

Santa Barbara Lawyer

Official Publication of the Santa Barbara County Bar Association
October 2010 • Issue 457



What Happens to Your Law Practice When You (Gulp) Become Incapacitated or Die?

BY JAMES F. COTE

We lawyers are always so busy taking care of our clients' problems that we often can't find the time to make our own plans. Investment plans, business plans, vacation plans, estate plans, fire escape plans - the list goes on and on and on.

How many of us have a plan in place for what would happen to our active legal practice if we unexpectedly became incapacitated or died? Probably not many. The whole idea is so uncomfortable to think about that our reaction is one of convenient avoidance. The need for a plan is even more important for sole practitioners, because we do not have partners already in place to cover for us.

I procrastinated on this topic as long as anyone, even though I should know better: for more than a decade my practice has focused on estate planning, probate, and trust administration. But when my sister (a retired estate planning attorney and accountant) gently prodded me on the subject recently, I had to admit: I had no plans. That has now changed, and it is much easier to do than you might think.

The purpose of this article is to briefly discuss the applicable law and to urge you to promptly draft and sign two short documents that can protect you, your family, your clients and your practice from the emergency of your unexpected absence from practice.

Two Codes at Play

Both the Business & Professions Code and the Probate Code have provisions that will cover the management of your law practice if you become incapacitated or die. The B&P Code focuses primarily on protecting your clients, while the Probate Code provides important provisions to protect your law practice as a valuable asset.

"Closing Down" Under the B&P Code

Under B&P Code §§6180 and 6190, the State Bar or the Superior Court can assume control over your law practice by selecting and appointing a "Practice Administrator."

The job of a Practice Administrator appointed under the B&P Code is to protect your clients - by ending your client relationships and closing down your practice. To put salt in the wound, if you are found to be incapacitated, your license will automatically be placed on inactive status, and you will have to seek reinstatement before you could return to practice, if there is any practice left.

"Continuance" Under the Probate Code

The powers granted a Practice Administrator under PC §§ 2468 and 9764 are greater than those allowed under the B&P Code, because here, the goal is not to just close down your practice, but to continue and preserve it, so you can return to it once you are able, or so your estate can properly market it. BP §6185(a)(7).

Your conservator (PC § 2468) or executor (PC § 9764) can petition for the appointment of a Practice Administrator. If the authority granted your Agent in your Advance Health Care Directive specifically references the law practice, a conservator may not need to be appointed. (See PC §2468(a) which allows any "other person interested in the estate" to seek the appointment of a Practice Administrator.) The advantages go on.

The court shall appoint the lawyer you have nominated (see sample Nomination of Practice Administrator, next page) unless it would be "contrary to the best interest of the estate or would create a conflict of interest." PC §2468(f) and PC §9764(f). If immediate action is necessary, the court can waive notice for the appointment. PC §2468(b) and §9764(b). The powers granted under PC §6185 can be greater than those allowed under BP Code §§6180 and 6190.

The Malpractice Issue

I should add that failing to adequately plan for protecting our clients' interests in the event of your incapacity or death could be malpractice, because we each owe continuing duties of loyalty, confidentiality and service to our clients. These duties follow us unrelentingly into our sickbeds and then even into our graves!

Friendly Advice

As my sister told me: If I unexpectedly became incapacitated or died, it would be much better for everyone involved if my law practice was managed under the Probate Code, by a Practice Administrator I carefully chose in advance.

So, I am telling you: Make an emergency plan for your law practice by signing both an Advanced Health Care Directive and a Nomination of Practice Administrator. Do it now, before your sister brings it up. ■

James F. Cote has been a lawyer in Santa Barbara for 34 years. His practice focuses on estate planning, probate and trust administration. His sister, Christine Gress, now in Santa Barbara and working with her brother part-time, is a retired estate planning attorney with an LLM in tax, and an accountant.

NOMINATION OF LAW PRACTICE ADMINISTRATOR

I, Prepared Lawyer, am licensed to practice law in the State of California and currently practice at Law Office of Prepared Lawyer, located in Santa Barbara, California ("my law practice").

In the event of my disability or death, I hereby nominate _____ and _____, in the order named, to serve as the Practice Administrator of my law practice, and to take control of my law practice during the period of my disability and/or for the course of the administration of my estate. Probate Code Sections 2468 and 9764.

The authority granted hereunder shall be sufficiently comprehensive to allow the Practice Administrator to take control of my files and the assets of my law practice and to speak for me in matters regarding my law practice, including petitioning the Santa Barbara Superior Court for appointment as Practice Administrator. Probate Code Section 2468(a). In the event of my disability, one of the purposes of such an appointment will be to avoid the need for the appointment of a conservator.

I hereby ask the Santa Barbara Superior Court to appoint the Practice Administrators nominated above, unless to do so would adversely impact my clients or other persons interested in my practice or my estate. Probate Code Sections 2468(f) and 9764(f). I also ask that the Practice Administrators be granted all of the powers provided in the Business & Professions Code Section 6185.

Dated:

Prepared Lawyer, Attorney at Law
[Add Notarial Acknowledgment]



Santa Barbara County Bar Association

The Santa Barbara County Bar Association invites its members to nominate candidates for the following awards to be made at its Annual Meeting at the Greek Orthodox Center in November 2010:

Pro Bono

During the calendar year, an individual who donated at least 50 hours of direct legal services to low income persons without expectation of remuneration.

John T. Rickard Judicial Service Award

An individual or firm who made outstanding contributions to the judiciary and/or the local court system.

Richard Abbe Humanitarian Award

An outstanding attorney or judge whose life, leadership and conduct exemplifies humanitarian principles.

Frank Crandall Community Service Award

(established 1995)

Law firm facilitating pro bono services to community non-profit organizations(s). Factors to consider: services benefiting low-income persons; leadership in community projects; nature and quality of work and hours per attorney; percent of firm attorneys involved in pro bono work; existence of a policy encouraging pro bono activity.

Please submit any nominations by October 15 to:

Lynn E. Goebel: lgoebel@lgfamilylaw.com, (805) 879-7513, or

Lida Sideris: sblawmag@verizon.net, (805) 569-5511