



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #10

**REQUESTED ACTION:** Approval of the report and recommendations of the Special Committee on Law Practice Continuity.

The Special Committee on Law Practice Continuity was appointed in 2002 to address the practical, legal and ethical issues raised by the death, disability or disappearance of solo practitioners and small firm lawyers and make recommendations for coverage of the practice of a lawyer who dies or is in some way unable to continue providing legal services. Last year the Special Committee published a draft guide, entitled *Planning Ahead: Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death*.

The Special Committee has now proposed a uniform rule, to be adopted by the four departments of the Appellate Division, to establish a process by which the court could designate a caretaker attorney to assist, on a temporary basis, in the management, closure or sale of a law practice on behalf of an attorney who is unable to continue to practice law. The report notes that at present, the four departments each have rules to provide for appointment of a receiver to inventory the files of a suspended, resigned or disbarred attorney, as well as those of mentally or physically incapacitated attorneys. However, the report notes that these procedures are generally used where the attorney in question has been the subject of a complaint or disciplinary proceeding, and does not address those situations where an attorney has ceased practice for another reason.

The proposed rule would cover three categories of attorneys. The first is attorneys who have been suspended or disbarred or have resigned from the practice of law but have not complied with the Appellate Division rules governing the cessation of practice. The proposed rule provides that the Appellate Division may appoint a caretaker, direct the manner of compensation of the caretaker, and direct the caretaker to undertake specific tasks to protect the clients of the disciplined attorney. The second category includes attorneys who are under investigation by a grievance committee and have abandoned their practices; under the proposed rule, the caretaker will attend to the clients' immediate interests and, if appropriate, ensure that the attorney's support staff is compensated. The third category includes attorneys who suffer unforeseen health programs or accidents or who pass away suddenly, in which case the court can appoint a caretaker attorney – who may be an attorney already designated by the incapacitated attorney to handle the law practice in the event of incapacity – to handle the attorney's practice.

The rule envisions the involvement of local bar associations' law practice continuity committees to recruit volunteers to serve as caretakers, to maintain a list of attorneys for consideration by the court in appointing a caretaker, and to provide resources for caretaker attorneys. In the event that a local committee is not available, the report suggests that NYSBA's committee serve this purpose.

The proposed rule was originally circulated to section and committee chairs for comment in mid-November 2004. In response to comments received from interested groups, the Special Committee made several modifications to the draft rule, including the addition of a definition of "caretaker attorney"; the addition of provisions by which the court may require an accounting from the caretaker attorney; an amendment to the procedure for the discharge of a caretaker attorney; and the addition of a provision by which notice is given to interested persons when a caretaker attorney makes a fee application to court.

Included in your materials is the report submitted by the Special Committee in January 2005 (when the report originally was scheduled for House consideration, but was deferred in order to permit other interested groups to comment). In addition to the proposed rule, the Special Committee recommends that consideration be given to amendment of CPLR 321 to provide for an automatic stay when a caretaker attorney is appointed, and recommends that the Committee on Civil Practice Law and Rules be charged with developing appropriate legislation.

Finally, the Special Committee anticipates an ongoing role in encouraging attorneys to plan for the possibility of sudden absence from practice, as well as to act when a local law practice continuity committee is unavailable, and therefore requests that it be designated as a standing committee of the Association.

Attached to these materials is a proposed resolution submitted by the Special Committee for your consideration.

The report will be presented at the June 25 meeting by Special Committee Chair David R. Pfalzgraf and committee member Sarah Diane McShea.

**PROPOSED RESOLUTION FROM  
SPECIAL COMMITTEE ON LAW PRACTICE CONTINUITY**

**WHEREAS, the Special Committee on Law Practice Continuity was appointed in April 2002 to address the practical, legal and ethical issues raised by the death, disability or disappearance of solo practitioners and small firm lawyers; and**

**WHEREAS, the Special Committee has issued a report proposing (1) a uniform court rule to govern the appointment of a caretaker attorney for the practice of an attorney who has died or otherwise become unable to practice law; (2) consideration of an amendment to the Civil Practice Law and Rules to provide a stay in court proceedings when a caretaker attorney has been appointed; and (3) designation of the Special Committee as a standing committee;**

**Now, therefore, it is**

**RESOLVED, that the New York State Bar Association approves the recommendation of the Special Committee with respect to the adoption of a uniform court rule to govern the appointment of caretaker attorneys; and it is**

**FURTHER RESOLVED, that the NYSBA Committee on Civil Practice Law and Rules is hereby designated to evaluate and draft appropriate statutory amendments to provide a stay in court proceedings when a caretaker attorney has been appointed; and it is**

**FURTHER RESOLVED, that the Special Committee on Law Practice Continuity is hereby established as a standing committee of the Association, and is charged with (1) continued educational efforts to assist solo practitioners and small firm attorneys to plan ahead for the possibility of sudden absence from practice and (2) to serve as a source for volunteer caretaker attorneys in those instances in which a local bar association is not available to provide volunteers; and it is**

**FURTHER RESOLVED, that the officers of the New York State Bar Association are hereby empowered to take such other and further steps as they may deem warranted to implement this resolution.**



REPORT OF THE  
SPECIAL COMMITTEE ON LAW PRACTICE CONTINUITY

**Executive Summary**

Attached is a draft rule prepared by the Special Committee, dealing with the appointment of a caretaker attorney in a situation where a sole practitioner is absent from practice, either temporarily or permanently, and has made no provision for another attorney to assume responsibility for the needs of the sole practitioner's clients. This proposed uniform court rule is intended to address several situations in which lawyers leave the practice of law suddenly, without adequate advance planning. The purpose of the rule is primarily to protect the interests of the clients of such lawyers and, to the extent compatible with that goal, to protect the interests of the lawyers themselves.

We submit this proposed rule and a supporting memorandum for consideration by the Association's Executive Committee and House of Delegates at their January 27 and 28, 2005 meetings. Depending on the responses, and any action taken by the House of Delegates, the proposed rule may then be submitted to the Administrative Board for consideration.

Earlier last year, this Special Committee presented to the Executive Committee and House of Delegates a preliminary report on its work, and circulated for review its guide, entitled "Planning Ahead: Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death" (hereafter *Guide*). In advance of those presentations, we invited all NYSBA Sections and appropriate Committees to comment concerning the *Guide*. This fall we presented the attached proposed rule and supporting memorandum to the Executive Committee, asking their leave to similarly circulate said documents for review by the Sections and Committees, in advance of formal consideration of the proposed rule at the Annual Meeting. The responses we received to the draft of the *Guide* and the proposed rule are attached.

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\*The *Guide*, titled "Planning Ahead: Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death" is available at the following Web URL: <http://www.nysba.org/planningahead>; or you may request a copy from Terry J. Brooks, 518-487-5580, or by e-mail to [tbrooks@nysba.org](mailto:tbrooks@nysba.org)

## **A. Background**

### **Creation of the Committee and Assigned Mission**

In April 2002, the Special Committee on Law Practice Continuity was created by then NYSBA President Steven Krane to address the practical, legal and ethical issues raised by the death, disability or disappearance of solo practitioners, to ensure that clients can continue receiving legal services without interruption, and that the affairs of the lawyer's solo practice can be resolved or continued in an orderly fashion. The Special Committee on Law Practice Continuity was asked to prepare a *Guide* to assist solo and small firm practitioners in planning an orderly transition of their practice, as well as to recommend a mechanism whereby another attorney could be authorized to intervene and protect the interests of the clients of a deceased, disabled or absent sole practitioner who had not made adequate provision in advance for his or her inability to continue representing clients. While contingency plans and caretaker agreements are widely used in other professions, there is little guidance on the subject for New York lawyers. Our goal has been to provide such guidance and recommend such changes to existing court rules as may be needed for the proper handling of such situations. The Committee has also undertaken to examine problems associated with the reconstruction of law practices in the aftermath of disasters, such as the World Trade Center tragedy, when more than 14,000 lawyers were either temporarily or permanently displaced. While we all hope that no more disasters of that magnitude will occur, the same problems apply in the case of fire, flood or other natural disaster affecting a law firm's offices.

