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SUMMARY KEYWORDS

attorney, client, incapacity, court, incapacitated, succession plan, assisting, law firm, important, files, case, firm, event, lawyer, practice, solo practitioner, plan, hypothetical, law, state

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Hello, everyone. Today we're going to be presenting a seminar to you, an MC le seminar what to do when an attorney in your law practice dies or becomes incapacitated? My name is Russell

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and I'm an attorney here in California, I practice primarily family law and litigation. However, we do have some cases that are in private mediation. But nevertheless, I have active clients both that have cases in the court system, and actually cases that are preferably handled outside of court. But we do nevertheless, have court calendaring deadlines. So today, what a bunch of my colleagues and I were thinking about whenever we do have lunches is how do we plan for when an attorney becomes incapacitated, or has an accident, or also may, in fact, unfortunately, die unexpectedly? It's important that we have a backup plan, a plan in which other people, preferably an attorney, that you consult, or that is a friend or a colleague, or maybe an attorney in your firm that is aware of how to handle important issues such as how do I pay the bills? How do I pay the mortgage on the law building? Or how do I pay the rent? How do I make sure that my clients are adequately taken care of, let's say, for instance, if we want to go on a trip, or in the event that we decide we want to take an extended trip, a trip for two weeks ends out, ends up later on becoming a trip for three months, which is terrific, but you need to make sure if you do have clients, you know, in the state of California, it's important to keep your client apprised of the communications and updates on their particular case. So we came up with this topic because death and incapacity in general people just don't want to really talk about it. I mean, we I don't

handle estate planning. I'm a family law litigation attorney. So a lot of my cases are court intensive. In addition to that, we have a lot of discovery and calendaring deadlines. And in our office, what we do is we have a dual calendaring system. Now many of these legal malpractice insurances will require the companies will require before renewal, that the attorneys

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actually certify

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that their law firm has two calendaring methods. And that's for us electronic. And then we also have a backup electronic calendar, and also a handwritten calendar, which is kind of old school. But that's just in case technology fails us, at least we have something to follow up on. So what I do want to impress even if you don't have a have a backup plan, at least have a minimum. But you know, just a minimum one sheet of paper in the event that something happens to you or your law practice. Let's say hypothetically, you're a solo practitioner, it's important that you keep someone a prize of the different types of cases that you have, especially if you handle litigation. Because as a litigator, you know that there are calendaring deadlines with the court. There are also deadlines, to file, let's say an exhibit list and also a court transcripts. And also lodge witnesses witness lists with the court. And you certainly don't want to be in trouble with the state, with the state bar with any sorts of different types of complaints, we already have enough concerns. So it's important that we keep everybody in the loop of what is going on. In the event that there is incapacity or in the event that God forbid, something happened. So let's go on to slide two, which is the introduction. And let's go ahead and talk about well, what is what is incapacity? incapacity could actually be a couple of different things. It could be, let's say, hypothetically, God forbid, you know, you have to go through medical treatment, and it's unexpected. How are you? If you are going to notify your clients? Would you notify your clients? How would you do that? Or would you just get a backup attorney let's say for instance, in the past, I'd been a true solo practitioner. And when I was a solo practitioner I had only myself to rely on. I was what was called the legal secretary and also the attorney in charge and also the billing person. So in this event, if you are going to be going to receive some type of medical treatment, you definitely want to lean on somebody An attorney, typically so that they will understand what is going on with your cases. But with that, you also want to receive permission from your client, your current client to go ahead and share information. In the event that something does happen to you, you want to let your client know that you want their case is important to your firm, as well as to achieving the results that you would initially agreed upon. So you want them to know that you were trying to take care of them, as well as taking care of your law practice. And making sure it's duties and obligations are met. incapacity can also be unplanned it. For instance, in our office, we actually had an attorney, a good attorney, but he was relatively new in that regard. And unfortunately, you know, he was

actually on his way to a really just a basic trial setting conference on a major case, and we all had court appearances in different in different parts of the counties. So he unfortunately got himself into an accident. However, he became temporarily incapacitated, meaning he was knocked unconscious after that, after that accident on his way to court. And it was unfortunate, and we actually didn't learn it until about 11 o'clock. And as you know, for those of you that practice in where we are in Los Angeles County, the first court call is at 830. In the morning, and sometimes in the family courts. The judges have a second call at 945 1030. In that regard, but then our attorney that we said that we relied upon to attend this just very basic TSC. That would have been continued anyway, did not appear in court. So the opposing counsel actually had an agreement with

