

# Contra Costa Lawyer Online



The screenshot shows the homepage of the Contra Costa Lawyer Online website. At the top is a banner with the title "CONTRA COSTA LAWYER" over a landscape image. Below the banner is a navigation menu with items: Current Issue, Features, Spotlight, Pro Bono, Self-Study MCLE, About, and MarketPlace. A secondary menu includes: Inside, President's Message, News & Updates, Bar Soap, Lifestyle, LRIS, Ethics Corner, Coffee Talk, and Magazine Archive. The main content area features a large photo of a diverse group of business professionals celebrating. Below the photo is the article title "The Surprising Importance of Succession as a Team Sport" and a short introductory paragraph. A row of six small thumbnail images is positioned below the article. The page is divided into two columns: "Spotlight" and "News & Updates". The "Spotlight" column contains three articles with small profile photos: "Board Success Comes From Planning", "Smoke and Mirrors? An Update on Sessions, Federal Enforcement Priorities, and State-Legal Cannabis", and "An Interview With Our Newest Judge, Hon. Leonard Marquez". The "News & Updates" column contains three articles with small photos: "Turning Lemons into Lemon-AID", "The Senior Lawyers Task Force", and "Comedy Night – May 16".

## CONTRA COSTA LAWYER

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### The Surprising Importance of Succession as a Team Sport

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The Contra Costa Lawyer is the official publication of the Contra Costa County Bar Association (CCCBA) published 12 times a year - in six print and 12 online issues.



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# Planning for Your Transition from the Practice of Law

Friday, June 01, 2018

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Recently, in both written and digital media we have been confronted with innumerable articles, blogs, posts and dissertations in regard to the ever-increasing numbers of baby-boomers who are retiring or otherwise transitioning out of the work force and how that may or may not impact society, the economy, social security and future employment opportunities. Before anyone gets too excited, rest assured that this issue of the Contra Costa Lawyer will not be extolling the virtues of the baby-boomers, bemoaning the differences between those baby-boomers and millennials, or *vice versa*. Instead, this issue explores the concept of succession planning and certain of the issues raised and to be confronted in the context of the transitioning of professional practices, with an emphasis on the legal profession.

To begin our journey through the succession planning landscape, Alay Yajnik presents us with an article entitled *"The Three Options for Law Firm Succession Planning,"* in which he sets out three specific alternatives for transitioning a law firm or a particular attorney's practice within a firm. In the article, Yajnik emphasizes that all attorneys and firms will confront eventually the issue of succession planning, and for that reason, the strategy for such transition is a serious matter which should not be avoided and should be specific to the needs and desires of the parties involved.

Following the decision to begin the succession planning process, the professional and/or firm needs to develop the precise strategy for moving forward. In his article entitled *"The Surprising Importance of Succession as a Team Sport"* John O'Dea explains that the succession planning process raises very technical questions which require detailed answers in areas such as tax, law, banking, financial planning, etc. O'Dea goes on to provide details and examples of how the answers to such questions are obtained from and utilized by the various professional "team members." While it would be convenient for a single advisor or professional to provide all of the information and advice to be considered in the succession planning process, to assume that such possibility exists may be naïve in today's complicated landscape and could prove to be detrimental ultimately to the professional or firm being advised.

As John O'Dea points out, one of the considerations in the development and selection of a succession planning strategy is its tax ramifications. Recently, the Tax Cuts and Jobs Act of 2017 (the "Act") was signed into law by President Trump. Ryan Lockhart outlines the changes to the estate tax system and the taxation of pass-through entities brought about by the Act in the article entitled *"Business Succession Planning Opportunities under the New Tax Act."* Lockhart explains how the Act has increased the federal estate and gift exemption and provides a brief analysis of the Act's impact on C corporations and pass-through entities such as S corporations, limited liability companies and partnerships. In the article, he also addresses the considerations and issues for

professionals created by the Act, which should provide for interesting tax planning discussions by and among professionals now and in the near future.

While professionals are weighing their options and deciding upon a strategy moving forward, they need to ensure that they and their clients are properly protected from damages arising from claims of professional negligence, i.e., malpractice claims. In his article entitled *"Insurance Considerations for Transitioning Attorneys,"* Michael Crist discusses the nature, purpose and intricacies of professional errors and omissions insurance policies. He explains further how the insurance coverages under those policies may or may not provide coverage for claims in relation to departing professionals and how the use of "tail" coverage may be utilized to ensure coverage in such instances. No professional wants to be in the unenviable position of being faced with a claim that he/she thought was covered, only to learn that it is not.

In today's professional practices, we are almost entirely dependent on technology to communicate with clients and colleagues, prepare documents and pleadings and store information. Accordingly, in devising a succession plan, we cannot overlook, dismiss or disregard the role that our computer systems play in the implementation of the succession plan strategy. Along those lines, Roy Brown, in the article entitled *"Fundamental Areas not to be Overlooked When Writing a Plan for Your Computer System,"* provides us with advice to heed in regard to our information technology systems. Roy identifies specific areas that should be addressed in order to ensure that both the transitioning professional and his/her practice do not have any technological hiccups or, worse yet, meltdowns during and/or following the implementation of the agreed upon succession plan.

In my own article, entitled *"Top Ten Succession Planning Considerations and Issues for Professionals,"* I attempt to identify and outline, ala David Letterman, what I believe to be the ten most important issues for professionals to ponder in creating and implementing a successful succession plan, starting with number ten. While I concede that some may have their own version of a top ten list, or reorder the priority of the list's components, all of the considerations and issues discussed in the article, in one form or another, are essential to a thorough and flexible professional practice's succession plan.

Finally, in the *Spotlight* portion of this edition, the Senior Lawyers Task Force of the Contra Costa County Bar Association discusses issues and options in regard to the retirement or transition from the practice of law.

We hope that you find the information contained in this issue of the Contra Costa Lawyer to be interesting, informative and thought provoking.

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# Board Success Comes From Planning

Friday, June 01, 2018



Like your business, or other organizations, the CCCBA Board of Directors focuses on succession planning for the association. Such planning is critical for any organization to thrive. It involves a balance of analyzing “what do we need now” along with a look towards “what do we think we need a few years from now.” In this article, I hope to better explain the board selection and succession planning process and remove some of the mystery in the process.

