

Agenda

The Law Society
of British Columbia



Benchers

Date: Friday, May 29, 2020

Time: **9:00 am - Call to order**

Please join the meeting anytime from 8:50 am to allow enough time to resolve any video/audio issues before the meeting commences.

Location: Virtual meeting

Recording: *Benchers, staff and guests should be aware that a digital audio and video recording will be made at this Benchers meeting to ensure an accurate record of the proceedings. Any private chat messages sent will be visible in the transcript that is produced following the meeting.*

VIRTUAL MEETING DETAILS

The Bencher Meeting is taking place via a virtual meeting. If you would like to attend the meeting, please email BencherRelations@lsbc.org.

OATH OF OFFICE:

President Ferris will administer the oath of office (in the form set out in Rule 1-3) to new elected Bencher, Cheryl D'Sa.

1	Administer Oath of Office
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CONSENT AGENDA:

Any Bencher may request that a consent agenda item be moved to the regular agenda by notifying the President or the Manager, Governance & Board Relations prior to the meeting.

2	Minutes of April 17, 2020 meeting (regular session)
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3	Minutes of April 17, 2020 meeting (<i>in camera</i> session)
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4	Revised Legal Aid Strategy
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Agenda



5	Rule 4-20: Proposed Amendments concerning the Publication of Citations	
6	Rule 10-1: Proposed Amendments to Permit Service through Member Portal	
7	Rule 1-26: Proposed Amendments regarding the Voter List for Elections and By-elections	
REPORTS		
8	President’s Report	Craig Ferris, QC
9	CEO’s Report	Don Avison
10	Federation of Law Societies Report	Pinder K. Cheema, QC
11	Attorney General Eby’s Report	Hon. David Eby, QC
UPDATES		
12	Report on Outstanding Hearing & Review Decisions (<i>Materials to be circulated at the meeting</i>)	Craig Ferris, QC
FOR INFORMATION		
13	Wayne Robertson, Q.C. Access to Justice Award	
14	Annual Bencher Conflicts Disclosure Form	
15	Bencher <i>In Camera</i> Guidelines	
16	Three Month Bencher Calendar – June to August 2020	
IN CAMERA		
17	Other Business	



Minutes

Benchers

Date: Friday, April 17, 2020

Present:

Craig Ferris, QC, President	Jamie Maclaren, QC
Dean P.J. Lawton, QC, 1 st Vice-President	Claire Marshall
Lisa Hamilton, QC, 2 nd Vice-President	Geoffrey McDonald
Paul Barnett	Steven McKoen, QC
Pinder K. Cheema, QC	Christopher McPherson, QC
Jennifer Chow, QC	Jacqueline McQueen
Barbara Cromarty	Elizabeth J. Rowbotham
Jeevyn Dhaliwal, QC	Mark Rushton
The Hon. David Eby, QC	Karen Snowshoe
Lisa Feinberg	Thomas L. Spraggs
Martin Finch, QC	Michelle D. Stanford, QC
Brook Greenberg	Michael Welsh, QC
Sasha Hobbs	Chelsea D. Wilson
Julie K. Lamb, QC	Guangbin Yan
Dr. Jan Lindsay	

Unable to Attend: Jasmin Ahmad
Heidi Zetsche

Staff Present:	Don Avison, QC	Jason Kuzminski
	Barbara Buchanan, QC	Michael Lucas, QC
	Jennifer Chan	Alison Luke
	Natasha Dookie	Jeanette McPhee
	Su Forbes, QC	Doug Munro
	Andrea Hilland	Lesley Small
	Kerryn Holt	Adam Whitcombe, QC
	Jeffrey Hoskins, QC	

<p>Guests: Kenneth Armstrong Dom Bautista Dr. Susan Breau Jennifer Brun Michelle Casavant Dr. Catherine Dauvergne Dr. Cristie Ford</p> <p>Alexis Kazanowski Shawn Mitchell Ian Mulgrew Caroline Nevin Josh Paterson Linda Russell Kerry Simmons, QC</p> <p>Karen St. Aubin Sharon Sutherland Bill Veenstra, QC</p>	<p>President, Canadian Bar Association, BC Branch Executive Director, Law Courts Center Dean of Law, University of Victoria Vice President, Canadian Bar Association, BC Branch Member, Aboriginal Lawyers Forum Dean of Law, University of British Columbia Associate Dean Research and the Legal Profession, Peter A. Allard School of Law Assistant Dean of Law, Thompson Rivers University CEO, Trial Lawyers Association of BC Columnist, Vancouver Sun CEO, Courthouse Libraries BC Executive Director, Law Foundation of BC CEO, Continuing Legal Education Society of BC Executive Director, Canadian Bar Association, BC Branch Membership Director, Trial Lawyers Association of BC Director of Strategic Innovation, Mediate BC Board of Directors, Canadian Bar Association</p>
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CONSENT AGENDA

1. Minutes of March 6, 2020, meeting (regular session)

The minutes of the meeting held on March 6, 2020 were approved as circulated.

2. Minutes of March 6, 2020 meeting (*in camera* session)

The minutes of the *in camera* session held on March 6, 2020 were approved as circulated.

3. Executive Committee Terms of Reference

The Executive Committee Terms of Reference were approved as circulated.

4. Access to Justice Advisory Committee Terms of Reference

The Access to Justice Advisory Committee Terms of Reference were approved as circulated.

5. Rule 3-102 (3): Proposed Amendment to Permit the use of Certain Electronic Documents and Information in Client Identification and Verification

The following resolution was passed unanimously and by consent.

BE IT RESOLVED to amend the Rule 3-102 by adding the following subrule:

- (3.1) Despite subrule (3), an electronic image of a document that is created by and obtained directly from a registry maintained by the government of Canada, a province or a territory or a foreign government, other than a municipal government, may be treated as a document or information for the purposes of subrule (2) (b).

6. Rules 2-105 and 3-41: Recommendations to Amend Rules Concerning the Payment of the Second Instalment of the Indemnity Fee

The following resolution was passed unanimously and by consent.

BE IT RESOLVED to amend the Law Society Rules as follows:

1. *In Rule 2-105, by adding the following subrule:*

- (3) The date for payment of the second indemnity fee instalment is prescribed under Rule 3-41 (1) [*Payment of annual indemnity fee by instalments*].

2. *In Rule 2-108, by rescinding subrules (1) and (3) and substituting the following:*

- (1) A lawyer who fails to pay fees by the date required under Rule 2-105 (2) *[Annual practising fees]* but pays all of those fees before December 31 of the year preceding the year for which they are payable, together with the late payment fee under this rule, continues to be a member of the Society.
- (3) A lawyer, other than a retired or non-practising member, who has failed to pay the annual practising fee in accordance with Rule 2-105 (2) *[Annual practising fees]*, is required to pay the late payment fee for practising lawyers specified in Schedule 1.

3. *In Rule 3-41 (1), by rescinding paragraph (b) and substituting the following:*

- (b) the second instalment on or before June 30 of the year for which it is paid or a later date specified by the Executive Director.

7. Rule 4-20: Proposed Rule Amendments concerning the Publication of Citations

The following recommendations were approved, in principle, unanimously and by consent:

- amendments to Rule 4-20(1) to require the Executive Director to publish a citation on the website once the citation has been authorized and the respondent has been notified; and
- amendments to the rule that would permit an application to the Tribunal for an order that the citation be anonymized, and that the criteria that must be established be set out in the rule.

The amendments were referred to the Act and Rules Committee to develop rules to implement the recommendations, and to return the matter to the Benchers to approve the rule changes.

8. Rule 10-1: Proposed Amendments to Permit Service through Member Portal

Benchers approved unanimously and by consent the Executive Committee's recommendation that Rule 10-1 be amended to allow for the possibility of service through the Discipline Portal.

The recommended amendments to Rule 10-1 to give effect to this change were to:

- (a) expand the available electronic methods of service to include a provision describing a broad definition of "electronic method" or "electronic means" that would allow for service via an electronic portal; and

- (b) provide that service via this expanded electronic method or means is deemed to be served on the next business day after it is sent, in keeping with the current Rule 10-1(7) for service via electronic mail and electronic facsimile.

It was also agreed that, for service through the Discipline Portal to be effective, some provision must be built into the rule to ensure the party receiving service be required to be notified as well through some other form of communication, which could include email.

The amendments were referred to the Act and Rules Committee to prepare the necessary rule amendments to be returned to the Benchers for approval.

9. External Appointment: Vancouver Foundation Board of Directors

The following resolution was passed unanimously and by consent.

BE IT RESOLVED that Rita Andreone, QC be confirmed as the Law Society's nominee to the Vancouver Foundation Board of Directors, to be re-appointed for a second term of three years commencing May 1, 2020.

10. Students who Fail the Professional Legal Training Course: Recommendation to Amend the Law Society Rules

Benchers resolved, unanimously and by consent, that the Law Society Rules be amended to vest the discretion in the Executive Director to grant a second or third opportunity to complete a PLTC examination(s) or assessment(s).

The matter was referred to the Act and Rules Committee to prepare rule amendments to implement the Bencher decision, and to return the matter to the Benchers to approve the rule changes.

REPORTS

11. President's Report

Mr. Ferris began his President's Report by speaking about COVID-19 and the impact it has had on Law Society operations, the administration of justice, the legal profession and the court system. He provided a summary of various urgent matters that presented issues during the last month where immediate steps were required; such as the swearing of affidavits, the LTSA, articling students and the Professional Legal Training Course, forms, paper, the courts, access to justice and how to keep all of these processes operational. Mr. Ferris thanked the Attorney General and his department for their hard work to keep systems operating, for consulting with the Law Society and for listening to concerns that have been brought forward.

