



Preparing for the Unexpected: Backup Lawyers for Solos and Small Firms

Serving Illinois Lawyers

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Preparing for the Unexpected: Backup Lawyers for Solos and Small Firms

Introduction

According to the Illinois Attorney Registration and Disciplinary Commission (ARDC), nearly fifty percent of registered lawyers in Illinois are fifty years old or older. Out of nearly 50,000 active registered lawyers in a private practice setting, nearly 14,000 are solo practitioners and over 13,000 additional lawyers practice at law firms of ten or fewer lawyers. Among those approximately 27,000 solo and small-firm lawyers, only about one in five reported that they had a written succession plan in place. The figure is even lower for solo practitioners – only 17.2% reported that they had a written succession plan in place.

Contingency planning is prudent not only for ethical reasons, but for professional and personal considerations, as well. Absent a written succession or “backup” plan, you cannot provide your clients with the level of service that they expect from you. If you suffer from a short but incapacitating illness, you are likely to return to a law practice experiencing potential malpractice claims, breach of contract claims, lost clients, and cash-flow problems. Moreover, without a backup plan in case of your death or incapacity, you are likely to leave your loved ones and devoted office staff with the burden of trying to ensure that your clients’ needs are met.

This resource is designed to aid in the process of developing and implementing a backup plan whereby you designate a backup lawyer as part of a plan designed to protect you, your firm, your reputation, your clients, your staff, and your family in the event of an unplanned (or, possibly, planned) long-term absence from your practice.

This resource is applicable whether or not you are a solo practitioner. If you practice in a small firm, consider whether it is appropriate to have another lawyer in your firm act as a backup lawyer. It may not be. In that case, consider entering a backup-lawyer relationship with a lawyer outside your firm. For instance, if you are the sole owner and partner in a small firm with one or more associate lawyers, you may not want to delegate control over your firm to a young associate. Also consider that even if you are comfortable leaving the day-to-day operation of your firm to a young associate, you should ensure that the associate understands how the firm is run on a day-to-day basis. Most young associates are not entrusted with this level of responsibility. This resource can provide you with a starting point for your evaluation of your own associates as potential backup lawyers.

Starting the Process: Finding a Backup Lawyer and Formulating a Plan

Before jumping headfirst into the process of selecting candidates to serve as a backup lawyer for your firm, first consider the purposes for which you may need a backup lawyer. Your particular needs will

govern the formulation of a plan and the implementation thereof. Unfortunately, no plan is universally applicable. Any plan will have to be made with your particular requirements in mind.

Under most circumstances, an appropriately designated backup lawyer can provide an invaluable service when a lawyer unexpectedly dies or becomes physically, mentally, or emotionally disabled or incapacitated. But a backup lawyer can be of use under other circumstances, as well, such as in the event of a lengthy absence from your office due to a planned vacation, a military deployment, childbirth or adoption, a long trial, family emergency or recuperation from a medical procedure. Clients will appreciate the foresight and attention to their important legal matters.

Once you have decided why coordination with a backup lawyer will aid your practice, you should begin the process of looking for an appropriate backup lawyer. Consider this an important due diligence process and give it the same care and attention that you would when investigating a potential associate hire or proposed partnership arrangement.

A good backup lawyer will exhibit all the following characteristics:

- Is skilled, dependable, and trustworthy;
- Has a good reputation within the legal community;
- Practices in the same area of law (*e.g.*, estate planning or criminal defense litigation);
- Practices in the same geographical area; and
- Carries adequate professional liability insurance.

Just as importantly, a good backup lawyer must be willing to serve in such a capacity for you. You may find that a backup lawyer is willing to help you in this regard if you are willing to provide the same service to them.

For many solo practitioners, especially those practicing in smaller cities and towns, you may have trouble finding a skilled lawyer in the same practice area who is willing to provide you and your clients with this service. If you have trouble finding a backup lawyer, consider reaching out to former colleagues or law-school classmates or joining a local bar association and getting involved in a section focusing on your practice area(s).

Implementation: Documenting the Details

Once you have found a dependable, trustworthy, *insured* lawyer in your geographical location who practices in your area, you will need to implement your plan by documenting the details in three important respects:

1. Notifying clients of the arrangement and obtaining their consent thereto;
2. Documenting the operational information for your firm and providing the backup lawyer with an introduction to your practice; and
3. Documenting the arrangement with backup lawyer.

Obtaining Clients' Informed Consent

A backup-lawyer relationship will only work if the client offers their informed consent to the arrangement. This is not only the case for practical reasons, as a client would almost certainly be unhappy if their important legal matters were delegated without their permission to an outside lawyer with whom they were not familiar, but for ethical reasons, as well.

For new clients or for new matters on behalf of existing clients, the clients' informed consent should be memorialized in a written engagement/retainer agreement. For instance, the agreement should contain a provision like the following:

"I have arranged with another lawyer (the "Backup Lawyer") to provide legal services to you in connection with the engagement described herein in the event that I am unable to provide those services due to my death, impairment, disability or incapacity [or in the event that I have a planned absence from the office of over fourteen days]. Under such circumstances, and where the Backup Lawyer has verified that there exists no conflict of interest, you hereby authorize the Backup Lawyer to take all reasonably necessary action to provide those legal services described herein, including receipt of confidential information connected with this engagement. There will be no lawyer-client relationship between you and the Backup Lawyer unless and until the Backup Lawyer begins to provide legal services to you in accord with this provision and my agreement with the Backup Lawyer."

