



LAWYERS
HELPING
LAWYERS

**NJSBA LAWYERS HELPING
LAWYERS TASK FORCE REPORT
MARCH 2019**

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BACKGROUND AND METHODOLOGY	

The NJSBA Lawyers Helping Lawyers Task Force was established by 2018-2019 President John E. Keefe Jr.

Keefe formed the Task Force after a harrowing personal experience that began in May 2017.

He was a successful and experienced civil trial lawyer, his family was thriving and he was next in line to become president of the NJSBA, the state’s largest organization of lawyers, judges and other legal professionals.

But then came a cancer diagnosis that leveled him. He underwent months of grueling treatments that kept him mostly out of the office. His partners and close friends kept his caseload moving, ensuring he had a relatively easy reentry when he was strong enough to return to work and be sworn in as president of the NJSBA.

Though Keefe knew he was lucky to have that level of support, he also knew that many New Jersey attorneys don't, especially in a state where over two-thirds of attorneys in private practice are in solo or small firms.

With a desire to pay forward for all of the kindness and generosity that he had received during his illness, Keefe created the Task Force. Its mission was to ensure members of the profession -- especially lawyers in solo and small firms who don't have partners or associates to rely on if they get sick -- could find assistance and resources to guide them through a difficult medical crisis.

The Task Force is comprised of attorneys and judges who have suffered health challenges or helped colleagues navigate those waters.

The members of the Task Force spent a year examining the ways the legal community can provide assistance to attorneys facing acute medical crises that require them to temporarily step back from the practice of law.

That work has included examining the issues that affect litigators, transactional attorneys, the courts and bar associations. It conducted extensive nationwide research to learn how bar associations and court systems around the country address the issues. It has reviewed publications and created documents practitioners can use to keep track of critical information that would serve as a guide if an attorney has to stop practicing suddenly. And it has discussed and debated proposals to update the Rules of court to address critical issues.

This report outlines not just the steps the Task Force recommends the legal community undertake to address the needs of its colleagues who confront a serious medical illness, but also provides insights and observations from people who have lived through this challenge, either first hand or as someone who has served as the emergency support structure for a fellow attorney, as a way to emphasize the very real need for action and protection.

EXECUTIVE SUMMARY

The single most important action item to help an attorney facing a medical crisis, in the estimation of the Task Force is simple: Think ahead.

That is the central sentiment the Task Force's discussion and research consistently found and serves as the underpinning theme of all of the recommendations contained in this report. Indeed, it is clear that attorneys have a further ethical duty to their clients to have a plan in place that will ensure client matters are not neglected.

All lawyers, especially those in solo and small firms, would be wise to think ahead, organize a few documents, like maintain lists of active clients, important deadlines and a list of passwords, and identify a colleague who can be counted on to step in and help.

That preparedness involves:

- Updating the Rules of Court to ask attorneys each year when they complete the annual attorney registration to name someone who can serve as an emergency back-up in their practice;
- Having the legal community and/or judiciary give further consideration and study to the idea of creating a temporary disability mechanism that attorneys can access in the time of a medical crisis;
- Recommend all attorneys create an emergency preparedness plan that is well defined;
- The creation of a portal on the New Jersey State Bar Association's website that would provide resources, information, sample documents and a means to reach out in times of medical crisis; and
- Urging county and affinity bar associations to establish procedures or create a roster of attorneys in various specialties who may be willing to provide temporary assistance to a colleague since these are the entities that most attorneys and local courts will turn to first in times of crisis.

HON. EVELYN MAROSE

On Aug. 23, 2004, my business partner, Walter Lucas, Esq. passed away after suffering complications from a surgery performed on Dec. 1, 2003. While Walter was released just days

after the surgery, he was readmitted on Jan. 2, 2004 and with the exception of a 24-hour period at Kessler Rehabilitation Institute, he remained hospitalized from Jan. 2, 2004 to Aug. 23, 2004.

