



The Law Society of
Upper Canada | Barreau
du Haut-Canada

The Contingency Planning Guide

For Lawyers

October 2014

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THE CONTINGENCY PLANNING GUIDE

Contingency planning for the operation of the law practice in the event of death, disability or other unexpected periods of absence from practice should be considered by the lawyer as a means of providing peace of mind for loved ones, clients and employees. This Guide has been prepared to encourage and assist lawyers who are in private practice to make such plans.

How to Use This Guide

The sample documents and other resources contained in this Guide are not intended to provide legal advice. They should be used thoughtfully and adapted by lawyers to suit their own individual circumstances.¹

This Guide contains the following sample documents and resources.

Sample Documents

- Sample Continuing Power of Attorney for Property Excluding Law Practice
- Sample Continuing Power of Attorney for Property for Law Practice
- Sample Direction for the Release of the Power of Attorney for Property for Law Practice Document
- Sample Last Will and Testament Clauses
- Sample Law Practice Coverage Agreement Between the Planning Lawyer and the Replacement Lawyer

Other Resources

- Planning Lawyer: Steps For Managing Your Law Practice to Facilitate the Task of the Replacement Lawyer
- Checklist for the Replacement Lawyer Who Takes Over the Law Practice of another Lawyer
- Practice Tips – Preparation of a Law Office Procedural Manual
- Checklist of Issues to Consider when Preparing Continuing Power of Attorney for Property Documents

¹ This Guide is not intended to replace a lawyer's professional judgment or to establish a one-size-fits-all approach to planning for such contingencies. Lawyers should make plans that take into consideration the particular circumstances of their practice including the nature and the locality of the law practice. Subject to the Guide provisions that incorporate legal, by-law or *Rules of Professional Conduct* requirements, a decision not to follow the provisions in the Guide will not, in and of itself indicate that a lawyer has failed to provide quality service. Whether a lawyer has provided quality service will depend upon the circumstances of each case.

- Checklist of Issues to Consider when Preparing Wills
- Article entitled “*Preparing for the Death and Disability of a Law Partner or Shareholder*”

This Guide outlines a number of key steps for lawyers making such plans. The recommended steps differ depending on whether the lawyer is a sole proprietor or is practising in partnership or in a professional corporation with more than one lawyer.

Terminology

The term “sole proprietor” for the purposes of this Guide means a sole practitioner, a lawyer practising as a sole proprietor in association with another lawyer(s) or a lawyer practising through a professional corporation of which the lawyer is the sole shareholder.

The term “Planning Lawyer” for the purposes of this Guide means the lawyer who makes arrangements for a Replacement Lawyer to take over the lawyer’s law practice and protect the interests of the lawyer’s clients in the event of the lawyer’s death, disability or unexpected absence from practice. The term “Replacement Lawyer” means a lawyer entitled to practise law in Ontario who takes over the Planning Lawyer’s law practice in the event that the Planning Lawyer dies, becomes disabled or is unexpectedly absent from practice.

Lawyers who lack the requisite knowledge and skill to develop their own contingency plan and prepare the required documentation should seek the advice of a lawyer with expertise in the area. In addition, depending on the lawyer’s circumstances, the lawyer may also wish to consult with a financial adviser.

Successful planning for death, disability or other unexpected absences from practice depends upon the existence of a Replacement Lawyer who is willing and able to take over the Planning Lawyer’s practice. Lawyers are encouraged to assist their colleagues and protect the interests of their colleagues’ clients by agreeing to act as Replacement Lawyers if their circumstances permit.

KEY STEPS FOR A LAWYER PRACTISING AS A SOLE PROPRIETOR

If you are a Sole Proprietor consider taking the following key steps when planning for death, disability and other extended absences from practice.

STEP ONE

Choose a Replacement Lawyer and an alternate Replacement Lawyer entitled to practise law in Ontario to take control of your practice and protect the interests of your clients in the event of your death, disability or other unexpected absences from practice.

STEP TWO

Discuss with your Replacement Lawyers, the plans that you intend to make and ensure that they are agreeable to assuming the role.

The following are some issues that you may wish to discuss at this time with your Replacement Lawyer:

- *The role of the Replacement Lawyer (e.g. wind up the practice or preserve and sell it)*
- *When will the Replacement Lawyer step into your practice*
- *Compensation for the Replacement Lawyer*
- *The location of your Power of Attorney document, Last Will and Testament and how the Replacement Lawyer will obtain the document when required*
- *The steps that you have taken or will take to facilitate the work of the Replacement Lawyer if the Replacement Lawyer should need to step into your practice*
- *Where the Replacement Lawyer will find information about your practice if the Replacement Lawyer is required to step into your practice (e.g. the location of an office manual containing information about your practice and key contacts)*

STEP THREE

Discuss with your bank(s), the bank's requirements to ensure that the Replacement Lawyer can access your trust/general accounts in the event of your death, disability, or unexpected absence from your practice.

STEP FOUR

Grant a power of attorney for property to the Replacement Lawyer and to an alternate Replacement Lawyer to take control of your law practice and protect the interests of your clients in the event of your disability or unexpected absence from practice.

We recommend that you consider having separate Continuing Power of Attorney Documents for your personal assets and for your law practice. In this way your Replacement Lawyer will have full power and authority to operate, sell or wind down your law practice, while simultaneously ensuring that control over your personal assets such as your family home and bank and investment accounts remain with your spouse, family member or whomever else you have named as attorney for property with respect to your personal assets. Naming a different person to act as attorney for the Personal Assets also gives someone other than the Replacement Lawyer (most often a family member or trusted friend) the ability to review the transactions undertaken by the Replacement Lawyer in respect of the Law Practice, and to negotiate and approve the price and terms of a possible sale of the Law Practice to the Replacement Lawyer.

Resources

Sample Continuing Power of Attorney for Property Excluding Law Practicepage 8
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Sample Direction for the Release of the Power of Attorney for Property for Law Practice Document.....page 14
Checklist of Issues to Consider when Preparing Continuing Power of Attorney for Property Documents.....page 37

STEP FIVE

Appoint a Replacement Lawyer and a successor Replacement Lawyer as estate trustee for your law practice in your last will and testament.

We recommend that you consider preparing two Wills, one dealing with assets related to your law practice and the other dealing with all other assets. The purpose of having two Wills is to provide the Replacement Lawyer with full power and authority to operate, sell or wind down the law practice, while simultaneously ensuring that control over personal assets such as a family home and bank and investment accounts remains with the Planning Lawyer’s spouse, family member or whomever else the Planning Lawyer has currently named as his or her executor.

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STEP SIX

Consider entering into a written agreement with your Replacement Lawyer outlining both your responsibilities and the responsibilities of the Replacement Lawyer.

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Sample Law Practice Coverage Agreement between the Planning Lawyer and the Replacement Lawyerpage 19

STEP SEVEN

Prepare your practice so as to make the task of your Replacement Lawyer easier.

You should ensure that your practice is managed in a way that facilitates the task of your Replacement lawyer when he or she is required to step into your practice. In this regard in addition to ensuring that your practice is managed effectively, you should consider preparing an office manual outlining the procedures and other important information about your firm.

Resources

Planning Lawyer: Steps for Managing Your Law Practice to Facilitate the Task of
the Replacement Lawyerpage 25
Practice Tips - Preparation of a Law Office Procedural Manualpage 33
Checklist for the Replacement Lawyer Who Takes Over the Law Practice of
Another Lawyer.....page27

STEP EIGHT

Ensure that there are sufficient funds available to the Replacement Lawyer to cover for a period of time office overhead and expenses and if appropriate any arrangements for compensation to the Replacement Lawyer (e.g. unused line of credit if available, life or disability insurance or other arrangements).

KEY STEP FOR A LAWYER PRACTISING IN A PARTNERSHIP OR A PROFESSIONAL CORPORATION WITH MORE THAN ONE LAWYER

A lawyer operating as a partnership of lawyers or a professional corporation with more than one lawyer shareholder should deal with the death, disability or other prolonged unexpected absence of a partner or shareholder of the firm by way of agreement among the partners or shareholders of the firm.

Resource

Article entitled "*Preparing for Death and Disability of a Law Partner or Shareholder*"
by Rachel Blumenfeld.....page 43

SAMPLE CONTINUING POWER OF ATTORNEY FOR PROPERTY EXCLUDING LAW PRACTICE

The following sample form continuing power of attorney for property excluding law practice may be used by lawyers when developing a contingency plan for their personal assets excluding their law practice in the event of their own incapacity or other disability preventing a return, whether temporary or otherwise, to their law practice. This sample form should be modified to suit the personal circumstances of the lawyer.

Continuing Power of Attorney for Property made in accordance with the Powers of Attorney Act and the Substitute Decisions Act, 1992, as amended.

This Continuing Power of Attorney for property is given by **(NAME OF DONOR)**, of the *(insert "City" or "Town")* of _____, in the Province of _____ Ontario.

1. I revoke any continuing power of attorney for property previously given by me, save and except for any continuing power of attorney for property which I have executed in connection with the management and disposition of my Law Practice as defined in paragraph 2 below. I declare that this continuing power of attorney for property applies only to my Personal Assets, as defined in paragraph 2 below.
2. For purposes of this continuing power of attorney for property:
 - (a) "Law Practice" means all property, both real and personal, of every nature and kind whatsoever, used in connection with my law practice including without limiting the generality thereof all bank accounts, investments, trust funds, client lists, client property, leasehold interests in any business premises, accounts receivable, goodwill, equipment, software and software licences, intellectual property and passwords and includes my Law Practice Corporate Properties.

<p><i>Delete reference to Law Practice Corporate Properties if no corporations form part of the Law Practice.</i></p>

- (b) "Law Practice Corporate Properties" means all shares, debt and other interests which I may own in [*name of law professional corporation*], any successor corporation, and any other corporation that owns assets used in the carrying on of my Law Practice or that has employees who are involved in the carrying on of my Law Practice; and
 - (c) "Personal Assets" means all my assets personally owned by me both real and personal of every nature and kind whatsoever save and except for my Law Practice.
3. I appoint **(NAME OF PERSON BEING APPOINTED)** to be my attorney for property in respect of my Personal Assets, and I authorize my attorney to do on my behalf anything in respect of my Personal Assets that I could do if capable of managing property, except make a Will, subject to the law and any conditions or restrictions contained in this document.

