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Issue Number 2015-6. Managing Transitions: Best Practices for When a Practitioner Passes Away

Disclaimer: This article does not constitute legal advice; it's provided for general informational purposes only.

Benjamin Franklin famously wrote, "[I]n this world nothing is certain but death and taxes." When a Circular 230 practitioner dies, leaving behind a tax practice, there can be many questions and much uncertainty about the practitioner's preparations beforehand and the consequences for clients and those responsible for administering the deceased practitioner's estate. The governing legal obligations and restrictions may vary from case to case depending on the practitioner's status as an attorney, certified public accountant (CPA), or enrolled agent and the state and locality where the practitioner conducted their practice.

Treasury Circular 230, *Regulations Governing Practice before the Internal Revenue Service*, sets forth rules of conduct for attorneys, CPAs, enrolled agents, and other individuals representing taxpayers before the IRS. While Circular 230 does not directly address the implications of a practitioner's death or disability, section 10.33 sets forth aspirational best practices that tax practitioners should consider. This article discusses issues raised by the death of a tax practitioner or the onset of a severe debility in physical or mental health such that they can't viably conduct their practice. The discussion below offers several suggestions and tips to protect the practitioner's clients, firm, and family and ensure compliance with legal requirements of privacy and confidentiality.

Be Prepared by Incorporating Best Practices into Your Business Operations

A key best practice for all practitioners is to communicate clearly and regularly with clients and manage client expectations throughout the representation, from start to finish. This best practice begins when the practitioner first engages with a client. The practitioner should discuss all significant aspects of the representation: its scope, terms, and purposes or objectives, and the actions to be taken during the representation and at its termination. Further, these subjects ideally should be memorialized in a comprehensive engagement letter[1] or agreement with the client.[2] As

[1] BLACK'S LAW DICTIONARY (12th ed. 2024) (defining "engagement letter" as, "A document identifying the scope of a professional's services to a client and outlining the respective duties and responsibilities of both; esp., a letter from a lawyer agreeing to represent a person or entity in some legal matter and formally establishing an attorney-client relationship."); *cf. Cohen v. Radio-Elecs. Officers Union, Dist. 3, NMEBA*, 679 A.2d 1188, 1196 (N.J.1996) ("Agreements between attorneys and clients concerning the client-lawyer relationship generally are enforceable, provided the agreements satisfy both the general requirements for contracts and the special requirements of professional ethics.") (internal citation omitted); *Skoda Minotti Co. v. DiGioia*, 2010-Ohio-4901, ¶ 8, 2010 WL 3934571, *1 (in a case involving a fee dispute between an accounting firm (the plaintiff) and two related former clients (the defendants), plaintiff sent a letter to the defendants proposing to offer them accounting services, and the letter "expressed the terms of the agreement, the services plaintiff would perform, and the responsibilities of both plaintiff and defendants.").

the representation progresses, the practitioner should provide timely updates to the client, documented in writing, and if necessary, revise the engagement document to reflect material developments. If a practitioner unexpectedly becomes mentally or physically incapacitated or dies, the written engagement and updates will assist in any needed transition of the client's matter(s) to another tax professional.

Another best practice is to establish a clear policy for the retention, disposition (including destruction), and return of client files and other records. You can communicate this policy to clients in the engagement document. Retaining client files beyond the need for them leaves tax practitioners at risk for potential exposure of private client information and, upon the practitioner's retirement, incapacity, or death, can cause an unnecessary burden for others in dealing with the files and related records.

A third best practices is implementing a data security and privacy plan that complies with rules, requirements, and guidelines applicable to your practice.[3] Also consider adopting a *business continuity plan* that addresses the effect of extraordinary broadscale events (such as a natural disaster, cyberattack, or pandemic) and lays out steps to be taken if the result is either (1) the practitioner's physical, technological, or other inability to function normally or (2) their general unavailability. Pertinent portions of the plan can be shared with clients (e.g., by inclusion in the engagement document).

Adhering to the above best practices will advance the goal of providing the highest quality representation to clients.

