



Law Society
of Ontario

Barreau
de l'Ontario

Tab 3.1

Client Contingency Planning

Amendments to By-Law 7.1

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Motion

That Convocation approve the Motion at Tab 3.1.1, which amends By-Law 7.1 to implement a requirement for licensees in private practice to maintain a client contingency plan for their professional business.

Background

In January 2021, this Committee established a Working Group tasked with considering six proposals to transform the Law Society's Trustee Services department, which were made in an external review.

The Working Group reported back to the Committee in April 2022, including endorsing the recommendation in the external review that the Law Society adopt a new by-law requirement for all licensees in private practice to maintain a succession or business continuity plan for their professional business. The Working Group recommended the requirement apply to sole practitioners and licensees practising law or providing legal services in firms.

In June 2022, the Committee launched a consultation about this recommendation.¹ Based on the feedback from that consultation, the Committee made a number of changes to the proposed recommendation, including narrowing and focusing the role of a successor or administrator licensee to safeguarding client interests in circumstances where their lawyer or paralegal is suddenly or unexpectedly unable to continue in respect of the retainer.²

Rationale - Protecting Client Interests

In most circumstances, licensees have arrangements in place to ensure the protection of client interests and property in the event that they suddenly or unexpectedly cease practising law or providing legal services, whether due to death, disability, or other cause.

For lawyers and paralegals who work in firm structures, the partnership/shareholder or associate/employee model inherently provides that continuity. Clients retain the firm, which will take over responsibility for client matters and ensure the continued protection of client files and property if a lead lawyer or paralegal is no longer able to act.

¹ The Consultation Report is available [here](#).

² Note that in by-law drafting the term successor was replaced with administrator. It is recommended that this change be adopted by the Committee in respect of the client contingency plan requirement as it more accurately reflects the scope of responsibility applicable to the licensee who steps in to protect client interests.

Licenses who do not practise law or provide legal services in firm structures may also make individual arrangements for the continuity or succession of their professional business in the event that they are no longer able to continue working.³

Unfortunately, the experience of the Law Society's Trustee Services department is that some sole practitioners and those working in cost and space saving type arrangements fail to plan for sudden or unexpected events that may impair their ability to maintain their professional obligations to clients. These professional obligations include the duties of competence, quality of service, confidentiality, preservation of clients' property, and responsibilities to the courts and tribunals.⁴

Where licenses cease practising law or providing legal services unexpectedly without making appropriate arrangements for their professional business, the Trustee Services department must step in to protect and distribute client trust monies and other property, assist with the wind-up of the business, and transition client files.

There are two primary problems with this:

1. By the time Trustee Services finds out that they need to intervene in a practice it is often weeks after the licensee has actually stopped working; and
2. Trustee Services does not have any of the necessary information about the licensee's practice to intervene immediately and must take the time needed to access digital records and files and locate trust accounts.

Often clients won't be aware that their lawyer or paralegal is no longer practising law or providing legal services and will assume their legal matter is still being monitored.

If that isn't the case, urgent issues may be ignored, cases may be dismissed or limitation periods missed, and legal interests may be compromised. Clients may also find that their trust funds are suddenly inaccessible, which may hold up pending real estate transactions, or require clients to wait to receive their funds while Trustee Services works to gain access to the licensee's accounts.

A licensee who fails to plan for unexpected practice interruptions may also suffer personal and professional consequences. The worth of their practice may be impaired without a plan to realize value from it, and their family members are often left with the responsibility

³ Voluntary succession planning has long been encouraged by the Law Society. Since at least 2014, the Law Society has published a [contingency planning guide](#) for lawyers, which provides step-by-step guidance, sample documents and additional resources. Since at least the early 2000s, practice specific CPD programming has highlighted the importance of licensee succession planning and programs dedicated entirely to retirement and succession planning issues for licenses are provided regularly.

⁴ Encouraging succession planning does not appear to have sufficiently addressed this issue. The exact number of licenses who have succession or continuity plans is unclear. One Law Society survey revealed that 80% of licenses do not have estate plans or business continuity plans. In addition, 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.

of winding-up the licensee's professional business at significant expense and burden during a very difficult and vulnerable time.

In the last decade or two, the number of practices that have required the involvement of Trustee Services has increased significantly. It is anticipated that this trend will continue, corresponding with an aging bar, in particular in respect of sole practitioners.⁵ Therefore, there is a pressing and increasing need to address this issue in order to protect client interests.

The Committee recommends that Convocation approve the proposed amendments to By-Law 7.1 to require that licensees in private practice implement a contingency plan for their professional business that is targeted at protecting their clients' interests in circumstances where they are no longer able to practise law or provide legal services.

The Client Contingency Plan

To ensure that clients are not left in the lurch and to ensure that their interests are protected, the proposed amendments require that all licensees in private practice maintain a client contingency plan for their professional business.

A compliant plan, for which a template will be made available, will 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 an administrator licensee to assume responsibility for the wind-up of the licensee's professional obligations to clients;
- 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 wind-up the licensee's professional obligations to clients.

