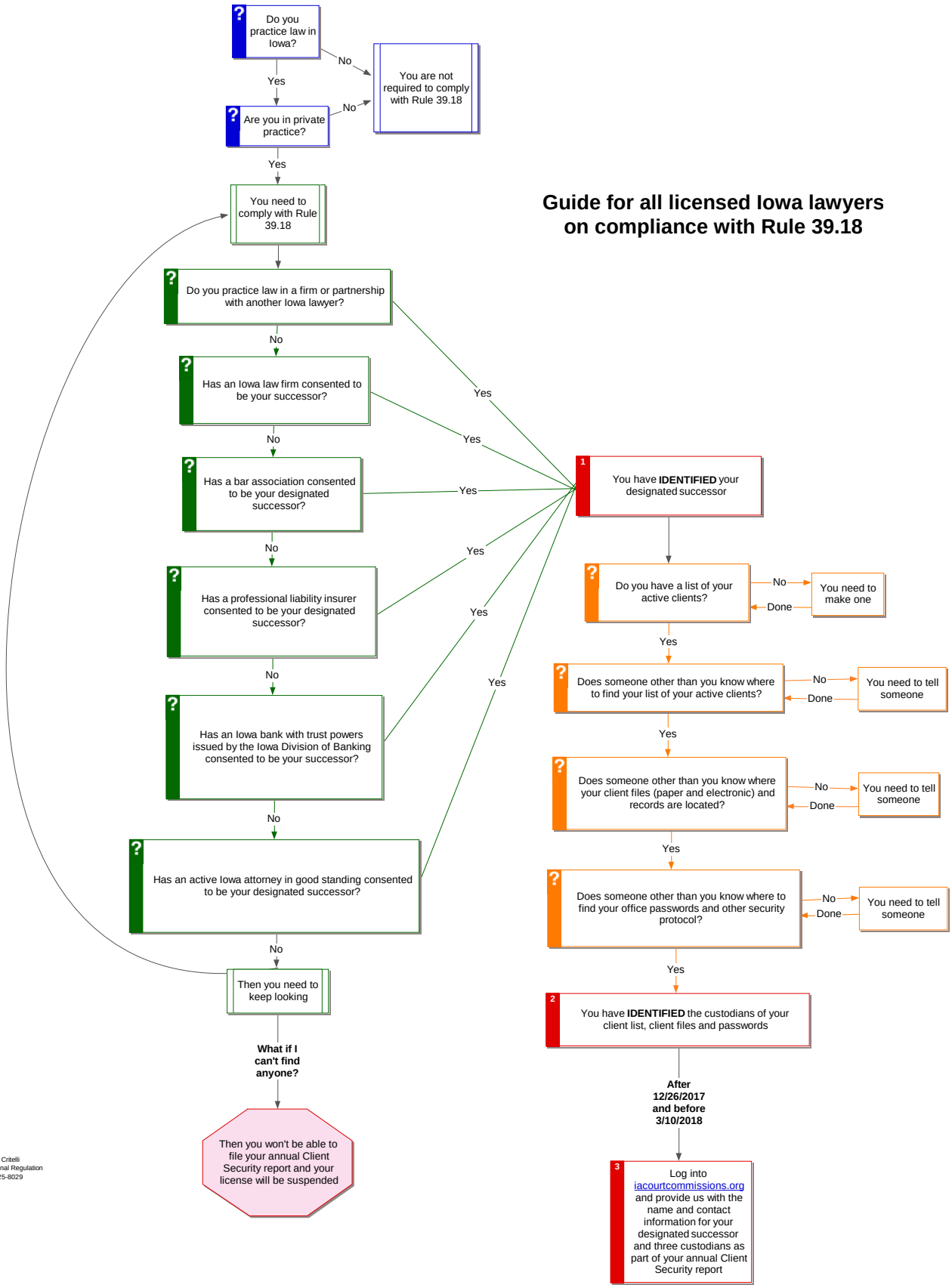
Guide for all licensed Iowa lawyers on compliance with Rule 39.18