Mr. Krane indicated that "there is a need in New York to address the practical, legal and ethical issues raised by the death, disability or disappearance of solo practitioners and small firm lawyers. Our goal is to provide clear guidance to lawyers and bar associations about maintaining continuity that allows for uninterrupted legal services for clients, consumers of legal services. When a solo practitioner or small firm lawyer dies or is in some way unable to provide service, and has not made contingency plans, we need to ensure that there is in place an appropriate legal framework established by statute, court rule or ethics code that allows clients to continue being served. Right now, no such mechanism exists, and we believe that addressing this issue is long overdue."

The stated Mission and Charge of the Committee is as follows:

"The Committee is charged with the task of addressing the practical, legal and ethical issues raised by the death, disability (short or long term) or disappearance of solo practitioners and small firm lawyers, where there is a concern about the ongoing legal work of the practitioner's clients. It should produce and submit to the Executive Committee and House of Delegates a report providing clear guidance to lawyers and bar associations about maintaining continuity that allows for uninterrupted legal services for clients. Recommendations should be made for coverage of situations where a solo practitioner or small firm lawyer dies or is in some way unable to provide continuing legal

service, and has not made contingency plans for coverage of ongoing legal work. The report should recommend procedures to ensure that there is in place an appropriate legal framework established by statute, court rule and/or ethics code that allows clients to continue being served. Such report should recommend steps that allow for another attorney or attorneys, acting in an official caretaker role, to tend to the legal needs of clients of solo practitioners. The report should also address problems in the reconstruction and continuation of law practices after a disaster, such as a fire, flood, earthquake or other natural disaster, or in the case of an act of terrorism or other such attack.”

### **Preceding Work by the Committee on Attorney Professionalism**

Prior to the appointment of this Special Committee, NYSBA’s Committee on Attorney Professionalism had done substantial work in this area. Committee members had gathered information on the subject from various states and NYSBA Sections, and had produced an interim report, summarizing their findings and identifying all of the issues that should be addressed in this project. They also provided copies of all the materials they had collected on the subject. The Chair of that Committee, James M. Altman, and two of its members, Barbara F. Smith and Susan F. Gibraltar, serve on the Professional Continuity Committee and have been very active members. We applaud and appreciate the firm foundation for this project provided by the Committee on Attorney Professionalism, and thank its members for their valuable input.

### ***B. Organization of our Committee***

We viewed this project as falling into four major quadrants: the absence of a solo practitioner from practice on a temporary or permanent basis and, in either situation, where there is a plan in place to deal with such absence, or where there is no such plan in place. Since mass disaster is one of the contexts in which such problems might arise, and in view of the great loss and disruption events like those of 9-11 may cause, we gave special attention to planning for and recovering from such an event. Our Committee organized itself into a number of subcommittees, dealing with various aspects of its mission, as follows:

#### **Voluntary Cessation of Practice Subcommittee**

- Temporary absence due to illness, disability or rehabilitation
  - Who will be the assisting attorney?
  - What will be the source of the assisting attorney’s authority? Extent of liability?
  - Who will pay the assisting attorney?
- Permanent absence due to retirement or sale of practice

#### **Temporary Absence from Practice Due to Illness, Disability or Rehabilitation**

- Judicial vs. non-judicial assistance
- Who will be the caretaker?
- What will be the source of the caretaker’s authority?

- Extent of liability?
- What will be the source of payment for the caretaker?
- Resumption of practice issues

#### **Death of Solo Practitioner Subcommittee**

- Planned solution
- Assisting attorney – non-judicial solution
- Judicial solution
- Handling the estate of the solo practitioner

#### **Permanent (Other than Death) Cessation of Practice Due to Disbarment, Suspension or Disappearance**

- Judicial solution in each case
- Who will be the caretaker?
- What will be the source of the caretaker’s authority? Extent of liability?
- What will be the source of payment for the caretaker?

#### **Disaster Planning and Recovery Subcommittee**

- Develop model disaster plan
  - Who has critical information?
  - Passwords?
  - Trust account information?
  - Centralized calendar?
- Data
  - Business and personal
  - Computer, credit cards, etc.
  - Back-up off site
  - Secondary back-up
- Casualty insurance and malpractice insurance
- Videotape whole office annually
- Damaged files - How handled?

The full Committee met bimonthly after its creation, until it had completed its work on the *Guide* and proposed rule. Subcommittees met between meetings of the Committee, by conference call, to pursue their individual assignments.

### ***C. The outcome of our Committee’s work: A Guide for a “planned” situation and a proposed rule for appointment of a caretaker in an “unplanned situation”***

#### **1. Development of a Guide for situations where the sole practitioner is temporarily or permanently absent from practice, with a plan in place**

We found that guidance on how to set up a plan to deal with a solo practitioner’s absence is rather scant, particularly if one seeks information and guidance tailored to the needs of New York practitioners. The most comprehensive materials we found on the subject were produced

by the Oregon State Bar Professional Liability Fund. In Oregon, they have compulsory membership in the Bar and compulsory malpractice insurance, through a “captive” insurance plan run by the Bar. Accordingly, with funding and staff to develop such materials, they have developed some very helpful resources. They were kind enough to give us permission to adapt some of their materials for use in New York. The Virginia Bar Association has a good set of materials available at its Web site, and it was willing to share those materials with us, to adapt for New York use. With their permission, we borrowed language from sample will provisions prepared by James E. Brill, Esq., a solo practitioner from Houston, Texas, and Edward S. Schlesinger, Esq., of Hofheimer, Gartlir & Gross, in New York City.

By piecing together materials from these various sources and adapting them to use in New York, and with original drafting of some documents by members of our Committee, we have fashioned a *Guide* for solo practitioners who wish to plan and prepare for the contingency of their sudden absence from practice. This *Guide*, which we submit with this report, contains references to a number of attached documents (checklists, sample letters, a sample will provision, etc.) designed to provide New York attorneys a useful set of resources with which to prepare such plans.

Essentially, the *Guide* contains guidelines, FAQs, checklists and sample forms to help assisting attorneys in “planned” situations, whether they are managing an absent attorney’s practice temporarily, or closing or selling the practice because the absence is of a permanent nature. The *Guide* also contains suggestions and forms for attorneys in their estate planning and in establishing their firm’s procedures, to make it easier for an assisting attorney to effectively accomplish the tasks required.

