



Staff Calls to the Lawyers Assistance Program

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Prepared for: Benchers

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Purpose: Decision in Principle

Resolution

That the Benchers:

1. authorize the Executive Director to contact the Lawyers Assistance Program (“LAP”) concerning a lawyer that staff has identified to be displaying indicia of problems on which LAP could offer assistance; and
2. approve in principle an amendment to the Rules that will permit the Executive Director to make the contact. The Executive Director may delegate that responsibility to appropriate staff.

Synopsis

1. Given the nature of the work done by the Professional Regulation and Practice Standards Departments in particular, Law Society staff often witness lawyers experiencing issues where it is believed the Lawyers Assistance Program (“LAP”) could provide meaningful assistance. Such issues include suspected mental health and addiction issues. In some cases it is believed there is a significant threat to the lawyer including the risk of suicide. This puts additional stress on staff who currently have no way to immediately address such issues, other than calling law enforcement in cases of imminent danger. Law Society rules as currently drafted prevent staff from providing information to LAP about individuals in need of assistance. Being able to do so would provide opportunities to proactively address many issues that otherwise develop into more significant problems requiring regulatory action. Being able to make such calls is therefore in the public interest and, it is believed, could result in much needed assistance to struggling lawyers.
2. By contacting LAP, staff would simply be taking steps that are currently open to lawyers generally with the same requirements applying. There would be no communication back from LAP to the Law Society. Typically LAP would require at least one further contact before taking any steps. Calls to LAP by the Law Society would in many cases be in situations where disciplinary steps were not seen to be appropriate, but there could be some cases where disciplinary action is being or may be pursued.

Background

3. The Professional Regulation Department receives 1000 to 1200 complaints a year. 80 to 85% of those are closed at the staff level. While a number of files are closed as not disclosing proof of professional misconduct, many of the closed files give rise to concerns about the lawyer. Staff remediate where appropriate in an attempt to avoid such issues in the future, often referring lawyers to relevant sections of our website and other resources including the

Small Firm Practice Course, the Practice Refresher Course or the Communications Toolkit – all developed by the Law Society to assist lawyers and thereby proactively regulate.

4. Many complaints received relate to lawyers who are exhibiting concerning behaviours where the most effective response is not a current remedial resource. Such behaviours include an inability to meet deadlines, to respond appropriately to clients and other lawyers and generally to cope with the demands of practice. The underlying causes of such behaviours can often be mental health issues including depression, anxiety and addictions. These sorts of issues can often be dealt with effectively through LAP.
5. LAP is an organization of members of the BC legal community (lawyers, judges, support staff, etc.), independent of the Law Society. The program assists individuals within the legal community who suffer from drug and alcohol dependency, depression, stress, and other personal issues. It provides “confidential outreach, education, support and referrals” to members of the legal community. A lawyer may contact LAP directly for assistance. LAP itself will contact a lawyer when they have received 2 independent referrals about an individual.
6. It has been noted in the past in presentations made to the Benchers by LAP’s Executive Director Derek LaCroix, QC that many lawyers in serious distress will not voluntarily ask for or seek help. Mr. LaCroix has also noted that early detection and intervention greatly improves the rate of successful recovery.
7. In October, 2001, the Benchers approved in principle a recommendation made by the Practice Standards Committee that a rule be created to allow that Committee, in appropriate cases, to provide LAP with the name and any other necessary information of a lawyer who had been the subject of a meeting with the Committee or to a Practice Review.
8. The matter returned to the Benchers in December 2001 together with a draft proposed rule amendment that would permit such disclosure. Mr. McDiarmid, then chair of the Practice Standards Committee, outlined the request from the Practice Standards Committee for an amendment to the Law Society Rules that would permit the Committee, in appropriate cases, to provide to LAP the name of a lawyer, and any other necessary information, who has been the subject of a Review by the Committee. He said the Practice Standards Committee thought this rule change would provide an additional tool needed to protect both the public and members. Concerns about confidentiality, our relation with LAP and member perception were raised during the Bencher discussion and Mr. McDiarmid noted the Practice Standards Committee had debated all the points that had been raised and concluded that the benefits to the public and the member would outweigh the potential harms. In his view it was important to remember that many people suffering from the kind of problems contemplated are in denial and the somewhat heavy-handed responses available to the Law Society may do more harm than good, whereas the LAP may be able to assist the member. Nevertheless, the motion did not receive the necessary two-thirds support to pass.

9. The current examination of the issue is approached from the point of view as to whether *staff* should be able to contact LAP. The Board of LAP has advised the Chief Legal Officer that it would accept calls from Law Society staff concerning members of the legal profession who are, or who are perceived by staff to be, demonstrating behaviour that suggests they are suffering from difficulties. (See attached letter from Derek LaCroix). The information being disclosed would, essentially, be information that others could also have observed. It would not necessarily be unique to the Law Society. These calls to LAP from Law Society staff would be treated exactly as would calls from any other person, would be kept strictly confidential by LAP, and LAP would not report back to the Law Society. LAP confirms that generally it will need at least two independent calls before outreach with the lawyer is attempted.
10. In most cases the concerns staff have about particular lawyers come as a result of behaviours observed in dealing with complaints. LAP seeks enough information to enable it to understand the behaviour of concern and to follow up with the lawyer in question. It is anticipated that the substance of referrals to LAP would be in the nature of sharing those observations.