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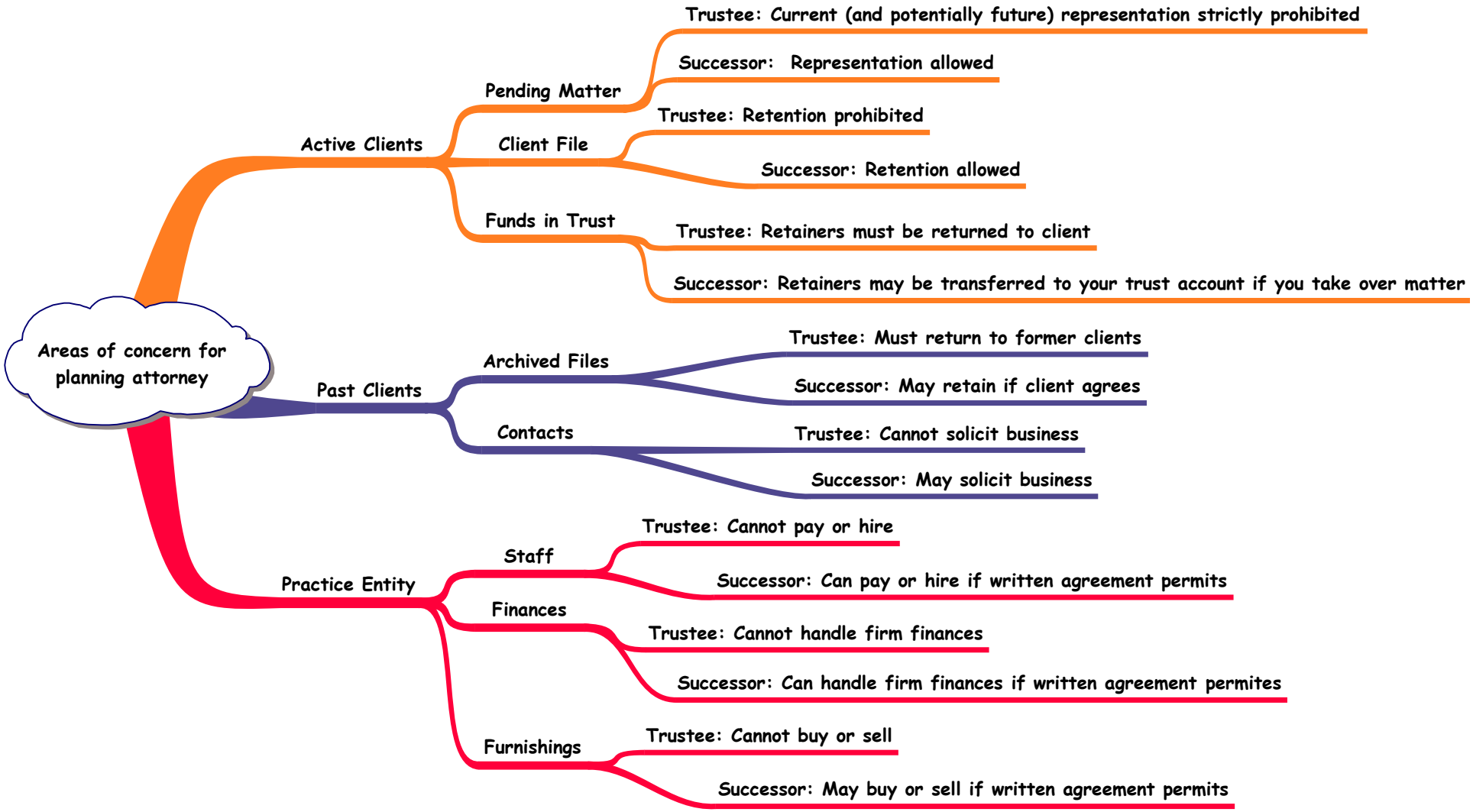
Why be designated as a successor?

Trustee: someone who has no interest in the trust property and cannot benefit by the exercise of the powers

Successor: someone who stands in the shoes of the predecessor



Attorney Death and Disability Planning

April 2017

Office of Professional Regulation

Introduction

The demographics of Iowa's private practitioner community suggest that death or disability of sole practitioners will be common in coming years. Recent changes in court rules, notably Iowa Court Rule 45.11 and Iowa Court Rule 39.18, are intended to help address these situations. The purpose of this outline is to assist Iowa practitioners in implementing these new rules and in preparing their practices for maintenance, closure, or sale incident to their death or disability.

The primary focus of this outline is on planning by sole practitioners. Issues in practice administration occur less frequently with respect to attorneys practicing as a member or employee of a firm. However, a firm also can plan to ease transition of the practice when an attorney member or employee becomes disabled or dies. The provisions of rule 39.18 accordingly require all private practitioners to make the same designations as sole practitioners.

Why Planning for Death or Disability Makes Sense

Planning for the effect of death or disability on your practice is appropriate and necessary for ethical, personal, and professional reasons.

Once representation of a client has been undertaken, an attorney has an ethical duty of diligence. The duty of diligence includes planning to safeguard client interests in the event the attorney no longer is able to practice due to death or disability. *See* Iowa R. Prof'l Conduct 32:1.3, cmt. 5.

Effective December 25, 2017, an Iowa attorney in private practice (including an attorney practicing in a firm with other attorneys) is required to accomplish at least the "first tier" planning requirements of Iowa Court Rule 39.18.

An attorney has an obligation to take appropriate action to safeguard the confidences of clients upon the attorney's death or disability. Iowa R. Prof'l Conduct 32:1.6, cmt. 18; Iowa R. Prof'l Conduct 32:1.9.

Contingency plans for your extended absence may be a condition of coverage by an attorney's professional liability insurance carrier, or at least a consideration in the insurer's issuance of coverage.

If an attorney is temporarily disabled, preserving the viability of the practice pending resolution of the disability may be in the attorney's economic interest. If the attorney is permanently disabled or deceased, planning may assist in transfer of the practice to another attorney. *See* Iowa R. Prof'l Conduct 32:1.17 (sale of practice may include good will).

Planning may ease the burden of winding up or selling the practice on surviving family members.

Law practices not prepared for the practitioner's disability or death have been a source of claims against the Client Security Trust Fund, generally based on retainers inadequately accounted for. In addition, trustee claims for compensation and expenses often are submitted to the Client Security Commission for payment. Planning and an orderly practice transition can reduce claims, help maintain the fund balance, and reduce the frequency of special assessments.

Finally, effecting a smooth transition for clients following death or disability demonstrates professionalism and competence as a practitioner.

Iowa Rules

Until 2005, no Iowa rule specifically required that practicing attorneys prepare their practices for maintenance, closure, or sale incident to their disability or death. The Iowa Rules of Professional Conduct, adopted in 2005, now address the requirement:

> 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. *See* Iowa Ct. Rs. 35.17(6), 35.18 (where reasonable necessity exists, the local chief judge shall appoint a lawyer to serve as trustee to inventory files, sequester client funds, and take any other appropriate action to protect the interests of the clients and other affected persons of a deceased, suspended, or disabled lawyer).

Iowa R. of Prof'l Conduct 32:1.3, cmt. 5.

Iowa Court Rule 39.18 provides more detailed guidance regarding the duty to plan for death or disability. The rule originally was adopted in 2015, but implementation was delayed to permit study by the Iowa State Bar Association. The bar association study resulted in a revised rule that will be effective

December 25, 2017, for the annual client security report filing due in March of 2018. The revised rule creates a mandatory "first tier" of succession planning that all attorneys in private practice in Iowa will be required to complete as part of the annual client security report. The mandatory "first tier" is focused on tasks essential to protecting the interests of clients. The revised rule allows Iowa practitioners to adopt an optional written plan, in which the attorney may provide further guidance and authority, primarily for law firm management and administrative tasks.