Walter had one son in college, one daughter in high school, one son in grammar school and a professional working spouse. During the months of his hospitalization, Walter and his family needed substantial love, care and assistance. I either began or ended every day with a visit to the hospital to see Walter and spend the rest of the day caring for our business. There was much to do to survive. Members of the legal community, in particular the Essex County Bar Association and its individual members, offered their unconditional support.

I would like to see a mechanism in place to assist colleagues who might not have partner(s), or whose partner(s) might need assistance to keep their firm healthy, while the incapacitated attorney is able to devote his energies to recovery. Thanks to the vision of NJSBA President Keefe and the work of the Lawyers Helping Lawyers Task Force, a proposed means of assistance is formulating that will include, among other things, a proposed rule change, an emergency plan checklist and a designation of an attorney or firm willing to help a colleague, especially a sole practitioner, in need.

RULES of COURT

The Task Force considered what initiatives might be effective to address two types of circumstances that impact an attorney's ability to fulfill professional responsibilities: (1) serious health issue or death that requires a plan of succession for the attorney's clients and (2) serious health issue that renders the attorney temporarily unable to fulfill any or all of the attorney's professional responsibilities.

I. Proposed Rule Amendments

A. Succession

The American Bar Association has recommended that all sole practitioners have a succession plan in place to ensure ethical obligations to clients are met in the event of death. As set forth elsewhere in this report, NJSBA will make available a checklist, complete with sample documents, to assist an attorney to prepare for an emergent interruption in law firm services. There are only three states that have made having a succession plan mandatory - namely, Florida, Maine, and South Carolina. At least two states, Florida and Delaware, ask attorneys to provide the name of a colleague or law firm that can serve as an emergency back-up to service clients in the event of a medical crisis.

Because the designation of an attorney or law firm to step in when the emergency arises is a pivotal factor in addressing this situation, the Task Force recommends an amendment to R. 1:20-1(c), the annual registration statement requirement, that allows attorneys to designate an attorney who will protect clients' interests in the event of an attorney's death, incapacity or temporary disability. Although Florida, Maine and South Carolina require the designation of a succession plan, it was the consensus of the Task Force that the designation should, at least initially, be introduced as a voluntary measure, and suggest the example offered in Delaware's annual attorney registration that asks attorneys to voluntarily provide the name of a colleague is a good model to follow.

The proposed rule amendment references a designated attorney who will act "in the event of the attorney's death, incapacity or temporary disability." It provides notice to the court that an arrangement has been made by an attorney and his/her designee regarding the handling of the attorney's matters. The attorney retains control of the circumstances under which a designee will assume responsibility for the practice and the conditions under which the designee will conduct the practice, such as any agreement regarding compensation.

The proposed rule amendment does not grant the court authority appoint any attorney, including the designee, to conduct the attorney's practice. It is therefore materially different from R. 1:2012, which authorizes the court to appoint an attorney to represent the clients of an attorney who "has been judicially declared mentally incapacitated or involuntarily committed to a mental hospital," and does not address physical health issues. The proposed amendment to R. 1:20-1(c) reads:

. . . As part of the annual registration process, each attorney shall certify compliance with Rule 1:28A and may identify an attorney or law firm authorized to practice law in this State who is capable and has agreed to conduct the attorney's legal practice to protect the interests of the attorney's clients in the event of the attorney's death, incapacity or temporary disability. All registration statements shall be filed by the Fund with the Office of Attorney Ethics, which may destroy the registration statements after one year. Each lawyer shall file with the Fund a supplemental statement of any change in the attorney's billing address and shall file with the Office of Attorney Ethics a supplemental statement of any change in the home address and the address of the primary law office as required by Rule 1:21-1(a), as well as the main law office telephone number previously submitted and the financial institution or the account numbers for the primary trust and business accounts, either prior to such change or within thirty days thereafter. All persons first becoming subject to this rule shall file the statement required by this rule prior to or within thirty days of the date of admission.

The information provided on the registration statement shall be confidential except as otherwise directed by the Supreme Court.