Mr. Ferris said now more than ever we ought to be talking about reform, and that not only is COVID-19 happening and impacting the justice system, but it is causing a fundamental change in society and in the legal profession – one in which there is no going back. Mr. Ferris spoke about the increased use of technology to conduct business, and the continued need to examine and challenge the ways in which we operate. He said there is no better time than right now to be talking about reforms, and referenced reforms already taking place in Utah and Arizona. Suggestions for further consideration included the intersection between independent paralegals, the limits of unauthorized practice and technology, reserved legal services versus a definition of practice of law that covers the field, and a regulatory sandbox to test and spur on innovation.

Mr. Ferris emphasized that the Law Society and the Benchers need to be part of the transformation that has been unleashed, and that the response needs to be quicker, more decisive and more innovative, while maintaining the core principles.

12. CEO's Report

Mr. Avison echoed Mr. Ferris' comments that this period of time is one of fundamental transition that we will look back in years to come. He provided a summary of the activities that have taken place since the March 6 Bencher meeting; including, a call ceremony in Vancouver on March 13 and Law Society staff transitioning to working remotely mid-March. The transition to remote working has gone well and he recognized there are parts of the business that will never be the same again. A number of committee meetings have already taken place virtually and improvements will continue to be made over time. Internal Law Society meetings have proceeded, including a senior leadership response team, the ladder meetings and management team meetings. A number of communications pieces have also been distributed to the profession.

The Law Society has been working closely with the courts regarding the swearing of affidavits, work has been underway on issues with land title documents with the support of the Ministry of the Attorney General and the Deputy Attorney General, and additional work has been required with respect to builder's liens and to improve the capacity for meetings to be held virtually in the strata context. There have also been regular weekly calls with the CEOs from all Canadian law societies, which has provided a valuable opportunity for increased information sharing.

Regarding the second indemnity fee instalment, Mr. Avison referred to the recommendation before Benchers to provide the Executive Director with a general discretion to delay the payment of the fee, and indicated other areas for relief were being considered. He also said more information would be available in the coming days about the PLTC program and plans for completing the current session as well as beginning future sessions.

Mr. Avison then invited members of the Senior Leadership Team to provide an update to Benchers on each of their areas of responsibility.

Benchers asked Mr. Avison for additional information about the impact of COVID-19 on articling students and their ability to observe court proceedings, arrangements in place for PLTC, and regional call ceremonies.

13. Attorney General Eby's Report

Attorney General Eby began by sharing details of work done by the Ministry of the Attorney General to address issues raised by COVID-19 and its impact on the justice system. He identified three stages of response: the first stage focusing on immediate support needed and trying to keep services operating; the second stage focusing on clearing any backlog and the third stage focusing on preparations for the end of restrictions being in place. The majority of efforts to date have been focused on stage one and determining which matters are the most urgent or take priority. A lot of work is underway to deal with pressing matters in a timely way so that systems are transformed and people's constitutional rights are protected. Attorney General Eby then spoke about some areas of focus for the next stage and was supportive of the continued involvement and cooperation between the Law Society, Canadian Bar Association BC Branch, all levels of the courts and the Ministry of the Attorney General to work together to respond to the impacts of COVID-19.

DISCUSSION/DECISION

14. Roundtable on implications of COVID-19 for the legal profession and the administration of justice

Benchers shared concerns about the impact of COVID-19 on the legal profession and the administration of justice and identified some areas for further consideration or work. Matters discussed included in-person attendance at court versus virtual appearances, improvements to court procedures and rules, fee relief for members of the Law Society, the impact of COVID-19 on young lawyers and articling students, accessibility of the courts, a review of the Law Society tribunals processes, continuing professional development requirements and the use of technology in the legal profession. Mr. Ferris thanked Benchers for their thoughtful contributions. He indicated it would be helpful if staff looked further at the matters raised and report back to Benchers at future meetings.

15. Legal Aid Strategy for Law Society

After discussion of the proposed Legal Aid Strategy, Benchers agreed to refer the strategy back to the Access to Justice Advisory Committee for further revision with a view to it coming back before Benchers for approval at the May 29 meeting.

UPDATES

16.2020 First Quarter Financial Report

With reference to the report included on page 74 of the materials, Ms. McPhee provided an overview of the financial results and highlights to the end of February 2020 and noted some areas likely to be impacted by COVID-19, such as practice fees, PLTC revenue, electronic filing revenue, miscellaneous revenue and interest revenue.

17. Report on Outstanding Hearing & Review Decisions

Mr. Ferris thanked people in advance for advising him of the status of outstanding hearing and review decisions, and encouraged Benchers to keep up efforts to get decisions out on time and follow up with their fellow panel members to ensure reports are completed in a timely manner.

FOR INFORMATION

18. Revisions to 2020 Bencher and Executive Committee Meeting Dates

There was no discussion on this item.

19. Letter from President Ferris to family of Alan Hope, QC

There was no discussion on this item.

20. Letter from Craig Ferris, QC to Attorney General Eby dated March 30, 2020 regarding the current state of affairs

There was no discussion on this item.

21. Three Month Bencher Calendar – April to June 2020

There was no discussion on this item.

The Benchers then commenced the *In Camera* portion of the meeting.



Memo

To: Benchers
From: Access to Justice Advisory Committee
Date: April 27, 2020
Subject: Revised Legal Aid Strategy

Background

The Benchers considered a draft legal aid strategy on April 17, 2020. There were two recommended changes to the draft:

1. Rather than indicate that the rates for legal aid lawyers must be fair and reasonable, the strategy should refer to “legal aid service providers”. This edit allows for a broader view than simply tariff rates for lawyers, including the potential role for licensed paralegals;
2. It is important that the strategy recognize that the Association of Legal Aid Lawyers (“A.L.L.”), in its negotiations with government, might not cover all the areas of legal aid the Law Society is interested in. The strategy should make it clear that the Law Society’s engagement in legal aid is not contingent on how negotiations between ALL and the government proceed, or if A.L.L. does not remain the official negotiating body.

In light of the feedback, the Access to Justice Advisory Committee made edits to the draft legal aid strategy, and provide a revised strategy for approval by the Benchers (**Appendix 1**). A redlined version is at **Appendix 2**.

Recommendation

Recommendation: **Be it resolved** that the Law Society adopt the legal aid strategy set out in **Appendix 1** to this memorandum.

/DM

/Appendices

Appendix 1: Law Society of British Columbia's Legal Aid Strategy

Goal:

The Law Society of BC will be, and be seen to be, a strong champion for publicly funded legal aid in BC.

Guiding Principles:

1. The Law Society will be guided by the Law Society's *Vision for Publicly Funded Legal Aid*;
2. The Law Society will take a constructive and collaborative approach to championing legal aid in BC;
3. The Law Society's positions on legal aid will be based on consultation, research and evidence.

The core principles of legal aid strategy:

The Law Society's legal aid strategy involves supporting the following core principles of legal aid:

1. Eligibility for legal aid should be fair and reasonable;
2. The services provided by legal aid, the types of legal problems and scope of geographic coverage, should meet the essential public needs for legal services;
3. The compensation paid to legal aid service providers should be fair and reasonable.

The strategy will involve monitoring the extent to which legal aid addresses the three core principles, and determining whether the Law Society needs to take particular action.

The Law Society's *Vision for Publicly Funded Legal Aid* is the reference point from which analysis of future legal aid developments will be assessed.

Government and the Association of Legal Aid Lawyers (“A.L.L.”), or equivalent negotiating entity (“Bargaining Agent”)

The Law Society’s legal aid strategy recognizes that the government of British Columbia and A.L.L. are exploring a framework for future negotiations regarding legal aid in which A.L.L. is the official negotiating party. The ways in which these negotiations progress will inform and guide the appropriate response by the Law Society. While the Legal Aid Strategy needs to be responsive to negotiations between the government and A.L.L., it also needs to address important matters that are not covered by those negotiations.

A two-stage analysis will be utilized.

1. Analysis of matters covered by the government and A.L.L.’s (or the Bargaining Agent’s) negotiating framework:

For matters covered by the framework between the government and A.L.L. (or the Bargaining Agent), the Law Society will:

1. Monitor the negotiations;
2. Be available for consultation;
3. Provide constructive commentary and analysis where appropriate;
4. Where appropriate, recommend a strategy to the Benchers.

2. Analysis of matters not covered by the government and A.L.L.’s (or the Bargaining Agent’s) negotiating framework:

For matters not covered by the government and A.L.L.’s (or the Bargaining Agent’s) negotiating framework, the Benchers will determine the most effective means of analyzing the issue: (for instance, referral to the Access to Justice Advisory Committee, a working group, another committee, or to staff).

The group which is assigned the task will:

1. Determining the issue(s) or problem(s) to be addressed;
2. Consider whether the issue or problem relates to the Law Society’s Vision for Publicly Funded Legal Aid;

3. If so, develop potential solutions or strategies based on consultation, evidence and research;
4. Consider the information / evidence with respect to the issue, and whether further information gathering is necessary. Here the Law Society may rely on existing research, as well as engage in consultations and/or discrete research;
5. Where appropriate, recommend a strategy to the Benchers.