Several other rules suggest obligations to clients upon disability or death:

Iowa Rule of Professional Conduct 32:1.5(e) (Fees). An attorney should not divide a fee for legal services with another attorney who is not in the same firm, absent disclosure to the client of the arrangement, and consent by the client confirmed in writing. Depending on the terms of your written plan or agreement regarding the scope of duties and compensation of the designated attorney, the disclosure and consent contemplated by rule 32:1.5(e) may be required at some point during your designated attorney's administration of your practice.

Iowa Rule of Professional Conduct 32:1.9(c)(2) (Confidentiality of Information). An attorney may not reveal information relating to representation of a former client except as the ethics rules otherwise permit or require with respect to a client. Arguably the requirement to formulate a backup plan falls within the exception for disclosures permitted or required by the ethics rules, so that your clients' written, informed consent to your designated attorney accessing their confidential information is not required. Nonetheless, disclosure of the existence of the backup agreement to clients in your standard fee agreements or engagement letters may be prudent.

Iowa Rule of Professional Conduct 32:1.16 (Declining or Terminating Representation). An attorney must withdraw from representation of clients when his or her mental or physical condition materially impairs his or her ability to represent the client. The withdrawal may require permission from the tribunal where any action on behalf of the clients may be pending. The withdrawal also triggers obligations to reasonably notify the client, return papers and property to them, and refund any unearned advance fees.

Iowa Rule of Professional Conduct 32:1.17 (Sale of Law Practice). This rule prescribes how a law practice may be sold by one attorney to another, and includes good will as a saleable component of a law practice. Comment 13 to the rule contemplates sale of a practice by a non-attorney representative, such as the estate of a deceased attorney, and implies that the purchasing attorney is obligated to ensure that the rule is observed even though the seller is not an attorney.

Opinion 78-30, Iowa Board of Professional Ethics and Conduct, Disposition of Files of Deceased Lawyer (1978). Opinion 79-72, Iowa Board of Professional Ethics and Conduct, Deceased Partner's Files – Disposition or Retention (1979). Both opinions place responsibility for proper disposition of client files on the executor of the deceased attorney's estate. The opinions appear to contemplate notice to the clients and an opportunity for a client to retrieve the client's file before the file may be destroyed. If no address is available for a particular client, the opinions specify retention of that client's file for a period of five years after notice, before the file may be destroyed.

Opinion 08-02, Iowa State Bar Association Committee on Ethics and Practice Guidelines (2008). This opinion recommends creation of a written file destruction policy, disclosure of the file destruction policy in engagement letters and closing letters, and a final notice before destruction of a client file. The opinion suggests sample disclosure or notice language.

As noted in comment 5 to rule 32:1.3, our rules also provide a framework for judicial supervision of a practice when an attorney has not planned for disability or death.

Iowa Court Rule 34.17. (Disability Suspension). Iowa Court Rule 34.17 provides for suspension of an attorney's license to practice upon disability, and for appointment of a trustee to protect the interests of clients and other affected persons. The principal duty of the trustee is to protect the interests of the disabled attorney's clients. The trustee has little if any duty to protect the interests of the disabled attorney, and the trustee's actions generally will not preserve the disabled attorney's practice during the suspension period. Rule 34.17 was amended effective December 25, 2017, to require the district chief judge to consider a standby nomination made by the disabled attorney under rule 39.18 if appointment of a trustee is necessary.

Iowa Court Rule 34.18. (Death, Suspension, or Disbarment of Practicing Attorney). Iowa Court Rule 34.18 provides for appointment of a trustee to protect the interests of clients and other affected persons upon the death, disbarment, or suspension of an attorney, provided reasonable necessity exists. Here also, the principal duty of the trustee is to protect the interests of the dead or suspended attorney's clients. The trustee's actions generally will not protect the interests of the deceased or suspended attorney or the deceased attorney's estate or preserve the value of the practice for the estate or for sale. Rule 34.18 was amended effective December 25, 2017, to require the district chief judge to consider a standby nomination made by the deceased, suspended, or disbarred attorney under rule 39.18 if appointment of a trustee is necessary. Also, an attorney or entity designated under rule 39.18 now will be permitted to apply for appointment of a trustee. This change complements a provision in the new rule 39.18 which allows the designated attorney or entity to seek appointment of a trustee at any time.

Iowa Court Rule 45.11 (Designation of Successor Signatories). Iowa Court Rule 45.11 allows an attorney who is the sole attorney signatory on a trust account to designate a successor signatory, whose authority becomes effective upon the occurrence of an event described in the designation. Possible events include death, disappearance, abandonment of the practice, incapacity, suspension, or disbarment. The successor signatory must be a member of the Iowa bar in good standing. Rule 39.18 provides that an attorney or entity designated under the provisions of that rule also is authorized to serve as a successor signatory under rule 45.11.

Death and Disability Practice *Before* Iowa Court Rule 39.18

What Currently Happens at Death if No Succession Plan Exists

Three courses of action have been used for disposition of the practice of a deceased sole practitioner if no succession planning has occurred.

Iowa Probate Code. The first course of action is to proceed under the Iowa probate code. The personal representative of the deceased attorney appears to have authority to administer the practice as part of the general administration of the decedent's estate. Iowa Code § 633.350; *see* Ethics Op. 79-72. The personal representative would be entitled to assistance from the attorney engaged to assist in administration of the estate. Iowa Code § 633.82. A special appointment of another attorney to assist with administration of the practice would be possible under Iowa Code section 633.84 (delegation of authority to outside specialists with court approval).

Iowa Court Rule 34.18. A second course of action is to petition for appointment of an attorney (or attorneys) as trustee or trustees to administer the practice under Iowa Court Rule 34.18.

An application for the trustee appointment under rule 34.18 may be made on behalf of the Attorney Disciplinary Board or the county bar association. The application must show that the attorney involved has died, and that reasonable necessity exists for appointment of a trustee.