We plan to publish this *Guide* and attendant resources in print form, as a booklet on the subject; to post these materials with other “Attorney Resources” on NYSBA’s Web page; to write articles about the subject for occasional inclusion in NYSBA’s periodicals (*Journal*, *News*, *Digest*, and Section newsletters/journals); and to make these materials the basis of CLE programs on the topic. We plan to make the *Guide* available to local and specialty bar associations throughout the state, and to bring our work to the attention of New York’s Conference of Bar Leaders, inviting their cooperation in disseminating information and materials on this subject.

## **2. Development of a proposed uniform Court rule when a solo practitioner is temporarily or permanently absent from practice, with no plan in place**

In 2001, the New York State Bar Association Committee on Attorney Professionalism identified the need for a uniform process, following a study of the consequences of attorneys’ failure to plan for the management or dissolution of their law practices upon disability or death. The Committee observed that there was a dearth of appropriate policies or rules in New York State to address the problem identified.

The Committee learned that an *ad hoc* approach had developed in various counties, whereby a volunteer attorney would be contacted, often by a local Bar Association executive or staff member, to assist with the management of a practice for an attorney who, for one reason or another, was unable to continue practicing. These attorneys, in many of these situations, devote



numerous hours of work sorting through reams of paperwork, analyzing case files, addressing court calendars, etc., often without compensation and with uncertain standing for professional liability issues. In many parts of the State, there is no organized response to the problem at all.

In view of this situation, the Special Committee on Law Practice Continuity set about the task of drafting a proposed uniform Court rule, to establish a process whereby a court may appoint a caretaker attorney to assist in the temporary management, permanent closure or sale of a law practice on behalf of an attorney who is unable to continue to practice law, either temporarily or permanently. The primary role of the caretaker attorney is to protect the clients of the attorney who has become incapacitated and, to the extent not incompatible with that obligation, to protect the interests of the disabled or deceased lawyer.

This proposed uniform court rule is intended to address several situations in which lawyers leave the practice of law suddenly and without adequate advance planning. In addition, the Committee anticipates that, even with advance authorization, a caretaker attorney designated by a solo practitioner may wish to seek court appointment under this proposed rule.

Each Appellate Division presently has one or more rules providing for the appointment of a receiver to inventory the files of a disbarred, resigned or suspended attorney, as well as an attorney who has become incapacitated, mentally or physically, and is otherwise unable to continue practicing law. Presently, such appointments, which are relatively rare, occur following a request from a disciplinary or grievance committee, acting upon numerous client complaints. However, it was clear to the Committee that there is a greater need for the appointment of “caretaker” attorneys, including in situations where the incapacitated lawyer has not been the subject of any complaint or disciplinary proceeding.

Lawyers may be incapacitated temporarily or permanently, physically or mentally, in circumstances in which their inability to continue practicing was not anticipated or planned for. Lawyers practicing in partnerships or professional corporations generally, although not always, have built-in protections for their clients, who are represented by the law firm and not by the individual lawyer. In those cases, it is the law firm's responsibility to make sure that the clients' interests are fully protected. However, sole practitioners may or may not have done adequate advance planning for their unforeseen incapacity. And, even when a sole practitioner has made adequate advance plans, it may be advisable for the lawyer who is assuming responsibility for the practice of another attorney to be formally appointed by a court as a “caretaker” attorney, pursuant to this proposed rule.

Each Appellate Division has its own rules dealing with lawyer incapacity or inability to practice. The proposed uniform “caretaker” rule incorporates provisions common to the existing court rules and is an effort to ensure that the same remedies are available in all four departments, to assist lawyers, clients, disciplinary and grievance committees and, where appropriate, bar association law practice continuity committees. The proposed uniform court rule is an amalgam of our present court rules and the most successful approaches presently used in other jurisdictions.

The first category in which appointment of a caretaker attorney is appropriate involves lawyers who are disbarred, resigned or suspended and who have not complied with the Appellate Division's disciplinary order and rules governing the conduct of such lawyers—for example, by not notifying clients of their inability to continue practicing and not returning files to the clients or new counsel, as required. It is not unusual for lawyers facing serious discipline to disregard their obligations to clients and courts. In such situations, the Appellate Divisions sometimes appoint receivers, either a member of the appropriate disciplinary committee or a lawyer in private practice. Receivers are rarely compensated for their work, which is typically done on a voluntary basis. The proposed rule incorporates existing court rules and expands upon the current practice. The rule provides that the Appellate Divisions may appoint a caretaker attorney, direct that compensation be paid, either from the disciplined lawyer's practice or from other available sources, and direct the caretaker to undertake specific tasks and responsibilities, as directed by the appointing court, for the protection of clients. The appointment of such outside caretaker attorneys will relieve the disciplinary committees of the burden of inventorying and reviewing client files and will also protect clients from the disclosure of their confidential information (and possible waiver of attorney-client privilege), which can occur when a public agency reviews private client files and documents.

The second category involves lawyers who have not yet been disciplined, but who are under investigation by a grievance committee. A common problem is lawyers who abandon their practices, either physically or constructively as a result of disability. In such case, the disciplinary committee may receive a flood of client complaints citing a lawyer's disappearance, incapacity or other unavailability. The appointment of a caretaker attorney in such cases will effectively protect the clients and enable the disciplinary committee to continue and complete its investigation. A caretaker attorney will attend to the clients' immediate interests -- *e.g.*, by making sure that all clients are notified, that bank accounts and funds are protected, that court dates are not missed or, if already missed, that courts are promptly notified, and, where appropriate, that the attorney's support staff are compensated for their ongoing work and assistance with client matters.

The third category involves lawyers with no disciplinary problems or pending complaints. Lawyers may suffer unforeseen, incapacitating health problems or sudden accidents which render them temporarily or permanently unable to return to their offices or handle client matters. Such attorneys may even have provided for a colleague to step in to handle their law practice in the event of their disability or incapacity. Even in such situations, it is preferable for the caretaker attorney to act with the imprimatur and under the supervision of an appointing court. Just as the Appellate Division rules permit the Supreme Courts to determine the division of fees between a substituted lawyer and a lawyer who has been disbarred or suspended, so it is appropriate to permit the Supreme Courts to appoint caretaker attorneys in situations which do not involve allegations of professional misconduct by the temporarily incapacitated, disabled or deceased lawyer.

Finally, the proposed uniform rule incorporates what has been the practice in some departments of relying on bar association members to act, in a voluntary capacity, as caretaker lawyers or receivers for the practices of lawyers who become incapacitated, temporarily or permanently. The rule will protect lawyers appointed as caretakers from unwarranted complaints

about the proper handling of their responsibilities and will ensure that client confidences are appropriately protected.

The rule envisions the creation of bar association law practice continuity committees throughout the state. Those committees will be able to assist in several ways. They may learn of a lawyer's incapacity, in many cases, sooner than clients or the courts, and will be able to apply for the appointment of a caretaker expeditiously to protect the interests of the lawyer's clients. We envision training lawyers to become caretakers and anticipate that the New York State and local Bar Associations will develop an experienced pool of lawyers, from which the courts may appoint individuals to act in specific cases. This will not limit the courts' ability to appoint caretakers, but will provide a resource as, in some parts of the State, it has often been difficult to find volunteer attorneys to serve in this capacity.

Nothing in the proposed rule will restrict the Appellate Divisions from making any appointment for the protection of clients or limit the ability of the disciplinary committees to investigate and pursue allegations of professional misconduct by any attorney within their jurisdiction. The purpose of the proposed uniform rule is client protection.