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our,

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with our firm to go ahead and continue that matter. So we were making an appearance with their permission on their behalf as well, just to continue the hearing out. So the clerk won't goes ahead and she files or she doesn't file she sets an OSC re sanctions on both parties, because we didn't show up. But in any regard, the court ended up calling our office asking where's the attorney? So we were looking for the attorney who was supposed to be there. But our assistant said he was supposed to be there in court, and he didn't show up. In any event. What are you going to do in those instances, in in our firm what we do, per every court hearing that we have, even if it's a minor TSC we always have a memo in our electronic calendaring as well as our electronic billing system and our electronic notes. It's all one program that's linked together, and many of your law firms have that as well. And I always impress on Junior attorneys to keep very detailed notes. So for instance, if I was the person handling this basic procedural TSC, what I would actually recommend is, and this is what I did, and the attorney who actually was not what he he, he put down that there was a TSC. But he didn't list down a list of details. But the managing attorney Of course, and I, we all we all knew what was going on with this particular case, because this is an important case in our law firm as with all of our other cases. But this one in particular had lots of different court hearings since we were going we were being set to go to trial. So it's important that you instruct your loss staff, your junior returnees, particularly because you're still learning as well as your assistants to go ahead and keep very detailed notes as to Okay, well, what is your trial preparation? Or what is your court hearing preparation? So in the event that something does happen, at least we know how to present to the court or to the court clerk, exactly what we anticipated would go on at the hearing because in the event that something happens, you become incapacitated, or God forbid, you are actually taken to the hospital and you are not able to be in touch with the Office for many days, two weeks, let's say hypothetically, that you were in

the hospital recovering from this unforeseen accident, then it is it is very important that you go ahead and leave detailed notes for people. So that's what I mean by incapacity. incapacity could be mental incapacity that is unplanned, it could be a planned incapacity that could just be temporary. For instance, you know, I have a family member that went through medical treatment for cancer that went through chemotherapy and radiation. So with that, with the chemotherapy and radiation, there may be moments of incapacity, you know, you want to be prepared with that. You want to be If you want to have a backup you if you decide that you're going to close your law office temporarily, you want to let the public know you want to let your clients know your potential clients, your colleagues, if they are willing to help one colleague, two colleagues, you want to notify your current clients of the particular issues that may happen. And then, you know, if indeed the attorney does die, then what are you going to do to go ahead and plan for it's, it's like having an estate plan for your law firm. And that's ultimately what you want to be prepared for. So, incapacity could also be one for the purposes of this presentation if you become disabled, or if there's some type of a disappearance or Unfortunately, sometimes with some of us, in the legal community, we'll go through investigation, a disbarment unfortunately. So in the event that you're being investigated, you know, you want to cooperate with the State Bar of California. And in addition to that, if there comes a point where the State Bar tells your law firm that you should be notifying your clients of a potential closure or a temporary closure in your law office, then you want to make sure that it is okay to identify backup attorney who is going to be handling cases for you in that regard.

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Next slide,

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we're going to talk about how his incapacity determined in the state of California. So take a look at California probate code section 810 13. California defines incapacity as an ability to make decisions or perform certain acts, that when at least a one of the mental functions are impaired or lacking such as an inability to understand or communicate with others, problems recognizing familiar people and objections, a failure to reason logically, presence of delusions and hallucinations, inability to control mood, resulting in actions that are inappropriate in relation to the circumstances and failure to understand and appreciate the consequences of their action. And in the state of California, incapacity is initially determined by a treating physician, or so a physician that's licensed by the state of California. And sometimes, you know, we joke about it, and we might think of incapacity in California, and you go through the bullet points in the probate code of how incapacity is defined and it sounds like a lot of other attorneys that we encounter

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in

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court.

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You know, you want to you also want to note that with all of the mental functions that are impaired that I mentioned, the probate code does have a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions to be responsible for their acts or decisions. So just note that a lot of times incapacity. We may think somebody is incapacitated, but you ultimately have to determine it, you know, make that reasonable judgment make that reasonable conclusion. One time, I was actually in court on a request

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for order and

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it was a spousal support a temporary Spousal Support Modification. And this was my first time meeting the new opposing counsel, the opposing counsel, I thought I smelled some alcohol on his breath, but I couldn't be for certain because he was walking around and he was acting really very strangely. And he in fact, called me a different name. The first he called me, Miss No. And then he called me Miss Chen. And I was just taken aback, but I said, it's Miss No. And he was threatening me as most attorneys do posturing before we go in to court, and we were hoping to reach a settlement outside in the courts corridor. But unfortunately, we didn't reach a settlement.