Per our bylaws, the board consists of seventeen (17) directors, five of whom are in officer positions (president, president elect, secretary, treasurer, and immediate

past president). Each year, a Board Nominating Committee is created no later than March 1. Traditionally, the president elect is the chair of the nominating committee and nominates other members to the committee. Typically, those committee members are former CCCBA presidents and/or former board members, and last year, for example, I also included the 2019 Board President, Wendy Coats, since she will also “inherit” the board. The board then votes on the proposed members of the nominating committee.

Repeating an annual process, in April 2018, Theresa Hurley, Executive Director, sent out the first notice for a call for candidates to join the Board of Directors of the CCCBA. All members should have received this, and subsequent, notices. The notices identified that nominations were due by June 1, 2018. Thus, as of the date of this publication, the nomination period for 2019 has closed.

Once the candidates’ information is received, the Board’s Nominating Committee reviews and analyzes the applications, letters of recommendation, and any other materials submitted by the candidates. The nominating committee will interview candidates, and ultimately determine a slate of nominees for the board to review. The proposed slate must also contain at least two additional alternative candidates. This slate of nominees and alternatives must be provided to the board and Executive Director no later than August 15. The Board then reviews the slate and approves or modifies the slate at the September board meeting. Next, the approved slate is sent to all voting association members no later than October 1, for approval no later than October 31.

There is no magic description of the “ideal” board member. It is true, however, that most board members have already demonstrated commitment and service in some aspect(s) of the association. Some examples include serving as a leader in a Section, and/or serving on any of our numerous committees, including the Criminal Conflicts Panel Committee, Pro Bono Committee, Contra Costa Lawyer Editorial Board, LRIS Committee, and others. Frankly, those more familiar with the depth and breadth of the CCCBA are likely better equipped to help serve as a Board Member. In addition, the nominating committee also takes into account the current Board composition, and tries to diversify the Board in terms of practice area, solo vs. larger firm vs. in-house vs. government

attorneys, geographic reach/location of the candidate's office/practice, and other experiences.

Generally, directors are elected for a term of three (3) years. Directors may serve only two consecutive three-year terms. Directors may be appointed as an officer, which terminates the three-year term, and initiates succeeding one (1) year terms for each officer position (treasurer, secretary, president-elect, president, and immediate past-president). If an individual has served a six-year term, or has served through all Officer positions, the individual may be re-elected to the Board after a break of at least one year.

Of course, filling vacant Board positions is just one part of succession planning. If you have any questions about the board, or the CCCBA operations, please reach out to our wonderful staff or to any board member.

For over 21 years, James Wu has practiced employment law. He is a defense litigator for employers, and he also provides advice and counsel to reduce the risks of employment-related claims and lawsuits. Contact James at [james@jameswulaw.com](mailto:james@jameswulaw.com) and [www.linkedin.com/in/jamesywu](http://www.linkedin.com/in/jamesywu)



# The Top Three Options for Law Firm Succession Planning

Friday, June 01, 2018



At some point, you will no longer be running your firm. There are many reasons why you could leave your firm, including your health, a desire to enjoy a retired life, financial independence, and many others.

Although the reasons that will prompt you to exit your firm are unclear, one thing is certain: at some point, you will no longer be running your firm.

Given that reality, you have two choices: Prepare, or don't prepare.

All too often, attorneys do not prepare for their eventual exit. They hastily close the doors of their practice (or their family closes the doors for them). In doing so, they potentially lose a five or six figure payout and negatively impact their legacy.

Other attorneys plan their exit from their firm and reap the rewards: they get a nice chunk of income, bolster their legacy, and feel great about the outcome.

When it comes to law firm succession plans, there are three basic options, each with its own tradeoffs:

- Close the doors
- Internal buyout by your firm
- Sell to another firm or lawyer

## “Closing the Doors” as a Strategy

“Closing the Doors” can be an effective strategy, especially if you have already achieved financial independence and have built your legacy. When you close down your firm on your timeline, you have peace of mind. You have time to notify clients and wind down the operational aspects of your firm (on-going cases, personnel, leases, etc.). Although you may not receive a significant financial benefit, you can take pride in the fact that you have gracefully exited the firm as a true professional. And because it's planned, you are ready for the next phase of your life. Of the three options, this is usually the easiest, fastest way to execute your succession strategy.

Pros:

- Easy to implement
- Requires minimal advance planning (in most cases)

Cons:

- Minimal financial gain, and often is actually an expense

- Firm ends when you leave

## “Internal Buyout by Your Firm” as a Strategy

“Internal Buyout by Your Firm” is the traditional planned strategy. Your ownership stake is bought by others in your firm. This can be accomplished at once, though most often the purchase is executed over time. This option provides you with a financial benefit and reward for building your firm, and preserves your legacy. This option also gives you considerable flexibility in how you exit. Often times, attorneys cede control over the firm but continue to work in the firm on a part-time basis as Senior Counsel or Of Counsel. It does, however, require significant advance planning as you must groom future partners, structure the firm so it can run without you, have the valuation method (e.g. Certified Valuation, Rule of Thumb Multiplier, etc.) clearly documented in the Partnership Agreement, and negotiate your exit.

Pros:

- Significant financial gain
- Firm continues after you leave

Cons:

- Requires years to implement (ideally 5+ years)
- Exit negotiations can be difficult, particularly if the valuation method is not clear

## “Sell to Another Firm” as a Strategy

“Sell to Another Firm” is a relatively new planned strategy. Your firm is bought by another firm or attorney. This option provides you with a financial benefit and reward for building your firm, and may even preserve your legacy. Typically, attorneys continue to work for a period of time to ensure a smooth transition. There are two challenges with this approach: (1) your firm has to have significant intrinsic value without you involved, and (2) you have to locate a buyer.

There are many ways to value the firm. Conventional wisdom is to multiply the firm’s annual gross revenue by a multiplier of 0.5 to 3.0. The more attractive the firm without you involved, the higher the multiplier. Others suggest thinking of the sale price as an origination bonus (15%-25%) based on the predictable continuing revenue of the firm. **At the end of the day, the value of the firm is what someone else is willing to pay.** No more and no less. Therefore, if you want to sell your firm, you must demonstrate that the firm has value without you. Usually, this requires changes in the firm over time.

