

## Draft Succession Planning Standard (April 2020)

Law Office Management Standards Committee

### #9 – Succession Planning

1. A lawyer must have a written and accessible plan to protect clients and client property<sup>1</sup> in the event of the cessation of the lawyer's practice.<sup>2</sup>
2. A law firm must have a written and accessible plan that includes the practices of all lawyers in the firm, and should contemplate the practices of all lawyers in the firm ceasing simultaneously.<sup>3</sup>
3. A lawyer or law firm must review annually its succession plan and update it as appropriate.<sup>4</sup>
4. A lawyer or law firm must include in their succession plan information and adequate arrangements to allow for the handling of clients and management of the practice<sup>5</sup> with minimal interruption<sup>6</sup>.

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#### Practice Notes:

##### Introduction

Clients can be seriously inconvenienced or prejudiced if a lawyer or firm fails to have an adequate succession plan in place that contemplates all possible scenarios in which a law practice may cease to operate (e.g. death, temporary and long term illness, unforeseen business interruption). In addition, there are significant costs to the Society (ie members) when lawyers leave behind paper files and trust funds with no successor in place.

The Society is taking multi-pronged approach to encouraging and supporting all practices to have functional succession plans:

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#### NOTES

<sup>1</sup> See generally Rule 3.5 (Preservation of Client's Property) of the Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012 ("the Code"). These duties are closely related to and should be read in conjunction with Rule 3.3 of the Code addressing confidential information.

<sup>2</sup> Subregulations 4.6.1, 4.6.2, and 4.6.5 of the Regulations made pursuant to the *Legal Profession Act*, S.N.S 2004, c.28

<sup>3</sup> Subregulations 4.6.4

<sup>4</sup> Subregulation 4.6.4

<sup>5</sup> Subregulation 4.6.6

<sup>6</sup> Rule 3.7 of the Code outlines lawyer's duties relating to withdrawal from representation. While this Rule generally does not contemplate those circumstances where a succession plan might be effected – i.e. death, illness, disaster / unforeseen business interruption – the duties outlined in Rule 3.7-8 (Manner of Withdrawal), speaking to minimizing client expense and avoiding prejudice, are relevant to both the practice successor and succeeding lawyer.

- Succession plans are now required under the Regulations (pursuant to the *Legal Profession Act*)
- The Society's Legal Services Support (LSS) team delivers succession planning workshops and works with members, including meeting with individual firms
- LSS has developed supportive materials (see 'Additional Resources') including a Guide, a template succession plan, a template file retention/destruction plan, and a succession checklist.
- Firms will reflect on succession planning when they complete their triannual self-assessment of their Management System for Ethical Legal Practice ("MSELP")
- When new firms register with the Society, they discuss succession planning with the LSS team.
- The Society has identified a number of possible ways to make succession easier and continues looking for and working on solutions.
- The Society's Trust Assurance team works with firms that report old balances to offer advice and encourage resolution.
- The Trust Account Working Group is exploring how lawyers can best transfer responsibility for their trust accounts at the time succession is needed.

## **Development of Practice Standard**

The Standard reflects the minimum requirements laid out in Regulation 4.6 (pursuant to the *Legal Profession Act*). It goes further, in providing guidance on particular issues for consideration when developing succession plans and presenting practice resources and support to assist in the process.

The Standard recognizes that each lawyer's and firm's succession plan should reflect their unique practice circumstances.

## **Issues for Consideration**

### ***Circumstances and outcomes of practice cessation***

Cessation of a lawyer's practice can follow from a number of circumstances including:

- temporary disability or incapacity;
- long term disability or incapacity;
- death;
- unforeseen disaster (ie hurricane, flood).

Each of these scenarios should be contemplated by lawyers and firms when developing their succession plans.

The NSBS-LSS Succession Planning Guide suggests considering, too, the three basic outcomes for your practice at retirement, disability or death:

- 1) Practice wind-up
- 2) Practice transfer
- 3) Practice stays 'intact' and the existing firm takes responsibility.

In addition to the requirement for each lawyer to have a succession plan, law firms are also required to have a plan that includes the practices of all lawyers in the firm. In many firms, other lawyers in the firm act as natural practice successors for one another. This might not be the cases where, for example, practice expertise varies among the lawyers in a firm.

For firms of all sizes, it is important to cover succession planning in partnership agreements. Firms should include a plan for what happens in the event of a dissolution, particularly the process to follow for dealing with open client files and trust monies.

In the case of smaller practices, the firm's succession plan must contemplate the unlikely scenario of the practices of all lawyers in the firm ceasing simultaneously.

In the case of a disaster or unforeseen circumstances that prevent entry to a physical workspace, having the firm's files stored online and accessible – together with accessible office systems (telephones, email, etc.) means you can continue practising with minimal interruption.