You should include in the engagement agreement a disclaimer stating that the client will have no lawyer-client relationship with the backup lawyer unless services are performed in connection with the backup-lawyer role. A potential backup lawyer will not likely agree to accept such a responsibility if doing so could subject them to malpractice liability merely by having agreed to serve in such a role.

For ongoing legal matters on behalf of current clients, you should either enter into an amended engagement agreement including a provision such as that set forth above or you should notify such clients in writing of the plan to utilize a backup lawyer under the circumstances discussed above and ask each client to sign a copy of the letter acknowledging their grant of consent to act in accord therewith.

As discussed in further detail below, it is important that you keep a list of all open client matters for the backup lawyer's use as a reference if their services are needed. The list should articulate for which matters you have obtained written informed consent from the client to use a backup lawyer. Your goal should be to obtain written acknowledgment and consent from every client, so that the backup lawyer will not be restricted in terms of which matter(s) they can handle on your clients' behalf. If you fail or are unable to obtain a client's consent, there is a chance that the client will be left with no legal assistance.

Creating the Backup-Lawyer Agreement

A thorough written agreement between your firm and the backup lawyer is key to an effective backup-lawyer arrangement. Below is a non-exhaustive list of provisions that should be included in the agreement between you and the backup lawyer. Under many circumstances, it will make sense to enter into a reciprocal arrangement, whereby you act as backup lawyer for the other lawyer.

Initiation/Duration/Termination

Identify how it will be decided when backup lawyer will be authorized and responsible for taking over your law practice, even temporarily. Will it be up to the discretion of the backup lawyer? Will it be upon the occurrence of some other event, such as your death or disability as defined by a medical professional, or something else? Will it be based upon the discretion of someone else, such as a close family member or a trusted member of your office staff? Could it be based upon the direction of a personal representative designated in your will? The agreement should also identify the duration of the arrangement and should set forth a procedure for the termination thereof. For instance, it could terminate immediately upon delivery of written notice by you to the backup lawyer; it could terminate immediately upon delivery of written notice by the backup lawyer to you; and/or it could terminate immediately upon delivery of written notice by your designated legal representative to the backup lawyer.

Conflict-Check Procedure

The agreement should set forth a process whereby the backup lawyer will conduct conflict checks in accord with established and documented conflict-check procedures. It would not be surprising for a backup lawyer to be conflicted out of representing one or more of your clients, especially if both of you practice in a small town. Your agreement should ensure that proper conflict-check procedures are followed and, if a conflict exists, it should include a provision dictating a procedure for what to do in such instances (*e.g.*, if a conflict exists, the backup lawyer may not provide services on behalf of your client, but the backup lawyer is given the power to find another lawyer—an alternate backup lawyer—who can serve as a backup lawyer to assist the client).

Independent Contractor

The agreement should provide that the backup lawyer will be acting as an independent contractor to your law firm and that the independent-contractor relationship will begin only upon those terms set forth in the agreement. Omitting such a clause could cause your arrangement to be considered an employer-employee relationship, in which case there may be agency and tax implications that could have been avoided. You may also want to include a disclaimer that there is no lawyer-client relationship and/or partnership relationship between you and the backup lawyer.

Confidentiality

Include a provision requiring the backup lawyer to keep in strict confidence all client information and requiring the backup lawyer to use any such confidential information only to the extent reasonably necessary to carry out the terms of the representation as set forth in the agreement. The backup lawyer should also keep any information relating to the operation of your firm in strict confidence.

Minimum Insurance

You should require the backup lawyer to maintain appropriate professional liability insurance coverage, with policy limits equal to your own. (You should also check the ARDC's website, www.iardc.org, to ensure that the backup lawyer has disclosed to the ARDC that they have malpractice coverage.) Consider that your own professional liability policy as well as the backup-lawyer's professional liability policy could be implicated in a malpractice claim arising from or relating to the backup-lawyer's work on behalf of one of your clients. For this reason, it is preferable that you and the backup lawyer be insured with the same professional liability insurer.

Power of Attorney

Consider whether you want the backup lawyer to have power of attorney or other authorizations, such as an authorized signatory for your financial accounts. If so, include a specific provision in your written agreement to that effect.

Fees

Detail how the backup lawyer will be compensated for their efforts on behalf of your clients. Will the backup lawyer be paid an hourly rate? Will that rate be defined by your agreement with your client? Will the backup lawyer be paid based on a different calculus? Be specific. You may want to include in the agreement a procedure for the adjudication of a fee dispute or a fee claim.

Succession

In the event of your death or permanent incapacity, is the other lawyer asked to wind up the affairs of your law office? Will doing so be based upon the discretion of someone else, such as a close family member or a trusted member of your office staff? Could it be based upon the direction of a personal representative designated in your will?

If the backup lawyer is asked to wind up the affairs of your law office, you may want to consider including in your agreement a method of valuation of your law firm so that, in such an instance, the backup lawyer can buy your law firm with the purchase price paid to you or your estate. Or, if the backup lawyer does not wish to buy your firm, you may want to authorize the backup lawyer to sell the firm to a third party. If you choose to include such a provision, you should include a provision identifying the particular circumstances under which the backup lawyer is authorized and/or required to wind up the affairs of your law firm or to buy or sell the firm. You will also want to designate the backup lawyer as an attorney-in-fact under such circumstances, so that the lawyer can take all necessary actions to wind up or sell the law firm.

