The Law Society of British Columbia

Agenda

Benchers

Date:	Friday, November 4, 2016
Time:	**7:30 am** Continental breakfast **8:30 am** Call to order
Location:	Bencher Room, 9th Floor, Law Society Building
Recording:	***Benchers, staff and guests should be aware that a digital audio recording is made at each Benchers meeting to ensure an accurate record of the proceedings.***

CONSENT AGENDA:

The Consent Agenda matters are proposed to be dealt with by unanimous consent and without debate. Benchers may seek clarification or ask questions without removing a matter from the consent agenda. Any Bencher may request that a consent agenda item be moved to the regular agenda by notifying the President or the Manager, Executive Support (Renee Collins) prior to the meeting.

ITEM	TOPIC	TIME (min)	SPEAKER	MATERIALS	ACTION
1	Consent Agenda	1	President		
	• Minutes of September 30, 2016 meeting (regular session)			Tab 1.1	Approval
	• Minutes of September 30, 2016 meeting (*in camera* session)				Approval
	• Code of Professional Conduct for British Columbia - Transferring Lawyer Rules: rules 3.3-7 and 3.4-17 to 3.4-23			Tab 1.3	Approval
	• QC Appointments Advisory Committee Appointment			Tab 1.4	Ratification
	• 2017 Fee Schedules			Tab 1.5	Approval

The Law Society of British Columbia

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ITEM	TOPIC	TIME (min)	SPEAKER	MATERIALS	ACTION
EXECUTIVE REPORTS					
2	President's Report	5	President	Oral report (update on key issues)	Briefing
3	CEO's Report [see *in camera* section]				
4	Briefing by the Law Society's Member of the Federation Council	5	Gavin Hume, QC		Briefing
DISCUSSION/DECISION					
5	Law Firm Regulation Task Force: Interim Report	5	Herman Van Ommen, QC	Tab 5	Discussion
6	Access to Legal Services Advisory Committee - Policy Discussion: Lawyers' professional responsibility to promote access to legal services	30	Herman Van Ommen, QC / Claire Hunter	Tab 6	Discussion
REPORTS					
7	Report on Outstanding Hearing & Review Decisions	5	Herman Van Ommen, QC	(*To be circulated at the meeting*)	Briefing
8	Financial Report – September YTD 2016	10	Miriam Kresivo, QC / CFO	Tab 8	Briefing
9	Lawyer Education Advisory Committee: Update on Federation Conference	5	Tony Wilson	Tab 9	Briefing
10	TRC Advisory Committee Update	5	President		Briefing

The Law Society of British Columbia

Agenda

ITEM	TOPIC	TIME (min)	SPEAKER	MATERIALS	ACTION
FOR INFORMATION					
11	Proposed amendments to the Rules regarding Bencher candidate eligibility			Tab 11	Information
IN CAMERA					
12	*In camera* • CEO's Report • Bencher concerns • Other business		Adam Whitcombe		Discussion/ Decision

The Law Society of British Columbia

Minutes

Benchers

Date: Friday, September 30, 2016

Present:
David Crossin, QC, President
Herman Van Ommen, QC, 1st Vice-President
Miriam Kresivo, QC, 2nd Vice-President
Satwinder Bains
Jeff Campbell, QC
Pinder Cheema, QC
Lynal Doerksen
Thomas Fellhauer
Craig Ferris, QC
Martin Finch, QC
Brook Greenberg
Dean P.J. Lawton
Jamie Maclaren
Sharon Matthews, QC
Christopher McPherson
Nancy Merrill, QC
Lee Ongman
Greg Petrisor
Claude Richmond
Phil Riddell
Elizabeth Rowbotham
Mark Rushton
Carolynn Ryan
Daniel P. Smith
Michelle Stanford
Sarah Westwood
Tony Wilson

Excused:
Lisa Hamilton
J.S. (Woody) Hayes, FCPA, FCA
Steven McKoen

Staff Present:
Tim McGee, QC
Deborah Armour
Taylore Ashlie
Renee Collins
Denise Findlay
Su Forbes, QC
Aaron Griffith
Andrea Hilland
Jeffrey Hoskins, QC
David Jordan
Michael Lucas
Alison Luke
Jeanette McPhee
Doug Munro
Annie Rochette
Alan Treleaven
Adam Whitcombe
Vinnie Yuen

Guests:	Dom Bautista	Executive Director, Law Courts Center
	Mark Benton, QC	Executive Director, Legal Services Society
	Johanne Blenkin	CEO, Courthouse Libraries BC
	Anne Chopra	Equity Ombudsperson, Law Society of BC
	Michael Welsh	Vice-President, Canadian Bar Association, BC Branch
	Richard Fyfe, QC	Deputy Attorney General of BC, Ministry of Justice, representing the Attorney General
	Gavin Hume, QC	Law Society of BC Member, Council of the Federation of Law Societies of Canada
	Michele Ross	Education Chair, BC Paralegal Association
	Prof. Bradford Morse	Dean of Law, Thompson Rivers University
	Caroline Nevin	Executive Director, Canadian Bar Association, BC Branch
	Wayne Robertson, QC	Executive Director, Law Foundation of BC
	Monique Steensma	CEO, Mediate BC

CONSENT AGENDA

1. Minutes

a. Minutes

The minutes of the meeting held on July 8, 2016 were approved as circulated.

The *in camera* minutes of the meeting held on July 8, 2016 were approved as circulated

b. Resolutions

The following resolution was passed unanimously and by consent.

BE IT RESOLVED that the Benchers appoint Ardith Walkem to the JES for a two-year term effective September 1, 2016.

BE IT RESOLVED to confirm that commentary 2 to rule 3.4-11.4 is corrected and adopted as follows:

> **[2]** The limited nature of short-term summary legal services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm. Accordingly, the lawyer is disqualified from acting for a client receiving short-term summary legal services only if the lawyer has actual knowledge of a conflict of interest between the client receiving short-term summary legal services and an existing client of the lawyer or an existing client of the *pro bono* or not-for-profit legal services provider or between the lawyer and the client receiving short-term summary legal services.

EXECUTIVE REPORTS

2. President's Report

Mr. Crossin thanked the guests who regularly attend Bencher meetings, and on behalf of the Benchers also provided heartfelt condolences to absent Bencher Lisa Hamilton for her recent loss. He then briefed the Benchers on various Law Society matters to which he has attended since the last meeting.

He noted that Kensi Gounden, Manager of Practice Standards, has shepherded a project to collect and review data on the nature of lawyers' practices to identify patterns of behavior that may represent areas of risk to lawyers. The goal is to develop tools to respond to such patterns and provide early intervention to help lawyers avoid potential pitfalls leading to possible disciplinary action. To build on this work toward more proactive regulation, the Executive Committee is

recommending the creation of a task force to engage Benchers, in collaboration with Mr. Gounden and his team, to develop a model for best use of the data collected. The Committee is recommending as members of this task force Michelle Stanford, Woody Hayes, FCPA, FCA, Craig Ferris, QC and Jeff Campbell, QC, with staff support to be provided by Gurprit Copeland, Manager, Intake and Early Resolution and Kensi Gounden, Manager, Practice Standards. He thanked them in advance for their willingness to serve.

Mr. Crossin called for a motion to create an Early Intervention Task Force (moved by Mr. Fellhauer, seconded by Mr. Richmond).

The question was asked about what specifically the Task Force would be looking at, and further, how the information at issue is collected. Mr. Crossin clarified that the Task Force will be looking at how best to use practice information collected to try to help lawyers avoid risk behaviours warranting disciplinary action.

Regarding the collection of information, Mr. McGee clarified that this is one of our current Strategic Plan initiatives. Information is collected through our Annual Practice Declaration, through surveys and through review of other jurisdictions and is available to our Practice Standards group to assist in their function. The Task Force would review the collection and delivery of data, as well as models for use of that data to help lawyers avoid risk.

In response to another question, he clarified that this is a broader concept than that of diverting those with mental health or substance abuse issues to treatment rather than discipline. Ms. Ongman, a member of the Practice Standards Committee, described the tool as one that analyzes areas with the highest potential risk, rather than analyzing individuals.

Mr. Crossin also noted that privacy considerations would be amongst the issues reviewed by the Task Force. Mr. Crossin then sought the Benchers' approval for the creation of the Early Intervention Task Force; it was approved unanimously.

He also reported on his attendance at the New Westminster Bar dinner, at which Chief Justice Bauman spoke about his interest in limited scope retainers as another means of achieving increased access to justice, and his implementation of a protocol to educate and engage judges on this important tool.

Finally, Mr. Crossin attended UBC and UVic law to speak to first year students and was advised of the declining enrollment of female law students at UBC. He proposed raising the issue with the Equity and Diversity Committee to engage that committee on a review of the continued challenges facing women in the legal profession. He has also been made aware of the challenges facing students hoping to obtain articles, training or mentorship in the area of criminal law. He cited the shrinking of the Criminal Bar as a significant problem for the Courts and the Bar in

general. The Criminal Defence Advocacy Society has commissioned a report on these challenges, which he has provided to Bencher and Chair of the Legal Aid Task Force Nancy Merrill, QC for further review.

3. CEO's Report

Mr. McGee provided highlights of his monthly written report to the Benchers. He began by introducing Ms. Annie Rochette, the new Deputy Director of PLTC who started on August 15 and comes to the Law Society with an extensive and impressive background in legal education.

He reported on a recent meeting with the Attorney General, Deputy Attorney General and Ministry staff. In that meeting we stressed the need to focus on alternative legal service providers in order to increase access to justice and legal services, which require legislative amendments. We reiterated our commitment to coordinating with the Ministry to move those initiatives forward. On a related note, Mr. McGee also reported that the Notaries' Board recently confirmed its continuing interest in a possible merger of regulatory operations. He will report back to Benchers as developments occur.

Following up on a discussion begun at the last Bencher meeting, Mr. McGee also confirmed that the Equity and Diversity Advisory Committee will meet following this meeting to focus on completion of the review of the Ombudsperson program.

He also provided various operational updates, including an update on our skills enrichment and training program, as well as the upcoming employee survey. The latter is instrumental in gauging the level of staff engagement on key aspects of employment at the Law Society, and enabling us to respond and develop action plans around requests or concerns.

The annual performance review process is underway, which facilitates conversations between managers and staff using a comprehensive template as a guide to discussion about the year's progress and challenges as well as developing goals for the year ahead. The process provides opportunity to celebrate accomplishments, in conjunction with our REX awards program, and address challenges.

Staff are further engaged through our staff forums which are held three times a year. The forum planned for next week will focus on engaging staff on cultural competency training, recognizing the importance of consulting for different viewpoints and how best to move forward.

Mr. McGee then introduced Taylore Ashlie, Director of Communications and Knowledge Management to provide a presentation on our website redevelopment. Responding to feedback regarding difficulties with our current website, we have begun a four phase project to improve and redesign the site. Key features have been designed in response to the external consultations;

pending feedback on the mock-up screens from Benchers today, we will begin a "build" phase with the ultimate goal of "going live" in January, 2017.

The goal with the redesign is to achieve effective navigation, and a professional and modern look with content that is both engaging and mobile friendly. Ms. Ashlie then presented mock-up screens and navigational tools to give Benchers an idea of the new design concepts.

With the new design, a significant amount of content has been removed from the home page, with white space and images being used to focus content. The areas of lawyer look-up, discipline history and policy objectives and initiatives are highlighted, with changes being made to terminology to provide clarity; for example, lawyer look-up will now be known as "Lawyer Directory".

Several features have been added to aid navigation which was identified as one of the biggest difficulties with the current site. A bar has been added to the middle of the homepage to act as a rotating carousel for important items which can be selected by the viewer. In a move away from top level navigation, main items are now located on the left side with navigation icons available on every page of the site. A menu icon will be located on the top left providing more navigation choices and FAQ's. This new navigation system is mobile friendly, enabling easier and more widespread access.

