**Report to the MSBA Rules of Professional Conduct**

**Committee Regarding Succession Planning**

**Succession Planning Subcommittee**

**March 29, 2019**

**REPORT AND RECOMMENDATIONS**

The Rules of Professional Conduct Committee appointed a subcommittee in September 2018 to review issues pertaining to succession planning in the event of death, disability or incapacity of an attorney, and to consider whether to recommend a rule change to incorporate more specific ethical obligations. The subcommittee reviewed developments in other states and sought input from relevant stakeholders. The subcommittee declined to recommend that the MSBA recommend any rule change at this time. The subcommittee does have other recommendations, however.

Here is an overview of the subcommittee’s work:

1. **Background**

The subcommittee began its work by hearing from Tre Critelli, the Director of the Iowa Office of Professional Regulation. Effective January 1, 2018, Iowa Court Rule 39.18 requiresan attorney in private practice to identify in his or her annual Client Security Report the attorney’s designated representative to act in the attorney’s stead in the event of death or disability.  Mr. Critelli provided the historical development of this rule, including the earlier, unsuccessful implementation of a successor-identification requirement. Mr. Critelli also explained how the Iowa State Bar Association now serves as a “qualified attorney-servicing association,” for attorneys in private practice for the purposes of meeting Rule 39.18’s designation requirement. To date, only 78 attorneys have chosen to designate the ISBA and pay the $100 fee associated with that selection.

1. **Stakeholders**

Because of the interests they represented, three positions were included on the subcommittee: representation from the Office of Lawyers Professional Responsibility, Lawyers Concerned for Lawyers, and Minnesota Lawyers Mutual. These representatives provided meaningful background, research and experience. Each has provided a summary of their participation:

* 1. **Office of Lawyers Professional Responsibility**

Susan Humiston, OLPR Director, and Aaron Sampsel, Assistant Director, participated in the subcommittee, and Ms. Humiston submitted this report:

The OLPR’s primary participation involved presenting how other states, and Minnesota, have chosen to address issues of succession planning beyond Iowa’s rule change, which was the impetus for the instant conversation in Minnesota.

Minnesota currently is in-line with the majority of states who take a reactive approach to succession issues, i.e., the Director may be appointed as a trustee by the Supreme Court to inventory client files and close trust accounts of deceased, disabled or absent lawyers who have not made other arrangements. Rule 27(a), Rules on Lawyers Professional Responsibility. The OLPR generally has a few trusteeships open at any given time (most open at one time was 7), and generally has the staff and storage space to undertake these responsibilities when there is no one else to address the issue from a client protection perspective. Incremental cost of the OLPR’s administration of trusteeships, beyond staffing, is minimal. The Director and staff have immunity per rule, and the cost is funded generally through attorney annual registration fees.

Some states have started to take a more proactive approach to this issue. A handful of states have a designation program, whereby attorneys can designate a successor or surrogate to step in for them. Two states have mandatory designations (Maine and Florida); three states have permissive designations (Indiana, Delaware, and Louisiana). The Wisconsin bar association has a voluntary registry outside of annual registration. Whether the designation is mandatory or permissive, no rules require counsel to step in, rather it is a voluntary process that gives the bar or regulation counsel a place to start to see if someone may be interested in helping to wind down a practice. Iowa was the first state to require its attorney population to prepare a plan, in addition to a mandatory designation. New Mexico is currently considering this approach, as is Illinois. Many states have detailed resources or handbooks on succession planning widely-available (generally published by the bar association) to assist counsel in succession planning, an obligation already required under most state’s ethics rules (and the model rule). *See e.g.,* Comment 5 to Rule 1.3. Illinois has included succession planning information in its practice management test that all attorneys without malpractice insurance must take.