Authority for the appointment is placed with the chief judge in the district where the deceased attorney practiced. The appointment by the chief judge is subject to confirmation by the Supreme Court. Thereafter, the trusteeship is supervised by the chief judge through final report and closure. Closure of the trust is appropriate when all pending representation of clients has been completed, or the purposes of the trust otherwise have been accomplished. The trust must be terminated by an order of the appointing chief judge.

Informal Administration. If knowledgeable law firm staff members are available to assist and the deceased attorney's family is supportive, it sometimes is possible to close a law practice without court supervision. This approach appears to be most suitable when a non-attorney family member, such as a spouse, has been a long-term, integral part of the law firm staff. Another attorney known to the family often assists with informal administration. Even under this approach it still may be necessary to seek a trustee appointment under rule 34.18 for the limited purpose of administering and closing the deceased attorney's trust account, as the decedent may have been the only account signatory, or the depository bank may not recognize the authority of any signatory who survives the decedent.

Comparing the Courses of Action. The courses of action offer different advantages and features, and are not mutually exclusive. In recent years, one or more of the courses of action have been employed in concert. The considerations in selecting the proper course or courses of action include the following:

> The trustee's duty to protect the interests of the clients is narrower than the duties of a fiduciary for a deceased attorney's estate. For this reason, trustees sometimes can move more quickly to advise active clients of their need to engage new counsel, distribute trust account balances to those persons entitled to them, and distribute files to clients.
>
> Trustees do not attempt to preserve the practice for sale, collect receivables, or address dissolution of the business aspects of the practice. Absent use of a parallel course of action by the decedent's survivors, a trusteeship generally dismembers the client base of the practice and may reduce the value of the practice remaining for the decedent's estate.
>
> The allowable fees and expenses of a trustee are to be paid first from the decedent's estate. It appears the trustee's fees and expenses are entitled to administrative priority. *See* Iowa Code § 633.425(2) (other costs of administration). If the trustee cannot be paid from the estate, the Client Security Commission has authority and discretion to pay those fees and expenses. If there is any concern regarding the solvency of the estate, a trustee appointment under rule 34.18 therefore offers a second avenue for compensation of the trustee even if formal probate is undertaken also.
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> Administration of the law practice through formal probate, with the appointment of professional assistance if required, offers more encompassing authority than a trustee appointment. In

> addition to the tasks normally undertaken by a trustee to protect the interests of clients, representatives of the estate can attempt to sell the physical assets and good will of the practice, collect earned but unpaid fees including the value of work performed but unbilled at the time of the decedent's death, and dissolve the business aspects of the practice. If one professional handles these tasks in addition to those normally undertaken by a trustee, the overall cost to the estate may be reduced. Use of the probate process may be especially attractive if a likely purchaser of the practice is readily available.
>
> Informal administration of a law practice generally is dependent on knowledgeable, experienced staff members or family members available to assist. As the nature of law practice becomes less reliant on staff support and more reliant on attorney technology skills, it seems less likely that informal administration will be a viable alternative. Informal administration also depends on the willingness of third parties to recognize authority of the staff or family members. In those instances where informal authority is insufficient, resort to a trusteeship or formal probate proceeding may be required.

What Currently Happens Upon Disability if No Succession Plan Exists

Three courses of action also are available for administration of the practice of a disabled practitioner if no succession planning has occurred. The considerations in selecting these courses of action are similar to the considerations applicable to administration of the practice of a deceased practitioner.

Iowa Court Rule 34.17. The course of action commonly used to administer the practice of a disabled sole practitioner, if no succession planning has occurred, is appointment of an Iowa attorney (or attorneys) as trustee or co-trustees under the provisions of Iowa Court Rule 34.17. Rule 34.17 provides a two-step process, the first of which is the disability suspension of the practitioner, which then prompts the appointment of a trustee.

An application to the Supreme Court for the disability suspension of an Iowa lawyer may be made on behalf of the Attorney Disciplinary Board or the county bar association. The application must show that the attorney involved is not discharging professional responsibilities, due to disability, incapacity, disappearance, or abandonment of the practice. The Supreme Court also may enter a suspension order based on the certification by any clerk of court in Iowa that an attorney has been adjudicated mentally incapacitated, an alcoholic, a drug addict, or has been committed to a hospital or institution for treatment.

Upon notification that a disability suspension has been ordered by the Supreme Court, an appointment of trustee *shall* be made by the chief judge in the district where the disabled attorney practiced. The appointment by the chief judge is subject to confirmation by the Supreme Court. Thereafter, the trusteeship is supervised by the chief judge through final report and closure. Closure of the trust is appropriate once the disabled attorney has been reinstated to practice, or all pending representation of clients has been completed, or the purposes of the trust otherwise have been accomplished. The trust may be terminated by order of the appointing chief judge.

Conservatorship Under Probate Code. Another course of action is appointment of a conservator under the provisions of Iowa Code section 633.566. An application for appointment of a conservator must show that the proposed ward's decision-making capacity is so impaired that he or she is unable to make communicate, or carry out important decisions concerning the person's financial affairs. Iowa Code § 633.556(2)(a). As is the case in a formal probate proceeding, the conservator would be would be entitled to assistance from the attorney designated to assist in administration of the conservatorship. Iowa Code §§ 633.82, 633.649. Similarly, a special appointment of another attorney to assist with administration of the practice would be possible under Iowa Code section 633.84 (delegation of authority to outside specialists with court approval).

Informal Administration. If knowledgeable law firm staff members are available to assist and the disabled attorney's family is supportive, it sometimes is possible to administer a disabled attorney's law practice without court supervision. This approach appears to be most suitable when a non-attorney family member, such as a spouse, has been a long-term, integral part of the law firm staff. Another attorney known to the family often assists with informal administration. Even under this approach it still may be necessary to seek a disability determination and trustee appointment under rule 34.17 for the limited purpose of administering and closing out the disabled attorney's trust account, as the disabled attorney may have been the only account signatory. A disability determination and trustee appointment also may be necessary if the disabled attorney refuses to cooperate with, or resists, informal administration.

