

# A Lawyer's Guide To Client Service Continuity Planning

By **Thomas Rohback, Craig Reiser and Eva Yung**

Lawyers hate succession planning. No one wants to think about being unable to handle a matter or to admit that they can be replaced — especially to their colleagues or clients. Yet, we have all talked about the need to plan ahead for clients, often framed in the context of preparing for the eventuality that we "could get hit by a bus."

But unlike the bus, the COVID-19 pandemic is not an isolated incident. As we have already seen, the business and professional impact of the pandemic is enormous, ranging from the death and debilitating illness of key attorneys to the overall disruption of routine practices.

Although the conditions in which we practice law are rapidly evolving as we adapt to this new normal, our ethical obligations to our clients remain — and failing to hew to them in this trying time may lead clients to bring malpractice or breach of fiduciary duty claims when the dust settles. These obligations — set forth in the American Bar Association Model Rules of Professional Conduct — vary by state and are numerous. Among others, they include requirements that lawyers:

- Act with reasonable diligence and promptness in representing a client;[1]
- Communicate relevant information to clients in a timely manner;[2] and
- Take steps to the extent reasonably practicable to protect the client's interests upon the termination of the representation.[3]

The rules do not specify how to satisfy these general principles, and there are myriad ways to do so. But as the opinions addressing the ethical duties of departing lawyers reflect, to meet these and other obligations, lawyers should not only be prepared to protect their clients themselves, but should also take proactive steps to ensure that someone else is able to do so if need be.[4]

We all know it is important to plan ahead so that another lawyer could readily step in our stead for our clients.[5] And we all know that it requires relatively little effort to enable another lawyer to do that — basic steps such as communicating with our colleagues, maintaining an updated client file, and keeping organized records go a long way toward succession planning.

But for a variety of reasons, many lawyers do not individually take steps in their daily practice to ensure uninterrupted client service. Whether it is the feeling that we are already too busy, a sense that we alone are indispensable to our clients, or concern that involving other lawyers on a project might cause clients to balk at a bill, these steps often fall by the wayside.



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The unprecedented COVID-19 crisis provides a timely reminder of the importance of having a transition plan. While the Rules of Professional Conduct do not expressly contemplate a pandemic, the ABA and various state bar associations have highlighted how the ethical precepts outlined above require lawyers to take basic — yet, often ignored — steps to ensure that client service continues uninterrupted in a time when it is more likely that we or our colleagues will fall ill.[6]

Ensuring continuity of client service depends on another lawyer being able to pick up where you have left off without a hitch, whether that person is a colleague or someone designated to take on the matter. This means that you must build some redundancy and internal communication into your practice.

Here, we present some practical suggestions that will provide a road map to your matters and keep client service continuing without interruptions, whether it is a pandemic or a bus that prevents you from performing them yourself.

### **Prepare Summary Memoranda on Key Issues**

One practical way to ensure continuity of a matter is to maintain a running list of open projects that addresses all of the key issues someone would need to know to step in — such as the status and location of communications with opposing counsel on a litigation or deal, project timelines, and legal research findings.

The more information is memorialized in writing, the easier it will be to ensure seamless transition of critical client services. Having detailed, current, and easy-to-follow memoranda on the matter is all the more important for the solo practitioner, for whom this may be the only way of explaining the matter to a potential successor.[7]

### **Prepare an Onboarding Packet for New Lawyers**

Another related step to take is to create an onboarding packet for incoming lawyers to the case or deal. This could consist of an introductory memorandum describing the case and its issues (as suggested above), a guide to where the relevant files are located (as suggested below), and, where applicable, who on the case or deal team is responsible for particular workstreams on a matter.

Not only is this something that will be handy when new lawyers are staffed on the matter, having an onboarding packet ready to go ensures that whoever takes on primary responsibility for the case can hit the ground running.

### **Create a Guide to the Electronic or Hard-Copy Client File**

To ensure that the next lawyer taking responsibility for a matter is fully equipped to represent the client's interests, it is critical that documents for a matter (including key communications) are stored in an accessible location and organized in a coherent way. While this sounds easy enough, important information sometimes does not make its way into the client file — or, when it does, it is saved in a nonuniform way that makes it difficult for others to locate important documents.

To make it easier for a new lawyer or client to sort through a large client file and ensure uniformity in how materials are stored, consider creating a guide of where and how materials are saved. While placing such memoranda in the client file is a good start, for large and complex matters, consider also identifying the legal or factual issues that are

covered by the memoranda and correspondence saved in the file. Such a guide will go a long way toward ensuring that a new lawyer can readily and efficiently situate themselves to the organization of the client file.