Locating a buyer can be done via several avenues. Two of the most popular are your network and business brokers. Your network can be a strong source of high quality buyers. However, you sacrifice a measure of confidentiality when you disclose your intent to “find another partner” to your network. A more traditional route is to utilize a business broker (preferably one with many years of experience working with law firms). In either case, you should be prepared for an “earn out” arrangement, as your exit is more likely occur to over a few years rather than immediately.

Pros:

- Significant financial gain
- Well-defined exit from the firm

Cons:

- Requires years to implement
- Must be attractive to an external firm or attorney

## How to Build Your Succession Strategy

The succession strategy for your firm is one of the most critical strategic decisions that you will make in your professional life. It should not be taken lightly. The good news is that there is a lot of information available in the public domain. The difficult part is crafting the right succession strategy for you. A trusted advisor can help you evaluate your options and create a succession strategy that is unique to you.

*Alay Yajnik is a trusted advisor to law firms of all sizes. As the founder of Lawyer Business Advantage, he implements best practices in strategy, business development, team performance, and time management to transform law firms and help lawyers create their Perfect Practice™. Lawyer Business Advantage ([www.lawyerbusinessadvantage.com](http://www.lawyerbusinessadvantage.com)) is a proud member of the Contra Costa County Bar Association.*

# The Surprising Importance of Succession as a Team Sport

Friday, June 01, 2018



It won't surprise you that successful exit and succession planning is a team sport. Successfully selling a professional services firm requires answers to deeply technical questions pulled from the fields of tax, law, banking and more. As a result, attorneys, CPAs, bankers and others will be forced to work closely together as a team for our clients to be successful.

However, what you may not know is that the team providing this advice has value that far exceeds their technical competence. You may be startled to learn that your value as a part of a good cross-functional team may be in your ability to

coordinate how you motivate your mutual client – for their own good.

Many owners of professional services firms will be relying on the transition value of their ownership to make an important contribution to their retirement success. This is true regardless of whether your client is transitioning from the fields of architecture, tax, consulting, or law. The value your client receives in exchange for their life's work may have an important impact on their ability to achieve their financial goals and objectives.

If you have been around projects related to the purchase, sale or transition of a company, you have learned that success is often dependent on the team around the owner. And, yet, too many of us have been invited to work on projects to clean up a succession mess that could have been avoided had the owner assembled a good team of experts pulled from the fields of investment banking, tax, law, corporate banking, personal financial planning and wealth management.

Why are these otherwise competent business owners messing up this critical stage in their business life and skipping the advice of a competent cross-functional team?

It is easy to blame the owner for being penny-wise and pound foolish. It often appears that owners are resisting the expense of competent advice early in the process. But, I think this misses an important and subtler point. Most successful business owners have learned from their own success to make decisions in a very specific fashion. I believe that this decision-making pattern will ultimately become a liability when owners get to this step in their careers.

By way of background, I am often hired by the owners of closely held businesses to be their personal financial planner and wealth manager. What my clients tell me differentiates my practice is my focus on the wealth issues that specifically apply to individuals who own and operate a closely held business.

In this line of work, I study everything I can about the mindset of successful founder business owners. Take some of the lessons Ray Dalio shares in his book, *Principles*. Ray is the founder of Bridgewater Associates. Bridgewater, according to Bloomberg, is now one of the world's largest hedge funds. However, Ray didn't achieve this outcome without substantial failures along the way. While reading Ray's book, it dawned on me that the wisdom I was admiring was the iterative nature of his business process. Successful owners like Ray are often forced to test, fail, learn, apply and improve all aspects of their operations. This is real-world learning, wisdom and value creation. And, owners like Ray are rewarded for behaving specifically in this fashion. It's Darwinian. If owners don't learn and adapt, they repeat the same failures enough to wipe them out. If they have survived, it is not because they avoided failure. Rather, it is likely due to their ability to fail, assess, adjust, learn and adapt.

As I was reading Ray's book, I was reminded of an idea shared with me by a guy I admire a great deal, Chris Andersen - Co-CEO & Founder of AssayCS. AssayCS advises business owners on the purchase and sale of companies. Chris told me one time that you don't get very good at selling companies until you've done it more than a few times. Back to Ray's point, you need to strive, fail, assess, learn, and apply too many lessons in the first few efforts to develop any meaningful skill in that area.

Business owners have come to trust in their own ability to try, fail, adjust and move on. This experience allows them to take on high risk / low information challenges in their lives such as launching a new product or entering a new market.

The rising concern I feel on behalf of my clients is that they are attempting to answer the question of their ultimate transition in the same fashion as all the other business decisions they have faced. They have learned to under-value the study of an issue ahead of time. They have learned to ask for forgiveness and not permission. The result is that they aren't skimping on advice as much as relying on what has worked in the past.

I would be less worried except few of our mutual clients have the luxury of time, energy and capital to fail in the process of selling their companies. And, back to Chris' earlier point, you don't get very good at selling ownership in a company until you have done it more than a few times.

This is why I believe so strongly in succession as a team sport. No one advisor can change an owner's mind on their own. We may have to motivate our mutual clients and educate them about the special nature of this specific business question. It will be incumbent on us to point out the potential blind spot here and the severity of the risks if mishandled. It will be up to us to work together to get our clients to face this question differently. Our clients' financial future may well depend on the team's ability to do so.

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# Business Succession Planning Opportunities Under the New Tax Act

Friday, June 01, 2018



Late last year, President Trump signed into law the Tax Cuts and Jobs Act of 2017 (the “Act”), effective in 2018 for tax purposes. [1] The Act provided certain substantial changes to the tax code that include provisions that may be of interest to family owned businesses and professionals. This article will address the changes to the estate tax system, the new deduction for qualified business income of pass-through entities and how planning for one or both may be beneficial for succession planning needs.