Note that retirement preparation and succession planning for an emergency are closely linked. The regulatory requirements for succession planning are similar to those for a lawyer changing their practicing membership category to retired, or for resigning ones membership from the Society. (See [Application for change of category from non-practising to retired](#) and [Application for change of category from practising to resigned](#))

### ***Succession Models***

When planning your practice succession, a good place to start is considering the various models:

- 1) Internal: A traditional model for succession in small and sole practices is to recruit a new lawyer or clerk to take over. Increasingly, lawyers find it is difficult to attract someone who will stay long term. Firms of more than one lawyer often rely on other lawyers in the practice, especially where practice expertise aligns.
- 2) Sale: Another traditional approach is to arrange the sale of your practice in advance of retiring. This works best if you have unique goodwill that is transferrable and if your practice is 'clean,' including having paper and trust accounts in good order.
- 3) Merger: Increasingly, sole practitioners and small firms join another firm before getting to the point where a successor is needed. Some continue to operate out of their existing offices as a satellite of the merged firm. This can be a way to reduce management responsibilities and allow you to approach retirement gradually.
- 4) Successorship: Here, a lawyer-successor comes in at the point you are unable to practice, attends to your responsibilities and either keeps or distributes your files. Sometimes, a sale of all or part of the practice is possible, best arranged in advance.
- 5) Stewardship: where the responsibilities are simple enough, some lawyers prefer to use a non-lawyer (e.g. spouse, office manager...) to do most of the work to wind up their practice and then to look after file retention/destruction. A lawyer is still needed to supervise in these circumstances.

### ***Costs and proceeds of succession***

There are different ways to cover costs and obtain payment for you or your estate (in the event of sale):

- 1) Insurance is recommended if it is an option for you, even if you expect money to come in from your practice over time. If you plan to cover the costs at death or disability with insurance, you can look after your succession costs, debt and perhaps have a surplus for your estate. For example, a life insurance policy payable to your successor or firm plus an agreement to pay the balance to a beneficiary can give you peace of mind.
- 2) Sale: you worked out a price or valuation formula for your practice, including any transferable goodwill. You have a contract, which could be a partnership agreement or otherwise.
- 3) Balance after succession accomplished: your practice at succession may have receivables, WIP that can be billed, owned equipment that can be sold and surplus cash in your general account. In some instances, all or part of the practice *might* be saleable, but that's hard to do if you are not around to help with the transition. You may also have obligations: payables, accounting costs especially if you have a trust account, staff obligations, taxes etc.
- 4) Negative payment: you plan for your estate to pay for succession.

### ***'Adequate arrangements' and assigning responsibilities***

When considering adequate arrangements to allow for the handling of clients and management of the practice, subregulation 4.6.6 points to the following specific considerations:

- (a) open and closed files;
- (b) wills and wills indices;
- (c) foundation documents and other important records;
- (d) other valuable property;
- (e) passwords and the means to access computers, email, accounting and other electronic records;
- (f) trust accounts and trust funds;
- (g) other accounts related to the member's practice; and
- (h) any other arrangements necessary to carry on or wind up the lawyer's unique practice.

Not all of these might be relevant to a particular lawyer's practice. Equally, 'any other arrangements necessary' falls to the professional judgment and discretion of the lawyer in fulfilling their obligations.

Equally important is identifying the key players in your succession (ie Executor/Trustee/POA, lawyer successor or supervisor) and ensuring that each is aware of what they are agreeing to. You should be confident they will be of sufficient capacity to do the job when the time might come. If circumstances change and this is not the case, new arrangements should be made.

Each of these considerations is discussed in more detail in the NSBS-LSS Succession Planning Guide.

### ***Preparing for succession – file retention and old trust balances***

The biggest consideration – regardless of whether you want to sell, retire, or simply prepare for contingencies – is how to make your practice more appealing to others. This means considering how you retain files (ie electronic versus paper storage) and

addressing lingering obligations like open files, foundation documents, and old trust balances.

With the advent of privacy laws and changes in attitude toward paper, lawyers have to rethink their file retention/destruction practices. The reason we keep closed files is to defend against liability claims or professional responsibility complaints. Beyond that, lawyers are not archivists. Storage for other reasons, or for longer than reasonably necessary, is problematic, whether your files are paper or electronic.

The Society has resources to help and LSS team can offer guidance. See the NSBS-LSS Succession Planning Guide, File Retention/Destruction Plan Template, and Targeted Paper Reduction Guide, in particular.

Another way to prepare is to clean up old trust account balances by working through them systematically. To start, eliminate 3+ yr old balances. Then tackle your 2+ yr old balances; then your 1+ yr old balances.

If necessary, take advantage of the periodic [applications](#) the Society makes respecting undistributed trust funds.

You can contact the Society's Trust Assurance team at 902 422 1491 or at [trustaccounts@nsbs.org](mailto:trustaccounts@nsbs.org) if you would like support, or simply have questions, about trust account issues including old balances.

#### **Additional Resources:**

NSBS-LSS: [Succession Planning Guide](#)

NSBS-LSS: [File Retention/Destruction Plan Template](#)

NSBS-LSS: [Succession Plan Sample](#)

NSBS-LSS: [Succession Checklist](#)

NSBS-LSS: [Sample Succession Plan for Simple Situations](#)

NSBS-LSS: [Targeted Paper Reduction Plan Guide](#)

LIANS has useful [links](#) and precedents on succession-related issues.

The [Law Society of BC](#), [Law Society of Alberta](#), and [Law Society of Ontario](#) all have sections on their websites devoted to succession, including precedents you might choose to adapt. Beware that the law and practice can be different: Ontario, for example, allows testators to have two wills.

Connect with NSBS' Legal Services Support team at 902-422-1491 or [LSS@nsbs.org](mailto:LSS@nsbs.org) to discuss your succession planning.