OLPR perspective at this time: Requiring succession plans or even attorney designations involves a large educational undertaking for the bar (the main lesson from Iowa) and more back-end administration then you would think, and it is unlikely to change the number of trusteeships the Director handles each year, which number is currently manageable. This may change over the course of the next three to five years and should be monitored. I would like to see more states have more experience with the more robust rules like Iowa has implemented. In the meantime, I would like to see more educational information offered to the Minnesota bar (ideally a joint project between the MSBA and the OLPR) to make this easier for more attorneys to incorporate into their practice. The topic of a rule change should be revisited in 3-5 years.

* 1. **Minnesota Lawyers Mutual**

Todd C. Scott, Vice President of Risk Management at Minnesota Lawyers Mutual Insurance Company (MLM), participated in the subcommittee. MLM, as a provider of professional liability insurance and legal risk management solutions for legal professionals, provided the following position statement regarding whether Minnesota attorneys should be obligated, as a part of their annual licensing and reporting requirements, to identify their formal succession plan:

MLM believes that a succession plan is fundamental to operating a safe and risk free law practice, and necessary for the protection of consumers of legal services. Therefore, MLM continues to strongly support a mandatory rule of the Supreme Court of Minnesota, upon petition of the Minnesota State Bar Association, that all lawyers in the private practice of law formally identify that they have a succession plan through the use of a simplified form at the time of their annual attorney registration.

**Background**

Since 1982, when it was created by the Minnesota State Bar Association, Minnesota Lawyers Mutual Insurance Company (MLM) has been committed to being an efficient, accountable and permanent risk management resource to the legal profession. Risk management encompasses many things, including insurance, which are employed to mitigate or remove the danger to lawyers from errors and omissions or other professional risks. We are pleased to have served that role in the Minnesota legal community and to be a permanent risk management resource for Minnesota lawyers.

Over the years we have seen the harm that comes to the legal profession from lawyers who do not adequately plan their professional operations and business strategies. This harm includes matters where a lawyer has suddenly (or at times, not so suddenly) become incapacitated or deceased without having a succession plan or any contingencies in place for the safe and timely transfer of their contractual obligations with their legal clients. Nearly all of us who work in an underwriting, claims, or risk management capacity at MLM have encountered the unfortunate situation where someone is contacting the company to report that an attorney has become suddenly ill or has passed away, and the firm is seeking guidance on what to do with closing the practice since no succession plan is in place.

When that call for help comes, it comes in many forms. At times it is from a partner or associate who would simply like guidance on how to inform the clients that they will no longer be represented by the incapacitated or deceased attorney. Other times, it is from an attorney who is a friend or sharing office space with the incapacitated or deceased lawyer, who feels a personal and professional obligation to assist in the difficult matter. However, there are numerous times that the call comes from someone who is not an attorney or legal professional, but they feel a personal obligation to assist with the matter – often a spouse, a sibling, or an adult child sitting at dad or mom’s desk, wondering what to do with all the legal files around them. Without written guidance or instruction from the deceased or incapacitated lawyer, these situations are often the most difficult of all for the person making the call, the estate, and ultimately the clients who were represented by the suddenly departed attorney.

To be clear, although MLM is a company that insures approximately 20,000 policyholders, the company does not experience reports of incapacitated or deceased lawyers on a monthly basis. Generally, these reports come to MLM at the rate of 2 to 3 events per year. We attribute this rate to the many conscientious lawyers who already view succession planning as a sound business practice and have made plans to protect all phases of their client matters. However, in recent years there has been a noticeable increase in reports to MLM of attorneys who have been suddenly incapacitated or deceased while still engaged in the practice of law, and without a formal succession plan in place, the firm or firm representative seeks urgent guidance on how to best meet the needs of the clients.