## Applicable Provisions of the Act

One of the main changes the Act made was effectively doubling the unified federal estate and gift exemption (the “Exemption”). Under the old law, an individual’s Exemption was set at a base of \$5 million indexed to inflation. [2] As of 2017, the individual Exemption was \$5.49 million. [3] Under the Act, an individual’s Exemption base is doubled to \$10 million, and after accounting for inflation, the individual Exemption is estimated to be near \$11.2 million for 2018. [4] The Act retains inflation indexing for the Exemption. Therefore, as a result, you can expect the Exemption to increase each year. Also, the generation-skipping transfer tax (“GST”) exemption is still tied to the Exemption under the Act; therefore, the individual GST exemption is also \$11.2 million per individual. [5]

Importantly, the Act did not change the availability of portability of Exemption between spouses; therefore, a married couple has effectively \$22.4 million of Exemption to utilize in their estate planning. [6] Furthermore, the Act did not make changes to the annual gift tax exclusion. For 2018, the annual gift tax exclusion is \$15,000 of property annually to any donee without using any of the individual’s Exemption. [7]

However, the Act is set to expire in 2025, due to certain Senate budgetary rules. After its expiration, the Exemption and GST exemption limits will revert to pre-2018 levels. [8] Therefore, absent Congress making the provisions permanent, individuals or families looking to take advantage of the increased exemption limits may need to act sooner rather than later to utilize their Exemption for succession purposes.

## Are C Corporations and certain pass-through entities favored under the Act?

The Act dramatically lowered the corporate income tax rate. Starting in 2018, C Corporations will pay a flat rate of 21%, which is significantly lower than the previous 35%. [9] Additionally, the corporate alternative minimum tax is fully repealed. [10]

For pass-through entities (i.e. partnerships, limited liability companies, S Corporations and sole proprietorships), there now exists a potential 20% deduction of qualified business income (“QBI”). [11] QBI is defined as net business income after all business deductions have been claimed. However, due to particular limitations, only certain pass-through entities will be able to utilize this deduction. First, there are threshold income limits: \$157,500 for single filers and \$315,000 for married joint filers; and phase-out limits: up to \$207,000 for single; and up to \$415,000 for married joint filers. For taxpayers under these limits, the deduction is available to all. For taxpayers above the threshold limits, there are limitations in place to reduce or eliminate the deduction. [12]

In addition to the threshold limits, certain professions are excluded from utilizing the deduction if the professional taxpayer’s income is above the phase-out limits. Excluded professions are those in the professional service industries of health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, or any trade or business where the principal asset of such trade or business is the reputation or skill of one or more of its employees or which involves the performance of services that consist of investing and investment management, trading, or dealing in securities, partnership interests, or commodities. [13]

If the deduction is available for taxpayers above the phase-out limits (and those not in the excluded professions), then the deduction is limited to the lesser of: (1) 20% of QBI or the greater of either (i) 50% of the W-2 wages of the business or (ii) the sum of 25% of W-2 wages plus 2.5% of the unadjusted basis of all “qualified property” in the business. [14] For the purposes of this provision, qualified property is defined as any tangible property for which depreciation deductions are allowed under IRC Section 167, that was held by and used in the business, and has not already reached the end of the depreciable period. [15] This could potentially include anything from machinery, equipment and real estate holdings, so long as they are still being depreciated. Most practitioners expect that real estate holding companies, organized as pass-through entities such as limited liability companies, may be the most common businesses to utilize the deduction.

Of note, the Internal Revenue Service (“IRS”) has not issued regulations pertaining to the deduction. The IRS stated they hope to issue by the end of June. Also due to complexity of the requirements and limitations, taxpayers should consult their tax attorney, CPA or accountant for guidance.

## What is the excluded professional to do?

Unfortunately, the Act excludes many professions from utilizing the pass-through deduction above the threshold and phase-out income limits. However, certain opportunities may still exist. Professionals who also invest in non-excluded ventures, such as real estate holdings, may take the opportunity to increase investment in such non-service related ventures in order to utilize the deduction on future income derived from those non-service related ventures. Also, if a professional is involved in family businesses that are not service-related industries, the professional may wish to increase income opportunities through the family business and take advantage of the deduction.

Another opportunity may exist in converting businesses to C Corporations. With the lower corporate income tax, businesses that may be in a growth period, and wish to retain earnings and not distribute dividends to investors (i.e., family members in a family business), may wish to convert to a C Corporation so that the corporate income is taxed at the much lower rate.

Finally, there exists great potential to combine the increased Exemption with either the lower corporate tax rate or the pass-through deduction. Family operated businesses may wish to utilize lifetime gifts of business interests to younger generations to leverage the Exemption while also potentially reorganizing the business entity structure to utilize the lower corporate rate or the pass-through deduction. This combination may maximize the power of inter-generational tax planning and current income tax planning while securing the succession of family businesses within the family.

## Conclusion

The Act provides an exciting opportunity for certain types of investments or businesses to lower income taxes while also providing leverage for generational planning. Family businesses should take advantage of this opportunity to secure a wealth and business succession plan while maximizing the available income tax reductions and before certain provisions of the Act expire or are changed by Congress.

[1] The “Tax Cuts and Jobs Act of 2017” was renamed “An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018” on December 19, 2017; Pub. L. 115-97 (hereinafter cited to as the “Act”).

[2] IRC § 2010 (c)(3); The index used for inflation calculations has been changed to The Chained Consumer Price Index for All Urban Consumers.

[3] Rev. Proc. 2016-55.

[4] IRC § 2010 (c)(3); Act § 11061.

[5] *id.*

[6] IRC § 2010.

[7] Rev. Proc. 2017-58.

[8] Act § 11061.

[9] Act § 13001.

[10] Act § 12001.

[11] Act § 11011; IRC § 199A.

[12] *ibid.*

[13] *ibid.*

[14] *ibid.*

[15] IRC § 167; Act § 11011.

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# Insurance Considerations for Transitioning Attorneys

Friday, June 01, 2018



As a professional in today's complex legal environment, there is tremendous value in having a sound professional liability insurance solution. Unfortunately, as of today, there is not just a single, universally viable product for law firms. Law firms, in particular, are susceptible to being sued for millions over alleged errors. With a continued rise in defense costs that can easily surpass six figures, professional liability claims have the potential to be crippling to a business. Additionally, although a lawyer's act or omission may occur in work performed today, a claim stemming from that wrongful act may not be realized or made against the lawyer for

a significant period of time, perhaps even years down the road.

