



Law Society
of Ontario

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de l'Ontario

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Mandatory Succession Planning

Consultation Report

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the Law Society of Ontario

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Table of Contents

Introduction	2
Background	2
Why Mandate Succession Planning?	3
Benefits of Succession or Business Continuity Planning.....	5
The Succession Plan	5
Compliance Focused Initiative.....	9
Implementation.....	9
Feedback Invited and Questions for Comment	11
Next Steps.....	11

Introduction

The Professional Regulation Committee (the “Committee”) seeks feedback from lawyers, paralegals, legal organizations, and the public about a recommendation from the Trustee Services Working Group to require that licensees in private practice maintain a succession or business continuity plan for their legal services business.

The Committee now seeks feedback about this recommendation so that it may be considered further in the context of impacts on the professions and clients.

Background

The experience of the Law Society’s Trustee Services department is that there is insufficient succession or business continuity planning by licensees, in particular among lawyers who practise as sole practitioners or in affiliated cost and space sharing type arrangements.¹

Trustee Services is the Law Society department responsible for the protection, preservation, and appropriate distribution of client trust monies and property, such as client files, testamentary documents, or corporate minute books. The department is primarily engaged where a licensee ceases to practise law or provide legal services but has not made appropriate arrangements with respect to winding-up their professional business, for instance as a result of death, sudden illness or incapacity, or due to retirement, suspension, or licence revocation. In many of those cases, the licensee’s practice is essentially abandoned. Before the Law Society is able to intervene, clients’ legal interests may be jeopardized, cases may be dismissed, trust funds may be inaccessible, and clients may lose access to their files and other important documents.

The vast majority of licensees who become involved with Trustee Services are lawyers as opposed to paralegals, and are predominately sole practitioners.

There are approximately 9,500 lawyer and approximately 1,600 paralegal sole practitioners. In addition, there are approximately 6,000 lawyers and approximately 700 paralegals who are in small firms of fewer than 6 lawyers. Licensees in those two business structures represent over 50% of licensees in private practice. Unfortunately, many of these licensees do not plan sufficiently for suddenly or unexpectedly being unable to continue with their professional business.

Over the last decade, the headcount and overall budget of Trustee Services has almost doubled, to correspond with a significant increase in trusteeships and related practice

¹ The exact number of licensees who have succession or continuity plans is unclear. One Law Society survey revealed that 80% of licensees do not have estate plans or business continuity plans. However, between 2017 and 2019, 468 sole practitioners underwent a practice review, and 41% responded “no” to the question that asks among other things whether they have a succession plan. An additional 40% indicated some level of compliance with the issues covered under that question.

wind-ups. It costs approximately \$2,000,000 per year to run the Trustee Services Department.²

It is anticipated that these costs will continue to rise as the population ages, since older licensees are at greater risk of unexpectedly having to stop practising law or providing legal services due to death, illness or incapacity. In line with the overall aging of Canada's population, the Law Society has seen a significant rise in the number of sole practitioners over the age of 65. For instance, between 2005 and 2020, there was an increase of almost 240% in the number of sole practitioner lawyers over 65, from 618 in 2005 to 2,101 in 2020. There was a similar increase in the number of paralegal sole proprietors over 65 years of age between 2010 and 2020, from 60 in 2010 to 204 in 2020.³

Why Mandate Succession Planning?

Insufficient succession planning leaves the licensee's clients, employees, and professional business in the lurch. It also fails to protect the licensee's own personal and legacy interests in the asset that is their law practice and often leaves the licensee's family members to manage the wind-up of the professional business at what is a very difficult time. If Trustee Services is required to step in after a licensee has suddenly or unexpectedly ceased practising law or providing legal services, it ultimately costs all licensees.

A mandatory succession plan requirement would protect client interests, ensure licensee compliance with professional obligations, preserve licensee professional businesses and reputations, and reduce Law Society administration.

1. Protect Client Interests

Where a licensee is suddenly or unexpectedly unable to practise law or provide legal services, clients with active matters may have their legal interests jeopardized. Often clients will not be aware that their lawyer or paralegal is no longer practising law or providing legal services, and will assume that their legal matter is still being monitored. When this is not the case, urgent issues may be ignored, and cases may be dismissed or positions and interests compromised. Trust funds may be inaccessible, which may hold up pending matters, such as real estate transactions, or require that clients wait for long periods of time while Trustee Services works to gain access to the licensee's accounts. Clients may also be unable to access important documents, such as their files, wills, or corporate minute books. When Trustee Services is required to intervene in a licensee's

² This includes both the trusteeship functions and the Unclaimed Trust Fund (UTF). The UTF was established in 1999 to retain funds held in licensees' trust accounts where the funds have been held by the licensee for at least two years and the party entitled to them cannot be located. The Trustee Services Working Group has not recommended any changes to the UTF function.