Introducing Your Firm and Documenting Firm Procedures for the Backup Lawyer

To ensure a seamless transition to the backup lawyer should the need arise, you must plan ahead. This means that the backup lawyer should be intimately acquainted with the manner of operation of your law practice. Upon the implementation of a Backup-Lawyer Agreement, you should give the backup lawyer a tour of your office. Introduce them to your staff, if any. Demonstrate how to use your computer system, including e-mail, calendaring, and file-management software. Inform them how to use your redundant calendaring system. Show them where files are kept and how to find open or closed files. Explain your conflict-check procedures and ensure they understand how to obtain a list of current clients to perform their own conflict check should they be required to take over the representation of your clients.

Although a tour of your law office will provide the backup lawyer with an invaluable introduction to your law practice, it is no substitute for keeping detailed written information relating to the operation of your firm and arranging for this information to be available to the backup lawyer if needed. You should keep the following information in an accessible and easy-to-understand format:

- A list of all open or active matters, including a clear identification of the client(s) and whether the client has authorized the backup lawyer to provide services on their behalf (also, show the

backup lawyer how to generate a current version of such a list, as they will need to do so to run a conflict check);

- If the status of the open/active matters is not apparent from the foregoing list or a cursory look at the file, consider including a short status report, as well;
- A list of all closed matters, including an identification of the client(s);
- A list of the financial institutions at which your firm has accounts, as well as the account numbers and an identification of the individual who is an authorized signatory to the accounts in your absence (as part of a good system of checks and balances, we recommend that you separately designate a different lawyer to be the backup authorized signatory to your financial accounts);
- The contact information for your firm's IT professional or vendor;
- A list of other vendors and/or individuals who provide the firm with other services;
- Instructions to access file-management, e-mail, voicemail, and billing systems, including any applicable passwords (consider also providing access to accounting information, such as trust-account ledgers, to the lawyer designated as the backup authorized signatory to your financial accounts);
- A description of the firm policy for preserving client files and records;
- A description as to where original client property, including documents, is kept;
- A description of office policies for hiring and paying vendors;
- An explanation as to how to access mail, if the firm has a post-office box or other mail-receipt service, and faxes; and
- If your office space is leased, provide the contact information for the property owner.

We recommend that you keep the list in a secure location, such as a safe deposit box, a safe in your office, or in an encrypted file accessible to the backup lawyer. If there is a trusted member of your office staff, we recommend making the list accessible to that individual who can then pass it along to the backup lawyer if the circumstances so require.

Remember, the backup lawyer is likely to be busy handling their own law practice and the more difficult and time-consuming the process to become acquainted with your practice, the more likely the backup lawyer will be unable to provide your clients with the level of care that they expect of you. As such, you should not only take care to provide the backup lawyer with all the information identified above, but you should take care to routinely update the information. This will greatly aid in the backup-lawyer's ability to identify quickly and painlessly which matters need immediate attention and to act accordingly. Otherwise, the backup lawyer is likely to spend critical time figuring out what needs attention as opposed to taking the necessary action.

Under the best circumstances, you will have a trusted family member or member of your office staff who will be able to provide the backup lawyer with the foregoing information and with access to your office if you are unable to do so. If not, you will need to provide the backup lawyer with a set of keys to your office and instructions to access the foregoing information.

Additional Considerations

Financial Institutions

As discussed briefly above, you will need to decide whether the backup lawyer will be given full access to your firm's bank accounts and account ledgers. Depending on the circumstances, such as the death or permanent incapacity of a solo practitioner, it may be necessary for a third party to have such privileges. We recommend that you designate a different individual – not the backup lawyer – as an authorized signatory to your law firm accounts. [Rule 1.15 of the Illinois Rules of Professional Conduct](#), which addresses the safekeeping of client property, generally requires that client property and the property of other third persons be held by a “lawyer.” As such, the authorized signatory, like the backup lawyer, must be a licensed lawyer.

You should inquire of your financial institution what is necessary to authorize another to sign on your account. Your bank may require that you grant power of attorney, in which case a limited and contingent power of attorney should be executed and approved by the bank. Be sure to articulate in the power of attorney the particular situations under which the power of attorney is to be given, such as only upon your death or only upon written authorization by the backup lawyer. The decision to designate an authorized signatory is incredibly important, as the authorized signatory will have full access to your accounts, even if for only a limited time. You could be held legally and ethically responsible if the designated signatory mishandles client funds.

Your Estate

When entering into a Backup-Lawyer Agreement, you should update your will to include provisions for the continued handling of client matters and the disposition of your law firm that are consistent with those set forth in your Backup-Lawyer Agreement. Designate a personal representative for the express purpose of winding up your law practice. Direct either the executor or the backup lawyer to notify your lawyers' professional liability carrier of your death or disability and to activate or purchase an extended reporting period for your policy.

The terms of your will must necessarily depend on the nature of your practice and the particular provisions in your Backup-Lawyer Agreement.

Life Insurance

You may want to consider taking out a small life insurance policy with your estate as the beneficiary and with an explicit instruction in your will that the proceeds should be used to close out your law practice. A disability policy may be appropriate, as well. Remember that running a law practice costs money and the backup lawyer will not likely be willing to incur those costs.

Professional Liability Insurance

Disclose your backup lawyer to your professional liability insurer. You want to ensure that you are covered in the event of a claim.

