

Helpsheet: Appointing an alternate and continuity of practice

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Introduction

Sole practitioners often ask about arrangements to protect their practice should they become incapacitated, and what action should be taken by personal representatives in the event of the death of the practitioner. The following basic guidance is intended to identify the issues arising in such circumstances and to suggest some steps that should be taken to safeguard the interests of the practice, its clients, and staff.

It is emphasised that what follows is not a substitute for proper legal advice and, indeed, such specific advice should be sought as indicated below.

Background

While nobody likes thinking or talking about unexpected incapacity or even death, they are both a sad fact of life. The implications for your business, family and clients are significant and accordingly need to be considered and planned for.

Benjamin Disraeli, the former UK Prime Minister once said, "I am prepared for the worst, but hope for the best." While we all like to think we are invincible and immortal, we are not. In the event of a tragedy, your family will have to cope with sorting your business as well as with the shock and emotional turmoil of seeing a loved one seriously ill or gone. Making a plan and taking the steps below can lessen the burden on them considerably.

While alternate arrangements are primarily to protect continuity of business where a 'serious' life situation has arisen, they can equally be appropriate to cover planned extended periods of absence for example to allow recovery from planned or unplanned health treatment or extended time travelling with the knowledge that appropriate arrangements are in place to cover any situation which may emerge during the practitioner's absence.

While there are many ways to describe what is meant by incapacity, one way of describing it may be where either temporarily or permanently a practitioner is unable to make, communicate, understand, or remember decisions.

While alternates are generally thought about in relation to sole practitioners, it is worth considering the impact of incapacity or death relating to any principal in a firm. Many of the principles and reasons for an alternate for a sole practitioner are equally appropriate in other situations to ensure continuity in the event of incapacity or an orderly dealing in the event of death.

While it is probably unlikely that there will be a need to appoint an alternate in multi-principal practices (other than where a principal has personal appointments), it is likely to be valuable for the objectives behind and the principles of alternates to be agreed. For a practitioner in a partnership, the arrangements could be part of the partnership agreement or as a separate agreement with another firm or individual. If you operate through a limited company or LLP, provision for continuity should be made in the articles of association or members' agreement.

Is an alternate compulsory?

Under the Clients' Money Regulations (Regulation 11), sole practitioners are required to have arrangements in place with an alternate. The arrangements must ensure that the proper distribution or processing of Clients' Monies, can be continued by the alternate, with a minimum of disruption, in the event of the incapacity or death of the sole practitioner.

Alternate arrangements must be with a corporate entity where the majority of the Principals are members of a CCAB professional body, or alternatively with an individual who is a member of a CCAB professional body and who holds a practicing certificate from that body.

Sole practitioners are required to certify in writing to ICAS that arrangements are in place which meet the above requirements and that any bank which operates the Client Money Account has consented to the arrangement prior to receiving or holding Clients' Monies.

In addition, the ICAS [Public Practice Regulations](#) (Regulation 3.20) require sole practitioners to have written contingency arrangements in place to ensure that the functions of the sole practitioner's firm can be continued with a minimum of disruption, in the event of the incapacity or death of the sole practitioner. The Public Practice Regulations do not require an alternate, although in many sole practitioner circumstances adequate arrangements may only be achievable through having an alternate arrangement in place. Further guidance on the Public Practice Regulation requirements is available in the Regulatory guidance on contingency arrangements for sole practitioners.

Where regulated work is undertaken by the sole practitioner (for example audit, insolvency, investment business or consumer credit under Designated Professional Body licencing) then the alternate arrangements must enable that regulated work to be undertaken by individuals with equivalent qualifications and authorisations to the sole practitioner. In relation to insolvency practitioners, the alternate must hold a current insolvency licence with the appropriate authorisations (personal, corporate or full). The insolvency licence held by the alternate does not have to be an appointment taking licence as the alternate arrangement in itself will not result in the office holder appointments transferring to the alternate.