Evaluation Criteria

11. In the course of employment at the Law Society, staff routinely comes into contact with members of the legal community, most of whom are, of course, lawyers. Most of the interaction is in connection with matters relating to regulatory issues, usually through professional conduct or disciplinary investigations or practice standards matters. During such interactions, there are often telling indications of concerning behaviours – the type of “life issues” that can affect a lawyer’s ability to practise law. Sometimes these issues are admitted directly by the lawyer under investigation. Sometimes the evidence is circumstantial, but is such that it leaves staff with the strong inference of substance abuse, addictions, or mental health concerns.
12. The public interest will be well-served where lawyers who suffer from mental health or addiction problems to a degree that adversely affects their ability to practise law obtain assistance with their issues. Often the complaint that has given rise to the contact with the Law Society is not serious enough to attract a disciplinary result. The lawyer will thus be continuing to practise law. If there are addiction or mental health issues that go unchecked, the risk of harm to clients and to the lawyer increases. Even if the lawyer’s conduct does result in a disciplinary result, the lawyer may still be able to practise law and mental health or addiction issues should be dealt with. The possibility of immediate assistance being offered to the lawyer through LAP could alleviate considerable distress and future complaints.

13. If staff lawyers have identified indicators of these types of problems, but without sufficient real evidence to address the matter through a regulatory result, there is currently little that can be done given the confidentiality requirements over the information obtained. Should staff therefore be able to contact an organization that may be able to offer assistance to the lawyer, that in turn will protect clients? It is not likely in the public interest to ignore an avenue that could assist in ameliorating issues that prevent a lawyer from practising law in a competent manner.
14. Many lawyers who are afflicted with these issues are in a state of denial as to the existence of a problem. While staff could and does recommend directly to a lawyer that the lawyer contact LAP him or herself, there is no guarantee that the lawyer will do so.

Public Interest

15. The Law Society's object and duty is to protect the public interest in the administration of justice by, inter alia, ensuring the honour and competence of lawyers. It is in the public interest that lawyers practise law free from any substance abuse, addiction or mental health issues that put clients at risk. The Law Society was an integral part of the process through which LAP was created. Having been involved in the creation of a program designed to help lawyers facing issues that interfered with their well-being and, by extension, their ability to practise law and act for their clients in an effective, competent manner, it may seem strange that the Law Society would not itself seek to make calls to LAP where indications present themselves concerning issues with which LAP could assist.
16. When assessing the public interest, the question to ask is "isn't the public interest better served by creating opportunities for lawyers who may be in need of assistance with mental health, addiction or substance abuse problems?" Would the Law Society be serving the public interest by staying silent with information that, if shared with LAP, could result in assistance to a lawyer whose practice was suffering due to these problems?
17. Moreover, the Law Society's reputation with the public could suffer if it were known that the Law Society does not reach out to LAP where Law Society staff have these concerns, particularly if they could affect the lawyer's practise and relationship with clients or other justice system participants.

Program Effectiveness

18. In the past, concerns have been raised that if lawyers believe that the Law Society will communicate with LAP, lawyers may not be as forthcoming in providing information to investigators. If this were the case, the effectiveness of regulatory programs could be compromised. Regulatory staff do not believe there is a real risk in this regard. As contemplated above, in most instances the substance of s staff calls to LAP would be based on staff's observations of behaviours giving rise to concerns, not information coming from

the lawyer or a third party. In these cases, the information being disclosed would be information about behaviours that others could also have observed, and would therefore not be information unique to the Law Society¹.

Member Relations

19. Concerns have been expressed in past discussions of this issue about how lawyers would perceive a policy decision to allow the Law Society to contact LAP based on information it had gathered about a lawyer in the course of that lawyer's engagement with the Law Society. It has been said that some may view such a decision as an unwarranted intrusion into the personal lives of lawyers.
20. This concern is ameliorated somewhat if one considers that any call to LAP is itself treated confidentially by LAP. The Law Society would never know what, if any action resulted from its call to LAP.
21. The concern then is really one about how lawyers would react to their regulatory body acting in a way that some would characterize as paternalistic.
22. Again, this can be countered by recognizing that proactive regulation is very effective. Dealing with issues before they become regulatory problems, thereby reducing harm to the public, is a most legitimate regulatory exercise. In addition, part of the Law Society's object and duty is to support and assist lawyers in fulfilling their duties in the practice of law. If Law Society staff members have identified concerns about a lawyer with which LAP could help, one could logically argue that it would be consistent with the Law Society's duties as expressed in s. 3(e) of the *Legal Profession Act* to assist the lawyer by calling LAP.

