

**MENTOR MATCH PROGRAM**  
**WORKSHEET Z**  
**INTRODUCTION TO PLANNING FOR RETIREMENT, DEATH OR DISABILITY**

Worksheet AA is intended to facilitate a discussion about the importance of planning ahead for how a lawyer's practice should be handled in the event of the lawyer's retirement, death or disability.

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- Discuss the importance of planning ahead for one's practice if an unexpected absence such as disability or death occurs, including relevant considerations such as a lawyer's duty not to prejudice his or her clients' cases by making sure they have access to their files. See Rules of Prof. Cond. Rule 1.3, Comment 5; Gov. Bar R. V(8)(F); American Bar Association Formal Opinion 92-369, attached.
- If mentoring in-house (particularly in a small firm), discuss what plan is in place for firm lawyers to take over the cases of clients of a firm lawyer who unexpectedly has a long-term illness, dies, or becomes incompetent or otherwise disabled.
- Discuss a lawyer's obligation to colleagues and to the profession to assist with the inventorying of clients' files when an attorney in a solo practice dies or becomes incompetent or otherwise disabled, including relevant ethical considerations such as an inventorying attorney's duty to allow a colleague's clients to choose their own counsel.
- Discuss the importance of planning for disaster, different types of disasters which could realistically affect a practice, and specific ways to plan for disaster. Review and discuss the attached articles. Dan Pinnington, *Would You and Your Practice Survive These Common Disasters?*, LAW PRACTICE TODAY, Oct. 2005  
<https://www.abanet.org/lpm/lpt/articles/mgt10055.html>  
  
Ellen Freedman, *Protect Your Clients and Yourself: Prepare for Disaster Before it Happens*, LAW PRACTICE TODAY, Oct. 2005. <https://www.abanet.org/lpm/lpt/articles/mgt10057.html>
- Discuss specific ways to plan for death, disability, and retirement, as well specific steps that should be taken by the lawyer is inventorying the files of the deceased, disabled or disappeared colleague. Review the attached checklists published by the Washington State Bar Association.
- Discuss and Review *Indiana's Attorney Rule: Best Practices and Procedures* found at <http://www.inbar.org/LinkClick.aspx?fileticket=mTUdYLJvkzA%3d&tabid=74&mid=1063>

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## RESOURCES

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### INDIANA RULES OF PROFESSIONAL CONDUCT RULE 1.3: DILIGENCE

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

#### Comment

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. *Cf.* Rule V, Section 8(F) of the Supreme Court Rules for the Government of the Bar of Ohio.

View complete comments at [http://www.in.gov/judiciary/rules/prof\\_cond/](http://www.in.gov/judiciary/rules/prof_cond/)

### INDIANA RULES OF ADMISSION AND DISCIPLINE

#### RULE 23 Disciplinary Commission and Proceedings

##### Section 27. Attorney Surrogates

(a) *Definitions for purposes of this section only:*

“Attorney Surrogate” means a senior judge certified by the Indiana Judicial Nominating Commission or another member of the bar of this State, in good standing, who has been appointed by a court of competent jurisdiction to act as an attorney surrogate for a lawyer.

“Court of competent jurisdiction” means a court of general jurisdiction in the county in which a Lawyer maintains or has maintained a principal office.

“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.

“Fiduciary Entity” means a partnership, limited liability company, professional corporation, or a limited liability partnership, in which entity a Lawyer is practicing with one or more other members of the Bar of this State who are partners, shareholders or owners.

“Lawyer” means a member of the Bar of this State who is engaged in the private practice of law in this State. “Lawyer” does not include a member of the Bar whose practice is solely as an employee of another Lawyer, a Fiduciary Entity or an organization that is not engaged in the private practice of law.

(b) *Designation of Attorney Surrogate*

(1) At the time of completing the annual registration required by Ind. Admission and Discipline Rule 2(b), a Lawyer may designate an attorney surrogate on the annual registration form provided by the Clerk of the Supreme Court by specifying the name, office address and residence address of the attorney surrogate and certifying that the attorney surrogate has agreed to the designation in a writing in possession of both the lawyer and the surrogate. The designation of an attorney surrogate shall remain in effect until revoked by either the designated attorney surrogate or the Lawyer designating the attorney surrogate. The Lawyer who designates the attorney surrogate shall notify the

Clerk of the Supreme Court of any change of designated attorney surrogate within thirty (30) days of such change. The Clerk shall keep a list of designated attorney surrogates and their addresses.

- (2) A Lawyer, practicing in a Fiduciary Entity, shall state the name and address of the Fiduciary Entity in the attorney surrogate designation section of the Lawyer's annual registration form. Because of the ongoing responsibility of the Fiduciary Entity to the clients of the Lawyer, no attorney surrogate shall be appointed for a Fiduciary Entity.
- (3) Unless otherwise designated on the annual registration form required by Ind. Admission and Discipline Rule 23 § 21(D) pursuant to subsection (1) above, a Lawyer not practicing in a Fiduciary Entity will be deemed to designate a senior judge or other suitable member of the bar of this State in good standing appointed by a court of competent jurisdiction to perform the duties of an attorney surrogate.

(c) *Role of Attorney Surrogate*

(1) Upon notice that a Lawyer has:

- (a) died;
- (b) disappeared;
- (c) become disabled; or
- (d) been disbarred or suspended and has not fully complied with the provisions of Ind. Admission and Discipline Rule 23, Section 26

any interested person (including a local bar association) or a designated attorney surrogate may file in a court of competent jurisdiction a verified petition (1) informing the court of the occurrence and (2) requesting appointment of an attorney surrogate.