Benchers had specific questions regarding the look and feel of the site, the tools available and ease of navigation. In response, Ms. Ashlie confirmed that the photo on the home page will continually change to reflect the diversity of the province and its people. Mr. McGee noted that the Lawyer Directory feature is planned to remain functionally the same, and he acknowledged the suggestion that it become sortable by community or link to other lawyer referral services. In response to other very specific suggestions, Mr. McGee confirmed that this current phase of development is focused on the look of the site and navigational tools; he noted and welcomed all suggestions and invited Benchers to provide their ongoing feedback as the project progresses.

Mr. Crossin reiterated that it would be helpful if Benchers could write to Ms. Ashlie with their feedback on the current site and suggestions for improvement in design and function. He also noted that the TRC Committee has had a preliminary discussion about the website regarding ease of accessibility to the members and the public concerning the ongoing work of that committee and the Law Society's continuing efforts towards reconciliation and cultural competency.

4. Briefing by the Law Society's Member of the Federation Council

Gavin Hume, QC briefed the Benchers as the Law Society's member of the Federation Council. He provided a summary of the upcoming meetings in New Brunswick October 19-22; the conference portion will be focused on legal education and the collaboration between law

societies, law schools and the Federation. There will also be a strategic planning meeting, which for the first time will engage the new governance structure and provide a more detailed focus.

Finally, there will be a council meeting with a full agenda which will include the usual committee reports, and a discussion of the terms of reference for the Public Affairs and Government Relations Committee, a committee that will be responsive to periodic requests from the Federal Government seeking Federation input on specific issues, such as anti-money laundering and judicial appointments. Also on the agenda will be a discussion on how to move forward with the review of the National Committee on Accreditation (NCA); Mr. Hume noted that the last full review of the NCA was in the late 1990's and there have been concerns regarding approval of candidates and their capacity to meet standards of bar admission programs across the country. Further, Mr. Hume anticipates that the issue of money laundering will be discussed, and the TRC Working Group will provide an update and report.

Finally, Mr. Hume reported that on October 7, 2016 the Supreme Court of Canada will hear the appeal in *Sidney Green v. Law Society of Manitoba* regarding the right of law societies to mandate requirements for continuing professional development. The Federation will intervene on the appeal.

In response to a question, Mr. Hume noted that the NCA review was likely to be a comprehensive one, given the significance of the issue of international mobility in many jurisdictions.

DISCUSSION/DECISION

5. Presentation of 2017 Budget & Fees

Chair of the Finance and Audit Committee Miriam Kresivo, QC briefed the Benchers on the proposed budget and fees for 2017. She thanked committee members David Crossin, QC, Herman Van Ommen, QC, Craig Ferris, QC, Tom Fellhauer, Sharon Matthews, QC, Woody Hayes, FCPA, FCA, Bill Mclagan, QC, Peter Lloyd, FCPA, FCA, and Peter Kelly for their hard work in bringing this proposed budget to the Benchers. She also provided particular thanks to staff for their countless hours of work in preparation, including CFO Jeanette McPhee, CLO Deb Armour, Director of Insurance Su Forbes, QC, Controller Aaron Griffith and CEO Tim McGee.

Ms. Kresivo emphasized that the process is one of balance, seeking to ensure the resources necessary to uphold our mandate to regulate in the public interest, while being mindful of what is reasonable to ask of our members. The process was also a rigorous one, with the current proposed budget having gone through several revisions to reduce it where possible.

She then summarized the proposed budget as follows:

General Fund:

Budgeted resources must ensure we are able to deliver core regulatory programs and meet key performance measures. With this budget, we face an increasing demand in key regulatory areas; proposed is an increase of 6.2% for internal resources in these areas, 60% of which will be funding the addition of resources in key regulatory areas to meet current demand. We are enhancing funding for delivery of PLTC, to ensure materials are updated regularly, and are providing for an upgrade of IT and Knowledge Management structures. In the result, the proposed fee is $1,745.55, which represents an increase of 4.9%.

The assumption is that revenue will increase due to a projected 1.6% increase in the number of members. PLTC revenue is expected to remain similar to last year with a projection of 500 students. Revenue from electronic filings is also projected to be similar to last year, as is revenue from non-practicing fees. Revenues are also generated by building leases.

The Capital Plan remains similar to last year, and includes the loan repayment to LIF, various capital projects supporting operations, as well as particular projects such as structuring upgrading.

We also fund external programs as a mandatory component of the fees. This year $380 of the practice fee will go toward funding of individual organizations or programs over which the Law Society collects the fee, but does not manage. Ms. Kresivo noted that the Law Society's role in the governance and the mandatory nature of these fees will be looked at in the coming year.

The Trust Assurance Fund fee will continue at $15 per transaction, and the 2017 budget is similar to the 2016 budget at $2.6 million. Real estate sales are expected to decline by 8%. Next year, the Committee will be looking at allocating net assets to the Part B Insurance Program.

Ms. Kresivo noted that we compare favourably with other law societies; we are not the least expensive but we provide excellent service and doing so efficiently.

Mr. Kresivo then reviewed the insurance fee. The number of insurance reports is trending up. Areas of risk for future potential claims include the 15% tax on foreign purchasers of real estate, the Limitation Act and the Wills and Estates and Succession Act. Offsetting these potential risks is the investment returns, on which we are exceeding the benchmark. Balancing risk against investment returns, we have determined there are sufficient assets to meet appropriate guidelines. As a result, the recommendation is to maintain the insurance fee at the current level of $1750.

Accordingly, the fee for practicing insured lawyers for 2017, inclusive of the insurance fee, is $3875.57. This amount puts us at the lower end of the scale country-wide.

When asked about whether the operating expenses associated with external counsel costs are an anomaly or represent a trend, Ms. Kresivo clarified that it did not appear to be a one-time anomaly. There was a comprehensive review done of the issue which determined that this was at least a 2-3 year issue, and very likely an ongoing trend. It was also determined that it would be more efficient to increase staff levels and handle more of the work internally, rather than hire more external counsel in the short term to alleviate additional pressures.

Ms. Armour noted that the in-depth review of the issue, involving outside consultants, internal management consultation and a thorough analysis of the data, was precipitated by legal fees increasing year over year. The size and complexity of investigations and hearings has been increasing, and legal defence costs have been rising. The number of citations has decreased, but the number of hearing days has increased dramatically. These findings are consistent with jurisdictions around the country. The review revealed a shortfall between resources, capacity and demand in three key areas: investigations, discipline and intake and early resolution. This shortfall is projected to persist through 2019. Without the addition of resources, the gap is projected to increase. Regulating in the public interest includes timely resolution; without adequate resources, the ability to do so declines. The recommended increases result from the determination that it is more cost effective to address this shortfall internally.

Ms. Armour encouraged any additional questions from Benchers, to alleviate any concerns they may have around the increase.

Several Benchers provided their thanks to the Committee and staff for the considerable work involved with the budget and fee recommendations. Some noted that the fees have an impact not just on lawyers, but by extension, on the public as well. Given the implications for access to justice, the efforts of committee members and staff to manage costs is appreciated.

Mr. Crossin raised for future consideration the possibility of extending insurance discounts to certain lawyer groups, such as young lawyers or those practicing in a legal aid context. Ms. Kresivo noted that this was something the Finance Committee could consider moving forward.

She then moved the following resolutions:

BE IT RESOLVED that, commencing January 1, 2017, the practice fee be set at $2,125.57 pursuant to section 23(1)(a) of the Legal Profession Act, consisting of the following amounts:

General Fund	$1,745.55
Federation of Law Societies contribution	$28.12
CanLII contribution	$39.24

Pro bono/Access to legal services contribution	$28.91
REAL program contribution	$4.25
CLBC contribution	$185.00
LAP contribution	$67.00
Advocate subscription fee	$27.50
Practice Fee	$2,125.57

(moved by Mr. Ferris, seconded by Mr. Fellhauer). Motion passed unanimously.

BE IT RESOLVED that:

– the insurance fee for 2017 pursuant to section 30(3) of the *Legal Profession Act* be set at $1,750;

– the part-time insurance fee for 2017 pursuant to Rule 3-40(2) be set at $875; and

– the insurance surcharge for 2017 pursuant to Rule 3-44(2) be set at $1,000.

(moved by Mr. Ferris, seconded by Mr. Fellhauer). The motion was passed unanimously.

Ms. Kresivo reviewed one additional matter with Benchers. She noted that the Finance and Audit Committee established an insurance sub-committee to maintain a review of insurance matters. She confirmed the Committee's complete confidence in the management and operation of LIF, but given the considerable value of the fund, due diligence dictates appropriate oversight be in place. The sub-committee members will be Craig Ferris, QC, Herman Van Ommen, QC, Peter Kelly, Peter Lloyd, FCPA, FCA and Ms. Kresivo herself. This sub-committee reports to the Finance Committee periodically.

Mr. McGee thanked the Benchers for their review and approval of the fees, which represents the culmination of considerable effort and emotional energy on the part of staff and committee members alike. He specifically thanked Ms. Kresivo for her leadership during challenging times, and her facilitation of constructive discussion.

6. Trust Shortages: Extending Current Insurance Coverage

Mr. Crossin introduced Su Forbes, Director, Lawyers Insurance Fund (LIF) to brief Benchers on the recommendations from LIF to expand the existing coverage for "bad cheque scams" to other

"social engineering scams" that result in trust shortages, such as fraudulent client instructions. She referred Benchers to the materials for a more thorough analysis. The framework in place in Part C has a sub-limit of $500,000 per claim, per lawyer, per firm, with a deductible of 35% to ensure lawyers remain diligent about avoiding such scams, which results in a maximum of $325,000 in coverage. There is a profession-wide annual aggregate of $2,000,000, though Ms. Forbes estimates no more than two such claims in a year would be likely. For more thorough details of the coverage and costs, Ms. Forbes referred the Benchers to the accompanying materials.

Mr. Crossin called for the motion to expand Part C coverage for the 'bad cheque scam' to include other social engineering frauds that result in shortages in lawyers' trust accounts because of a lawyer's mistaken belief that funds held in trust are properly payable to a fraudster (moved by Ms. Matthews, seconded by Ms. Ongman). The motion passed unanimously.

Ms. Kresivo then took the opportunity to provide public recognition of Ms. Forbes, her team and their impeccable operation of LIF, as evidenced by the recent independent audit.

7. Federation Council Representative Selection

Mr. Crossin recognized the acclamation of First Vice-President Herman Van Ommen, QC as the Law Society's new Federation Council representative. His term will commence November 15, 2016.

8. Family Law Legacy Award

Ms. Nancy Merrill, member of the former Family Law Task introduced the motion to establish an award to recognize excellence in family law, particularly in areas of non-adversarial practice, pro bono and access to justice. Members of the former Task Force believe so strongly in the establishment of an award that they provided an initial $1200 in support. Details such as the name of the award and the nomination and selection process will be worked out following Bencher approval.

Ms. Merrill moved (seconded by Ms. Ryan) that, to support the Law Society in advancing the importance of family law from an access to justice perspective, the Law Society establish a legacy award to advance the Law Society's public interest mandate in the area of family law.

In response to a question, Ms. Merrill clarified that Law Society staff would administer all aspects of the award, including publicity, the nominations process and the organization of the presentation of the award which was anticipated to be at the Bench and Bar Dinner.

The motion was passed unanimously.

Ms. Matthews congratulated the Family Law Task Force members on this important initiative, noting that there are profound access to justice issues in the area of family law, and members of that Bar are deserving of credit for their ongoing efforts in that regard.

REPORTS

9. Report on the Outstanding Hearing & Review Decisions

Written reports on outstanding hearing decisions and conduct review reports were received and reviewed by the Benchers.

10. TRC Advisory Committee Update

Mr. Crossin briefed the Benchers on recent meetings of the TRC Advisory Committee, noting that focus has centered on the development of Terms of Reference which have been provided for Bencher review and approval.

The Committee will be meeting again shortly to begin discussion of concrete steps to address the TRC Calls to Action. He noted that a possible focus might be legal education, both at law schools and post-graduation; he also noted this will be the topic of discussion at the upcoming Federation Conference.

