



SUCCESSION PLANNING

by John Allen, CA

For some time now, the Law Society of Saskatchewan has been concerned about succession planning or the lack thereof by some of its members.

To determine the magnitude of this issue, questions relating to succession planning were included as part of the annual reporting process (TA-3) for the last 2 years.

Responses to these questions showed that overall, 56% of respondents in the first year had no succession plan. This number improved to 45% in the second year. However, a greater concern was noted regarding sole practitioners where 76% in the first year and 60% in the second year had no succession plan. This concern is accentuated by the fact that over 40% of practitioners are 51 years of age or older.

The problem with not having a succession plan, particularly if you are a sole practitioner, relates to, among other things, the time and cost required to address requirements of active files and to wind up the practice, including trust accounts. These costs can be very substantial, particularly if no succession plan is in place and the Law Society is required to appoint a trustee. Since the cost of the trustee may have to be paid from the member's estate, it is very important for the member to ensure an appropriate succession plan is in place.

In order to ensure practitioners, particularly sole practitioners, address this issue, the questions on the annual reporting form (TA-3) are being revised for year ends on or after December 1, 2008. The revised questions ask:

- if there is a succession plan in place.
- for the name(s) of member(s) accepting succession responsibilities.
- whether this acceptance agreement is in writing.
- whether, in the case of a sole practitioner, mention of this arrangement is made in the member's Will.

If the answer to any of the above questions is *no*, corrective action will be required as part of the annual TA-3/TA-5 review process. Since arrangements must be in place as part of the annual report clearing process, **please start making the necessary arrangements now.**

In 2006, Mr. Al Snell, Q.C., then Co-Administrator of the Law Society, prepared a draft brief regarding succession plans. Much of the following discussion is based on information included in that brief. Thanks Al. Thanks also to Ron Kruzeniski, Q.C., and Tom Schonhoffer, Q.C., for their input.

The discussion can be divided into two parts:

1. **Lawyers With Partners**

- Clients are clients of the firm and surviving partners are responsible for all clients.
- It is suggested that partners should anticipate the possibility of death or disbarment of a partner as they would the dissolution of the firm. The partnership agreement should address existing and ongoing overhead and debt issues, as well as the question of any equity belonging to the deceased lawyer which would be the property of his or her estate.
- The proceeds of any insurance policies taken out on the member should be payable to the firm.

2. **Sole Practitioners**

- The 2005 amendments to *The Legal Profession Act, 1990* provide that a judge may “direct that the costs of the trustee appointed pursuant to the section be paid by the member or the member’s estate as the case may be”. To protect the assets of the estate, it is imperative to have a succession plan.
- Choose a successor lawyer(s) who has agreed to step in immediately upon death. It is recommended that the parties have a written agreement.
- The successor lawyer should understand the practice and be comfortable in assuming responsibility. A reciprocating agreement between two sole practitioners is possible. Thought should be given as to whether the successor lawyer has the time, expertise and resources to manage the deceased’s practice as well as his/her own. It may be preferable to name a successor lawyer who practices with a larger firm with more resources.
- Every lawyer should maintain a list of current open files so that the successor lawyer will know where to start. Make sure you keep your client and file database current.
- Keep your successor lawyer informed about major developments in your practice.
- There should be a list of passwords to computers and a list describing the nature and location of important documents (for example, Wills, including the lawyer’s own Will, contracts, leases, insurance policies, etc.). Any safety deposit boxes or other storage facilities used by the practice should be identified and the location of keys or codes identified.
- Keep your accounting records up to date.
- There should be a list of all bank accounts, investments made on behalf of clients, and any financial arrangements or dealings of the practice. Keep your staff informed about what is going on in your practice so that they can assist in the administration of your practice when you are not there.

- The member should consider including a clause in his/her Will directing the executor(s) to authorize the named successor lawyer to conduct transactions relating to the operation of the law firm (including all trust and general bank accounts) as soon as possible upon the death of the member. Consider appointing your successor lawyer as “Practice Executor” (analogous to a literary Executor) with the power to wrap up and/or sell your practice after you die.
- The member should also consider providing the named successor lawyer with a similar authorization (ie. Power of Attorney) conditional upon the member being unable to continue to provide legal services (ie. injury, disbarment, etc.) while he/she is alive. Consider using an enduring Power of Attorney to provide your successor lawyer with authority to take over your practice if you become disabled.
- The written agreement with the successor lawyer should deal with work-in-progress at the time of death. For example, it is suggested that in most cases, it is appropriate to immediately bill open files in order to distinguish cut-off of fees belonging to the estate from those which will be earned by the successor lawyer. There should also be a provision for the splitting of fees on open contingency files. For example, on a 20% contingency, it may be provided in the agreement that the deceased's estate is entitled to 10% and the successor lawyer is entitled to 10%. It could also provide for arbitration as to a proper split of the contingency or third party assessment. It also could provide for a calculation of hourly rate fees of either the deceased or the successor lawyer to be deducted from the percentage recovered on contingency with the balance going to the other party.
- It is possible, initially at least, that the income derived from the practice will not support the overhead. It is therefore imperative that the succession plan provide for funding of the practice and it is suggested that a policy of insurance or some other access to funds be provided in order to supply capital to pay overhead and expense costs. Consider setting aside some life insurance to be used specifically for the purpose of paying a lawyer to wrap up your practice.

Make sure your disability and/or business interruption insurance coverage will adequately fund a lawyer to maintain or wrap up your practice if you become disabled.

- All lawyers should be current in file destruction procedures to avoid leaving the successor lawyer and the deceased lawyer's family with a backlog of closed files.
- Keep your spouse or significant other and your Executor (if different) informed of the arrangements you have made with respect to these issues.

Responsibilities of a Successor Lawyer

- A successor lawyer should immediately conduct a conflict search and a triage of open files to determine which need immediate attention.
- All open client materials and files should be located.
- Clients, courts and lawyers on the other side of files should be notified.
- Ensure all trust accounts are balanced and accessible.

- There should be an early discussion of the transition with family or representatives of the estate in order to avoid misunderstandings concerning the value of the practice as an asset of the estate and the difference between the legal responsibilities of the successor lawyer to clients and the legitimate interest of the estate in the practice as an asset.
- Arrange for any necessary transfer of files.
- Bill files as of date of death or according to the agreement.

It is strongly suggested that successor members be familiar with the practice (i.e. spend a bit of time annually to review these guidelines with the practitioner and become familiar with location of client lists, files, documents, bank accounts, accounting records, etc.).

The preceding information is provided for use by the membership as a guideline and is not intended to be all inclusive or to cover all or every conceivable circumstance. The member's professional judgment and expertise must be applied to each situation, whether planning for succession or being the successor lawyer.

Although having a written succession plan in place is not currently a Law Society Rule, it is hoped that members will develop succession plans or review existing succession plans based on information contained herein.

(November 2008)