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Editor: Karen L. Dyck,
Loss Prevention Coordinator

c/o 250 Yonge Street
Suite 2900
Toronto, Ontario
M5B 2L7
Email: karen.l.dyck@gmail.com

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■ Bulletin # 205
Planning for the Unexpected

Excerpted with permission of The Law Society of Manitoba and the author, from the paper, Checklists for Succession Planning by Jocelyn Frazer, published by the Law Society of Manitoba in Succession Planning (October 6, 2011).

Succession planning is something that should be relevant to all lawyers in active practice, regardless of the stage that they are at in their careers. All lawyers need to have a plan in place to ensure that client interests are protected in the event of their sudden illness, death, incapacity or impairment. Essential information relating to client matters and the ongoing obligations of the practice must be able to be interpreted by an assisting lawyer regardless of whether that is a partner, associate, friend or formal custodian. For a lawyer in a small firm setting or sole practice, it is particularly important to have arrangements in place for another lawyer to step in and ensure that clients are not prejudiced and that your staff and family are not placed in an overwhelming position.

As the age demographic of the profession shifts, the potential for more lawyers to find themselves in a position where they are forced to leave practice suddenly is also increasing. When a lawyer does make a sudden exit from practice, and there is no succession plan in place, the plan is incomplete, or no arrangements have been made relating to access to the trust account, the costs to the practice and the risks to the clients can be significant.

In addition to circumstances beyond their control, lawyers can decide to wind down their law practice for any number of reasons: change of career, pursuit of non-legal opportunities, retirement, moves to in-house counsel positions, judicial appointment, or parental leave. It is important to have a plan in place to deal with these career transitions in a systematic way and to allow sufficient time to cover the necessary steps.

Where the exit plan includes the sale of a law practice, prior planning can greatly impact the value that stands to be realized. Good practice management over the life of a practice (or at least the last five years) can go a long way toward creating an asset that someone is willing to purchase. There are both ethical and financial considerations that affect the sale of a practice and ultimately a great range in the values that are placed on these. It is important to be realistic in terms of what a lawyer stands to recover, and to allow sufficient time to adequately prepare and find the right person to take over the practice. This is not something that happens overnight and not every practice is salable.

The following [checklist] has been provided to serve as a starting point in developing a succession strategy for a law practice.

CHECKLIST: PLANNING FOR THE UNEXPECTED

1. Maintain an office procedure manual outlining all key aspects of your practice and a list of all law office contacts. Some lawyers prepare a letter to their staff or spouse directing how matters should be dealt with in their absence. (see Chapter 57 of Flying Solo: A Survival Guide for the Solo and Small Firm Lawyer Fourth Edition, for a sample letter)

2. Maintain an office limitation system and client file diary system, accurately reflecting all deadlines and all reminders so that next steps on files can be easily reviewed. Keep these systems up to date.

3. Ensure that each client file contains sufficient detail that another lawyer taking over the file would know where the matter stood at any point in time.

4. Keep your time and billing entries current.

5. Obtain life insurance along with a disability policy to cover both your personal requirements in the event of loss of your earning power, and also to cover the costs associated with hiring another lawyer to administer your practice and cover cash flow requirements as the practice is closed or sold.

6. Make arrangements with a colleague or another lawyer for them to step-in if you are not able to practice, for whatever reason. Consider whether a formal agreement is appropriate. In some situations it may be appropriate to include provisions in your retainer agreement as to the arrangements in place in the event of your death, incapacity or impairment.

7. Ensure that you have a valid will, including any terms required to deal with practice related issues. Also consider whether a Power of Attorney

is required to deal with banking and trust accounting issues or your practice generally.
8. Make sure that your staff, partners/associates, and family are aware of the arrangements that you have made.

To obtain the complete set of materials from this program, contact the Law Society of Manitoba's Education & Competence Department: www.lawsociety.mb.ca/education /continuing-professional-development

■ Bulletin # 206
You Have a Will, Don't You?

While attending a recent continuing professional development program on succession planning for lawyers, I was struck by a statistic delivered in the context of a discussion on the process whereby a law society takes custodianship of a lawyer's practice on death or disability. The presenter, a lawyer who acts as custodian for a law society, noted that in 3 of 4 recent custodianships where the lawyer had passed away suddenly, the lawyer died leaving no Will.

While the sample is small and the ratio may not bear out on a larger scale, it is nonetheless startling that lawyers who would doubtless have recommended at least basic estate planning to their clients would not have not taken any steps to secure their own estates.

The reasons for making a Will are plentiful and should be well-known to every practising lawyer. But what you may not know is that if you fail to plan for your demise, and your law society has to step in to look after your clients and your ongoing work, the costs of doing so can be substantial, and will be a charge or expense to your estate.

Many of the same considerations will apply to putting in place a Power of Attorney to deal with practice issues if you are incapacitated. As set out in the Checklist in Bulletin #205, be sure that your planning includes making provision to address any issues related to winding up your legal practice, and then make sure that your partners or staff members are aware of the arrangements you have put into place.

■ Bulletin # 207
Notify Your Insurer!

Do you need to be convinced to err on the side of caution and report to your insurer when you discover circumstances that could potentially result in a professional liability claim? If so, did you know that failing to notify your liability insurer of a potential claim could have consequences beyond potential coverage issues under the policy, including the possibility that you could be found guilty of professional misconduct?

This was recently made very clear by the Manitoba Court of Appeal. In September, 2011, the Court upheld a decision of The Law Society of Manitoba's Discipline Panel finding a member guilty of professional misconduct for, *inter alia*, failing to give notice to the Director of Insurance of the Law Society as soon as practicable after becoming aware of any acts or omissions that might give rise to a claim. *In Luk v. Law Society of Manitoba*, 2011 MBCA 78, the Court found that:

> It is clear from the Panel's reasons that it did consider the excuses put forward by the appellant for failing to notify the insurer once she knew that there was an error. The Panel rejected those excuses as not being reasonable. Its decision to do so was clearly explained and, in our opinion, was a reasonable decision.
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> Rule 5-36 does not state, nor does it mean, that failure to comply without reasonable excuse is automatically professional misconduct. Rather, it states that it "may" constitute professional misconduct. A panel of the Law Society must, therefore, consider the relevant circumstances before deciding that a failure to comply will constitute professional misconduct.

The requirement for insured lawyers to report potential claims to the insurer as soon as practicable upon becoming aware of circumstances which might result in a claim is part of every CLIA liability insurance policy, but there are generally two approaches taken by law societies in imposing the mandate to report potential claims to the local insurance program. The requirement may be found in the society's rules (as in Alberta, Manitoba, Northwest Territories, Yukon and Nunavut) or the requirement for reporting of claims may be found solely in a society's professional code of conduct (as in Saskatchewan, Nova Scotia, Prince Edward Island, New Brunswick, and Newfoundland.) In either case, a lawyer's breach, whether of the rule or the professional code obligation, in the right set of circumstances, could potentially result in a finding of professional misconduct.

Is failing to report worth the risk?