He reported that the Law Society has been invited to speak at the First Nations Summit in October. He has asked Appointed Bencher and TRC Advisory Committee member Dan Smith to speak on behalf of the Benchers and the Law Society.

Mr. Van Ommen moved the adoption of the TRC Advisory Committee Terms of Reference (seconded by Mr. Fellhauer). The motion was passed unanimously.

RTC
2016-09-30

REDACTED MATERIALS

REDACTED MATERIALS

REDACTED MATERIALS

The Law Society of British Columbia

Memo

To:	The Benchers
From:	The Ethics Committee
Date:	September 20, 2016
Subject:	Code of Professional Conduct for British Columbia ("BC Code") – Transferring Lawyer Rules: rules 3.3-7 and 3.4-17 to 3.4-23

The purpose of this memorandum is to recommend that the BC Code be amended by the adoption of a new set of transferring lawyer rules to replace existing BC Code rules 3.4-17 to 3.4-26 and Appendix D. Also required is one consequential amendment to Commentary [1] to rule 3.4-11, which makes reference to screening guidelines in Appendix D, which are relocated to following Commentary [3] to rule 3.4-20 in the proposed new set of transferring lawyer rules set forth below.

Resolution

Be it resolved to amend the Code of Professional Conduct for British Columbia by:

(a) rescinding rules 3.4-17 to 3.4-26, their associated Commentaries, and Appendix D;

(b) adopting new rules 3.3-7 and 3.4-17 to 3.4-23, and their associated Commentaries, as recommended by the Ethics Committee; and

(c) replacing the words "The guidelines at the end of Appendix D" in Commentary [1] to rule 3.4-11 with the words "The guidelines following Commentary [3] to rule 3.4-20."

Background

The existing set of transferring lawyer rules was drawn initially from the Professional Conduct Handbook, the precursor document to the present BC Code. In 2014 the Federation of Law Societies of Canada adopted a newly developed set of transferring lawyer rules into the Model Code of Professional Conduct (the "Model Code"). Other Canadian provincial jurisdictions have since adopted transferring lawyer rules that match those in the Model Code, in some cases with minor variations. The Ethics Committee in British Columbia has spent portions of the past two years reviewing and developing a set of transferring lawyer rules that it views as superior to those in the present BC Code. The proposed new set of transferring lawyer rules more closely conforms to the Model Code version. There are with a few minor variations, mostly in the

accompanying Commentary, which the Committee thinks preserve any advantages of the current set of rules and adequately reflect the British Columbia context.

In May, 2016, a discussion memorandum including the proposed set of transferring lawyer rules was posted on the Law Society's website for consultation. The consultation opportunity was flagged with a "highlight" on the Law Society's home page and an announcement of the consultation was included in an e-brief distributed electronically to Law Society members.

If adopted as presented, the recommended new transferring lawyer rules would bring the BC Code into closer accord with the Model Code. This development serves the objective of moving toward more transparently uniform ethical codes and standards across the country and, in the view of the Ethics Committee, without substantive loss in the process. In the very few places where the Ethics Committee thought there was a potential issue of content or guidance in harmonizing the BC Code with the Model Code, it determined to augment the Model Code language with three additional Commentary points and one additional screening guideline (each identified in the Table of Concordance at the end of the consultation memorandum). With these additions to the Model Code provisions, the Ethics Committee is satisfied that the important content of the existing BC Code provisions is preserved into their replacement provisions.

The new rules 3.3-7 and 3.4-17 to 3.4-23, and their associated Commentaries, as recommended by the Ethics Committee, are provided below for clarity of reference in the proposed resolution. Any underlining of text in these provisions is for the purpose of illustrating the additions to the Model Code's provisions and is not intended to survive into the new rules if they are adopted.

Following the below presentation of the proposed new rules is a copy of the consultaion memorandum, which contains a more in-depth discussion of the differences between the proposed new rules and relevant Model Code rules and attaches a copy of the existing BC Code provisions to be rescinded, as well as a copy of the Model Code's version of the transferring lawyer rules.

The new transferring lawyer rules

3.3-7 A lawyer may disclose confidential information to the extent reasonably necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a law firm, but only if the information disclosed does not compromise the solicitor-client privilege or otherwise prejudice the client.

Commentary

[1] As a matter related to clients' interests in maintaining a relationship with counsel of choice and protecting client confidences, lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice.

[2] In these situations (see Rules 3.4-17 to 3.4-23 on Conflicts From Transfer Between Law Firms), rule 3.3-7 permits lawyers and law firms to disclose limited information. This type of disclosure would only be made once substantive discussions regarding the new relationship have occurred.

[3] This exchange of information between the firms needs to be done in a manner consistent with the transferring lawyer's and new firm's obligations to protect client confidentiality and privileged information and avoid any prejudice to the client. It ordinarily would include no more than the names of the persons and entities involved in a matter. Depending on the circumstances, it may include a brief summary of the general issues involved, and information about whether the representation has come to an end.

[4] The disclosure should be made to as few lawyers at the new law firm as possible, ideally to one lawyer of the new firm, such as a designated conflicts lawyer. The information should always be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship.

[5] As the disclosure is made on the basis that it is solely for the use of checking conflicts where lawyers are transferring between firms and for establishing screens, the

disclosure should be coupled with an undertaking by the new law firm to the former law firm that it will:

(a) limit access to the disclosed information;

(b) not use the information for any purpose other than detecting and resolving conflicts; and

(c) return, destroy, or store in a secure and confidential manner the information provided once appropriate confidentiality screens are established.

[6] The client's consent to disclosure of such information may be specifically addressed in a retainer agreement between the lawyer and client. In some circumstances, however, because of the nature of the retainer, the transferring lawyer and the new law firm may be required to obtain the consent of clients to such disclosure or the disclosure of any further information about the clients. This is especially the case where disclosure would compromise solicitor-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge).

Conflicts from Transfer Between Law Firms
Application of Rule

3.4-17 In rules 3.4-17 to 3.4-23,

"matter" means a case, a transaction, or other client representation, but within such representation does not include offering general "know-how" and, in the case of a government lawyer, providing policy advice unless the advice relates to a particular client representation.

Commentary

[2] Rules 3.4-17 to 3.4-26 apply to lawyers sharing space. Treating space-sharing lawyers as a law firm recognizes

(a) the concern that opposing clients may have about the appearance of proximity of lawyers sharing space, and

(b) the risk that lawyers sharing space may be exposed inadvertently to confidential information of an opposing client.

3.4-18 Rules 3.4-17 to 3.4-23 apply when a lawyer transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that:

(a) It is reasonable to believe the transferring lawyer has confidential information relevant to the new law firm's matter for its client; or

(b)

(i) the new law firm represents a client in a matter that is the same as or related to a matter in which a former law firm represents or represented its client ("former client");
(ii) the interests of those clients in that matter conflict; and
(iii) the transferring lawyer actually possesses relevant information respecting that matter.

Commentary

[1] The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification. As stated by the Supreme Court of Canada in *Macdonald Estate v. Martin*, [1990] 3 SCR 1235, with respect to the partners or associates of a lawyer who has relevant confidential information, the concept of imputed knowledge is unrealistic in the era of the mega-firm. Notwithstanding the foregoing, the inference to be drawn is that lawyers working together in the same firm will share confidences on the matters on which they are working, such that actual knowledge may be presumed. That presumption can be rebutted by clear and convincing evidence that shows that all reasonable measures, as discussed in rule 3.4-20, have been taken to ensure that no disclosure will occur by the transferring lawyer to the member or members of the firm who are engaged against a former client.

[2] The duties imposed by this rule concerning confidential information should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

[3] **Law firms with multiple offices** — This rule treats as one "law firm" such entities as the various legal services units of a government, a corporation with separate regional legal departments and an interjurisdictional law firm.

3.4-19 Rules 3.4-20 to 3.4-22 do not apply to a lawyer employed by the federal, a provincial or a territorial government who, after transferring from one department, ministry or agency to another, continues to be employed by that government.

Commentary

[1] Government employees and in-house counsel — The definition of "law firm" includes one or more lawyers practising in a government, a Crown corporation, any other public body or a corporation. Thus, the rule applies to lawyers transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same.

Law Firm Disqualification

3.4-20 If the transferring lawyer actually possesses confidential information relevant to a matter respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless:

(a) the former client consents to the new law firm's continued representation of its client; or

(b) the new law firm has:

(i) taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the transferring lawyer to any member of the new law firm; and

(ii) advised the lawyer's former client, if requested by the client, of the measures taken.

Commentary

[0.1] There are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that there will be no disclosure of the former client's confidential information to any member of the new firm:

(a) if the transferring lawyer actually possesses confidential information respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, and

(b) if the new law firm is not sure whether the transferring lawyer possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring lawyer did in fact possess such confidential information.

[1] It is not possible to offer a set of "reasonable measures" that will be appropriate or adequate in every case. Instead, the new law firm that seeks to implement reasonable measures must exercise professional judgment in determining what steps must be taken "to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information." Such measures may include timely and properly constructed confidentiality screens.

[2] For example, the various legal services units of a government, a corporation with separate regional legal departments, an interjurisdictional law firm, or a legal aid program may be able to demonstrate that, because of its institutional structure, reporting relationships, function, nature of work, and geography, relatively fewer "measures" are necessary to ensure the non-disclosure of client confidences. If it can be shown that, because of factors such as the above, lawyers in separate units, offices or departments do not "work together" with other lawyers in other units, offices or departments, this will be taken into account in the determination of what screening measures are "reasonable."

[3] The guidelines that follow are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

Guidelines: How to Screen/Measures to be taken

1. The screened lawyer should have no involvement in the new law firm's representation of its client in the matter.

2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.

3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.

4. The firm should take steps to preclude the screened lawyer from having access to any part of the file.

4.1 The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm.

5. The new law firm should document the measures taken to screen the transferring lawyer, the time when these measures were put in place (the sooner the better), and should advise all affected lawyers and support staff of the measures taken.

6. These Guidelines apply with necessary modifications to situations in which non-lawyer staff leave one law firm to work for another and a determination is made, before hiring the individual, on whether any conflicts of interest will be created and whether the potential new hire actually possesses relevant confidential information.

How to Determine If a Conflict Exists Before Hiring a Potential Transferee

[4] When a law firm ("new law firm") considers hiring a lawyer, or an articled law student ("transferring lawyer") from another law firm ("former law firm"), the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the law firm that the transferring lawyer is leaving and with respect to clients of a firm in which the transferring lawyer worked at some earlier time.

[5] After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether any conflicts exist. In determining whether the transferring lawyer actually possesses relevant confidential information, both the transferring lawyer and the new law firm must be very careful, during any interview of a potential transferring lawyer, or other recruitment process, to ensure that they do not disclose client confidences. See Rule 3.3-7 which provides that a lawyer may disclose confidential information to the extent the lawyer reasonably believes necessary to detect and resolve conflicts of interest where lawyers transfer between firms.

[6] A lawyer's duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[7] Issues arising as a result of a transfer between law firms should be dealt with promptly. A lawyer's failure to promptly raise any issues may prejudice clients and may be considered sharp practice.

Transferring Lawyer Disqualification

3.4-21 Unless the former client consents, a transferring lawyer referred to in rule 3.4-20 must not:

(a) participate in any manner in the new law firm's representation of its client in the matter; or

(b) disclose any confidential information respecting the former client except as permitted by rule 3.3-7.

3.4-22 Unless the former client consents, members of the new law firm must not discuss

the new law firm's representation of its client or the former law firm's representation of the former client in that matter with a transferring lawyer referred to in rule 3.4-20 except as permitted by rule 3.3-7.

Lawyer Due-diligence for non-lawyer staff

3.4-23 A lawyer or a law firm must exercise due diligence in ensuring that each member and employee of the law firm, and each other person whose services the lawyer or the law firm has retained:

(a) complies with rules 3.4-17 to 3.4-23; and

(b) does not disclose confidential information:

i. of clients of the firm; or

ii. any other law firm in which the person has worked.

