

# Incapacitated Business Owners

Attorneys & Fiduciaries

**ACUÑA ♦ REGLI**  
Business Planning ♦ Administration ♦ Conservatorship ♦ Elder Law Litigation  
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## About the Presenters

**Frank R. Acuña** is a founding partner of ACUÑA ♦ REGLI. He is a California State Bar certified estate planning, trust, and probate law specialist. His practice includes estate planning; inheritance litigation; business succession planning; special needs trusts; and farm, ranch, and vineyard succession planning. Mr. Acuña has taught tax seminars for the National Tax Practice Institute, the California Society of Enrolled Agents, the California Society of Tax Professionals, the National Association of Enrolled Agents, and the American Institute of Certified Public Accountants. Mr. Acuña also is a featured speaker for the Professional Fiduciary Association of California, the National Guardianship Association, and the California Public Administrators, Public Conservators, and Public Guardians. He advises tax, fiduciary, and investment professionals throughout the State of California.

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## About the Presenters

**Tracy S. Regli** is a founding partner of ACUÑA ♦ REGLI. Tracy focuses her practice on probate and trust administration, fiduciary representation, conservatorship and special needs planning. She has assisted many banks, fiduciaries, and family members with administering large and small estates throughout California. Prior to starting the firm, Tracy worked for a national real estate investment trust, negotiating and drafting commercial real estate transactions. Her extensive business experience makes her a more effective lawyer when administering estates and negotiating disputes for her clients.

Tracy is an active member of the Alameda and Contra Costa Bar associations, the Professional Fiduciary Association of California (PFAC), and the Southern Alameda Estate Planning Council. She is a sought-after speaker and has spoken at PFAC and Estate Planning Council meetings and conventions. Her pro bono activities include participating in the Lawyers in the Library program and assisting low income seniors through workshops sponsored by the Contra Costa County Bar Association.

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## Case Study #1

Carrie is a licensed professional fiduciary in solo practice. She handles probate, trust administration, and conservatorship cases.

During Thanksgiving Dinner, she choked on a piece of turkey and died. Her husband fears malpractice actions and asks for your advice.

Carrie has no agreements in place with other licensed fiduciaries. How should Carrie's husband handle the winding up of her practice?

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## Case Study #2

Same facts as Case Study #1, except Carrie does not die. She suffers brain damage due to oxygen deprivation while waiting for the EMTs to arrive.

Carrie insists that she is able to continue her practice. However, telephone messages and angry letters and emails are beginning to pile up.

Carrie has no agreements in place with other licensed fiduciaries. How should Carrie's husband handle the winding up of her practice?

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## Duties and Liability in a Nutshell

### ❖ Fiduciary Duties

- ❖ Duty to limit liability
- ❖ Duty to report to court and beneficiaries
- ❖ Duty to provide "continuity of care"

### ❖ Professional Negligence

- ❖ Failure to fulfill any of the duties listed above
- ❖ Simple Rule of Thumb: Perfection (anything else is malpractice)

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### Case Study #3

Sam is a licensed professional fiduciary. He suffers an heart attack and dies. While his family attempts to wind up his practice, liability insurance on a home he is managing for a trust client lapses and, during the holiday season, burns to the ground due to a Christmas tree fire.

- ❖ Does Sam's estate have any liability for the post-mortem loss?
- ❖ Is there any way to limit the liability?

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### Case Study #4

Same facts as #3, but Sam is a licensed attorney handling inheritance litigation cases. Sam dies a week before the statute of limitations runs on a huge trust contest claim he was supposed to file. Does Sam's estate have any liability for the post-mortem loss?

- ❖ Is there any way to limit the liability?

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### Limited Role of Licensing Authorities

- ❖ Discipline vs. Proactive Protection
  - ❖ Typically, licensing authorities only become involved when an error has been made and a complaint is filed with the authority
  - ❖ Exception: Attorneys
- ❖ The Complaint Process
  - ❖ Typically a long process and little recourse to having a practice manager appointed
  - ❖ Typical remedies: License revocation and fines

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## Determining Incapacity

### ❖ Fiduciary Duties

#### ❖ Limiting Liability

- ❖ Including a confidentiality waiver in all engagement documents
- ❖ Appointing a "practice protector" named in the engagement documents
- ❖ Maintaining a complete, accurate, up-to-date client/matter list and calendar

#### ❖ Reporting to Court and Beneficiaries

### ❖ When All Else Fails – Court Action

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## Determining Incapacity

### ❖ Attorney-Client Limitations:

#### ❖ Confidentiality vs. Client Protection

- ❖ Duty of Confidentiality
  - ❖ Exception: Practice Wind-Up
- ❖ Practice Protection Requirements
  - ❖ Solos and small firms
  - ❖ State Bar backup
  - ❖ Tenderloin Notices