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So we decided to

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go before the court and that was okay. And now we wanted to take live testimony. The judge wanted to set that for a couple of months out because he was unprepared and his client was unprepared with witnesses, which was fine. We anticipated that. But he was actually he, the judge

noticed that, you know, he said that he wasn't served with the request for order yet he was able to go through my class. declaration for the modification and support, very detailed. And he said that he didn't know about the he, in fact, didn't know about the court hearing that we were there on that particular day. And he tried to act shocked. And then the judge just wasn't buying it. And then he started calling the judge different names. And then the judge admonished him and then said, you need to take a minute, we're not going to call this case back, we're going to continue what out and it got continued out for four months. But after the court hearing, he walked very closely to us, I didn't smell the alcohol. But he was behaving just very oddly, his mannerisms. He was slurring his speech. And he is he had his shirt untucked, but then he was wearing a suit. And it just, it was very odd. I, in the end, I did not report that to the state bar I didn't have, I didn't believe with reasonable proof that he was incapacitated. He did say my name, he said it incorrectly. But I make that mistake, sometimes, he may have just been posturing whether he was telling the truth or not. But in any event, if he was, let's say, for instance, unfortunately, you know, there there are many professionals out there that suffer from alcohol abuse, then yes, there should be a plan in terms of incapacity, and your firm should definitely be prepared with that. So next slide, that we discuss who can help in the event that a lawyer dies or in or becomes incapacitated, if you actually die, without having a backup plan, or what's called a plan for how your law firm is going to be managed in the event that you are incapacitated or unable to do. So if you don't appoint some type of an executor or leave an attorney in charge, then unfortunately, it could be your spouse if you're married. However, for those of you who are single out there, it can actually be you know, I mean, it could be a parent who's already going to be distraught. It could be a child, an adult child, who is going to be confused over everything as to the death, if that was planned, or unplanned, or the incapacity being unplanned, there's already going to be so much going on. That's why it's important to impress on all attorneys that we should have a backup plan. In the event that an attorney becomes incapacitated, and the types of person that the types of people outside of course, you know, I mean that the best person to handle this would be another attorney. And if you are a solo practitioner, then perhaps it's an attorney that you have shared office space with, or an attorney that you are good friends with, or an attorney colleague that you bounce ideas off of. And you know, of course, you have to notify the clients in advance. But you definitely want to keep an active caseload list that active caseload list that actually states who the active clients are, where they are in the litigation process, whether they're in discovery, what the next steps are

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discovery responses, when those are due, or trial, like if there's a trial date, within six months, that's coming up or a year, or if they're private mediation or arbitration, whatever it is, you definitely want to make sure that you have an active case like client list. And then you also want to make sure that there's somewhat of an inactive case list. You know, we have some clients where they've gone through a divorce, but they have very young minor children, minor children

that are in elementary and middle school, and they're afraid that they might have custody issues come up, and also child support and Spousal Support Modification issues in the future until the children reach 18. So then they keep our firm on retainer. But then, of course, there's no court hearing. But at the same time, maybe five years ago, they had a contentious divorce where they don't trust the other side. And if they are, oh, just want to call our office for legal advice. They keep us on retainer, which is fine. We're happy to have those those types of clients. Those are, those are good clients. But you definitely want to make sure that the inactive clients are taken care of as well because they do randomly call. Another good point that we do at our office is every time we get a new case, whether that case has come from another attorney or not. We always have our junior attorneys and also our staff. You know, you can have your staff as well as yourself do this, you have a case memo. And the case memo will actually determine, okay, who the parties are, what the issues are at the time of at the time when they retain the law firm. And where you are in the current case, and just constantly keep updating that, you know, all you have to do is you copy and paste and you edit, and then you leave that under memo in your electronic file, or in your hardcopy file if you choose to keep hardcopy files because at least that way, if something happens, then you know, that someone else if they have to fill in for you as assisting counsel in the event that you become incapacitated, or if you die, that they'll be able to pick up not exactly where you left off, but they're going to be able to understand your client's needs your client's legal strategy. And they're not going to have to do double work, which will only frustrate the client and also frustrating irritate the court. Now the courts, of course, are going to be of assistance. But at the same time, why go ahead and create more work, when you can do preventative planning and creating what's called you know, a hypothetical estate plan for your law firm. And for you as a solo practitioner, why not make it easier on yourself, why not make it easier on your clients.