Commentary

[1] This rule is intended to regulate lawyers and articled law students who transfer between law firms. It also imposes a general duty on lawyers and law firms to exercise due diligence in the supervision of non-lawyer staff to ensure that they comply with the rule and with the duty not to disclose confidences of clients of the lawyer's firm and confidences of clients of other law firms in which the person has worked.

[2] Certain non-lawyer staff in a law firm routinely have full access to and work extensively on client files. As such, they may possess confidential information about the client. If these staff move from one law firm to another and the new firm acts for a client opposed in interest to the client on whose files the staff worked, unless measures are taken to screen the staff, it is reasonable to conclude that confidential information may be shared. It is the responsibility of the lawyer/law firm to ensure that staff who may have confidential information that if disclosed, may prejudice the interests of the client of the former firm, have no involvement with and no access to information relating to the relevant client of the new firm.

The Law Society of British Columbia

Memo

To: Members of the Profession and others interested in BC Code changes

From: Ethics Committee

Date: May 11, 2016

Subject: **Following the Model Code of Professional Conduct: Transferring Lawyer Rules: Rules 3.3-7 and 3.4-17 to 3.4-23**

This memorandum outlines the major differences between the Federation of Law Societies' Model Code transferring lawyer rules and our current rules. It recommends that we rescind our current rules (*BC Code* rules 3.4-17 to 3.4-26 and Appendix D) and substitute for those rules, with minor modifications, the new transferring lawyer rules adopted by the Federation of Law Societies (Model Code rules 3.3-7 and rules 3.4-17 to 3.4-23).

I. Federation Comments

In a memorandum of November 6, 2014 to Law Societies Gavin Hume, Q.C., the Chair of the Federation Standing Committee on the Model Code made the following comments concerning the then new Model Code transferring lawyer rules:

> 20. The need to review the conflicts of interest rules for lawyers transferring between law firms was first flagged by the Model Code Implementation Committee (the committee charged with revising the original draft Model Code) prior to adoption of the Model Code. The CBA also raised concerns about these provisions during the process leading to adoption of the original conflicts of interest rules. In response to concerns from law society liaisons that amendments to the Model Code should not be made piecemeal, the Standing Committee determined that these rules should be revised in tandem with other anticipated revisions to the conflicts rules. Specifically, the Standing Committee waited for the release of the *McKercher* decision to finalize revisions to all of the conflicts rules.
>
> 21. At an early stage in its deliberations, the Standing Committee engaged in an informal dialogue with the ethics/conflicts partners at some national firms and law society staff with extensive experience in transferring lawyer related issues. The committee also benefited from the work of the Law Society of British Columbia on these issues. In addition, the Standing Committee carefully considered consultation feedback on the draft rules and clarified the application of key concepts where ambiguities were identified by stakeholders.

22. The guiding principle underlying the redrafted rules is that there should be no use of confidential information that may prejudice the client. The Standing Committee edited the transferring lawyer rules with the goal of creating practical and easy to apply rules for the safeguarding of confidential information (see new rules 3.4-17 – 3.4-23 generally). This resulted in the deletion of much of Model Code rule 3.4-20 and its replacement with rules based on a principled and simpler approach.

23. The rules make it clear that only actual possession of confidential information is caught by the rules; knowledge of confidential information is thus not imputed to a lawyer. This is underlined by retention of the clear statement of principle from commentary to the Model Code rule 3.4-19, stating that imputed knowledge does not give rise to disqualification (see first paragraph of commentary to new rule 3.4-18).

24. Model Code rule 3.4-25 "Determination of Compliance" has been deleted, reflecting the view of the Standing Committee that the Model Code ought not to require law societies to make decisions or findings about transferring lawyer situations.

25. Another significant change is to allow for summary disclosure of confidential information to detect and resolve conflicts of interest arising from a lawyer's change of employment or from changes in the ownership of a law firm. This change is based on the American Bar Association model and reflects a desire to regulate a practice that currently falls into a regulatory grey area. These changes appear in the commentary to both the transferring lawyer and the confidentiality rules (see new rule 3.3-7 and see the corresponding commentary under new rule 3.4-20 under the heading "How to Determine If a Conflict Exists Before Hiring a Potential Transferee").

26. The separate definition of "client" applicable to the Model Code transferring lawyer rules has been deleted in recognition of the fact that the definition in rule 1.1-1 is broad and inclusive and is applicable to the entire Model Code. The Standing Committee determined that the combination of duties owed to anyone who reasonably thinks they are a client under the definition of "client" in the Model Code and the lawyer's obligations under the confidentiality rules are sufficient in this context. The definition of "confidential information" has also been deleted as rule 3.3-1 covers this concept, making the definition in 3.4-17 both vague and unnecessary (see deletions in new rule 3.4-17).

27. Based on stakeholder feedback, the commentary describing law firms with multiple offices has been amended, eliminating language specifying that legal aid programs with community law offices form one law firm (see commentary paragraph [3] to rule 3.4-18).

28. Rule 3.4-22 concerning relevant information that is not confidential has been deleted as the Standing Committee sees no principled reason to impose an obligation to set up confidentiality screens or risk law firm disqualification for information that is not confidential.

29. Based on relevant case law, the Standing Committee revised the rule about lawyers supervising non-lawyer staff and added new commentary to provide additional guidance. The Standing Committee returned to the guiding principle that the rules governing transferring lawyers must protect confidential information and determined that lawyers and law firms must have administrative structures in place to protect confidential client information (see new rule 3.4-23).

II. Major Differences Between New Model Code Rules and BC Code Rules

The relevant Model Code provisions are rule 3.3-7 and rules 3.4-17 to 3.4-23. The current *BC Code* provisions are rules are rule 3.4-17 to 3.4-26 and Appendix D. Both the current Model Code and *BC Code* rules are attached, along with proposed new *BC Code* rules based on the Model Code provisions. Although there are numerous differences between the new Model Code provisions and our current *BC Code* provisions, we describe five important differences below:

1. How to determine whether confidential information is at issue without disclosing the information?

Our *BC Code* does not formally address the confidentiality issue created when a lawyer proposes to transfer from one firm to another where that lawyer may have confidential client information from a client of the old firm that is relevant to a client of the new firm. We have advised lawyers in the past that it is reasonable to disclose confidential client information in a transferring lawyer situation for the purpose of avoiding conflicts, where the client will not be prejudiced by such a disclosure.

The draft rules formally address this issue in Model Code rule 3.3-7 and Commentary. Rule 3.3-7 states:

> A lawyer may disclose confidential information to the extent reasonably necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a law firm, but only if the information disclosed does not compromise the solicitor-client privilege or otherwise prejudice the client.
>
> (see also the commentary in the attached materials)

This seems to us to be a welcome codification of the principle that permits a lawyer to infer client consent to a disclosure of confidential information for the purpose of avoiding a conflict, where the client will not be prejudiced by the disclosure.

2. Expanded definition of the word "matter"

The BC Code definition of "matter" is the following:

> **"matter"** means a case or client file, but does not include general "know-how" and, in the case of a government lawyer, does not include policy advice unless the advice relates to a particular case.

The Model Code definition is:

> **"matter"** means a case, a transaction, or other client representation, but within such representation does not include offering general "know-how" and, in the case of a government lawyer, providing policy advice unless the advice relates to a particular client representation.

The Model Code definition seems to us to be more appropriately expansive by including the words "or other client representation."

3. Precise reference in draft Model Code to imputed knowledge

Rule 3.4-18, commentary [1] includes the statement "The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification."

While this principle is implicit in the *BC Code* transferring lawyer rules and, in the past, the Ethics Committee has affirmed it, it is helpful to have it stated so plainly.

4. Elimination of duty to notify former firm where no confidential information is at issue.

Rule 3.4-22 of the *BC Code* imposes a duty to notify the former client if the transferring lawyer has any information relevant to a matter, even if that information is not confidential. The Model Code rule eliminates this requirement where the information is not confidential. The rationale is that there is no justification for protecting information that is not confidential with confidentiality screens and potential law firm disqualification. We agree with this rationale.

5. Elimination of rule re discussion between new law firm and transferring lawyer

The draft rules eliminate the equivalent of *BC Code* rule 3.4-24 which states:

> **3.4-24** Unless the former client consents, members of the new law firm must not discuss the new law firm's representation of its client or the former law firm's representation of the former client in that matter with a transferring lawyer to whom rule 3.4-20 or 3.4-22 applies.

We think the Federation's new rule 3.4-23 takes care of any issues addressed by *BC Code* rule 3.4-24. It states:

> **3.4-23** A lawyer or a law firm must exercise due diligence in ensuring that each member and employee of the law firm, and each other person whose services the lawyer or the law firm has retained:
>
> (a) complies with rules 3.4-17 to 3.4-23; and
>
> (b) does not disclose confidential information:
>
> i. of clients of the firm; or
>
> ii. any other law firm in which the person has worked.

6. Elimination of rule re determination of compliance

The BC Code rule with respect to this issue is rule3.4-25, which states:

> **3.4-25** Notwithstanding remedies available at law, a lawyer who represents a party in a matter referred to in rules 3.4-6 or 3.4-17 to 3.4-26 may seek the opinion of the Society on the application of those rules.

The current Model Code version eliminated the Model Code's former equivalent of this provision, preferring instead to let individual Law Societies choose to make transferring lawyer decisions or not.

Clearly the LSBC would have the authority to give opinions and would generally do so through its practice advisors or the Ethics Committee, whether such authority is stated in the transferring lawyer rules or not. The current *BC Code* provision has confused lawyers in the past about the Law Society's role with respect to these rules and we believe there is merit to the Model Code position.

7. Compression of Commentary including guidelines

The draft commentary to the transferring lawyer rules substantially reduces the advice both the Model Code and the *BC Code* offer with respect to compliance with the rules (the current *BC Code* primarily in Appendix D). Most of this advice relates to the details of screens that must be erected to comply with the rules. We think screening devices are much better understood than when the transferring lawyer rules were enacted in the 1990s. Should the Benchers adopt these transferring lawyer rules which are more succinct than the old *BC Code* rules, we propose to consider whether any deleted portions of Appendix D ought to be retained on our website for the benefit of the profession.

III. Attachments

Although the Model Code transferring lawyer rules continue a basic similarity with the *BC Code* rules (which are the old pre 2013 rules from the *Professional Conduct Handbook*), individual rules are sufficiently different that it would be confusing to try and give you a copy of those rules that is redlined to our current rules. Instead we refer you to section II of this memorandum for the general kinds of changes the current Model Code rules reflect and we attach the following distinct versions of the two Codes for you to review:

Attachment 1 contains our current transferring lawyer rules, rules 3.4-17 to 3.4-26, along with Appendix D.

Attachment 2 contains the Model Code transferring lawyer rules as adopted by the Federation.

Attachment 3 contains our proposed new *BC Code* transferring lawyer rules. It eliminates the current format of the BC Code which divides between the rules and Appendix D in favour of placing all the transferring lawyer rules in the *BC Code* itself, as the Model Code does. Some items that we believe should be preserved from the current *BC Code* rules and have no counterpart in the Model Code are underlined so that you will be aware of them. The underlining is not intended to be preserved in the final copy.

Attachments:

- Attachments 1, 2 and 3 (see section II above).

Attachment 1
- Current *BC Code* rules [784780]

Attachment 2
- Model Code rules introduced in 2014 [1027443]

Attachment 3
- Proposed new BC Code rules [942025]

- Table of Concordance between Model Code rules and proposed new *BC Code* rules [1030225]

[1027064/2016]

Attachment 1

CURRENT BC CODE TRANSFERRING LAWYER RULES

Conflicts from transfer between law firms

Application of rule

3.4-17 In rules 3.4-17 to 3.4-26:

"confidential information" means information that is not generally known to the public obtained from a client; and

"matter" means a case or client file, but does not include general "know-how" and, in the case of a government lawyer, does not include policy advice unless the advice relates to a particular case.

Commentary

[2] Rules 3.4-17 to 3.4-26 apply to lawyers sharing space. Treating space-sharing lawyers as a law firm recognizes

(a) the concern that opposing clients may have about the appearance of proximity of lawyers sharing space, and

(b) the risk that lawyers sharing space may be exposed inadvertently to confidential information of an opposing client.