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Appendix 2: Law Society of British Columbia's Legal Aid Strategy (Redlined Version)

Goal:

The Law Society of BC will be, and be seen to be, a strong champion for publicly funded legal aid in BC.

Guiding Principles:

1. The Law Society will be guided by the Law Society's *Vision for Publicly Funded Legal Aid*;
2. The Law Society will take a constructive and collaborative approach to championing legal aid in BC;
3. The Law Society's positions on legal aid will be based on consultation, research and evidence.

The core principles of legal aid strategy:

The Law Society's legal aid strategy involves supporting the following core principles of legal aid:

1. Eligibility for legal aid should be fair and reasonable;
2. The services provided by legal aid, the types of legal problems and scope of geographic coverage, should meet the essential public needs for legal services.;
3. The ~~tariff rates~~compensation paid to legal aid ~~lawyers~~service providers should be fair and reasonable.

The strategy ~~should~~will involve monitoring the extent to which legal aid addresses the three core principles, and determining whether the Law Society needs to take particular action.

The Law Society's *Vision for Publicly Funded Legal Aid* is the reference point from which analysis of future legal aid developments will be assessed.

Government and the Association of Legal Aid Lawyers (“A.L.L.”), or equivalent negotiating entity (“Bargaining Agent”).

The Law Society’s legal aid strategy recognizes that the government of British Columbia and A.L.L. are exploring a framework for future negotiations regarding legal aid in which A.L.L. is the official negotiating party. ~~How~~ The ways in which these negotiations progress will ~~impact~~ inform and guide the appropriate response by the Law Society. ~~While~~ The Legal Aid Strategy needs to be responsive to negotiations between the government and A.L.L. (or the Bargaining Agent), but it also needs to address important matters that are not covered by those negotiations.

A two-stage analysis will be utilized.

1. ~~How to analyze~~ Analysis of matters covered by the government and A.L.L.’s (or the Bargaining Agent’s) negotiating framework:

For matters covered by the framework between the government and A.L.L. (or the Bargaining Agent), the Law Society ~~should~~ will:

1. Monitor the negotiations;
2. Be available for consultation;
3. Provide constructive ~~feedback~~ commentary and analysis where appropriate;
4. Where appropriate, recommend a strategy to the Benchers.

2. ~~How to analyze~~ Analysis of matters ~~covered not~~ covered by the government and A.L.L.’s (or the Bargaining Agent’s) negotiating framework:

For matters not covered by the government and A.L.L.’s (or the Bargaining Agent’s) negotiating framework, the Benchers shall determine the most effective means of analyzing the issue: (~~e.g. for instance, referral to~~ the Access to Justice Advisory Committee, a working group, another committee, or to staff, ~~etc.~~).

The group which is assigned the task ~~shall~~ will:

1. Determining the issue(s) or problem(s) to be addressed ~~Determine what is the issue or problem (the core legal aid principle) we are trying to address;~~

2. Consider whether the issue or problem relates to the Law Society's Vision for Publicly Funded Legal Aid;
3. If so, develop potential solutions or strategies based on consultation, evidence and research;
4. Consider the information / evidence with respect to the issue, and whether further information gathering is necessary. Here the Law Society may rely on existing research, as well as engage in consultations and/or discrete research;
5. Where appropriate, recommend a strategy to the Benchers.



Memo

To: Benchers
From: Jeffrey G. Hoskins, QC for Act and Rules Committee
Date: May 5, 2020
Subject: **Rule 4-20: Proposed Amendments concerning the Publication of Citations**

1. At the virtual Benchers meeting on April 17 the Benchers accepted the recommendation of the Executive Committee calling for the amendment of Rule 4-20 and referring the matter to this Committee to recommend appropriate amendments.
2. This is the substance of the recommendations that were approved:
 - (a) approval in principle of amendments to Rule 4-20(1) to require the Executive Director to publish a citation on the website once the citation has been authorized and the respondent has been notified;
 - (b) approval in principle of amendments to the rule that would permit an application to the Tribunal for an order that the citation be anonymized, and that the criteria that must be established be set out in the rule;
 - (c) referral to the Act and Rules Committee to develop rules to implement the recommendations and to return the matter to the Benchers to approve the rule changes.
3. I attach for your reference the report of the Executive Committee to the Benchers making the recommendations. I also attach amendments, in redlined and clean versions, recommended by the Act and Rules Committee for adoption to give effect to the Benchers decision. A suggested resolution for that purpose is also attached.
4. The proposed scheme is that the substance of the citation *must* be published on the Law Society website, eliminating the exercise of discretion by the Executive Director. Instead, discretion may be exercised, on application, by the Law Society Tribunal.

5. Publication takes place seven days after the respondent is notified of the citation to allow an opportunity for an application for anonymous publication of the citation. There is no option for no publication at all.
6. The respondent or another person affected by the publication, may apply to the Tribunal for anonymous publication. If an application is made, the publication is anonymous until a decision is made on the application. If there is no application, the publication names the respondent.
7. The application is adjudicated by the President or designate (i.e., a Chambers Benchers) on the basis of whether there are extraordinary circumstances that outweigh the public interest in the publication. This is a lower standard than for anonymous publication of a hearing decision finding misconduct because that follows a hearing or admission, whereas a citation is an unproven allegation of one or more discipline violations. The standard suggested is the same for preventing or limiting publication of an interim condition of practice imposed on a lawyer under investigation under Rule 3-10.
8. The Committee recommends to adoption of the attached suggested resolution.

Attachments: report to Benchers
 draft amendments
 resolution

JGH



Rule 4-20: Proposed Rule Amendments concerning the Publication of Citations

April 7, 2020

Prepared for: Benchers

Prepared on behalf of: Executive Committee

Purpose: Proposed amendments to Rule 4-20(1)

Purpose

1. After considering a recent decision of the Supreme Court that dealt with Rule 4-20 and the publication of citations, the Executive Committee, in its regulatory policy role makes recommendations for amendments to the Rule to address the outcome of the decision.

Case Summary

2. On February 7, 2020, sealed reasons for judgment were released in a decision of the Supreme Court of British Columbia in a matter in which the petitioner member of the Law Society ('the petitioner') was successful in an application for judicial review of a decision by the Executive Director refusing to anonymize a citation issued against the petitioner. The application was made in connection to Rule 4-20.

3. Rule 4-20 (Disclosure of citation) states:

4-20 (1) Once the respondent has been notified of a direction to issue a citation, the Executive Director may disclose to the public the citation and its status.

(2) The Executive Director may disclose the outcome of a citation, including dismissal by a panel, rescission by the Discipline Committee or the acceptance of a conditional admission.

(3) Disclosure under this rule may be made by means of the Society's website.

(4) This rule must not be interpreted to permit the disclosure of any information that is subject to solicitor and client privilege or confidentiality.

4. The petitioner submitted to the Executive Director that under the current rule, the Law Society may disclose the citation, and therefore the Executive Director's decision to publish the citation is discretionary. The petitioner asked the Executive Director to exercise his discretion not to publish the citation.
5. After considering the submissions of the petitioner and the Law Society, the Executive Director released his decision to deny the petitioner's application. The Executive Director directed that the citation would be published within seven days. His written reasons for his decision noted that:

...only in rare and exceptional cases where one or more individuals would suffer extraordinary prejudice to such an extent that it would outweigh the public interest in having the Law Society carry out its discipline processes in a transparent and accountable manner.

The Executive Director did not conclude that the petitioner's application warranted an exception to the practice of publishing a citation.

6. The petitioner brought an application to the Supreme Court of British Columbia to stay the Executive Director's decision, seeking judicial review on whether the Executive Director erred in refusing to grant the application to anonymize publication of the citation. The Court allowed the judicial review and quashed the Executive Director's decision refusing to publish the citation anonymously and made an order restraining the Executive Director from publishing the petitioner's name or any identifying information within the citation.

Issue

7. Challenges to the exercise of the discretion to publish the citation, which names the lawyer, can create problems for the Law Society in demonstrating its ability to regulate the profession effectively and transparently. Such challenges open the door to lawyers against whom citations have been authorized to apply for non-publication of the decision to publish, opening up the possibility for review on a regular basis of the Executive Director's exercise of discretion to publish.
8. As the publication of a citation against a lawyer is meant to ensure that the public is aware of allegations of professional misconduct that are serious enough to warrant a citation in order to ensure that the public, and in particular, existing or putative clients are aware of the allegations, challenges to the decision to publish would be contrary to what the Law Society generally considers to be in the public interest.
9. Consideration of an amendment to the Rule to address these concerns is therefore warranted to ensure the Law Society is able to discharge its regulatory functions effectively and transparently.

Background to Rule 4-20(1)

History of the Rule

10. For much of the history of the Law Society, discipline of lawyers was not done publicly. It was not until 1983 that the hearing process became public.
11. Rule 4-20(1) can be traced to 1988. Prior to 1988, there was no explicit direction in the Law Society Rules regarding public disclosure of a citation. In 1988, there was a major update to the *Legal Profession Act* in British Columbia, and the Law Society updated its rules accordingly. This saw the creation of the predecessor of what is now Rule 4-20.
12. In 1988, what was then Rule 467 read as:

Citation may be disclosed

467. Once a citation has been served on the respondent, the Secretary may disclose to the public the citation and the status of the inquiry.

