PLANNING AHEAD

Protecting your and your clients' interests in the event of your disability, death or other disaster

by Frank Overton Brown Jr.

The Senior Lawyers Conference has worked since its inception to encourage and assist lawyers in protecting their own and their clients' interests by planning for the lawyer's own disability, incapacity, impairment, death, disappearance or other crisis.

Lawyers should be concerned with matters related to the protection of clients' interests, when a law practice ends. They should establish a written plan for the orderly concluding or other disposition of the practice (bearing in mind that Rule 1.17 permits the purchase and sale of a law firm); designate another lawyer to assist in that regard; and maintain easily understandable records to help the other lawyer to carry out his or her responsibilities. If a lawyer has not made such plans, the Virginia State Bar may have a receiver appointed to do this.

The costs of receiverships may be substantial, and they are costly to the bar. In the FY 2005-2006 VSB budget, two hundred thousand dollars is budgeted for receiverships. Receiverships involve attorneys who are deceased, disabled or have serious misconduct problems that will result in loss of property to clients or others. Considering human frailties, receiverships due to misconduct will probably never be eliminated. The VSB currently has twenty receiverships pending; of these twenty, eight involve deceased or disabled attorneys. Rather than a lawyer doing no planning and relying on the appointment of a receiver, a lawyer should meet his ethical duty (and his own best interests) by having a plan in place that allows the lawyer's practice to be dealt with properly.

The Senior Lawyers Conference Web Site at www.vsb.org/slc links to planning documents, such as a special power of attorney and agreement regarding law practice and a last will and testament provision to appoint an executor for the practice.

To encourage Virginia lawyers to plan, on behalf of the SLC, I present a program to bar associations. The program has full CLE ethics credit, and is presented as a one-hour or two-hour program, depending on the needs of the bar association. This program is presented at no cost to the association.

If your local bar association wishes to schedule this program, please call Patricia A. Sliger at (804) 775-0576, and she will make the referral to me.

Considering that lawyer impairment may lead to disability, death or other problems, one of the areas of help which I mention in the program is Lawyers Helping Lawyers, which is a 501(c)(3) nonprofit corporation endorsed by the Virginia State Bar, The Virginia Bar Association, the Virginia Trial Lawyers Association and the Virginia Board of Bar Examiners. Lawyers Helping Lawyers provides confidential, nondisciplinary assistance to members of the legal profession who experience professional impairment as a result of substance abuse or mental health problems. This help comes from professional staff and a statewide network of volunteers. James E. Leffler, is the executive director. The toll free telephone number is (877) 545-4682. Judges and lawyers should be aware of this program, which can remedy situations, which might otherwise result in receiverships.

Although there is presently no specific requirement in the Virginia Rules of Professional Conduct, lawyers should arrange to protect clients' interests in the event of the attorney's own inability to do so. Consider Rules 1.1 and 1.3: Rule 1.1 Competence—"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Rule 1.3 Diligence—"(a) A lawyer shall act with reasonable diligence and

promptness in representing a client. (b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16. (c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3."

Because client confidentiality has been a concern regarding this type of planning, it is encouraging to note that the Supreme Court of Virginia amended Rule 1.6, effective January 1, 2004, to add the following paragraph (4) to paragraph 1.6 (b): "(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal... (4) Such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence."

In 2002, the comment to Rule 1.3 of the American Bar Association Model Rules of Professional Conduct was amended to state that "the duty of diligence may require that each sole practitioner prepare a plan" 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." The Supreme Court of Virginia has not adopted this comment; however, the Virginia State Bar Council has recommended to the Court an added Comment to Rule 1.3 (see description below).