[3] Rules 3.4-17 to 3.4-26 apply to lawyers transferring to or from government service and into or out of an in-house counsel position, but do not extend to purely internal transfers in which, after transfer, the employer remains the same.

[4] Rules 3.4-17 to 3.4-26 treat as one "law firm" such entities as the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm and a legal aid program with many community law offices. The more autonomous that each such unit or office is, the easier it should be, in the event of a conflict, for the new firm to obtain the former client's consent.

[5] See the definition of **"MDP"** in Rule 1 and Rules 2-23.1 to 2-23.14 of the Law Society Rules.

3.4-18 Rules 3.4-17 to 3.4-26 apply when a lawyer transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that:

(a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client ("former client");

(b)the interests of those clients in that matter conflict; and

(c)the transferring lawyer actually possesses relevant information respecting that matter.

3.4-19 Rules 3.4-20 to 3.4-24 do not apply to a lawyer employed by a federal, provincial or territorial government who continues to be employed by that government after transferring from one department, ministry or agency to another.

Law firm disqualification

3.4-20 If the transferring lawyer actually possesses confidential information relevant to a matter referred to in rule 3.4-18 (a) respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless:

(a)the former client consents to the new law firm's continued representation of its client; or

(b)the new law firm can establish, in accordance with rule 3.4-25, when called upon to do so by a party adverse in interest, that

(i) it is reasonable that its representation of its client in the matter continue, having regard to all relevant circumstances, including:

(A) the adequacy and timing of the measures taken under clause (ii);

(B) the extent of prejudice to the affected clients; and

(C) the good faith of the former client and the client of the new law firm; and

(ii) it has taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the transferring lawyer to any member of the new law firm.

Commentary

[2] Appendix D may be helpful in determining what constitutes "reasonable measures" in this context.

[3] Issues arising as a result of a transfer between law firms should be dealt with promptly. A lawyer's failure to promptly raise any issues identified may prejudice clients and may be considered sharp practice.

Continued representation not to involve transferring lawyer

3.4-22 If the transferring lawyer actually possesses information relevant to a matter referred to in rule 3.4-18 (a) respecting the former client, but that information is not confidential information that may prejudice the former client if disclosed to a member of the new law firm, the new law

firm must notify its client of the relevant circumstances and its intended action under rules 3.4-17 to 3.4-26.

3. 4-23 Unless the former client consents, a transferring lawyer to whom rule 3.4-20 or 3.4-22 applies must not:

(a)participate in any manner in the new law firm's representation of its client in that matter; or

(b)disclose any confidential information respecting the former client.

3.4-24 Unless the former client consents, members of the new law firm must not discuss the new law firm's representation of its client or the former law firm's representation of the former client in that matter with a transferring lawyer to whom rule 3.4-20 or 3.4-22 applies.

Determination of compliance

3.4-25 Notwithstanding remedies available at law, a lawyer who represents a party in a matter referred to in rules 3.4-6 or 3.4-17 to 3.4-26 may seek the opinion of the Society on the application of those rules.

Due diligence

3.4-26 A lawyer must exercise due diligence in ensuring that each member and employee of the lawyer's law firm, and each other person whose services the lawyer has retained

(a)complies with rules 3.4-17 to 3.4-26, and

(b)does not disclose confidences of clients of

(i) the firm, and

(ii) another law firm in which the person has worked.

Appendix D – Conflicts Arising as a Result of Transfer Between Law Firms

Matters to consider when interviewing a potential transferee

1. When a law firm considers hiring a lawyer or articled student ("transferring lawyer") from another law firm, the transferring lawyer and the new law firm need to determine, *before transfer,* whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the firm that the transferring lawyer is leaving, and with respect to clients of a firm in which the transferring lawyer worked at some earlier time.

During the interview process, the transferring lawyer and the new law firm need to identify, first, all cases in which:

(a)the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client,

(b)the interests of these clients in that matter conflict, and

(c)the transferring lawyer actually possesses relevant information respecting that matter.

When these three elements exist, the transferring lawyer is personally disqualified from representing the new client unless the former client consents.

Second, they must determine whether, in each such case, the transferring lawyer actually possesses relevant information respecting the former client that is confidential and that may prejudice the former client if disclosed to a member of the new law firm.

If this element exists, then the transferring lawyer is disqualified unless the former client consents, and the new law firm is disqualified unless the firm takes measures set out in this Code to preserve the confidentiality of information.

In rules 3.4-17 to 3.4-26, "confidential" information refers to information not generally known to the public that is obtained from a client. It should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

In determining whether the transferring lawyer possesses confidential information, both the transferring lawyer and the new law firm need to be very careful to ensure that they do not disclose client confidences during the interview process itself.

Matters to consider before hiring a potential transferee

2. After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether a conflict exists.

(a) If a conflict does exist

If the new law firm concludes that the transferring lawyer does possess relevant information respecting a former client that is confidential and that may prejudice the former client if disclosed to a member of the new law firm, then the new law firm will be prohibited from continuing to represent its client in the matter if the transferring lawyer is hired, unless:

(i) the new law firm obtains the former client's consent to its continued representation of its client in that matter, or

(ii) the new law firm complies with rule 3.4-20.

If the new law firm seeks the former client's consent to the new law firm continuing to act, it will, in all likelihood, be required to satisfy the former client that it has taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information to any member of the new law firm. The former client's consent must be obtained before the transferring lawyer is hired.

Alternatively, if the new law firm applies under rule 3.4-25 for an opinion of the Society or a determination by a court that it may continue to act, it bears the onus of

establishing the matters referred to in rule 3.4-20. Again, this process must be completed before the transferring lawyer is hired.

An application under rule 3.4-25 may be made to the Society or to a court of competent jurisdiction. The Society has a procedure for considering disputes under rule 3.4-25 that is intended to provide informal guidance to applicants.

The circumstances referred to in rule 3.4-20 (b) are drafted in broad terms to ensure that all relevant facts will be taken into account.

(b) If no conflict exists

If the new law firm concludes that the transferring lawyer possesses relevant information respecting a former client, but that information is not confidential information that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must notify its client "of the relevant circumstances and its intended action under rules 3.4-17 to 3.4-26.

Although Rule 3.4-20 does not require that the notice be in writing, it would be prudent for the new law firm to confirm these matters in writing. Written notification eliminates any later dispute as to the fact of notification, its timeliness and content.

The new law firm might, for example, seek the former client's consent to the transferring lawyer acting for the new law firm's client in the matter because, absent such consent, the transferring lawyer must not act.

If the former client does not consent to the transferring lawyer acting, it would be prudent for the new law firm to take reasonable measures to ensure that there will be no disclosure of the former client's confidential information to any member of the new law firm. If such measures are taken, it will strengthen the new law firm's position if it is later determined that the transferring lawyer did in fact possess confidential information that, if disclosed, may prejudice the former client.

A former client who alleges that the transferring lawyer has such confidential information may apply under rule 3.4-25 for an opinion of the Society or a determination by a court on that issue.

(c) If the new law firm is not sure whether a conflict exists

There may be some cases in which the new law firm is not sure whether the transferring lawyer possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm.

In such circumstances, it would be prudent for the new law firm to seek guidance from the Society before hiring the transferring lawyer.

Reasonable measures to ensure non-disclosure of confidential information

3. As noted above, there are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that there will be no disclosure of the former client's confidential information to any member of the new law firm:

(a) if the transferring lawyer actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm, and

(b) if the new law firm is not sure whether the transferring lawyer possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring lawyer did in fact possess such confidential information.

It is not possible to offer a set of "reasonable measures" that will be appropriate or adequate in every case. Rather, the new law firm that seeks to implement reasonable measures must exercise professional judgement in determining what steps must be taken "to ensure that there will be no disclosure to any member of the new law firm."

In the case of law firms with multiple offices, the degree of autonomy possessed by each office will be an important factor in determining what constitutes "reasonable measures." For example, the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm or a legal aid program may be able to argue that, because of its institutional structure, reporting relationships, function, nature of work and geography, relatively fewer "measures" are necessary to ensure the non-disclosure of client confidences.

Adoption of all guidelines may not be realistic or required in all circumstances, but lawyers should document the reasons for declining to conform to a particular guideline. Some circumstances may require extra measures not contemplated by the guidelines.

When a transferring lawyer joining a government legal services unit or the legal department of a corporation actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new "law firm," the interests of the new client (i.e., Her Majesty or the corporation) must continue to be represented. Normally, this will be effected either by instituting satisfactory screening measures or, when necessary, by referring conduct of the matter to outside counsel. As each factual situation will be unique, flexibility will be required in the application of rule 3.4-20 (b).

Guidelines:

1. The screened lawyer should have no involvement in the new law firm's representation of its client.

2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.

3. No member of the new law firm should discuss the current matter or the prior representation with the screened lawyer.

4. The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.

5. The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised:

(a)that the screened lawyer is now with the new law firm, which represents the current client, and

(b)of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.

6. Unless to do otherwise is unfair, insignificant or impracticable, the screened lawyer should not participate in the fees generated by the current client matter.

7. The screened lawyer's office or work station should be located away from the offices or work stations of those working on the matter.

8. The screened lawyer should use associates and support staff different from those working on the current client matter.

[784780/2015]

Attachment 2

FEDERATION MODEL CODE TRANSFERRING LAWYER RULES – INTRODUCED IN 2014

3.3-7 A lawyer may disclose confidential information to the extent reasonably necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a law firm, but only if the information disclosed does not compromise the solicitor-client privilege or otherwise prejudice the client.

Commentary

[1] As a matter related to clients' interests in maintaining a relationship with counsel of choice and protecting client confidences, lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice.

[2] In these situations (see Rules 3.4-17 to 3.4-23 on Conflicts From Transfer Between Law Firms), rule 3.3-7 permits lawyers and law firms to disclose limited information. This type of disclosure would only be made once substantive discussions regarding the new relationship have occurred.

[3] This exchange of information between the firms needs to be done in a manner consistent with the transferring lawyer's and new firm's obligations to protect client confidentiality and privileged information and avoid any prejudice to the client. It ordinarily would include no more than the names of the persons and entities involved in a matter. Depending on the circumstances, it may include a brief summary of the general issues involved, and information about whether the representation has come to an end.

[4] The disclosure should be made to as few lawyers at the new law firm as possible, ideally to one lawyer of the new firm, such as a designated conflicts lawyer. The information should always be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship.

[5] As the disclosure is made on the basis that it is solely for the use of checking

conflicts where lawyers are transferring between firms and for establishing screens, the disclosure should be coupled with an undertaking by the new law firm to the former law firm that it will:

(a) limit access to the disclosed information;

(b) not use the information for any purpose other than detecting and resolving conflicts; and

(c) return, destroy, or store in a secure and confidential manner the information provided once appropriate confidentiality screens are established.

[6] The client's consent to disclosure of such information may be specifically addressed in a retainer agreement between the lawyer and client. In some circumstances, however, because of the nature of the retainer, the transferring lawyer and the new law firm may be required to obtain the consent of clients to such disclosure or the disclosure of any further information about the clients. This is especially the case where disclosure would compromise solicitor-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge).

Conflicts from Transfer Between Law Firms
Application of Rule

3.4-17 In rules 3.4-17 to 3.4-23,

"matter" means a case, a transaction, or other client representation, but within such representation does not include offering general "know-how" and, in the case of a government lawyer, providing policy advice unless the advice relates to a particular client representation.

3.4-18 Rules 3.4-17 to 3.4-23 apply when a lawyer transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that:

(a) It is reasonable to believe the transferring lawyer has confidential information

relevant to the new law firm's matter for its client; or

(b)

(i) the new law firm represents a client in a matter that is the same as or related to a matter in which a former law firm represents or represented its client ("former client");
(ii) the interests of those clients in that matter conflict; and
(iii) the transferring lawyer actually possesses relevant information respecting that matter.