#### ***D. Malpractice and professional insurance issues—a tribute to a fallen colleague***

There were a number of professional practice-related issues which the Committee considered, pertaining not only to the temporarily or permanently-absent attorney, but also to the caretaker attorney who assumes certain responsibilities and liabilities in the discharge of the caretaker attorney's duties. These issues are addressed in our *Guide*. We gratefully acknowledge the assistance of Anne B. Keenan from Bertholon-Rowland, who served on this Committee and very ably guided us on the many aspects of professional malpractice and liability insurance. Ms. Keenan died in June of 2004, in a tragic accident, and our work is dedicated to her memory.

Our Committee considered the question of how best to protect the interests of clients, as well as the interests of those lawyers willing to serve as appointed caretaker attorneys. There are at least two distinct problems. The first is that the original lawyer may have committed malpractice, which is discovered by the caretaker in the course of his or her work. Typically, such malpractice will be covered by the original lawyer's policy, assuming there was coverage. The second problem is the risk to clients that the caretaker attorney will be negligent in the handling of the clients' matters. Such negligence might or might not be covered by the original attorney's legal malpractice policy. The Committee was concerned that clients not be exposed to greater potential harm as a result of the appointment of a caretaker attorney, which is intended to protect their interests, first and foremost. In the Committee's view, the optimal solution is to require that any attorney appointed as a caretaker have malpractice insurance, even a limited policy. In situations where the caretaker attorney is a retired attorney (or someone who would not normally have current malpractice insurance coverage), we would recommend that this Association explore the feasibility of establishing a low-cost group insurance policy, to cover appointed caretaker attorneys who have no malpractice insurance. This would be similar to the group policies available to cover otherwise uninsured attorney volunteers for pro bono legal work. The alternative – not requiring malpractice insurance for caretaker attorneys – would

leave the clients at risk and without remedy in the event that the appointed caretaker was negligent in handling his or her responsibilities.

***E. Funding and reimbursement of expenses***

Our Committee had numerous and lengthy discussions about one of the more troubling issues attending the sudden and unplanned absence of a sole practitioner from practice—how will the Court-appointed caretaker attorney and the remaining office staff of the absent attorney be compensated, and how will expenses of the firm be paid? We recommend that the first source of such compensation be the assets of the affected attorney’s practice, subject to rights of that attorney’s family members or estate, if the attorney is deceased. This makes the most sense, for the caretaker attorney’s services will, in most cases, enhance the value of the practice, which may be sold or transferred. Caretakers may also be compensated from the fees paid by the clients of the practice which the caretaker attorney is assisting. Finally, if there are insufficient assets and income, as a last resort, appropriate compensation and reimbursement of expenses could be authorized by the appointing authority. In the case of temporary incapacity, the affected lawyer might remain ultimately responsible for such payment. And, in some cases, compensation might be available from other sources, such as the Lawyers’ Fund for Client Protection or the Lawyers’ Assistance Trust.

The Committee also concluded that the caretaker attorney should be permitted to purchase the law practice, subject to approval by the appointing Court and agreement by the affected attorney’s survivor or personal representative. The Committee, however, was wary of allowing caretaker attorneys to “cherry pick” clients and cases from the practice they were appointed to oversee, as in some cases this would lessen the value of the practice and diminish its attractiveness to potential buyers.

***F. Proposed amendment to the CPLR, to facilitate implementation of the rule***

The main goal of our proposed rules is to protect the interests of the clients of the deceased or disabled lawyer. Although a court may have the inherent power under the proposed court rules to stay all proceedings in which the attorney has appeared, such power is not explicitly granted to the court and it is doubtful that the court can be given such power merely by court rule. CPLR 2201 gives a court the power only to stay an action in its own court, not elsewhere.

CPLR 321 provides that if an attorney dies, becomes physically or mentally incapacitated, is removed or suspended or otherwise disabled, no further proceeding shall be taken in an action in which such attorney has appeared, without leave of the Court, until 30 days after notice to appoint another attorney has been served on the client. Under the proposed caretaker rules, there are instances where a caretaker may be appointed which would not come under the current CPLR 321, such as when the attorney has retired, disappeared or abandoned his practice. By adding the provision that CPLR 321 applies when a caretaker attorney is appointed, the stay becomes automatic and the client is protected.

Accordingly, to assist with the implementation of our proposed rules, we recommend that this Association, through its Committee on Civil Practice Law and Rules and its legislative program, seek the following amendment to the CPLR:

**CPLR 321. Attorneys**

(a) No change

(b) No change

(c) Death, removal or disability of attorney. If an attorney dies, becomes physically or mentally incapacitated, or is removed, suspended or otherwise becomes disabled at any time before judgment, or has a caretaker attorney appointed for him, no further proceeding shall be taken in the action against the party for whom he appeared, without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs.

[Added material is underlined.]

***G. Preparation of a Guide for Court-appointed caretaker attorneys***

We are in the process of preparing a Guide for attorneys who may be appointed by a Court, pursuant to the proposed rule described above, to serve as caretaker attorneys during the temporary or permanent absence of a sole practitioner, where that sole practitioner had made no plans or provisions for a caretaker or successor attorney. In rough-draft form at present, this Guide contains much of the material set forth in our first *Guide* (“Planning Ahead: Establish an Advance Exit Plan to Protect Your Clients’ Interests in the Event of Your Disability, Retirement or Death”), to the extent that such materials relate to the Court-appointed setting. It also contains new materials, unique to the Court-appointed setting. We are prepared to finish work on the second Guide fairly promptly, but think it appropriate to wait for the reaction of NYSBA’s Executive Committee and House of Delegates to our proposed rule, prior to finalizing the corresponding Guide. If our proposed rule is approved by NYSBA’s governing bodies, and subject to any amendments that may be made to the wording of the rule, we would anticipate submitting our second Guide, to be included with the proposed rule and supporting memorandum when those documents are presented to the Administrative Board of the Courts. We trust that such a Guide would be useful to Court-appointed caretaker attorneys.

***H. Continuation of this group as a standing committee to serve as a resource in Court-appointed caretaker attorney situations, and to continue refinement of the guides***

We view our *Guide*, and the corresponding Guide we are preparing for use by Court-appointed caretaker attorneys, to be documents subject to ongoing refinement and improvement. We anticipate and hope that attorneys who use our *Guide* to plan ahead for their sudden absence from practice, and attorneys who are called upon by such plans to act as caretaker attorneys, will, based on their practical experiences with such situations, suggest improvements that can be made to our *Guides*. We will welcome and incorporate such shared wisdom and innovation, for the benefit of all. We anticipate an ongoing role in encouraging sole practitioners to plan ahead for the possibility of their sudden absence from practice. We are prepared in years to come to involve ourselves in CLE programs and will prepare articles on the subject for publication in

legal periodicals throughout the state. For those purposes, we think this Committee should be continued.

Likewise, in situations where there has been no advance planning and where a program, established pursuant to our proposed uniform court rule of the four Appellate Divisions, would be well-served by the availability of panels of volunteers throughout the state (preferably on a county-wide or judicial district level, involving Law Practice Continuity Committees from the respective local county bar associations), we anticipate the need for the New York State Bar Association to keep in place its Committee on Law Practice Continuity. Our Committee would be able to provide a source of volunteers where the local county bar associations were unable to locate appropriate volunteers. These volunteers would serve on local panels which would be available to render assistance where a sole practitioner was deceased or incapacitated, temporarily or permanently, and where no "planned arrangements" had been made to handle the attorney's practice. In addition to these panels, or as part of them, we would recommend that local bars attempt to insure that their program has access to volunteers in a wide variety of practice areas, so that specialized expertise might be available to handle a deceased or incapacitated attorney's practice and clients, as needed.

