial objectives.

Most decisions regarding retirement from the practice of law, (either full or part-time, whether planned or unplanned, voluntary or involuntary), raise significant **personal** and **professional** issues. These decisions affect not only the individual practicing lawyer, but will also have substantial impact upon their clients, and well as family, and professional colleagues. Preparing for both planned and unplanned absence from the practice of law deserves thoughtful prompt attention and continual periodic review. Lawyers can ill afford the risks of waiting until illness, accident, disability, death or unanticipated retirement prevent them from adequately accomplishing necessary planning and implementation steps. Action should be taken when an individual has control of his or her own destiny. Every lawyer needs to find and take time for periodic thoughtful, deliberate advance planning, long before any urgent need for action arises.

Performance of a Personal Retirement Analysis (“PRA”) and creation of an individualized Advance Exit Plan (“AEP”) are not easy tasks and honest evaluation of multiple inter-related professional and personal matters complicates decision making.

With respect to an Advance Exit Plan, lawyers must address critical ethical issues of professional responsibility, including preservation of client confidences, and avoiding conflicts of interest. Consideration of such issues will affect the transferability of an interest in a law practice to a particular transition or successor attorney or firm.

Why should an attorney have an AEP? First and foremost, it is to protect the clients' interests. In addition, it may help the lawyer preserve economic value in the law practice. Indeed, proper advance planning may provide an opportunity to enhance the economic value of the law practice for possible sale or merger or retirement. Decisions about these and other aspects of an exit from the practice of law cannot and should not be made casually, impulsively or when the capacity to act rationally and responsibly may be severely limited because of physical or mental disability or unforeseen events and/or conditions.

Creation of an Advance Exit Plan requires careful, detailed consideration of all personal and professional circumstances. An individual AEP should be established early in a lawyer's career and ought to be revised as often as significant changes occur in his or her professional and personal life. There is no "cookie-cutter" Advance Exit Plan which fits everyone's needs. Each plan is personal and unique and must take into account a wide range of individual desires and objectives. Creation of an appropriate AEP takes substantial time and serious thought and effort because one must conduct an accurate, detailed subjective and objective analysis of all personal and professional objectives and financial resources and assets. Planning for a successful retirement requires continual candid self-evaluation, updating, and full and frank discussions with those affected by such important decisions, including a spouse, members of the family, professional law partners, colleagues, associates, and key office personnel. It may also be wise to consult one or more trusted friends and/or advisers.

If an honest Personal Retirement Analysis is performed and a sound Advance Exit Plan is established, if a need arises for temporary or permanent absence from the practice of law, part-time or full-time, clients will be protected and a lawyer will be ready when contingencies prevent or significantly impair a lawyer's ability to practice law. Preparing for the possibility of involuntary, unplanned, or unexpected absence from the practice of law is at least as important as preparing for a planned absence. We should be able to recognize that events of unanticipated accident, physical or mental disability, incapacity, and early death can and do happen to everyone--- including practicing young lawyers.

In view of what is at risk, for clients and lawyers alike, it seems appropriate for the reasonably prudent lawyer to take the initiative, while he or she is mentally and physically able, to avoid potentially adverse consequences.

STEPS TO CONSIDER WHEN ESTABLISHING A PERSONAL RETIREMENT ANALYSIS (PRA) & AN ADVANCE EXIT PLAN (AEP)

In formulating an individual Personal Retirement Analysis and Advance Exit Plan, the following steps are suggested:

1. Candidly and concisely identify and write down both **personal** and **professional** goals and objectives;
2. Candidly identify and evaluate **individual** psychological makeup, physical, medical and mental conditions, and all resources, talents and circumstances, including health, finances, responsibilities and obligations, age and stage in life, professional skills and competence, in light of personal and professional goals and objectives;

3. Candidly identify and evaluate specific **areas of practice and setting** (whether private, public or corporate) and particular capabilities and requirements, such as support staff and backup mechanisms, which are needed to provide competent, quality legal services and to accomplish individualized professional goals;