If an attorney dies without a contingency plan in place, the VSB can petition the court to appoint a receiver to deal with the practice and take necessary actions to protect clients' interests under *Virginia Code* Section 54.1-3900.01. Bar dues must cover the difference when there are not enough assets in the law firm to cover the cost of the receivership. Having a contingency plan in place will drastically reduce the problems and questions that arise if something should happen to the attorney, and may eliminate the need for a receiver. In November 2003, the VSB Receivership Task Force was established to study the costs and procedures involved when receivers are appointed to terminate the law practices of deceased or impaired attorneys or of attorneys whose licenses to practice law have been suspended or revoked under circumstances that would preclude their further involvement in client matters or client funds. The task force has focused on the issues of costs of receiverships, qualifications and responsibilities of receivers, insurance for receivers, and the relevant *Virginia Code* Sections. The task force examined the Virginia statutes dealing with receivers for law practices and drafted amended *Code* Sections 54.1-3900.01 and 54.1-3936, and 2.2-1839, all of which were passed by the General Assembly and signed by the Governor in 2005. The task force is presently working on a *Handbook for Receivers* to assist receivers for law practices throughout the commonwealth in performing their duties, and to lend uniformity to procedures statewide. In support of the VSB's and SLC's efforts to encourage lawyers to plan for their own disability or death, and thereby to reduce the need for the appointment of receivers, the Receivership Task Force, in conjunction with the Standing Committee on Legal Ethics, proposed a new Comment [4] to Rule 1.3 of the Rules of Professional Conduct, which was debated by VSB Council at its meeting on October 20-21, 2005, amended, and recommended to the Virginia Supreme Court as follows:

> "[4] A lawyer should plan for client protection in the event of the lawyer's death, impairment, incapacity or disappearance. The plan should be in writing and should designate a responsible attorney capable of making, and who has agreed to make, arrangements for the protection of client interests in the event of the lawyer's death, impairment, incapacity or disappearance."

It is hoped that the Supreme Court will act on this matter in the not-too-distant future.

The first step in developing a plan is to gather the facts that you will need to dis-

cuss with your potential "back-up" attorney. To assist you in this regard, we have provided a checklist on the SLC Web site (www.vsb.org/slc) under "attorney resources."

The next step is to be certain that your office procedures are current and in place. In collaboration with your office staff, you should draft written materials for the back-up attorney and your office staff. These materials should include:

- Engagement letters with notice language to clients similar to this—"Confidentiality. You are my client and our communications are a matter of attorney-client privilege and are confidential. You agree that I shall have the right to designate a 'back-up' or 'assisting attorney' to protect your interests in the event of my death, disability, incompetence, incapacity or inability to act on your behalf. You agree that I may reveal to this attorney such information that I believe reasonably necessary to protect your interests in such events"
- A letter to be sent to clients when your back-up attorney begins to act.
- An up-to-date office procedures manual.
- A description of your files maintenance and office systems.
- Locations of files and materials which are stored or safeguarded off-site.
- Instructions for producing a list of client names and addresses for open and closed files.
- Guidance on your system for monitoring all deadlines and follow-up dates and your calendaring system.
- Methods for keeping client files appropriately documented.
- Time and billing records.
- Bank account records, including trust and non-trust accounts.
- Passwords for computer access.
- A "telephone tree" or similar communication method for office personnel.
- Location and contact information regarding professional liability and other insurance policies.
- A current attorney checklist.

The next step is to select your potential back-up attorney. Above all, this person should be someone that you trust (this will be intuitive on your part), who is in good standing with the bar, who is experienced in handling the types of legal matters which you handle, who is reasonably likely to be available when needed, and who has professional liability insurance. It is important in discussing this matter with the potential back-up attorney that there be complete openness and honesty on both sides about what is expected, including a discussion of and provision for the source of compensation for the back-up attorney. The agreement which you enter