**Statement of Support For a Formal Rule Requiring Succession Planning**

MLM has identified the following reasons in support of its view that a rule mandating a formal succession plan for all attorneys in private practice in Minnesota is essential for the protection of consumers of legal services:

1. A rule would not be unduly burdensome upon Minnesota attorneys in light of the annual lawyer registration and law firm reporting requirements already in place. Currently, all Minnesota attorneys are required to report annually to the Minnesota Supreme Court Office of Lawyer Registration their address, email, an affirmation concerning Rule 1.15 of the Minnesota Rules of Professional Conduct and firm trust account information, professional liability status, and additional demographic information. Additionally, all law firms who are organized professionally in Minnesota have annual reporting obligations to the Minnesota Office of Lawyers Professional Responsibility (OLPR) where they are required to report address and contact information, information about the firm’s organizational document, positions within the firm that have governance authority, the name and address of every member of the firm with ownership interest or governance authority in the firm, and an affirmation that all employees, agents and independent contractors who furnish professional services on behalf of the firm are authorized to practice law. In both cases, the annual reporting responsibilities require attorneys to provide a sworn statement by the applicant or an authorized attorney of the firm. Comparatively, none of the proposals that currently exist regarding a formal succession plan for all attorneys in private practice in Minnesota would be unduly burdensome. In jurisdictions such as Iowa and Illinois, great care has been taken to ensure that the annual reporting requirements for a succession plan are as least restrictive as possible. In some cases, the annual reporting requirement for a succession plan would amount to a simple check-box on the attorney annual registration form. In light of the annual mandatory reporting requirements described herein, it is MLM’s belief that none of the proposals that currently exist regarding a formal succession plan for all attorneys in private practice in Minnesota would be unduly burdensome.
2. Although a formal succession plan is already viewed as an ethical responsibility for lawyers licensed in Minnesota, a significant representation of lawyers in private practice do not have a succession plan in place. In Minnesota, attorneys have an obligation to exercise diligence, to safeguard the client’s property, and to ensure that a client’s interests are protected when the representation ends. Therefore, it can be said that it is ethically incumbent on counsel to ensure there is a succession plan in place if the attorney is unable to complete the representation of their client for any reason. Despite these ethical obligations, it is MLM’s belief that very few lawyers in solo or small firm private practices have a formal succession plan in place. In July 2018, The Illinois Attorney Registration & Disciplinary Commission (ARDC) reported that of the 49,444 active status lawyers currently engaged in the private practice of law, only 17% of lawyers identifying as sole practitioners report that they have a written succession plan. In private practice law firms with 2 to 10 lawyers, 25% report that their law firm has a written succession plan. As firms become larger, the percentage of firms reporting that they have a succession plan increases. For example, at firms with 100 or more lawyers, 58% of lawyers reported having a formal succession plan. We are unaware if Minnesota lawyers have been surveyed in recent years on the issue of succession planning, however our experience has been that the number of Minnesota lawyers reporting to MLM that they have a formal succession plan would be similar to that of Illinois, and that very few sole practitioners or lawyers in firms of 2 to 5 attorneys have a formal succession plan in place.