If **(FIRST PERSON)** cannot or will not be my attorney because of refusal, resignation, death, mental incapacity, removal by the court or any other reason, I substitute **(NAME OF ALTERNATE PERSON)** to act as my attorney for property in respect of my Personal Assets in place of **(FIRST PERSON)** in the same manner and subject to the same authority as **(FIRST PERSON)**.

The parties being named in this continuing power of attorney do not have to be the same as the parties named in the continuing power of attorney prepared for the lawyer's law practice.

4. It is my intention that this document is a continuing power of attorney for property pursuant to the *Substitute Decisions Act, 1992* and may be used during my incapacity to manage property.
5. This power of attorney includes the following powers:
 - (a) I authorize my attorney to exercise all powers in connection with my Personal Assets as I would be able to exercise had I chosen to exercise such powers myself, or had I legal capacity to exercise such powers. This therefore authorizes my attorney to bind, secure information, and execute documents in connection with any Personal Assets in respect of my attorney's dealings with any person. Without restricting the generality of the foregoing, I expressly constitute my attorney as my "legal representative" for the purposes of s.150 (1) (d) and all other purposes of the *Income Tax Act (Canada)*, and authorize my attorney to bind, secure information and execute documents on behalf of my Personal Assets in respect of any matter involving the government of Canada or any institution, such as a bank or trust company, regulated by the government of Canada.
 - (b) I authorize my attorney to delegate any act my attorney may exercise to some other person, and to revoke or suspend such delegation.
 - (c) I authorize my attorney to take physical possession of all of my Personal Assets, including property held in a safety deposit box, property held in safekeeping by others on my behalf, and property held by others subject to some professional privilege, which privilege I waive for this purpose. For greater certainty, my attorney shall be entitled to review my Will, in order to be able to manage my Personal Assets in a manner that is sensitive thereto.
 - (d) My attorney may take compensation out of my Personal Assets for any work done in connection with this continuing power of attorney for property by him, her, or them, in accordance with the prescribed fee scale established pursuant to the provisions of the *Substitute Decisions Act, 1992*, as amended, for the compensation of attorneys under a continuing power of attorney.
 - (e) I authorize my attorney to provide any consent on my behalf with respect to any right of possession or other interest I may have in a matrimonial home under the *Family Law Act*.
6. Any other general or limited power of attorney, whether continuing or not, granted by me with respect to my Law Practice is not revoked and all such powers of attorney shall co-exist with this continuing power of attorney for my Personal Assets as multiple powers of attorney.

7. This continuing power of attorney will come into effect on the date it is signed and witnessed.

I have signed this power of attorney in the presence of both of the witnesses whose names appear below.

I have signed this power of attorney on _____, 20** (insert date)

[Signature of the Donor]

NAME OF DONOR

We are the witnesses to this power of attorney. We have signed this power of attorney in the presence of the person whose name appears above, and in the presence of each other, on the date shown above. Neither one of us is the attorney, a spouse or partner of the attorney, a spouse or child of the grantor or person whom the grantor has demonstrated a settled intention to treat as a child of the grantor, a person whose property is under guardianship or who has a guardian of the person, or less than eighteen years old. Neither one of us has any reason to believe that the grantor is incapable of giving a continuing power of attorney.

[Signature of Witness]

[Signature of Witness]

Insert name and address of witness

Insert name and address of witness

SAMPLE CONTINUING POWER OF ATTORNEY FOR PROPERTY FOR LAW PRACTICE

The following sample form continuing power of attorney for property for law practice may be used by lawyers when developing a contingency plan for their law practice in the event of their own incapacity or other disability preventing a return, whether temporary or otherwise, to their law practice. This sample form should be modified to suit the personal circumstances of the lawyer.

Continuing Power of Attorney for Property made in accordance with the Powers of Attorney Act and the Substitute Decisions Act, 1992, as amended.

This Continuing Power of Attorney for property is given by **(NAME OF DONOR)**, of the
(*insert* "City" or "Town") of _____, in the Province of
Ontario.

1. I revoke any continuing power of attorney for property previously given by me in connection with the management and disposition of my Law Practice as defined in paragraph 2 below.

Include this clause if there is an existing continuing power of attorney for the law practice that the lawyer wants revoked.

2. For purposes of this continuing power of attorney for property:

- (a) "Law Practice" means all property, both real and personal, of every nature and kind whatsoever, used in connection with my law practice including without limiting the generality thereof all bank accounts, investments, trust funds, client lists, client property, leasehold interests in any business premises, accounts receivable, goodwill, equipment, software and software licences, intellectual property and passwords, and includes my Law Practice Corporate Properties.

Delete reference to Law Practice Corporate Properties if no corporations form part of the Law Practice.

- (b) "Law Practice Corporate Properties" means all shares, debt and other interests which I may own in [*name of law professional corporation*], any successor corporation, and any other corporation that owns assets used in the carrying on of my Law Practice or that has employees who are involved in the carrying on of my Law Practice; and
 - (c) "Personal Assets" means all my assets personally owned by me both real and personal of every nature and kind whatsoever save and except for my Law Practice.
3. I appoint **(NAME OF FIRST REPLACEMENT LAWYER)** to be my attorney for property in respect of my Law Practice and I authorize my attorney to do on my behalf anything in respect of my Law Practice that I could do if capable, except make a Will, subject to the law and any conditions or restrictions contained in this document.

If **(FIRST REPLACEMENT LAWYER)** cannot or will not be my attorney for property in respect of my law practice because of refusal, resignation, death, mental incapacity, removal by the court, or any other reason, I substitute **(NAME OF ALTERNATE REPLACEMENT LAWYER)** to act as my attorney for property in respect to my Law Practice in place of **(FIRST REPLACEMENT LAWYER)** in the same manner and subject to the same authority as **(FIRST REPLACEMENT LAWYER)**.

The parties being named in this continuing power of attorney do not have to be the same as the parties named in the continuing power of attorney prepared for the lawyer's personal property.

4. It is my intention that this document is a continuing power of attorney for property pursuant to the *Substitute Decisions Act, 1992* and may be used during my incapacity to manage property.
5. This power of attorney includes the following powers:
 - (a) I authorize my attorney to exercise all such powers in connection with my Law Practice as I would be able to exercise had I chosen to exercise such powers myself, or had I legal capacity to exercise such powers. This therefore authorizes my attorney to bind, secure information, and execute documents on behalf of my Law Practice in respect of my attorney's dealings with any person. Without restricting the generality of the foregoing, I expressly authorize my attorney to bind, secure information, and execute documents on behalf of my Law Practice in respect of any matter involving my clients, the Law Society of Upper Canada, the Lawyers' Professional Indemnity Company LAWPRO, any institution in which I maintain a professional membership for my Law Practice, the government of Canada or any institution, such as a bank or trust company, regulated by the government of Canada.
 - (b) I authorize my attorney to delegate any act my attorney may exercise to some other person, and to revoke or suspend such delegation.
 - (c) I authorize my attorney to take physical possession of my Law Practice, including property held in a safety deposit box, property held in safekeeping by others on my behalf, and property held by others subject to some professional privilege, which privilege I waive for this purpose. For greater certainty, my attorneys shall be entitled to review my Will, in order to be able to manage my Law Practice in a manner that is sensitive thereto.
 - (d) My attorney shall be entitled to be compensated at the rate of \$ _____ per hour for all reasonable time spent administering my Law Practice under this continuing power of attorney.
 - (e) My attorney shall be permitted to purchase any of my assets governed by this continuing power of attorney at fair market value with the consent of my attorney appointed in my continuing power of attorney dated _____, 20** in respect of my Personal Assets.
6. Any other general or limited power of attorney, whether continuing or not, granted by me with respect to my Personal Assets is not revoked and all such powers of attorney shall co-

exist with this continuing power of attorney for my Law Practice as multiple powers of attorney.

7. This continuing power of attorney will come into effect on the date it is signed and witnessed.

I have signed this power of attorney in the presence of both of the witnesses who names appear below.

I have signed this power of attorney on _____, 20 (insert date)**

[Signature of the Donor]

NAME OF DONOR

We are the witnesses to this power of attorney. We have signed this power of attorney in the presence of the person whose name appears above, and in the presence of each other, on the date shown above. Neither one of us is the attorney, a spouse or partner of the attorney, a spouse or child of the grantor or person whom the grantor has demonstrated a settled intention to treat as a child of the grantor, a person whose property is under guardianship or who has a guardian of the person, or less than eighteen years old. Neither one of us has any reason to believe that the grantor is incapable of giving a continuing power of attorney.

[Signature of the Witness]

[Signature of the Witness]

Insert name and address of witness

Insert name and address of witness

SAMPLE DIRECTION FOR THE RELEASE OF THE POWER OF ATTORNEY FOR PROPERTY FOR LAW PRACTICE DOCUMENT

To: *(insert name of person or law firm holding the document in safekeeping)*
Barristers and Solicitors

From: *(insert name of lawyer granting the power of attorney)*

RE: Continuing Power of Attorney for Property for
Law Practice made by me in favour of: *(insert name of Replacement Lawyer)*

Replacement Lawyer: *(insert name of Replacement Lawyer)*

Alternate: *(insert name of alternate Replacement Lawyer)*

You have agreed to hold the above document in safekeeping for me. In view of the fact that a need for the use of the document may arise in circumstances where I might lack the capacity to direct you or may otherwise be unavailable, you may rely upon this direction at that time. I agree that in consideration for your undertaking to hold the document for me, you shall be indemnified from any liability to my estate or to any third party as a consequence of relying on this Direction, or exercising any judgement this Direction requires you to exercise. You may also, where necessary, provide this Direction to any physician for the purpose of exercising such judgement, and such physician shall be similarly indemnified in relying on this document or exercising any judgement the circumstances require him or her to exercise.