A template plan will be made available by the Law Society to ensure licensee compliance.

⁵ Between 2005 and 2022 there was an increase of almost 240% in the number of sole practitioner lawyers over 65, and a similar increase in the number of paralegal sole proprietors over 65 between 2010 and 2022.

I. The Administrator

Licensees who are sole proprietors will be required to name one or more other licensees to act as their administrator. Appointing an administrator licensee to protect the interests of clients in the event that a licensee is unexpectedly absent from practice is consistent with contingency planning advice for licensees from both the Law Society and LawPRO.

In response to feedback received during the consultation, the Committee recommends a narrow role for the administrator, who will be required, at minimum, to wind-up the licensee's client obligations or supervise a non-lawyer steward (for instance a staff or family member) in the proper wind-up of the licensee's obligations to their clients.

Specifically, the administrator will be required to carry out, or supervise three functions:

1. Notify the Law Society's Trustee Services department and the licensee's insurer as soon as possible after learning that the licensee has ceased working.
2. Advise clients that the licensee is no longer able to continue in respect of the retainer and arrange for the transfer of the clients' files and other property to another licensee or their return to the clients.
3. Attempt to access the licensee's trust accounts, if applicable, for the purpose of returning or transferring trust funds as directed by the clients (or parties, or the court, where consent is required).

Licensees may wish to enter into more comprehensive business continuity agreements that include the continuation of the licensee's business by the administrator or the sale of the licensee's business to another licensee or licensee firm. However, the mandated requirements of administrators are limited to the three functions above.

In circumstances where an administrator cannot be identified, for instance where licensees are working in remote locations without a community of licensees on which to rely, the Trustee Services department will assist in identifying an administrator and to facilitate the arrangement. The Trustee Services department may charge a fee for this service that will be set at an amount that encourages diligence on the part of the licensee but does not punish licensees who are simply unable to find an administrator due to circumstances beyond their control. Ultimately, if a suitable administrator cannot be identified, the Trustee Services department can work with the licensee to put a plan in place to ensure the wind-up of the licensee's professional business in accordance with the client contingency plan requirement.

II. Reporting

Licensees in private practice will be required to confirm annually that they have made appropriate client contingency arrangements, including creating a contingency plan that they have reviewed in the preceding 12 months.

Licenseses who work as in-house counsel, in legal clinics or government, and licenseses who are in the non-practising class will be exempt from the requirement.

Reporting will include two options:

1. Sole practitioners will be required to confirm that they have created a client contingency plan that complies with the Law Society's minimum requirements, that they have reviewed that plan in the preceding 12 months, and that they have obtained the consent of their administrator to act as such.
2. Licenseses practising in firms (partners and associates) will be required to confirm that their firm has a plan, and that it complies with the Law Society's minimum requirements, including a contingency in the event that no members of the firm are able to carry on the firm's professional business.

Licenseses will report on the Law Society Annual Report, beginning for the 2025 year (i.e. a reporting deadline of March 31, 2026).

III. Compliance Focus

Non-compliance with the Client Contingency Plan, when discovered and not remedied, will be subject to the same corrective and disciplinary options as other failures to comply with other Law Society requirements.

However, compliance through advice, guidance, and education, as opposed to enforcement or discipline, will be the focus of the initiative. Existing Law Society programs, such as spot audits, practice reviews, the Practice Management Helpline, and the Practice Essentials Course will serve as means to educate licenseses about the requirement and to connect licenseses who are having difficulty complying with the Trustee Services department, for instance to assist in identifying an administrator. Enforcement will only be considered in circumstances where a licensee refuses to comply with the requirement.

Additional Supports for Licenseses

To support licenseses, the Committee recommends the following in support of the client contingency plan requirement:

I. Resources

A full suite of resources be prepared or updated for licenseses, including:

- A client contingency plan template, which if used and completed correctly will ensure that the licensee's plan is compliant with the requirement.
- A power of attorney template and instruction letter precedents to direct the transfer of the licensee's trust account(s) to their administrator.

- Increased succession planning CPD offerings, as well as targeted practice supports.
- Amended and updated resources, including the [Law Society's contingency planning guide](#).
- Individualized guidance and resources, including telephone support. The Trustee Services department will continue to provide guidance and assistance as business cessation issues arise for licensees, including administrators, family members, and employees. For example, Trustee Services will remain available to:
 - consult with licensees creating a client contingency 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.

II. Clarity about Liability and Insurance Coverage for Administrators

The Law Society will also provide specific guidance about professional liability for administrators. This issue was discussed at length by the Committee and was the focus of significant feedback during the consultation. Ultimately, the Committee decided that the narrowed role for the administrator would ensure limited, if any, involvement in the clients' legal matter, thereby limiting their potential exposure to liability claims.

However, the Law Society will continue attempts to leverage the expertise of LawPRO and paralegal insurers in crafting practical guidelines for administrators. These guidelines will document best practices that will help administrators exercise proper diligence in respect of the wind-up of the licensee's professional obligations to clients. While liability will depend on the specific circumstances of each situation, best practice guidelines will establish a baseline for licensees and may serve as a checklist to avoid accusations or findings of negligence.