Commentary

[1] The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification. As stated by the Supreme Court of Canada in *Macdonald Estate v. Martin*, [1990] 3 SCR 1235, with respect to the partners or associates of a lawyer who has relevant confidential information, the concept of imputed knowledge is unrealistic in the era of the mega-firm. Notwithstanding the foregoing, the inference to be drawn is that lawyers working together in the same firm will share confidences on the matters on which they are working, such that actual knowledge may be presumed. That presumption can be rebutted by clear and convincing evidence that shows that all reasonable measures, as discussed in rule 3.4-20, have been taken to ensure that no disclosure will occur by the transferring lawyer to the member or members of the firm who are engaged against a former client.

[2] The duties imposed by this rule concerning confidential information should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

[3] **Law firms with multiple offices** — This rule treats as one "law firm" such entities as the various legal services units of a government, a corporation with separate regional legal departments and an interjurisdictional law firm.

3.4-19 Rules 3.4-20 to 3.4-22 do not apply to a lawyer employed by the federal, a provincial or a territorial government who, after transferring from one department, ministry or agency to another, continues to be employed by that government.

Commentary

[1] Government employees and in-house counsel — The definition of "law firm" includes one or more lawyers practising in a government, a Crown corporation, any other public body or a corporation. Thus, the rule applies to lawyers transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same.

Law Firm Disqualification

3.4-20 If the transferring lawyer actually possesses confidential information relevant to a matter respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless:

(a) the former client consents to the new law firm's continued representation of its client; or

(b) the new law firm has:

(i) taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the transferring lawyer to any member of the new law firm; and

advised the lawyer's former client, if requested by the client, of the measures taken.

Commentary

[1] It is not possible to offer a set of "reasonable measures" that will be appropriate or adequate in every case. Instead, the new law firm that seeks to implement reasonable measures must exercise professional judgment in determining what steps must be taken "to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information." Such measures may include timely and properly constructed confidentiality screens.

[2] For example, the various legal services units of a government, a corporation with separate regional legal departments, an interjurisdictional law firm, or a legal aid program may be able to demonstrate that, because of its institutional structure, reporting relationships, function, nature of work, and geography, relatively fewer "measures" are

necessary to ensure the non-disclosure of client confidences. If it can be shown that, because of factors such as the above, lawyers in separate units, offices or departments do not “work together” with other lawyers in other units, offices or departments, this will be taken into account in the determination of what screening measures are “reasonable.”

[3] The guidelines that follow are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

Guidelines: How to Screen/Measures to be taken

1. The screened lawyer should have no involvement in the new law firm’s representation of its client in the matter.

2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.

3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.

4. The firm should take steps to preclude the screened lawyer from having access to any part of the file.

5. The new law firm should document the measures taken to screen the transferring lawyer, the time when these measures were put in place (the sooner the better), and should advise all affected lawyers and support staff of the measures taken.

6. These Guidelines apply with necessary modifications to situations in which non-lawyer staff leave one law firm to work for another and a determination is made, before hiring the individual, on whether any conflicts of interest will be created and whether the potential new hire actually possesses relevant confidential information.

How to Determine If a Conflict Exists Before Hiring a Potential Transferee

[4] When a law firm (“new law firm”) considers hiring a lawyer, or an articled law student (“transferring lawyer”) from another law firm (“former law firm”), the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the law firm that the transferring lawyer is leaving and with respect to clients of a firm in which

the transferring lawyer worked at some earlier time.

[5] After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether any conflicts exist. In determining whether the transferring lawyer actually possesses relevant confidential information, both the transferring lawyer and the new law firm must be very careful, during any interview of a potential transferring lawyer, or other recruitment process, to ensure that they do not disclose client confidences. See Rule 3.3-7 which provides that a lawyer may disclose confidential information to the extent the lawyer reasonably believes necessary to detect and resolve conflicts of interest where lawyers transfer between firms.

[6] A lawyer's duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

Transferring Lawyer Disqualification

3.4-21 Unless the former client consents, a transferring lawyer referred to in rule 3.4-20 must not:

(a) participate in any manner in the new law firm's representation of its client in the matter; or

(b) disclose any confidential information respecting the former client except as permitted by rule 3.3-7.

3.4-22 Unless the former client consents, members of the new law firm must not discuss the new law firm's representation of its client or the former law firm's representation of the former client in that matter with a transferring lawyer referred to in rule 3.4-20 except as permitted by rule 3.3-7.

Lawyer Due-diligence for non-lawyer staff

3.4-23 A lawyer or a law firm must exercise due diligence in ensuring that each member and employee of the law firm, and each other person whose services the lawyer or the law firm has retained:

(a) complies with rules 3.4-17 to 3.4-23; and

(b) does not disclose confidential information:

i. of clients of the firm; or

ii. any other law firm in which the person has worked.

Commentary

[1] This rule is intended to regulate lawyers and articled law students who transfer between law firms. It also imposes a general duty on lawyers and law firms to exercise due diligence in the supervision of non-lawyer staff to ensure that they comply with the rule and with the duty not to disclose confidences of clients of the lawyer's firm and confidences of clients of other law firms in which the person has worked.

[2] Certain non-lawyer staff in a law firm routinely have full access to and work extensively on client files. As such, they may possess confidential information about the client. If these staff move from one law firm to another and the new firm acts for a client opposed in interest to the client on whose files the staff worked, unless measures are taken to screen the staff, it is reasonable to conclude that confidential information may be shared. It is the responsibility of the lawyer/law firm to ensure that staff who may have confidential information that if disclosed, may prejudice the interests of the client of the former firm, have no involvement with and no access to information relating to the relevant client of the new firm.

Proposed New BC Code transferring lawyer rules

3.3-7 A lawyer may disclose confidential information to the extent reasonably necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a law firm, but only if the information disclosed does not compromise the solicitor-client privilege or otherwise prejudice the client.

Commentary

[1] As a matter related to clients' interests in maintaining a relationship with counsel of choice and protecting client confidences, lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice.

[2] In these situations (see Rules 3.4-17 to 3.4-23 on Conflicts From Transfer Between Law Firms), rule 3.3-7 permits lawyers and law firms to disclose limited information. This type of disclosure would only be made once substantive discussions regarding the new relationship have occurred.

[3] This exchange of information between the firms needs to be done in a manner consistent with the transferring lawyer's and new firm's obligations to protect client confidentiality and privileged information and avoid any prejudice to the client. It ordinarily would include no more than the names of the persons and entities involved in a matter. Depending on the circumstances, it may include a brief summary of the general issues involved, and information about whether the representation has come to an end.

[4] The disclosure should be made to as few lawyers at the new law firm as possible, ideally to one lawyer of the new firm, such as a designated conflicts lawyer. The information should always be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship.

[5] As the disclosure is made on the basis that it is solely for the use of checking conflicts where lawyers are transferring between firms and for establishing screens, the

disclosure should be coupled with an undertaking by the new law firm to the former law firm that it will:

(a) limit access to the disclosed information;

(b) not use the information for any purpose other than detecting and resolving conflicts; and

(c) return, destroy, or store in a secure and confidential manner the information provided once appropriate confidentiality screens are established.

[6] The client's consent to disclosure of such information may be specifically addressed in a retainer agreement between the lawyer and client. In some circumstances, however, because of the nature of the retainer, the transferring lawyer and the new law firm may be required to obtain the consent of clients to such disclosure or the disclosure of any further information about the clients. This is especially the case where disclosure would compromise solicitor-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge).

Conflicts from Transfer Between Law Firms
Application of Rule

3.4-17 In rules 3.4-17 to 3.4-23,

"matter" means a case, a transaction, or other client representation, but within such representation does not include offering general "know-how" and, in the case of a government lawyer, providing policy advice unless the advice relates to a particular client representation.

Commentary

[2] Rules 3.4-17 to 3.4-26 apply to lawyers sharing space. Treating space-sharing lawyers as a law firm recognizes

(a) the concern that opposing clients may have about the appearance of proximity of lawyers sharing space, and

(b) the risk that lawyers sharing space may be exposed inadvertently to confidential information of an opposing client.

Transferring lawyer rules: incorporation of Model Code rules with elimination of Appendix D of *BC Code* (redlined to Model Code)

3.4-18 Rules 3.4-17 to 3.4-23 apply when a lawyer transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that:

(a) It is reasonable to believe the transferring lawyer has confidential information relevant to the new law firm's matter for its client; or

(b)

(i) the new law firm represents a client in a matter that is the same as or related to a matter in which a former law firm represents or represented its client ("former client");
(ii) the interests of those clients in that matter conflict; and
(iii) the transferring lawyer actually possesses relevant information respecting that matter.

Commentary

[1] The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification. As stated by the Supreme Court of Canada in *Macdonald Estate v. Martin*, [1990] 3 SCR 1235, with respect to the partners or associates of a lawyer who has relevant confidential information, the concept of imputed knowledge is unrealistic in the era of the mega-firm. Notwithstanding the foregoing, the inference to be drawn is that lawyers working together in the same firm will share confidences on the matters on which they are working, such that actual knowledge may be presumed. That presumption can be rebutted by clear and convincing evidence that shows that all reasonable measures, as discussed in rule 3.4-20, have been taken to ensure that no disclosure will occur by the transferring lawyer to the member or members of the firm who are engaged against a former client.

[2] The duties imposed by this rule concerning confidential information should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

[3] **Law firms with multiple offices** — This rule treats as one "law firm" such entities as the various legal services units of a government, a corporation with separate regional

Transferring lawyer rules: incorporation of Model Code rules with elimination of Appendix D of *BC Code* (redlined to Model Code)

legal departments and an interjurisdictional law firm.

3.4-19 Rules 3.4-20 to 3.4-22 do not apply to a lawyer employed by the federal, a provincial or a territorial government who, after transferring from one department, ministry or agency to another, continues to be employed by that government.

Commentary

[1] Government employees and in-house counsel — The definition of "law firm" includes one or more lawyers practising in a government, a Crown corporation, any other public body or a corporation. Thus, the rule applies to lawyers transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same.

Law Firm Disqualification

3.4-20 If the transferring lawyer actually possesses confidential information relevant to a matter respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless:

(a) the former client consents to the new law firm's continued representation of its client; or

(b) the new law firm has:

(i) taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the transferring lawyer to any member of the new law firm; and

(ii) advised the lawyer's former client, if requested by the client, of the measures taken.

Commentary

[0.1] There are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that there will be no disclosure of the former client's confidential information to any member of the new firm:

(a) if the transferring lawyer actually possesses confidential information respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, and

Transferring lawyer rules: incorporation of Model Code rules with elimination of Appendix D of *BC Code* (redlined to Model Code)

(b) if the new law firm is not sure whether the transferring lawyer possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring lawyer did in fact possess such confidential information.

[1] It is not possible to offer a set of "reasonable measures" that will be appropriate or adequate in every case. Instead, the new law firm that seeks to implement reasonable measures must exercise professional judgment in determining what steps must be taken "to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information." Such measures may include timely and properly constructed confidentiality screens.

[2] For example, the various legal services units of a government, a corporation with separate regional legal departments, an interjurisdictional law firm, or a legal aid program may be able to demonstrate that, because of its institutional structure, reporting relationships, function, nature of work, and geography, relatively fewer "measures" are necessary to ensure the non-disclosure of client confidences. If it can be shown that, because of factors such as the above, lawyers in separate units, offices or departments do not "work together" with other lawyers in other units, offices or departments, this will be taken into account in the determination of what screening measures are "reasonable."

[3] The guidelines that follow are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

Guidelines: How to Screen/Measures to be taken

1. The screened lawyer should have no involvement in the new law firm's representation of its client in the matter.

2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.

3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.

4. The firm should take steps to preclude the screened lawyer from having access to any part of the file.

4.1 The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm.

Transferring lawyer rules: incorporation of Model Code rules with elimination of Appendix D of *BC Code* (redlined to Model Code)

5. The new law firm should document the measures taken to screen the transferring lawyer, the time when these measures were put in place (the sooner the better), and should advise all affected lawyers and support staff of the measures taken.

