NOVA SCOTIA
BARRISTERS' SOCIETY

Succession Planning Guide

Legal Services Support

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Where do I start?

The Society's Regulations, made under the *Legal Profession Act,* say what you need in your succession plan:

Succession Plan

4.6.4 A law firm or sole practitioner must

(a) maintain a current succession plan for the practice including all lawyers in the firm;

(b) annually review the succession plan; and

(c) pursuant to Regulation 4.11, report to the Executive Director regarding the succession plan.

4.6.5 A succession plan must contemplate the unique arrangements that will be necessary in the event of the cessation of the lawyer's practice for any reason, including

(a) temporary disability or incapacity;

(b) long term disability or incapacity; and

(c) death of the lawyer.

4.6.6 At a minimum, a succession plan must include information and adequate arrangements to allow for the handling of clients' property and management of the practice with regard to the following, where applicable:

(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.

Find the Regulations online.

Retirement preparation and succession planning for an emergency are linked closely. The regulatory requirements for succession planning are similar to the requirements for changing from your practicing membership category. In other words, it's inevitable that you do the planning discussed in this Guide. Learn more about changing category here.

Models

A good way to start looking at your options is to consider basic models for succession:

1) **Internal**: A traditional model for succession in small practices is to recruit a young lawyer or clerk to take over. While this can work well, we do hear from members about how it's increasingly difficult to attract someone who will stay.
2) **Sale**: Another traditional approach is to arrange a 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**: A model we see is sole practitioners and small firms joining another firm before they get 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 worry and management responsibilities and allow you to approach retirement gradually.
4) **Successorship**: 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 want 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. Please see next section.

Another way to weigh your options is to consider three basic outcomes for your practice at retirement, disability or death:

1) **Wind-up**: clients dispersed, obligations transferred elsewhere, practice shuts down, remainder, if any, goes to you or your estate.
2) **Transfer**: clients and obligations go to the same lawyer or law firm. You or your estate may be able to negotiate payment for the transfer of the practice. Practice transferred intact.
3) **Stay put**: practice stays intact, lawyer(s) internally take(s) responsibility.

There are likewise different ways to cover costs and obtain payment for you or your estate:

1) **Insurance**: It is typically 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.

Who does what?

The key players in a succession situation are your (1) personal representative/trustee/POA; (2) lawyer, either to do the work to effect your chosen model as Successor or to supervise the work of a Steward; and possibly (3) Steward.

If your practice is busy or has complexity, such as a trust account, transactions to close, many files, or your preparation work is not advanced, you probably need to put everything into the hands of a lawyer as your Successor.

If your sole practice is being wound-up and is simple, (fewer open files, no transactions or trust account and sufficient preparation work) you can consider having a Steward do most of the work, supervised by a lawyer. A Steward is a trusted non-lawyer (e.g. family, staff or friend – possibly your personal representative or person who has an enduring power of attorney) who is able to do the required wind-up work under supervision of a lawyer of your choice.

The people you choose must agree and should be aware of what they're agreeing to. You need to be confident they will be of sufficient health to do the job when the time might come, or have an alternate.

Lawyer - Successor: A lawyer with a similar practice often is chosen. This might be the most sure-footed way to reliably and responsibly deal with your affairs, and is necessary

if you cannot check **all** of the boxes below under the next paragraph re stewardship. They needn't practise in your community but must be able to attend at your office sufficiently to complete the task. They must know what they're in for and consent in writing so there's no confusion.

Non-lawyer Steward: You might be thinking about a spouse or even staff member as a Steward to wind up or even sell your practice. They are not insured or bound by the *Code of Professional Conduct*, so they need supervision by a lawyer. Without adequate supervision, you would not be ensuring your professional obligations are met.

- ☐ No trust account or property/transactional practice, unless a successor lawyer is arranged to immediately take on responsibility for your trust account and any transactions.
- ☐ You are confident that all of your clients' interests will be looked after.
- ☐ Counsel is in place to supervise and to answer questions.
- ☐ A stewardship agreement with a confidentiality clause is executed (see sample simple stewardship plan).
- ☐ The instructions and information you provide are sufficient.
- ☐ The task is manageable by your chosen Steward: consider the volume of files, the type of work and whether it involves a lot of deadlines, limitations, court appearances etc.
- ☐ Your preparation is adequate so their tasks are easy.
- ☐ You have laid the groundwork for quickly transferring your open files to lawyers.
- ☐ Your closed files should be ready for destruction and labelled for when to destroy by your retention/destruction policy.
- ☐ You keep no original wills (or you provide for them).
- ☐ Counsel agrees to accept (preferably in electronic form) the files with instructions for will and POAs, as well as any foundation documents if you practiced property under the *LRA.*
- ☐ If you, in your professional judgement, decide to use a stewardship model, here is a sample simple stewardship plan which you may use to create your own.