B. Temporary Disability

RPC 1.16(a) provides in pertinent part: “[W]here representation has commenced, [a lawyer] 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” Depending on the nature of the representation, a serious health condition may or may not “materially impair” representation. The Task Force considered what procedures might be adopted to address situations in which an attorney’s serious health issue has a **temporary** impact on the ability to fulfill professional responsibilities. It was further recognized that the serious health issue may (1) render the attorney unable to fulfill any professional responsibilities or (2) limit the attorney’s ability to fulfill some professional responsibilities.

The Task Force considered whether additional recommendations might be proposed to alleviate some of the stressors an attorney diagnosed with a serious health condition must deal with. Those stressors include the demands of meeting deadlines imposed by court rule or order; the fact that insurance coverage may be compromised if the attorney continues to work while receiving treatment, the concern that transferring a file to another attorney temporarily may result in the loss of that client. In reviewing these issues, the Task Force considered an additional amendment to the Rules and whether county bar associations might establish a roster of attorneys willing to volunteer to provide assistance for attorneys in need. The Task Force concluded that further study is necessary regarding resources at the county level and, for the reasons that follow, an additional amendment to the Rules is not recommended at this time.

As noted, Rule 1:20-12 does not address physical health issues. In addition, because the rule is triggered by a finding that the attorney cannot ethically or competently practice, it includes a blanket prohibition against the practice of law and strips the attorney of any autonomy regarding the resumption of practice. The Task Force found these factors inconsistent with the goal of providing help to attorneys to the degree and for the duration they need, allowing them to transition back to the full-time practice of law at their own pace.

The Task Force also considered proposing a new rule creating a “temporary disability status” that would “constitute good cause for the relaxation of the Rules of Court generally and a substantial factor in a determination whether exceptional circumstances exist for relief under the Rules.” To deter possible abuse, the rule would necessarily require proof of the temporary disability and judicial oversight. A proposed rule was drafted, largely tracking Rule 1:20-12 and employing the term “serious health condition” and its definition used for the definition for application of temporary disability benefits in N.J.S.A. 34:11B-3. Upon further review, the Task Force concluded

that the draft rule should not be recommended at this time because (1) the anticipated requirements imposed a heavy, if not onerous, burden on an ailing attorney and (2) the relief afforded is limited in nature, primarily benefiting litigators, and might well be available under the Rules at present.

For the sake of completeness, the draft rule reads as follows:

R. 1:28C-1 Temporary Disability Status

The court may grant “temporary disability status” to an attorney who is (1) temporarily unable to fulfill any or all of the attorney’s professional responsibilities (2) due to the attorney’s serious health condition. “Serious health condition” means an illness, injury, impairment, or physical or mental condition which requires: (1) inpatient care in a hospital, hospice, or residential medical care facility; or (2) continuing medical treatment or continuing supervision by a health care provider.

R. 1:28C-2 Application for Temporary Disability Status

(a) Any attorney who meets the conditions set forth in R. 1:28C-1 or a representative authorized to act on behalf of the attorney by prior designation in the annual registration statement required by R. 1:20-1(c) or other means, may apply for temporary disability status by submitting a certification to the Director of the Administrative Office of the Courts that sets forth the following:

- (1) the facts that satisfy the conditions set forth in R. 1:28C-1;
- (2) the identity of physicians and health care providers involved in the treatment of the attorney for the condition that is the subject of the claimed disability;
- (3) medical records that identify the serious health condition and the planned course of treatment;
- (4) the anticipated length of disability;
- (5) the professional responsibilities the attorney is unable to fulfill due to the disability;
- (6) the identity and contact information of the attorney or law firm that is capable and has agreed to conduct the attorney’s legal practice to protect the interests of the attorney’s clients

(b) The filing of an application by an attorney or authorized representative for temporary disability status shall be deemed to constitute a waiver of any doctor-patient privilege. Upon request, the attorney shall be required to provide additional medical records as needed to evaluate the application or to determine whether the period of temporary disability has ended.

The attorney shall furnish to the Director written consent to the release of such information and records as requested.