Make a Succession Plan

Practitioners should consider developing a *formal succession plan* for how the sale or termination of the practitioner's business (due to retirement, incapacity, or death) will be handled.[4] Ideally,

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[2] As an example, the American Institute of Certified Public Accountants and the Chartered Institute of Management Accountants (AICPA-CIMA) provide on their website a 2024 Tax Consulting Engagement Letter ("An engagement letter is a contract that establishes the services a practitioner will provide to his or her clients. Each engagement requires careful consideration to address its particular circumstances.").

[3] For general information, see IRS Publication 4557, *Safeguarding Taxpayer Data: A Guide for Your Business*, and IRS Publication 5293, *Protect Your Clients; Protect Yourself – Data Security Resource Guide for Tax Professionals*. If you are an Authorized IRS *e-file* Provider, see IRS Publication 1345, *Authorized IRS e-file Providers of Individual Income Tax Returns* (including "Safeguarding IRS *e-file*" in Chapter 2).

[4] A succession plan is a matter of professional responsibility for attorneys. *See, e.g.*, ABA Model Rule of Professional Conduct 1.3, Diligence, Comment [5] ("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."); *accord* ABA Comm. on Ethics and Pro. Resp., Formal Op. 92-369 (1992) (sole practitioners should "make arrangements for their client records to be maintained in the event of their own death" and "at a minimum include the designation of another lawyer" who would have authority to review the records and notify clients of their attorney's death). *See, generally*, Emily Schmidt, *Should States Require Private Attorneys to Maintain Succession Plans?*, UCLA Law Review Blog (Nov. 23, 2021) (noting that four states mandate succession planning for sole practitioners, while an additional 38 states recommend it).

this plan will be described in the practitioner's engagement document or otherwise shared with clients. Among actions to be included in the development of the plan are:

- Entering into an agreement with another tax practitioner, an "assisting practitioner,"[5] who will close out the practice, and that familiarizes the assisting practitioner with the contours of your practice.
- Keeping an up-to-date inventory of all open client matters, including client names, addresses, and contact information.[6]
    - This inventory should be sufficiently detailed to allow assisting practitioners, or whoever assumes responsibility for the representation, to quickly comprehend the client's needs and expectations, including any upcoming deadlines, and to minimize delays, client inconvenience, or impairment of the representation.
    - All files should be secured – e.g., with passwords and encryption – and steps taken to ensure the assisting practitioner can securely access the records.
- Ensuring the assisting practitioner has access to information and funds to stay current with bills and finances.
- Discussing with clients whether to authorize additional practitioners to represent the client or receive information on the client's behalf via a Form 2848 or Form 8821, *Tax Information Authorization*, respectively, to avoid an interruption in representation before the IRS.
- Devising a communications plan to inform clients in the event of the practitioner's incapacity or death.
- Speaking with your own family members regarding the existence of the succession plan and their involvement with the plan.

What to Do if a Practitioner Becomes Incapacitated or Dies

When a tax practitioner either becomes incapacitated[7] or dies, if there is a succession (or business continuity) plan, the practitioner's firm or assisting practitioner should implement the plan and communicate with the practitioner's clients and the IRS. If there is no succession plan, in the case of a sole practitioner, the executor or administrator of the practitioner's estate, or their guardian or the like (if they're in the care of a fiduciary due to their physical or mental state), will need to take these actions and should contemplate retaining a tax professional to assist them.

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[5] *See* Phila. Bar Ass'n Pro. Guidance Comm., Pa. Ethics Op. 2014-100 (2015) ("Along the lines suggested by [ABA Formal Ethics] Opinion 92-369 [referenced in footnote 4, above], a number of jurisdictions have concluded that appointment by a lawyer of a 'backup attorney' - more often called an 'assisting attorney' - is the favored mechanism for dealing with the closure, sudden or otherwise, of a law practice.").

