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Preparing for LSO's New Client Contingency Plan Requirement

By: Nick Esterbauer

Introduction

Especially when a lawyer practices on their own or with a smaller firm, the effect of their unexpected absence from the office can be devastating for clients. If files are unexpectedly neglected long-term, court attendances may be missed, limitation periods can expire, actions may be administratively dismissed, and other important dates may pass, which may prejudice clients and expose the absent lawyer (or their estate) to claims by clients whose deadlines have been missed.

Contingency planning offers at least a partial solution to this problem. A contingency plan comes into effect following death, during periods of mental incapacity, and/or to cover an otherwise unexpected absence of a lawyer from practice, and authorizes a replacement lawyer to act in the planning lawyer's absence and to manage the planning lawyer's practice with the objective of maintaining the office and protecting the rights of clients until the planning lawyer is able to return to work or their clients have had an opportunity to secure new representation (whether the replacement lawyer or someone else).

While it may be a given that the clients of lawyers working at larger firms will be able to access assistance from an absent lawyer's colleagues in the event of an unexpected absence from the office during an important stage of a file, planning may still be needed to ensure that there is a system in place to notify clients of the absence, monitor, report, and respond to any ongoing developments, and to assist clients in extending or complying with important deadlines. Furthermore, approximately one-third of Ontario lawyers are sole practitioners who are unlikely to have back-up help ready and able to step into their shoes absent intentional planning.¹

2023 saw more claims against Ontario lawyers than any other year.² Claims in respect of wills and estates matters are increasing as our population continues to age and we continue to see an increase in litigation over large, complex estates, with claims relating to litigation remaining common.³ As these trends continue, we can only expect that contingency planning will become increasingly necessary in the coming years.

¹Jim Middlemiss, "The rise of the sole practitioner" (2013) *Financial Post*, available at: <https://financialpost.com/legal-post/the-rise-of-the-sole-practitioner>.

² 2023 Annual Report: Transformation (2024) *Lawyers' Professional Indemnity Company* at 7, available at: <https://www.lawpro.ca/wp-content/uploads/2024/08/LAWPRO-Annual-Report-2023-AODA.pdf>.

³ *Ibid* at 10.

Contingency Planning Mandatory for Ontario Lawyers in Private Practice Beginning in January

Various provincial and state bar associations throughout North America have long encouraged lawyers to plan for the unexpected. However, few lawyers, especially those practising on their own and whose practices stand to benefit most from contingency planning, actually do so.⁴

Under amended Law Society of Ontario By-law 7.1, contingency planning will no longer be merely encouraged as a best practice, but will be mandatory effective January 1, 2025: all Ontario lawyers in private practice will be required to have a client contingency plan authorizing another currently-licensed lawyer to administer their practice, to come into effect in the event that they should pass away or become mentally incapable of carrying on their work.⁵

The purpose of the amended By-law is not to subject lawyers to an onerous new requirement, but to enhance public protection in the least restrictive way possible. As we see in our practice, inattention to a client contingency plan can result in situations where a lawyer's client is suddenly unrepresented, needs to find new counsel on an urgent basis, and, in some cases, misses court-ordered deadlines or limitation periods before the client even knows that their lawyer is no longer able to assist them.

While By-law 7.1 will be amended as of January 1, 2025, it is understood that audits are unlikely until after the filing of lawyers' 2025 annual reports at the end of March 2026.⁶ That being said, it is important that lawyers who may not currently have a plan in place begin to consider steps to ensure compliance in 2025 and beyond.

What is a Contingency Plan?

Some lawyers who have recently learned of this new contingency plan requirement might wonder what a contingency plan actually is and what its components might look like. Below we highlight some of the key components of a contingency plan.

Agreement With the Replacement Lawyer

Lack of communication is a common issue in incapacity and estate planning. Attorneys and estate trustees alike are often unaware of the nature of the role being assumed, the wishes of the incapable or deceased, and sometimes even of the appointment itself. In the context of planning for absence from a law practice, the same issues may arise, but poor communication will negatively impact the rights of clients to whom we owe a fiduciary duty. If a limitation period expires or court date is missed while the planning lawyer is incapable or dead, remedies may be limited to professional negligence claims against the lawyer or their estate.

No matter how well-qualified a replacement lawyer may be, experience will not matter if the lawyer is not prepared to act in the planning lawyer's absence. Given the amount of work required and risks associated with acting as a replacement lawyer, some lawyers may be hesitant to take on the role. However, successful planning for a lawyer's unexpected absence caused by death or incapacity depends on the willingness of replacement lawyers to step in. A replacement lawyer may benefit from bringing the planning lawyer's clients into his or her own practice, should this be provided for in the agreement, subject to client consent.

⁴ Courtney Kennaday & Reid Trautz, "When You Go to Heaven, Will Your Practice Go to Hell?" (2009) *American Bar Association: Law Practice Today*, available at: <http://apps.americanbar.org/lpm/lpt/articles/pma01091.shtml>.

⁵ Client contingency planning (2024) *Law Society of Ontario*, available at: <https://lso.ca/lawyers/about-your-licence/manage-your-licence/client-contingency-planning> [LSO Resources].

⁶ *Ibid.*

Use of Powers of Attorney and Wills or Other Documents in Contingency Planning

In the practice of estate litigation, estates made up of assets distributed pursuant to multiple wills are frequently encountered. Most often, a separate will is used to deal with business assets or corporate shares, while another will addresses all other assets of the estate. This same model can be applied with respect to a law practice in contingency planning to maintain separation between the authority to carry on one's legal practice and the administration of other assets of the estate.