Just like any relationship, a good relationship with a backup lawyer will require some time and effort to maintain. On a yearly basis, obtain confirmation from your backup lawyer and through the ARDC website, www.iardc.org, that your backup lawyer carries professional liability insurance.

As mentioned above, in the event of your death or disability, your will and your Backup-Lawyer Agreement should direct either your executor or backup lawyer to notify your lawyers' professional liability carrier and activate or purchase an extended reporting period.

Annual Self-Assessment

You should also conduct an annual self-examination. Are you still keeping records in the same manner? Are you still using the same case-management and docketing/calendaring software or other systems? Do you still have the same office staff? The same vendors? The same policies/procedures? Have you kept up on your efforts to memorialize and obtain consent from *every* client to use a backup lawyer? Has your will changed? Have your client lists been kept current? Have newly hired office staff been introduced to your backup lawyer? Have office procedures (including passwords) changed? If any of the foregoing have occurred, the written procedures left for the backup lawyer should be updated. If the nature of your practice changes dramatically, you may want to reconsider your choice of backup lawyer. In any event, you should renew your Backup-Lawyer Agreement yearly to ensure that it takes into consideration not only the changes in your practice, but potential changes in the circumstances of your backup lawyer.

Conclusion

Remember, it does no good to have office policies/procedures if you don't follow them! It is essential to a working backup-lawyer relationship that you follow your own policies and procedures. For instance, if you delay in documenting that new files have been opened or old files have been closed, a backup lawyer may have no way of knowing which client matters need tending to and which can be ignored.

Be proactive. There is simply no effective way to address your clients' needs in the event of your unexpected incapacitation or death without thinking ahead. Take time this week to consider whether the sort of succession planning discussed herein is appropriate for your practice and, if so, what would be necessary to best protect your firm, your reputation, your clients, your staff, and your family.

Backup Lawyer Do's and Don'ts

Do...

- ✓ Have a written Backup-Lawyer Agreement.
- ✓ Reach out to the Illinois State Bar Association and the Section Council related to your area of practice if you have trouble finding the right lawyer to serve as your backup.
- ✓ Memorialize in writing your clients' informed consent to your Backup-Lawyer Agreement.
- ✓ Keep a list of all open client matters for the backup-lawyer's use as a reference if their services are needed.
- ✓ Make sure your Backup-Lawyer Agreement addresses: initiation/duration/termination procedures, conflict-check procedures, independent-contractor status, confidentiality, minimum insurance, power of attorney, fees, and succession.
- ✓ Perform an annual self-assessment to make sure that you and your backup lawyer are aware of changes in your practice.

Don't...

- ⊗ Leave important stakeholders out of the loop.
- ⊗ Limit your planning to when you retire or close your practice for good.
- ⊗ Choose a backup lawyer who isn't experienced in your area of practice.
- ⊗ Create a backup plan and leave it on the shelf. Keep your plan, your staff, and your backup lawyer up to date on changes to your practice.
- ⊗ Overlook the little things. Give your backup lawyer a tour of the office and your procedures. Demonstrate how to use your computer system, including e-mail, calendaring, and file-management software. Inform them how to use your redundant calendaring system.
- ⊗ Overlook your personal estate-planning needs. Take this time to make sure your estate plan and life insurance are also up-to-date.

Checklist: What to Look for in a Backup Lawyer

- Is the potential backup lawyer skilled?
- Is the potential backup lawyer dependable?
- Is the potential backup lawyer trustworthy?
- Does the potential backup lawyer have a good reputation within the legal community?
- Does the potential backup lawyer practice in the same area of law (*e.g.*, estate planning or criminal defense litigation) for which you may need their services?
- Does the potential backup lawyer practice in the same geographical area?
- Has the potential backup lawyer been disciplined by any disciplinary or regulatory authority?
- Does the potential backup lawyer carry adequate professional liability insurance?
- Do you trust the potential backup lawyer to maintain your legal practice in your absence?

Checklist: Initial Setup of Backup-Lawyer System

- **Due diligence.** Before deciding upon a backup lawyer, conduct a thorough due diligence process relative to candidates for the position. See the *Checklist: What to Look for in a Backup Lawyer*.
- **Obtain clients' informed consent.** Before entering into a formal agreement with a backup lawyer, you should obtain each client's informed consent to be represented by the backup lawyer in the event of your serious impairment, disability, or incapacity. Your clients' consent should be confirmed in writing, either via a signed letter or an engagement/retainer agreement or supplement thereto. For new engagements, use an engagement/retainer agreement that contains the appropriate disclosure of your backup-lawyer agreement.
- **Prepare and maintain a list of open client matters.** The list should identify each matter and should indicate for which matters you have obtained written informed consent from the client to use a backup lawyer. The backup lawyer may only take over the legal representation of clients who have given their informed consent to the system. This list will be made available to the backup lawyer and will provide the backup lawyer with the necessary information to decide which clients they may assist.
- **Prepare a Backup-Lawyer Agreement.** You will need to prepare a proposed Backup-Lawyer Agreement to be executed by you and the backup lawyer. See the *Sample Backup-Lawyer Agreement* to get started. You may want to consider entering into a reciprocal Backup-Lawyer Agreement, whereby you will serve as a backup lawyer to your backup lawyer.
- **Designate an authorized signatory to your financial accounts.** Under optimal circumstances, your backup lawyer will not have direct access to your financial accounts. Rather, another lawyer should be appointed to exercise control over your legal practice's financial accounts if you are unable to do so. You should then introduce the authorized signatory and the backup lawyer to one another, as they will have to work together in the event of your serious impairment, disability, or incapacity. You will need to contact your financial institutions to ensure that your authorized signatory agreement will satisfy the financial institution's requirements.
- **Consult your estate-planning lawyer.** Depending upon the scope of your Backup-Lawyer Agreement, you may need to arrange for the disposition of your legal practice upon your death or permanent incapacitation. You should consult an estate-planning lawyer to incorporate instructions for the disposition of your legal practice into your estate plan and to coordinate plans for the disposition of your legal practice with your Backup-Lawyer Agreement.
- **Prepare and maintain a thorough Office Procedures Manual.** Your backup lawyer will be lost without a thorough, up-to-date manual detailing important information relating to your practice. The manual should include the following and should be updated as circumstances change:
 - A list of all open or active matters, including a clear identification of client(s) and whether the client has authorized the backup lawyer to provide services on their behalf (also, show the backup lawyer how to generate a current version of such a list, as they will need to do so to run a conflict check).