- (2) A copy of the verified petition shall be served upon the Lawyer at the address on file with the Clerk of the Supreme Court of Indiana or, in the event the Lawyer has died, upon the personal representative, if one has been appointed. Upon the filing of the verified petition, the court shall, after notice and opportunity to be heard (which in no event shall be longer than ten (10) days from the date of service of the petition), determine whether there is an occurrence under (a), (b), (c) or (d), and an attorney surrogate needs to be appointed to act as custodian of the law practice. If the court finds that an attorney surrogate should be appointed then the court shall appoint as attorney surrogate either the designated attorney surrogate as set forth pursuant to subsection (b)(1), a suitable member of the Bar of this State in good standing or a senior judge.
- (3) Upon such appointment, the attorney surrogate may:
  - (a) take possession of and examine the files and records of the law practice, and obtain information as to any pending matters which may require attention;
  - (b) notify persons and entities who appear to be clients of the Lawyer that it may be in their best interest to obtain replacement counsel;
  - (c) apply for extensions of time pending employment of replacement counsel by the client;
  - (d) file notices, motions and pleadings on behalf of the client where jurisdictional time limits are involved and other legal counsel has not yet been obtained;
  - (e) give notice to appropriate persons and entities who may be affected, other than clients, that the attorney surrogate has been appointed;
  - (f) arrange for the surrender or delivery of clients' papers or property;
  - (g) as approved by the court, take possession of all trust accounts subject to Ind. Prof. Cond. R. 1.15(a), and take all appropriate actions with respect to such accounts;

- (h) deliver the file to the client; make referrals to replacement counsel with the agreement of the client; or accept representation of the client with the agreement of the client; and
    - (i) do such other acts as the court may direct to carry out the purposes of this section.
  - (4) If the attorney surrogate determines that conflicts of interest exist between the attorney surrogate's clients and the clients of the Lawyer, the attorney surrogate shall notify the court of the existence of the conflict of interest with regard to the particular cases or files and the attorney surrogate shall take no action with regard to those cases or files
- (d) *Jurisdiction of Court*

A court of competent jurisdiction that has granted a verified petition for appointment under this section shall have jurisdiction over the files, records and property of clients of the Lawyer and may make orders necessary or appropriate to protect the interests of the Lawyer, the clients of the Lawyer and the public. The court shall also have jurisdiction over closed files of the clients of the Lawyer and may make appropriate orders regarding those files including, but not limited to, destruction of the same.
- (e) *Time Limitations Suspended.*

Upon the granting of a verified petition for appointment under this section, any applicable statute of limitations, deadline, time limit or return date for a filing as it relates to the Lawyer's clients (except as to a response to a request for temporary emergency relief) shall be extended automatically to a date 120 days from the date of the filing of the petition, if it would otherwise expire on or after the date of filing of the petition and before the extended date.
- (f) *Applicability of Attorney-Client Rules.*

Persons examining the files and records of the law practice of the Lawyer pursuant to this section shall observe the attorney-client confidentiality requirements set out in Ind. Professional Conduct Rule 1.6 and otherwise may make disclosures in camera to the court only to the extent necessary to carry out the purposes of this section. The attorney-client privilege shall apply to communications by or to the attorney surrogate to the same extent as it would have applied to communications by or to the Lawyer. However, the attorney surrogate relationship does not create an attorney/client relationship between the attorney surrogate and the client of the Lawyer.
- (g) *Final Report of Attorney Surrogate: Petition for Compensation; Court Approval.*

When the purposes of this section have been accomplished with respect to the law practice of the Lawyer, the attorney surrogate shall file with the court a final report and an accounting of all funds and property coming into the custody of the attorney surrogate. The attorney surrogate may also file with the court a petition for reasonable fees and expenses in compensation for performance of the attorney surrogate's duties. Notice of the filing of the final report and accounting and a copy of any petition for fees and expenses shall be served as directed by the court. Upon approval of the final report and accounting, the court shall enter a final order to that effect and discharging the attorney surrogate from further duties. Where applicable, the court shall also enter an order fixing the amount of fees and expenses allowed to the attorney surrogate. The amount of fees and expenses allowed shall be a judgment against the Lawyer or the estate of the Lawyer. The judgment is a lien upon all assets of the Lawyer (except trust funds) retroactive to the date of filing of the verified petition for appointment under this section. The judgment lien is subordinate to nonpossessory liens and security interests

created prior to its taking effect and may be foreclosed upon in the manner prescribed by law.

(h) *Immunity*

Absent intentional wrongdoing, an attorney surrogate shall be immune from civil suit for damages for all actions and omissions as an attorney surrogate under this section. This immunity shall not apply to an employment after acceptance of representation of a client with the agreement of the client under subsection (c)(3)(h) above.

View complete rule and comments at <http://www.in.gov/judiciary/rules>

*Indiana's Attorney Rule: Best Practices and Procedures* found at <http://www.inbar.org/LinkClick.aspx?fileticket=mTUdYLJvkzA%3d&tabid=74&mid=1063>

The Missouri Bar, *Planning Ahead: A Guide to Protect Your Client's and Your Survivor's Interests in the Event of Your Disability or Death*, <http://www.mobar.org/3f8a2f55-4407-44a2-ba10-39396c2d790c.aspx>.

The Washington State Bar Association, *Protecting the Client's Interests in the Event of the Lawyer's Death or Disability*, <http://www.wsba.org/lawyers/ethics/closing+a+practice-intro.htm>.