You may release my Continuing Power of Attorney for Law Practice to the Replacement Lawyer or the Alternate Replacement Lawyer at the request of said person upon the receipt of one (1) or more of the following documents:

1. A written direction from the undersigned to the Replacement Lawyer or the Alternate Replacement Lawyer to commence to act under this Power of Attorney for Property for Law Practice; or
2. A written confirmation from a qualified medical doctor advising that the doctor has examined the undersigned and, in the opinion of the doctor, it would be unwise for the undersigned to continue to independently handle his (or her) own financial affairs, or words to that effect; or
3. A sworn statement by the Replacement Lawyer, or the Alternate Replacement Lawyer that, based on the information available to him (or her), it would be in the undersigned's best financial interests for the Replacement Lawyer, or the Alternate Replacement Lawyer, to begin to act under the Continuing Power of Attorney for Law Practice, and the undersigned is unable to give instructions under paragraph 1 above and the Replacement Lawyer or Alternate Replacement Lawyer is unable to obtain an opinion from a medical doctor as in paragraph 2 above.

_____, 20**
(insert date)

(insert name of Donor)

SAMPLE LAST WILL AND TESTAMENT CLAUSES

The following sample clauses may be used by lawyers when developing last will and testaments for their law practice and other assets in the event of their own death. These sample form clauses should be modified to suit the personal circumstances of the lawyer.

The cross references in square brackets after each heading correspond to the paragraphs in the *Checklist of Issues to Consider When Preparing Wills* on page 40.

1. Introduction [1]

General Will

I, [name of Planning Lawyer], of [City], Ontario, hereby declare that this is my Last Will and Testament with respect to my General Estate (as hereinafter defined) and shall be referred to as “my General Will”.

Law Practice Will

I, [name of Planning Lawyer], of [City], Ontario, hereby declare that this is my Last Will and Testament with respect to my Law Practice Estate (as hereinafter defined) and shall be referred to as “my Law Practice Will”.

2. Revocation [2]

General Will

I hereby revoke all Wills and Codicils made by me prior to [date] regarding those of my assets that form part of my General Estate. For greater certainty, nothing in this my General Will shall revoke, or override, any Will made by me that purports to dispose of my Law Practice Estate (as hereinafter defined), which other Will shall be referred to as “my Law Practice Will”.

Law Practice Will

I hereby revoke all Wills and Codicils made by me prior to [date] regarding those of my assets that form part of my Law Practice Estate. For greater certainty, nothing in this my Law Practice Will shall revoke, or override, any Will made by me that purports to dispose of my General Estate (as hereinafter defined), which other Will shall be referred to as “my General Will”.

3. Life Insurance [3]

Law Practice Will

I hereby revoke all previous bequests, declarations or agreements made by me in connection with the payment of the insurance policy on my life with [name of insurance company], policy number [number], and I declare that the proceeds of the said policy shall be payable to [Name of Replacement Lawyer] as Special Trustee as a separate

trust upon the same terms and conditions contained in paragraph [*insert the paragraph number of the dispositive provisions of the Law Practice Will*] of my Law Practice Will. This declaration shall be a declaration within the meaning of the *Insurance Act* (Ontario).

4. Executors of Lawyer's Estate [4 and 5]

General Will

I appoint [name] to be the sole Estate Trustee, Executor and Trustee of this my General Will. In the event that [name] predeceases me, or is or becomes at any time unable or unwilling to act or to continue to act as the Estate Trustee, Executor and Trustee of this my General Will, then I appoint [name] to be the sole Estate Trustee, Executor and Trustee of this my General Will in the place and stead of [name]. The person or persons from time to time acting as the Estate Trustee, Executor and Trustee of this my General Will is or are referred to herein as "my Trustee".

Law Practice Will

I appoint [name of first Replacement Lawyer] to be the sole Estate Trustee, Executor and Trustee of this my Law Practice Will. In the event that [name of first Replacement Lawyer] predeceases me, or is or becomes at any time unable or unwilling to act or to continue to act as the Estate Trustee, Executor and Trustee of this my Law Practice Will, then I appoint [name of alternate Replacement Lawyer] to be the sole Estate Trustee, Executor and Trustee of this my Law Practice Will in the place and stead of [first Replacement Lawyer]. The person or persons from time to time acting as the Estate Trustee, Executor and Trustee of this my Law Practice Will is or are referred to herein as "my Trustee".

5. Executors of Clients' and Other Estates [6]

General Will

If at my death I am the sole executor of the estate of my spouse or of any parent, child or sibling of mine or my spouse, and where by reason of devolution of appointment, my executor would otherwise become successor executor or trustee of such estate or trust, then I appoint my Trustee to be the successor executor or the successor trustee of such estate or trust.

Law Practice Will

If at my death I am the sole executor or trustee of any estate or trust, other than the estate of my spouse or any parent, child or sibling of mine or my spouse, and where by reason of devolution of appointment, my executor would otherwise become successor executor or trustee of such estate or trust, then I appoint my Trustee to be the successor executor or the successor trustee of such estate or trust.

6. Compensation [7]

Law Practice Will

I authorize my Trustee to claim and receive from my Law Practice Estate, as compensation for his/her time, trouble, care and skill in administering my Law Practice Estate, compensation calculated at the rate of *[select one alternative]*

- % of [net monthly billings / gross monthly billings / monthly accounts collected] from my law practice
- \$ per hour/day/month
- his/her hourly rate

Such compensation may be taken at intervals with the prior written approval of the person or persons from time to time acting as the estate trustee, executor and trustee of my General Will, or with the approval of the Superior Court of Justice upon application by my Trustee to pass his or her accounts.

7. Definitions [1 and 8]

Both Wills

In this Will,

- (a) "My Law Practice Estate" means all property, both real and personal, of every nature and kind whatsoever, used in connection with my law practice including, without limiting the generality of the foregoing, [my Law Practice Corporate Properties and] all bank accounts, investments, trust funds, client lists, client property, leasehold interests in any business premises, accounts receivable, goodwill, equipment, software and software licences, intellectual property and passwords.
- (b) "My Law Practice Corporate Properties" means all shares, debt and other interests which I may own at my death in *[name of law professional corporation]*, any successor corporation, and any other corporation that owns assets used in the carrying on of my law practice or that has employees who are involved in the carrying on of my law practice.
- (c) "My General Estate" means all of my property of every nature and kind whatsoever and wheresoever situate, but excluding my Law Practice Estate;

General Will

- (d) "My property" and "my estate" shall, unless the context otherwise requires, mean only my General Estate and shall not include my Law Practice Estate.

Law Practice Will

- (e) "My property" and "my estate" shall, unless the context otherwise requires, mean only my Law Practice Estate and shall not include my General Estate.

8. Vesting Clause

General Will

I give, devise and bequeath my General Estate to my Trustee upon the following trusts, namely:

Law Practice Will

I give, devise and bequeath my Law Practice Estate to my Trustee upon the following trusts, namely:

9. Debts Clause [9]

General Will

My Trustees shall pay out of and charge to the capital of my General Estate my debts (including any income or profits tax payable by me or by my primary estate in respect of myself or my General Estate for the year of my death or any previous or succeeding year), funeral and testamentary expenses, and all estate, legacy, succession and inheritance taxes or duties, whether imposed by or pursuant to the law of this or any other jurisdiction whatsoever, that may be payable as a consequence of my death and that have not been paid by the executors and trustees of my Law Practice Estate out of my Law Practice Estate. In addition, if my Trustees deem it to be necessary or advisable, my Trustees may pay out of my General Estate all or any portion of my debts specifically related to my Law Practice Estate.

Law Practice Will

My Trustees shall pay out of and charge to the capital of my Law Practice Estate my debts (including any income or profits tax payable by me or by my Law Practice Estate in respect of myself or my Law Practice Estate for the year of my death or any previous or succeeding year) specifically related to my Law Practice Estate and if my Trustees deem it to be necessary or advisable, my Trustees may also pay out of my Law Practice Estate all or any portion of my other debts, funeral and testamentary expenses, and all estate, legacy, succession and inheritance taxes or duties, whether imposed by or pursuant to the law of this or any other jurisdiction whatsoever, that may be payable as a consequence of my death and that are not specifically related to my Law Practice Estate.

10. Purchase by Trustee [14]

Law Practice Will

Notwithstanding trusteeship, my Trustee may purchase any asset from my Law Practice Estate either at public auction or by private contract, provided that in the latter case the sale shall be at a price and on terms and conditions approved in writing by the person or persons from time to time acting as the estate trustee, executor and trustee of my General Estate.

SAMPLE LAW PRACTICE COVERAGE AGREEMENT² BETWEEN THE PLANNING LAWYER AND THE REPLACEMENT LAWYER

This Agreement is made the *[insert the date]*.

Between:

X *[insert the Planning Lawyer's name]*

(the "Planning Lawyer")

and

Y *[insert the Replacement Lawyer's name]*

(the "Replacement Lawyer")

WHEREAS the Planning Lawyer is a sole proprietor practising law in Ontario.

AND WHEREAS the Replacement Lawyer is a lawyer practising law in Ontario.

AND WHEREAS the Planning Lawyer wishes to put a plan in place for the management, sale or winding up of his/her Law Practice (as defined in section 1), in the event that the Planning Lawyer becomes incapacitated or unable to manage the affairs of the Law Practice for any reason or if he/she dies while still in practice.

AND WHEREAS the Planning Lawyer has appointed the Replacement Lawyer as his/her Law Practice Attorney and Law Practice Estate Trustee (as defined in section 1).

AND WHEREAS the parties wish by this Agreement to clarify when and on what terms the Replacement Lawyer shall act as Law Practice Attorney or Law Practice Estate Trustee.

NOW THEREFORE in consideration of the mutual covenants herein contained and for other good and valuable consideration, the parties agree as follows:

Definitions

1. Wherever used in this Agreement, the following terms shall have the meanings set out below:

² This sample form agreement may be used by sole proprietors or lawyers who are the sole shareholders of a professional corporation when developing a contingency plan for their law practice in the event of their death, own incapacity or other disability preventing a return, whether temporary or otherwise, to their law practice. This sample form should be modified to suit the personal circumstances of the lawyer.

This sample form agreement has been adapted from a sample form agreement prepared by the Law Society of British Columbia. We wish to thank the Law Society of British Columbia for its assistance.