General considerations

The arrangements made should provide, as far as possible, for the practice to be continued as a going concern until such times as the practitioner is able to return to business or the practice can be sold.

As noted above the arrangements must be made in a manner which complies with the Public Practice Regulations and the Clients' Money Regulations (together, the Regulations). While the Regulations do not require arrangements to be made with another ICAS member or firm there is clearly advantages to doing so in terms of the understanding of ICAS requirements and existing knowledge and relationship with ICAS.

You should give consideration as to what the alternate is being asked to do and whether that individual or firm has adequate resources and experience not only to cover your practice but also without being detrimental to their own. For this reason it is often more appropriate for a sole practitioner's alternate arrangement to be with a 2-3+ partner firm or a partner within such a firm rather than with another sole practitioner.

You should try and find a firm or practitioner that is compatible with your own procedures, and whose fee structures and type of work undertaken are similar to your own. As such, a discussion should take place as to how the respective firms operate, who the key personnel are and so on.

What should be covered in an agreement?

Whatever arrangements are made, they must be in writing. An 'understanding' or similar informal arrangement can prove to be ineffective due to a lack of consensus between the parties as to what is required. It may also be necessary for the alternate to demonstrate that they have the requisite authority.

Because the arrangements are contractual and require legal input on behalf of both parties it is strongly recommended that legal advice be sought and that the alternate agreement is drawn up by solicitors.

While the parties can include (or exclude) whatever powers they wish as part of an agreement, it is important that as part of a consensual legal agreement there is clear documentation clearly agreeing what is being provided for. It is suggested that an agreement should include clauses that deal with the following matters as a minimum:

- The parties subject to the agreement;

- The nature of the legal relationship between the parties;
- The precise circumstances which will cause the management arrangement to come into effect. Consideration should be given to whether evidence of incapacity from a medical practitioner or other party should be provided for the agreement to be activated;
- The maximum duration that the management arrangement should be effective for and provide for arrangements should the maximum duration period need to be exceeded;
- The alternate's obligations. This may include obligations including maintenance of books and records, payment of VAT and other taxes, professional membership and regulatory matters (including for example undertaking MLRO obligations, PII notifications for both parties or notification for insolvency bonds), confidentiality, restrictive covenants, attendance at premises, time commitment to alternate management, access to clients, etc;
- The alternate's powers relating to the administration of the practice. For example in relation to the engagement and dismissal of staff, operation of bank accounts, etc. For insolvency practitioners, the agreement should also set out the alternate's powers in relation to insolvency appointments;
- The basis of the alternate's remuneration (time basis, fee sharing, etc);
- The level of any indemnity provided to each party in respect of actions taken during the operation of the management arrangement;
- The matters to be included in any communication to be sent to clients in the event of the practitioner's incapacity or death;
- Provision relating to the termination of the agreement, including termination on retirement or the wish by either party to withdraw from the agreement. Provision for termination should also be considered where either party breaches the terms of the agreement, for example the alternate ceasing to hold the necessary regulatory authorisations, or where the alternate would be considered to be no longer fit and proper to act as an alternate;
- Date of entering the agreement.

Consideration should also be given to provisions relating to the sale of the practice in the case of long-term incapacity or death. It is not unusual for there to be provision that, in such circumstances, the alternate is given first refusal either at an agreed price or at a price to be agreed with personal representatives, who may wish to take advice on valuation. While it is possible for the alternate agreement to also narrate the business or asset sale arrangements, it is likely that legal advice will be required and that the detailed business or asset sale be documented separately and entered into by the personal representatives at the appropriate time. This will ensure that other factors such as employment law issues where the practice has employees (for example transfer of undertaking and protection of employment provisions) and warranties are appropriately dealt with. Similar provisions may also apply to insolvency practitioners in relation to the transfer of appointments (see Reserved Areas of Work – Insolvency).

If the practice is an authorised training office (ATO), ICAS should be notified in writing of any material change in the ability of the ATO to meet the standard of training laid down in the bye-laws.