An underlying premise of an Errors & Omissions ("E&O") policy is that the insurance company shall pay a covered claim, including defense costs, on behalf of an insured, up to the limit of liability purchased. To many, this is not immediately clear as there are many different coverage provisions that need to be reviewed prior to determining a covered claim. For a member in transition, the innate intricacies of an E&O policy may lead to more questions than answers.

An E&O "loss" references the amount an insurer is legally obligated to pay as a result of a claim, typically including defense costs. If appropriate professional liability limits are not selected, defense costs alone may quickly mount, thereby reducing the limits available for other claims, and can eventually exhaust the limit of liability. Whether it be for a breach of fiduciary duty or malpractice, it is not uncommon for defense costs to far exceed a case's settlement value.

An "insured," which includes the designated firm, typically extends to the firm's current partners, principals, directors, officers, shareholders or other members of the firm while performing in their respective capacities. For coverage to continue to be afforded to such individuals that have left a firm, it is imperative that a firm's E&O policy form be broad enough to maintain them as insureds. While a departed firm member may sleep better believing they remain covered, the scope of coverage for past individuals is limited to claims arising from their services rendered while with the insured firm. Coverage does not follow an individual to a new role or employment outside of the insured firm.

A fundamental feature of most professional liability policies is its "claims-made" reporting provision. Claims, which are most frequently received in the format of a written demand for monetary damages, largely stem from an alleged error by a firm while performing its professional services; however, if a claim is not reported to the carrier per the terms of the contract, it is unlikely that coverage will be available.

Unlike an “occurrence based” policy, the policy that is triggered and responds to a claim on a claims-made policy, is the policy that is in effect when a claim is first made against an insured and reported to the responsible insurance carrier. This method prevents multiple policies from responding to a series of related wrongful acts that occurred over multiple policy periods. To avoid forfeiture of coverage, an insured may be required to notify its carrier of an E&O claim during the same policy period it was received or within a brief grace period, such as thirty (30) to sixty (60) days, post policy expiration. If reported to the carrier during the post expiration period, the claim would most often need to be received by the insured during the policy term. Ultimately, if the claim reporting provisions are not met by the insured, the lawyer or firm will forfeit coverage under that policy.

In the event an insured elects to terminate or no longer renew its E&O coverage, it is wise to purchase an extended reporting period, commonly known as a “tail”, from the incumbent insurer. The realization of a professional liability error is far different from that of your typical automobile accident or home fire. Since an attorney’s exposure for claims likely stretches well past a policy’s expiration date, a tail policy creates an additional extended time period to report claims. Tails are typically offered for terms of one (1) to five (5) years, although under certain circumstances for an unlimited period of time, and are made effective as of the date of termination or non-renewal of the policy. It is important to recognize that the tail coverage only applies to professional services rendered, or wrongful acts committed, prior to the effective date of the policy’s termination.

Tail coverage is offered by many of the standard and non-standard E&O carriers. Should the need for such coverage arise, there is often a fairly significant variance between the number of years of coverage that a carrier is willing to provide and the subsequent cost of such coverage. If a firm’s current carrier does not offer the desired extended reporting terms, there are certain stand-alone carriers who are able to bridge the gap. Insurers typically require the purchase of an extended reporting period to occur within a specific number of days from the expiration date or the ability to procure the tail will be lost. To avoid a lapse in coverage, possibly due to acquisition or financial burdens, securing favorable tail coverage is essential. Even if the tail cost is high, the payments are due in full at the time of purchase and are considered fully earned and non-cancellable.

Transition within the law industry is inevitable, but not without potential pitfalls from an insurance perspective. If an attorney is moving from one firm to another, the new firm’s E&O carrier will most often only respond to claims arising from work performed on behalf of the new firm. Certain policies will extend coverage to the attorney’s previous work, but this is not the assumed standard. To avoid relying on the prior firm’s ongoing E&O coverage, or possibly lack thereof, in some circumstances an attorney may have the option to purchase an individual tail policy from the prior firm’s carrier upon departure.

In conclusion, a comprehensive review of your E&O insurance solution is strongly recommended to ensure appropriate and adequate coverage is in place. In the present climate, with law firms performing a myriad of professional services, it is vital to a firm’s longevity and financial health to have a tailored E&O program that properly accounts for all of the varied exposures. It is imperative that both the firm and its respective attorneys take into consideration their prior acts, as well as the prior acts of attorneys who are no longer with the firm.

*Michael Crist is a partner with the Property and Liability insurance brokerage CF&P Insurance Brokers in Walnut Creek. As a member of the CF&P team since 2003, Michael*

*is proud to represent the third generation of the family business.*

# Top Ten Succession Planning Considerations and Issues for Professio...

Friday, June 01, 2018



In deciding upon and implementing a succession plan for a professional practice or firm, there are many matters to consider and issues to address. From my experience and practice, the following represent the top ten of such considerations and issues.

## Number 10: Identify and confirm the participants in the plan

It is important to be able to identify who the key players in your succession plan will be and what roles they will undertake. This process involves, among other things, confirming that the individuals who will be

succeeding the professional have both the desire and ability to do so. That is, are they willing to take on the responsibility of stepping into the shoes of the exiting professional and have the acumen necessary to carry out their respective roles?

## Number 9: Decide and agree upon the funding of the plan

Once the players are identified and confirmed as viable options in implementing the succession plan, the exiting professional needs to feel comfortable with the funding of the plan. That is, who will be paying what to whom, how and when? Will this be a one-time payout, a fixed amount installment plan, an amount tied to future revenues or profits, or some combination thereof?

## Number 8: Discuss the plan with the key players

Even after the plan is agreed upon, it should not be left to gather dust until its implementation. Instead, the exiting professional should discuss the plan with the key players on a regular basis (e.g., quarterly, semi-annually, etc.) in order to (a) re-confirm the commitment of the successors to the plan and (b) reinforce to those key players the commitment of the exiting professional.

