

Policy

Practice Contingency Planning

Purpose	1.1	This policy outlines the Victorian Legal Services Board and Commissioner's approach to law practice contingency planning for sole practitioners and sole directors of incorporated legal practices (ILPs).
Introduction	2.1	<p>Law practices conducted by a sole practitioner, or sole director in the case of an ILP¹, are particularly vulnerable to disruption if the practitioner is suddenly unable to fulfil their duties due to illness, injury or death.</p> <p>If you are a sole practitioner you should put arrangements in place to ensure that another legal practitioner is able to either continue running your practice, to attempt to sell the practice or to wind up its affairs, as required in the circumstances of the case.</p> <p>The overriding rationale for having a law practice contingency plan is to safeguard the interests of clients of the practice. However, these arrangements may lead to other benefits, such as minimising adverse impacts on your family and limiting the need for costly regulatory intervention such as the commencement of an external intervention by the Board. An effective risk management system can assist you to meet your overarching public interest obligations, facilitate your business continuity and protect the reputation, credibility and value of your firm.</p>
Key definitions	3.1	Alternate means an Australian legal practitioner nominated to take control of the law practice of a sole practitioner in the event that a Personal Representative is not able to do so.
	3.2	Personal Representative means an Australian legal practitioner nominated to take control of the law practice of a sole practitioner in the event that they are no longer able to manage it.
	3.3	Uniform Law means the Legal Profession Uniform Law, which forms Schedule 1 to the <i>Legal Profession Uniform Law Application Act 2014 (Vic)</i> .
Guidelines for sole practitioners and sole directors of ILPs	4.1	<p>Appointing a Personal Representative</p> <p>You should nominate a Personal Representative and an Alternate, who would be responsible for conducting and, if necessary, disposing of the practice in the event that you are unable to conduct the practice. Nominating a Personal Representative is a key component of any law practice contingency plan. This will ensure that the practice can continue to operate with minimum disruption to clients.</p> <p>Nomination of a Personal Representative and the nature of the appointment will depend on the circumstances in which they will be acting. For example, appointing a Personal Representative as your power of attorney will allow them to take over the law practice in the event that you can no longer manage your law practice due to serious illness or injury. However, a power of attorney will not allow the Personal Representative to manage your law practice in the event of your death.</p> <p>Alternatively, you may wish to appoint your Personal Representative as a limited or joint executor under your will, or to leave them your law practice as trustee for the purposes of winding up or selling it.</p> <p>If you nominate a Personal Representative by informal agreement, in the event of your death or incapacity, the Board may still need to formally appoint them as a Manager by commencing an external intervention under Chapter 6 of the Uniform Law in order for</p>

¹ For ease of reference, sole practitioners and sole directors of ILPs are referred to as 'sole practitioners' for the rest of this policy

them to take control of your law practice. Appointment as a Manager under the Uniform Law will impose certain obligations on your Personal Representative, including regular reporting requirements and an obligation to report any potential misconduct discovered during the course of the Management.

4.2 **Qualifications and experience required to be a Personal Representative**

You need to carefully consider who you appoint as your Personal Representative.

Both the Personal Representative and the Alternate will need to meet the same requirements as you in order to take control of your law practice. That is, at a minimum, they will need to hold a **principal practising certificate** so they can step into your shoes and run your practice.

If you operate a trust account, you will need to appoint a Personal Representative and an Alternate who have trust authorisation, hold the appropriate levels of professional indemnity insurance and have made the required Fidelity Fund contributions. Note, however, that internal compliance requirements for the approval of a Personal Representative may vary across different institutions.

Additionally, if you are the sole director of an incorporated legal practice, your Personal Representative and Alternate will need to meet any further requirements imposed on directors under the *Corporations Act 2001* (Cth).

4.3 **Choosing a Personal Representative**

You should choose someone who is familiar with the fields of law that you practice in.

You need to think about your preferred Personal Representative's ability to step into your shoes quickly. For example, a legal practitioner who works for another person may not be able to take on the responsibilities of your practice at short notice if their employer does not consent to the arrangements.

You also need to think carefully about your preferred Personal Representative's capacity to take on the demands of your practice in an emergency. Reciprocal arrangements with another sole practitioner may work well to cover a short period of time (for example, while you recover from an unforeseen illness or injury). However, these arrangements may not be appropriate for longer periods at short notice, which may well be the case in an emergency.