In your succession, whether effected by a lawyer or a steward with counsel, think about different roles that can be distinct people or combined in some way:

1 Lawyer as Successor 2 Other people may help (e.g. your staff), if responsible to the Successor	1 Non-lawyer Steward 2 Lawyer supervising

3 Personal representative 4 Attorney per enduring POA 5 Lawyer(s) to whom your files might be referred	3 Personal representative 4 Attorney per enduring POA 5 Lawyers to whom your files might be referred

Preparing for Succession

Below, we discuss different aspects of practice commonly encountered in succession. To make your plan, you have three tasks to prepare over time:

1) Simplify and prepare to make succession – or retirement – possible
2) Organize information for your successor
3) Provide solutions for the issues you anticipate.

The biggest consideration, regardless of whether you want to sell, retire, or simply prepare for contingencies: how to make your practice more appealing to others, especially to take on any lingering obligations like open files and foundation documents. Prepare by doing a “clean up” over time.

How you retain files (revised 2023)

You might retain your files as paper, in electronic format, or both. The considerations for destruction of e-files are the same as for paper files, below. Electronic storage does NOT allow you to store files for many years. After a suitable retention period, your file should be destroyed to help you comply with privacy law, among other considerations.

Electronic storage, backed up electronically perhaps on a separate drive or on the Cloud, is increasingly preferred by NS lawyers. There are many benefits. Several firms have successfully transitioned. Feel free to call for guidance if you are considering a transition. Our website has good resources on cloud computing.

If you have a lot of paper, it can be intimidating for a potential successor/purchaser to contemplate how to deal with it. The same holds true for anyone you wish to have succeed you.

Scanning is not a good strategy if the file should simply be shredded. Scanning can help, but it is daunting and expensive. As of 2023, we do not necessarily recommend that you scan stored files. Given our current guidance on file retention, you will likely be

able to shred much of what you might have. We encourage you to call for guidance specific to your circumstances.

There are some paper items, identified below, that present long-term storage challenges that get in the way of smooth succession.

Closed files: Paper and Electronic

With the advent of privacy laws, lawyers have had to rethink their file retention/destruction practices. The main reasons we keep closed files are to defend against liability claims or professional responsibility complaints. Storage for other reasons, or for longer than reasonably necessary, is problematic, whether your files are paper or electronic, because you cannot keep personal information for longer than you have a defined purpose, and you would have difficulty sorting the personal information from the rest of the file.

The good news is that we have new (developed 2022-23) guidance on file retention. Please see our Template File Retention & Destruction Policy for guidance. After you read it, you may simply sign and date it if in agreement, or make your own policy. We strongly recommend that you make and follow a written policy, and do all retention and destruction in accordance with it.

After reviewing anonymized claims data, we were unable to find claims being commenced beyond 6 years from the date of closing for almost all file types. The 2015 *Limitation of Actions Act* undoubtedly has an influence. Nor do complaints get made beyond 6 years. This is also the length of time you are required to keep client ID. For that reason, there is no identifiable reason to keep most files and their personal information if there is no expectation of complaints or claims.

For real estate files, claims tend to emerge a little later and it is too early to tell if there will be many claims in the 6-15 year range. This suggests the “ultimate” limitation period in the *LAA,* 15 years, as a justification for keeping property files that long, but not longer.

Aside from some exceptions noted on the Template Policy, keeping your files for 6 yrs, or 15 yrs for property files, is in line with justifications claims experience and the *LAA.*

Privacy law then tells you to destroy personal information, because your justification for holding it has elapsed. It is impractical to separate the personal information, and there is no reasonable expectation of claims or complaints.

A new practice standard is currently working its way through the approval process which would reflect the need to destroy personal information, and it should be more comforting for lawyers to have three anchors: in privacy law, claims data and the *LAA.*

This is simpler than any guidance in the past and assure that files will be kept long enough to serve their purpose, and not so long that there is risk related to longer retention.

LIANS adds some detail:

1) Write a professionally acceptable[1] policy for destruction that uses your professional judgement. If you follow the NSBS Template as it is written, that satisfies this requirement.

2) Be mindful of legislated limitation periods as there might be some types of files that warrant keeping longer than most (e.g. infant settlements, people with disabilities) when you establish your policy.
3) Follow the policy and don't make exceptions on by file, by document or by client.
4) Keep a record of what files were destroyed and when.
5) Your policy may distinguish between files of different types (e.g. personal injury, criminal, property).
6) Don't shred things where you know there's a claim/potential claim.