Duties of the Trustee Appointed under Iowa Court Rules 34.17 or 34.18

Under both Iowa Court Rule 34.17 and Iowa Court Rule 34.18, the overarching purpose of the trust is to protect the interests of clients and other affected persons. Both rules describe the trustee's tasks as inventorying files, sequestering client funds, and taking other action appropriate to the purpose of the trust. The trustee has little if any duty to protect the interests of the disabled, suspended, or deceased attorney, or the deceased attorney's estate, and should not attempt to keep the attorney's business viable during the suspension period or preserve the value of the practice for the estate or for sale. If a legal representative of the deceased, suspended, or disabled attorney appears and

seeks to preserve the value of the practice for sale, the trustee should cooperate to the extent possible. A sale of the practice could produce sufficient return to help pay the fees and costs of the trusteeship.

Death and Disability Practice *After* Iowa Court Rule 39.18

Terminology

Iowa Court Rule 39.18 and the forms prepared by Iowa Trust & Estate Counsel (ITEC) use the terms *designated attorney* and *planning attorney*. To reduce confusion, the same terms are used in this outline. The term *Designated Attorney* refers to the lawyer designated under the provisions of rule 39.18 to administer the practice of a deceased or disabled attorney. The term *Planning Attorney* refers to the attorney making the designation, whose practice is to be administered.

The New Framework of Rule 39.18

Iowa Court Rule 39.18 will be effective December 25, 2017, for the 2018 annual report filing season. Rule 39.18 creates two "tiers" of planning. The "first tier" is mandatory, and the "second tier" is optional.

The "first tier" is a mandatory short form designation and authorization as part of the annual questionnaire filed with the Client Security Commission. The designation must identify an active Iowa attorney, law firm with at least one active Iowa attorney, or qualified attorney-servicing association. The designation also must identify where the planning attorney's records are located, including a current client list, and authorize the designated attorney or entity to perform certain tasks necessary to protect the interests of the planning attorney's clients. The listed tasks include reviewing client files, notifying clients of the planning attorney's death or disability, determining if other actions are necessary to protect client interests, and administering the planning attorney's trust account.

> All attorneys in private practice are required to complete the "first tier" short form designation as part of the annual client security questionnaire. If a planning attorney is a member of a law firm that includes other Iowa attorneys in good standing, the planning attorney may simply designate his or her own firm.
>
> Attorneys who are not in private practice in Iowa may indicate that status on the annual questionnaire and will not be required to complete the portion of the questionnaire pertaining to succession planning.

> Because the "first tier" designations will be part of the annual client security questionnaire, chapter 39 of the court rules creates a duty to update the designation information within 30 days after the designation information occurs. The Office of Professional Regulation will add a succession plan update module on the lawyer account page to allowing updates between annual reporting periods.

The "second tier" of succession planning is an optional but encouraged written plan that the planning attorney may create if desired. In the optional written plan, the planning attorney may provide further guidance and authority to perform law firm management and administrative tasks. Those tasks may include collecting fees, paying law firm expenses and client costs, compensating staff, terminating leases, and selling the practice.

Rule 39.18 requires all attorneys in private practice to maintain a current client list. The Iowa State Bar Association Committee on Ethics and Practice Guidelines is developing a standard for content of a current client list.

The rule authorizes the designated attorney or entity to apply to the judicial district chief judge for an order confirming the death or disability of the planning attorney.

A qualified attorney-servicing association is defined as a bar association all or part of whose members are admitted to practice in Iowa, a company authorized to sell professional liability insurance to Iowa attorneys, or an Iowa bank with trust powers issued by the Iowa Division of Banking.

The amendments authorize the designated attorney or entity to petition for appointment of a trustee under the provisions of rule 34.17 or 34.18, as applicable, if the designated attorney or entity believes it is beneficial to be court-appointed as a trustee, or believes it is appropriate for the court to appoint an independent trustee. If the designated attorney or entity applies for a trustee appointment under rule 34.17 or 34.18, the amendments require the judicial district chief judge to give due regard to any designation or standby nomination the planning attorney made under the provisions of rule 39.18.

Implementing the Mandatory "First Tier" Provisions

An initial task is selection of another Iowa attorney in good standing, Iowa law firm with at least one active Iowa attorney in good standing, or a qualified attorney-servicing association to serve as designated attorney or entity. This selection should be made with care, as the designated attorney or entity will be

responsible for the transition of clients and the office, and probably also for proper disbursement of client funds in the trust account.

The planning attorney should familiarize the designated attorney or entity with the planning attorney's office procedures and system. The planning attorney should consider providing the designated attorney or entity a tour of the office, with introductions to staff, and familiarization with how to access the client list, files, and other paper and electronic records.

The planning attorney also should brief the law office staff and his or her family regarding the existence and purpose of the designation, and how they should assist the designated attorney or entity with access to the client list, files, and other paper and electronic records.

Besides identifying the designated attorney as part of the mandatory "first tier" requirements, the planning attorney is required to specify the "custodian" and location of the client list, electronic and paper files and records, and the passwords and other security protocols required to access electronic files and records. The term "custodian" in this context is not intended to require that some person other than the planning attorney actually have physical possession of these materials. The intent is that some person other than the planning attorney should be knowledgeable regarding the location of these materials and have the ability to help the designated attorney gain access to them.

> **Examples:** The "custodian" for this purpose might be a law staff member or a family member who knows where the materials are located and has a key to the office. If the planning attorney has briefed the designated attorney on the location of these materials and provided the designated attorney with a key to the office, the designated attorney could be the "custodian." If the planning attorney has briefed the designated attorney on the location of the materials but no person other than the planning attorney has a key to the office, the "custodian" might be the office landlord who has a key to the office.

