

CHAOS CURES

PLANNING AROUND DEATH OF LAWYERS (OR THEIR COMPUTERS) IN SOLO OR SMALL FIRM PRACTICES

DANIEL SCHUMACK

(c) May 2016



SCHUMACK RYALS

CHAOS CURES

SCHUMACK represents lawyers . . .

- bar complaint defense
- fee dispute litigation/arbitration
- private ethics advice
- partnership agreements/unwinds
- law firm continuity/succession planning – *today's focus*

Contact: 703-934-4656 schumack.com

CHAOS CURES

What would happen to your friend Paul, and his practice, if he died (or became comatose) tomorrow?

CHAOS CURES

Let's assume Paul's firm is a partnership.

Paul's partners would be expected to notify affected clients of Paul's death (or incapacity), give them a choice to continue working with the firm, and protect any deadlines while waiting for client instruction on what to do next.

See Ethics Rules 1.4 and 1.16.

CHAOS CURES

Why does Paul's firm need to act?

- Partners have disciplinary exposure for missed deadlines and failure to notify Paul's clients.
- Firm has malpractice liability for missed deadlines.
- Paul's clients represent an ongoing revenue opportunity to the firm.

CHAOS CURES

Partner compliance in the old/paper days was relatively easy and involved looking at things that were physically present in Paul's home or office:

- Check firm's centralized records for calendar, client contacts, and pleadings.
- Confirm against anything on Paul's desk or in Paul's briefcase.
- Ongoing monitoring for any new mail/deliveries or phone callers.

CHAOS CURES

In the new paperless/virtual world there is a very high risk that Paul has virtual accounts and/or passwords, related to his law practice, that are not known to his partners – even if Paul was not trying to defraud his partners.

Discovering these facts may require impounding of Paul's computers, cell phones, and tablets.

CHAOS CURES

What if Paul was the firm's only owner?

Did the firm have any associates?

Did Paul have a longtime executive assistant?

Was Paul a one-man show?

CHAOS CURES

If Paul was a one man show, the bar expected Paul to have a written continuity and succession plan.

See Ethics Rule 1.3 Comment 5

CHAOS CURES

If Paul had one or more associates, the bar still expected Paul to have a written continuity and succession plan.

Absent such a plan, some associates will have a duty to protect client interests.

CHAOS CURES

If Paul had no associates, but had trusted paralegals or executive assistants, the bar expected Paul to have a written continuity and succession plan.

A non-lawyer cannot mop-up Paul's practice without some oversight by a licensed attorney.

CHAOS CURES

If Solo Paul is dead, why does his family care?

- Paul's estate could be sued for Schumack's definition of *post-mortem malpractice*.
- If Paul's firm is an entity, the firm could be sued for malpractice – making the entity worth less to Paul's estate.
- Paul's associates might be sued for malpractice for failure to protect client interests.
- Paul's associates might be disciplined for failure to protect client interests.

CHAOS CURES

With or without a continuity/succession plan, if no lawyer steps forward to mop-up Paul's solo practice, the bar will impose a receivership.

D.C. Bar Rule XI § 15

MD Code Court Rules § 16-777

Virginia Code § 54.1-3900.01

CHAOS CURES

Mopping up after Paul's solo practice will most likely be more difficult than mopping up after a deceased partner. Paul's clients take it on faith that someone will be able to find/decipher Paul's physical and virtual systems if he dies.

Partners usually have combined systems for billing, Rolodex, calendars, and records retention.

CHAOS CURES

In the old/paper days, mopping up Solo Paul's practice would have been relatively easy. It would have involved much the same process as required to close out a partnership interest:

Check Paul's house and office for calendar, client contacts, and pleadings; sort through file cabinets and desks; check Paul's briefcase; and keep a lookout for any new mail/deliveries or phone callers.

CHAOS CURES

In the paperless/virtual world, Solo Paul's practice is a potential minefield. The mop-up lawyer should:

- Try to impound Paul's computers, cell phones, tablets, etc., in order to have any chance of identifying Paul's virtual accounts and/or passwords.
- Try to interview any associates and support staff regarding known deadlines and whereabouts of billing system, calendar, Rolodex, client files, and passwords.

CHAOS CURES

What could YOU do today, while still healthy?

CHAOS CURES

If YOU have partners, you should urge the partners to adopt a written partnership agreement.

If YOU have no partners, you should promptly adopt a Rule 1.3 Comment 5 continuity and succession plan.

CHAOS CURES

If YOU are a soloist, you could contract with a senior associate or a trusted peer to take on continuity and succession responsibility.

Peer-based plans could be reciprocal in nature.

CHAOS CURES

With or without partners, YOU need an estate plan. The estate plan should, at minimum, include a *Will* and a *Power of Attorney*.

These estate plan documents should include language educating the named fiduciaries about the need for speed in protecting client interests and the fact that appointment is not a license to practice law.

CHAOS CURES

With or without partners, YOU need to make periodic lists of all of your virtual accounts and passwords. These lists need to be stored in a secure physical place.

If you have no trusted relatives or law partners, you might consider using an escrow agent to hold these lists.

CHAOS CURES

With or without partners, your computerized data – whether cloud or local – is always at risk of loss due to malice, accident, or ordinary wear and tear.

The solution in all cases is: *backup, backup, backup*. You will, hopefully, use some kind of encryption for those backups. Make sure your mop-up person will be able to find and decrypt your backups.

CHAOS CURES

HAVE A PLAN:

NO LAWYER SHOULD WANT HIS/HER
PRACTICE CLOSED BY A
BAR-APPOINTED RECEIVER