## Number 7: Determine the role of the exiting professional

Will the exiting professional exit the practice or firm entirely as of day one, or will his/her exit be phased over a period of months or years? Will he/she remain an employee or consultant of the practice or the firm for some period of time? If so, how will he/she be compensated?

## **Number 6: Establish a process for the transition of the clients/patients and a narrative for the implementation of the plan**

The exiting professional and his/her successors need to agree upon the method and timing of transitioning clients/patients/books of business to the successors who will be charged with managing those clients/patients/books of business after the departure of the exiting professional. A narrative should also be developed in order to explain and publicize the reason for and benefits of the transition.

## **Number 5: Agree upon the value of the interest to be acquired**

It is extremely important that all participants in the plan understand as early as possible the exact value of the exiting professional's interest in the practice/firm and how that value is established (e.g., agreed upon amount, formulaic calculation, appraisal, etc.). Only when the exiting professional and his/her successors are comfortable with the valuation will the plan go forward and have any likelihood of success.

## **Number 4: Understand the tax ramifications of the plan's implementation**

Depending on the exact structure of the plan, it will have varying tax ramifications for all concerned (i.e., the exiting professional, his/her successors and the practice/firm). That is, will the payments received by the exiting professional be characterized as capital gains, ordinary income or something else? Will the payments made by the successors be deductible to them or the practice/firm? Many times the individuals involved in succession planning have preconceived notions about how the receipt or payment of monies will be treated for tax purposes. During the planning and development process, the exiting professional and his/her successors should discuss with an accountant and/or other financial advisor exactly how the payments made under the plan will be treated (i.e., what is the net amount of the payments received or made).

## **Number 3: Allow for flexibility in the plan**

As we are all aware, the only constant is change, and as with everything else, circumstances will likely change within the practice or firm, and/or with the exiting professional and/or his/her successors. Therefore, the plan should be flexible enough to accommodate such changed circumstances.

## **Number 2: Develop a plan**

This is a close correlation to Number 3. Professional practices do not necessarily need to develop *the* plan at the outset; but they should have *a* plan. Specifically, it is more important to develop some type of plan, even if it is subsequently changed or scrapped altogether for another plan. The mere existence of the plan will promote discussion in relation to the considerations and issues identified in Numbers 10-3, above.

## AND THE NUMBER ONE THING TO DO IN RELATION TO DEVELOPING AND IMPLEMENTING A SUCCESSION PLAN IS: GET STARTED!

While this may sound simple, it has been my experience that it is not. It is far more convenient to carry on the business of the practice or the firm than it is to tackle the task of developing and implementing a succession plan for the practice or the firm. However, the most successful plans are the ones that are established well in advance of the departure of the exiting professional(s) involved in the plan. As a rule of thumb, this process should start three to five years ahead of the planned departure.

### Summary

While there is no guarantee that any particular succession plan will be successful in all respects and for all concerned, two things are, in fact, certain: (1) the absence of any succession plan invites chaos and (2) the consideration and resolution of the items identified, above will at least set the professional practice or firm on the right track to planning for and addressing the inevitable departure of professionals from the practice or firm.

***Roger Brothers** is a transactional business attorney whose practice includes: general counsel services, including corporate counsel, business and succession planning and debt and equity financing; transactional counsel services, including mergers and acquisitions, entity formation and operation, reorganizations and general commercial transactions; and general counsel to high net worth clients concerning family succession planning including serving clients as "Family Office" CEO.*

# Writing a Plan for Your Computer System

Friday, June 01, 2018

## Fundamental Areas not to be Overlooked!

According to surveys conducted by CNBC and the Financial Planning Association, more than 70 percent of small businesses have no succession plan. Couple this with the number of small business owners older than 50, and that's nearly 20 percent of the U.S. population. So, it only makes sense that a good succession plan is more critical than ever.

*"Despite the generally high recognition of the need for succession planning, many law firms have been reluctant, or lax, in developing adequate succession plans. Many—if not most—law firms have been dealing with succession planning case-by-case (which might be appropriate), and ad hoc (which is not). Moreover, lawyer succession issues are often addressed belatedly, if not grudgingly. Many firms persist in avoiding the issue, hoping that, given time, transitions will spontaneously take shape and work out."*

— Alan R. Olson, Altman Weil, Inc.

For many businesses, the computer system is fundamental to daily operations. To operate without access to computers or critical software is all but impossible. A succession plan that contains vital information about the computer system is a key to keeping daily operations going.

A complete inventory of equipment, and the detail required to access software, third-party accounts, and email should be in the plan. Gathering the information isn't difficult to do, and when you use one or more of the methods described later, managing it all will be easy.

## Ensure Long-Term Access to User Accounts

Your plan should include a complete inventory of all equipment and devices. The inventory should list the make and the model, as well as the username and the password to access each device.

Over the long-term, you'll need to replace the computers and other equipment in your office. So, when it's time to execute the plan, the landscape of the computer system may have changed dramatically.

Many of our clients adopt one of two methods for the long-term management of user accounts and passwords. Both make succession planning easy, and either should work for your system:

- **Free to change**—Users choose their own passwords and don't have to share it with the system administrator. The administrator then creates a separate account to access and manage the computer.
- **Locked**—Users cannot choose their own password. Users receive a password, and the system administrator manages the password. Log the password for the account in your succession plan, then remove any permissions that allow the user to change the password. This way, you'll always have access to the device.



Either one of these methods will ensure long-term access to the workstations and software on your network.

## How to Identify Business Critical Software

When you take inventory of the software on your network, look for items that are “mission critical.” If you think you can’t live without a program for a day or two, then log it. If you look at a program and you haven’t used it in two years, then it may not be that important.

Capture the vendor, account number, username, password, and website information. Put this information in your succession plan. Here are some areas to look for important software. Here’s a sample list of software to get you thinking about your network:

- **Legal Research**—Lexis/Nexis, Westlaw, Fastcase, Shepard’s, etc.
- **Accounting and Billing**—Quickbooks Desktop/Online, PC Law, Legalmaster, Bill4Time, TimeSlips
- **Servers**—Fileservers, NAS devices, or other filesharing devices
- **Backup Software**—Mozy, Carbonite, Amazon, Acronis, Symantec
- **Cloud File Sharing Systems**—Dropbox, ElephantDrive, Amazon, OneDrive
- **Microsoft Office Software**—Online software such as Office 365
- **Webhosting and Domain Services**—Godaddy, Bluehost, Wix, etc.
- **Miscellaneous Desktop Software**—Look for programs that are critical to daily operations
- **Network Devices**—Sonic walls, routers, switches, Comcast modem, WAVE modem, or AT&T U-verse box
- **Printers**—Multifunction printers and copiers often have a control panel that controls access to printing and accounting features.