- If the status of the open/active matters is not clear from the foregoing list or a cursory look at the file, consider including a short status report.
- A list of all closed matters, including an identification of the client(s).
- A list of the financial institutions at which your firm has accounts, as well as the account numbers and the contact information for your authorized signatory. Consider providing the backup lawyer with access to view, if not edit, your trust-account ledger.
- Contact information for all office staff.
- Contact information for your spouse or other closest relative and the personal representative of your estate.
- The contact information for your firm's IT professional or vendor.
- A list of other vendors and/or individuals who provide the firm with other services;
- Instructions to access the following systems (including login and password):
 - File-management;
 - E-mail;
 - Voicemail;
 - Time-entry, billing, and invoicing.
- A description as to where files are kept and how they are organized.
- A description of the firm policy for preserving client files and records, including client property.
- A description as to where original client property, including documents, is kept.
- A description of office policies for hiring and paying vendors.
- An explanation as to how to access mail, if the firm has a post-office box or other mail-receipt service, and faxes.
- Instructions as to how to run a conflict check.
- If you have a safe-deposit box, consider providing information as to its location and how to access it. Otherwise, provide this information to your authorized signatory.
- If your office space is leased, provide the contact information for the property owner. Consider introducing your property owner or building management to your backup lawyer.
- **Introduce the backup lawyer to your practice.** Give the backup lawyer a tour of your office. Do the following during the tour:
 - Introduce the backup lawyer to your office staff, if any.
 - Identify for the backup lawyer where files and other important documents are kept.
 - Demonstrate how to use your e-mail, file-management, and calendaring systems.

- Describe how to use your redundant calendaring system.
- Explain your conflict-check procedures.
- Ensure that the backup lawyer knows where to find the Office Procedures Manual (which should be kept in a secure location).
- **Provide the backup lawyer with access to your office.** If you choose not to give a key to your office to the backup lawyer, introduce the backup lawyer to someone, such as a family member or trusted member of your staff, who can provide the backup lawyer with access if necessary.
- **Stay up to date.** Ensure that all pending dates are calendared. Thoroughly document your files as though they are going to be transferred to another lawyer tomorrow. Maintain current time-entry and billing records.
- **Introduce the backup lawyer to your spouse or other closest relative and the personal representative of your estate.** In the event of your disability or death, the backup lawyer will likely have to coordinate with your family and personal representative.
- **Inform your carrier.** Provide the name and address of your backup lawyer to your professional liability insurer.
- **Disability and/or life insurance.** Consider obtaining disability and/or life insurance policies and naming your legal practice as beneficiary. If the backup-lawyer's services are needed, you will want to ensure that your practice has the funds necessary to remain open and functional. Your backup lawyer will not want to use their personal funds to fund the operation of your practice. Moreover, the backup lawyer may not be focused on ensuring that accounts receivable are paid promptly.
- **Update the Office Procedures Manual regularly.**
- **Conduct an annual review of your backup-lawyer system.** See *Checklist: Annual Review of Backup-Lawyer System*.

Checklist: Annual Review of Backup-Lawyer System

Having a functional backup-lawyer system requires regularly updating your Office Procedures Manual, keeping your backup lawyer apprised of significant changes in your firm, and conducting a yearly self-assessment of your Backup-Lawyer System. Below checklist to aid in your annual review.

- **Is the backup lawyer still the right backup lawyer for you?** Take time to reevaluate your choice of a backup lawyer based on the same criteria used to select the backup lawyer in the first place. Consider the following (see the *Checklist: What to Look for in a Backup Lawyer*):
 - Do you still believe that the backup lawyer is skilled, dependable, and trustworthy?
 - Does the backup lawyer still have a good reputation within the legal community?
 - Has your practice changed? Has the backup-lawyer's practice changed? If so, does the potential backup lawyer still practice in the same area of law for which you and your clients may require their services?
 - Has the backup lawyer moved? Does the backup lawyer still practice in the same geographical area?
 - Has the potential backup lawyer been disciplined by any disciplinary or regulatory authority?
 - Does the potential backup lawyer still carry adequate professional liability insurance?
 - Do you still trust the potential backup lawyer to maintain your legal practice in your absence?

If you no longer believe that the backup lawyer should serve in that role for you, restart the process of selecting a backup lawyer. Remember to terminate the Backup-Lawyer Agreement with the former backup lawyer.