[6] If the assisting practitioner wishes to confirm who (the specific taxpayers) the incapacitated or deceased practitioner was authorized to represent before the IRS, a Freedom of Information Act (FOIA) request may be filed with the IRS. In response to the FOIA request, the Centralized File Authorization (CAF) will generate a listing of the representative's clients, which the assisting practitioner can then compare against the practitioner's files. See the *Instructions for Form 2848* for more details.

[7] Incapacity is a "[l]ack of physical or mental capabilities" or a lack of "ability to have certain legal consequences attach to one's actions." BLACK'S LAW DICTIONARY (12th ed. 2024) ("Also termed *legal incapacity.*"); *Id*., *Incompetency* ("Lack of legal ability in some respect, ...").

Communication with Clients

- Procedures should be put in place for the handling of ongoing client matters according to what each client wants and for the disposition of client files – i.e., their return to the client, transfer to the assisting or another practitioner, or their destruction. While not required under Circular 230 (and maybe not under bar and accountancy rules), discussion and client decision making up front is beneficial.
    - If a succession plan is in place and the client has previously been informed of, and consented to,[8] what would happen to their matter(s) upon the practitioner's incapacity or death, this advance notice to clients about who will receive their records, and assume responsibility for their cases, will set expectations. As such, providing the notice is a best practice for many practitioners.
- ***Client Choices***
    - If the client chooses to remain with the practitioner's firm or with another practitioner agreed to in advance, the assisting practitioner must ensure that all necessary paperwork is filed with the IRS especially for clients under examination.
    - If the client chooses to go elsewhere, arrangements should be made for the prompt and orderly transfer of all the client's files. Section 10.28 of Circular 230 specifies a practitioner's obligation to return client records upon the client's request; any successor practitioner would have a similar obligation.
- If there is no succession plan and no advance notice to the client, the assisting practitioner should promptly confirm arrangements with each client. No client files should be transferred to another practitioner without the client's permission.
- In carrying out a succession plan, the assisting practitioner should also consider these best practices:
    - Ensure that no files are removed without client permission.
    - Control access to the premises.
    - Backup electronic files, whether stored locally or in the cloud.
    - Interview employees, independent contractors, and vendors to ascertain all known clients and client property beyond available records.
    - Consider publication in local media of the office closure and the need for clients to retain new representation and take possession of their files.
    - Keep copies of files for a deceased practitioner's estate, as necessary, for purposes of potential claims against the practitioner and to help determine the rights to fees and reimbursable expenses.
    - Track and confirm that clients have received notice.
    - Safeguard client confidentiality.

[8] It seems prudent (even if not obligatory) to obtain a client's agreement or approval whenever possible. *Cf.* ABA Formal 92-369, n. 8 ("Although the designation of another lawyer to assume responsibility for a deceased lawyer's client files would seem to raise issues of client confidentiality, in that a lawyer outside the lawyer-client relationship would have access to confidential client information, it is reasonable to read Rule 1.6 [on confidentiality] as authorizing . . . disclosure . . . [under paragraph (a)] ('A lawyer shall not reveal information relating to representation of a client . . . except . . .[if] impliedly authorized . . . to carry out the representation.') Reasonable clients would likely not object to, but rather approve of, efforts to ensure that their interests are safeguarded.").

Communication with the IRS

- **Return Preparer Office (RPO).** If a deceased practitioner had a preparer tax identification number (PTIN), there is no need for the assisting practitioner to inform the RPO of the practitioner's death. The RPO checks the National Account Profile (NAP)[9] monthly and changes PTIN statuses to "deceased" as appropriate.

  In contrast, the RPO should be notified if the practitioner is incapacitated. Notification by a fiduciary with a Form 56, *Notice of Fiduciary Relationship*, on file with the IRS will cause the RPO, upon the fiduciary's request, to change the practitioner's PTIN status to "inactive." If the notification is submitted by someone other than a fiduciary (such as an assisting practitioner), the RPO will log the information, with the PTIN subsequently expiring.