THE SENIOR LAWYERS CONFERENCE

The Senior Lawyers Conference of the Virginia State Bar presently has more than 11,200 members. All members of the Virginia State Bar who are fifty-five years of age or older and in good standing are automatically members of the SLC. No application is necessary and no dues are required. Since the establishment of the SLC in 2001, the members of the SLC have been active in many programs and activities, including the following (as lawyers are inclined to say) by way of illustration, and not by way of limitation: production and distribution of the Senior Citizens Handbook (in conjunction with the Young Lawyers Conference); SLC sponsorship of a luncheon at the VSB annual meeting honoring senior lawyers for fifty years of service (a special effort of past Chair William B. Smith) development and promotion of Senior Law Days by local bar associations (a pioneering effort of our chair, William T. Wilson); encouragement of mentoring of young lawyers by senior lawyers (an especial interest of our chair-elect, Jack W. Burtch Jr.); adoption of an emeritus rule which enables retiring attorneys, in association with an approved legal assistance organization and under the supervision of a supervising attorney, to provide pro bono legal services to the poor and working poor of Virginia (former SLC board member Clarence M. Dunnaville Jr. worked tirelessly on this); encouraging local bar associations to educate the public about health care decision making and advance medical directives (R. Hunter Manson III, a former SLC board member, began this effort); development of a greatly-used and greatly useful Web site for the benefit of attorneys and the public at www.vsb.org/slc; encouraging civility and professionalism (former SLC board members G. Marshall Mundy and C. Glasgow Butts laid the groundwork for this, and current board members Edward R. Slaughter Jr. and Homer C. Eliades continue the effort); working to reform the involuntary commitment processes in Virginia; publishing a mailed and online newsletter, the *Senior Lawyer News*, available on our Web site; improving the quality of care provided to senior citizens in and the standards of accountability for nursing homes and assisted living facilities; and educating attorneys to make plans to protect their and their clients' interests in the event of the attorney's disability, death or other disaster (past Chair Patricia A. Barton devoted countless hours of hands-on work in this effort).

Please contact any SLC officer or Board of Governors member to offer suggestions for programs and activities. If you are interested in volunteering to be more active in the SLC, please let us know.

into should be in writing and executed copies should be kept by both parties.

Inform your office staff about the identity of the back-up attorney and of their roles if something should happen to you. Make this a collaborative effort.

Be sure your client files are organized in a manner that will make it easy for anyone to see the history of the file and the steps that need to be taken next. Document issues discussed in meetings, telephone conversations, advice provided and client responses in writing and maintain these documents in the client file. Use checklists and other forms that will assist file management. Include contact information for all involved parties.

Another way to maintain order is to have a closed-file retention/disposition program in place. Whether your firm retains files for a set number of years after closing or forever, it is essential to have an organized file retention/disposition program. Closed files should be indexed and assigned a closed number. The file should indicate if and when it is to be destroyed on the index and file. For guidance, *See* Virginia Legal Ethics Opinion 1305.

If you keep original client documents, such as wills, trust agreements or deeds, be sure that they are properly safeguarded and accounted for.

Ethics rules for trust accounting should be adhered to and followed at all times (*See* Rule 1.15). Two good resources to assist with trust accounting are the rule itself and *Lawyers and Other Peoples' Money*, by Virginia lawyer Frank E. Thomas III, and available from Virginia CLE.

Your contingency planning should also take into account actions to be taken in the event of natural and/or man-made disasters.

The written agreement with your back-up attorney and all supporting materials referenced above should be updated and reviewed with your back-up attorney and staff periodically, in order to protect your and your clients' interests.

Frank Overton Brown Jr. of Richmond is a member and past chair of the Senior Lawyers Conference Board of Governors, and he has served on the Virginia State Bar Council. He concentrates his practice in the areas of wills, trusts, estate planning, estate and trust administration and related tax matters. He is a fellow of the American College of Trust and Estate Counsel. Brown is a former commissioner in chancery for Richmond Circuit Court, and he is a regular continuing legal education program lecturer. He holds bachelor's, master's and law degrees from the University of Richmond, where he taught as an adjunct professor of law for eight years and has continued to participate in estate planning issues.