If you do the above, and your file is destroyed pursuant to, and in accordance with, a *bona fide* retention / destruction policy, this will not in and of itself impact your insurance coverage. Likewise, NSBS' Professional Responsibility Department agrees not to hold against you the destruction of a file in accordance with such a policy, in the unprecedented event of a complaint more than 6 years after the fact, as long as you do not have knowledge of the potential complaint.

Here's a link to our File Retention/Destruction Policy Template.

Tips

- If you don't do so already, cull your files of redundant material and anything that can be returned to a client before storage, including all client property.
- Consider destroying file materials that exist elsewhere and can thus be reconstructed in the unlikely event it is needed.
- Box your closed paper files by destruction date.
- Do not box foundation documents and will files with other types of files.
- The point is to handle the paper once and for you or your successor to be able to shred entire boxes without more sorting.

Trust accounts

Clean up old balances, 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. If you want, try one balance to get you comfortable with the process.

Contact our Trust Assurance team at 902 422 1491 or at trustaccounts@nsbs.org if you would like support, or simply have questions, about trust account issues including old balances.

[1] In light of your professional obligations including to your insurer, objectively viewed.

To change category, your trust account will need to be properly closed, including a final accountant's report.

We offer resources to assist you with the process of clearing your trust account.

Link to new Web section on clearing old balances

Foundation documents from *LRA* property matters

One of the most challenging items to retain is foundation documents:

1) What are foundation documents?
2) What is the obligation to keep them?
3) How long am I liable?
4) What happens to them when I stop practising?
5) Start now: receive and retain them as electrons, not paper.
6) Should I scan my existing paper foundation documents?
7) Why do this?

1) Foundations documents are:
    - The items you must retain and produce under *the Land Registration Act*, particularly in several places in its Administration Regulations.[2]
    - Obligation to retain and produce "foundation documents" started April 24, 2009 under *Legal Profession Act* Regulations and on May 4, 2009 under LRA Regulations.
    - Defined in the *Legal Profession Act Regulation* 1.1.1 (ma)[3]
    - They include title searches and anything else you relied on to form an opinion for the Property On Line system.
    - NOT the entire property file (not your deed, mortgage, instructions etc).
    - NOT pre-LRA title searches etc. (see next section for old property files)
    - Learn what is/isn't a foundation document – it will help you.
    - Teach your staff.

2) What is the lawyer's obligation to keep foundation documents?
    - Is in the *LRA Administration Regulations* (various sections) and the *LPA Regulations*
    - No end point is spelled out, unfortunately

[2] Link to Current Foundation Document Checklist

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- Our *Regulation 8.2.1- .5* spells-out certain procedures for keeping and transfer
- In addition to the specific regulatory obligation to retain foundation documents, lawyers must retain files for other reasons, eg to cooperate with their insurer

3) How long am I liable if I make a mistake?
    - *If* the Province pays compensation, the *LRA* says the Province can recover from the lawyer for ten years, but in practice this is of limited comfort to lawyers.
    - A client may take action for negligence/breach directly against the lawyer.
    - Liability for tort or contract is determined by the *Limitation of Actions Act.*
    - In practice, this means that liability for the vast majority of files will be two years from discovery to a maximum of 15 years, unless the claimant is/was a minor or person with a disability within the meaning of the *LAA*.
    - Your regulatory obligation to keep foundation documents appears to run longer than your civil liability; civil liability/producing your file for your insurer is a distinct reason to keep it.

4) What happens if I want to stop practising?
    - Your foundation documents must be “transferred” to a practising lawyer.
    - Lawyers cannot change category until another practitioner signs for the foundation documents (Reg. 8.2.3 &.4)

5) The best way to receive and retain them is electronically.
    - Start right now. This is a strong recommendation.
    - You will have a much easier time if you **receive and** r**etain foundation documents electronically**. Paper foundation documents are hard to find someone to take on.
    - All foundation documents start as electrons: starting today, always receive them and keep them as electrons.
    - If your searcher faxes or sends paper, and they cannot switch to electronic searches, buy them a scanner – it will save you time and trouble and thus probably money.
    - If you can’t read a search on your computer screen, print it, but then destroy the paper copy when done with it – no later than when you close your file.

6) What about my existing paper foundation documents?
    - Documents used only to certify anything before April 24, 2009:
        - these predate the *LPA Reg.* requirement to retain and produce foundation documents.