Respectfully submitted:

David R. Pfalzgraf, Chair  
James M. Altman.  
Francis X. Carroll  
Anthony E. Davis  
Jeffrey M. Fetter  
Susan F. Gibraltar  
S. Jeanne Hall  
Paul Michael Hassett  
Douglas C. Johnston  
Kim Steven Juhase  
Anne B. Keenan  
Steven C. Krane  
Anne Maltz  
Sarah Diane McShea  
Mark S. Ochs  
Robert L. Ostertag  
Timothy J. O'Sullivan  
Anthony R. Palermo  
Michael Philip, Jr.  
Hon. Eugene F. Pigott, Jr.  
Barbara F. Smith.  
Leroy Wilson, Jr.

June 9, 2005

**PROPOSED UNIFORM COURT RULE ON THE APPOINTMENT OF CARETAKER ATTORNEYS**

**22 NYCRR Part 1250**

**Client Protection; Voluntary or Involuntary Cessation of Law Practice; Caretaker Attorneys**

- 1250.1 Application
- 1250.2 Who May Seek Appointment of a Caretaker Attorney
- 1250.3 Request for Appointment of a Caretaker Attorney
- 1250.4 Appointment of a Caretaker Attorney
- 1250.5 Duties and Role of a Caretaker Attorney
- 1250.6 Compensation of a Caretaker Attorney
- 1250.7 Bar Association Involvement
- 1250.8 Lawyer Assistance Committee Designation

**1250.1 Application**

(a) This rule shall apply to an attorney who:

- (1) has resigned or been suspended or disbarred from the practice of law pursuant to Judiciary Law §90(2) or (4), or who is under investigation by a departmental disciplinary committee, a grievance committee or a committee on professional standards;
  - (2) has been judicially declared incompetent or incapable of caring for his or her property; involuntarily committed to a mental hospital, alleged or found to be incapacitated from continuing to practice law by reason of physical or mental illness or infirmity or because of addiction to drugs or intoxicants, or for whom a guardian has been appointed pursuant to Article 81 of the Mental Hygiene Law;
  - (3) has disappeared or abandoned the practice of law;
  - (4) has retired;
  - (5) has died; or
  - (6) has otherwise become unable to practice law, either temporarily or permanently.
- (b) In the event an attorney to whom this rule applies has made adequate provision for the protection of his or her clients in compliance with court rules or court order, or by contract, designation or other arrangement, such provision shall govern to the extent consistent with these rules unless the Appellate Division or Supreme Court determines, upon a showing of good cause, that these rules should be invoked. If the attorney is practicing in a law partnership, professional corporation or limited liability company, this rule shall not be invoked unless a court determines, upon a showing of good cause, that the entity in which the attorney practiced is no longer legally responsible for or able to handle matters previously entrusted to the attorney.
- (c) The purpose of this rule is to protect clients and, to the extent possible and not inconsistent with the protection of clients, to protect the interests of the attorney to whom this rule applies.



- (d) "Respondent", as used in this rule, applies to an attorney who has been disciplined, or is subject to discipline, pursuant to Judiciary Law §90(2) or (4). "Assisted Attorney" refers to an attorney who is not subject to disciplinary proceedings, but to whom this rule otherwise applies. "Caretaker Attorney" shall mean an attorney appointed by a court pursuant to this rule. An attorney may designate another attorney by contract, appointment or other arrangement to handle or assist in the continued operation, sale or closing of the attorney's law practice in the event of such attorney's death, incapacity or unavailability. An attorney so designated may seek appointment as a "caretaker attorney" under this rule.

### **1250.2 Who May Seek Appointment of a Caretaker Attorney**

- (a) Related to an attorney discipline matter. A departmental disciplinary committee, grievance committee or committee on professional standards may commence a proceeding for the appointment of a caretaker attorney or attorneys in the Appellate Division. In the event that more than one proceeding pertaining to a respondent or assisted attorney is commenced under this rule, the proceedings shall be consolidated before the Appellate Division, which may appoint a caretaker attorney or attorneys, as it deems appropriate.
- (b) Not related to an attorney discipline matter. A member of a bar association law practice continuity committee (defined in §1250.7, below), an attorney licensed to practice law in this state, or any other interested person, may commence a proceeding for the appointment of a caretaker attorney or attorneys, either in the Appellate Division or in the Supreme Court of the county in which the respondent or assisted attorney last resided or maintained his or her office. In the case of an attorney who is alleged to have disappeared or abandoned his or her law practice, a proceeding may not be commenced until a reasonable time has elapsed after the attorney's disappearance or abandonment.

### **1250.3 Request for Appointment of a Caretaker Attorney**

- (a) The proceeding shall be commenced by an order to show cause supported by petition or affidavit for the appointment of a caretaker attorney or attorneys, pursuant to §1250.2, which, unless the court orders otherwise, shall be served personally upon the respondent or assisted attorney, upon at least one of the attorney's partners, if any, the attorney's guardian or other responsible party capable of conducting the attorney's financial affairs, or the personal representative of the attorney's estate, if the attorney is deceased; or in such manner and upon such persons as the court directs.
- (b) The respondent or assisted attorney or his or her personal representative may designate a caretaker attorney and the court shall respect such designation unless the court determines, upon a showing of good cause, that such designation should be set aside.
- (c) All papers, records and documents pertaining to any proceeding commenced under this rule shall be closed and remain confidential until the court directs disclosure of the matter, upon a finding that such disclosure will not prejudice the interests of the respondent or assisted attorney or his or her clients. However, the court may take necessary steps to protect the interests of the attorney's clients, including notification of the proceeding to appropriate disciplinary agencies, to courts to which similar applications have been made, and to other interested persons or entities. Unless the court determines otherwise upon a showing of good cause, the court shall direct that personal or medical information pertaining to the respondent or assisted attorney and

information pertaining to such attorney's clients, including their identities and the nature of their matters, be sealed.

#### **1250.4 Appointment of a Caretaker Attorney**

- (a) Upon the filing of an application pursuant to 1250.3(a) for the appointment of a caretaker attorney, the court may:
- (1) order an examination of the attorney by qualified medical and psychological experts if the respondent or assisted attorney is alleged to be incapacitated, disabled or incompetent to practice law;
  - (2) appoint an attorney to represent the respondent or assisted attorney if he or she is without adequate representation;
  - (3) appoint a *guardian ad litem* for the respondent or assisted attorney if the court has reason to believe that the attorney has a physical or mental illness or infirmity that may render the attorney incapable to practice law;
  - (4) direct that a hearing be held to determine whether a caretaker attorney should be appointed and pending such hearing:
    - i. limit the disbursement of funds from the respondent or assisted attorney's escrow, special or operating accounts;
    - ii. restrict the transfer or removal of files and client property from the respondent or assisted attorney's office;
    - iii. direct the preparation of a list of all clients, matters pending before any court, tribunal or administrative agency and non-litigated matters entrusted to the attorney;
    - iv. appoint a temporary caretaker attorney; and
    - v. take such other action as is necessary to protect the interests of the clients and the respondent or assisted attorney;
  - (5) dismiss the proceeding.
- (b) If the court determines upon a showing by clear and convincing evidence that the appointment of a caretaker attorney is necessary to protect the interests of the respondent's or assisted attorney's clients, the court may appoint a caretaker attorney to:
- (1) take such action as may be indicated to protect the interests of the clients as well as the interests of the respondent or assisted attorney; and
  - (2) perform such other specific duties as are described in §1250.5.
- (c) The court shall review requests by the caretaker attorney for compensation and reimbursement, make findings as to the reasonableness and necessity of the expenses, and fix the amount and source of compensation and reimbursement to be paid to any caretaker attorney appointed under this rule.
- (d) The court may order the caretaker attorney to submit interim and final accountings, as it deems appropriate, which shall be served upon the personal representative and the respondent or assisted attorney, if available.