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So

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other people that could take over in the event that a lawyer dies or becomes incapacitated, could also be a guardian of the lawyer or it could also be an appointed attorney. Now, the appointed attorney, as I mentioned, you really do not want the Superior Court to appoint an attorney to manage your law firm in the event that you die or become incapacitated, because in order to get to the court, in order for the court to hear whether an appointed attorney could be an attorney, handling your cases, the courts going to have to hear it your your matter. And they're going to have to review the petition that's being filed by your state, or by the person by the spouse if there was no succession plan that was left. So it's important to identify an assisting attorney, somebody who is going to be competent and capable and knowledgeable on your current cases, and also

on the deadlines that we talked about. Now let's move on to the next slide. closing down a law practice, we're not going to spend too much time on closing down a law practice. But just keep in mind that this does not have to do with incapacity or even death. But more of winding your law practice down. And in the past, what I have done is I've sent quarterly updates to my clients, as well as to potential clients about the different types of issues and concerns that our firm as well as active events and active causes that our firm was involved

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with,

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so as to promote the law practice. In a similar way, if your firm does the same thing, such as sends out holiday cards, you can notify your clients have the different types of upcoming goals that your firm has in terms of perhaps winding down your practice and moving to part time practice. So you do want to make sure that you communicate with your clients and you want to communicate with your business with your law firms partners, such as a bank who might handle your mortgage or might also handle different other finances for your firm

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such as a retirement company who's handling your your, your your law firms, 401k and other for instance the health insurance company or disability insurance company, you definitely want to make sure that these folks are in the know about what's going on in your your your firm or not going to talk too much about the next slide. The next slide concerns is selling your law practice. So when you do sell your law practice, know that the American Bar Association has model rules such as rule 1.17, which governs the sale of a law practice and what the type of purchase price will be between the buyer and the seller. And it is also going to address The lawyer and the law firm selling the law practice and the type of written notice that's required to current clients. We've talked a little bit briefly about the succession plan throughout this m CLE seminar. But let's go ahead and talk about the fine details. In the next slide with what a succession plan will

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cover,

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a good succession plan is going to be similar to an estate plan. And in the event of an attorney

becoming disabled or incapacitated, I have what's called a five page succession plan, which is pretty general. But I also have a very detailed one. And that detailed one is just a bigger, more detailed part of the five page one, the five page one actually contains passwords, everyday passwords to get into the court websites to get into the process server websites to govern our accounts to pay the law firm rent to pay the law for mortgage, that is going to have some information on financial accounts, which include the electricity for the office, which include the gas bill for the heat, and which will also include any other bills you want to it's just like thinking about your house, your personal house, how are your family members going to live? And typically, the attorney client trust account, that is a very important account, you want to check in and ask the bank whether you can add two people as part of your law firm, to the attorney client trust account, a primary one and a secondary one, in the event that something happens to the primary trust holder. What are you going to do? And how is this going to be addressed? The information that you're closed client case files should also be part of the detailed succession plan, the detailed succession plan, I say, because a lot of close client case files, they're not really active cases. And if they have been in your firm for maybe three years, and the state rule says your your to keep client files for five years, you want to keep those you want to let your staff as well as access to succession plan, identify where these files are being kept. Are these files being kept stored electronically on the cloud, or are they being kept elsewhere at a physical storage facility. So you want to identify that in your detailed succession plan in the event that clients from the past decide that they want to request their case file from you because their cases legal matter has been revived in the state court or in federal court, whatever it is, then you want to detail the payment schedule, as well as current liabilities that your law firm has been in family law, we have, you know, legal research programs c Eb, we have Westlaw or Lexus and then we also have judicial forms, you know, Form Builder that we have there, those are current monthly liabilities disco master that need to be paid. And then you want to provide some general instructions on computer passwords and how to reset that information. So that the the the information for your succession plan is going to be available to the assisting attorney or the person who you've labeled as the successor to your firm who's going to be handling this without ease in the event that you become incapacitated. In the event that you are not feeling well, one day and unfortunately, if that requires hospitalization, this person will know how to operate your firm or will know who to turn to to go ahead and get this information up and running. So that way your law firm is not put in a position, a competitive disadvantage.

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And the important succession plan. A succession plan should also include instructions on when to return a client's file and also choosing a successor who can actually take the responsibility and not be so over overstressed with your current caseload. You know, you want to identify somebody, perhaps I mean, perhaps it is a solo practitioner, but a solo practitioner, who will you know, who you've worked with, is able to handle the capacity and the types of clients that you have. And