(c) Upon finding that grounds exist for a determination that the attorney qualifies for temporary disability status, the Director shall submit the application for consideration by the Supreme Court, which, if satisfied that such grounds exist, shall enter an order granting the attorney temporary disability status, effective retroactively to the date of application. The temporary disability status shall continue until the attorney provides notice to the Court that he or she is able to resume the practice of law or until further order of the Court.

(d) Applications and all materials considered in the determination of an application for temporary disability status are confidential. All orders granting temporary disability status are public.

(e) The entry of an order granting an attorney temporary disability shall constitute good cause for the relaxation of the Rules of Court generally and a substantial factor in a determination whether exceptional circumstances exist for relief under the Rules. The entry of such an order shall not toll the statute of limitations applicable to any cause of action.

(f) An attorney granted temporary disability status or the attorney's authorized representative shall promptly notify all clients of (i) that status, (ii) the limitations on the attorney's ability to provide representation, (iii) the anticipated length of time such status shall continue and (iv) the identity of the attorney or law firm designated to conduct the attorney's legal practice during the period of temporary disability.

(g) Upon entry of an order granting temporary disability status, the attorney or authorized representative shall promptly provide notice of such order and the identity of the attorney or law firm designated to conduct the attorney's legal practice during the period of temporary disability period to adversaries and the courts in any pending matter.

CATHERINE FINNERTY

In June 2018, I suffered an unexpected major heart attack. My heart completely stopped beating. I made it just inside the hospital doors and they were able to use the defibrillator to restart my heart. While I was up in the Cardiac ICU a few hours later, I was on the phone scrambling to call colleagues. I am very thankful to the colleagues who stepped in for me the next morning and who took over my bankruptcy and real estate matters. But I cannot even begin to tell you how stressful it was to have a heart attack as a solo practitioner and then be forced to find coverage at the last minute. In many ways, I felt so unprepared and that I had let my clients down -- a horrible feeling to have on top of all the things I was going through physically and emotionally.

While I was in the ICU, I asked my family to bring me some law journals and magazines and, in a twist of fate, it was the issue where President Keefe wrote about his experience battling his illness. It was great to find out I was not alone in the struggle of coping with health issues. I am looking forward to a comprehensive approach from the NJSBA and believe it will help many other attorneys out there.

EMERGENCY PREPAREDNESS PLANNING

It is not just a good idea to be prepared for emergencies. It is fundamentally necessary to conclude that a sole practitioner has the ethical obligation to put a succession plan in place in the event that he or she is unable to meet client needs.

The March 2006 “Eye on Ethics” column from the ABA e-newsletter *YourABA* notes that Formal Opinion 92-369 (1992) notes that lawyers have been disciplined for the neglect of client matters owing to ill health or personal problems. It further suggests that lawyers who have failed to protect their clients’ interests should be sanctioned, “both in the hope of encouraging other lawyers to make such preparations, and to restore confidence in the bar, though the sanctions would obviously have no deterrent effect on deceased lawyers.”

A discussion of diligence also shines light on the issue. Comment 5, Rule 1.3 of the ABA Model Rules of Professional Conduct (RPC) states: “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.”

And New Jersey’s Opinion 692 offers follow up on that idea. The opinion, (“Retention of Closed Client Files”) of the New Jersey Advisory Committee on Professional Ethics quotes RPC 1.3, which requires a lawyer to act with “reasonable diligence and promptness when representing a client,” and concludes with the following: “‘Reasonable diligence’ requires a sole practitioner to make arrangements for disposition of client files in the event of death or retirement. This is an obligation which all law firms and sole practitioners must prepare for now.”

Noting these ethical recommendations, the logical extension is that practitioners, especially those in a solo practice, should have an emergency plan.