Operation of bank accounts

Clients' money must be available with minimal disruption. For insolvency practitioners, this applies to case funds. The alternate must be able to legally operate relevant bank accounts when necessary.

Banks should be made aware of the alternate arrangements. It is unclear if all banks will give effect to alternate mandates and in any case any agency arrangement would cease on death of a practitioner. Alternates should therefore be joint account holders, with the alternate agreement including provisions that they shall not provide instructions or request information in relation to the practice's bank accounts except in event of incapacity or death.

Any breach of the agreement by the alternate would not only give rise to civil remedies for breach of contract but would also be viewed by ICAS as a departure from acceptable standards of conduct and may result in disciplinary proceedings.

Reserved Areas of Work

If the practitioner operates in any of the three reserved areas for which additional authorisations are required, additional considerations apply.

Audit

A registered auditor must, within 10 business days, tell ICAS of any change in circumstances that may affect the ability to conduct audit work.

In practical terms, an audit appointment is of a firm (an individual if the firm is a sole practitioner) by the client. The client's consent to the appointment of an alternate would therefore be necessary. In some situations where there is physical but not mental incapacity it may be possible to complete or undertake an audit in the name of the firm. For example, it may be possible to sub-contract the audit field work (this need not be done by a registered auditor provided other requirements are satisfied), or in a case where all the work had been carried out except the review and sign-off, another registered auditor, properly appointed as an alternate, could complete the assignment. The practitioner would require to sign off the audit report unless the alternate had been appropriately designated as a responsible individual of the firm (this requires ICAS approval).

Where a sole practitioner dies, a casual audit vacancy arises and an alternate cannot act. If the intention is that the alternate succeeds to the practice, he would have to be a registered auditor. In this case, as in general practice, the decision would lie with the client who may or may not appoint the alternate.

Investment, Insurance and similar business

It is the firm (individual if the firm is a sole practitioner) that is licensed by ICAS under the Designated Professional Body scheme. The firm must, within 10 business days, tell ICAS of any change in circumstances that may affect the firm's eligibility to be licensed.

An alternate could undertake work that requires a licence on behalf of the licensed firm provided they were competent to do so.

In the event of the death of a sole practitioner, the firm no longer meets the eligibility criteria. It may be possible to grant a temporary dispensation and personal representatives should contact ICAS immediately.

If authorised by the FCA, the FCA should be contacted for appropriate advice.

Insolvency

Insolvency is a personal appointment. Like audit, certain work can be sub-contracted just as a practitioner may employ staff to work for him. It is advisable therefore to have an alternate in place to oversee and progress cases when the original appointee is unable to carry out his duties on a temporary basis. The agreement should set out the alternate's powers in relation to insolvency appointments.

For insolvency practitioners who are employees or consultants, arrangements may be documented in the contract of employment/contract for services or as a separate agreement.

The personal nature of insolvency appointments gives rise to some specific issues around capacity for alternates to act in certain circumstances. This is because certain personal rights cannot be delegated even with the benefit of a Power of Attorney. It is therefore essential that legal advice is taken regarding any alternate agreement involving insolvency appointments.

Where the practitioner dies or becomes permanently incapacitated, the insolvency practitioner's caseload would be transferred to a replacement insolvency practitioner by application to the Court. This however will take a period of time to complete and have appointments transferred and alternate arrangements can ensure that cases can be progressed in the intervening period.

As noted above, it is not unusual for there to be provision in an alternate agreement that, in the case of long term incapacity or death, the alternate is given first refusal to be nominated as replacement office holder. The agreement would normally also set out how in such circumstances the value to be paid for the appointments would be agreed (taking into account the legislative provisions regarding the determination of each office holders remuneration).

Personal Appointments

It is not uncommon for principals in a practice to hold appointments such as trusteeships, executorships, Judicial Factories, guardianships and other personal appointments. The personal nature of these appointments gives rise to some specific issues around capacity for alternates to act in certain circumstances. This is because certain personal rights cannot be delegated even with the benefit of a Power of Attorney. It is therefore essential that legal advice is taken regarding any alternate agreement where personal appointments are held.