- (e) Upon application by the caretaker attorney, the personal representative or the respondent or assisted attorney, the court may terminate the proceeding and discharge the caretaker attorney upon a showing that the caretaker attorney has completed his or her responsibilities or that such appointment is no longer required to protect the interests of the clients or those of the respondent or assisted attorney.

**1250.5 Role, Duties and Authority of a Caretaker Attorney**

- (a) The role of a caretaker attorney is to protect the clients of the respondent or assisted attorney and, to the extent possible and not inconsistent with the protection of such clients, to protect the interests of the attorney to whom this rule applies.
- (b) A caretaker attorney appointed by the court shall enter the offices of the respondent or assisted attorney and may, with the assistance of that attorney if possible, do the following, as authorized by the court:
  - (1) prepare an inventory of the matters being handled by the attorney;
  - (2) protect the clients' rights, files and property;
  - (3) notify all clients represented in pending matters of the appointment of the caretaker attorney or attorneys as promptly as possible, personally or by mail, or both, and, unless the practice is likely to be sold or the assisted attorney is likely to resume practice, advise them to seek counsel of their choice;
  - (4) act as interim counsel upon the request of a client;
  - (5) deliver files and property to the clients upon their request, subject to the respondent's or assisted attorney's right to retain copies of such files or assert a retaining or charging lien against such files or property if fees or disbursements for past services rendered are owed to the attorney by the client;
  - (6) collect outstanding attorney's fees, costs and expenses, and make arrangements for the prompt resolution of any disputes concerning outstanding attorney's fees, costs and expenses;
  - (7) collect any monies and safeguard any assets in the office of the respondent or assisted attorney and hold the moneys and assets in trust pending their disposition upon order of the court;
  - (8) request compensation for his or her professional services and reasonable and necessary expenses;
  - (9) to the extent possible, assist and cooperate with the respondent or assisted attorney and his or her representative in the transition, sale or windup of his or her practice;
  - (10) act as signatory on trust, escrow, IOLA, special and operating accounts, disburse funds to clients or other persons entitled thereto, and otherwise safeguard such funds.
  - (11) submit such accountings as the court may require.

- (c) A caretaker attorney shall maintain or procure professional liability coverage with a carrier admitted to do insurance business in New York, which coverage shall insure his or her work as a caretaker attorney under these rules and, if requested, shall present proof of such coverage to the court appointing the caretaker attorney.
- (d) A caretaker attorney shall not disclose any information pertaining to any matter so inventoried or handled without the consent of the client to whom such matter relates, except as necessary to carry out the order of the appointing court.
- (e) In the event of the death, disappearance or incapacity of a sole practitioner, the caretaker attorney and his or her law firm:
  - (1) shall not, except upon approval of the court, serve in any other capacity as counsel for the respondent or assisted attorney, or as executor or administrator of, or counsel to, the respondent or assisted attorney's estate ;
  - (2) may assist the respondent or assisted attorney's personal representative, guardian, conservator or other representative, or his or her estate, in the termination or sale of the law practice under DR 2-111 [22 NYCRR 1200.15-a];
  - (3) shall not without the permission of the court represent a client, other than to temporarily protect the interests of the client, except and until the caretaker attorney purchases the law practice as permitted under DR 2-111 [22 NYCRR 1200.15-a];
  - (4) may be eligible to purchase the law practice under DR 2-111 [22 NYCRR 1200.15-a], but only upon the court's approval of such sale.
  - (5) shall provide such accountings to the personal representative, respondent or assisted attorney as the court may direct.
- (f) A caretaker attorney is governed by the Code of Professional Responsibility and the same rules of professional conduct applicable to the respondent or assisted attorney with respect to client matters or files.
- (g) The caretaker attorney shall be deemed to be a member of a Lawyer Assistance Committee under Judiciary Law §499 and DR 1-103 [22 NYCRR 1200.4], except that the caretaker attorney shall be liable to the clients of the respondent or assisted attorney and third parties for acts or omissions outside the scope of these rules or the court order appointing the caretaker attorney.

#### **1250.6 Compensation of a Caretaker Attorney**

Upon application, the court may order that the caretaker attorney or attorneys receive compensation for professional services rendered and for reasonable and necessary expenses incurred as a caretaker attorney, to be paid from the assets or estate of the respondent or assisted attorney; or from fees generated from clients of the respondent or assisted attorney; or from such other available source as the court may direct. Unless the court directs otherwise, such application shall be made upon notice to the personal representative, the respondent or assisted attorney and such other persons as the court may specify.

**1250.7 Bar Association Involvement**

- (a) The New York State Bar Association or any duly established local or specialty bar association may sponsor a law practice continuity committee to assist attorneys who are unable to continue to practice law or appropriately manage their law practices and to address the needs of clients of such attorneys who have not made other arrangement for the representation of their clients or the orderly transition or termination of their law practices. Such law practice continuity committees shall, among other things, recruit attorneys willing to serve as caretaker attorneys; maintain a list of potential caretaker attorneys for consideration by the Supreme Court or Appellate Division when appointing caretaker attorneys; and provide such resources as are available to facilitate the work of appointed caretaker attorneys.
- (b) Executive officers or governing bodies of the respective bar association(s) may appoint members to such law practice continuity committees, or appointment may be made in such other manner as may be provided in the governing rules of the bar associations.
- (c) If a law practice continuity committee is notified by a client, judge, attorney, grievance committee or any other interested party that there is an attorney to whom this rule may apply, the committee shall determine whether it would be in the best interest of the respondent's or the assisted attorney's clients to commence a proceeding under this Rule for the appointment of a caretaker attorney. In the event that the law practice continuity committee determines that it is in the best interest of the attorney's clients to act, or upon referral of a case pursuant to the other provisions of this rule, the committee through its chair or other designated party may apply to the Appellate Division or the Supreme Court, pursuant to §1250.2 and §1250.3, for the appointment of a caretaker attorney or attorneys, who shall be a member of the Bar of the State of New York in good standing and who may be a member of a law practice continuity committee.
- (d) The confidential information and communications between a client and the respondent or assisted attorney, if learned or discovered by a member or authorized agent of a law practice continuity committee, shall be deemed to be privileged on the same basis as provided by law between attorney and client, and may be waived only by the client.
- (e) A member of a law practice continuity committee or a caretaker attorney possessing knowledge, gained in either capacity, of the respondent or assisted attorney's violation of 22 NYCRR §1200.3 is exempt from the reporting requirements of 22 NYCRR §1200.4.