- **Is your Office Procedures Manual current?** Go through the manual and ensure that every item is complete and up to date. For instance:
 - Are you still using the same case-management and docketing/calendaring software or other systems?
 - Do you still have the same vendors?
 - Do you still have the same policies and procedures?
 - Have you kept up on your efforts to memorialize and obtain consent from *every* client to use a backup lawyer? Does your client/matters list reflect this?
 - Has your will changed?
 - Have your passwords changed?
- **Has your estate plan changed?** If your estate plan has changed, consider how the change will affect your Backup-Lawyer Agreement and take any necessary action.
- **Has there been a significant change in your office staff or office procedures?** If so, consider giving your backup lawyer another tour of your office. Introduce the backup lawyer to new staff. Demonstrate new office procedures to the backup lawyer.
- **Renew your Backup-Lawyer Agreement.** Review the agreement and, if appropriate, update it to address any significant changes in your practice or your backup-lawyer needs.

Sample Backup-Lawyer Agreement

Below is a sample agreement for use as a template in situations where a backup lawyer will be taking over your law practice in the event of your impairment, disability, or incapacity. This is meant to be a starting point for the drafting of a Backup-Lawyer Agreement that will suit the particular needs of your practice and which will be appropriate for your backup lawyer, as well.

The sample agreement does not provide for the planning lawyer to provide the backup lawyer with a power of attorney to take actions on the planning lawyer's behalf, including closing the law firm in the event of a permanent incapacity or death, nor does the sample agreement contemplate that the backup lawyer arrangement will survive your death. You should consult with your estate-planning lawyer before including any such provisions in your agreement or preparing a separate agreement to designate another individual to close your law practice. For solo practitioners, we recommend making a provision in your will for the disposition and, if appropriate, closing of your law practice in the event of your death.

Because the backup lawyer will be representing your clients and will thereby owe fiduciary duties to your clients, the backup lawyer should not serve as your lawyer or fiduciary, as conflicts of interest may result. As such, we recommend authorizing another individual to close your law practice in the event of your death or to coordinate with the backup lawyer in closing your practice in the event of a permanent impairment, disability, or incapacity.

The sample agreement contemplates that the backup lawyer will represent your clients and, as such, will receive confidential information from and relating to your clients; however, the backup lawyer will not be an authorized signatory to your financial accounts. We recommend that you enter into a separate agreement with another individual to serve as authorized signatory to your financial accounts.

The sample agreement provides that the backup lawyer will have discretion to determine when you have become impaired, disabled, or incapacitated such that the backup-lawyer's responsibilities under the agreement would commence. Depending upon your circumstances, it may be appropriate to have a spouse or close family member, a trusted member of your office staff or some other person determine when the agreement will become effective.

The sample agreement is not reciprocal in nature.

The sample agreement also does not provide for the funding of your law practice during your impairment, disability, or incapacity, other than to the extent that accounts receivable may be used for such purposes. You may want to consider purchasing a disability insurance policy or other insurance policy and naming your legal practice as beneficiary.

The sample agreement does not include an indemnification provision, whereby the planning lawyer will indemnify the backup lawyer for actions taken in good faith in connection with the backup-lawyer's role under the terms of the agreement. You may want to include such a provision.

The sample agreement also contains no provision restricting or purporting to restrict the backup lawyer from forming their own lawyer-client relationship with any of your clients either during the period of your incapacity or afterwards. You may wish to include such a provision, though you should be aware that agreements that purport to restrict a lawyer's ability to enter into a lawyer-client relationship are, in many cases, unenforceable.

SAMPLE AGREEMENT

This agreement (the "Agreement") is between [your name] (the "Planning Lawyer") and [the backup-lawyer's name] (the "Backup Lawyer") (the Planning Lawyer and the Backup Lawyer are referred to collectively as the "Parties") and is intended to protect the Planning Lawyer's clients and the Planning Lawyer's legal practice in the event of the Planning Lawyer's serious impairment, disability or incapacity.

1. Effective Date and Duration. This Agreement shall become effective upon Planning Lawyer's impairment, disability, or incapacity. This Agreement shall remain in effect during the pendency of the Planning Lawyer's impairment, disability, or incapacity or until otherwise terminated as addressed in Paragraph 9 herein.

2. Determination of Impairment, Disability, or Incapacity. The Planning Lawyer shall be considered to be impaired, disabled or incapacitated for the purposes of Paragraph 1 where such impairment, disability or incapacity is such that the Planning Lawyer is unable to practice law or is substantially limited in their ability to practice law. A determination whether the Planning Lawyer is impaired, disabled or incapacitated for the purposes of Paragraph 1 shall be made by the Backup Lawyer in their sole discretion. In making such determination, the Backup Lawyer shall act upon any reasonably reliable information, including but not limited to communications with members of the Planning Lawyer's family and, if available, the written opinion or opinions of one or more licensed physicians or other medical professionals responsible for care of the Planning Lawyer. By this Agreement, Planning Lawyer authorizes the disclosure of Protected Health Information to the Backup Lawyer.¹ The Backup Lawyer may also rely upon the opinions of other individuals with a close and continuous relationship with the Planning Lawyer, including their spouse, relatives, close friends, colleagues, and office staff.