³ The overall percentage of lawyers in private practice who are over 65 years of age is also increasing. In 2005, approximately 5% of all lawyers in private practice were 65 or older. By 2020 that had increased to 13%. In 2010, approximately 4.6% of all paralegals in private practice were 65 or older. By 2020, that had increased to 8.5%.

professional business it is common to see missed limitation periods, neglected or abandoned refugee or immigration applications, unfiled documents or uninitiated processes, and corporate or real estate transactions that are unable to close.

2. Comply with Professional Obligations

Licensees who fail to make sufficient arrangements for the cessation of their professional business may breach their professional obligations, such as Rule 3.1 (Competence), Rule 3.2 (Quality of Service) and Rule 3.5 (Preservation Client's Property) under the *Rules of Professional Conduct*.⁴

3. Preserve Licensee Professional Businesses and Reputations

Licensees who fail to plan for suddenly or unexpectedly being unable to continue with their professional business may suffer significant personal consequences. The licensee's work over the course of their career and their well-earned professional reputation may be tarnished as clients are left without representation and must scramble to obtain their files or trust funds. Ultimately, the licensee's professional legacy may be ruined.

The licensee's financial legacy may also be impaired without a plan to realize value from their professional business. In the experience of Trustee Services, where a licensee ceases to practice without any succession or business continuity plan, there is no value left in their professional business. Within days, clients and any staff have gone elsewhere, and Trustee Services becomes involved in an operation to salvage client property from a ruined business.

Often a member of the licensee's family is their estate trustee, and they are left with the responsibility of winding-up the licensee's estate, including their professional business. If the estate trustee is not a lawyer, this can be a daunting task, even where the licensee has made appropriate arrangements. Where there is no succession plan, the licensee's estate trustee may incur significant expenses and burden at what may be a very difficult and vulnerable time.

4. Reduce Law Society Administration

If a licensee stops practising suddenly or unexpectedly without having made alternative arrangements for their practice, the Trustee Services department must step in to protect and distribute client trust monies and property, assist with the wind-up of the business and the transitioning of active files, including immediate transition when client interests may be prejudiced.

The administration of a single trusteeship may take hundreds of work hours to complete over months or even years. In addition, practice recovery efforts may generate significant amounts of paper files, including wills and estate administration documents, that must be

⁴ Paralegals are subject to these duties under Rule 3.01 (Competence), 3.02 (Advising Clients), and Rule 3.07 (Client Property) under the *Paralegal Rules of Conduct*.

stored at additional expense. The Law Society is rarely able to recoup these expenses from the licensee's estate and must fund these efforts through general revenues derived from licensee fees.

Benefits of Succession or Business Continuity Planning

A mandatory succession plan requirement will not eliminate trusteeships and custodianships. However, it is estimated that adopting a requirement will significantly reduce this burden on the Trustee Services department, in particular in respect of the two-thirds of trusteeships that are solely the result of licensee illness, incapacity, or death. Even incomplete or partial plans and arrangements may reduce the overall work required by the department, which is funded through licensee fees.

The costs to administer the Trustee Services department is only a small portion of the overall Law Society budget. However, if a licensee fails to make sufficient plans for their professional business and the Trustee Services department is required to intervene, the costs to the licensee's clients may be significant. Clients may suffer financial losses to resurrect abandoned matters and legal interests may be forfeited.

A requirement to maintain a succession plan would mitigate that burden on clients by:

- Protecting client files and property, as well as client interests in active legal matters; and
- Promoting and ensuring professional responsibility and understanding that licensee client obligations include making sure that there are appropriate arrangements in place to safeguard client interests, files, and property when licensees cease providing legal services unexpectedly.

Requiring that licensees maintain a succession plan would also:

- Proactively address a growing risk as the professions continue to age;
- Preserve business value by making licensee professional businesses more attractive for potential successors;
- Encourage appropriate business management that will allow licensees to exit the professions with dignity; and
- Bring the Law Society of Ontario in line with other law societies, such as in [Nova Scotia](#) and [Saskatchewan](#), where succession plans are also required.