(a) **“Authorized Person”** means the following:

- i. the Planning Lawyer, if alive and capable of managing his/her affairs;
- ii. if the Planning Lawyer is alive but incapable of managing his/her affairs, the person(s) from time to time acting as the attorney(s) for property or guardian(s) of property of the Planning Lawyer with respect to the Planning Lawyer’s assets other than the Law Practice; or
- iii. if the Planning Lawyer has died, the person(s) from time to time acting as the executor(s) or estate trustee(s) of a Will governing the Planning Lawyer’s assets other than the Law Practice.

Each person whom the Planning Lawyer has appointed as an Authorized Person at the date hereof is listed in Schedule “A” to this Agreement. The Planning Lawyer agrees to notify the Replacement Lawyer promptly in writing of any change to the Authorized Persons.

- (b) **“Law Practice”** means all property, both real and personal, of every nature and kind whatsoever, used in connection with the Planning Lawyer’s law practice including without limiting the generality thereof all bank accounts, investments, trust funds, client lists, client property, leasehold interests in any business premises, accounts receivable, goodwill, equipment, software and software licences, intellectual property and passwords and includes the Planning Lawyer’s Law Practice Corporate Properties.
- (c) **“Law Practice Attorney”** means the attorney appointed by the Planning Lawyer under The Law Practice Power of Attorney.
- (d) **“Law Practice Corporate Properties”** means all shares, debt, and other interests that the Planning Lawyer may own in [*insert the name of the law professional corporation if applicable*], any successor corporation, and any other corporation that owns assets used in carrying on the Law Practice or that has employees who are involved in the carrying on of the Law Practice.
- (e) **“Law Practice Estate Trustee”** means the estate trustee appointed under the last will and testament of the Planning Lawyer with respect to the Law Practice executed on [*insert the date of signing*], a copy of which is attached to this Agreement as Schedule “B”.
- (f) **“Law Practice Power of Attorney”** means the continuing power of attorney for property of the Planning Lawyer with respect to the Law Practice executed on (insert the date of signature), a copy of which is attached to this Agreement as Schedule “C”.

Assumption of Duties

2. The Replacement Lawyer accepts his/her appointments as, and subject to sections 3 and 4, agrees to act as, Law Practice Attorney and/or as Law Practice Estate Trustee.
3. The Replacement Lawyer’s duties as Law Practice Attorney or as Law Practice Estate Trustee shall commence only on the date the Replacement Lawyer receives actual notice of (the “Commencement Date”):

(a) grounds to request the release of the Law Practice Power of Attorney, in accordance with the Direction Regarding the Release of the Document attached to this Agreement as Schedule “D”; or

(b) the death of the Planning Lawyer.

Until the Commencement Date, the Replacement Lawyer shall be under no obligation to monitor the Law Practice or the circumstances of the Planning Lawyer.

4. The Replacement Lawyer shall have two weeks from the Commencement Date to review the books, records and files of the Law Practice and notify the Authorized Person whether or not the Replacement Lawyer is able and willing to accept at that time the duties under this Agreement and the attached Schedules. While conducting the review of the Law Practice, the Replacement Lawyer will take reasonable steps to deal with urgent matters to protect the interests of the Planning Lawyer and his or her clients.

Practice Management

5. If the Replacement Lawyer accepts the duties under this Agreement, the Replacement Lawyer will take possession and control of the Law Practice, and will manage the Law Practice on behalf of the Planning Lawyer in the same manner that a prudent and competent lawyer would manage his or her own legal practice. Without limiting the generality of the foregoing, the Replacement Lawyer will, if and to the extent appropriate in the circumstances, follow the guidance set out in the Law Society of Upper Canada’s *Checklist for the Replacement Lawyer who takes over the Law Practice of Another Lawyer*, which is attached to this Agreement as Schedule “E”.

6. If the Planning Lawyer has died or if there is no reasonable expectation, after consultation with the Planning Lawyer, the Planning Lawyer’s immediate family or the Planning Lawyer’s doctor, that the Planning Lawyer will be able to resume the practice of law in a timely manner to retain the clients and preserve the good will of the Law Practice, the Replacement Lawyer will sell or wind down and dispose of the Law Practice.

Financial Management

Lawyers should consider how the Replacement Lawyer will cover the office overhead and expenses for a period of time. Sections 7 and 8 are only relevant if the funding mechanism is insurance purchased for this purpose. Insurance, however, is not the only option. Other funding methods might include payment of expenses from the general account, personal bank account or, by the estate as provided for in the will. Sections 7 and 8 should be modified to reflect the funding mechanism chosen.

7. The Planning Lawyer will purchase disability and life insurance for the purpose of paying the Replacement Lawyer and funding the expenses of the Law Practice. The Planning Lawyer will name the Replacement Lawyer as the beneficiary of such policies.

8. The Replacement Lawyer shall:

(a) hold the proceeds received from the disability and life insurance policies referred to in section 7 in trust and use those proceeds for paying the expenses of the Law Practice, which includes the Replacement Lawyer’s fees;

- (b) account for the proceeds of the disability and life insurance policies and their use as part of the reporting requirements under this Agreement; and
- (c) give to the Authorized Person, any proceeds remaining after the Planning Lawyer returns to practice or the practice is sold or wound up.

Include section 9 below only if the Lawyer would like to specify tasks that are mandatory for the Replacement Lawyer to perform. If section 9 is not included in the Agreement, then section 5 of the Agreement would apply and the Replacement Lawyer would be required to consider all the matters referred to in Schedule "E" but could exercise his or her own judgment as to whether any particular action was required. Examples of items that the Planning Lawyer might wish to make mandatory, by listing them in section 9, are the payment of law office expenses for a period of time, the collection of accounts receivable, dealing with the lawyer's bank accounts including trust accounts.

9. Without limiting the generality of section 5 and the powers and duties under this Agreement and the attached Schedules, the Replacement Lawyer will:

[List duties]

10. If the Replacement Lawyer wishes to buy some part or all of the Law Practice, he/she may do so, if acceptable terms can be reached with the Authorized Person.

Indemnity

11. Each party (the "Responsible Party") agrees to indemnify and save harmless the other party (the "Innocent Party") from all loss or damage that the Innocent Party may sustain in any manner as a result of an error or omission made by the Responsible Party, so long as the Innocent Party did not have actual knowledge of the error or omission or, having actual knowledge, so long as the Innocent Party acted honestly and reasonably in attempting to correct the error or omission.

Reporting

12. The Replacement Lawyer will provide to the Authorized Person, on a quarterly or other reasonable periodic basis, or on request by the Authorized Person, a written report(s) to include, but not limited to, an accounting for accounts billed, accounts collected and expenses paid, and any efforts to sell or otherwise dispose of the Law Practice.
13. If the Replacement Lawyer decides to sell or wind down the Law Practice, the Replacement Lawyer will provide a written explanation to the Authorized Person.

Compensation

14. In consideration of carrying out the duties of Law Practice Attorney and Law Practice Estate Trustee, the Planning Lawyer agrees to pay to the Replacement Lawyer, and the Replacement Lawyer agrees to accept as sufficient, the compensation set out in the Last Will and Testament and/or Law Practice Power of Attorney of the Planning Lawyer attached as Schedules B and C.

Termination

15. If the Replacement Lawyer has not assumed any duties under this Agreement, this Agreement may be terminated:
- (a) by the Replacement Lawyer on two weeks' written notice to the Planning Lawyer, or
 - (b) by the Planning Lawyer, if alive and capable of managing his/her affairs, immediately on providing written notice to the Replacement Lawyer.
16. Subject to the Replacement Lawyer's duties pursuant to the Law Society of Upper Canada *Rules of Professional Conduct* and in particular Section 3.7 on Withdrawal from Representation, if, after assuming any duties under this Agreement, the Replacement Lawyer decides that he/she can no longer act, he/she will:
- (a) give the Authorized Person two weeks' written notice of this decision;
 - (b) prepare to hand over the Law Practice or what remains of it and any funds the Planning Lawyer holds in trust from disability and life insurance proceeds;
 - (c) provide a written report to the Authorized Person as described in section 12;
 - (d) take any steps necessary in this two week period to deal with urgent matters to protect the interests of the Planning Lawyer and the clients;
 - (e) advise Trustee Services of the Law Society of Upper Canada of the decision to withdraw; and
 - (f) provide any additional information requested by the lawyer taking over the duties outlined in this Agreement.
17. If the Replacement Lawyer has assumed any duties under this Agreement, this Agreement may be terminated:
- (a) by the Planning Lawyer, if alive and capable of managing his/her affairs, on two weeks' written notice to the Replacement Lawyer;
 - (b) by any Authorized Person, immediately upon providing written notice to the Replacement Lawyer in which the Authorized Person shows good cause for such termination.

Subject to the duties of the Replacement Lawyer pursuant to the Law Society of Upper Canada *Rules of Professional Conduct* and in particular Section 3.7 on Withdrawal from Representation, the Replacement Lawyer will cooperate with the Planning Lawyer or other Authorized Person in returning the Law Practice to the Planning Lawyer and follow the steps set out in paragraph 16 (b), (c), and (d).

PLANNING LAWYER: STEPS FOR MANAGING YOUR LAW PRACTICE TO FACILITATE THE TASK OF THE REPLACEMENT LAWYER

Consider taking the following steps to prepare your law practice for the entry of a Replacement Lawyer.

- Have a system in place for the opening, closing and destruction of client files and ensure that this system is followed.

Resources

- Law Society File Management Guideline
<http://www.lsuc.on.ca/with.aspx?id=2147491190>
- Guide to Retention and Destruction of Closed Client Files
<http://www.lsuc.on.ca/with.aspx?id=2147499150>

- Have a complete client list with contact information that can be produced at any time.
- Document your files well so that the Replacement Lawyer reviewing the file will know what has transpired in the file.
- Confirm your retainer in writing with the client and have a copy of the retainer agreement or correspondence in the file. Also consider inserting a provision into your retainer agreement with the client indicating your arrangement with the Replacement Attorney to manage or dispose of your law practice in the event of your death, disability or unexpected absence from your practice.

Resources

- Retainer Agreements or Engagement Letters
<http://www.lsuc.on.ca/with.aspx?id=2147494248>
- Sample Retainer Agreements
<http://www.practicepro.ca/practice/financesbookletprecedents.asp>

- Have a conflict checking system in place and keep it up to date.