Therefore, you and the person you nominate must both feel confident that the demands of your law practice can be accommodated in an emergency situation on the basis that it may be unclear how long their assistance will be required.

You may consider choosing someone who you know well and in whom you have trust and confidence. Your representative will need to liaise with your family and clients. However, there is nothing to prevent you from entering into a professional arrangement, for example, by engaging another principal legal practitioner with appropriate qualifications to run your law practice while you recover from a serious illness. Similarly, a professional executor also holding a principal practising certificate with trust authority may be able to take control of your law practice after your death.

A Personal Representative is entitled to charge clients for work undertaken during the period in which they are acting in such a capacity. However, any work undertaken on client files must be charged in accordance with the agreement in place between the law practice and the relevant client.

4.4 When does a Personal Representative have to step in?

The most common situations in which the Personal Representative will be required to take control of the law practice are:

- Where the sole practitioner or sole director has been incapacitated due to injury or illness;
- Following the death of the sole practitioner or sole director;
- In the event that a sole practitioner's or sole director's practising certificate is suspended or cancelled and the Board determines that it is appropriate in the circumstances for the Personal Representative to do so; and
- It will be necessary for the Personal Representative to notify the Board that they are proposing to take control of your law practice. The Board reserves the right to assess the suitability of the Personal Representative to take control of your law practice.

4.5 Is the Personal Representative paid?

It is up to you and the Personal Representative to make arrangements relating to fees in addition to those paid for work done on client files. For example, it may be agreed that:

- No fees will be charged by the Personal Representative in relation to work completed other than for work on client files;
- The Personal Representative will be able to accept referrals where clients of your law practice wish to retain the Personal Representative;
- The Personal Representative will be able to retain a percentage of any sale price in relation to client files and/or deeds; or
- Another arrangement that is suitable to both you and the Personal Representative.

The Board may consider the Personal Representative to have a conflict of interest in circumstances where they benefit otherwise than in accordance with the agreement.

4.6 If there is no practice contingency plan in place

If you do not have an agreement with a Personal Representative (and an Alternate) in place, the Board may need to appoint a Manager to your law practice under the Uniform Law in the event of your death or incapacity. This is a lengthy, disruptive and very costly process, requiring a legal practitioner to conduct a full audit of the law practice before attempting to either sell or refer all active client files to other legal practitioners.

In an event where you are injured or die suddenly, it can be difficult for your family, employees and clients if the Board is required to appoint a Manager to come in and take over your law practice. To date, these interventions have cost an average of \$40,000 each, with the law practice (or the practitioner's estate) being liable for these costs in the first instance (in accordance with section 365 of the Uniform Law).

Ultimately, the best case scenario for you, your family and the clients of the law practice is for you to arrange for someone who knows the practice to take over and deal with it in accordance with your wishes.

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4.7 Relationship with the Alternate

The purpose of appointing an Alternate is so that there is someone available to step into the Personal Representative’s shoes if they are unable to act when required. Accordingly, the Alternate should be given all of the information and documentation that is held by the Personal Representative, ready to take control of the law practice in the event that both you and the Personal Representative are unable to manage the law practice due to death or incapacity.

All the guidelines set out above apply equally when determining who to appoint as an Alternate and putting in place a suitable arrangement with an Alternate. However, the arrangement with the Alternate does not need to be the same as the arrangement with the Personal Representative. For example, the Personal Representative may be a practitioner who agrees to manage the law practice without charge, while the Alternate may be someone who seeks to be reimbursed for time spent undertaking management tasks, or may be a professional executor or attorney rather than a colleague or friend.

Content of practice contingency plan

5.1 Once you have nominated both a Personal Representative and an Alternate, you should create a ‘contingency pack’ for their use in the event that they are required to take over the law practice at short notice. This should be kept somewhere safe, to be provided to them when needed, and should include:

- A duplicate set of keys and computer and banking passwords for their use;
- A list of key contacts, ensuring that at least one of those key contacts is aware of your practice contingency plan and who you have nominated as your Personal Representative and Alternate; and
- Details relating to any clerks, secretaries or other solicitors employed by the law practice and the conditions of their employment.