4. Candidly evaluate the **time, effort, resources and commitment** needed to satisfy both personal and professional goals in light of available time, energy and resources;

5. **Periodically revisit and re-evaluate** the **Personal Retirement Analysis** and the **Advance Exit Plan** as personal circumstances and professional practice change, and be flexible and willing to modify the PRA and AEP when the situation demonstrates the need and desirability of doing so;

6. Prepare, update and maintain accurate **client contact information, instructions to key office personnel** and necessary client and banking authorizations to facilitate smooth transition, sale, merger or closing of your law practice;

7. Maintain and periodically update client files and any relevant **checklists**; and

8. Establish advance written arrangements with partners, associates or any designated successor or temporary “Surrogate” attorney(s) to facilitate transfer, windup or close of your law practice, or otherwise protect the interests of your clients and your Estate.

Respectfully submitted, Anthony Robert Palermo

August 9, 2013

ANTHONY ROBERT PALERMO
WOODS OVIATT GILMAN LLP
700 CROSSROADS BUILDING, 2 STATE STREET
ROCHESTER, NEW YORK 14614
TEL: (585) 987-2882
E-Mail: apalermo@woodsoviatt.com

EDUCATION

- University of Michigan (B.A., Political Science, 1951);
- Georgetown University Law Center (J.D. 1956);
- Certified Federal Court Mediator, (USDC WDNY 2012).

PROFESSIONAL EMPLOYMENT

PRIVATE SECTOR

- Woods Oviatt Gilman LLP, Of Counsel (1999-present);
- Hodgson, Russ, Andrews, Woods & Goodyear, LLP, Rochester NY, Partner (1994-97, Of Counsel (1998);
- Harter, Secrest & Emery, Rochester, NY, Partner (1981-1994);
- Brennan, Centner, Palermo & Blauvelt, Rochester, NY (1961-61), Partner, (1963-1981).

PUBLIC SECTOR

- Assistant U.S. Attorney, WDNY, Rochester, NY (1960-1961);
- Assistant U.S. Attorney, SDNY, NYC (1958-1960);
- Trial Attorney, U.S. Department of Justice, Washington, D.C. (1956-58).

SELECT PROFESSIONAL ORGANIZATIONS

American Bar Association Secretary (1990-1993); Board of Governors (1985-88; 1989-93); Senior Lawyers Division Delegate to ABA House of Delegates (2004-2011); Chair, SLD Practicing Senior Lawyers Committee (1994-2007), Chair, SLD State & Local Senior Lawyers Outreach Committee (2008-Present), Member, Commission on Law and Aging (2011-present). John H. Pickering Award for Service (2012).

New York State Bar Association President (1979-80); House of Delegates (1973-75;1977-Present); Senior Lawyers Section, Member Executive Committee, Chair, Law Practice Continuity Committee (2008-present); Member, Law Practice Continuity Committee (2002-2009); Member, Law Practice Management Committee, Sub- Committee on Law Practice Continuity (2009-present); Chair, Senior Lawyers and Judges Committee, Elder Law Section (1997-2001); Member, Committee on Tort System (1997-Present); Chair, Action Unit #3 - Access to Legal Services (1976-78).

Monroe County (Rochester) Bar Association President (1973); Secretary (1969); Trustee (1964-65, 1972-75); Foundation of Monroe County Bar, President (1974-77); Chair, Public Defender Screening Commission (1973-4); Member, Law Practice Registry Committee (2007-

present); Rodenbeck Award for Service (1998); Justin L. Vigdor Senior Attorney Award for Service (2012).

American College of Trial Lawyers Fellow (1974 to present).

SELECT PROFESSIONAL ACTIVITIES

Charter Chair and Member of Board of Trustees, New York State Clients' Security Fund, now known as "New York State Lawyers' Fund for Client Protection" (1981-1990).