3. The increase in incidents where lawyers have died unexpectedly or suddenly have become incapacitated necessitates a rule requiring lawyers in private practice to register that they have a formal succession plan in order to protect consumers of legal services. In 2016, the Minnesota Office of Lawyers Professional Responsibility reported that it was appointed as trustee for seven attorneys who died unexpectedly without a plan in place to return client files or disburse funds in trust. In that report it was stated by the office that, “One or two trustee appointments a year is typical; seven is very unusual.” Although MLM does not formally track the number of incidents where a lawyer has died or suddenly become incapacitated, MLM has also seen an increase in these incidents and is concerned. During the committee meetings, Minnesota Lawyers Concerned for Lawyers (LCL) also reported an increase in the number of incidents where lawyers suddenly had to abandon their practice out of concerns for their personal health and there was a need for attorneys to “step in” and assist with the firm’s clients while the responsible attorney is seeking medical and therapeutic assistance. Moreover, as more and more lawyers are working past the traditional age of retirement, MLM believes that the number of incidents where a lawyer has suddenly become incapacitated or has died unexpectedly will increase in the coming years. In a 2016 survey of Minnesota lawyers in private practice jointly produced by the MSBA, Minnesota CLE and MLM, when asked, “At what age do you plan to leave the practice of law?” 32% of respondents said they plan to retire between the ages of 65-69, and 45% said they plan to retire beyond the age of 70. In that same survey, 16% of Minnesota lawyers in private practice responded by saying that they do not plan to retire at all. For these reasons, MLM believes that the number of incidents where a lawyer has suddenly become incapacitated or deceased will likely increase rather than decrease in the coming years, leaving more consumers of legal services in search of a successor attorney and potentially jeopardizing their legal standing.
4. Successor attorneys and firm representatives are likely covered for any potential liability arising out of legal matters inherited from a disabled or deceased attorney if the successor attorney already has a professional liability policy in place. During the committee discussions, there was concern that a rule requiring the mandatory annual reporting of a formal succession plan would be burdensome on anyone named as successor attorney because of the potential for liability exposure after inheriting legal matters from the deceased or incapacitated attorney. In the event that an attorney becomes a successor attorney, professional liability policies generally cover most exposures when the insured attorney is working on behalf of an individual seeking professional legal services. This coverage is not dependent on whether the individual seeking legal services was originally a client of the insured attorney, or if they happen to be a client of the disabled or deceased attorney and may have sought professional legal services with the insured attorney on a temporary basis. It stands to reason that no legal professional would like to inherit a legal malpractice claim because of a defect that originated with an attorney who suddenly became disabled or deceased. However, in regards to the question of whether insurance coverage would be available to the successor attorney in such a professional liability matter, it is MLM’s belief that a claim would likely be covered for any potential liability arising out of legal matters inherited from a disabled or deceased attorney if the successor attorney already has a professional liability policy in place.
5. Currently, safeguards protecting consumers of legal services in Minnesota exist with the expectation that MLM, The OLPR, LCL and other agencies would intervene if legal matters are neglected, whereas a rule requiring Minnesota lawyers to declare that they have a formal succession plan in place would ensure that qualified, experienced Minnesota attorneys in private practice would take up the handling of neglected legal matters almost immediately upon the death or disability or an attorney in private practice. The effects of a single Minnesota attorney who is suddenly incapacitated or deceased without a formal succession plan can be devastating for the clients whose matters are suddenly and tragically neglected. These effects can be compounded during the intervening time that an agency other than the successor attorney has had to step in and oversee the neglected client matter on a temporary basis. Sound principles of justice and an adherence to the safeguards of protecting consumers of legal services, which are inherent with an attorney’s ethical obligations, require that Minnesota establish a simplified system where individuals are protected as quickly as possible by qualified attorneys, so long as the system is not unduly burdensome on the reporting attorneys or the regulators overseeing the process. For the reasons stated previously, MLM believes that the proposed systems are not overly burdensome, and that the principles of justice and consumer protection outweigh the annual tasks associated with a system that ensures Minnesota lawyers in private practice have a succession plan in place.