Once the planning attorney has submitted an annual client security questionnaire in compliance with rule 39.18, he or she should print out a designation form from his or her lawyer account page, execute it before a notary, and provide the executed form to the designated attorney. The designated attorney will need the executed designation form to establish his or her authority to administer the practice, and in particular to administer the trust account.

Implementing the Optional Second Tier Provisions

The "second tier" provisions of rule 39.18 can only be implemented by a written agreement and power of attorney regarding the scope of the duties to be

performed by the designated attorney and the planning attorney's authorization and consent to their performance. Iowa Trust & Estates Counsel (ITEC) has prepared forms to implement the "second tier" provisions, which are available at http://www.iowabar.org/default.asp?page=LawPracticeForms:

Law Practice Succession Plan Agreement: This agreement is intended to supplement the designations made in the annual client security questionnaire. The agreement addresses authority to administer numerous functions not authorized under the "first tier" designation, including law firm financial affairs, insurance, law firm staffing, termination of leases and other obligations, and sale or closure of the practice.

Durable Limited Power of Attorney for Management of Law Practice Upon Incapacity or Inability to Practice Law for Any Reason: This power of attorney form contains durability provisions and incorporates by reference the power and authority described in the Law Practice Succession Plan Agreement.

Providing for Designated Attorney (and Alternate) in Estate Planning Documents: ITEC has provided sample provisions for the planning attorney's will or revocable trust, directing the fiduciary for the estate or trust to engage the designated attorney to close or sell the practice in accordance with the succession plan agreement.

Law Practice Business Entities: Appointment of Agent to Manage Law Practice Upon Death or Incapacity: Forms are provided for entity consent and authorization of the designated attorney as an agent of the professional corporation or professional limited liability company.

> **Tip:** The ITEC forms describe the status of the designated attorney or alternate as an agent of the planning attorney. If the designated attorney acts solely as an agent, he or she could provide clients notice of errors, just as the planning attorney would have done had he or she been able. Acting solely as an agent, the potential for conflicts likely is reduced, such that the designated attorney can more easily assume duties as successor counsel for the clients. In contrast, if the designated attorney acts as the attorney for the planning attorney, his or her primary duty would be to the planning attorney. The designated attorney would not be able to inform clients of errors discovered in the work performed by the planning attorney, unless the planning attorney expressly consents to and directs such disclosures. The designated attorney's duties as counsel could increase the probability that conflicts of interest would prevent the designated attorney from assuming duties as successor counsel for the clients.

Client Notification

Once a designation has been made under rule 39.18, the planning attorney should provide notice to clients regarding the designation. The easiest way to do this is to include the information regarding the designation in your retainer agreements, engagement letters, and firm brochure. This provides clients with information about your arrangement and gives them an opportunity to object. Your client's signature on a retainer agreement should provide written authorization for the designated attorney to proceed on the client's behalf, if necessary.

Handling Client Files

One of the most troublesome issues confronted incident to death or permanent disability of a practicing attorney is the disposition of client files. Often the files never have been reviewed for client property or periodically purged by the disabled or deceased attorney. Proper handling of these files generally is a matter of considerable time and expense for the fiduciary or trustee, and will consume substantial time and expense on the part of the designated attorney absent preparation by the planning attorney.

The Iowa Supreme Court has adopted the "entire file" approach to the question of who owns the contents of a client's file. *Iowa Supreme Court Attorney Disciplinary Bd. v. Gottschalk*, 729 N.W.2d 812 (Iowa 2007); Restatement (Third) of the Law Governing Lawyers §46(2) (2000). Subject to narrow exceptions, the client owns the entire file, including attorney work product. *Gottschalk*, 729 N.W.2d at 819-820.

Unless the planning attorney has addressed disposition of client files in his or her engagement letters, fee contracts, or termination letters, it will not be permissible for the designated attorney to summarily destroy client files. Before any file is destroyed, it will need to be checked for original documents (wills, abstracts, conveyance instruments) and any other specific client property that must be removed from file and returned to the rightful owners. The designated attorney then will need to contact the clients and return all files to the clients involved. If a client refuses to take custody of the file or otherwise fails to respond after being contacted and advised of the impending destruction of the file, the designated attorney would be authorized to destroy the remaining contents of the file if the normal file retention period has passed.

With respect to those files for which a client address cannot be found, the normal procedure ordered in trustee cases has been to publish notice regarding the files, and then retain those files that are unclaimed for a period of five or six years during which these clients may come forward and claim their file.

Planning attorneys can minimize the burden of file disposition upon termination of their practice by adopting some procedures in their daily practice:

> Planning attorneys should consider including an agreement and consent regarding file destruction in their initial engagement letter or fee agreement with each client, or in the arrangements made upon termination of each representation.
>
> Planning attorneys should periodically examine all files for which the last action was completed more than six years ago (or more than whatever minimum retention period is prescribed by your professional liability carrier); remove documents or other client property for transfer to the client; and consider destruction of the paper file provided client consent exists.
>
> Planning attorneys should use a secure method to destroy client files, such as shredding, and document for future reference when and how each file was destroyed.

As a general rule, the best practice is to retain a client's file for a minimum period of six years after the last action taken on the file, as prescribed for trust account records and supporting documents under Iowa Court Rule 45.2(2). The planning attorney's professional liability carrier may recommend a longer minimum retention period. It is permissible to retain files in electronic form only and dispose of the paper files.

Preparation of Planning Attorney Personal Affairs

Planning attorneys will want to maintain a current will, designating a personal representative and alternates, so that probate of their estate can be opened and a personal representative can be appointed quickly upon their death.

Iowa law gives broad powers to a personal representative to sell or wind down a business, and to hire professionals to help administer the estate. Iowa Code §§ 633.84, 633.350. However, for the personal representative's protection, you may want to include language in your will that expressly authorizes the personal representative, along with such professionals as the personal representative may engage, to administer the practice in an effort to preserve its value pending disposition and assist with orderly transition of client matters. The planning attorney should consider instructing the personal representative to engage the designated attorney for that purpose, with the appointment order or engagement incorporating provisions of the backup agreement. The form provisions prepared by ITEC use this approach.