While no specific form of contingency plan is currently mandated, the Law Society recommends that lawyers consider the use of a separate power of attorney for property as part of their client contingency plan. A separate (secondary or tertiary) last will and testament can also be used to authorize a replacement lawyer to access and administer the planning lawyer's assets necessary to manage their law practice. Generally speaking, one set of documents is used to grant authority exclusively with respect to the law practice and the other(s) deal(s) with all other personal assets and decision-making. The authority granted to a replacement lawyer can be limited to assets and decisions only with respect to the law practice and its property. The ability of the replacement lawyer to operate, sell, or wind down the law practice is not restricted, but control over personal assets remains separate.

Contingency planning for lawyers who practice at a larger firm differs from that for sole practitioners in that death or incapacity should be dealt with by way of an agreement with the other partners or shareholders of the firm. The response to a partner's absence from a partnership is typically addressed within the partnership agreement. Most often, upon the prolonged absence of a partner, that lawyer will no longer be a partner, and their personal representative may assume the status of a retired partner for limited purposes. Where a corporation is involved in the practice, a shareholder's agreement should similarly address what will happen in the event of death or incapacity.

Challenges of Contingency Planning

In some regions, it may be challenging to find a lawyer willing to act in our absence who is familiar with the relevant practice area. Though there are Ontario lawyers experienced in our practice areas who are prepared to act as replacement lawyers, in smaller communities, these services may be sparse and conflicts of interest are more likely to arise. That being said, with increasing remote meeting opportunities and the continuation of virtual court attendances in many jurisdictions, physical proximity between the planning lawyer and replacement lawyer may be less essential than it was in the past.

The planning lawyer should also ensure that adequate resources will be available to the replacement lawyer for the continued management of the practice if that is the planning lawyer's intention. A planning lawyer may wish to obtain extended coverage from LawPRO and/or a life insurance policy to ensure that sufficient assets are available to maintain the practice, and that the replacement lawyer and/or employees are not required to work without compensation. Employment law advice may also be needed with respect to the obligations of the planning lawyer to their staff.

Licenses who face difficulty in obtaining the agreement of a replacement lawyer to assist in the event of their prolonged absence from the office during a period of incapacity or after death have been invited to contact Trustee Services through LSO Connects.⁷

⁷ *Ibid.*

Checklist

When considering what steps may be needed in order to put a contingency plan in place, lawyers may wish to begin by considering the following checklist questions:

1. Is contingency planning already addressed by a partnership agreement, shareholders' agreement, or other existing planning or documentation?
2. If the answer to (1) is no, can the planning lawyer identify a suitable replacement lawyer (i) in proximity to your physical practice (if needed), and (ii) experienced with the practice area(s) with which the planning lawyer actively assists clients?
3. Has the replacement lawyer consented to their role as replacement lawyer, if their assistance becomes necessary?
4. Is the replacement lawyer a lawyer in good standing with the Law Society of Ontario? (If the replacement lawyer at any time ceases to be a licensee, the plan will need to be updated.)
5. Have documents been prepared to provide the replacement lawyer with authority to administer the legal practice?
6. Are there other practical steps that ought to be considered in the circumstances of the planning lawyer's practice?⁸
7. Has the contingency plan been reviewed with an experienced estate planning lawyer and/or an employment lawyer?
8. Should extended coverage with LawPRO be considered to assist during any periods of transition and/or in which the contingency plan continues to be implemented?

These are only a few of the issues that lawyers may wish to consider as they prepare or update a client contingency plan. There are also a number of practical issues tying into the mechanics of how the replacement lawyer will be able to act, and questions that lawyers may wish to consider asking when approached to act as replacement lawyer.

Resources Available through the LSO

Back in June of 2013, the Law Society of Ontario (then known as the Law Society of Upper Canada) released contingency planning guides for lawyers and paralegals. The Contingency Planning Guide⁹ dealt with the specifics of putting together a contingency plan and facilitating the transition to management of the practice by a replacement lawyer.

Recently, the Law Society of Ontario has released updated guides and a number of other resources designed to assist lawyers and paralegals in complying with amended By-law 7.1. The updated resource site includes tools specific to planning lawyers and to replacement lawyers, including checklists, a precedent power of attorney, a detailed plan template, FAQ section, and checklists.¹⁰

⁸ Checklists outlining practical considerations for planning lawyers and replacement lawyers are included in the LSO Resources website, *supra* note 5.

⁹ The Contingency Planning Guide for Lawyers (2013) *Law Society of Upper Canada*, previously available at: <http://www.lsuc.on.ca/ContingencyPlanningGuideLawyer/>.

¹⁰ LSO Resources, *supra* note 5.

Conclusion

Canada's population, including its lawyers, is aging. Notwithstanding its potential challenges, the task of contingency planning appears to be worth the effort, especially in this context and its mandatory status for Ontario private practice lawyers beginning in January 2025. The amendment of By-law 7.1 is expected to reduce the numbers of lawyers who begin to consider client contingency planning only after a terminal diagnosis is received and/or when their mental capacity is diminishing. With such high numbers of sole proprietorships and small firms in Ontario, the introduction of mandatory contingency planning has the potential to protect the clients and families of lawyers, as well as the planning lawyers themselves.



Editor: Suzana Popovic-Montag
spopovic@hullandhull.com
141 Adelaide St. W. Suite 1700
Toronto, Ontario
M5H 3L5
Tel: 416-369-1140

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