**Summary and Recommendation**

It is MLM’s advice and recommendation to the committee as follows:

For the reasons stated, MLM continues to strongly support a mandatory rule of the Supreme Court of Minnesota, upon petition of the Minnesota State Bar Association, that all lawyers in the private practice of law formally identify that they have a succession plan through the use of a simplified form at the time of their annual attorney registration.

In addition, MLM has witnessed the process and benefits that has resulted from Iowa’s decision to require all attorneys in private practice to formally identify their succession plan annually through their licensing process. We continue believe the Iowa plan has been well-vetted, successfully achieves the goal of protecting consumers of legal services, is not unduly burdensome to the lawyers of Iowa, and has been successful in achieving the goal of establishing succession planning as a requirement to practicing law in the state of Iowa.

Finally, if requested, MLM would be pleased to assist the Minnesota Supreme Court, Minnesota Attorney Licensing Board, Minnesota Office of Lawyers Professional Responsibility, and the Minnesota State Bar Association, in exploring ways to accommodate attorneys who are unable to identify a trustee or successor firm as a part of their formal succession planning obligations.

* 1. **Lawyers Concerned for Lawyers**

Joan Bibelhausen, Executive Director of Lawyers Concerned for Lawyers, participated in the subcommittee. She provided the following statement:

LCL assists lawyers who are struggling with mental health, substance use and other issues. LCL’s interest in the succession planning issue is two-fold. First, LCL has an interest in supporting lawyers who may need to take temporary leaves from practice. Second, LCL may support succession planning rules that allow a more expedited exit, with less harm to the lawyer and clients, if there are guidelines and rules for passing along a practice when someone must exit for health reasons.

**Temporary Leaves**

It is LCL’s firm belief that with appropriate care, treatment, and support; unless the issue is age-related cognitive impairment, the lawyer will nearly always be able to return to practice if they wish to do so. It is also our experience that the longer a lawyer resists treatment or other assistance, the more damage is likely to occur. We have never met a lawyer who needs to step away from practice temporarily, who does not care deeply about their clients. It is not uncommon for a lawyer to know they need help, but they delay taking steps because of that concern. Unfortunately, there are also lawyers who have delayed treatment for other illnesses, such as cancer, because they are afraid of what will happen to their practice and clients. As their anxiety grows, their depression deepens or their substance use, which may have been a way to cope with stress, spins out of control, and things only get worse. Their practice and clients may be impacted but they believe that they are serving clients more effectively by being present than they would by being absent in treatment or elsewhere. They miss things, they make mistakes and they choose paths that they would not have with a healthy mind. To the outsider this may not make sense. To the person with a mental health disorder, including substance use, they see no other way. There is no question that this desperation is a contributor to the higher that average suicide rate for lawyers.

Support for a lawyer may involve attending treatment or taking a leave of absence from practice for health reasons. The sooner an issue can be dealt with, the fewer problems there will be. Lawyers in organizations such as law firms or government offices will often have colleagues who can step in and assist with practice issues. Solo practitioners typically do not. They may be afraid to ask, or they may have already burned bridges while their illness has been active. Further, the lawyer who is suffering will often not have procedures in place or if they do, will not have recently followed them. The success of one’s recovery may depend, in part, on how much must be done to salvage a practice.

When a lawyer or others concerned about the lawyer contact LCL for assistance, we have sometimes worked with them to help arrange practice coverage. Often, they will not accept help otherwise. This may involve LCL staff (also attorneys) and LCL volunteers. In the case of an intervention, we may not have full access to details about the practice until the attorney has agreed to go to treatment. Because the practice may be in shambles, the assisting lawyer is placed at risk.

In 2015, the MSBA Rules of Professional Conduct Committee established a Task Force to look at protection of lawyers helping other lawyers. Its charge was:

*To study and make recommendations regarding issues that arise when a practicing attorney takes a leave from or abandons their practice either temporarily or permanently; including how to ensure client needs are protected while also addressing the concerns of attorneys who may be willing to provide assistance. Recommendations may include, but are not limited to, amendments to court rules and statutes in the areas of ethics, liability and privilege.*

The Task Force ultimately did not make any recommendations regarding rules to protect the assisting attorney. It did discuss the idea of malpractice coverage and in 2017 LCL purchased a malpractice policy to cover attorney staff and volunteers.

**Succession Resources**

LCL’s perspective has to do with the well-being of lawyers, the reduction of risk for impairment and assistance when impairment is present.

*Well-being*: There is no question that a lawyer will sometimes have difficulty admitting to things with which they are not familiar. There is no statute, case law, or summary guide about how to make retirement decisions, how to deal with the emotional aspects, and what to put in place to ensure a smooth transition. At LCL we see stressed or burned out lawyers who would like to slow down or stop but don’t have any idea of where to begin. And it’s incredibly difficult to admit you don’t know. Whatever is developed, it would provide a reason to consider necessary steps and perhaps some guidelines.