13. As drafted, the rule created a discretion for disclosure of the citation that was to be exercised by the Secretary (now Executive Director). It is, unfortunately, not clear why the rule was drafted with the inclusion of this discretion, although it is to be noted that publication and disclosure of discipline matters was still relatively new at the time, and many rules were drafted with the inclusion of a discretion, presumably to allow for determination as to publication on the basis of consideration of the various interests involved.
14. In January 1990, the Benchers debated whether the Law Society should inform the media of upcoming disciplinary hearings, as they were public hearings. After some debate for and against the motion, the Benchers decided that the Law Society should notify the Canadian Press that, if they inquire of the Law Society, they will be given information respecting citations outstanding and the names of the individuals involved. The debate identified the importance of disclosure to media who may be interested, although there remained a number of Benchers concerned about the effect on the lawyer, particularly if the citation were later dismissed. Arguments in favour of a public disclosure included the Law Society wanting its proceedings to be seen as open and in the public interest, as well as deterring lawyers from misconduct. Arguments against public disclosure included the potential for uneven application of the Secretary's/Executive Director's discretion for disclosure and the detrimental effect of disclosure, especially to practitioners in small communities or sole practitioners.
15. The Rule was next considered in 1998, when the Law Society Rules underwent another comprehensive update. The rule, now Rule 4-16, added subrules (3) and (4):

Disclosure of citation

4-16(1) Once the respondent has been notified of a direction to issue a citation, the Executive Director may disclose to the public the citation and its status.

(2) The Executive Director may disclose the outcome of a citation, including dismissal by a panel, rescission by the Discipline Committee or the acceptance of a conditional admission.

(3) Disclosure under this Rule may be made by means of the Society's website.

(4) This Rule must not be interpreted to permit the disclosure of any information subject to solicitor and client privilege and confidentiality.

16. Beginning in 1999, the Law Society began posting on its website the names of respondents and hearing dates in a 'hearings calendar'. The decision to have a 'hearings calendar' was made by the Executive Director, but no decision was made on whether to post other details of the citation or its outcome.
17. In 2002, the Disclosure and Privacy Task Force reported on matters relating to publication of citations. The Disclosure and Privacy Task Force identified options for disclosure consistent with developments in transparency expectations on public bodies. The focus of the policy discussion at that time was whether there should be proactive disclosure to media of the citations or whether public disclosure through the website sufficed. However, again, the issue of the discretion to disclose was not debated.
18. The option chosen by the Benchers at their September 2002 meeting was to adopt a policy that would permit the Law Society to post citations on its website, rather than simply the name of the respondent and the date of the hearing.
19. There have been small amendments to the rule since 2002, but they do not substantively change the intent of the rule.
20. Consistent with the decision in 2002, and as reflected in the reasons that the Executive Director gave in not exercising his discretion to publish the citation against the petitioner anonymously, the practice has become to publish citations against lawyers on the Law Society website.

The Problem

21. Generally, once the Discipline Committee has resolved to issue a citation against a lawyer, and the citation has been served on the lawyer, the Law Society publishes the citation in order to inform the public of the existence of the citation.
22. The result of the Court's decision, however, highlights the fact that the Rule provides a discretion to publish the citation to the public. The existence of a discretion permits a respondent to ask the Executive Director that publication not be made and, where the request is refused, to seek judicial review of the refusal to exercise the discretion not to publish.
23. Rule 4-20(1) in its current form does not match the practice of the Law Society in applying the rule. If the practice reflects the desired Benchers policy as determined in 2002, then the rule needs to be amended to remove the discretionary nature of the Executive Director's duty to disclose a citation to the public. Alternatively, if Rule 4-20(1) is not amended, then the Law Society is at risk of having the Executive Director's decisions in this area undergo judicial review, and potentially be quashed.

24. To expand on the problem, it is worth noting that Standard 15 of the Federation of Law Societies' National Discipline Standards is:

Notices of charge or citation are published promptly after a date for the hearing has been set.

25. In order to meet this standard, Rule 4-20(1) would need to be amended to remove the Executive Director's discretion to publish a citation, and instead make publication mandatory with potential for rare exception incorporated in the rule.

Key Comparisons

Law Society of Alberta

26. The Law Society of Alberta publishes their citations as Notice of Hearings in their schedule section of their website. Notably, the Law Society of Alberta Rules state the Benchers may establish guidelines for the Executive Director regarding publication of information, and that the Executive Director 'shall,' (not 'may') publish orders and written decisions. Section 78(4) of the *Legal Profession Act* also does not limit the Law Society of Alberta from disclosing or publishing the name of the lawyer subject to a hearing, even if that hearing is held in private. However, there is nothing in the Act or the Rules that refers explicitly to the power of the Executive Director to publish citations.

Law Society of Saskatchewan

27. The Law Society of Saskatchewan calls their citations 'Formal Complaints.' Formal complaints are published in two sections on the website, under 'pending discipline matters' as well as 'discipline news'. However, the details of the citation are only included in the 'pending discipline matters' section, whereas the 'discipline news' section is more of a schedule. Saskatchewan's Rules explicitly set out the requirement of the Society to publish a Formal Complaint. The relevant provisions are contained in Rules 1124(3) and 1137(1). It should be noted that the Rules use the word 'shall,' which removes the discretionary power, and also make explicit that publication includes the Society's website.

Law Society of Manitoba

28. The Law Society of Manitoba publishes their citations on their website under the section of 'upcoming hearings' as 'nature of charges', which are very succinct (for example, Breach of Integrity [x3]). If there is no hearing date attached to the citation, it uses the phrase 'to be set'. There are no separate documents linked or attached to the list of upcoming hearings.

Manitoba's Act and Rules around publication of citations are more discretionary, for example the complaints investigation committee 'may' direct the publication of the name of the member and the nature of the matter being investigated. However, the Act adds in an additional consideration for the committee, in that it can publish the citation if the committee considers it necessary for the 'protection of the public'.

Law Society of Ontario

29. The Law Society of Ontario publishes their citations on their Tribunal's website, which is separate but linked to the Society's website. They list their hearings under an 'upcoming hearings calendar' and include links to the 'Notice of Application – Conduct' which details the allegations to be heard as part of the citation. The Law Society of Ontario has two relevant sections in Rules of Professional Conduct that may cover the power of the Law Society to issue a citation, albeit the rules are not explicit.

Options

30. There are really two options: maintain the status quo or amend the rule to remove the exercise of discretion. If the second option is chosen, a sub-option could be to include a provision that permits a lawyer against whom a citation has been authorized to apply to the Tribunal to anonymize the citation, setting out the criteria that the lawyer must establish in order for an application to be considered.

Option 1

31. The first option is to continue with the rule and the Executive Director's practice as it currently stands. This option might be defensible, as in the 30-plus years of citations being published and the Executive Director having discretion to publish, it appears that there have been only two cases of a successful challenge with Judicial Review (one being the most recent, the other in the 1990s).
32. However, as discussed above, this option risks an outcome that results in a citation not being published. Such a result is inconsistent with transparency of process and leaves clients of a lawyer who may be facing serious sanctions in the dark about the lawyer's alleged conduct, or about risks to the lawyer's continued ability to represent the client.
33. Permitting a discretion to remain in the rules also risks public interpretation that the Law Society may be inclined to exercise discretion against publication, in the lawyer's interest rather than in the public interest. Given the most recent decision against the Law Society, it may be desirable to amend the rule to prevent future challenges to the Executive Director's powers.

Option 2

34. The second option is to amend Rule 4-20(1) by, for example, replacing the word ‘may’ with ‘must’.
35. This option would make publication of citations mandatory, which may be criticised as inflexible. However, the option would bring the rule in line with the current practice and would best implement Standard 15 of the National Discipline Standards. It would send a public message that allegations regarding a lawyer’s conduct that have been approved for hearing are matters in which the public has a legitimate interest, and would allow the public to know both the name of a lawyer against whom a citation has been authorized and the date of hearing, which are important considerations given that hearings are generally to be held in public.
36. Recognizing that there may indeed be rare occasions where the public interest would support the anonymization of the citation, an amendment to the rule could incorporate a provision for a member to apply that the citation be published anonymously. If this option were to be pursued, it is recommended that the application be made to the Tribunal rather than to the Executive Director, akin to the process for anonymizing a hearing decision. The Committee recommends, if this option is accepted, that the opportunity to make an application be extended to a party or individual affected by the citation so that any affected person could apply to anonymise publication if harm can be established. The power to apply should be extended to the Law Society as well, in the event the interests of justice or fairness required the application but no other person was prepared or able to make it.
37. The benefit of including in the Rules a provision for anonymity is that it could establish the requirements for consideration of an application. It also would make explicit in the rule that the practice is for the Executive Director always to publish, unless the applicant can establish, on evidence before the Tribunal, certain requirements upon their application.

Recommendation

38. The Executive Committee recommends that the Benchers approve, in principle, amendments to Rule 4-20(1) to require the Executive Director to publish a citation on the website once the citation has been authorized and the respondent has been notified.
39. The Committee also recommends that the Benchers approve, in principle, amendments to the rule that would permit an application to the Tribunal for an order that the citation be anonymized, and that the criteria that must be established be set out in the rule.
40. In both instances, if the recommendations are approved in principle, the issue should be referred to the Act and Rules Committee to develop rules to implement the recommendations, and to return the matter to the Benchers to approve the rule changes.