then you want to have discussions with the success seeing that success or returning to determine that they're willing and comfortable to take over your cases. And then you want to discuss, of course, before, you know, if you are going to be going through a planned incapacity temporary, you want to discuss that Remember, you discuss that in writing with your clients, of course, you can discuss it, of course, in person, that's going to be the best, but then you want to firm it up and writing so that there are no disputes later on in the future, because we all know how clients love to say, You never told me that or you never advise me that. Well, that's not true. Indeed, you did. So you go ahead, and you make sure that all of that information is in writing, especially when it has to do with the client. And indeed, if they agree with the assisting counsel, then you want to put something in writing, which indicates that an identify as you're assisting counsel. And just note that as a solo practitioner in the past, I used to share office space with other attorneys. And I would always talk with them, if they were down the hall, we would talk with our doors open. But in no way is that person that you're sharing office space with, on success being attorney or an assisting Attorney for the purposes of your law practice, unless you have an actual agreement, in the event that you become incapacitated, that this person is going to help you. So you might as well make that agreement in writing, and have an understanding. And typically, if you're a solo practitioner, as I remember, the legal malpractice insurance companies will not renew you unless you identify the backup attorney. So I remember there being at least one backup attorney, but it's always a good rule of thumb to have more than one in the event that one decides that they're on vacation or if they're out of the practice of law, then you have another backup person. And of course you want to continue to cultivate these relationships and keep these folks apprised of exactly what it is that your current caseload is the fine details, the calendaring deadlines, the mediations, the long trials that you're involved in. Now, what procedures should you take when an attorney is deceased or incapacitated? So let's say hypothetically,

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that

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you don't have this is the worst possible scenario scenario, you do not identify an assisting attorney that's accessing attorney and you are a true solo practitioner, what is going to happen? Well, in that instance, if an attorney does become incapacitated, then the clients matter is going to have no other choice. But it and if the state is notified of it, the state Superior Court is going to take control over the clients matters. It'll be identified, but it's going to take some time and on petition will be filed and then an assisting attorney is going to be an assisting attorney is going to be going ahead and taking over your your current cases. But that's going to take some time, as I mentioned, and be careful, because as part of my practice, I take limited scope matters and what the court is going to do the Superior Court once they receive notice that an attorney is deceased,

and has become incapacitated to the point where clients are coming into, you know, contacting the local County Bar Association. And we've had that, you know, I've given this presentation before and one of the scenarios was, you know, the local bar association is being contacted the president of the local bar association on how do I wind this member's practice down and the member and the the County Bar Association attorney member has no idea who this attorney is or what their caseload is. So in that event, that's just not a good situation. So, how to avoid this, that attorney should have a detailed succession plan. The detailed succession plan should include all the limited scope matters that will not pull up in an attorney search because when the state of California or when the Superior Court becomes involved in appointing an assisting attorney, what ended up happening is when you appoint an assisting attorney, then the court can also do a search on the attorneys names and determine who the attorney attorneys active clients are in court. But what about the clients that are not in court that you've taken a retainer from? You need to detail what the limited scope matters. are that the attorneys church will not be pulled up on. So keep that in mind when you're drafting your succession plan, your detailed succession

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plan, the limited scope

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matters, the matters that are in private mediation, you want to have that written down. In addition, you want to go ahead and and list down the different deadlines for those types of clients that are not to be calendered. So that way, there is information where you're the appointed assistant counsel is able to find that and take possession of that case and that legal strategy. Other information that should be included in a succession plan, include your business account, and also your attorney client trust account. You want to make sure how much money what is in the client trust account, particularly and for what purpose and if there are any court orders that are part of that those court orders need to be identified in your succession plan. You also want to include the different business accounts that you have, and where the payments are coming from and for what, where does payroll

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come from.

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So if you do practice in estate planning, you also want to make sure where the client if they have wills in which are deposited with the superior court or if they have if the law firm has a different

method for depositing estate plans. And keep in mind our next slide on ABA rule 28 model rules for lawyer disciplinary enforcement inventory of a lawyer files when an attorney becomes incapacitated or dies, and there is no partner, executor or other responsible party capable of conducting the attorney's affairs. The Presiding Judge in the Judicial District in which the attorney maintained a practice upon proof of fact, shall appoint a lawyer or lawyers to inventory the files of an attorney, and to take action, as seems indicated to protect the interests of the respondent and his or her clients. protection for records subject to inventory. Any lawyer so appointed shall not be permitted to disclose any information contained in any files inventory, without the consent of the client to whom the file relates, except as necessary to carry out the order of the court, which appointed the lawyer to make the inventory. But the lawyer client privilege must extend. So that review of the file by the trustee is not deemed to be disclosed to a turn a third party, which would waive the privilege. And the Superior Court of California can appoint an attorney to inventory the files of the attorney to protect the interest of justice. So keep that in mind. But at the same time, know that all of this can be avoided. You don't want to be disciplined, your firm your good name doesn't want to be tarnished, you work very hard. So just keep a succession plan it is it's going to take maybe an hour or two. And if you don't have a detailed one, it might only take an hour if even that to go ahead and list the different procedures that there are out there for for your actual firm. Our next slide solo practitioner, solo protect practitioner rule 1.1. A lawyer shall not intentionally or recklessly with gross negligence or repeatedly failed to perform legal services with competence, a sole practitioner must comply with diligence requirements under Rule 1.3. Now we're all diligent, we all can plan in the event of an attorney's death. So that's part of being a competent lawyer is to review your files. And for those of us that are money oriented, billable, oriented, goal oriented, you always want to review your client files every so often you routinely create. However, however, often you need to review your client files, you review them and then you Bill your client point one for it, that's okay. And then you update in the memo where your staff is going to be able to look at the status of the case to be able to give a client update to be able to give the court an update in the event that you have to go in at Part A on an emergency order, at least we're all surprised, someone outside of yourself is going to know how to handle this.