    - You might conclude that you only need to retain searches etc from before April 24, 2009 as long as needed to guard against civil liability, produce a file for your insurer, or produce a file if a complaint is laid, as with any other file. [4]
- "Foundation documents" used to certify from April 24, 2009-present:
    - As of October 1st 2023, await further clarification before expending resources. In other words, keep them as is.
    - We're exploring possible solutions and will update this guidance in time.
- "Foundation documents" you create or acquire in the future:
    - Anything you can receive and retain electronically will make it easier for you in the future.
    - Always keep foundation documents distinct from the rest of the file, is an electronic or cardboard file folder that can be retained. This too will make it easier for you in the future.

7) Why do this?
    - To make it *much* easier to change categories whenever you retire, stop practising, or have a new career opportunity.
    - When you have to ask another practising lawyer to receive transfer of your foundation documents, would they say "yes" to boxes of paper? Would they say "yes" if the foundation documents are mixed with the rest of the bulky file?
    - If you get asked to receive boxes of paper foundation documents, what would you say?
    - You will also reduce your paper burden to reduce risk, save space etc.

Pre-LRA title searches & pre-*LRA* property files

These are simply old closed files: see above. All of them are surely closed longer than 15 years.

If you've been practising a long time, this might require a change in thinking. Before the *LRA*, there was also no "new" *Statute of Limitations*, files were paper and thinner than any paper files today, it was much easier to find someone to take your paper files, privacy laws were less developed, NSBS and LIANS guidance was more complicated and it was common to see property files as long-term keepers to guard against any potential liability, answer any question or provide any service should the need ever arise. Now, paper is regarded as a burden and an obstacle to succession. Paper also presents certain risks that have grown over time.

[4] Don't forget your client ID obligations from *Regulation* 4.13 inc. 4.13.26

Open files

You should consider as part of your plan who can take your open files of different kinds. Your plan assures your clients are served in a timely way, and that deadlines are not missed. While you can make arrangements for another lawyer to take on your open files, it is ultimately the client's choice. When the client consents, their file and trust funds can be transferred.

Wills, instructions and index

We strongly recommend returning original wills to your clients now. Wills must sometimes be kept – and easily found – for far longer than the practice of the lawyer. Return them before you lose touch with the client, because they are an obstacle to having a succession plan that works.

If you do keep wills, somebody else has to agree to hold them. The client should consent when their will moves, so contact information is important. Index your wills.

Consider scanning to accomplish long-term storage of the instructions/capacity information. These are also long-term storage issues, because you might be called upon to testify.

Tip: swear and attach affidavits of execution to all your wills, if not done already.

Powers of Attorney

NSBS recommends that you NOT keep the ONLY original. If you have the only one, consider returning it. If you have one of multiple originals, consider the commitment you made to your client among other factors before it might be destroyed. Capacity issues can arise, so your file might be important years from now if the client's circumstances suggest the current POA might be their last.

Client property (including documents and minute books)

As you close files, return client property to the clients.

Sometimes lawyers send letters seeking instructions about client property, e.g. old minute books or original papers, without success. Google, Facebook, POL, the RJSC website, Canada 411 and LinkedIn are great resources for finding people. We suggest you search to find your client and then try a phone call or an email to get instructions to destroy or return. Confirm any instruction to destroy. Some clients never pick up their property; a courier is better than being stuck with it indefinitely.

Consider including the fate of unreturnable client property in your retainer agreements.

Minute books

Minute books are client property. Avoid situations where you are holding minute books for clients with whom you might lose contact. Keep in mind that under the *Nova Scotia Companies Act*, even after a company has been struck off or dissolved by surrendering its certificate of incorporation, it can be revived. You might not even know if there is property (e.g. shares, bank account, land) in that company's name. Fortunately, the Articles, Memorandum, special resolutions, and names of officers and directors are all filed with RJSC and can be reproduced, which might be enough to revive the company.

The irreplaceable items are any evidence of legal and beneficial ownership (e.g. shares and share ledgers) and minutes.

Once the company is struck off, consider scanning any irreplaceable items (there might be none with a simple single shareholder company). Then shred the minute book contents. Recycle or dispose of the seal.

Replaceable Content

There are other examples where paper file contents are simply copies of documents that exist at an authority. Some firms find it cheaper and easier to shred replaceable paper documents: medical records, Crown disclosure, case law, court-filed documents, RJSC filed documents and perhaps other things. The logic is that it can be cheaper to get a second copy than to scan or pay for additional storage. If the information is personal, even if you store electronically, your PIPEDA obligations are an additional reason to shred replaceable items.

