Risk management for sole practitioners

Protecting your practice in emergencies

31 October 2001

Protecting your practice in emergencies

Have you ever wondered what would happen to your practice if you became mentally or physically incapable, or died suddenly? If the worst did occur, and you had not protected your practice, there is the possibility that your family or estate would be faced with the large expense of a Law Society intervention and a great deal of worry for those who were left to sort out your affairs. Making contingency plans should be seen in the context of proper business planning and as such should be an integral part of managing your practice.

The following recommendations may help sole practitioners and should be read in conjunction with Principles 3.10, 3.14 Annex 3c and Chapter 24 of the Guide to the Professional Conduct of Solicitors 1999 (8th edition) – (the Guide)

Mental or physical incapacity and sudden emergencies

a) **First steps** - it is important to make immediate arrangements to appoint a solicitor manager who will able to run the practice in the event that you become mentally or physically incapable, or due to other circumstances are unable to continue operating your practice, even if this is for a short duration. The solicitor concerned must ***be a*** solicitor qualified to supervise in accordance with Rule 13 of the Solicitors Practice Rules. This means the solicitor must have held a practising certificate for at least 36 months within the previous 10 years and have completed a minimum of 12 hours training in management skills.

The easiest way to effect the appointment is by executing an **Enduring Power of Attorney** (EPA). By giving the attorney general powers to act on your behalf you will enable your appointed solicitor manager to take over your practice. However, if your attorney has reason to believe that you are becoming, or have become, mentally incapable, he or she will have to register the EPA with the Public Guardianship Office before continuing to manage your practice as the Power of Attorney will lapse temporarily.

The Sole Practitioners Group feels on balance that the best arrangements are those which are the simplest. Provided that you have chosen your attorney very carefully, by allowing him or her total discretion to make whatever decisions are necessary for the good of the practice depending on the circumstances prevailing at the time, it will be easier for you to complete the statutory prescribed form. You may make more than one EPA, and you may wish to do so in order that different matters, such as personal savings accounts, are covered. If you wish to restrict your attorney's powers, instructions can be given in the EPA, but take care with the drafting. Incomplete or ambiguous instructions can lead to the EPA being refused by those asked to accepted the attorney's authority (eg banks or other financial institutions) or being rejected by the Public Guardianship Office if the EPA has to be registered.

If you wish, you can stipulate that the EPA should not come into effect until you become mentally incapable of managing your practice, or when your attorney believes you are becoming mentally incapable, in which case, as stated above, the EPA will have to be registered with the Public Guardianship Office before it can be operated. This provision will not, however, cover sudden emergencies.

It is sensible to include a charging clause in the EPA (if appropriate).

Warning: with the repeal of s3.3 of the Powers of Attorney Act 1985 by the Trustee Delegation Act 1999, an EPA is unlikely to be valid to delegate for an indefinite period trustee powers in situations where a sole practitioner is a sole trustee of an existing estate or trust or executor of a testator who has not yet died. In these cases the EPA takes effect as a trustee delegation under the Trustee Act 1925 and so is valid for one year only, and it is necessary for receipts for capital monies to be given by two persons.

The Law Society has produced helpful guidance on preparing EPAs – contact Philip King, the Policy Adviser to the Mental Health and Disability Committee in the Law Society's Representation and Law Reform Directorate (020 7242 1222). The EPA statutory prescribed form is also helpful.

b) **Finding a suitable solicitor –** this is probably one of the greatest problems for sole practitioners and is not easy to solve. Some practitioners will not come into contact with other local solicitors in their work and knowing whom they can approach and trust is difficult. One of the best ways is through "networking" with other local sole practitioners perhaps through the existence of a local Sole Practitioners Group. If one does not exist, involvement in your local Law Society will put you in touch with other practitioners. The local Law Society might even be able to suggest practitioners who would be willing to help, perhaps someone who is semi retired.

Although the Sole Practitioners Group would like to be able to set up a national network of solicitor managers, it has been found that local arrangements are best as sole practitioners need to assess for themselves the suitability of a particular solicitor and it could be that mutual cover with another sole practitioner can be agreed. It is possible to make arrangements with a local partnership, or one of the partners, and you may like to consider this if it is difficult to find another sole practitioner.

c) **Your Bank** – if you have a sudden emergency and know that you are going to be away for a certain time, you should inform your Bank of the identity of the solicitor who will be running your practice so there is no delay in operating client and office accounts. In all eventualities the bank will require evidence of a valid delegation. Individual banks may have different requirements before accepting a changed client and office account signatory.

d) **Preparation –** in an emergency there will be no time to prepare in advance for an incoming solicitor manager. Practice management considerations are therefore very important in this context. Anyone coming into another solicitor's practice must be able to take over with the least difficulty, and will find lists of clients, checklists or summaries in files, important contact names, addresses and telephone numbers, code numbers, insurance certificates and any other authorisation certificates, an office manual and any other organisational considerations very helpful. This is particularly important if you do not have any staff who can guide the person concerned, or the staff in the office are not well briefed themselves. There should also be precise instructions on how to access the data in the computer system, what information may be held **only** in the computer, and where the back up disks are kept.

e) **Review –** it is important to check from time to time that your designated attorney is still able to take over when required

Remember to ensure that your family or partner, and your office staff know the arrangements you have made and where they can locate the relevant documents which ideally should be kept in one place.

That contention on behalf of the Applicant appears to us to be well founded. However, Mr *K'Owade* for the Respondent, submitted that section 9 of the Act should be so construed that the act of an unqualified person does not render his acts invalid because of lack of qualification unless the client was aware of such lack of qualification. Apparently, this submission is based on the common law of England. It is said that proceedings are not invalidated between one litigant and the opposite party merely by reason of the litigant's solicitor being unqualified, for example for his not having a proper practising certificate in force.

With respect, we reject this argument. The facts of this case are governed clearly by the provisions of the Advocates Act and not the common law in England. The provisions of section 9 are unambiguous and mandatory and the principles of common law do not apply as the jurisdiction of this Court is to be exercised in conformity with the Constitution and subject thereto, all other written laws.. Section 3(1) of the Judicature Act (Chapter 8) reads:

> "3(1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with:
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> (*a*) the Constitution;
>
> (*b*) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part X of the Schedule to this Act, modified in accordance with Part XX of that Schedule;
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> (*c*) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12 August 1897, and the procedure and practice observed in courts of justice in England at that date;
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> but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary".

In these circumstances, the memorandum of appeal is incompetent having been signed by an advocate who is not entitled to appear and conduct any matter in this Court or in any other court. Accordingly, we strike out the appeal with costs thereof to the Applicant including the costs of the notice of motion dated 26 February 2001.

For the Applicant:
Information not available

For the Respondent:
Information not available