The Succession Plan

A. Elements

The required succession plan would include information and adequate arrangements to allow for the handling of client property and management of the licensee's professional business including, with respect to:

- Appointment of a successor licensee to assume responsibility for the licensee’s practice;
- The location of
 - open and closed files;
 - client property including wills and will indices;
 - foundation documents and other important records and valuable property;
- Passwords and the means to access computers, email, accounting and other electronic records;
- Details of, and access to all trust accounts, trust funds and any other accounts related to the licensee’s professional business, including the location of all accounting records and the contact information for any bookkeepers or accountants; and
- Any other arrangements necessary to carry on or wind-up the licensee’s unique professional business.⁵

Licensees who are sole proprietors would be required to name one or more other licensees who are prepared to take possession of client property (including files and funds), or are prepared to supervise a non-lawyer steward (for instance a family member), to properly distribute or wind-up the licensee’s professional business. Licensees should also be required to indicate that they have obtained the consent of their successor licensee to act in that capacity.

B. The Role of the Successor

At its core, the role of the successor licensee (the “successor”) is to:

- Ensure the orderly transfer of client matters and files to clients or to a new licensee (who may or may not be the successor);
- Enable the return of funds and/or property held in trust; and
- Satisfy the licensee’s obligation to provide competent representation.

The successor may enact one, or a combination of the following three outcomes for the licensee’s professional business.

1. Maintain – the licensee’s professional business may remain intact, with the successor taking over responsibility. The successor may be a younger licensee who has worked with the licensee prior to the succession or a more established practitioner.
2. Transfer – client files and obligations may be transferred to another licensee or a firm. Preferably the transfer would be negotiated and arranged by the licensee before they stop providing legal services; however, the successor licensee might

⁵ The Working Group’s recommendation about the requirements for a succession plan are based on needs identified by Trustee Services and the requirements in place for lawyers in Nova Scotia. That Law Society’s succession planning requirements and resources are available [here](#). Nova Scotia lawyers are also provided with a template succession plan, which is available [here](#).

agree to be tasked with arranging the transfer after the licensee has ceased providing legal services. A transfer may take the form of a sale of the professional business or a merger with another licensee professional business.

3. Wind-up – client matters may be transferred to other licensees, outstanding obligations may be resolved, and the business shut down. The successor may wind-up the professional business, or they might supervise a non-licensee, for instance a family member or a long-term employee, as they perform the wind-up.

Licensees should consider the preferred outcome for their professional business, and should arrange as many elements of the succession as possible in advance. The extent of the successor's role will vary depending on the plan chosen by the licensee. However, in all instances the successor would be expected to perform, or supervise an initial triage review of the licensee's client matters to identify those files that require urgent action and consider whether they might:

- Assist on a full or limited basis;
- Suggest a referral for the client; or
- Advise the client of the urgency and provide information about finding a new lawyer, for instance through the Law Society Referral Service.

The successor should know the licensee's preferred outcome for the professional business, and agree to their role as successor. Details of the licensee's plan and the successor's role, which may include compensation, should be established as far in advance as possible.

Sole practitioners in particular are encouraged to consider using a "buddy system" to provide backup support and act as successors for each other's professional business. Having backup support available can provide day-to-day assistance and can facilitate exposure to each other's professional business, which is helpful in the event either needs to act as successor in the future.

C. What if there is no Successor Available?

The Working Group's report recognizes that there may be instances in which a licensee is unable to identify a successor, for instance where licensees are working in remote locations without a community of licensees on which to rely. To provide for those instances, the Working Group recommends that a process be developed to allow for Trustee Services to assist in identifying an appropriate successor and to facilitate an arrangement.

The Working Group recommends a fee for this service set at an amount that encourages diligence on the part of the licensee but does not punish licensees who are simply unable to find a successor due to circumstances beyond their control.⁶

D. Resources

The mandatory succession plan requirement would be supported by a full suite of resources for licensees, which will include:

- Creating a succession plan template, which if used and completed correctly, will ensure that the licensee's plan is in compliance with the requirement.
- Developing increased and improved succession planning CPD offerings, as well as targeted practice supports.
- Amending and updating existing resources, including the [Law Society's contingency planning guide](#).
- Individualized guidance and resources, including telephone support. The Trustee Services department would remain available to provide guidance and assistance as business cessation issues arise for licensees, including successors, family members, and employees. For example, Trustee Services will be available to:
 - consult with licensees creating a succession plan;
 - provide templates, checklists and other resources commonly used when winding up a practice;
 - facilitate access to bank accounts and storage facilities; and
 - provide guidance with respect to communications with clients and others seeking access to files and information.

E. Guidance About Trust Account Management

The Working Group report acknowledges that trust account management, and in particular the transferring of responsibility for a trust account to another licensee, may be a significant obstacle to effective succession planning. Specific guidance is recommended to advise licensees that:

- Banks are not consistent in terms of what they will accept in support of transferring responsibility for a trust account;
- Licensees should meet with their bank manager as part of arranging their succession plan to ensure that the bank will accept what the licensee puts in place to transfer responsibility for their business and trust accounts;
- Making a successor licensee a second signatory on the licensee's trust account may be the most effective way to transfer responsibility, however, there are risks to that approach that may not be viable for some licensees or successor lawyers; and

⁶ The licensee may also be required to negotiate an additional fee with the successor identified by the Law Society. However, attempts should be made to identify lawyers who may act as each other's successor and not require additional compensation.