Relationship between LAP and the Law Society

23. While the Law Society had a role to play in the creation of LAP, LAP and the Law Society are independent organizations. LAP shares no information about its specific activities with the Law Society, and guards the confidentiality of its processes and dealings with lawyers very carefully.
24. Some thought therefore needs to be given to whether calls by Law Society staff to LAP will create a perception of a tie between LAP and the Law Society. If the process is simply a call by staff with a concern about behaviour of the lawyer that could have been noted by others, and if there is no report back from LAP to the Law Society, this perception is addressed.

¹ Different considerations would be required, however, where the information giving rise to the concern came from the lawyer only in the course of being investigated, such as through an admission to staff.

Nevertheless, procedures should be put in place to ensure the disclosure of only the necessary information to make an effective referral.

Legal Issues

25. The disclosure of information by the Law Society to third parties raises legal issues.

26. Section 88(3) of the *Legal Profession Act* says:

(3) A person who, during the course of an investigation, audit, inquiry or hearing under this Act, acquires information or records that are confidential or subject to solicitor client privilege must not disclose that information or those records to any person except for a purpose contemplated by this Act or the rules.

Rule 3-3(1) of the Law Society Rules says:

3-3 (1) No one is permitted to disclose any information or records that form part of the Executive Director's investigation of a complaint or the Complainants' Review Committee's review of it except for the purpose of complying with the objectives of the Act or with these Rules.

Section 33 of the *Freedom of Information and Protection of Privacy Act (FOIPPA)* says:

33 A public body may disclose personal information in its custody or under its control only as permitted under section 33.1, 33.2 or 33.3.

27. "Personal Information" is defined in that Act as follows:

"personal information" means recorded information about an identifiable individual other than contact information.

28. Reading these three enactments together, information gathered by the Law Society about a lawyer beyond the lawyer's name and business address is "personal information" that may not be disclosed unless there is a provision in sections 33.1, 33.2 or 33.3 of the *FOIPPA* that permits disclosure. Regardless of *FOIPPA*, information gathered by the Law Society that is confidential cannot be disclosed except for a purpose contemplated by the *Legal Profession Act* or the Law Society Rules, and any information gathered by the Law Society in the course of the investigation of a complaint cannot be disclosed except for the purpose of complying with the objectives of the *Act* or Rules.

29. One of the permissions for the disclosure of personal information under *FOIPPA* is found in s. 33.1(c), which permits the disclosure of information in accordance with an enactment of British Columbia or Canada that authorizes or requires its disclosure. "Enactments" include both primary and subordinate legislation, such as regulations under an Act. Law Society rules are legally regulations under the *Legal Profession Act*, so they constitute an "enactment." Therefore, Law Society Rules that authorize the disclosure of information meet the requirements of s. 33.1. The Law Society could consequently pass a rule

authorizing the disclosure of information to LAP in specific circumstances that would address the otherwise general prohibition of such information under *FOIPPA*.

30. Disclosure of confidential information gathered in accordance with the *Legal Profession Act* or pursuant to an investigation that may not otherwise be disclosed by virtue of s.88(3) or Rule 3-3(1) can be disclosed for the purpose of complying with the *Act* or the Rules. The Law Society could, therefore, create a rule authorizing disclosure of information that will meet the requirements of *FOIPPA* that permit disclosure. That Rule should be connected to fulfilling a purpose of complying with the *Act* or Rules, but as described above, such disclosure could be done for the purpose of complying with s. 3(e) of the *Legal Profession Act*.
31. Because the Law Society is governed by *FOIPPA*, it is possible that should someone (such as the lawyer under investigation) make an *FOI* request about whether staff called LAP concerning the lawyer's behaviour, the Law Society could not refuse to answer the question. A rule change such as that described above would inform everyone that a call by staff to LAP was possible.

Conclusion

32. There is a valid policy rationale for amending the rules to permit staff to contact LAP in appropriate cases. Being able to do so fulfils important regulatory ends because it allows the Law Society to proactively address issues before they develop into conduct that requires regulatory action. The proposed action is in the public interest, and is, as described above, consistent with s. 3(e) of the *Legal Profession Act*. It is also consistent with the Strategic Plan, because it makes the Law Society a more effective regulator.
33. Turning a blind eye to indicia of concern where help could be made available is not in the public interest or in the interests of the lawyers themselves. The Law Society ought to take steps to protect the public by assisting lawyers in fulfilling their duties in the practice of law, and if staff lawyers are concerned about the well-being of a lawyer but cannot themselves do anything directly, a referral to an organization that can seem only to make sense.

Subsequent Steps

34. If the Benchers agree in principle that staff should be able to contact LAP regarding lawyers about whom they have concerns about mental health, addiction or substance abuse issues, the matter will need to be referred to the Act and Rules Committee for the necessary rule changes, which will then be returned to the Benchers for approval at a later date.

35. Once the changes are made, we anticipate directing staff to consult with a Manager prior to making contact with LAP, so that we can work towards a consistent approach and track the number of contacts.