The planning attorney should consider the likely cash flow situation of the practice upon disability or death. If the remainder of the planning attorney's

property (other than the practice) is likely to pass by operation of law to a spouse or other family members, the practice might be placed in a cash-poor situation, especially if the accounts receivable are not amenable to rapid billing. Cash flow needs of the practice for routine expenses and compensation of staff may continue for some period after the planning attorney's death or disability. The planning attorney may want to consider practice interruption insurance, disability insurance, and insurance on his or her life as sources for interim capital to wind up the practice in the event of disability or death.

Succession Planning By a Member of a Firm

The law firm organizational document is an appropriate place to include provisions relating to the death or disability of attorney members and employees of the firm.

One possible topic for the firm organizational document is a list of duties of all attorney members of the firm during routine practice, with the goal of maintaining a well-organized practice that is amenable to transition. The list of duties might include many of the topics addressed in the attached "Preparing a Law Practice for Death, Disability or Incapacity."

Other possible topics for the firm organizational document are law firm authority and duties after the death or disability of an attorney member of the firm.

The firm also may want to consider formalizing designated attorney or practice group arrangements, wherein attorneys working in similar areas will maintain some level of familiarity with the matters assigned to another attorney or attorneys in the group.

Office of Professional Regulation (OPR) Implementation of Rule 39.18

During the period April through November of 2017, the staff at OPR will be working with a web site developer to implement necessary changes to the annual client security questionnaire and other functions on the OPR / Supreme Court Commissions web site.

The changes will allow attorneys in active status to submit succession planning designations as part of the annual client security report and questionnaire, and update succession planning designations at any time. A new heading titled "Succession Planning Functions" will be added to the menu on the lawyer account page. Under the heading "Succession Planning Functions" there will be two buttons, one titled "Update Designations" and the other titled "View / Print Designation of Authority." The "Update Designations" button will take an attorney through a set of screens that pose the same succession planning questions posed on the normal client security questionnaire. The "View / Print

Designation of Authority" button will generate an official report that incorporates the succession planning designations and authorizes the designated attorney or entity to carry out the duties described in rule 39.18 in the event of the planning attorney's death or disability. This report will be viewable and printable by the planning attorney at any time from his or her lawyer account page. The intent is that the planning attorney will print out the report, execute it, and provide a copy to the designated attorney.

The changes will allow staff at OPR to view an attorney's succession planning designations. In addition, the staff at OPR will be able to print out the official form showing the current designations, which the OPR director or assistant directors may execute and give to the designated attorney or entity in the event the planning attorney did not do so prior to his or her death or disability. This form would authorize the actions described by the rule.

Appendix A – Preparing a Law Practice for Death, Disability, or Incapacity
Appendix B – Checklist for Actions by the Attorney Designated under the "First Tier"

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APPENDIX A - Checklist – Preparing a Law Practice for Death, Disability, or Incapacity

Much of the confusion and expense involved in transition of your practice after your death or disability can be minimized by some prior planning and disciplined conduct of your practice prior to your departure. Some recommended tasks in preparation of your practice are as follows:

Introduce your designated attorney to your staff. Make certain your staff knows how to contact the designated attorney if an emergency occurs before or after office hours. If you practice without regular staff, make sure another appropriate person (spouse, significant other, landlord, for example) knows how to contact your designated attorney and arrange access to your office.

Inform your spouse, significant other, or closest living relative, and the personal representative of your estate of your designation and how to contact the designated attorney.

Forward the name, address, and phone number of your designated attorney to your professional liability insurance carrier. This will enable your carrier to locate the designated attorney in the event of your death, disability, impairment, or incapacity.

Review your designation with your designated attorney annually.

Familiarize your designated attorney with your office systems and keep him or her apprised of office changes.

Consult with your bank to ensure that your designations pertaining to authority over bank accounts will be honored. You may find it necessary to prepare a separate, successor signatory document under rule 45.11 to satisfy your bank.

Make sure all your file deadlines (including follow-up deadlines) are calendared, and your staff or software can produce an accurate list of the deadlines.

Keep your trust account and billing records up-to-date.

Prepare a law office list of contacts. Make sure your designated attorney has a copy.

Ensure your staff or software can produce an accurate list of current clients, addresses and telephone numbers.

Avoid keeping original client documents (e.g., wills, abstracts) in client files; consolidate and index your holdings of these documents or return them to clients.

Periodically purge paper files after proper notice to the clients and passage of the minimum retention period suggested in the following section of the outline. If possible, transition to files in electronic form only to avoid having to dispose of paper files.

Include provisions in your engagement letters and fee contracts regarding disposition of client files once a matter is concluded.

Include provisions in your retainer agreements and engagement letters that disclose that you have arranged for a designated attorney to close your practice in the event of death, disability, impairment, or incapacity.

Have a thorough and up-to-date office procedure manual that includes information on:

a. How to check for a conflict of interest;
b. How to use the calendaring system;
c. How to generate a list of active client files, including client names, addresses, and phone numbers;
d. Where client ledgers are kept;
e. How the open/active files are organized;
f. How the closed files are organized and assigned numbers;
g. Where the closed files are kept and how to access them;
h. The office policy on keeping original client documents;
i. Where original client documents are kept;
j. Where the safe deposit box is located and how to access it;
k. The bank name, address, account signers, and account numbers for all law office bank accounts;
l. The location of all law office bank account records (trust and general);
m. Where to find, or who knows about, the computer passwords;
n. How to access your voice mail (or answering machine) and the access code numbers; and
o. Where the post office or other mail service box is located and how to access it.