III. Guidance About Trust Account Management

Licensees will continue to be advised that part of the client contingency planning process includes meeting with their bank manager to ensure that the bank will accept what the licensee has put in place to transfer responsibility for their trust account to the administrator licensee.

In addition, the Law Society will attempt to continue engaging with the Canadian Bankers Association (CBA) with the goal of establishing standardized processes and procedures to facilitate the transfer of a trust account from a licensee to their administrator.

Next Steps

If the Motion at Tab 3.1.1 is adopted by Convocation, the amendments to By-Law 7.1 will come into force on January 1, 2025.

LAW SOCIETY OF ONTARIO
BY-LAWS MADE UNDER
SUBSECTIONS 62 (0.1) AND (1) OF THE LAW SOCIETY ACT

BY-LAW 7.1 [OPERATIONAL OBLIGATIONS AND RESPONSIBILITIES]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON APRIL 25, 2024

MOVED BY Megan Shortreed

SECONDED BY William McDowell

THAT By-Law 7.1 [Operational Obligations and Responsibilities], in force immediately before this motion is moved, be amended as follows:

1. Effective January 1, 2025, the English version of the By-Law is amended by adding the following:

PART II.1

CONTINGENCY PLANNING

Definition: administrator

19.1. (1) In this Part, “administrator” means a licensee appointed and authorized to take or cause to be taken all steps necessary to preserve and carry on or to wind up the professional business of the licensee who appoints them.

Interpretation: winding up professional business

(2) Without limiting what it means to wind up the professional business of a licensee, winding up the professional business of a licensee includes the following:

1. Advising the licensee’s clients that the licensee cannot complete their retainers and arranging for the transfer of the clients’ files to another licensee or returning the clients’ files to the clients.
2. Returning or transferring clients’ trust funds as directed by the clients.

When contingency planning requirement not applicable

19.2. (1) This section does not apply to a licensee while they are practising law or providing legal services,

(a) within any of the following settings:

1. The Government of Canada,
2. A provincial or territorial government,
3. A municipal government,
4. A First Nation, Metis or Inuit government,
5. A clinic, within the meaning of the Legal Aid Services Act, 2020, that is funded by Legal Aid Ontario,

6. Legal Aid Ontario, pursuant to Part III of the Legal Aid Services Act, 2020,
7. An in-house legal department; or

(b) through a firm that is a sole proprietorship not owned by the licensee, an ordinary partnership or a limited liability partnership.

Contingency planning requirement

(2) A licensee who practises law or provides legal services shall maintain a contingency plan in accordance with this section for the preserving or carrying on or the winding up of their professional business in the event the licensee is unexpectedly temporarily or permanently unable to practise law or provide legal services and is incapable of meeting their obligations as licensee or former licensee.

Minimum components of contingency plan

(3) A contingency plan shall, at a minimum, include the following:

1. The appointment of an administrator.
2. Information on the location of and the means of obtaining possession or control of all property that is or should be in the possession or control of the licensee in connection with,
 - i. the professional business of the licensee,
 - ii. the business or affairs of a client or former client of the licensee,
 - iii. an estate for which the licensee is or was executor, administrator or administrator with the will annexed,
 - iv. a trust of which the licensee is or was a trustee,
 - v. a power of attorney under which the licensee is was the attorney, or
 - vi. a guardianship under which the licensee is or was the guardian.
3. Without limiting the generality of paragraph 2, information on the location of and the means of obtaining possession or control of all trust and other accounts of which the licensee is holder in connection with,
 - i. the professional business of the licensee,
 - ii. the business or affairs of a client or former client of the licensee,
 - iii. an estate for which the licensee is or was executor, administrator or administrator with the will annexed,
 - iv. a trust of which the licensee is or was a trustee,
 - v. a power of attorney under which the licensee is was the attorney, or
 - vi. a guardianship under which the licensee is or was the guardian.
4. Without limiting the generality of paragraphs 2 and 3, information on the location of and the means of obtaining possession or control of all [accounting records] and contact information for all bookkeepers or accountants that worked for the licensee in connection with,
 - i. the professional business of the licensee,
 - ii. the business or affairs of a client or former client of the licensee,
 - iii. an estate for which the licensee is or was executor, administrator or administrator with the will annexed,
 - iv. a trust of which the licensee is or was a trustee,
 - v. a power of attorney under which the licensee is was the attorney, or
 - vi. a guardianship under which the licensee is or was the guardian.

Contingency plan to be current

(4) A contingency plan shall be current at all times.

Timing of review of contingency plan

(5) A licensee shall review their contingency plan at least once every year.

Administrator to notify Society, insurers

19.3. An administrator whose appointment is activated shall notify the Society and the appointing licensee's professional liability insurers that the appointing licensee has ceased practising law or providing legal services and that they are the administrator in respect of the appointing licensee's professional business.