*Risk reduction*: Increased stress means an increased likelihood of mental health, including substance use, issues. A toolkit or guidelines would make a difference. LCL has shared documents and guides created by other states, but we provide a disclaimer that there may be Minnesota consideration.

*The impaired lawyer*: LCL has worked with lawyers who choose not to continue in practice because there is too great a risk that mental health issues will return. LCL has also assisted lawyers or those who are concerned about them when a cognitive issue is suspected or present. These lawyers need to close their practices and if they had a plan when they were healthier, the transition will be better. The lawyer who is impaired is unlikely to make a plan. The lawyer who made a plan before they were impaired will be able to transition from practice with less emotional impact. The mental health of the impaired lawyer who does not have a successor or plan may be more greatly impacted if there is a punitive aspect.

1. **Discussion**

The subcommittee gathered additional information. It invited Emily Eschweiler, Director of the Office of Lawyer Registration, to speak to logistical issues of implementing a rule change through the annual lawyer registration process. Ms. Eschweiler stated that it would be feasible to add a checkbox to the lawyer registration form (indicating, e.g., that the attorney had a designated successor). In the view of Ms. Eschweiler, a potential problem is the lack of available OLR staff time to answer the many likely inquiries regarding a new question on the form. Ms. Eschweiler indicated that education of attorneys would be of paramount importance.

The subcommittee engaged in lively discussion regarding whether to recommend that the MSBA recommend a succession planning rule change.

The subcommittee discussed reasons there should be a rule change, which included:

* Clients will be better protected by adoption of a rule change, because even though under current but more generic ethical obligations attorneys should have a succession plan, many attorneys in small firms or who practice as solos do not have such plans in place.
* Minnesota has many attorneys, and they are aging or more cognizant of the obligations of attorney wellbeing, so this issue is growing in importance;
* Implementing a rule that merely requires checking a box to indicate one has a success plan on the annual attorney registration is not a huge burden on either attorneys or the OLR;
* With an increasing emphasis on attorney wellness, and obligations to
* There is a growing trend among other states toward addressing succession planning in a more proactive manner, and Minnesota has more typically been on the forefront on issues such as this; and
* MLM believes that a succession plan is fundamental to operating a safe and risk-free law practice, and necessary for the protection of consumers of legal services.

The subcommittee discussed reasons it should not recommend a rule change, at least not at this time, which included:

* If the rule is made effective by merely checking a box on the annual registration form, it will have little effect on rule-followers and those who generally don’t follow rules;
* Other states’ rules (like Iowa and Illinois) have not been in effect very long yet, so if wait a couple years we will have the benefit of learning from their mistakes;
* Because this is not yet a case management problem for OLPR, it is not necessary to make a rule change at this time;
* There is significant education that must be provided for a rule to be successfully implemented, so it makes sense to spend some time providing the education and getting attorneys to voluntarily take action before a rule change is in effect; and
* If we do the rule change now, we don’t really have time for the comprehensive education campaign that is necessary.

1. **Recommendations**

Ultimately, a motion was made that the subcommittee recommend adoption of a rule requiring some sort of succession plan disclosure in order to register as an attorney. The motion failed to pass.

However, the subcommittee agreed that further work needed to be done by the RPC Committee:

1. The RPC Committee should monitor succession- and incapacity-planning rule developments in other states and considerations related to the need for such a rule in Minnesota, so that rule change is reconsidered at an appropriate time.
2. In the short-term, MSBA should consider as part of its efforts to encourage attorney wellbeing taking the lead, with assistance with the Office of Lawyers Professional Responsibility, Minnesota Lawyers Mutual, and Lawyers Concerned for Lawyers, creating a handbook and checklist for Minnesota attorneys on best practices for succession and incapacity planning.

**Subcommittee Members:**

Lisa Lodin Peralta, Chair

Timothy Baland

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Fred Finch

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