Resources

- Selecting a Conflict Checking System
<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147491184>
- Checklist of Essentials of a Conflict Checking Systems
<http://www.practicepro.ca/practice/conflict/appendix5.asp>

- Have a tickler or reminder system in place and keep it up to date.

Resources

- Time Management Practice Management Guideline
<http://www.lsuc.on.ca/For-Lawyers/Manage-Your-Practice/Time-Management/Time-Management-Practice-Management-Guideline/>
- Keep your bookkeeping and accounting records up to date.
- Keep your time and billing records up to date.

Resources

- The Bookkeeping Guide
<http://www.lsuc.on.ca/with.aspx?id=2147499736>
- Prepare a law office procedural manual outlining the key processes in your law firm and important information about your firm and keep it up to date.

Resources

- Practice Tips – Preparation of a Law Office Procedural Manual at page 33.
- Have a contingency plan in place and periodically review and update the plan.
- Ensure that you have sufficient funds available to the Replacement Lawyer to cover office overhead and expenses for a period of time.³
- Discuss with your bank or determine what happens to your bank accounts, line of credit and other loans if you die or become disabled.
- Consider all types of insurance, including: professional liability insurance coverage, property insurance (if you own your building); contents insurance, including extra riders for computers or other equipment of significant value; commercial general liability for third-party bodily injury or property damage; business interruption insurance; crimes coverage; and disability, life, or other appropriate personal coverage. With respect to professional liability insurance, consider whether the standard \$250,000.00 LAWPRO run-off coverage is sufficient or whether it should be increased with Optional Run-off Buy-up coverage in the event that you pass away and discuss this with your Estate Trustee for the Law Practice.

³ A line of credit issued to a lawyer may not advance funds after the lawyer's death or disability.

CHECKLIST FOR THE REPLACEMENT LAWYER WHO TAKES OVER THE LAW PRACTICE OF ANOTHER LAWYER

Steps Before and Shortly After Entering the Law Practice

- Determine whether you have the authority to take over the law practice and if so, the scope of your authority

If you do not have the authority, determine what steps you will need to take in order to obtain the authority. If you have the authority, determine whether your role is to wind down the law practice or preserve it.

- Ensure that you have appropriate professional liability insurance in place
- Secure the office, client property, client files and all law firm bank accounts (trust and general)
- Meet with the law firm staff to address employment and related issues
- If the lawyer has a Teraview Account advise Teranet of the lawyer's death or disability and determine how you will deal with documents that require electronic registration.
- Determine whether there are any matters that require your immediate attention

This might involve: reviewing the firm's law office procedural manual, if any, the firm's calendaring or tickler system, books and records and accounts payable, the lawyer's desk diary or calendar, any unopened mail, email and facsimiles; retrieving voice mail messages and speaking to staff and others.

- If there are matters that require your immediate attention, consider whether you have any conflicts of interest and how you will deal with these

If you have a conflict of interest and cannot act, you may need to make arrangements for another lawyer to deal with the matter.

- Contact clients for matters that are urgent and obtain instructions to act on their behalf

Depending on the nature of the matter, you may need to obtain adjournments or extensions of closing dates or other deadlines.

- Advise the court and opposing counsel that the Planning Lawyer has died or is incapacitated

- Determine whether you have access to the law firm bank accounts (trust and general) and lines of credit or what steps you will need to take to gain access
- Establish how you will be compensated.

Additional Steps Once You Have Entered the Law Practice

Office Procedures

- Familiarize yourself with the firm's office procedures

This might involve reviewing the firm's office procedure manual and/or interviewing staff to obtain an understanding of the law firm procedures.

Conflict Checking System

- Determine the law firm procedure for checking for conflicts of interest
- Do a conflicts check before you start working on files
- If there is a conflict of interest, determine how you will deal with it

Calendar/Tickler System

- Determine the law firm procedure(s) used to record deadlines and significant dates
- Ensure the calendar or tickler system is up to date
- Identify any matters that need immediate or early attention and determine how you will deal with these

Files

- Locate the list of active files including names and addresses of clients
- Locate the list of closed files
- Determine where active/closed files are stored
- Determine how files are organized
- Determine how the filing system works – opening, closing, filing, organization of the information in the file, destroying the file
- Review the status of active files and determine how you will deal with each file
- Determine how you will deal with closed files

Notification of Clients

- Notify clients of the death or disability of the Planning Lawyer

If the client wishes to retain you to act in the matter, you should consider confirming in writing the terms of the retainer with the client. If the client wishes to retain another lawyer, prepare the file for transfer and consider having the client execute either a direction authorizing you to release the file to another lawyer or a receipt confirming the delivery of the file to the client and the termination of the retainer with the Planning Lawyer. In addition if applicable notify the court or tribunal that the Planning Lawyer is no longer acting and take steps to ensure that the Planning Lawyer has been removed as the lawyer of record and notify the opposing lawyer that the Planning Lawyer is no longer acting with regards to the matter.

Law Firm Bank Accounts/ Financial Records

- Identify the bank accounts related to the law practice (trust, general, electronic registration bank account, special trust accounts)
- Notify the bank(s) of the death or disability of the lawyer
- Determine who has signing authority on the account(s) and make changes if required
- Deposit any funds that require depositing
- Notify the law firm's accountant/bookkeeper of the death or disability of the Planning Lawyer
- Determine the type of bookkeeping system in place
- Locate and review accounting records, cheque books and most recent bank statements
- Determine the procedure used for recordkeeping and the individuals involved
- Ensure that the books and records are up to date
- Determine how the books and records will be kept up to date
- Determine whether you need to establish any internal controls regarding the firm's books and records

Client Property

- Determine the firm's policy and procedure with regards to client property
- Locate safety deposit box, key and inventory of contents
- Examine contents and make inventory of contents
- Secure all client property in the Planning Lawyer's possession

- Notify clients of the death or disability of the Planning Lawyer and how they may retrieve their property

Original Documents

- Determine the firm policy regarding original documents including last will and testaments and powers of attorney
- Locate any original documents being stored and determine how you will deal with these (return to owner or continue storing)
- Notify clients of the death or disability of the Planning Lawyer and how they may retrieve their original documents
- If a client cannot be reached determine how you will deal with that client's original documents

Mail, Email and Facsimiles

- Review unanswered mail, email and facsimiles and determine whether responses are required and if so, when and how responses will be prepared
- Determine the office procedure for filing mail, email and facsimiles
- Determine how you will handle mail, email and facsimiles going forward

Client Billing

- Determine the type of billing system
- Determine how and when bills are prepared
- Determine how and who will prepare bills going forward
- Identify accounts receivable and procedures used for collection
- Determine what steps if any should be taken to collect account receivables

Docketing System

- Determine the type of timekeeping system used
- Locate time records
- Determine if and how time records will be kept going forward

Accounts Payable

- Determine whether there are any lines of credit or loans and how you will deal with these
- Determine the status of accounts payable (operating costs, taxes, insurance, rent, utilities, supplies, services, benefits, employee expenses, withholding taxes, levies, insurance premiums, membership fees etc.)
- Determine how you will deal with the accounts payable
- Determine how you will deal with payroll and remittances

Computer System

- Determine the type of computer system and software applications in place
- Determine computer passwords
- Determine back-up procedures and locate and secure back-up disks or records
- Determine how back-up will occur going forward

Other Office Equipment (telephones, photocopier, fax machine etc)

- Determine if equipment is owned or leased
- Determine how you will deal with equipment
- Determine how the equipment works
- Determine how voice mail system works
- Determine how phone calls, voice mail messages and emails and facsimiles will be dealt with going forward

Office Lease/Ownership

- If the premises are leased, obtain a copy of the lease and review it, determine what payments if any need to be made, any notices to be given and whether the lease will continue
- If required, notify the Landlord of the Planning Lawyer's death or incapacity if required
- If the premises are owned, determine if there are any outstanding payments relating to the premises, how they will be paid and how you will deal with the premises going forward.

Employees

- Identify the employees of the Planning Lawyer and the terms of their employment

- Obtain advice if required regarding employer obligations and determine how the Planning Lawyer's employer obligations will be met
- Determine whether the employees will remain or be terminated

Teranet Account

- Notify Teranet of the death or disability of the Planning Lawyer
- Determine how electronic registration of documents relating to the Planning Lawyer's Practice will be effected going forward

Law Society and LAWPRO

- Notify the Law Society of the change in status of the Planning Lawyer
- Notify LAWPRO of the change in status of the Planning Lawyer

Additional Resources

- Law Society Guide to Closing Your Practice
<http://www.lsuc.on.ca/with.aspx?id=2147499389&langtype=1033>
- Law Society Guide for Retention and Destruction of Closed Client Files
<http://www.lsuc.on.ca/with.aspx?id=2147499150>
- Law Society Practice Management Guidelines
<http://www.lsuc.on.ca/with.aspx?id=2147490535&langtype=1033>
- LAWPRO Managing Practice Interruptions booklet
www.practicepro.ca/disasterbooklet or
http://www.practicepro.ca/practice/pdf/Practice_Interruptions_booklet.pdf
- Law Society Bookkeeping Guide
<http://www.lsuc.on.ca/with.aspx?id=2147499736&langtype=1033>

PRACTICE TIPS – PREPARATION OF A LAW OFFICE PROCEDURAL MANUAL

In order to facilitate the task of the Replacement Lawyer, you should consider preparing an office procedural manual outlining your firm's office procedures and other important information about your law practice. The manual should be reviewed periodically and kept up to date.

A law office procedural manual may include the following information.