6. These Guidelines apply with necessary modifications to situations in which non-lawyer staff leave one law firm to work for another and a determination is made, before hiring the individual, on whether any conflicts of interest will be created and whether the potential new hire actually possesses relevant confidential information.

How to Determine If a Conflict Exists Before Hiring a Potential Transferee

[4] When a law firm ("new law firm") considers hiring a lawyer, or an articled law student ("transferring lawyer") from another law firm ("former law firm"), the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the law firm that the transferring lawyer is leaving and with respect to clients of a firm in which the transferring lawyer worked at some earlier time.

[5] After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether any conflicts exist. In determining whether the transferring lawyer actually possesses relevant confidential information, both the transferring lawyer and the new law firm must be very careful, during any interview of a potential transferring lawyer, or other recruitment process, to ensure that they do not disclose client confidences. See Rule 3.3-7 which provides that a lawyer may disclose confidential information to the extent the lawyer reasonably believes necessary to detect and resolve conflicts of interest where lawyers transfer between firms.

[6] A lawyer's duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[7] Issues arising as a result of a transfer between law firms should be dealt with promptly. A lawyer's failure to promptly raise any issues may prejudice clients and may be considered sharp practice.

Transferring Lawyer Disqualification

3.4-21 Unless the former client consents, a transferring lawyer referred to in rule 3.4-20 must not:

(a) participate in any manner in the new law firm's representation of its client in the matter; or

Transferring lawyer rules: incorporation of Model Code rules with elimination of Appendix D of *BC Code* (redlined to Model Code)

(b) disclose any confidential information respecting the former client except as permitted by rule 3.3-7.

3.4-22 Unless the former client consents, members of the new law firm must not discuss the new law firm's representation of its client or the former law firm's representation of the former client in that matter with a transferring lawyer referred to in rule 3.4-20 except as permitted by rule 3.3-7.

Lawyer Due-diligence for non-lawyer staff

3.4-23 A lawyer or a law firm must exercise due diligence in ensuring that each member and employee of the law firm, and each other person whose services the lawyer or the law firm has retained:

(a) complies with rules 3.4-17 to 3.4-23; and

(b) does not disclose confidential information:

i. of clients of the firm; or

ii. any other law firm in which the person has worked.

Commentary

[1] This rule is intended to regulate lawyers and articled law students who transfer between law firms. It also imposes a general duty on lawyers and law firms to exercise due diligence in the supervision of non-lawyer staff to ensure that they comply with the rule and with the duty not to disclose confidences of clients of the lawyer's firm and confidences of clients of other law firms in which the person has worked.

[2] Certain non-lawyer staff in a law firm routinely have full access to and work extensively on client files. As such, they may possess confidential information about the client. If these staff move from one law firm to another and the new firm acts for a client opposed in interest to the client on whose files the staff worked, unless measures are taken to screen the staff, it is reasonable to conclude that confidential information may be shared. It is the responsibility of the lawyer/law firm to ensure that staff who may have confidential information that if disclosed, may prejudice the interests of the client of the former firm, have no involvement with and no access to information relating to the relevant client of the new firm.

Transferring lawyer rules: incorporation of Model Code rules with elimination of Appendix D of *BC Code* (redlined to Model Code)

Table of Concordance between the transferring lawyer rules of the Model Code and the proposed new rules for the *BC Code*

Model Code rule or commentary	**Proposed BC Code rule, or commentary**
3.3-7	3.3-7
3.3-7, commentaries [1 – 6]	3.3-7, commentaries [1 – 6]
3.4-17	3.4-17
No equivalent	3.4-17, commentary [1]
34-18	34-18
3.4-18, commentaries [1 – 3]	3.4-18, commentaries [1 – 3]
3.4-19	3.4-19
3.4-19, commentary [1]	3.4-19, commentary [1]
3.4-20	3.4-20
No equivalent	3.4-20, commentary [0.1]
3.4-20, commentaries [1 – 3]	3.4-20, [1 – 3]
3.4-20 “Guidelines”	3.4-20 “Guidelines”
3.4-20 Guideline [1]	3.4-20 Guideline [1]
3.4-20 Guideline [2]	3.4-20 Guideline [2]
3.4-20 Guideline [3]	3.4-20 Guideline [3]
3.4-20 Guideline [4]	3.4-20 Guideline [4]

No equivalent	3.4-20 Guideline [4.1]
3.4-20 Guideline [5]	3.4-20 Guideline [5]
3.4-20 Guideline [6]	3.4-20 Guideline [6]
3.4-20, commentaries [4 – 6]	3.4-20, commentaries [4 – 6]
No equivalent	3.4-20, commentary [7]
3.4-21	3.4-21
3.4-22	3.4-22
3.4-23	3.4-23
3.4-23, commentaries [1 & 2]	3.4-23, commentaries [1 & 2]

The Law Society of British Columbia

Memo

To:	Benchers
From:	Renee Collins
Date:	October 27, 2016
Subject:	**Law Society Representation on the 2016 QC Appointments Advisory Committee**

1. Background

In January of this year, and in keeping with historical practice, the President and First Vice-President were appointed to participate in an advisory committee that reviews all applications for appointment of Queen's Counsel, and recommends deserving candidates to the Attorney General. The other members of the QC Appointments Advisory Committee are the Chief Justices, the Chief Judge, the Deputy Attorney General and the CBABC President.

Due to conflict, Mr. Van Ommen is no longer able to participate; in order to ensure full Law Society representation at the recent meeting of the Advisory Committee, Mr. Crossin appointed Second Vice-President Miriam Kresivo, QC.

2. Recommendation

I recommend that the Benchers ratify the appointment of Second Vice-President Miriam Kresivo, QC as the Law Society's representative on the 2016 QC Appointments Advisory Committee.

The Law Society of British Columbia

Memo

To: Benchers
From: Jeffrey G. Hoskins, QC
Date: October 3, 2016
Subject: **2017 Fee Schedules**

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1. Before the end of each calendar year, the Benchers must revise the fee schedules, which appear as schedules to the Law Society Rules, to reflect changes taking effect on the following January 1.

2. Under section 23(1)(a) of the *Legal Profession Act*, the Benchers have approved a practice fee of $2,125.57 for 2017. The insurance fee was also approved at $1,750 for lawyers in full-time practice, $875 for those in part-time practice and liability insurance surcharge, all of which are unchanged from 2016.

3. I attach a suggested resolution that will give effect to the change.

JGH

Attachments: resolution

2017 FEE SCHEDULES

SUGGESTED RESOLUTION:

BE IT RESOLVED to amend the Law Society Rules, effective January 1, 2017, as follows:

1. ***In Schedule 1, by striking "***$2,057.09***" at the end of item A 1 and substituting "***$2,125.57***", and***

2. ***In Schedule 2, by revising the prorated figures in each column accordingly; and***

3. ***In the headings of schedules 1, 2 and 3, by striking the year "***2016***" and substituting "***2017***".***

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

The Law Society of British Columbia

Interim Report of the Law Firm Regulation Task Force

Herman Van Ommen, QC (Chair)
Martin Finch, QC
Sharon Matthews, QC
Peter Lloyd, FCPA, FCA (Life Bencher)
Jan Christiansen
Lori Mathison
Angela Westmacott, QC
Henry Wood, QC

October 3, 2016

Prepared for:	Benchers
Prepared by:	Michael Lucas, Kerryn Garvie and Alison Luke Policy and Legal Services Department
Purpose:	Decision

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Executive Summary

1. Recognizing that law firms exercise a significant amount of power in the legal profession and have considerable impact on, and influence over, professional values and conduct of lawyers practising in the firm, there has been a steady expansion of the number of legal regulators engaging in the regulation of entities providing legal services.

2. Following legislative amendments to the *Legal Profession Act* in 2012, the Law Society established a Law Firm Regulation Task Force, mandated with recommending a framework for regulating law firms in BC. This interim report provides the Benchers with a detailed review of the Task Force's work-to-date and includes ten recommendations pertaining to various aspects of the regulatory design.

3. Elements considered in this report include:

    - defining regulatory goals and objectives;
    - the nature and scope of law firm regulation;
    - the adoption of a set of "professional infrastructure elements";
    - the development of several ancillary aspects of the framework, including firm contacts and registration processes; and
    - a number of compliance and enforcement related issues, including self-assessment, compliance reviews and potential disciplinary action.

4. The report concludes by outlining the Task Force's proposed next steps in developing a model of regulation that will improve the quality and effectiveness of the provision and regulation of legal services and enhance the protection of the public interest in the administration of justice.

Introduction

5. Historically, legal regulators have restricted their regulatory ambit to individual lawyers, a mode of regulation that was both desirable and practical in the context of a profession dominated by sole practitioners or small firms.

6. However, over the last several decades the landscape of the legal profession has changed dramatically. Although there are still a significant number of lawyers acting as sole practitioners, the majority of lawyers now practise in firms, some containing many hundreds of members. In larger firms, it is not uncommon for legal services to be provided by teams of

lawyers under the management or direction of a lead lawyer, and many aspects of the provision of legal services, including conflicts, accounting, training and supervision are carried out at the firm level. Even in small and middle sized firms, billing and other administrative aspects of practice are often handled by the firm itself. Despite these significant changes, the regulatory approach has, until recently, remained largely the same – focused on the individual.

7. Increasingly, there is also a recognition that firms tend to develop distinct organizational cultures that affect the manner in which legal services are provided. Accordingly, firms have become relevant actors in terms of their impact on, and influence over, professional values and conduct, and exercise a significant amount of power in the legal profession.[1]

8. In response, many jurisdictions are adopting new regulatory models designed to address the conduct of law firms. This interim report outlines work of the Law Society's Law Firm Regulation Task Force, which has spearheaded the development of a law firm regulation framework for BC.

Background

9. Over the last decade, there has been a steady expansion of the number of regulatory regimes that have introduced aspects of regulation that specifically address entities that provide legal services. Regulators of the legal profession in England and Wales, and several Australian states have adopted regulatory models that address professional conduct at the firm level. Many Canadian provinces have followed suit, with numerous law societies broadening their regulatory focus, shifting from a model that exclusively focuses on individual lawyers to one that also includes the collective lawyers work in. Nova Scotia, Quebec, Ontario, Alberta, Saskatchewan and Manitoba are all at various stages of developing their own frameworks for entity regulation.[2]

10. In 2011, the Benchers decided there was merit in exploring the extent to which the Law Society could directly regulate law firms in BC.[3] Recognizing that firms are now a dominant

[1] Adam Dodek, "Regulating Law Firms in Canada" (2012) 90:2 Canadian Bar Review. Dodek argues that law firm culture needs to be the focus of regulation. Rationale presented to support this new regulatory approach, include: the impact of firms' cultures on the provision of legal services and associated professional conduct; public perception that members of large firms receive favourable treatment from regulators, undermining confidence in the self-regulation of the profession; and the recognition that most other professions regulate entities. Online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1984635 . See also Amy Saltzyn "What If We Didn't Wait?: Canadian Law Societies and the Promotion of Effective Ethical Infrastructure in Law Practices" (2014) Ottawa Faculty of Law Working Paper No. 2015-15. Online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533229

[2] These jurisdictions are considering regulating non-legal entities as well. As such, their focus has been "entity" regulation rather than "law firm" regulation. At this stage, BC is only considering the regulation of law firms.

[3] The Law Society's last two Strategic Plans have both contained initiatives addressing law firm regulation. Most recently, initiative 2-2(b) of the 2015-2017 Strategic Plan directs the continuation of the work of the Task Force in

– but as yet, unregulated – feature of the legal environment, firm regulation was seen as a means of improving the quality and effectiveness of the provision and regulation of legal services across the province.

11. In 2012, legislative amendments to the *Legal Profession Act ("LPA")* provided the Law Society with the authority to regulate law firms of any size and organizational structure. Some of these amendments are not yet in force, as they await the Law Society's determination about how to exercise this new authority.[4]

12. Following these legislative changes, the Executive Committee created a staff working group to gather information about law firm regulation in other jurisdictions and possible models for regulation, including the advantages and disadvantages of various approaches. In July 2014, the Law Firm Regulation Task Force was established. The Task Force, which is composed of both Benchers and non-Bencher members of the profession and is supported by a team of Law Society staff, was given the mandate of recommending a framework for regulating law firms.