Appendix B – Checklist for Actions by the Attorney Designated under the "First Tier"

The duties of an attorney designated under the "first tier" provisions of rule 39.18 are limited to basic protection of client interests. The rule authorizes the designated attorney to review client files, notify each client of the planning attorney's death or disability, properly dispose of inactive files, arrange for storage of files and trust account records, and determine if there is a need for other immediate action to protect the interests of the clients. The attorney designated under the "first tier" provisions also is authorized as a successor trust account signatory and may prepare final trust accountings and make trust account disbursements. Recommended actions by the designated attorney upon death or disability of the planning attorney are as follows:

Confirm the Death or Disability of the Planning Attorney: If there is any doubt regarding the existence of conditions triggering actions under the designation, the designated attorney may apply to the chief judge of the judicial district in which the planning attorney practiced for an order confirming the planning attorney's death or disability.

Acquire Proof of Authority as Designated Attorney: Once the planning attorney has submitted an annual client security questionnaire in compliance with rule 39.18, he or she will have the ability to print out a designation form from his or her lawyer account page, execute it before a notary, and provide the executed form to the designated attorney. The designated attorney likely will need the executed designation form to establish his or her authority to administer the practice. If the designation form executed by the planning attorney is not available, the Office of Professional Regulation will be able to print out and provide a similar designation form, executed by the director or an assistant director of OPR based on the official records at OPR.

Access the Files and Records: The designated attorney should secure the office, files, and other practice property of the planning attorney, including trust account records and the trust account checkbook. If the planning attorney maintained client files or trust account records electronically, it may be necessary also to secure the computers, along with the user names and passwords for access.

> **Tip:** The planning attorney is required to specify the "custodian" and location of the client list, electronic and paper files and records, and the passwords and other security protocols required to access electronic files and records. The Office of Professional Regulation can advise the designated attorney regarding the identity of the custodian and the specified locations of the materials based on the last client security questionnaire filed with the Client Security

> Commission. The best practice, however, is for the planning attorney to directly advise the designated attorney of that information.

Assess the Situation: A designated attorney may petition the district court at any time for appointment as the trustee or appointment of a different attorney as a trustee under the provisions of rules 34.17 or 34.18. Once the designated attorney has assumed duties, he or she should assess the condition of the planning attorney's practice and determine if the duties under the "first tier" of rule 39.18 can be performed and the designated attorney can be properly compensated without court supervision and assistance. If court supervision and assistance seems necessary, an application for appointment of a trustee should be filed.

> **Tip:** The level of preparation of the practice at the time of the planning attorney's death or disability will be a key factor in determining whether a trustee appointment will be necessary. For example, if the planning attorney's trust account records are inadequate to establish client entitlements to funds in the trust account, or the trust account balance appears insufficient to honor all client claims on the account, a trusteeship may be necessary to adjudicate disbursement of the trust account. A second key factor will be whether it appears the designated attorney will be directly compensated for his or her time and expenses by the planning attorney or his or her estate. If there is doubt regarding compensation of the planning attorney, a trustee appointment will make reimbursement by the Client Security Commission possible.

Provide Notice to the Planning Attorney's Clients and Other Interested Persons: The designated attorney should provide notice of the death, suspension, or disability to the planning attorney's clients, opposing counsel, and the court in all pending matters, and notify clients of their right (and need) to pick up their file and engage other counsel. *See* Iowa R. Prof'l Conduct 32:1.16(d)(duties to clients upon termination of representation). Clerks of court or court administrators for those counties where the planning attorney practiced can provide lists of open cases in which the planning attorney has appeared. Identify imminent deadlines if possible, and provide specific notice to clients regarding these deadlines.

Protect the Confidences of Clients: The designated attorney must be alert for conflicts of interest with his or her own practice and address them as contemplated in rule 39.18(5). The designated attorney should avoid examining any documents or acquiring information creating a conflict with the designated attorney's clients. If the designated attorney inadvertently acquires such information, rule 39.18(5) calls for prompt recusal or refusal of employment to protect the interests of the planning attorney's clients.

> **Tip:** Once the duties of the designated attorney are triggered, the designated attorney will want to examine the planning attorney's client list for potential conflicts with the designated attorney's client list before accessing any of the planning attorney's client files.

Distribute Files to Active Clients: The planning attorney should use the planning attorney's list of current clients and the list of the planning attorney's open cases provided by the clerks of court or district court administrator to determine what clients have open matters. Those clients should be contacted immediately, advised of the planning attorney's inability to continue representing them, and asked to pick up their file and seek new counsel.

Safeguard or Properly Dispose of Inactive Files: Inventory and return files to clients to the extent possible; provide proper notice before destruction of any files; make arrangements for files eligible for immediate destruction, long-term storage of files not eligible for immediate destruction, and for ultimate destruction authority for retained files. *See* Iowa R. Prof'l Conduct 32:1.16(d).

Reconcile the Trust Account and Make Proper Disbursements: Locate all trust account monies and records, coordinate with the depository institutions to execute new signature cards to prevent dissipation by former signatories on the accounts, reconcile the account statements and client ledger cards, and return all monies to the rightful owners. *See* Iowa R. Prof'l Conduct 32:1.15(d), Iowa Court Rule 45.2(2) (prompt accounting and return of funds or property clients or third persons are entitled to receive). Accounting assistance from the Client Security Commission should be requested if the condition or complexity of the accounting records exceeds the capabilities of the designated attorney, especially if there may be shortages in the account. Designated attorneys should be careful about returning trust account monies to clients before the account is completely reconciled.

> **Tip:** If the trust account balance is not sufficient to reimburse all parties for whom trust account balances should exist, the only solution may be to formulate a plan of distribution and present it to the district chief judge for approval. When a trust account balance has been insufficient to fully pay all clients for whom funds should be available in the trust account, the practice in trusteeships under rules 34.17 and 34.18 has been to pay the clients on a pro rata basis from the trust account balance, and assist the clients with filing claims with the Client Security Commission for reimbursement of the unpaid balance from the Client Security Trust Fund.