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So keep that in mind as a sole practitioner. Other items to keep in mind as an attorney, your your state is going to be responsible for notifying your clients of incapacity or

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death.

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Certainly as a sole practitioner, as an attorney, as you want to identify someone

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that is typically an attorney to handle your client's case totally to wind it down to figure out what's going to happen to do the succession planning. This is a time consuming project. If you don't have an assisting attorney, so do not burden the courts with this responsibility. Do not burden your colleagues that you've left behind your families, it's important to create that plan right now. On the different points that I mentioned during this presentation on the deceased attorneys law practice may also be sold

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to another

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member of the bar so long as it's permissible to do so under the California rules of professional conduct. So go ahead and take a look at that. Now, what happens if a solo practitioner or an attorney does not leave a person in charge of his estate, as I mentioned before the Superior Court in the county, or the state may actually become involved. And that's something that you do not want, or of course, clients are going to go ahead and contact the State Bar of California and the local county County Bar Association, as I mentioned to you,

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I've

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discussed this topic and various counties in the state of California. And I think that was in the desert Bar Association in Palm Springs when we talked about this topic. You know, we talked about an elder attorney who actually passed without having a succession plan. In his firm, he was a true solo practitioner. So two months was sped by the local bar association, about three to five years ago, just giving a call to the different attorneys in that particular practice asking begging, if they'll go ahead and take over in terms of finding out who the clients are for this particular attorney. And then in the end, he The, the at the time president local county, bar president couldn't find somebody and he couldn't handle the task himself to handle the deceased attorneys caseload. So what he did was they broke up three goodhearted attorneys assisting attorneys to wind the practice down. So that is something that we do not want to do to our fellow attorneys in

the county, because if we indeed could have an assisting attorney, and you know, I always especially a mess of medical crisises, you know, global worldwide, that that that we have had in the year 2020, it's important to identify and have a reserve, you know, set aside so that way, perhaps the assisting attorney could be compensated as part of winding down the service, although minimal, but at the same time, you know, this is the this is the inevitable, perhaps not incapacity, but death is. So it's important to definitely plan for that. And to have a trusted representative, who will go through the client files, who will know where to turn,

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who will go the

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client case updates, who will know how to pay your staff, we'll know how to make sure that the rent is taken care of that the lease is terminated, that you know, if it's a mortgage, that the payoff is occurs, and then that the property is passed to the correct individual. Now, if a sole practitioner or an attorney does not leave anybody in charge, a non attorney, spouse or a relative could be the representative that is going to help to examine the files and assist in closing the practice down. And as I mentioned before, we definitely don't want a non attorney, spouse or relative to have to do that, because what an emotional loss this might already be for them. Now a court assuming jurisdiction over a law practice may also make all the orders that are necessary and appropriate to exercise its jurisdiction. But again, the courts are not in the practice of doing that. So how much of a priority This is going to be I don't really know about You definitely don't want to burden the already congested court system already, when you already are able to plan for the inactivity and incapacity. Okay, and our next slide is going to discuss what if the deceased attorney is involved in a law firm or a partnership. If an attorney becomes incapacitated or deceased, the law firm would maintain custody of the client's file. It is important for the assisting attorney and the affected lawyer to discuss the details of what role the assisting lawyer is to play in the event of death or incapacity. And it's also important for the attorney and the assisting attorney to discuss the transitioning of clients. Now you want to talk to the assisting attorney? What information about the affected attorney, the affected attorney that being the person that's going to be incapacitated can reveal to the clients is the client okay with you revealing all 100% confidences with the exception of certain confidences and how deep into the client file will the affected attorney go? Or is this only for procedural hearings in the event that the affected attorney is not able to take client phone calls or address strategy. All these all these roles need to be discussed with the assisting attorney and also the affected attorney and ultimately reduced in a writing so that all parties the client particularly and both attorneys involved understand whose obligation as what.