LAW SOCIETY RULES

PART 4 – DISCIPLINE

Disclosure-Publication of citation

- 4-20** (1) ~~When there has been~~ Once the respondent has been notified of a direction to issue a citation, the Executive Director ~~may disclose to the public~~ must publish on the Society's website the fact of the direction to issue the citation, the content of the citation and its the status of the citation.
- (1.1) Publication under subrule (1) must not occur earlier than 7 clear days after the respondent has been notified of the direction to issue the citation.
- (2) The Executive Director may ~~disclose~~ publish the outcome of a citation, including dismissal by a panel, rescission by the Discipline Committee or the acceptance of a conditional admission.
- (3) ~~Disclosure-Publication~~ under this rule may be made by means of the Society's website and any other means.
- (4) This rule must not be interpreted to permit the disclosure of any information that is subject to solicitor and client privilege or confidentiality.
- (5) Except as allowed under Rule 4-20.1 [Anonymous publication of citation], a publication under this rule must identify the respondent.

Anonymous publication of citation

- 4-20.1** (1) A party or an individual affected may apply to the President for an order that publication under Rule 4-20 [Publication of citation] not identify the respondent.
- (2) When an application is made under this rule before publication under Rule 4-20, the publication must not identify the respondent until a decision on the application is issued.
- (3) On an application under this rule, where, in the judgment of the President, there are extraordinary circumstances that outweigh the public interest in the publication of the citation, the President may
- (a) grant the order, or
- (b) order limitations on the content, means or timing of the publication.
- (4) The President may designate another Benchers to make a determination on an application under this rule.
- (5) The President or other Benchers making a determination on an application under this rule must state in writing the specific reasons for that decision.

LAW SOCIETY RULES

PART 4 – DISCIPLINE

Publication of citation

- 4-20** (1) When there has been a direction to issue a citation, the Executive Director must publish on the Society's website the fact of the direction to issue the citation, the content of the citation and the status of the citation.
- (1.1) Publication under subrule (1) must not occur earlier than 7 clear days after the respondent has been notified of the direction to issue the citation.
- (2) The Executive Director may publish the outcome of a citation, including dismissal by a panel, rescission by the Discipline Committee or the acceptance of a conditional admission.
- (3) Publication under this rule may be made by means of the Society's website and any other means.
- (4) This rule must not be interpreted to permit the disclosure of any information that is subject to solicitor and client privilege or confidentiality.
- (5) Except as allowed under Rule 4-20.1 [*Anonymous publication of citation*], a publication under this rule must identify the respondent.

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- 4-20.1** (1) A party or an individual affected may apply to the President for an order that publication under Rule 4-20 [*Publication of citation*] not identify the respondent.
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- (3) On an application under this rule, where, in the judgment of the President, there are extraordinary circumstances that outweigh the public interest in the publication of the citation, the President may
- (a) grant the order, or
 - (b) order limitations on the content, means or timing of the publication.
- (4) The President may designate another Benchers to make a determination on an application under this rule.
- (5) The President or other Benchers making a determination on an application under this rule must state in writing the specific reasons for that decision.

PUBLICATION OF CITATION

SUGGESTED RESOLUTION:

BE IT RESOLVED to amend the Law Society Rules by rescinding Rule 4-20 and substituting the following:

Publication of citation

- 4-20** (1) When there has been a direction to issue a citation, the Executive Director must publish on the Society's website the fact of the direction to issue the citation, the content of the citation and the status of the citation.
- (1.1) Publication under subrule (1) must not occur earlier than 7 clear days after the respondent has been notified of the direction to issue the citation.
- (2) The Executive Director may publish the outcome of a citation, including dismissal by a panel, rescission by the Discipline Committee or the acceptance of a conditional admission.
- (3) Publication under this rule may be made by means of the Society's website and any other means.
- (4) This rule must not be interpreted to permit the disclosure of any information that is subject to solicitor and client privilege or confidentiality.
- (5) Except as allowed under Rule 4-20.1 [*Anonymous publication of citation*], a publication under this rule must identify the respondent.

Anonymous publication of citation

- 4-20.1**(1) A party or an individual affected may apply to the President for an order that publication under Rule 4-20 [*Publication of citation*] not identify the respondent.
- (2) When an application is made under this rule before publication under Rule 4-20, the publication must not identify the respondent until a decision on the application is issued.
- (3) On an application under this rule, where, in the judgment of the President, there are extraordinary circumstances that outweigh the public interest in the publication of the citation, the President may
- (a) grant the order, or
 - (b) order limitations on the content, means or timing of the publication.
- (4) The President may designate another Benchers to make a determination on an application under this rule.
- (5) The President or other Benchers making a determination on an application under this rule must state in writing the specific reasons for that decision.

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT



Memo

To: Benchers
From: Jeffrey G. Hoskins, QC for Act and Rules Committee
Date: May 5, 2020
Subject: **Rule 10-1: Proposed Amendments to Permit Service through Member Portal**

1. At the virtual Benchers meeting on April 17 the Benchers accepted the recommendation of the Executive Committee calling for the amendment of Rule 10-1 to allow service of documents by use of an electronic portal to give greater security to the document than service by email or other means.
2. I attach for your reference the report of the Executive Committee to the Benchers making the recommendations. I also attach draft amendments, in redlined and clean versions, which the Act and Rules Committee recommend for adoption to give effect to the Benchers decision. I attach a suggested resolution for that purpose.
3. The main proposed amendments would provide for an alternative method of service by means of posting a document to an electronic portal that is operated by the Law Society and to which the intended recipient has been given access. There is a requirement that the Law Society must notify the recipient of the posting by one of the other approved means of service. The document is deemed to be served the day after both the posting and the notification have taken place.
4. The Committee has also taken the opportunity to update this provision by
 - a. making it expressly apply to law firms;
 - b. replacing four instances of “his or her”, which is no longer a preferred form of gender neutral language;

- c. making subrule (8) consistent with other provisions in the rule by adding registered mail and courier to the means by which a person may be notified of something (as opposed to served with a document).

5. The Committee recommends the adoption of the proposed amendments.

Attachments: report to Benchers
 draft amendments
 resolution

JGH



Rule 10-1: Proposed Amendments to Permit Service through Member Portal

April 7, 2020

Prepared for:

Benchers

Prepared on behalf of:

Executive Committee

Purpose:

Proposed amendments to Rule 10-1

Purpose

1. The Executive Committee, acting in its role of considering regulatory policy matters and having considered a recommendation by staff, recommends amendments to Rule 10-1 in order to permit service through the Law Society Portal.

The Problem

2. At present, Rule 10-1 contemplates service by mail, electronic facsimile, or electronic mail and the only way to effect service apart from these standard methods is to obtain an Order for substituted service in accordance with Rule 10-1(2). The current methods of service clearly present some limitations.
3. In order to more efficiently address concerns surrounding the protection of privilege and confidential information, the Discipline Department has suggested an amendment to Rule 10-1 that will permit service via the Discipline Portal.
4. While the proposal contemplated that such service will primarily be used in situations where the other party refuses to respond to Law Society communications or attempts to evade service, the ability to use the Discipline Portal in this manner will provide the additional benefit of providing the Law Society with a secure method of sending large attachments to subject lawyers, where necessary, that contain third party information and documents otherwise protected by solicitor client privilege.

Background

Creation of the New Discipline Portal

5. The Discipline Department has recently developed its own specialized electronic portal that is accessible through the existing member portal.
6. The intention behind its creation is to use the Discipline Portal as a primary means of communicating with parties involved in the discipline hearing process. As well, both the Law Society and respondents have the ability to upload hearing-related documents and other communications to the Discipline Portal.
7. All individuals who become Law Society members are technically able to access the member portal. This includes non-practising members and former members. However, what is visible to each member varies depending on their practising status, insurance status, etc. For the purposes of the new Discipline Portal, members will see the “Regulatory Documents” tab only if citation file access is opened for them. When the citation file access is closed, they will no longer see

the “Regulatory Documents” tab and will no longer be able to read or upload documents to that citation file on the member portal.

8. When a document gets posted to the Discipline Portal, an email is generated informing the other party that there is a new document for them to review. If the document posted is a service document, the Discipline department would have the ability to customize the email to note that the recipient is being served.
9. The Manager of Discipline also has the administrative ability to monitor use of the portal and can determine whether or not a document has been viewed.

Current rules Regarding Service

10. When a lawyer is cited for misconduct as part of the Law Society’s discipline process, a notice of citation must be served pursuant to Rule 4-19:

4-19 The Executive Director must serve a citation on the respondent

(a) in accordance with Rule 10-1 [*Service and notice*], and

(b) not more than 45 days after the direction that it be issued, unless the Discipline Committee or the chair of the Committee otherwise directs.

11. Rule 10-1 describes the appropriate means of service and notice:

10-1 (1) A lawyer, former lawyer, articled student or applicant may be served with a notice or other document personally, by leaving it at his or her place of business or by sending it by

(a) registered mail, ordinary mail or courier to his or her last known business or residential address,

(b) electronic facsimile to his or her last known electronic facsimile number,

(c) electronic mail to his or her last known electronic mail address, or

(d) any of the means referred to in paragraphs (a) to (c) to the place of business of his or her counsel or personal representative or to an address given to discipline counsel by a respondent for delivery of documents relating to a citation.

(2) If it is impractical for any reason to serve a notice or other document as set out in subrule (1), the President may order substituted service, whether or not there is evidence that

(a) the notice or other document will probably

(i) reach the intended recipient, or

(ii) come to the intended recipient’s attention, or

(b) the intended recipient is evading service.