You may not have programs in every category listed here, but this list is a starting place for adding critical software to your succession plan.

## Email Accounts Are Mission Critical

Email accounts are a special category of software. Sometimes the line between business and personal usage blurs, especially for owners and partners. Personal and confidential information, as well as non-business communications, are often in these accounts. Even the “catch-all” accounts can contain confidential information.

In professional practices that run their own mail servers, it’s easy to control access to email accounts. Exchange servers and business portals are designed so a single administrator can control all the accounts. Your succession plan should contain the password and username for the administrator of the system, when appropriate.

For small firms, this may not be the case. If you use tomlawyer@yahoo.com, it’s possible no one will ever get into that account. Here’s why. Yahoo and other email providers view this as a personal email account. It isn’t a part of a business or an organization, so they require correct answers to security questions before allowing access to the account.

Here are two things to help avoid problems in this area:

- **Safe Place**—Keep your email password in a secure place. Remember to update any saved copies whenever you change your password.

- **Security Questions**—Put the answers to the security questions in your succession plan and record the email address and password for the backup email account, too.

## Simple Tools You Can Start Using Today

Third-party programs that catalog the equipment and software on your network are easy to use. They make it easy to gather the information, plus many of these programs can produce one or more reports you can insert into your plan.

Here are two tools to help you build and maintain your plan:

- **Password Manager**—Easy-to-use tool for keeping track of passwords and usernames. The consumer versions of these products support one to three users. If you have many users in your environment, look for options that support many users. Look at 1Password, LastPass, and Roboform.
- **Inventory Software**—A favorite tool for system administrators is the inventory feature built into most network management programs. The tool takes inventory of the entire network. It captures information about computers, switches, routers, software, and more. Look at Open-AudIT, Kuwaiba, and Spiceworks (network knowledge required).

Your succession plan is a living document you should update as your business grows and changes. There's always a risk the plan has become outdated by the time it's executed. But, if you implement some of the tools mentioned here for gathering and managing the network information, your succession plan should have accurate information when the time comes to execute it.

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# CCCBA Member Information Series 2018

Friday, June 01, 2018



Did you know that during the summer the Bar Association sponsors a Member Information Series each year? This series is here as a benefit to CCCBA members and is designed to provide information about areas that most of us deal with, but may not know much about, from issues related to getting older (from Social Security to home care management) to issues important to those just starting out (student loan debt repayment). This series is for everyone!

This year's series starts on June 19 with a program called "Maximizing your Social Security Benefits" and it focuses on

learning more about Social Security so that you can avoid mistakes that leave money on the table, maximize your benefits and effectively use Social Security as a means to prevent outliving your assets. [Register Here.](#)

On July 12 the Member Information Series continues with "Student Loan Debt Repayment Strategies" which looks at which repayment programs might work for you, effective strategies for saving for the future (debt repayment or buy a house?), and also ways to protect your family as you work toward repayment. [Register Here.](#)

On July 25 we look at "The A, B, C's and D of Turning 65", which addresses the alphabet soup of turning 65 and planning the transition to Medicare and a Medicare supplement and will cover Medicare Part A and B, eligibility for a Medicare supplement, types of supplements (but NOT specific company information), Prescription Drug Plans, timelines, open-enrollment and tips related to transitioning. It will also give a basic overview of Long Term Care Insurance as well. Whether you are coming up on 65 or you are taking care of your parents who are entering the world of Medicare, this is an important program. [Register Here.](#)

Finally, the series ends on August 8 with "The World of Care Management and Home Care in the New Millennium." This is a great follow up to the July 15 program in that it explores the options around home care and care management. [Register Here.](#)

The CCCBA provides this series each year to help its members become more informed about areas that affect us all. Although this is not an MCLE series, it is always well attended, so registration is recommended! Download the flyer of all sessions [here.](#)

# Coffee Talk - Business Succession Planning

Friday, June 01, 2018

**Coffee Talk** is a regular feature of the *Contra Costa Lawyer* magazine. We ask a short question related to an upcoming theme and responses are then published in the *Contra Costa Lawyer* magazine.

This month we ask:

## If you weren't practicing law, what would you be doing?

Writing novels!

- *Helen Peters, Attorney Mediator*

An Architect. Nothing is higher than an Architect (No joke, I was planning on going to Cal Poly to study architecture)

- *Joseph Doherty, Attorney at Law*

I'd be perfect at it if I didn't still need to practice it (law)... We used to go on lots of road trips when I was a kid. I remember being quite infatuated with the endless stream of long-haul trucks on the road. Some of them are quite obviously the pride and joy of their owner. The smoothness with which they command total control of the road, plus the prospect of seeing the world while being paid for the pleasure, were and still are magnetic. At the time (25-30 years ago), it was not unheard-of for a trucker to bring in \$200k annually, which isn't bad even in today's dollars. Then, as I grew older and learned how to cook, I discovered the amazing world of meat processing. Or rather the slowly dying practice of the neighborhood butcher. You know, the person down the street who knows absolutely everything about the meats he sells, who takes pride in every knife cut that goes into dressing a side of beef or a hog. The fella who's constantly tinkering with his sausage recipes. So my Plan B and Plan C, by the time I was studying for the bar, was either to buy my own big-rig or open up my own butcher shop. Come to think of it, I haven't yet ruled out either one...

- *Gary Vadim Dubrovsky*

I would devote my time to writing about California history.

- *Phyl van Ammers*

If not practicing law, I would like to be a teacher, as I have also been for many years.

- *John Díaz Coker*

When I retire there are two alternatives. One, is to go into teaching history because what is being taught today is nothing but propaganda. We can't forget or rewrite history. Second, full time grandfather. Being there for them down the block instead of two states away.