- If a licensee is not able to put a plan in place that will satisfy their bank, a successor lawyer may be required to seek a court order to direct the bank. Funds should be available from the licensee or in the estate to compensate the successor for this process.

The Working Group report also recommends that the Law Society encourage the Federation of Law Societies of Canada to liaise with the Canadian Bankers Association to discuss the issue of trust account transition. In time it is hoped that standard forms and agreements might be designed to provide certainty for successor licensees in respect of gaining access to the trust account regardless of the bank or the branch.

Compliance Focused Initiative

The Working Group recommends a compulsory requirement for a succession plan, to be included in the Law Society's by-laws along with the other basic financial requirements for every practice. Non-compliance, when discovered, would be subject to the same remedial and disciplinary options as other failures to comply with the By-Laws.

However, compliance through advice, guidance, and education, as opposed to enforcement or discipline, would be the early focus of this initiative.

Licensees in private practice would be required to indicate on their Annual Report filing that they have made appropriate business continuity arrangements including creating a succession plan that they have reviewed in the preceding 12 months.

Licensees who work as in-house counsel, in legal clinics or government, and licensees in the non-practising class would be exempted from the requirement.

Reporting would include two options:

1. Sole practitioners will be required to confirm annually that they have created a succession plan that complies with the Law Society's minimum requirements, and that they have obtained the consent of their successor to act as such.
2. Licensees practicing in firms (partners and associates) will be required to confirm that their firm has a plan, and that it complies with the Law Societies requirements, including a contingency in the event that no members of the firm are able to carry on the firm's professional business.

Compliance would also be confirmed through routine spot audits and practice reviews.⁷

Implementation

The Working Group recommends a staged implementation approach as follows:

⁷ Note that succession planning is already part of the practice review process. Changes anticipated would be limited to communicating the new requirement, directing licensees to compliance materials, and reporting non-compliance once the requirement is in force.

1. Initiation Phase (target 2023)

- Amend the Law Society's by-laws to establish the requirement and detail the prescribed elements of a compliant succession plan (target Spring 2023).
- To allow for licensees to become familiar with the requirements and for internal resource development and planning, the coming into force of the new requirement should be delayed for a significant period of time (target January 1, 2024 in-force date).
- During this initiation phase the new requirement should be communicated to licensees as extensively and frequently as possible.
- Outreach to stakeholders, such as Ontario's law associations and to the Ontario Bar Association accompanied by targeted outreach to practice specific local law associations and licensee organizations (e.g., Criminal Lawyers' Association, the Family Lawyers Association).
- Compliance encouraged by outreach, engagement, and education to be the primary focus of the initiative from initiation onward.

2. Requirement in force (target January 2024 – March 2025)

- By-Law requirement will come into force (target January 1, 2024).
- Add a requirement to the Annual Report that licensees indicate whether they have a succession plan (target 2024 Annual Report, available January 1, 2025, filing due by March 31, 2025).
- Compliance monitored through routine practice reviews and spot audits. If it is discovered that a licensee does not have a succession plan, they will be advised of the new requirement and directed to available resources and education offerings.
- Resources for licensees will be made available, including individualized advice and guidance through existing Law Society support programs.

3. Reporting and Enforcement (target beginning April 2025)

- Annual report filings will be reviewed and non-compliance identified.
- Compliance will be monitored through routine practice reviews and audits.
- Where a licensee indicates on their Annual Report that they do not have a succession plan, the licensee will enter into the enforcement process.

- Where a licensee is working toward compliance, discipline will be delayed as long as appropriate.

Feedback Invited and Questions for Comment

The Professional Regulation Committee invites feedback from the professions, stakeholders, and the public about the recommendations from the Trustee Services Working Group as outlined in this report. In particular, the Law Society would like to hear from sole practitioners, and licensees in private practice in smaller firms.

The Committee would also be interested in responses and thoughts on the following questions:

- What are the impediments to proper succession planning by licensees?
- What supports and resources should be in place to assist licensees with succession planning?
- Are there specific aspects of succession or business continuity planning that should be the focus of more thorough guidance and advice from the Law Society?

Next Steps

The Committee seeks input by November 30, 2022,

All feedback received will be reviewed by the Professional Regulation Committee to assist in determining whether to advise Convocation to adopt the recommendations of the Trustee Services Working Group.