5.2 It will also be important to make arrangements to have your Personal Representative and Alternate added as signatories to any trust and/or office accounts when needed. The steps to be taken will depend on the nature of the arrangements in place with your Personal Representative and will need to be discussed with the relevant bank.

For example, it may be possible to have your Personal Representative and Alternate added as ‘available signatories’ to an account, such that they cannot presently access any funds but will be able to do so on completion of formalities set by the bank. Alternatively, the bank may have a set process in place for a Power of Attorney or Executor to be able to become a signatory to these accounts in the event of your death or incapacity.

5.3 You should also put in place a communication plan with both your Personal Representative and Alternate, to ensure that you can update each other in relation to changes that may impact on the arrangements you have in place.

For example, if you operate a law practice that maintains a trust account and your Personal Representative no longer holds trust authorisation, you will need to consider nominating a new Personal Representative.

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Reporting to the Board	6.1	The Board maintains a secure register of all nominated Personal Representatives and Alternates, and practitioners should lodge details of their contingency plan through LSB Online.
	6.2	<p>In the event that you die or are incapacitated, your Personal Representative and/or your Alternate should contact the Board as soon as practicable to provide notification and advise that they will be taking control of the law practice. Where necessary, the Board will formally appoint your Personal Representative or Alternate as Manager in order to allow them to exercise the formal powers available under the Uniform Law.</p> <p>Where the Board otherwise becomes aware that you have died or you are no longer able to manage the law practice the Board will first contact the Personal Representative. If he or she cannot take control of the law practice, the Alternate will be contacted and request them to take control of the law practice pursuant to their arrangement with you. In the event that neither the Personal Representative nor the Alternate can take control of the law practice, the Board will be required to commence an external intervention at the expense of the law practice, you and/or your estate.</p> <p>You should note that the Board must act to protect the interests of clients at all times. The Board may appoint another practitioner to manage the law practice under Chapter 6 of the Uniform Law if it considers that the Personal Representative and Alternate are unsuitable.</p>
	6.3	In the event you decide to revoke your nomination of a Personal Representative and/or an Alternate, please notify the Board so that the register can be updated.

Guidelines for Personal Representatives and Alternates	7.1	<p>What to consider before becoming a Personal Representative?</p> <p>If you are considering accepting a nomination as either a Personal Representative or an Alternate, you must ensure that you have sufficient information to decide whether you have the ability and capacity to run a particular practice. The following information may assist you to make a decision:</p> <ul style="list-style-type: none"> • <i>Knowledge of the practice:</i> You may wish to ask questions about the practice including areas of law, systems and processes, record keeping and file management, financial health and staffing arrangements (if any). You should also take into consideration the health of the practitioner. • <i>Proximity:</i> This can be of particular concern in relation to rural and regional practices. You need to assess whether you are located sufficiently close to be able to run the practice at short notice. • <i>Financial impacts:</i> What arrangement are you considering in relation to payment for work performed as a Personal Representative? You may also wish to ask whether there is sufficient professional indemnity insurance in place to cover your actions and whether any funds have been set aside to meet liabilities while you are in control of the law practice. • <i>Assessment of the risks posed by the practice:</i> You should ask for information relating to past and present complaints and disciplinary matters and past trust account inspection reports (if applicable), as well as any insurance claims.
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- *Potential appointment as Manager:*
Depending on the circumstances, it may be necessary for the Board to appoint you as Manager of the law practice in order for you to take over the practice. You should be aware that such an appointment will impose some reporting requirements on you.

This is not a comprehensive list of the matters that you may need to consider and you should seek advice if necessary about whether it is appropriate for you to be a Personal Representative or an Alternate in the circumstances.

7.2 **Storage of files**

Where the law practice is being wound up, the Personal Representative will be required to either make arrangements or take responsibility for all archived client files for the seven-year retention period as well as for secure destruction thereafter. This may represent a significant expense and the parties should consider attempting to estimate and set aside sufficient funds to cover these costs.

7.3 **Charging for other costs**

A Personal Representative or Alternate should not expect any consideration for satisfying themselves about the nature and extent of their powers and duties. Those costs are an incident of practice where a person has accepted the responsibility of being a Personal Representative or Alternate.