Information about your filing system and procedures

- How to generate a client list including client names, addresses and phone numbers
- How to generate a file list
- How active files are opened and assigned numbers
- Where and how active files are stored
- Whether closed files are assigned numbers
- How can closed files be accessed
- How files are closed, retained and destroyed

Client Property

- Whether your firm retains original client documents and where these may be found
- What is your firm's policy and procedure regarding the receipt and return of client documents/property
- Does your firm have a safety deposit box and if so how do you obtain access to it
- What is your firm's procedure for dealing with original client wills
- If you store original wills, where are these kept

Office Administration

- What are your office hours
- How do you access the office
- Where can you obtain information about the security of the office (e.g. alarm system)
- How do you deal with mail (incoming and outgoing)
- How do you deal with deliveries (incoming and outgoing)
- How do you deal with facsimiles
- How do you organize/file your email
- Who are your service providers and contractors and where can information about the arrangements with them be obtained
- How do you accept or admit service
- Who is responsible for the firm website
- What are the rules regarding the use of technology in your firm

Information about your tickler or reminder system

- What type of tickler or reminder system does your firm use
- How does it work
- Who is responsible for inputting dates, retrieving dates, reminders and ensuring that the deadline is met

- How do you ensure that undertakings given and received are fulfilled

Information about your conflicts checking system

- What type of conflicts checking system does your firm have
- How does it work
- What information is inputted into the system and when
- Who is responsible for inputting the information
- Who is responsible for doing the conflicts check and identifying potential conflicts

Information about your bookkeeping system and financial records

- What type of bookkeeping system do you have
- Where are your financial records kept
- Who is responsible for keeping them up to date
- Who is responsible for doing the monthly reconciliations
- Where do you bank (name, address and phone number) and name and contact information of account manager
- Information on all of your law office bank accounts (trust, general, special trust accounts, account numbers and bank)
- What is the procedure for transferring trust monies (e.g. cheque , electronic, cheque requisitions, who is responsible for this)
- Outline internal controls in place
- Contact information for your bookkeeper, if applicable
- Contact information for your accountant
- How do you deal with petty cash
- Where do you keep your general and trust account cheques

Accounts Payable/Filings

- Where do you keep accounts payable information
- How do you deal with the payment of accounts
- Where do you keep information regarding outstanding loans (eg. line of credit)
- Do you have business credit cards and if so particulars
- How do you handle payroll and remittances
- How do you handle Law Society and LAWPRO filings including payment of transaction levies
- Where do you keep records of filings
- How do you deal with tax filings (income tax, HST) and where do you keep records of filings
- What is your record retention and destruction policy

Docketing System

- Describe your timekeeping/docket system
- Where do you keep time records
- Who is responsible for keeping time records

Billings

- When and how do you bill clients
- Who is responsible for billing
- Where do you keep information regarding billings
- How do you handle collections of outstanding accounts

Office Equipment

Photocopier

- Where can information about your photocopier and codes required to access it, if any, be found
- Who services your photocopier (contact information)
- Is it owned or leased and if leased where is the copy of the lease stored
- Where is the warranty kept

Computers/Printers

- Where can information about your computers be found
- Where can information about your computer systems and software applications be found
- Where can information about your passwords be found
- Where can information about your printers be found
- Who services your computers (contact information)
- Who services your printers
- Are the computers/printers owned or leased and if leased where is the copy of the lease stored
- What is the system for backing up data on your computer and who is responsible for this
- Where are the software disks and information about the software kept
- Where are the warranties for the computers and printers kept

Facsimile

- Where can information about your fax machine be found
- Who services your fax machine (contact information)
- Is it owned or leased and if leased where is the copy of the lease stored
- Where is the warranty is kept

Telephone

- Where can information about your telephone system and passwords required to access voice mail be found
- Who services your telephone system (contact information)
- Is it owned or leased and if leased where is the copy of the lease stored
- How do you retrieve voice mail
- Do you keep a record of your voice mail and what is the procedure for this
- Where is the warranty is kept

Client Identification and Verification

- What are your law firm procedures for identifying and verifying the identity of a client
- Where are client identification and verification records stored (in file, centralized system)

Employees

- Names and addresses of your employees and description of their jobs
- Where can terms of employment of each employee be found (e.g. copy of contract)
- Where are records relating to employees kept
- Where can information about employee pensions and other benefits be obtained

Contact Information (Name, Address and Phone Number)

- Attorney for Property
- Executor (s)
- Bank Manager
- Landlord
- Accountant
- Excess Insurer
- Disability Insurer
- Property Insurer
- Business Credit Card Company
- Bookkeeper
- Staff
- Contractors (conveyancer, process server, law clerk)
- Technology Service Provider
- Service providers

Office Premises

- Where may information regarding your lease or ownership of the office premises be obtained

Power of Attorney/Will

- Where is your will and continuing power of attorney for property

PSP to Access Teraview

- Where can information about your Teraview Account be obtained
- Who has PSPs under your account
- Who has access authority to documents under your account

CHECKLIST OF ISSUES TO CONSIDER WHEN PREPARING POWER OF ATTORNEY FOR PROPERTY DOCUMENTS

Contingency planning for the operation of a law practice in the event of a lawyer's incapacity or other extended periods of absence from the practice should be considered by the Planning Lawyer as a means of providing peace of mind for loved ones, clients and employees. A Planning Lawyer should consider how the law practice will be dealt with on his or her incapacity or for other extended periods of absence and address these considerations by establishing the appropriate documentation to facilitate either maintenance of the law practice or a sale or winding up of the law practice to another lawyer.

The use of separate Continuing Power of Attorney documents for Personal Assets and a Law Practice may assist a sole proprietorship or a professional corporation of which the Planning Lawyer is the sole shareholder to maintain financial stability both personally and professionally and to facilitate a smooth transition for clients of the Law Practice. The purpose of having two Continuing Power of Attorney documents is to provide the Replacement Lawyer with full power and authority to operate, sell or wind down the law practice, while simultaneously ensuring that control over Personal Assets such as a family home and bank and investment accounts remains with the Planning Lawyer's spouse, family member or whomever else the Planning Lawyer has currently named as his or her attorney for property with respect to Personal Assets. Naming a different person to act as attorney for the Personal Assets also gives someone other than the Replacement Lawyer (most often a family member or trusted friend) the ability to review the transactions undertaken by the Replacement Lawyer in respect of the Law Practice, and to negotiate and approve the price and terms of a possible sale of the Law Practice to the Replacement Lawyer. The use of such documents should be considered a preferable means of addressing contingency planning, as opposed to not having such documentation in place and running the risk of an appointment of a guardian of property pursuant to the *Substitute Decisions Act* or of having Trustee Services of the Law Society of Upper Canada take over the law practice.

When preparing such Continuing Power of Attorney documents, the Planning Lawyer should consider the following issues:

1. Ensure that all assets are dealt with, either under the Continuing Power of Attorney for Property for Law Practice [Page 11] or under the Continuing Power of Attorney for Property Excluding Law Practice [Page 8], and that there is no overlap that might cause confusion. The precedent documents accomplish this by defining what assets are to form part of the Law Practice, and providing that the Continuing Power of Attorney for Property Excluding the Law Practice covers all Personal Assets as defined in both types of documents. The precedent documents also make it clear from the very beginning of each document the nature of the assets for which authority is granted to the attorney for property to manage.
2. Ensure that neither Continuing Power of Attorney revokes the other. Each of the precedent documents stipulates that it only revokes prior Continuing Power of Attorney documents dealing with one particular group of assets (Law Practice or Personal Assets). This means that the subsequent preparation of a new Continuing Power of Attorney for only one set of assets will not affect the other Continuing Power of Attorney that is in existence for the other

set of assets. Consequently, changes can be made with respect to naming a new attorney for property or changing other terms independently for each type of document.

3. When selecting a Replacement Lawyer to act as attorney for property for the Law Practice, consider:
 - The proposed Replacement Lawyer's age, health, financial circumstances and family and business relationships and experience. It is advisable to name someone who is likely to be available not only if the Planning Lawyer becomes incapacitated or requires an extended period of absence from the law practice but also for as long as it takes to sell or wind up the law practice, if necessary. In essence, a Replacement Lawyer has full and absolute discretion to make decisions regarding the law practice, subject to any restrictions contained in the Continuing Power of Attorney for Law Practice so it is important to choose wisely and have regard to the fiduciary responsibilities being assumed by the Replacement Lawyer.
 - The ability of the Replacement Lawyer to communicate effectively with the attorney for property for Personal Assets as there will be a need to discuss management of the Law Practice assets, allocation of payment of Law Practice debts, taxes and other expenses and allocation of debts, taxes and other expenses to be paid from Personal Assets.
 - The nature and location of the proposed Replacement Lawyer's own law practice. A Replacement Lawyer with a well-established, well-run practice and reliable staff may be better able to take the time necessary to manage the Planning Lawyer's law practice. A Replacement Lawyer whose office is in the same town or the same part of the city as that of the Planning Lawyer may find it easier to go back and forth as required to attend to matters in both offices.
 - The impartiality of the proposed Replacement Lawyer. If the proposed Replacement Lawyer has a conflict of interest with another role (e.g. a landlord, tenant or creditor of the Planning Lawyer, a client of the Planning Lawyer or a potential purchaser of the Planning Lawyer's law practice), consider whether the conflict can be adequately addressed by requiring that certain decisions (such as the sale price and terms of the Planning Lawyer's law practice) be determined by agreement between the Replacement Lawyer and the attorney for property of the Planning Lawyer's Continuing Power of Attorney for Personal Assets or by some other reasonable decision-making process.
4. Approach the people selected to be the primary and alternate attorneys for property for each document to confirm that they are willing to act in these roles. In the case of the Continuing Power of Attorney for Law Practice, the consent of the Replacement Lawyer(s) to act may be contained in an agreement of the type included in this Contingency Planning Guide on page 19. Consider appointing more than one Replacement Lawyer to act as attorney for property for the Law Practice with joint or joint and several responsibilities. In certain circumstances this may be a good and practical option for the Planning Lawyer. In selecting such Replacement Lawyers, the Planning Lawyer may wish to consider the ability of the Replacement Lawyers to work together with each other so as to minimize conflicts. Additionally consideration should also be given to any changes required to the Replacement Lawyers' Professional Liability Insurance coverage as a result of the assumption of joint responsibilities.
5. If appropriate, negotiate ahead of time the rate of compensation to be paid to the Replacement Lawyer and, if desired, set it out in an agreement between the Planning

Lawyer and the Replacement Lawyer. Due to the nature of the work and the assets, it may not be appropriate to allow compensation to be claimed by a Replacement Lawyer in accordance with the regulations to the *Substitute Decisions Act*.