When it comes to emergency planning, the goal is to form a plan that is sufficiently well defined that it can be executed without the sole practitioner yet plastic enough that it can mold to any number of possible situations - and at the same time be something that can be formulated by a single busy practitioner

In the 2008 book, *Being Prepared: A Lawyer’s Guide for Dealing with Disability or Unexpected Events* by Lloyd Cohen and Debra Hart Cohen, offers five principles to follow. They are:

Define the identity of all of your potential helpers (both lawyers and nonlawyers) and define the various roles that they may fulfill as part of your personal support network;

Enable your support network by collecting and organizing an emergency casualty manual that contains your firm's institutional memory; that is, the working knowledge of the things and procedures needed to run your enterprise and serve your clients. The manual should familiarize the assisting attorney with the office and also explain, among other things, how to produce a client list including addresses;

Empower your helpers with documents that will give authority, understanding, and direction. Then add those documents to your emergency casualty manual;

Keep your emergency casualty manual safe but at the same time also make sure that it will be available to your helpers if a time of need arrives; and

Inform the members of your network and others close to you, such as clients, that you have formulated an emergency plan and composed an emergency casualty manual.

CHECKLISTS

Attorneys are busy addressing client needs and generating business. That can sometimes mean that it feels impossible to perform extra tasks, especially those that can seem theoretical, such as preparing for a medical crisis that may never happen. The Task Force recommends that all attorneys devote some time and energy toward planning, which will pay dividends should an emergency ever strike. The Task Force urges attorneys to create their own plan that includes information itemized below. Creating an emergency preparedness plan does not necessarily have to be a difficult task.

Here is a checklist itemizing the key information necessary to share in the case of an emergent health matter:

CHECKLIST: PREPARATION FOR EMERGENT INTERRUPTION IN LAW FIRM SERVICES

Identify assisting/succession attorney/designated emergency attorney

Assisting/Succession attorney agreement form

Ensure assisting/succession attorney is listed in professional liability insurance contract

Add assisting/succession attorney clause to retainer agreements

Form letter for client notification

Form letter for court notification

Form letter for attorney notification

Form letter for vendor notification

Password storage for assisting/succession attorney

Open files list

Closed files list

Provide for assisting/succession attorney's IOLTA access/signatory ability

Assisting attorney's access to calendar system

P.O. Box information

Electronic mail/filing access information

Designated county bar contact for general inquiries (if the county or affinity bar association has provided such a person)

The NJSBA online portal for general assistance

SAMPLE LETTERS

RETAINER AGREEMENT CLAUSE:

It is advisable to make clients aware of emergency plans, even before an emergency arises. Once an arrangement has been reached with a fellow assisting attorney, a paragraph should be inserted into retainer agreements, including information about the plan.

Suggested retainer language:

In order to ensure continued legal services in the event of (affected attorney)'s unexpected death, disability, impairment, or incapacity, (affected attorney) has arranged with another attorney to assist with handling your case. In such event, (affected attorney)'s office or the assisting attorney will contact you and provide you with information about your options in continuing representation in your case.

NOTICE TO LAWYERS/COURTS/CLIENTS IN THE EVENT OF AN EMERGENCY:

When an emergency has occurred, it is important to provide necessary notification to adversaries, the courts, if applicable, and clients. This will ensure there is no disruption in the ethical or fiduciary obligations an attorney has to their clients while also ensuring the courts and adversaries have notification in case deadlines or scheduling need to be adjusted.

Sample notice:

I, (affected attorney), have authorized the following attorney/s to temporarily assist with (management of my law practice/case files/representation of clients) due to emergent circumstances causing my inability to render full legal services at this time.

Name of Authorized Assisting Attorney:

Contact:

Signature:

CC: Insurance co.

Court

Attorneys

Vendors

Clients

AMY VASQUEZ

I would like to thank President Keefe for devoting his attention to this issue and creating this Task Force. In so doing, he has recognized an area of greatly needed assistance to lawyers in our state. When thinking about the potential impact of the Task Force's recommendations, I am

brought back to a traumatic time. In 2011, my husband, Peter N. Fiorentino Jr., Esq., who was a sole practitioner, went into cardiac arrest in a county courthouse. Four days later he died.

Handling his practice was just one of the challenges I suddenly faced. While there was support in many ways, two vital things that helped me in a practical way to move his client's interests forward at that troubling time were: 1) he had created a binder of passcodes and contacts and advised me of its existence and location; and 2) the county bar president offered services to assist me in handling his clients' immediate needs and in closing his practice. The Task Force is recommending these two safeguards become commonplace and offering additional supports to attorneys that encounter a similar tragic situation.