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Next slide, we discuss existing funds in the lawyers trust account. appointing an assisting or transitioning attorney is important for the transitioning attorney to access funds held on the affected attorney trust accounts. It is important for the assisting attorney to sign on your account in the event of death or incapacity. We discussed that earlier. Always have a backup. So ask the bank in which your trust account and also your business accounts are held in to have this backup attorney so that all of the firm's obligations as well as payroll can be satisfied. And when there is no backup attorney authorized to approve iolta disbursements in the event of death or incapacity or relative spouse or deceased attorneys estate has to go through the process in terms of getting a motion file in order to obtain direct bank access to release the iolta funds. And anything in which you're going to get a court order is going to be somewhat slow unless you will actually have to go ahead and do an ex parte and in that if in in that regard, I don't even know if the ex party is going to be granted. So just be mindful of that. Be very mindful of that. That's why it's important to create these backup plans. And it's important to arrange with the assisting attorney the ability to access the iolta to avoid the deceased or incapacitated lawyers, relatives and spouses from being liable for a malpractice claim arising from the client was unable to secure adequate representation because the funds are being held in the deceased attorneys or in the incapacitated attorneys iolta account. Just remember that you'd be careful malpractice could be brewing in the process of this. That's why it's important to have a succession plan. Now your fiduciary obligations are just basic, you know, think about the succession plan that we talked about earlier. You know write down your passwords to your computers and your phones have the calendaring deadlines, dual calendered, triple A, you know, there's a backup plan everywhere have your cases all up to date. You know, plan ahead avoid having your family members having to be posed with questions to clients who are demanding their files and or money in the attorney client trust account being returned. And as a transitioning attorney, the attorney who's going to assist the incapacitated or the attorney who has unfortunately died. ethical obligations are going to be there in terms of winding down affected attorney's office, keep in mind the Business and Professions Code as well as the rules mandated by the State Bar of California and representing clients that may have a conflict of interest in the event that, you know, perhaps you're practicing in the same client area and the client might have been the or the affected client might might have been an adverse party somewhere else,

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then you want to

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disclose those potential third party conflicts or have another attorney handle that particular client while you handle the rest of the clients for the affected attorney. Because you certainly want to

ensure that you're maintaining the attorney client privilege. So we're going to go through a couple of hypotheticals for the next 510 minutes. We'll see how many we can go ahead and get through hypothetical number one. What happens if the assisting or transitioning attorney discovers malpractice or misappropriation of clients funds? Which transition active cases from the affected attorney who is incapacitated or has died? Well, this is a good question. Now let's think about this a little bit because the assisting attorney duty is duty to the client. However, there is malpractice or potential malpractice. Now the reasonable attorney would actually convey this to the client, as this is the client's case, and this can hopefully be rectified with the discovery of it. So it's important to communicate that information to the client. hypothetical number two, whose interest is the assisting attorneys supposed to protect defining the relationship with the transitioning attorney and the affected attorney prior to the attorneys death or incapacity is important when the assisting attorney has the duty to report the error to the client, as well as the assisting attorneys own ethical duties when there is an ambiguity? Based on the attorney client relationship case law suggests that the courts typically apply the viewpoint of what a reasonable belief of the client whose matter was being transitioned. So the assisting attorney is supposed to protect of course the clients and protecting the clients infer in information as well as protecting their interest is of utmost hypothetical number three, Wendy is a sole practitioner and has just passed away Wendy has appointed Elizabeth and let's assume for this case, in a succession plan as her assisting and transitionary attorney, Elizabeth is obtained all the information because Wendy provided Elizabeth with passwords and case information in the event that she became incapacitated or died. After conducting a conflict church. Elizabeth finds out that Wendy's current client was a defendant in a civil matter that Elizabeth represented the petitioner two years ago, Elizabeth no longer represents the petitioner. What should Elizabeth do? Well, listen, this dude could do a couple of things she could act like she'd never, this never happened. But the ethical thing to do would be to go ahead and disclose it. And it's not enough to just disclose it in verbal communication to protect oneself as well as to protect the sole practitioner who just passed away. And to ensure that communications have indeed occurred about this, it's important that Elizabeth go ahead and write this potential conflict down. But again, there are probably no hard requirements to do so. But in the avoid in the at the interest of being conservative, and outlining the most reasonable approach. Elizabeth should write this write a brief communication to her client or the client who's affected and disclose that information. hypothetical for part A. Vivian is an attorney in a law firm consisting of two other attorneys named Sarah and Shawn. Within the last few months, Vivian has been forgetting client information, misplacing items, and has forgotten to appear at five hearings. What a physician consider Vivian to be incapacitated. Now remember, that's like in the beginning that we talked about, about the Business and Professions Code about identifying the incapacitated attorney and that attorneys are are deemed a full capacity Unless proven otherwise. So if you're forgetting client information to sort of a vague hypothetical, misplacing items, I mean, sometimes I do that when I'm having a busy day, not forgetting client information about misplacing items. But if you're forgetting client information, like a court hearing unimportant ex parte that you just talked about a few hours ago, I would be