6. If the Planning Lawyer runs his or her law practice through a professional corporation, or owns shares or debt in a management company that runs the practice, or in a corporation that owns real property leased by the law practice, the shares and debt in the corporation would normally be included in and administered as part of the Law Practice. Additional consideration should be given by the Planning Lawyer to addressing matters unique to these types of structures.
7. Any restrictions on the authority of the attorney for property, whether for the Law Practice or Personal Assets should be clearly set out in the respective Continuing Power of Attorney.
8. The terms governing the payment of any gifts or making of loans to family members or other parties should be clearly set out in the respective Continuing Power of Attorney.
9. If there is the possibility that the Replacement Lawyer may wish to purchase the Planning Lawyer's law practice, consider making provision for an option to purchase and address the terms of such a transaction in an agreement of the type included in this Contingency Planning Guide.

CHECKLIST OF ISSUES TO CONSIDER WHEN PREPARING WILLS

A Planning Lawyer who runs his or her practice of law as a sole proprietorship, or as a professional corporation of which the Planning Lawyer is the sole shareholder, should consider preparing two Wills, one dealing with assets related to his or her law practice (the “Law Practice Estate”) and the other dealing with all other assets (the “General Estate”). The purpose of having two Wills is to provide the Replacement Lawyer with full power and authority to operate, sell or wind down the law practice, while simultaneously ensuring that control over personal assets such as a family home and bank and investment accounts remains with the Planning Lawyer’s spouse, family member or whomever else the Planning Lawyer has currently named as his or her executor.

When preparing two Wills, the Planning Lawyer should consider the following issues:

1. Ensure that all assets are dealt with, either under the Law Practice Will or under the General Will, and that there is no overlap that might cause confusion. The precedent clauses accomplish this by defining what assets are to form part of the Law Practice Estate, and providing that the General Will covers all assets other than the Law Practice Estate. The precedent clauses also make it clear from the very beginning of each Will which set of assets is being dealt with.
2. Ensure that neither Will revokes the other. Each of the precedent documents stipulates that it only revokes prior Wills dealing with one particular group of assets (Law Practice Estate or General Estate). This means that even if a Codicil is later prepared to one of the Wills, thus republishing the revocation clause, it will not affect the other Will.
3. If the Planning Lawyer has secured a separate life insurance policy to fund the ongoing expenses of the Law Practice (including compensation due to the Replacement Lawyer), consider designating the Replacement Lawyer as the beneficiary, in trust to use the proceeds as part of the Law Practice Estate. If the Planning Lawyer also has other life insurance, take care that any life insurance beneficiary declaration in the General Will excludes the policy that is being dealt with under the Law Practice Will. If the Planning Lawyer only has one policy to cover both professional and personal obligations, consider dealing with it in the Law Practice Will with possibly a direction to pay a portion of the proceeds immediately to the Trustee of the General Will.
4. When selecting a Replacement Lawyer to act as executor for the Law Practice Will, take into account:
 - The proposed Replacement Lawyer’s age and health. It is advisable to name someone who is likely to be available not only when the Planning Lawyer dies but also for as long as it takes to sell or wind up the law practice.
 - The nature and location of the proposed Replacement Lawyer’s own law practice. A Replacement Lawyer with a well-established, well-run practice and reliable staff may be better able to take the time necessary to manage the Planning Lawyer’s law practice. A Replacement Lawyer whose office is in the same town or the same part of the city as that of the Planning Lawyer may find it easier to go back and forth as required to attend to matters in both offices.

- The impartiality of the proposed Replacement Lawyer. If the proposed Replacement Lawyer has a conflict of interest with another role (e.g. a landlord, tenant or creditor of the Planning Lawyer, or a potential purchaser of the Planning Lawyer's law practice), consider whether the conflict can be adequately dealt with by requiring that certain decisions (such as the sale price and terms of the Planning Lawyer's law practice) be determined by agreement between the Replacement Lawyer and the executor of the Planning Lawyer's General Will.
5. Consider approaching the people selected to be the primary and alternate executors of each Will to confirm that they are willing to act in this role. In the case of the Law Practice Will, the consent of the Replacement Lawyer(s) to act may be contained in an agreement of the type included in this Contingency Planning Guide.
 6. Satisfy yourself that the executorship or trusteeship of any estate or trust of which the Planning Lawyer is the last surviving executor or trustee (with no alternate executorship or trusteeship appointment in the governing Will or trust document) will devolve appropriately. Under the *Trustee Act*, unless a Will or trust document provides otherwise, the last surviving executor or trustee of an estate or trust is entitled to appoint a successor by Will. If there is no such appointment, then it is the personal representatives of the last surviving executor or trustee who can act as successor executor or trustee or appoint another person or other persons to fill this role. Even if it is not part of the Planning Lawyer's practice to take on executorships or trusteeships for clients, it is possible that the Planning Lawyer may be acting as executor and trustee for the estate of his or her own spouse or parent at the time of the Planning Lawyer's death. The precedent clauses emphasize the distinction between personal matters and professional matters by naming the Replacement Lawyer to administer estates and trusts of which the Planning Lawyer is named executor or trustee by virtue of his or her office, and the Planning Lawyer's personal Trustee (who may be a family member or other person with knowledge of or an interest in the family) to administer estates and trusts of which the Planning Lawyer is named executor or trustee by virtue of his or her personal relationship to the deceased, settlor or beneficiary.
 7. If appropriate, negotiate ahead of time the rate of compensation to be paid to the Replacement Lawyer and, if desired, set it out in an agreement between the Planning Lawyer and the Replacement Lawyer. Due to the nature of the work and the assets, it would not normally be appropriate to allow compensation to be claimed as a percentage of receipts and disbursements, as in a personal situation.
 8. If the Planning Lawyer runs his or her law practice through a professional corporation, or owns shares or debt in a management company that runs the practice, or in a corporation that owns real property leased by the law practice, the shares and debt in the corporation would normally be included in and administered as part of the Law Practice Estate. The precedent clauses contain extra provisions to deal with interests in corporations, specifically the wording in square brackets in paragraph (a) and the whole of paragraph (b) in Section 7, the Definition Section of the Last Will and Testament Sample Clauses.
 9. Allocate debts, taxes and other expenses appropriately between the Law Practice Estate and the General Estate. The precedent debts clauses require the Trustees of the Law Practice Will to pay all debts and taxes related to the Law Practice out of the Law Practice Estate, and the Trustees of the General Estate to pay all other debts, taxes, funeral and testamentary expenses. There is also discretion to pay debts and taxes related to one set

of assets out of the other. More care may need to be taken in allocating debts and taxes to the correct pool of assets if the beneficiaries of the two Wills are different.

10. If there are to be any specific bequests, take care that they appear in whichever Will governs the particular asset which is the subject of the bequest.
11. Where a legacy is to be paid, satisfy yourself that there will be sufficient funds in the Will that contains the legacy to pay it in full. Alternatively, the Planning Lawyer may wish to include the legacy in both Wills but, to avoid doubling up, may stipulate that the sum payable under the Law Practice Will is to be reduced by the sum, if any, paid under the General Will (or vice versa).
12. Include a residue clause in each Will to avoid any intestacy. In most cases (although this is not necessary), the residue clauses in the two Wills will be identical, so that income from and proceeds of sale of the Law Practice Estate can be distributed to the same beneficiaries of the Planning Lawyer, in the same proportions, and on the same terms and conditions as the Planning Lawyer's other assets.
13. The Replacement Lawyer may not want to be involved in the long term administration of a trust for a spouse, minor child, or other beneficiary of the Planning Lawyer. Therefore, if there are to be ongoing trusts, consider authorizing or directing the Replacement Lawyer to pay or transfer the funds to the executors and trustees of the General Will, or to another trustee, as and when they become available (generally upon the sale or winding up of the law practice).
14. If there is any chance of the Replacement Lawyer wanting to buy the Planning Lawyer's law practice, consider authorizing such a purchase in the Will. Without a power to purchase assets from the estate, the purchase would require the approval of either the court or of all the beneficiaries (if there are no minor, unborn, unascertained or mentally incapable beneficiaries). Instead, the sample clause allows the estate trustee of the Planning Lawyer's General Estate (most often a family member or trusted friend) to negotiate and approve the price and terms of a possible sale of the Law Practice to the Replacement Lawyer. The easy availability of such an independent review is a strong argument for having two separate Wills and for naming a different person from the Replacement Lawyer to act as estate trustee for the General Estate. Note that the precedent clause is an administrative power only. If the Planning Lawyer wishes to give a first option to the Replacement Lawyer to purchase the practice, or set out a formula for determining price or other terms and conditions of sale, this should be done in the main body of the Law Practice Will or in a separate agreement.

PREPARING FOR DEATH AND DISABILITY OF A LAW PARTNER OR SHAREHOLDER

By Rachel Blumenfeld

Historically, lawyers carrying on business together have done so through a partnership, often through a limited liability partnership (LLP). Increasingly, due to legislative changes,⁴ lawyers may now hold their partnership interests through professional corporations. In addition, smaller firms may be structured as professional corporations.

Where lawyers practise law together, either in a partnership or through a corporation, consideration should be given as to what will happen in the event that a lawyer retires, becomes disabled or dies. Both the law firm and each legal practitioner practising in the law firm should prepare for such events.

As in any business with multiple owners, problems can arise where a lawyer who is a partner or shareholder in a law firm retires, becomes disabled or dies. In order to minimize the disruption that such events may cause to the business, the partnership or shareholders agreement governing a law firm should specifically contemplate what would happen upon the occurrence of such events.

(i) Considerations for Partnerships and Partnership Agreements

An established law firm will typically have a comprehensive agreement that contemplates the retirement, disability or death of a partner. However, smaller or newly formed firms may not have an agreement in place.

A partnership agreement should contain specific provisions to address what happens when a partner becomes disabled or dies. First, a partnership agreement will typically provide that a partner will cease to be a partner upon disability or death, and that the personal representative of the partner be treated as a retired partner for certain purposes. For example, the agreement may include the following:

Upon the disability or death of a partner, that partner shall cease to be a partner and the provisions in this Agreement that apply to retired partners shall apply, *mutatis mutandis*, to the legal personal representative of the deceased partner.