In addition, from a completely different perspective, I view the Task Force's work as imperative to me as a sole practitioner who is also a mother. Plans are likely to be made in advance of maternity leave, but providing checklists and other practical materials through an online portal will become a valuable tool for any attorney preparing for their temporary absence from the practice of law.

NJSBA PORTAL

When a medical crisis hits, people turn naturally to their computers and the Internet to learn more about the treatments and what to expect.

Just as answers about medical issues are available online, so too should be answers about what attorneys should know to attend to their law practice in such fraught times.

The New Jersey State Bar Association is the professional home to over 18,000 attorneys, judges and other members of the legal community. Its website, njsba.com, attracts roughly 315,000 visitors for over 2.2 million page views a year and it has established askthenjsba@njsba.com as a way for members, other attorneys and the public to make inquiries.

The NJSBA is prepared to leverage the resources and information in this report to provide helpful information to attorneys who are in medical crisis.

The association will launch a branded portal, accessible to anyone at any time, that has the forms, checklists, guidance contained in this report, as well as supplemental information about insurance issues and other key considerations for attorneys, links to the Judiciary, other bar associations, and relevant articles.

COUNTY AND AFFINITY BAR ASSOCIATIONS

Many attorneys have a close connection with the county bar association where they live or work or the affinity bar association that speaks to their personal background or practice area specialty. Those organizations may be the one that an attorney turns to in the time of a medical crisis for help.

It would be useful to the legal community, courts and individual attorneys for county bar associations and affinity bar associations to perform emergency planning of their own. That will help create a more comprehensive framework within the legal community to ensure clients and attorneys don't fall through the cracks at a time of crisis.

Some suggestions of the Task Force for those entities are:

Consider cultivating a list of those attorneys, by practice area, willing to volunteer their time (with reasonable compensation as added incentive) to help oversee an attorney's practice. The bar association can then contact attorneys who have expressed interest on a rotating basis whenever it receives a request for assistance. While this practice may already be performed on an informal basis by many associations, making it a part of an organization's institutional goals provides the strongest safeguards; and

Review if it is useful to create a separate committee to oversee this process or simply add these duties to one of the current bar association committees (such as the Pro Bono Committee)

THOMAS BARLOW

President Keefe's Task Force hit home for me because of my personal experience with two close friends who were attorneys who became quite ill and, ultimately, passed away at a too young of an age. I saw the potential devastating effects that a sudden unexpected illness can have on the individual attorney, his or her family and friends and their practice. Thankfully, in both cases their firms were able to support them personally and professionally. However, it made me think what would happen to an attorney without such a built-in support system.

The Task Force is an excellent step in formally addressing the issues attorneys are facing every day and to lessen the impact on the individual attorney, to his or her practice and the legal community at large.

RECOMMENDATIONS and CONCLUSION

While no one wants to consider being stricken by an illness that leaves them unable to work, being proactive and practical can make a critical difference in whether a practice can survive. The cliché about an ounce of prevention being worth a pound of cure is rooted in truth.

When facing a medical crisis, an attorney should be able to focus on their treatment and a return to normal life, rather than be additionally stressed with the daily effort of running a practice. The Task Force makes the following recommendations as guidance to ensure that can be the case.

The NJSBA Lawyers Helping Lawyers Task Force recommends the following actions be taken to help attorneys and protect clients:

- Urge the New Jersey Supreme Court to adopt a proposed amendment to R. 1:20-1(c);
- Create a portal on the New Jersey State Bar Associations website that will aid attorneys in creating an emergency preparedness plan. The portal should provide information, sample documents and other resources;
- Invite county and affinity bar associations to maintain a list of those attorneys, by practice area, willing to volunteer their time to help oversee an attorney's practice; and
- Give further study and consideration to the creation of a temporary disability status as contemplated in the draft new Rule 1:28C-1, contained in this report.