- (3) The President may designate another Benchers to make a determination under subrule (2).
 - (4) A document may be served on the Society or on the Benchers by
 - (a) leaving it at or sending it by registered mail or courier to the principal offices of the Society, or
 - (b) personally serving it on an officer of the Society.
 - (4.1) A document required under the Act or these rules to be delivered to the President or the Executive Director must be left at or sent by registered mail or courier to the principal offices of the Society.
 - (5) A document sent by ordinary mail is deemed to be served 7 days after it is sent.
 - (6) A document that is left at a place of business or sent by registered mail or courier is deemed to be served on the next business day after it is left or delivered.
 - (7) A document sent by electronic facsimile or electronic mail is deemed to be served on the next business day after it is sent.
 - (8) Any person may be notified of any matter by ordinary mail, electronic facsimile or electronic mail to the person's last known address.
12. In several recent cases, citations have been authorized against lawyers who have refused to cooperate with the Law Society by advising of a place to serve documents on them or otherwise make themselves available for personal service.
 13. Despite numerous attempts to serve these lawyers in accordance with the requirements of Rule 10-1(1), the Law Society has been forced to seek an Order for substituted service pursuant to Rule 10-1(2) of the Law Society Rules. This is because service via email would merely result in a bounce back and service to the lawyer's last known address or facsimile number would mean sending documents knowing the intended recipient would not receive them.
 14. Accordingly, part of the requests made in the orders have included seeking the ability to post the notice to the lawyer's member portal on the Law Society's website. The member portal can be accessed by members using their username and password at www.lawsociety.bc.ca/labc/apps/members/index.cfm.

Protection of Privileged and Confidential Information

15. The main reason for seeking substituted service through the member portal has been to protect the confidential information of third parties from getting into the hands of anyone other than the subject lawyer.
16. In the course of its investigations and discipline process, the Law Society often obtains documents or information that are confidential or subject to solicitor client privilege pursuant to section 88(1.1) of the *Legal Professional Act*. While these documents or information may be used by the Law Society as evidence towards a citation, the Law Society has the responsibility

of protecting the disclosure of such information as if it were the person from whom that information was obtained. Section 88(2) of the *Legal Profession Act* reads as follows:

88(2) Despite section 14 of the *Freedom of Information and Protection of Privacy Act*, a person who, in the course of exercising powers or carrying out duties under this Act, acquires information, files or records that are confidential or are subject to solicitor client privilege has the same obligation respecting the disclosure of that information as the person from whom the information, files or records were obtained.

17. Ensuring that the Law Society protects third party or solicitor client privilege becomes a serious concern with regards to service, particularly in situations where the Law Society is aware that the subject lawyer cannot be reached through any of their previously known means of contact. Thus far, service through the member portal has negated this concern because it provides a secure means of uploading privileged and confidential documents while enabling the Law Society to meet its service obligations and obligations under section 88.

Discussion

18. Two options were considered: the status quo and the proposed amendment.

Status Quo (Order for Substituted Service)

19. The status quo does provide for a method of substituted service, such as the Discipline Portal, where the Law Society has been unable to serve a lawyer or former lawyer by one of the methods set out in Rule 10-1.
20. However, the process of seeking an Order for substituted service pursuant to Rule 10-1(2) can become rather onerous for the Law Society, as submissions must be prepared by Discipline Counsel and reviewed by the President or their designate before an order can even be made.
21. If the Law Society maintains the status quo, no rule amendments will be necessary. However, it means that the Law Society will have to continue seeking Orders for substituted service for all future instances where it seeks to serve documents through the existing electronic portal.
22. Given the intentions behind creating the Discipline Portal and the possibility of it providing a means of ensuring the Law Society meets its obligations under section 88(2) of the *Legal Profession Act*, the option of maintaining the status quo regarding service and Orders for substituted service is not preferable.

Amend Rule 10-1

23. Amending Rule 10-1 to allow for service through the Discipline Portal would allow the Law Society the option of effecting service in a more secure manner, thereby negating any risk to confidentiality and privilege, without having to go through the additional process of seeking an Order for substituted service to do so.

24. A review of other Canadian legal regulators did not reveal any legislation that expressly contemplates the use of an electronic portal for service. However, several provinces do have rules relating to service that might inform how an amendment to Rule 10-1 might be structured.

Electronic Method or Means

25. At present, Rule 10-1 only allows for service by registered mail, mail, courier, electronic facsimile, or electronic mail.¹
26. The same is true for Alberta.² However, Rule 83 of the Rules of the Law Society of Alberta further provides that where service of documents pertaining to a member's conduct (e.g. pre-hearing or hearing documents) in the ordinary course may be ineffectual, the Chair of the Conduct Committee may authorize a different method of service, which may include an "electronic method."
27. Rule 83(3) reads as follows [emphasis added]:
- 83(3)** The chair of the Conduct Committee or a chair of a pre-hearing conference may authorize any method of service considered reasonable in the known circumstances, including
- (a) Service of a notice pursuant to this rule may be effected by publication in which case the notice
 - (i) shall be addressed to the person to be served,
 - (ii) shall contain such information as directed by the chair, and
 - (iii) shall be published at such time as the chair may direct.
 - (b) Service of a notice pursuant to this rule may be effected by an electronic method where the person to be served has utilized communication by the same method to the Law Society in connection with the same proceeding and has not notified the Law Society that the addressee no longer subscribes to the information system which he or she utilized to communicate with the Law Society, in which case the notice
 - (i) shall be addressed to the person to be served,
 - (ii) shall contain such information as directed by the chair,
 - (iv) shall be transmitted at such time as the chair may direct, and
 - (v) shall be sent to the information system that had been utilized by the person to be served to communicate with the Law Society.
 - (c) Service of a notice pursuant to this rule may be effected by any other method of service authorized by the chair of the Conduct Committee or a chair of the pre-hearing conference, subject in such case to the prior approval of the chair and to any instructions given by the chair in respect of the service of the document by that other method.

¹ Rule 10-1(1).

² Rule 4, Rules of the Law Society of Alberta.

28. Although this rule appears to contemplate service by email as the intended “electronic method”, the definitions of “electronic” and “electronic agent” have the same meanings as they have in the Alberta *Electronic Transactions Act*:³

- (a) “**electronic**” includes created, recorded, transmitted or stored in digital form or in any other intangible form by electronic, magnetic or optical means or by any other means that have similar capabilities for creation, recording, transmission or storage;
- (b) “**electronic agent**” means a computer program or any other electronic means used to initiate an act or to respond to electronic information, records or acts, in whole or in part, without review by an individual at the time of the initiation or response; [...] ⁴

29. It should be noted that these definitions are broad enough to apply to an electronic portal and are also similar to those definitions contained in the BC *Electronic Transactions Act*.

30. Similarly, the Manitoba Law Society Rules use the term “electronic or other means” [emphasis added] in its description of applicable methods of service:

5-78(3) Service on a member of a charge under subsection (2) may be effected by:

- (a) serving the member personally;
- (b) sending it by registered mail to the member’s last known address; or
- (c) serving it personally on the member’s counsel or delivering a copy to the member’s counsel by electronic or other means.

31. Amending Rule 10-1 to include a more broad term like “electronic method” or “electronic means” would likely capture service through the Discipline Portal, as well as any future electronic portals used by the Law Society in its various proceedings, and not be restricted solely to email and facsimile as it currently is.

Deemed Service

32. In addition to amending Rule 10-1 to allow for service via the more broad “electronic method” or “electronic means”, consideration must be given as to how and when such service will be considered deemed.

33. In Ontario, The Law Society Hearing Division Rules of Practice and Procedure govern service of documents pertaining to regulatory hearings and appeals involving Ontario lawyers and paralegals are conducted by the Law Society Tribunal. Rule 10.04, in particular, provides that service will be deemed effective so long as it is done using the contact information provided by

³ Rule 83(1), Rules of the Law Society of Alberta.

⁴ *Electronic Transactions Act*, Statutes of Alberta, 2001, Chapter E-5.5, s. 1.

the member. This appears to be the case regardless of whether or not the member actually receives the documents.

Contact information in the Society's records

10.04 For this Rule and Rule 9, service on a licensee using contact information provided to the Society under By-Law 8, ss.3 and 4 shall be deemed effective unless otherwise ordered by the Tribunal.

34. Here in BC, the rule is actually more comprehensive. Subsections (5) to (7) of Rule 10-1 describe exactly when service is deemed depending on how it was effected.
35. If Rule 10-1 is amended to allow for service via an “electronic method” or “electronic means” (i.e. the Discipline Portal), a similar provision will also be required to explain how and when such service is considered deemed. It seems to make the most sense if the amendment mirrors subsection (7) which deems service on the next business day after a document is served by electronic mail or electronic facsimile.

Recommendation

36. The Executive Committee recommends that Rule 10-1 be amended to allow for the possibility of service through the Discipline Portal. Doing so will improve confidentiality in Law Society processes moving ahead with technology, and can improve efficiency in Law Society processes at the same time.
37. In order to effect this change, staff recommends an amendment to Rule 10-1 that:
 - (a) Expand the available electronic methods of service to include a provision describing a broad definition of “electronic method” or “electronic means” that would allow for service via an electronic portal; and
 - (b) Provide that service via this expanded electronic method or means is deemed to be served on the next business day after it is sent, in keeping with the current Rule 10-1(7) for service via electronic mail and electronic facsimile.
38. The Committee recommends, however, that for service through the Discipline Portal to be effective, some provision be built into the rule to ensure the party receiving service be required to be notified as well through some other form of communication, which could include email.
39. In the event the recommendation is accepted, the matter should be referred to the Act and Rules Committee to prepare the necessary rule amendments to be returned to the Benchers for approval.

