

NOTE: This material is intended as only an example, which you may use in developing your own form. It is not considered legal advice and as always, you will need to do your own research to make your own conclusions with regard to the laws and ethical opinions of your jurisdiction. In no event will ISBA Mutual Insurance Company be liable for any direct, indirect, or consequential damages resulting from the use of this material.

## Backup Lawyer: Sample Agreement

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

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

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

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

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

The sample agreement is not reciprocal in nature.

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

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

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

## SAMPLE AGREEMENT

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

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

**2. Determination of Impairment, Disability, or Incapacity.** The Planning Lawyer shall be considered to be impaired, disabled or incapacitated for the purposes of Paragraph 1 where such impairment, disability or incapacity is such that the Planning Lawyer is unable to practice law or is substantially limited in their ability to practice law. A determination whether the Planning Lawyer is impaired, disabled or incapacitated for the purposes of Paragraph 1 shall be made by the Backup Lawyer in their sole discretion. In making such determination, the Backup Lawyer shall act upon any reasonably reliable information, including but not limited to communications with members of the Planning Lawyer's family and, if available, the written opinion or opinions of one or more licensed physicians or other medical professionals responsible for care of the Planning Lawyer. By this Agreement, Planning Lawyer authorizes the disclosure of Protected Health Information to the Backup Lawyer.<sup>5</sup> The Backup Lawyer may also rely upon the opinions of other individuals with a close and continuous relationship with the Planning Lawyer, including their spouse, relatives, close friends, colleagues, and office staff.

**3. Compensation.** Planning Lawyer agrees to compensate Backup Lawyer a reasonable sum for services performed by Backup Lawyer pursuant to this Agreement, including acts of representation of Planning Lawyer's clients and acts otherwise taken in connection with the administration of Planning Lawyer's legal practice. Backup Lawyer shall maintain accurate, detailed time records for the purpose of determining the reasonable sum that shall be paid to Backup Lawyer.<sup>6</sup> Upon the termination of this agreement, Backup Lawyer shall provide to

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<sup>5</sup> The Planning Lawyer should execute HIPAA Authorizations identifying the Backup Lawyer and authorizing the disclosure of Protected Health Information to the Backup Lawyer upon the Backup-Lawyer's request.

<sup>6</sup> You may wish to include a provision mandating that disputes relative to the compensation provision of the agreement shall be submitted to arbitration.

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

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

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

**I. Administration of Planning Lawyer's Practice and Payment of Business Expenses.**

The Backup Lawyer is authorized to take any reasonably necessary action to engage in the day-to-day administration of Planning Lawyer's legal practice, including but not limited to payment of the usual and customary expenses of the Planning Lawyer's business, the employment of office staff and any tasks incident thereto.

**J. Conclude Legal Representation.** The Backup Lawyer is authorized to take any action necessary to conclude legal matters on behalf of Planning Lawyer's clients and to conclude the legal representation of Planning Lawyer's clients.

**K. Communications with Professional Liability Insurer.** Backup Lawyer is authorized to contact Planning Lawyer's Professional Liability Insurer to provide notice of any claims or potential claims. In the event of any such claims or potential claims, the Backup Lawyer shall cooperate with Planning Lawyer's Professional Liability Insurer.

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

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

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

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

client in light of the fact that confidential information has been obtained by virtue of or in connection with this Agreement.

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

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

**11. Minimum Insurance.** At all times during the pendency of this Agreement, the Planning Lawyer and the Backup Lawyer shall maintain in place minimum professional liability insurance with policy limits of \$250,000 per claim and \$500,000 in the aggregate.<sup>7</sup>

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

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

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

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<sup>7</sup> You may wish to require that the Backup Lawyer carry a more significant amount of insurance. If you operate a limited liability legal practice, at a minimum, both you and the backup lawyer should carry sufficient insurance to comply with Illinois Supreme Court Rules 721 and 722.

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

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

**PLANNING LAWYER**

\_\_\_\_\_  
[Planning Lawyer name]                      Date

**BACKUP LAWYER**

\_\_\_\_\_  
[Backup Lawyer name]                      Date

**ALTERNATE BACKUP LAWYER**

\_\_\_\_\_  
[Alternate Backup Lawyer name]      Date

\_\_\_\_\_