- **CAF Units.** To close out a deceased practitioner's CAF number, the assisting practitioner or a member of the deceased practitioner's firm (or in the case of a sole practitioner and no assisting practitioner, the executor or administrator of the practitioner's estate) should send a written request, by fax or mail, to the CAF Unit identified in the "Where to File" chart in the Form 2848 and Form 8821 instructions. Once the CAF Unit receives the notice, they will mark the CAF # owner as deceased, which nullifies all authorizations listed on the CAF for the deceased practitioner.

  If a practitioner is incapacitated and a fiduciary has been appointed (and a Form 56 has been filed with the IRS), the fiduciary can withdraw the incapacitated practitioner from all active authorizations.

- **Cancelling Employer Identification Number (EIN) and Closing Out Account.** The EIN is a business's permanent federal taxpayer identification number, so it technically cannot be cancelled. But for the EIN of a deceased or permanently incapacitated practitioner's business, the business account that is associated with the EIN can be closed. To close the business account, the practitioner's firm or assisting practitioner should send the IRS a letter that includes:
  - Full legal name of the business
  - EIN
  - Business address
  - Reason for closing the account

The notice assigning the EIN from the IRS should also be enclosed with the close-out letter, if available.

Send the document(s) to either:

Internal Revenue Service
MS 6055
Kansas City, MO 64108

[9] The NAP application is designed as an IRS Master File research tool. An Information Exchange Agreement exists between the Social Security Administration and the IRS for death records. The file that's generated can be accessed by IRS programs using the NAP.

Or

Internal Revenue Service
MS 6273
Ogden, UT 84201

The business account can only be closed once all necessary returns have been filed and all outstanding taxes paid. For more information, see:

- Canceling an EIN - Closing Your Account.
- Closing a Business
- Frequently asked questions: Deceased tax professionals

Ensuring Confidentiality of Taxpayer Information.

The impacted practitioner's firm, the assisting or successor practitioner, and the executor, estate administrator, testamentary trustee, or guardian should safeguard any taxpayer information they receive from or in connection with the incapacitated or deceased practitioner's practice. For general guidance on safeguarding taxpayer information, see IRS Publication 4557, Safeguarding Taxpayer Data (A Guide for Your Business).

Note: Safeguarding client information is also part of an attorney-practitioner's (and law firm's) ongoing professional responsibility. ABA Model Rule of Professional Conduct 1.6, Confidentiality of Information. Likewise, there may be comparable protections at the state level that CPAs must comply with, as there are in California, for example. Cal. Code Regs. tit. 16, § 54.1 ("No confidential information obtained by a licensee, in his or her professional capacity, concerning a client or a prospective client shall be disclosed by the licensee without the written permission of the client or prospective client, except for the following: [enumerating several exceptions, including "disclosures made by a licensee in compliance with a subpoena or a summons enforceable by order of a court"; "disclosures made by a licensee in response to an official inquiry from a federal or state government regulatory agency"; "disclosures made when specifically required by law"; and "disclosures made at the direct request of the client to a person or entity that is designated by the client at the time of the request"].); *see also* Cal. Code Regs. tit. 16, § 54 (generally defining "Confidential information" as "all information obtained by a licensee, in his or her professional capacity, concerning a client or a prospective client[.]").[10]

If you have questions about this article, please contact our office by phone at 202-317-6897 or eFax at 855-814-1722.

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[10] Additionally, although Circular 230 doesn't have a standalone section or sectional provision imposing a confidentiality requirement, section 10.51(a)(15) prohibits the following misconduct: "*Willfully disclosing or otherwise using a tax return or tax return information in a manner not authorized by the Internal Revenue Code*, contrary to the order of a court of competent jurisdiction, or contrary to the order of an administrative law judge in a proceeding instituted under §10.60." (Emphasis added.) The prohibition includes any violation of IRC 6713 or IRC 7216, which are civil and criminal penalties for unauthorized use or disclosure of income "tax return information" (defined in Treas. Reg. § 301.7216-1(b)(3)). Also, Circular 230 practitioners and their firms are subject to similar use and disclosure restriction under IRC 6103(c) to the extent they receive a taxpayer's confidential tax information from the IRS as a disclosure designee, typically designated on Form 8821, or on any other written consent to or request for disclosure.