#### ❖ Practice Transfer Notice Requirements (and maintaining client confidentiality while notice occurs)

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## Practice Transfer Notice

### NOTICE TO THE CLIENTS OF THE LAW OFFICES OF \*\*\*

PLEASE TAKE NOTICE that on or after April 29, 2016, certain assets of The Law Offices of \*\*\* will be sold to Acuña ♦ Regli, LLP:

- ❖ The telephone lines, facsimile lines, website presence, client lists, and client files of The Law Offices of \*\*\* will be transferred to Acuña ♦ Regli, LLP.
- ❖ You have the right to retain other counsel.
- ❖ You may take possession of any client papers or property held by The Law Office of \*\*\*, or direct the transfer of your files and property to another law firm.
- ❖ If notice of your wish to receive or transfer your client papers or property is not received within 90 days of the date of this notice, Acuña ♦ Regli, LLP, may continue to hold your files; act as your attorneys on your behalf; or, dispose of your files as part of our regular document retention policy, as appropriate.
- ❖ If you would like Acuña ♦ Regli, LLP, to be your attorneys, we will need you to meet with us and to sign a new client agreement. An attorney-client relationship will not be formed until we meet with you and a new client agreement is signed.

To request transfer of your files or to set a consultation appointment with Acuña ♦ Regli, LLP, please call (925) 906-1890, or email us at calcoor@AcunaRegli.com.

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## Case Study #5

Larry, Moe, and Curly are practice partners in a law firm, Dewey, Cheatem & Howe. Moe has become increasingly erratic, and both Larry and Curly fear early onset dementia. When they confront Moe, he combatively responds, "I'm no more crazy than you two knuckleheads."

What options do Larry and Curly have to protect themselves and their clients?

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## Best Practices – Practice Agreements

- ❖ Determining Incapacity – By Agreement
  - ❖ A neutral determination method to determine incapacity or regaining capacity:
    - ❖ Two licensed physicians . . .
  - ❖ A maximum term before the practice must be wound up:
    - ❖ Six months?
  - ❖ A method for determining incapacity disputes:
    - ❖ **Must** use alternative dispute resolution
  - ❖ A succession plan
    - ❖ Who will take over the practice and on what terms?
- ❖ Determining Incapacity – Court Action?

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## Best Practices – Succession Agreements

- ❖ Buy-Sell Agreements are critical!
  - ❖ Preferred: Practice Partners
  - ❖ Employee buy-out
  - ❖ Third party sales
  - ❖ Designated successor fiduciaries

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## Best Practices – Succession Agreements

- ❖ Valuation Methods – An Overview
  - ❖ Third party valulators
    - ❖ Difficult to value attorney and fiduciary practices due to the "personal" element
    - ❖ Usually apply a mechanistic formula that may not apply
    - ❖ No industry standard for fiduciary practices; varying standards for attorneys
  - ❖ Private party sales
    - ❖ Buyers do not want to put money up front; Sellers want as much as they can get
    - ❖ Better alternative: Percentage of collections for a term of years
  - ❖ Best Alternative: Sales to persons already involved in the practice
    - ❖ Client identification
    - ❖ Familiarity with practice and financial performance
    - ❖ Least disruption in practice
    - ❖ May avoid some notice issues
    - ❖ Some persuasive power if court action is necessary (judicial and client economy)

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## Best Practices – Succession Agreements

- ❖ Best Practice: Buy-Sell Agreements
  - ❖ External: With another attorney or fiduciary to purchase your practice in case of incapacity, death, retirement, etc.
  - ❖ Internal: With persons already involved in the practice.
- ❖ Issue: Some practice areas have value, some don't
  - ❖ Attorneys: Estate Planning vs. Probate/Trust Administration and Litigation
  - ❖ Fiduciaries: Conservatorship vs. Probate/Trust Administration
  - ❖ Solution: The percentage pay-out
- ❖ Best Practice: Review and revise any Buy-Sell Agreement every few years

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## Case Study #6

Robert is a very successful estate planning attorney. He would like to retire, but has been a sole practitioner his entire career. Associates have been a revolving door, claiming there was no future in the practice. Brokers and other attorneys have not been able to deal with him, citing his lack of office automation and record keeping as impediments to valuing or purchasing his practice. As Robert ages (now in his late 60s), more prospective clients are going elsewhere, citing their concerns as to whether he will be in practice as they age. Moreover, he has a family health history of unexpected incapacity or death due to strokes and heart attacks.

- ❖ What can Robert do now to make his practice more saleable?
- ❖ What changes in practice area should Robert make?
- ❖ Who/what are the most likely purchasers if Robert wants to retire in relatively short order?

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