3. Compensation. Planning Lawyer agrees to compensate Backup Lawyer a reasonable sum for services performed by Backup Lawyer pursuant to this Agreement, including acts of representation of Planning Lawyer's clients and acts otherwise taken in connection with the administration of Planning Lawyer's legal practice. Backup Lawyer shall maintain accurate, detailed time records for the purpose of determining the reasonable sum that shall be paid to Backup Lawyer.² Upon the termination of this agreement, Backup Lawyer shall provide to Planning Lawyer or, in the event of Planning Lawyer's

¹ The Planning Lawyer should execute HIPAA Authorizations identifying the Backup Lawyer and authorizing the disclosure of Protected Health Information to the Backup Lawyer upon the Backup-Lawyer's request.

² You may wish to include a provision mandating that disputes relative to the compensation provision of the agreement shall be submitted to arbitration.

continued impairment, disability or incapacity as defined in Paragraphs 1 and 2, above, or in the event of Planning Lawyer's death, to Planning Lawyer's representative, a complete and accurate accounting of the services provided by Backup Lawyer pursuant to this agreement.

4. Rights and Duties of Backup Lawyer. The Planning Lawyer consents to and authorizes the Backup Lawyer to take any action that the Backup Lawyer, in his sole judgment, reasonably deems necessary to represent clients of the Planning Lawyer in the event of the Planning Lawyer's impairment, disability or incapacity, including but not limited to the following:

- A. Representation of Clients.** The Backup Lawyer is authorized to represent each of the Planning Lawyer's current clients as of the effective date of this Agreement, subject to the requirement that the Backup Lawyer has conducted a conflict check in accord with Planning Lawyer's conflict-check procedures and has no conflict of interest with such client. Should Planning Lawyer have a conflict of interest with one or more clients, the Planning Lawyer shall take the actions to appoint an Alternate Backup Lawyer as set forth in Paragraph 5 herein as to any such clients and shall continue to represent any clients with whom no conflict exists. Should the Backup Lawyer commence legal representation of any of the Planning Lawyer's clients, the Backup Lawyer shall take reasonable steps to notify any such client of the same.
- B. Litigation and Settlement of Claims.** The Backup Lawyer is authorized to take any necessary action to litigate and/or settle claims on behalf of the Planning Lawyer's clients.
- C. Access to Office and Legal Files.** The Backup Lawyer is authorized to have complete, unfettered access to the Planning Lawyer's office, office equipment, client files and office administrative documents. This includes access to file-management systems, off-site storage, regular and electronic mail, and computer servers. This also includes the right to use the Planning Lawyer's electronic mail and regular mail to send mail as necessary for the representation of Planning Lawyer's clients. The access authorized pursuant to this paragraph and subparagraph does not include direct access to the Planning Lawyer's financial accounts, including client-trust and operating accounts.
- D. Communication with Clients.** The Backup Lawyer shall serve as counsel to Planning Lawyer's clients, subject to the limitations set forth in subparagraph A, above, and shall be entitled to and required to engage in communications with clients as set forth in the Illinois Rules of Professional Conduct and any other applicable disciplinary or regulatory rule.
- E. Maintain and Store Client Files.** The Backup Lawyer is authorized to take any necessary actions to maintain and store client files.
- F. Accounting.** The Backup Lawyer is authorized to provide a financial accounting and/or statement of legal services to any of Planning Lawyer's clients upon request. The Backup Lawyer is authorized to communicate with the authorized signatory to Planning Lawyer's financial accounts to accomplish such purposes.
- G. Return Client Property.** The Backup Lawyer is authorized to return client property upon appropriate request by a client of the Planning Lawyer.

- H. Charge and Collect Fees.** The Backup Lawyer is authorized to charge fees to Planning Lawyer's clients and to take necessary actions to collect fees from Planning Lawyer's clients, assuming no conflict of interest exists.
- I. Administration of Planning Lawyer's Practice and Payment of Business Expenses.** The Backup Lawyer is authorized to take any reasonably necessary action to engage in the day-to-day administration of Planning Lawyer's legal practice, including but not limited to payment of the usual and customary expenses of the Planning Lawyer's business, the employment of office staff and any tasks incident thereto.
- J. Conclude Legal Representation.** The Backup Lawyer is authorized to take any action necessary to conclude legal matters on behalf of Planning Lawyer's clients and to conclude the legal representation of Planning Lawyer's clients.
- K. Communications with Professional Liability Insurer.** Backup Lawyer is authorized to contact Planning Lawyer's Professional Liability Insurer to provide notice of any claims or potential claims. In the event of any such claims or potential claims, the Backup Lawyer shall cooperate with Planning Lawyer's Professional Liability Insurer.

5. Alternate Backup Lawyer. In the event that Backup Lawyer is unwilling or unable to represent any of Planning Lawyer's clients, by virtue of a conflict of interest, lack of experience or competence, or otherwise, the Planning Lawyer authorizes the Backup Lawyer to appoint an alternative backup lawyer (the "Alternate Backup Lawyer") to carry out the purposes of this Agreement. Upon execution of this Agreement, the Alternate Backup Lawyer shall have all of the rights, duties and obligations of the Backup Lawyer under this Agreement, subject to those rights, duties, and obligations exclusive to the Backup Lawyer, except that in no event shall an Alternate Backup Lawyer appoint an alternative backup lawyer.