Additional steps

In addition to the alternate agreement it is likely that additional steps will require to be put in place to give full effect to any agreement.

Power of attorney

Firstly to cover incapacity, a form of Power of Attorney is probably required which gives the alternate the necessary powers to act. It may also be useful to grant a further Power of Attorney to a trusted family member, friend or other professional to not only ensure that personal affairs can be dealt with in the event of incapacity but to give effect to decisions that may be required alongside the alternate arrangement. For example, the Power of Attorney may provide for the ability to give notification of incapacity required under the alternate arrangement, or give the power to extend an alternate arrangement beyond the period provided for in the agreement.

Will

Secondly, as a Power of Attorney will fall on death, it is necessary for your solicitor to replicate alternate provisions in your Will or by Codicil. Dying without a Will not only causes difficulties for your family, it could also lead to serious disruption to the business while the necessary administration is carried out to allow your estate to be dealt with.

The resultant delay may lead to your own affairs, and those of your clients, not being properly controlled and managed and consequently any value that may exist in the goodwill of the practice will diminish rapidly following death. It is necessary to protect the value of this 'wasting' asset - waiting for Confirmation of the Estate before realising the value of the practice may be too late.

It is therefore strongly recommended that you make a Will and appoint executors who can administer the estate. The Will should make reference to the existence of the continuity agreement and its purpose as well as to where the agreement is stored.

Other practical considerations

In practical terms, you should also consider who should be aware that such arrangements have been made. Obviously, your solicitor will be aware but you should consider your personal circumstances and make those closest to you who may first become aware of your incapacity that such arrangements exist. This could include for example, your spouse, partner, children or siblings. However, it is also probably wise that a senior employee (if you have any) be made aware as that person is likely to be a key liaison with the alternate. Whoever you make aware of the arrangement, it is useful for them and any key employee to meet the alternate when appointed, if they do not already know them.

As part of the regulatory requirements around alternates, you are required to notify ICAS that you have an alternate which we will hold on your record in case of being contacted by a third party in event of incapacitation.

Ensure business systems can be accessed

In addition to the necessary legal and commercial requirements to protect the practice in the event of incapacity or death, some additional practical arrangements should be planned.

It is essential that information on key contacts and other information to help the alternate is available as quickly as possible. You should prepare a document similar to, or as part of, a business continuity plan and a copy should either be kept by each party to the arrangement or its location documented as part of the agreement. Information might include for example:

- List of clients and their details
- Personnel files – staff and subcontractors
- Charge out rates
- WIP
- Access arrangements for office premises
- Debtors / creditors / bank
- Other significant contracts
- Details of clients records held
- Office procedures manual

You should ensure that passwords to key systems can be accessed. This may include servers, practice management and other business software, document management systems, electronic banking, etc.

You should also consider what plans may require to be put in place to divert phone calls and emails should the need arise.

It is also a good idea to prepare a personal “My Documents” dossier as well to help your family locate important information. ICAS Practice Support can help with making and documenting both.

Review your arrangements regularly

Circumstances will change over time for both you and your alternate, so it is essential that arrangements are put in place to regularly review whether they remain appropriate. It is suggested that as a minimum a discussion is held annual to confirm that the alternate is content to continue to act and that there are no significant matters which require to be amended in relation to the agreement.

Any amendments to arrangements following a review should be documented or, better still, reflected in a new agreement.

Specimen Documents

[Specimen Alternate Agreements](#)

Useful links

[Clients' Money Regulations](#)

[Public Practice Regulations](#)

[Designated Professional Body \(Investment Business\) Handbook](#)

[Audit Regulations](#)

[Insolvency Regulations](#)

[Regulatory guidance on contingency arrangements for sole practitioners](#)

Further information and assistance

Further assistance and information can be obtained from the Practice Support team. You can contact them through the Practice Support section of the [ICAS Technical helpdesk](#).

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