### **Integrate Additional Counsel Wherever Possible**

In addition to memorializing the status of the case for posterity, it is helpful — where possible, considering the client's strategic and budgetary objectives — to involve additional attorneys in the management of a case or deal so that they are prepared to suddenly take on primary responsibility for a project. In a law firm setting, this could mean including a team member on key communications, or creating an email group with other attorneys and ensuring that all such communications are shared with that group.

This practice is particularly important even beyond the unavailability of a lawyer due to death or illness. Depending on the demands of other cases or matters, it may be necessary for someone else on a team to step into the first chair on a project. For example, if the senior attorney on a case has to go to a three-week trial, it will be vital that other attorneys are able to take complete control of another ongoing case during the trial.

### **Schedule Regular Team Update Calls**

To the extent you practice with a litigation or deal team, scheduling regular calls is a good way to ensure that other lawyers are aware of — and working toward — the client's strategic goals. While some clients regard team calls or internal communications as an unnecessary cost, they can save hours of scrambling should one of the only lawyers with a bird's eye view of the matter be unavailable.

### **Know Your Email Retention Policy and Organize Your Inbox**

Given how many of our communications are conducted over email and how those emails are often not saved elsewhere without additional effort, as a backstop to saving emails to an electronic or hard-copy file, it is important to ensure that key emails are preserved and organized in a logical way so that someone stepping into the matter can access your inbox and find relevant communications that have not been saved elsewhere. Knowing your email retention policies is an important first step to making sure that electronic information others may need to understand the matter is not destroyed, inadvertently or as a routine practice.

Of course, this will only help a new lawyer or client find relevant information if the communications are organized in a coherent way. It is difficult at times to organize our inboxes — especially when we are particularly busy.

But organizing emails by client and matter on a daily basis helps ensure that your inbox is up to date and that the project of organizing does not become so burdensome that it never gets done. Also consider organizing your inbox further by creating subfolders relevant to significant issues — for example, a folder addressing correspondence with opposing counsel, a folder addressing legal research, and so on.

### **Conclusion**

Being able to quickly communicate the state of a client matter and smoothly hand it over to a successor is something lawyers at all levels and in all practices can do. While most of the above points probably sound familiar — and in some respects, even basic — the trick is to put them or similar steps into practice now and continue doing so.

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[1] See, e.g., Model Rules of Prof'l Conduct r. 1.3. In the context of litigation, specifically, the rules require that lawyers make reasonable efforts to expedite litigation consistent with the client's interests. See, e.g., Model Rules of Prof'l Conduct r. 3.2.

[2] See, e.g., Model Rules of Prof'l Conduct r. 1.4.

[3] See, e.g., Model Rules of Prof'l Conduct r. 1.16(d).

[4] See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 489 (2019) at 4 (requiring, in the context of a departing lawyer, that the client's files be "organized and up to date" and otherwise ready for transfer to new counsel if necessary); Formal Op. 99-414 (1999) at 1 n.1 (requiring that "active matters on which the departing lawyer has been working continue to be managed by remaining lawyers with competence and diligence pursuant to Rules 1.1 and 1.3").

[5] This is especially true in an emergency. For example, following Hurricane Katrina, the ABA commissioned a guide outlining a framework for business continuity planning in the wake of natural disasters. See BDA Global LLC, *Surviving a Disaster: A Lawyer's Guide to Disaster Planning*, ABA Special Comm. on Disaster Response and Preparedness (2011), [https://www.americanbar.org/content/dam/aba/administrative/disaster/surviving\\_a\\_disaster\\_a\\_lawyers\\_guide\\_to\\_disaster\\_planning.pdf](https://www.americanbar.org/content/dam/aba/administrative/disaster/surviving_a_disaster_a_lawyers_guide_to_disaster_planning.pdf).

[6] See Ethics During COVID-19, *Florida Bar News* (Apr. 8, 2020), <https://www.floridabar.org/the-florida-bar-news/ethics-during-covid-19/>; Rochelle Washington, *Bracing for the Unexpected: Disaster Preparedness for Lawyers*, D.C. Bar News (Mar. 30, 2020), <https://www.dcbar.org/about-the-bar/news/disaster-preparedness-for-lawyers.cfm>; Saul Jay Singer, *Legal Ethics in the Age of the Coronavirus*, D.C. Bar News (Mar. 20, 2020), <https://www.dcbar.org/about-the-bar/news/Legal-Ethics-in-the-Age-of-the-Coronavirus.cfm>; Ethics in the COVID-19 Pandemic, *State Bar of Michigan*, <https://www.michbar.org/opinions/ethics/COVID-19>.

[7] Cf. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 471 (2015) at 6 (in addressing the materials a solo practitioner is required to turn over to the client when he is terminated before the matter is completed, included in this set are any "internal notes and memos that were generated primarily for the lawyer's own purpose," and such materials "should be disclosed to avoid harming [the client's] interest").