6. Backup Lawyer Is Not Counsel for Planning Lawyer. Backup Lawyer is not the attorney for Planning Lawyer and nothing contained within this Agreement shall create an attorney-client relationship between Backup Lawyer and Planning Lawyer. Backup Lawyer may, at their sole discretion, inform the Planning Lawyer's Professional Liability Insurer of any errors or potential errors. Backup Lawyer may also, at their sole discretion, inform clients of Planning Lawyer of any such errors or potential errors and, under such circumstances, shall advise such clients to obtain independent legal advice in connection therewith. Backup Lawyer may also, at their sole discretion, inform any applicable regulatory or disciplinary body of any violations of the Illinois Rules of Professional Conduct or other applicable regulatory or disciplinary rules.

7. Preservation of Client Confidences and Attorney-Client Privilege. Backup Lawyer shall comply with [Rule 1.6](#) of the Rules of Professional Conduct. Backup Lawyer shall take reasonable measures to protect the confidential nature of confidential information learned by or shared with them in the course of their activities as Backup Lawyer pursuant to this Agreement, including in the course of representation of Planning Lawyer's clients. Backup Lawyer is authorized to disclose confidential information to the extent reasonably necessary to carry out the representation of Planning Lawyer's clients.

8. Avoidance of Conflicts of Interest. Before taking any action to represent any of Planning Lawyer's clients, Backup Lawyer shall conduct conflict checks in accord with Planning Lawyer's conflict-check

procedures and shall further confirm that there exists no conflict of interest with any such client. This conflict-check procedure shall include a review of Backup Lawyer's own list of clients and client matters. Backup Lawyer shall also create a list of Planning Lawyer's clients with whom an attorney-client relationship is created by virtue of or in connection with this Agreement and Backup Lawyer shall use such list when performing conflict checks relative to Backup Lawyer's own practice. In the event that a conflict of interest is present, Backup Lawyer shall act appropriately to ensure that client confidences are not revealed or shared and shall further give consideration to whether the Backup Lawyer may continue to represent their own client in light of the fact that confidential information has been obtained by virtue of or in connection with this Agreement.

9. Termination of Agreement. This Agreement shall terminate upon (1) the Backup Lawyer's determination that the Planning Lawyer's impairment, disability or incapacity as defined in Paragraphs 1 and 2 has ceased, terminated or concluded and the Backup Lawyer's written notice to the Planning Lawyer of the same; (2) delivery of written notice of termination, with or without cause, by the Backup Lawyer to the Planning Lawyer and the Planning Lawyer's representative; or (3) delivery of written notice of termination, with or without cause, by the Planning Lawyer or the Planning Lawyer's representative, a legally appointed Guardian over the person of the Planning Lawyer, or the Executor or Administrator of the Planning Lawyer's estate to the Backup Lawyer. Termination shall be effective three (3) business days following delivery of such notice. Termination of this Agreement on the foregoing terms is subject to and limited by any legal or ethical requirement that the Backup Lawyer continue the legal representation of one or more of Planning Lawyer's clients undertaken pursuant to this Agreement. Upon termination of this Agreement, Backup Lawyer shall return to Planning Lawyer or, in the event of Planning Lawyer's continued impairment, disability or incapacity as defined in Paragraphs 1 and 2, above, or Planning Lawyer's death, to Planning Lawyer's representative, any files, records or other property of or relating to Planning Lawyer's legal practice and/or Planning Lawyer's clients. Backup Lawyer shall, and is hereby authorized to, maintain a list of clients that Backup Lawyer represented or whose confidential information Backup Lawyer accessed in connection with this Agreement.

10. Nature of Relationship. The relationship of the Backup Lawyer to the Planning Lawyer as established by and described in this Agreement is that of an independent contractor. Nothing in this Agreement shall be construed to create any agency or employment relationship between the Planning Lawyer or any of its employees, on the one hand, and the Backup Lawyer, on the other hand.

11. Minimum Insurance. At all times during the pendency of this Agreement, the Planning Lawyer and the Backup Lawyer shall maintain in place minimum professional liability insurance with policy limits of \$250,000 per claim and \$500,000 in the aggregate.³

³ You may wish to require that the Backup Lawyer carry a more significant amount of insurance. If you operate a limited liability legal practice, at a minimum, both you and the backup lawyer should carry sufficient insurance to comply with Illinois Supreme Court [Rules 721](#) and [722](#).

12. Notice. All notices to Planning Lawyer, the Planning Lawyer’s representative and the Backup Lawyer shall be given by electronic mail as well as overnight courier or certified mail return receipt requested and shall be effective upon receipt, as follows:

If to Planning Lawyer, to: [identify name, address, and email address]

If to Planning Lawyer’s representative, to: [identify name, address, and email address]

If to Backup Lawyer, to: [identify name, address, and email address]

IN WITNESS WHEREOF, the Parties have executed this Agreement on the date indicated by each signature below.

PLANNING LAWYER

[Planning Lawyer name]

Date

BACKUP LAWYER

[Backup Lawyer name]

Date

ALTERNATE BACKUP LAWYER

[Alternate Backup Lawyer name]

Date

Disclaimer

This booklet includes loss prevention techniques designed to reduce the likelihood of being sued for legal malpractice. It is not the intent of these materials to suggest or establish practice standards or standards of care applicable to a lawyer's performance in any given situation. Rather, the sole purpose of these materials is to help lawyers insured by ISBA Mutual avoid legal malpractice claims, including meritless and frivolous claims. To that end, the intention is to advise lawyers insured by ISBA Mutual to conduct their practice in a manner that is well above the accepted norm and standards of care established by substantive legal malpractice law. The recommendations contained in these materials are not necessarily appropriate for every lawyer or law firm and do not represent a complete analysis of each topic.

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