very suspicious over that. And if you've forgotten to appear at five court hearings, and perhaps if this is not the first client that you have done this for, then absolutely, there is a question of incapacity down and you should have a succession plan. Indeed, you should go and perhaps get yourself checked out

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by a medical professional to determine that everything is okay medically. And at the at a minimum, you want to create that backup plan that succession plan with all the information on your client files. Most important are the calendaring deadlines for that particular client as well as for clients where there is a court hearing upcoming or a mediation or an arbitration or deposition, whatever those hearings are, that's going to be important to go ahead and list as part of your succession plan in addition to the other financial points that we have talked about earlier. No hypothetical for part B, assuming that Vivian was deemed to be incapacitated, what is the law firms best course of action in order to ensure that all Vivian's clients are taken care of in their upcoming proceedings? Well, assuming that Vivian is incapacitated, the law firm is going to if she is without a succession plan, that's going to be unfortunate because the law firm is going to have to appoint an attorney that's going to be in charge. And if she's a sole practitioner, then that's going to be difficult, because perhaps she has a best friend, that's a lawyer that is going to be able to help and that's not going to be in conflict with any of the firm's clients so that they can determine who are the clients that Vivian is servicing. And then they're going to have to create that plan of attack, determine what bills need to be paid, as well as what hearings need to be made, whether their depositions on calendar, whether a mediation and arbitration, whether voluntary settlement conferences or their court hearings, trial, all of that needs to definitely be covered. Now hypothetical number four, Part C, what should Sara and Shawn do before proceeding to contact her clients? Now, what they should do is determine Okay, well, the hope how they're going to communicate this incapacity temporary permanent, and how their their clients want their case to be handled, that they can have the option of going to another attorney, or contacting the local County Bar Association for a new attorney, or they can be with the current law firm, and then work with assisting counsel. And it's going to be unfortunate for the law firm staff to have to do that because more rapport would have been established with the firm and this assisting attorney if the attorney in charge of their particular case would actually have made that communication and transitioned the case over in the event of the incapacities. That way the client is aware of it. And client is not blindsided and shocked over all of this and they may feel insecure and may want to take their business and legal relationship elsewhere. And that's definitely what what you want to avoid. And that's why your firm wants to have a succession plan. Now, what are some of the important things that Vivienne should have done prior to being incapacitated?

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Now you and I have talked

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about that earlier throughout this presentation. And in the hypothetical just before she should have had a succession plan, a very detailed succession plan. Sounds like she has a lot of clients and what those clients if you're in litigation like I am, it's important to have a litigation strategy and litigation dates, the calendaring deadlines on when responses are due to to any particular hearings, discovery responses. Second, second continuances any trials that are upcoming, I mean, first and foremost, you want to serve as a client, but you want to leave very detailed notes. In addition to that, you also want to make sure that somebody is it the secondary assisting attorney knows how to get into your attorney client trust account as well as pay for for overhead expenses for salaries, employee salaries, to make sure that your malpractice insurance is paid for health insurance for your employees, the electricity bill the rents if she should have had all of that detailed, and that way you know the staff in charge would not be confused. This is already going to be emotional again. Not only for your staff, and it's going to be insecure for the clients and uncertainty. So it's important that, you know, as attorneys we learn from this mc CLE, as well as from this hypothetical. And we indeed plan for incapacity and or death by having a very detailed succession plan and identifying the assisting attorney or a third party who's able to assist in winding down your practice. Now, the last hypothetical is, what are some important things that Vivian should have done now? Vivian should have as I mentioned, she should have really had a detailed succession plan or at a minimum, a general succession plan because that would have given direction or a bare bones outline to her two remaining staff will will assume for the purposes of this presentation are not attorneys, and you definitely do not want to do that to people who have helped your law firm. So if you do have questions, please feel free to contact me and I am happy to discuss what to do when an attorney dies or becomes incapacitated. The last slide I have sources on where I did pull some research material to pull together this presentation for our legal community in the state of California. So good luck to you and if you have concerns, please don't hesitate to reach out to me