**1250.8 Lawyer Assistance Committee Designation**

Any member of a law practice continuity committee who acts pursuant to the provisions of this section, or any caretaker attorney, shall be considered to be a member of a lawyer assistance committee under Judiciary Law §499, except that such member or attorney may be liable to the clients of the respondent or assisted attorney and third parties for acts or omissions outside the scope of these rules or any court order appointing a caretaker attorney.

June 9, 2005

**Memorandum in Support**  
**22 NYCRR Part 1250**

**Client Protection; Voluntary or Involuntary Cessation of Law Practice; Caretaker Attorneys**

**Purpose**

To establish a process whereby a court may designate a caretaker attorney to assist in the temporary management, closure or sale of a law practice on behalf of an attorney who is unable to continue to practice law, either temporarily or permanently. The primary role of the caretaker attorney is to protect the clients of the attorney who is not able or permitted to practice law and, to the extent not incompatible with that obligation, to protect the interests of the incapacitated, deceased, suspended or disbarred lawyer.

**Existing Law**

There is no current law or regulation that provides a process for the appointment of caretaker attorneys to assist in the temporary management of, assist in the transition or closing of, a law practice on behalf of an attorney unable to practice law, either temporarily or permanently.

**Prior History**

In 2001, the New York State Bar Association Committee on Attorney Professionalism identified the need for a uniform process, following a study of the consequences of attorneys' failure to plan for the management or dissolution of their law practices upon their disability or death. The Committee observed that there was a dearth of appropriate policies and regulations in New York State to address the problems identified.

It was learned that an *ad hoc* approach had developed in various counties, whereby a volunteer attorney was contacted, often by a local Bar Association executive or staff member, to assist with the management of a practice for an attorney who for one reason or another was unable to continue practicing. These volunteers, in many of these situations, devote numerous hours of work sorting through reams of paperwork, analyzing case files, addressing court calendars, etc., often without compensation and with uncertain standing and protection concerning professional liability and client confidentiality issues. In many parts of the state, there is no organized response to the problem.

Motivated by the Committee's report, NYSBA President Steven Krane appointed the Committee on Law Practice Continuity to address the topic of the planned or unplanned cessation of law practice, whether temporary or permanent. The development of this set of rules calling for the appointment of caretaker attorneys in certain defined circumstances became one aspect of the work of the Committee.

**Statement in Support**

This proposed uniform court rule is intended to address several situations in which lawyers leave the practice of law suddenly or without adequate advance planning or both. The purpose of the rule is primarily to protect the interests of the clients of such lawyers and, to the extent compatible with that goal, to protect the interests of the lawyers themselves. The Appellate Divisions presently have rules providing for the appointment of a receiver to inventory the files of disbarred, resigned and suspended attorneys, as well as attorneys who become incapacitated, mentally or physically, and are unable to continue practicing law. Presently, such appointments generally occur following a request from a disciplinary or grievance committee, acting upon client complaints. However, studies have shown that

there is a far greater need for "caretaker" attorneys, often in situations where the incapacitated lawyer has not been the subject of any complaint or disciplinary proceeding.

Lawyers may be incapacitated temporarily or permanently, physically or mentally, often in circumstances in which their inability to continue practicing was not anticipated. Lawyers practicing in partnerships or professional corporations generally, although not always, have built-in protections for their clients, who are usually represented by the law firm and not by the individual lawyer. In those cases, it is the law firm's responsibility to make sure that the client's interests are fully protected. However, sole practitioners may or may not have done adequate advance planning for their unforeseen incapacity. And, even when a sole practitioner has made adequate advance plans, it may be advisable for the lawyer who is assuming responsibility for the practice of another attorney to be formally appointed by a court as a "caretaker" attorney, pursuant to this proposed rule.

There are several distinct scenarios, some of which are already covered by existing Appellate Division rules, in which it is advisable to seek the appointment of a caretaker attorney. The proposed uniform "caretaker" rules are an effort to ensure that the same remedies are available in all four departments to lawyers, clients, disciplinary and grievance committees and, where appropriate, bar association law practice continuity committees.

The first category involves lawyers who are disbarred, resigned or suspended and who have not complied with the Appellate Division's rules governing the conduct of such lawyers, for example, by not notifying clients of their inability to continue practicing and not returning files to the clients or new counsel, as directed. It is not unusual for lawyers facing serious discipline to disregard their obligations to clients and courts. In such situations, the Appellate Divisions sometimes appoint receivers, either the appropriate disciplinary committee or a lawyer in private practice. Receivers are rarely compensated for their work, which is typically done on a voluntary basis. The proposed rule incorporates existing court rules and expands upon the current practice. The rule provides that the Appellate Division may appoint a caretaker, direct that compensation be paid, either from the disciplined lawyer's practice or from other available sources, and direct the caretaker to undertake specific tasks and responsibilities, as directed by the appointing court, for the protection of clients. The appointment of such outside caretakers will relieve the disciplinary committees of the burden of inventorying and reviewing client files and will also protect clients from the disclosure of their confidential information (and possible waiver of attorney-client privilege), which can occur when a public agency reviews private client files and documents.

The second category involves lawyers who have not been disciplined, but who are under investigation by a disciplinary or grievance committee. Sometimes lawyers abandon their practices and the committees receive a flood of client complaints citing the lawyer's disappearance, incapacity or other unavailability. The appointment of a caretaker attorney in such cases will protect the clients more effectively and enable the disciplinary committee to continue and complete its investigation. A caretaker attorney will attend to the clients' immediate interests -- e.g., by making sure that all clients are notified, that bank accounts and funds are protected, that court dates are not missed or, if already missed, that courts are promptly notified, and, where appropriate, that the attorney's support staff are compensated for their ongoing work and assistance with client matters.

The third category involves lawyers with no disciplinary problems or pending complaints. Lawyers who suffer unforeseen, incapacitating health problems or sudden accidents which render them temporarily or permanently unable to return to their offices or handle client matters may not require the involvement of a disciplinary committee or Appellate Division, particularly if there are no allegations of impropriety. Such attorneys may even have provided for a colleague to step in to handle their law practice in the event of their disability or incapacity. Even in such situations, it is preferable for the "caretaker" attorney to act with the imprimatur and under the supervision of an appointing court. Just as the Appellate Division rules permit the supreme courts to determine the division of fees between a substituted lawyer and a lawyer who has been disbarred or suspended, so it is appropriate to permit the supreme courts to

appoint caretaker attorneys in situations which do not involve allegations of professional misconduct by the temporarily incapacitated, disabled or deceased lawyer. If it develops that there has been misconduct, the proceeding will be transferred to the appropriate Appellate Division.

Finally, the proposed uniform rule incorporates what has been the practice in some departments of relying on bar association volunteers to act as caretakers or receivers for the practices of lawyers who become incapacitated, temporarily or permanently.

The rule envisions the creation of bar association law practice continuity committees throughout the state. Those committees will be able to assist in several ways. They will learn of a lawyer's incapacity, in many cases sooner than clients or the courts and will be able to apply for the appointment of a caretaker expeditiously to protect the interests of the lawyer's clients. They will train lawyers to become caretakers and will develop an experienced pool of lawyers, from which the courts may appoint individuals to act in specific cases. This is not a limitation on the courts' ability to appoint caretakers, but rather a resource, as it has often been difficult to find volunteer attorneys to serve in this capacity.

Many states have similar rules and the proposed uniform court rule is an amalgam of our present court rules and the most successful approaches used in other jurisdictions.