Banking arrangements

Banks are inconsistent with what they will accept as a means of transferring responsibility for a trust account. While we're working on a better solution, our best advice is to meet with your bank manager to ensure they'll accept what you put in place. The most successful method with banks that we know of is for a successor lawyer to become a second signatory, but not everyone likes that idea. Your will and POA might suffice, but run them past your bank.

As you might worry, sometimes a will is acceptable, but when the lawyer dies the accounts can't be accessed quickly enough for pending matters. NSBS can help a successor achieve the deceased lawyer's wishes by seeking an emergency custodianship order. We now offer a template will and a POA for use with professional judgement.

Undertakings

How is someone to discharge any outstanding undertakings? A clear record, like an accessible undertaking book or list, can help your successor. In preparation, you can see the value in minimizing your outstanding undertakings, which typically goes hand-in-hand with cleaning up a trust account.

How do I make it all happen?

Succession planning is part of your estate planning.

1) Figure out what you need and want.
2) Get things in order to make the job easier, or plan to do so.
3) Recruit someone to look after your affairs.
4) Create/amend legal documents.
5) Review regularly, in this case annually.

You might wish to consult a lawyer about your succession plan.

If you were doing this for a non-lawyer client, you would put provisions in their will and enduring power of attorney to give the successor the authority they need to wind down the business and which express your wishes. Your own process is no different.

We have a set of estate documents and other tools to help you effect your wishes.

We recommend that you discuss your plan with your successor so they know what tasks they face and agree.

Money issues

Contemplate what must be paid as the successor wraps up your obligations, and how that will be looked after. Consider:

- Should I get insurance, perhaps through CBIA, to cover costs like payroll, getting another lawyer up to speed on files, storage and shredding of old files etc? This is advisable but not always possible.
- How can I maximize the value of my practice in someone else's hands, so costs are less of an issue?
- Do I expect there to be value left over after costs? Who gets it?
- Have I had an adequate discussion with my successor about money issues?

Tips for firms

You can adapt the Sample Succession Plan if you wish, or create your own. You might already have an understanding among partners. Now it's time to write it down. You need a plan for every lawyer at your firm. Make your plan clear for your successor/colleagues so your clients, colleague(s) and family are looked after.

Tips for sole practitioners

The Sample Succession Plan was drafted with sole practitioners, or the last member of a firm, in mind. In general, look for a successor likely to practice in similar areas of law, close enough to help (though not necessarily in your community) and who will be practising for the foreseeable future. In recruiting a successor, what would attract them? Perhaps they see it as a return of kindness or favours or a professional courtesy. Your goodwill with your returning clients has some value, but consider that a competitor could open an office next door. Your WIP, AR, excellent staff and future value in open files are assets. There will be liabilities. A key to success is what you do to prepare. You are the only lawyer who knows your practice, so you have to make it possible for someone else to do what is needed.

Tip for sole practitioners with simple practices: Stewardship

Some lawyers ask if they can use a staff member or spouse to do most of the work at succession. To help you reflect on this, which we call "stewardship," we developed a Sample Simple Succession Plan (Stewardship). See more detail, above.

Before you choose your spouse or a family member, as some want to, ask yourself a hard question: could they perform all the necessary functions in a timely way if grieving or looking after you?

What is the Society doing?

Clients can be seriously inconvenienced or prejudiced if a practice fails to have a succession plan. There are also significant costs to the Society, and hence all members, from members who leave behind masses of paper files and trust funds with no successor in place.

The Society has a multi-pronged approach to encourage and support all practices to have proper, functional succession plans:

- Succession plans are now required under our regulations.
- The Legal Services Support (LSS) team delivers succession planning workshops and works with members, including meetings with individual firms.
- LSS partnered with the Schulich School of Law to hold a regional showcase/recruitment event in 2023 with hopes of running it annually.
- LSS has developed supportive materials like this 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 "MSELP" self-assessment of management systems.
- When new firms register with the Society, they discuss succession planning with our Legal Services Support team.
- LSS has supported practitioners facing imminent succession challenges.
- The Law Office Management Standards Committee is considering a file retention and destruction standard.
- The Society is open to working with groups of lawyers in an area to help organize shredding and storage in an effort to keep the cost under control.
- LSS has identified a number of possible ways to make succession easier and is looking for/working on solutions.
- Our Trust Assurance team works with firms that report old balances to offer advice and encourage resolution.

On this issue and otherwise, Legal Services Support is available to advise lawyers at all stages of practice.

More Information & Resources

Connect with the Society's Legal Services Support team at 902-422-1491 or LSS@nsbs.org to discuss your succession planning.

Our website houses our most up to date resources in the Succession Planning Toolkit

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.