- *Dan G. Ryan, the crazyirishgrandpa*

Be a kept man.

- *David S. Pearson, Law Offices of David S. Pearson*

# The Senior Lawyers Task Force

Friday, June 01, 2018



President James Wu, as one of his initiatives for the year, created the Senior Lawyers Task Force. The focus of the Task Force is to look at topics and issues affecting “experienced” lawyers and to support those lawyers in their practices and in their lives beyond practice. The Task Force is led by Board Member Renée Welze Livingston and includes Past Presidents, Peter Mankin, Dick Frankel and Mike Brown, and past Board Members Joscelyn Jones Torru and Richard Alexander.

The Task Force discovered that 35% of CCCBA members have been practicing more than 30 years, 11% more than 40 years, and 20 members over 50 years! These numbers may increase as the Baby Boomers continue to age.

In order to better serve these members, a Senior Lawyer Roundtable was held on May 14. The 30 attendees had a spirited discussion of the topics that were of most interest to them. The group summarized the four main topics of interest:

1. Transitioning Out of Practice and Succession Planning
2. Sense of Purpose/What to do Next?
3. Mentoring/Giving Back
4. Improving Society

Other topics discussed were: creating community, volunteering and pro bono, competency issues, non-legal learning, senior biases and discrimination, and financial retirement issues. The participants decided to set up meetings in the future to discuss various topics of interest, including the possible formation of a Senior Lawyer Section. Watch for announcements of future meetings and bring your questions and share your experiences.

The Task Force will also sponsor a seminar at the MCLE Spectacular on November 16, 2018. If you have suggestions for seminar topics or speakers, contact Theresa Hurley at the CCCBA, 925-370-2548.

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# Turning Lemons into Lemon-AID

Friday, June 01, 2018



After cancelling her June 10 th wedding, CCCBA member Valerie Fenchel did something unusual. She decided to use the lovely venue (Rubino Estates Winery in Pleasanton), catering, flowers, and musicians for a fundraiser for Bay Area Legal Aid.

Fenchel is a family law attorney who practices in San Francisco. "I believe that the most significant impact you can have on somebody's life is empowering them to seek a healthy and supportive home environment," she said in an interview. "It is what happens at home that I believe has the most impact on whether we truly soar in

all other areas of our lives. Family dynamics can be unhealthy and at worst, toxic. These are dynamics nobody talks about. We keep them close to our vest. They are embarrassing, uncomfortable, and cause us to feel shame. I enjoy taking in a client that does not realize how much better his or her life could be, and showing them that it is not just possible, but necessary, and actually using the legal system to get what they are entitled to."

"While having a mother who practices family law has helped guide me, I believe it is actually the incredible marriage my parents built that inspires me to help others break free from unhealthy marriages. My parents always modeled for me what a healthy relationship should be, which has been a driving force for my desire to help others seek that. It's because my parents modeled such a successful marriage that I made the hard decision recently to end my engagement and call off a planned wedding. It's a humbling experience but the right decision – and one that helps me understand what my clients are going through," she said.

"This beautiful wedding that was supposed to happen that was the cause of so much anticipated excitement and joy...for it not to happen...well...obviously there is a reciprocal feeling of great loss and disappointment. I wanted to fill the void with something good that could truly help others. I believe that anything painful and hard happens for a reason and anytime I go through something hard, I do all I can to use the pain and sadness for something positive."

People talk about how "brave" she is, for not going forward with the wedding. "I never felt brave. I felt lucky," she said. "I am so lucky to have so much support from my family and friends where I had the ability to do this. I am so lucky that I had the choice financially to do this. There are so many people in my shoes that are not so lucky. Their failure to call off their engagement is not because they lack courage. It is because they lack the support and financial resources."

"Don't get me wrong, I was engaged to a beautiful soul that I continue to respect and admire in every capacity. We just were not a good fit to be married."

“The people that are truly brave are the men and women who are stuck in unsafe relationships where they are victim to domestic violence—that continue to persevere against all odds. The lucky ones have the financial resources to hire a family law firm to seek restraining orders on their behalf so that they may obtain peace in their homes. The unlucky ones cannot afford an attorney and stay stuck. That is, unless they seek the assistance of a non-profit like Bay Area Legal Aid.”

“I decided to have the venue benefit Bay Area Legal Aid so that my broken engagement could instead help spouses obtain peace in their homes. I believe this is a net win. One broken engagement will hopefully lead to multiple spouses set free to have the beautiful life they deserve.”

Fenchel contacted the CCCBA and asked for help publicizing the event, perhaps you saw it in the weekly email to members in May. Fenchel offered a discount to CCCBA members when they use the promo code CCCBA. For more information on Fenchel Family Law or on the event, please visit <http://www.fenchelfamilylaw.com/events/>.





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[The Surprising Importance of Succession as a Team Sport](#)

Most successful business owners have learned from their own success to make decisions in a very specific fashion. I believe that this decision-making pattern will ultimately become a liability when owners, not in this stan in



### Spotlight



[Board Success Comes From Planning](#)  
Like your business, or other organizations, the CCCBA Board of



[Smoke and Mirrors? An Update on Sessions, Federal Enforcement Priorities, and State Legal Cannabis](#)  
On January 4, 2018, U.S. Attorney



[An Interview With Our Newest Judge, Hon. Leonard Marquez](#)

### News & Updates



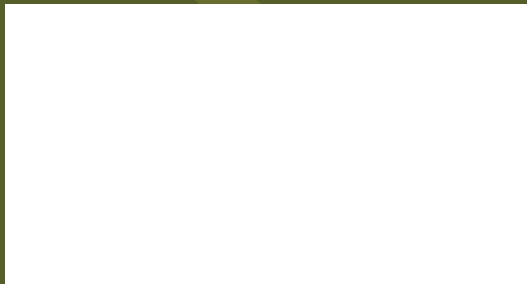
[Turning Lemons into Lemon-AID](#)  
After cancelling her June 10th wedding, CCCBA member Valerie Fenchel did something unusual. She



[The Senior Lawyers Task Force](#)  
President James Wu, as one of his initiatives for the year, created the Senior Lawyers



[Comedy Night – May 16](#)



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