Further, upon the death or disability of a partner, a partnership agreement will typically provide that the units held by the partner will be cancelled and the legal representative has no say in the conduct of the affairs of the partnership. A partnership agreement that governs partners that are professional corporations should contain a provision that deems references to the death or disability of a partner to be references to an approved shareholder where the partner is a professional corporation. For example, the agreement may include the following:

⁴ Lawyers in Ontario have been permitted to practise through professional corporations since 2006. (See sections 3.1 and 3.2 of the *Business Corporations Act* (Ontario), R.S.O. 1990, ch. B.16, as amended ("OBCA"), and ss. 61.0.1.- 61.0.9 of the *Law Society Act* (Ontario), R.S.O. 1990, ch. L.8, as amended ("*Law Society Act*").

The references to retirement, death or disability of a partner in this Agreement shall be deemed to be references to the shareholder where the partner is a professional corporation and, for greater certainty, upon the death of a shareholder, the professional corporation of which he or she is a shareholder shall cease to be a partner.

The partnership agreement should define what the term “disability” encompasses; for example, a partner might be considered “disabled” if the partner is unable to engage, in any material respect, in the full-time practice of law. Further, the agreement could grant a particular partner or committee of partners (the firm’s executive committee) the power, authority and discretion to determine whether a particular partner is disabled for purposes of the agreement. The agreement could also provide for a particular period of time during which a partner can be away from work because of a disability without being forced to withdraw from the partnership.

The partnership agreement should set out the timing of the repayment of the partner’s capital account, as well as any other accounts (e.g., the partner’s interest in unbilled disbursements and WIP), and the partner’s *pro rata* interest on his or her capital account. Where life insurance proceeds are available to the partnership, the agreement may stipulate that such payments are accelerated (compared to the schedule of payments on the retirement or expulsion of a partner). The agreement could provide that the firm pay such partner, or his or her estate, in a lump sum or in annual or more frequent instalments, over a specified period of time, the partner’s partnership interest multiplied by the value of the firm’s work-in-progress at the end of the month preceding the death of the partner.⁵

In addition, the agreement could include a clause that either requires each partner to obtain and maintain disability insurance and/or life insurance, or expressly states that obtaining and maintaining such insurance is the sole responsibility of each individual partner. In smaller partnerships, it may be prudent for the partners to hold term life (and/or disability) insurance policies on each other in order to have a source of funds to pay out the capital account of a deceased (or disabled) partner.

If life insurance proceeds are available to the partners or the partnership, the agreement may provide that a payment to a partner’s estate as a result of the partner’s death may be made as, when, and to the extent of the amount of, life insurance proceeds received by the partnership as a result of the death of a partner.

It would be prudent for the agreement to contain a general limitation on payments that would prevent the partnership from being required to pay an amount that exceeds a certain percentage of the net profit of the partnership for the year, notwithstanding the other provisions of the agreement. This would ensure the continued viability of the firm despite the disability or death of one of its partners.

The partnership agreement would also typically deal with the continued use of the name of a deceased partner and may include an indemnity for the estate of the deceased partner for liability resulting from the continued use of the partner’s name.

(ii) Considerations for Professional Corporations

As noted above, lawyers in Ontario are now permitted to practice law through a professional corporation. Where a law firm is organized as a professional corporation under the OBCA and

⁵ The partners should obtain advice from an accountant or valuator.

Law Society Act, the shareholders should enter into a shareholders agreement to govern their relationship. The shareholders agreement should contain provisions that are substantially similar to those described above, adjusting for the inherent differences between a partnership and a corporation.

If the deceased or disabled lawyer had a shareholder loan account, the agreement should set out the terms of payment of the loan; as with a partnership, for a smaller corporation, life insurance policies held by the corporation may be a practical solution to ensuring funds are available to pay out the loan.

Where a law firm carries on business as a professional corporation with more than one shareholder, the shareholders agreement should also address what should happen to the shares of an individual who retires, becomes disabled or dies. In particular, the agreement should address whether the individual's shares should be redeemed or purchased for cancellation and, if so, how those shares should be valued.

If the shares were acquired by the individual for nominal consideration, a redemption of the individual's shares may occur for nominal consideration, whereas if the shares were acquired by the individual for value, the agreement may provide that the individual's shares be redeemed for value.

In addition, a professional corporation must comply with the provisions of applicable legislation *i.e.*, the *Law Society Act*, and applicable Bylaws,⁶ and the OBCA. The OBCA provides that a corporation does not cease to be a professional corporation despite the death of a shareholder.⁷

(iii) *Considerations for the Practitioner Practising through a Professional Corporation*

It is becoming more common for lawyers to incorporate a professional corporation that becomes the partner in the law firm. The individual lawyer practising through a professional corporation or as a shareholder in a firm (*i.e.*, not as an employee) must also prepare for death and disability.

The OBCA requires that all of the issued and outstanding shares of a professional corporation formed under the *Law Society Act* be legally and beneficially held, directly or indirectly, by one or more members of the same profession, and that all of the officers and directors of the corporation be shareholders of the corporation.⁸ The OBCA further provides that the name of a professional corporation must include the words "Professional Corporation" or the French equivalent, and must carry on a business related to the particular profession (in the case of a lawyer, the practice of law).

Bylaw 7 of the Law Society of Upper Canada provides that a professional corporation must apply for permission to surrender its certificate of authorization when, *inter alia*, the corporation does not wish to renew the certificate or will no longer practice law in Ontario.⁹ The corporation is also generally required to publish a notice of its intention to surrender its certificate of authorization and to retain proof of such publication.

⁶ See Part II of Bylaw 7 at <http://www.lsuc.on.ca/For-Lawyers/Manage-Your-Practice/Practice-Arrangements/Professional-Corporations/>

⁷ Subsection 3.3(1).

⁸ Subsection 3.2(2).

⁹ Section 10.

Accordingly, an individual who practises law through a professional corporation should include a provision in his or her Will that provides that the shares of his or her professional corporation will be held and dealt with by a special trustee who is a lawyer in Ontario. This can be accomplished by having a separate Will that deals only with the shares of the testator's law corporation (and any debt owing to him or her by the corporation).

Further, provisions of the practitioner's Will with respect to the law practice should expressly direct the estate trustees to abide by any laws, rules, regulations and restrictions imposed by the Law Society of Upper Canada. For example, the Will may include the following:

In the event that my Trustees are dealing with my law practice and my shares of **ABC LAW PROFESSIONAL CORPORATION**, I direct my Trustees to abide by any laws, rules, regulations and restrictions imposed by the *Business Corporations Act* (Ontario), the *Law Society Act* (Ontario) and the Bylaws of the Law Society of Upper Canada.

Where the deceased practitioner is not the sole shareholder of the corporation, a shareholders agreement should be in place that dictates the manner in which the deceased shareholder's interest in the firm can be extracted, as described above with respect to a partnership interest.

Where the deceased practitioner is the sole shareholder of the corporation and he or she has a separate Will dealing with the law practice and naming another lawyer as estate trustee, or the Will of the deceased practitioner provides that the shares of his or her corporation be held and dealt with by a special trustee, the estate trustee or special trustee can appoint himself or herself as the director of the corporation. Depending on the circumstances and any specific direction in the deceased practitioner's Will, the estate trustee or special trustee will then have two choices:

1. The estate trustee or special trustee of the deceased practitioner may have the shares of the professional corporation valued and may arrange for the sale of the shares to a lawyer licensed to practise law in Ontario. The purchasing lawyer would then appoint himself or herself as the director of the corporation, change the corporate name to reflect the purchasing lawyer's name, notify the Law Society of the sale as required by section 11 of By-Law 7, and continue the law practice. The proceeds of sale of the shares would be distributed in accordance with the deceased practitioner's Will.
2. Alternatively, the estate trustee or special trustee of the deceased practitioner could cause the professional corporation to surrender its certificate of authorization. Pursuant to section 10 of By-Law 7, a professional corporation must apply for permission to surrender its certificate of authorization when, *inter alia*, the corporation does not wish to renew the certificate or will no longer practise law in Ontario. The corporation is also generally required to publish a notice of its intention to surrender its certificate of authorization and to retain proof of such publication. The Law Society will grant the application if it is satisfied that certain matters related to the protection of clients' interests have been dealt with. Once the certificate of authorization has been surrendered, the estate trustee or special trustee, as director, can file for a change of the corporation's name to delete references to legal practice and enable the corporation to continue as a holding corporation. Once the corporation ceases to be a professional corporation and, if necessary, its name has been changed, the shares of the corporation can either remain with the special trustee or be transferred to the general trustee(s) of the estate to be dealt with as ordinary shares of a private holding corporation.

SUMMARY

A partnership agreement should contain specific provisions to address what happens when a partner becomes disabled or dies. For example, the agreement may provide that:

- A partner will cease to be a partner upon disability or death, and the legal representative of the partner will be treated as a retired partner for certain purposes;
- The units held by a disabled or deceased partner will be cancelled;
- References to the death or disability of a partner are be deemed to be references to an approved shareholder where the partner is a professional corporation;
- A partner will be deemed to be disabled in certain circumstances;
- The partner's capital account and other accounts will be paid to the personal representative of the partner in a certain manner;
- The repayment of a partner's accounts and interest will be accelerated;
- Each partner will be required to maintain disability insurance and/or life insurance;
- In smaller partnerships, partners may hold life/disability insurance policies on each other;
- Payments of amounts exceeding a certain percentage of the net profit of the partnership for the year are prohibited; and
- The use of the name of a deceased partner is permitted.

Where a firm operates as a professional corporation, a shareholders agreement should contain substantially similar provisions to the ones described above.

An individual lawyer practising as a professional corporation or as a shareholder in a firm must also prepare for death and disability. In particular:

- The practitioner should consider having a separate Will prepared that deals with his or her shares of the law corporation, appointing a lawyer in Ontario as the estate trustee. At the very least, the practitioner's Will should provide that the shares of the corporation will be held and dealt with by a special trustee who is a lawyer in Ontario; and
- The estate trustee or special trustee can appoint himself or herself as the director of the corporation in order to either sell the law practice to a lawyer practising in Ontario who could apply for a certificate authorizing the corporation as a Professional Corporation, or apply to surrender the certificate of authorization of the corporation and, if necessary, file for a change of the corporation's name to exclude references to legal practice and enable the corporation to continue as a holding corporation. The corporation could then continue as a holding company.