LAW SOCIETY RULES

PART 10 – GENERAL

Service and notice

10-1 (0.1) In this rule, “recipient” means a lawyer, former lawyer, law firm, articulated student or applicant.

- (1) A ~~lawyer, former lawyer, articulated student or applicant~~ recipient may be served with a notice or other document ~~personally~~, by
 - (a) leaving it at ~~his or her~~ the place of business of the recipient, ~~or by~~
 - (b) sending it by
 - (ai) registered mail, ordinary mail or courier to ~~his or her~~ the last known business or residential address of the recipient,
 - (bii) electronic facsimile to ~~his or her~~ the last known electronic facsimile number of the recipient,
 - (eiii) electronic mail to ~~his or her~~ the last known electronic mail address of the recipient, or
 - (diiv) any of the means referred to in paragraphs (a) to (c) to the place of business of ~~his or her~~ the counsel or personal representative of the recipient or to an address given to discipline counsel by a respondent for delivery of documents relating to a citation, or
 - (c) posting it to an electronic portal operated by the Society to which the recipient has been given access and notifying the recipient of the posting by a method enumerated in paragraph (b) (ii) to (iv).
- (5) A document sent by ordinary mail is deemed to be served 7 days after it is sent.
- (6) A document that is left at a place of business or sent by registered mail or courier is deemed to be served on the next business day after it is left or delivered.
- (7) A document sent by electronic facsimile or electronic mail is deemed to be served on the next business day after it is sent.
- (7.1) A document that is posted to an electronic portal operated by the Society is deemed to be served the next business day after the document is posted and notification is sent to the recipient.
- (8) Any person may be notified of any matter by ordinary mail, registered mail, courier, electronic facsimile or electronic mail to the person’s last known address.

LAW SOCIETY RULES

PART 10 – GENERAL

Service and notice

10-1 (0.1) In this rule, “**recipient**” means a lawyer, former lawyer, law firm, articled student or applicant.

- (1) A recipient may be served with a notice or other document by
 - (a) leaving it at the place of business of the recipient,
 - (b) sending it by
 - (i) registered mail, ordinary mail or courier to the last known business or residential address of the recipient,
 - (ii) electronic facsimile to the last known electronic facsimile number of the recipient,
 - (iii) electronic mail to the last known electronic mail address of the recipient, or
 - (iv) any of the means referred to in paragraphs (a) to (c) to the place of business of the counsel or personal representative of the recipient or to an address given to discipline counsel by a respondent for delivery of documents relating to a citation, or
 - (c) posting it to an electronic portal operated by the Society to which the recipient has been given access and notifying the recipient of the posting by a method enumerated in paragraph (b) (ii) to (iv).
- (5) A document sent by ordinary mail is deemed to be served 7 days after it is sent.
- (6) A document that is left at a place of business or sent by registered mail or courier is deemed to be served on the next business day after it is left or delivered.
- (7) A document sent by electronic facsimile or electronic mail is deemed to be served on the next business day after it is sent.
- (7.1) A document that is posted to an electronic portal operated by the Society is deemed to be served the next business day after the document is posted and notification is sent to the recipient.
- (8) Any person may be notified of any matter by ordinary mail, registered mail, courier, electronic facsimile or electronic mail to the person’s last known address.

SERVICE BY PORTAL

SUGGESTED RESOLUTION:

BE IT RESOLVED to amend Rule 10-1 as follows:

1. by rescinding subrule (1) and substituting the following:

(0.1) In this rule, “recipient” means a lawyer, former lawyer, law firm, articulated student or applicant.

(1) A recipient may be served with a notice or other document by

(a) leaving it at the place of business of the recipient,

(b) sending it by

(i) registered mail, ordinary mail or courier to the last known business or residential address of the recipient,

(ii) electronic facsimile to the last known electronic facsimile number of the recipient,

(iii) electronic mail to the last known electronic mail address of the recipient, or

(iv) any of the means referred to in paragraphs (a) to (c) to the place of business of the counsel or personal representative of the recipient or to an address given to discipline counsel by a respondent for delivery of documents relating to a citation, or

(c) posting it to an electronic portal operated by the Society to which the recipient has been given access and notifying the recipient of the posting by a method enumerated in paragraph (b) (ii) to (iv).;

2. by adding the following subrule:

(7.1) A document that is posted to an electronic portal operated by the Society is deemed to be served the next business day after the document is posted and notification is sent to the recipient.; ***and***

3. by rescinding subrule (8) and substituting the following:

(8) Any person may be notified of any matter by ordinary mail, registered mail, courier, electronic facsimile or electronic mail to the person’s last known address..

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT



Memo

To: Benchers
From: Governance Committee
Date: May 7, 2020
Subject: Rule 1-26: Proposed Amendments regarding the Voter List for Elections and By-elections

The problem

Law Society Rule 1-26(1) requires the Executive Director, by October 10 of each year (or in the case of a by-election, the date set by the Executive Committee), to prepare a list of voters for each district in which an election is to be held. Voting in an election or by-election does not commence until November 11, resulting in a three-week window in which member status and address updates may be received by the Law Society that do not end up being reflected in the previously prepared voter list.

The election and by-election rules largely reflect a time when paper ballots were printed and distributed to eligible voters and the preparation of a voter list three weeks in advance was necessary to allow mailing of the paper ballots. Elections and by-elections are now almost entirely electronic and no paper ballots are produced.

In light of the way in which elections and by-elections are now conducted, the Governance Committee recommends that Benchers approve amendments to Rule 1-26.

Background

There are three main elements to Rule 1-26:

1. the date on which the voter list must be prepared;
2. a member may examine the voter list at the Law Society office during normal office hours;
3. a process is set out for when a member who has reason to believe that a voter list improperly includes or omits a name, or contains an error respecting the district in which a member is

entitled to vote may, before the election, report the error and the Executive Director must promptly investigate.

In addition to Rule 1-26, a practice has developed over time where election or by-election candidates can request and be provided with an electronic copy of the voter list for the district in which they are running for Benchers for campaigning purposes.

Discussion

Date voter list is prepared

Law Society staff prepare the voter list on the date specified in Rule 1-26 (or in the case of a by-election, the date set by the Executive Committee). Prior to every election or by-election, Member Services staff take steps to ensure all member status updates and address change requests are processed and completed prior to the voter list being prepared so that the voter list is as up-to-date as possible. Inevitably, however, member status updates and address change requests are received during the three-week period after the voter list has been prepared and before voting in the election or by-election commences.

Rule 1-26 does not contemplate the ease with which electronic updates can be made to a member's status or address in the Law Society member database. Rather than reflecting the real-time information stored in the database immediately before voting commences or during an election or by-election, the voter list prepared in accordance with Rule 1-26 is a snapshot of eligible voters on a specific date three weeks prior to an election or by-election.

While Rule 1-26 does permit a member to contact the Executive Director to report an error on the voter list and that process may lead to the voter list being updated, there is no provision for Law Society staff to prepare a voter list on a date closer to the commencement of an election or by-election, or update the voter list immediately before voting in an election or by-election commences.

From a practical point of view, it is both technically possible and easier for staff who administer an election or by-election for the voter list to be a "living" document that reflects real-time member status and address changes. A real-time voter list would also be more accurate (e.g. a member who appears on the voter list, whose status later changes to former member, would not be able to vote in an election or by-election, and conversely, a new member who is added to the member database after the voter list is prepared would be able to vote in an election or by-election). The Governance Committee therefore recommends that Benchers approve amendments to Rule 1-26(3) to allow for a real-time voter list to be prepared and utilized that would reflect member status and address changes made at any time during and up until the close of voting in an election or by-election.

Examination of voter list at Law Society office

Rule 1-26(3), which provides that a member of the Society may examine the voter list at the Society during normal office hours, is rarely (if ever) utilized. However, for every election or by-election, a printed voter list is prepared and made available for these purposes.

The current situation with the pandemic has highlighted the difficulty in being able to comply with this rule. Staff have therefore created a workaround, where a member can request access to the voter list and be provided with a copy electronically. Consistent with the rule, the voter list provided to members only contains the names, in alphabetical order, of all members entitled to vote in the district.

The Committee recommends that Benchers approve amendments to Rule 1-26(3) to remove the requirement that the voter list be made available at the Law Society office for in-person examination by members, and instead, provide that the voter list will be made available electronically.

Recommendation

The Governance Committee recommends that the Benchers approve amendments to Rule 1-26 to:

- a) provide that the voter list can be prepared and updated at any time during and up until the close of voting in an election or by-election to reflect member status and address changes; and
- b) remove the requirement that the voter list be made available at the Law Society office for in-person examination by members, and instead, provide that the voter list will be made available electronically.



CEO's Report to the Benchers

May 29, 2020

Prepared for: Benchers

Prepared by: Don Avison

1. Planning For The May 29 Bencher Meeting

Not surprisingly, we have had a number of questions regarding the planned format for the next Bencher meeting scheduled for May 29, 2020.

The April 17 meeting, conducted entirely with Zoom technology, worked quite well and provided for reasonable levels of access by staff, members of the profession and the usual guests. Attorney General David Eby Q.C. was also able to participate and offer a perspective on how the administration of justice could rise to the challenges presented by the COVID-19 pandemic.