Nothing in the proposed rule will restrict the Appellate Divisions from making any appointment for the protection of clients or limit ability of the disciplinary and grievance committees to investigate and pursue allegations of professional misconduct by any attorney within their jurisdiction. Nothing in the proposed rule will restrict the ability of any attorney to designate a successor attorney to handle or assist in the continued operation, sale or closing of that attorney's practice in the event of death, incapacity or other unavailability. The courts should respect such successor designations, unless there are sound reasons why they should not do so.

### **Summary of Provisions**

Part 1250.1 "Application" describes in what circumstances the court rule shall be applied.

Subdivision (a) describes an attorney to whom the rules apply as one who has been suspended or disbarred from the practice of law, or is under investigation in an attorney discipline matter; one who has been judicially declared incompetent, involuntarily committed to a mental hospital, incapacitated from continued practice by reason of illness, infirmity, addiction to drugs or intoxicants; or for whom a guardian has been appointed; one who has disappeared or abandoned the practice of law; has retired, died or otherwise become unable to practice law either temporarily or permanently.

Subdivision (b) provides that if the attorney has made adequate provision for the protection of clients, that provision shall govern; and, if the attorney was other than a solo practitioner, the rules would not apply unless the entity in which the attorney practiced is no longer legally responsible for that attorney's matters. Pre-planning by attorneys is strongly encouraged. Advance designation of a successor is the best assurance that the attorney's clients and practice will be handled properly and diligently in the event that the attorney dies or becomes incapacitated. Advance appointment may also increase the likelihood that a practice may be sold pursuant to DR 2-111 [22 NYCRR 1200.15-a], if sale of the practice is desirable. Finally, designation of a successor attorney will alleviate the burden on the courts to address the consequences of failure to plan.

Subdivision (c) states that the purpose of the rule is to protect clients, and to the extent possible and not inconsistent with such protection, to protect the interests of the attorney to whom the rule applies.



Subdivision (d) contains definitions of "respondent" (referring to the disciplined attorney); "assisted attorney" (an attorney not subject to disciplinary proceedings, but to whom the rule otherwise applies); and "caretaker attorney" (appointed by a court pursuant to this rule)

Part 1250.2 "Who May seek Appointment of a Caretaker Attorney" describes the two general categories of persons or parties who may seek such appointment. First, in subdivision (a), the process related to attorney discipline is described, and a departmental disciplinary committee, grievance committee or committee on professional standards may commence a proceeding in the Appellate Division. Otherwise, as described in subdivision (b), a member of a bar association law practice continuity committee, an attorney licensed to practice law in New York, or any other interested person may commence a proceeding for the appointment of a caretaker attorney(s) either in the Appellate division or the Supreme Court of the county in which the respondent or assisted attorney resided or maintained an office.

Part 1250.3 "Request for Appointment of a Caretaker Attorney" describes the process by which the proceeding may be commenced, upon an order to show cause supported by a petition or affidavit; describes service upon required individuals (subdivision (a)); contemplates that the respondent or assisted attorney may designate an attorney to handle or assist in the operation, sale or closing of the practice, which the court should respect, unless upon a finding of good cause shown, such designation is set aside (subdivision (b)); and directs that all papers, records and documents pertaining to the proceeding are closed and confidential, unless the court directs disclosure upon a finding that such disclosure will not prejudice the interests of the attorney or his or her clients.

Part 1250.4 "Appointment of a Caretaker Attorney", subdivision (a), describes the options the court has upon receipt of an order to show cause for the appointment of a caretaker attorney; e.g., ordering an examination by experts of the respondent or assisted attorney, appointing an attorney to represent the respondent or assisted attorney; appointing a guardian for such attorney; and directing a hearing concerning whether a caretaker should be adopted; or, the court may dismiss the proceeding.

Pursuant to subdivision (b), if the court determines that appointment of a caretaker is necessary to protect the interests of the clients, it may appoint a caretaker to inventory matters being handled by a respondent or assisted attorney; to protect the interests of the clients and the attorney; and to fulfill the other duties set forth in Part 1250.5.

Pursuant to subdivision (c), the court may review requests made by the caretaker attorney for compensation and reimbursement, may make findings and fix the amount and source of compensation and reimbursement to be paid to the caretaker attorney(s).

Pursuant to subdivision (d), the court may order the caretaker attorney to submit interim and final accountings and shall direct the caretaker attorney to serve a copy on the personal representative and, if available, the respondent or assisted attorney.

Pursuant to subdivision (e), the court, upon application by the caretaker attorney, the personal representative or the respondent or assisted attorney, may terminate the proceeding and discharge the caretaker attorney once his or her responsibilities are completed.

Part 1250.5 "Duties and Role of a Caretaker Attorney" states that the role is to protect the clients of the respondent or assisted attorney, and to the extent possible and not inconsistent with such protection, to protect the interests of the respondent or assisted attorney (subdivision (a)).

Subdivision (b) lists the responsibilities of the caretaker attorney, including acting as interim counsel upon request of a client, delivering files and property to the clients at their request; collecting outstanding attorney's fees, costs and expenses and resolving disputes about such matters; collecting money and

safeguarding assets; act as signatory on trust escrow, IOLA or special accounts, disburse or safeguard funds, as appropriate, and be eligible to purchase the law practice, upon court approval.

Subdivision (c) expects the caretaker attorney to maintain or procure malpractice insurance to cover his or her work as a caretaker.

Subdivision (d) prohibits caretaker attorneys from disclosing information pertaining to any matter handled as caretaker, without the consent of the client, except as necessary to carry out the order of the appointing court.

Subdivision (e) states that in the event of the death, disappearance or incapacity of a sole practitioner, the caretaker attorney or his or her firm shall not serve in any other capacity on behalf of the respondent or assisted attorney; and shall not act as successor attorney, other than temporarily, except and until the caretaker purchases the law practice, as permitted.

Subdivision (f) affirmatively states that the Code of Professional Responsibility applies to the caretaker acting in that capacity.

Subdivision (g) provides that a caretaker attorney shall be deemed to be a member of a Lawyer Assistance Committee as described in Judiciary Law section 499 and 22 NYCRR 1200.4, except that the caretaker would be responsible to clients or third parties for acts or omissions outside the scope of these rules.

Part 1250.6 "Compensation of a Caretaker Attorney" indicates that, upon application and appropriate notice, the court may order compensation to a caretaker attorney for professional services rendered and for reasonable expenses to be paid from the assets or estate of the respondent or assisted attorney; from fees generated by that attorney; or from such other available source as the court may direct.

Part 1250.7 "Bar Association Involvement" describes the process by which the New York State Bar Association or any local or specialty bar association may sponsor a "law practice continuity committee" to assist attorneys to manage their practices or assist in the orderly transition or termination of their practices, as appropriate. Such committees would recruit attorneys willing to serve as caretakers, maintain a list for consideration by the Appellate Division or Supreme Court when making appointment, and provide available resources to facilitate the work of appointed caretakers (subdivision (a)). Such committees have standing to commence a proceeding for the appointment of a caretaker (subdivision (b)).

1250.8 "Lawyer Assistance Committee Designation" provides that members of such committees shall be deemed to be members of a lawyer assistance committee under Judiciary Law Section 499, except they may be responsible to clients for acts or omissions outside the scope of the caretaker attorney role.