While infection levels in British Columbia continue to decline, and while the Province and Provincial Health Officer Dr. Bonnie Henry, has now advised that we are moving into phase two of the COVID recovery plan, it appears certain that what has come to be known as the “rule of 50” will remain in place for some time yet and this has implications for the May 29th meeting. As a result, our plan is to again proceed remotely using Zoom technology with a format substantially similar to the April 17th meeting.

We’ll continue to assess whether the July 10, 2020 Bencher meeting can involve in person participation in light of future public health announcements and as the recovery plan continues to unfold over the next month or so.

2. An Update On External Engagement During The Phase One COVID-19 Period

Over the course of the last three months we have maintained a high degree of engagement with various aspects of the administration of justice. At the upcoming Bencher meeting I intend to provide an overview of many of those discussions and processes. This will include:

- a summary of the work of the COVID-19 Response Group established by the Attorney General of BC and our understanding of the work of the External Technical Advisory Group;
- our regular discussions with the Deputy Attorney General;

- our interaction with the Provincial Court, the Supreme Court of British Columbia and the Court of Appeal;
- engagement with the profession, including the May 12 Town Hall that was attended by more than 800 members;
- the weekly Zoom conference of Law Society CEOs from across the country; and
- the status of the work of the Access to Justice BC round table.

I believe it is appropriate to note that at the most recent COVID-19 Response Group meeting the three key agenda items tabled by the Ministry of the Attorney General were:

- Virtual hearings;
- Alternative dispute resolution; and
- Expanded use of Alternative dispute resolution

3. LSBC's "Return To Office" Plan

Over the past several weeks a Working Group chaired by CFO Jeanette McPhee developed - and has now implemented - a Return to Office plan designed to facilitate an orderly return to the Law Society office that will be informed by, and consistent with, the expectations of the Provincial Health Officer.

Our goal over the next several weeks is to keep our on-site staff levels at less than 50 percent and to accommodate appropriate levels of social distancing. I will provide Benchers at the May 29th meeting with a summary of the elements of the plan and our experience with implementation to date.

LSBC staff have demonstrated an extraordinary commitment to maintaining high levels of productivity in a remote work context and I greatly appreciate their collective contribution to discharging our respective responsibilities. Staff engagement was evident with the participation of almost 170 staff members in a Return to Office Zoom webinar held on Friday, May 15.

4. Cullen Commission Re-convenes

On May 25, 2020 the next session of the Cullen Commission on Money Laundering in British Columbia begins. Much of this next phase of the Commission will focus on establishing a greater level of understanding regarding the domestic and international implications of money laundering.

I will provide a brief update at the May 29 meeting and we will provide a much more substantial briefing at the July meeting.

5. Budget Development Process For 2021

It will be obvious to all that, given the current circumstances and with the anticipated pressures in the months ahead, the budget development process for 2021 comes with a number of challenges.

Our plan remains to present a proposed budget to the Finance and Audit Committee and then to Benchers at the July meeting

Given the challenges faced by the profession, I will provide Benchers with an in camera summary of the budget development process and some of the key options/considerations we are examining.

Don Avison, QC
Chief Executive Officer

From: MacKenzie, Paige <pmackenzie@allard.ubc.ca>
Sent: Friday, April 17, 2020 1:22 PM
To: president@lsbc.org
Subject: RE: Creation of the Wayne Robertson QC Access to Justice Bursary

[THIS MESSAGE ORIGINATED FROM OUTSIDE OUR FIRM]

Hi Nancy,

I am very pleased to inform you that the **Wayne Robertson, Q.C. Access to Justice Award** was approved at the April 15th Senate meeting.

Below is the approved award description:

Wayne Robertson, Q.C. Access to Justice Award

A \$2,000 award has been made available annually through a gift from the Governors of the Law Foundation of British Columbia and the benchers of the Law Society of British Columbia in honour of Wayne Robertson, Q.C. for a second or third year J.D. student in good academic standing who through coursework or volunteerism has contributed significantly to increasing access to justice. Financial need may be considered. Wayne Robertson, Q.C., served as Executive Director of the Law Foundation of British Columbia from 2002 to 2019. He has devoted many volunteer hours to various community and non-profit organizations, serving as a board member for both the Canadian Crossroads International and Community Legal Assistance Society. This award was created in recognition of Wayne's work to increase access to justice. The award is made on the recommendation of the Peter A. Allard School of Law. (First award available for the 2019/2020 winter session).

Please let me know if you have any questions or concerns. Thank you very much for your generous support of the Allard School of Law.

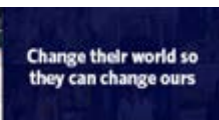
Thanks,

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**PETER A. ALLARD
SCHOOL OF LAW**
THE UNIVERSITY OF BRITISH COLUMBIA

**75TH
ANNIVERSARY**





Memo

To: Benchers
From: Governance Committee
Date: May 20, 2020
Subject: Annual Bencher Conflicts Disclosure Form

At the May 7, 2020 Governance Committee meeting, the Committee approved the attached Annual Bencher Conflicts Disclosure Form. The Committee agreed that the form should be circulated to Benchers in the coming months and then in January of each year going forward. Staff will circulate the form to Benchers to complete shortly and completed forms can be returned directly to Bencher Relations (BencherRelations@lsbc.org).

The Annual Bencher Conflicts Disclosure Form is attached to this memo for information and will also be posted to the Member Portal under Bencher Resources.

Annual Benchers Conflicts Disclosure Form

The Code of Conduct provides that Benchers are expected to avoid conflicts of interest to assure the public and the profession that both policy and adjudicative decision-making are being made free from external or improper interest, favour or bias. Benchers should also take care to avoid the perception of a conflict of interest or a conflict of duty.

The Code of Conduct recognizes that Benchers may have two types of conflicts:

1. A conflict of interest where the Benchers has a personal interest, either pecuniary or non-pecuniary, not shared by others in the outcome of a decision.
2. A conflict of duty when that duty to the Law Society may conflict with duties to another organization or cause.

Accordingly, you are asked to review the Code of Conduct and answer the following questions:

1. Please list any organizations of which you are currently a director or the controlling mind.

2. Please list any activities in which you are engaged, the objects or purpose of which substantially relates to the provision of legal services in BC or which may create a conflict with your duties as a Benchers.

3. I have reviewed the Code of Conduct and I agree to act in accordance with the letter and spirit of the Code. I also agree to advise the President if there are any changes to the above throughout the year.

Name



Memo

To: Benchers
From: Staff
Date: May 20, 2020
Subject: Bencher *In Camera* Policy

At President Ferris' request, the current Bencher *in camera* policy is provided to Benchers for information. As the policy has not been reviewed since 2003, the Governance Committee will give further consideration to if the current Bencher *in camera* policy requires updating.

5.1 Policy: Meeting *in Camera*

1. Meetings generally open

- a. Benchers meetings are open to Benchers, Law Society staff, members and articulated students unless the President (or other Benchers presiding) declares the meeting closed under Rule 1-16(4).
- b. The President may permit others to attend Benchers meetings and to speak, as appropriate in the discretion of the President.
- c. The President may declare a meeting *in camera* when, in the discretion of the President it is necessary or desirable, but the Benchers may, by resolution, cause the meeting to be open despite the President's ruling.

2. When an *in camera* session is required or appropriate

- a. The Benchers must meet *in camera*, with no staff, counsel or contractors present, to deliberate on a review of a panel decision or other matter that constitutes a hearing under the Legal Profession Act and Law Society Rules.
- b. The Benchers may meet *in camera*, with only those Law Society staff, counsel and contractors necessary for the discussion to be conducted, to discuss:
- c. matters relating to Law Society personnel; or
- d. matters of a financial or personal nature or other matters in respect of which, in the opinion of the Benchers, the need for privacy outweighs the public interest in disclosure.
- e. The Benchers may meet *in camera*, with only Law Society staff, counsel and contractors, to discuss:
 - i. litigation involving the Law Society and to seek or receive legal advice in any matter;
 - ii. negotiations between the Law Society and another body or an individual, if the Benchers consider that disclosure might reasonably be expected to harm the interests of the Law Society;
 - iii. any matter if, in the opinion of the Benchers, an open discussion would compromise the security of the Law Society or its property or of an identifiable individual; or

- iv. any matter if the Benchers consider that disclosure may reasonably be expected to harm the conduct of an investigation or enforcement of the Act, Rules or Professional Conduct Handbook.

3. Bencher decisions *in camera*

- a. The Benchers will not make a decision during an *in camera* session unless it is necessary to do so to protect privacy, security, confidentiality or privilege.

4. Record of *in camera* proceedings

- a. A member of staff, or in the absence of appropriate staff, a Bencher, will keep a record of decisions made by the Benchers in a meeting or part of a meeting held *in camera*, and may keep a record of the discussion, whether or not any decision was made by the Benchers.
- b. Minutes of a meeting or part of a meeting held *in camera* are confidential and must not be disclosed or distributed outside those entitled to attend, unless the Benchers decide otherwise.

5. Disclosure of *in camera* proceedings

- a. A decision made *in camera* will be recorded in the regular minutes of the Benchers, unless to do so would compromise privacy, security, confidentiality or privilege.
- b. Benchers and staff, and any others present during an *in camera* portion of a meeting or becoming aware of the substance of a discussion held *in camera*, will not disclose any information concerning that discussion without the permission of the President, but the Benchers may, by resolution, overrule the President's decision.