13. The Task Force is guided by four primary objectives:

    a. to enhance the regulation of the legal profession by expanding the regulatory horizon beyond individual lawyers to include entities that provide legal services;

    b. to enhance regulation by identifying areas of responsibility for law firms that reflect the importance of their role and by identifying opportunities for the development of standards for centralized functions that support the delivery of legal services, such as conflicts management and accounting;

    c. to engage law firms in ensuring compliance with regulatory requirements and efforts to maintain and, if necessary, to improve the professional standards and competence of lawyers who practise in the firm; and

    d. to establish responsibilities for communication, both within law firms and between firms and the Law Society, to ensure appropriate attention is brought to all matters involving regulatory standards and professional obligations.

14. The Task Force has met on eight occasions, during which it has considered a wide breadth of topics. These include: the value of establishing regulatory goals and outcomes; the nature and scope of law firm regulation, with a particular focus on the implications for sole

developing a framework for the regulation of law firms. Online at: www.lawsociety.bc.ca/docs/about/StrategicPlan_2015-17.pdf.

[4] To see the Bill at 3rd reading, see www.bclaws.ca/civix/document/id/bills/billsprevious/4th39th:gov40-3. Some amendments are proclaimed, such as the giving the Benchers the authority to make rules governing law firms, but are as yet, unused.

practitioners; the creation of a set of "professional infrastructure elements" that will serve as the foundation of the regulatory framework; and the development of several ancillary aspects of the framework, including firm contact persons and registration processes. The Task Force has also discussed compliance and enforcement related issues, including self-assessment, compliance reviews and potential disciplinary action. Earlier this year, the Task Force also conducted a province-wide consultation canvassing lawyers on their views on many of these issues. Feedback from that consultation has been discussed by the Task Force and has aided in developing the recommendations below.

Purpose

15. At this juncture, the Task Force wishes to present the Benchers with an interim report. The purpose of this report is to provide a detailed summary of the Task Force's work-to-date and reasoning, as well as to outline a series of recommendations that the Task Force has settled on.

16. The Task Force hopes that the report will elicit discussion around the recommendations presented below. As noted throughout this report, some aspects of the overall scheme are still under consideration, and feedback from the Benchers will assist the Task Force in continuing to develop some of the more detailed aspects of the regulatory framework.

Regulatory Goals

17. In the early stages of its work, the Task Force identified a number of rationales for pursuing law firm regulation. A central goal is to ensure fair and effective regulation that recognizes some issues and concerns transcend the work of any individual lawyer and are more akin to 'firm' responsibilities. Equally importantly, the new regulatory framework aims to aid the profession in delivering high quality legal services to clients through fostering a supportive, non-adversarial firm-regulator relationship. An additional regulatory goal of adopting a proactive approach to regulation is to reduce the types of behaviours that lead to incidents of misconduct, complaints and investigations. In so doing, the regulation should enhance the protection of the public interest in the administration of justice, as well as improving the Law Society's effectiveness as a regulator. These broad goals have informed much of the Task Force's work in developing the proposed regulatory model presented in this report.

18. Some jurisdictions have gone further than identifying a general set of rationale for law firm regulation and have established a set of specific "regulatory outcomes" – or the desired ends of the regulatory regime. These outcomes tend to be high-level and aspirational in nature and serve three major purposes: first, they help shape the regulatory scheme itself; second, they

can assist in clarifying the purpose of the regulation for both the profession and the public; and third, they can assist in measuring the success of the scheme, once implemented.

19. For example, the Nova Scotia Barristers' Society has developed six specific regulatory outcomes as part of its regulatory reform, which focus on lawyers and legal entities: providing competent legal services; providing ethical legal services; safeguarding client trust money and property; providing legal services in a manner that respects and promotes diversity, inclusion, substantive equality and freedom from discrimination; and providing enhanced access to legal services.[5]

20. At this stage, the Task Force is of the view that it is not essential to establish an exhaustive list of regulatory outcomes for BC. Rather, the Task Force recommends focusing on adopting a comprehensive set of "professional infrastructure elements," which represent key areas for which law firms bear some responsibility for the professional conduct of their lawyers. These elements, as further described at page 12 of this report, act as the backbone of the regulatory framework and are the *means* of achieving the goals of law firm regulation, rather than the end goals (regulatory outcomes) themselves. Many jurisdictions rely on similar types of elements or principles to define and guide the overall purpose of the regulation, rather than establishing a separate list of high-level, aspirational regulatory outcomes, as Nova Scotia has done.

> **Recommendation 1 -** Focus on the development of professional infrastructure elements as a means of achieving the desired outcomes of law firm regulation

21. Once the regulatory framework has been established, the Task Force may reconsider whether there is merit in developing regulatory outcomes, particularly as it relates to measuring the success of law firm regulation.

Proposed Application of Law Firm Regulation

22. The nature and scope of law firm regulation are key issues for the Task Force, with the question of 'how' and 'who' to regulate being fundamental to the overall design of the new regulatory framework.

[5]Regulatory outcomes for Nova Scotia are currently in draft form. See online at: http://nsbs.org/mselp-outcomes Nova Scotia is also undertaking a broad exploration of changes to the entire regulatory model, for which it has identified defined regulatory "objectives" that set out the purpose and parameters of legal services regulation, more generally. See online at: http://nsbs.org/nsbs-regulatory-objectives

Nature of law firm regulation

23. The Task Force has engaged in considerable discussion regarding the merits of adopting a "proactive" regulatory approach. Proactive regulation refers to steps taken by the regulator, or aspects built in to the structure of the regulation, that attempt to address or eliminate potential problems before they arise, including misconduct that may or may not result in complaints to the regulator. Accordingly, the emphasis is on assisting firms to comply, rather than punishing them for non-compliance. This model is premised on the theory that the public is best served by a regulatory regime that prevents problems in the first place, rather than one that focuses on taking punitive action once they have occurred.

24. Proactive regulation is also typically "outcomes-based," involving the setting of target standards or principles with which law firm compliance is encouraged. These principles are established and articulated by the regulator such that firms are told *what* they are expected to do, but there are no rules that tell firms *how* to specifically satisfy the principles and achieve compliance. This approach encourages both accountability and innovation in meeting professional and ethical duties.

25. In contrast, "reactive" regulation focuses on establishing specific prohibitions through prescriptive legal requirements (rules) and instituting disciplinary action when rules are violated. This is the approach law societies have traditionally taken when regulating lawyers: complaints are addressed individually in response to past misconduct.

26. A major criticism of this rules-based, complaints-driven model of regulation is that rather than taking steps to prevent the conduct from occurring in the first place, the regulator intervenes after the fact, and then only to sanction the lawyer for conduct that has already occurred. This creates little, if any, latitude for regulators to proactively manage behaviours of concern before they escalate.

> **Recommendation 2 –** Emphasize a proactive, outcomes-based regulatory approach

27. Following a review of a substantial body of academic literature as well as existing and developing models of law firm regulation,[6] the Task Force proposes a hybrid approach that

[6] The Solicitors Regulation Authority in England and Wales and a number of Australian jurisdictions all take a proactive, principles-based regulatory approach. Alberta, Saskatchewan, Manitoba and Ontario are all considering adopting proactive compliance-based regulation for law firms, while Nova Scotia is currently in the process of implementing what is referred to as "proactive management based regulation." The Canadian Bar Association also supports the proactive, compliance-based regulation of law firms.

emphasizes a proactive, principled, outcomes-based regulatory structure that is supported by a limited number of prescriptive elements designed to strengthen compliance.

28. As compared to more traditional modes of regulation, this "light touch" regulatory approach — which has informed many aspects of the regulatory design recommended by the Task Force in this report — is one in which the enforcement of rules plays a secondary and supporting role in achieving desired outcomes. The primary focus is on providing transparency about the objectives to be achieved, and placing greater accountability on both the regulator and the regulated in working together to ensure the proactive prevention of harms.

29. Under this approach, firms would implement internal policies and procedures addressing high-level principles established by the Law Society ("professional infrastructure elements"). The focus would be on outcomes, working in partnership with firms to support them in developing and implementing these policies to create a robust infrastructure that promotes the professional, ethical behaviour of their lawyers.

30. New rules would be designed to make firms' development of, and adherence to these policies and procedures a regulatory requirement. Compliance may be monitored through self-assessment or compliance reviews, as further detailed later in this report. By creating obligations to implement policies that promote professional conduct, the Law Society and law firms become engaged in a joint effort to prevent the occurrence of the type of behaviours that result in harm to clients and the public, and which may result in complaints and subsequent regulatory intervention.

Scope of law firm regulation

31. Under the *Legal Profession Act*, the Law Society has the authority to regulate law firms, which are defined broadly as "a legal entity or combination of legal entities carrying on the practice of law." As a result, all lawyers, including sole practitioners, *could* be recognized as practising within law firms and fall within the ambit of law firm regulation. However, whether all lawyers *should* be subject to law firm regulation, or subject to the same degree of regulation, must be considered. In this vein, the Task Force has discussed the merits of extending law firm regulation to non-standard law firms, including sole practitioners, individual lawyers in space-sharing arrangements, pro-bono and non-profit legal organizations, government lawyers and in-house counsel.

> **Recommendation 3 –** Include traditional law firms and sole practitioners within law firm regulation, while considering the inclusion of pro bono and non-profit legal organizations, government lawyers and in-house counsel at a later stage of regulatory development.

Traditional law firms

32. In BC, over 70% of lawyers now practise in law firms comprising two or more lawyers. Of these, 35% practise in small firms (2-10 lawyers), 13.7% practise in medium-sized firms (11-20 lawyers) and 24.2 % practise in large firms of 20 lawyers or more. The remaining 27% are sole practitioners.[7]

33. In order to design a comprehensive regulatory scheme, the Task Force recommends that all law firms should be subject to some form of law firm regulation, without distinction based on size. However, the Task Force is aware that the particular sensitivities associated with firm size should be recognized throughout the regulatory development process. Care must be taken not to add burdensome layers of regulation on top of the duties and obligations that existing rules already place on individual lawyers.

Sole Practitioners

34. The prevailing view of the Task Force is that sole practitioners should not be excluded from all aspects of law firm regulation, given this type of practice structure provides a sizable portion of the legal services delivered in BC. This position is also informed by the concern that such an exclusion may encourage some lawyers to pursue sole proprietorship to avoid being subject to the new regulatory scheme. However, the Task Force recognizes that, as the only lawyer in the firm, any 'law firm' responsibilities to meet regulatory requirements effectively fall to this individual. Given the broad goal of improving the regulatory process, creating additional burdens or costs for sole practitioners, or worse, double-regulation (as both an individual and a firm) should be avoided. Further, there may be some aspects of law firm regulation that have limited practical application when the firm consists of only one lawyer.

35. For example, if law firm regulation introduced a requirement that each firm must have policies and procedures in place to ensure conflicts of interest are avoided, consideration must be given to how this requirement should be tailored to the circumstances of sole practitioners, who, as individual lawyers, already have an independent professional responsibility to avoid conflicts of interests.

36. The Task Force recognizes that the nature and complexity of such policies will also vary based on whether the practice comprises one lawyer or hundreds, and the regulatory framework must recognize that a one-size-fits-all approach will be insufficient.

[7] These statistics were compiled on September 15, 2016.

37. The Canadian Bar Association ("CBA") has also highlighted the importance of ensuring that regulations are designed with a view to the unique practice circumstances of sole practitioners, including considering exemptions, as required, to avoid undue burden.[8]

38. The Task Force recommends that sole practitioners be engaged throughout the consultation process and provided with additional support as new regulations are rolled out, including guidance on the new regulatory requirements and access to model policies, specially-tailored education, training and mentorship programs.

Lawyers in space-sharing arrangements

39. The Task Force also recommends that sole practitioners in space-sharing arrangements be considered a regulated entity for some aspects of law firm regulation. These small collectives frequently develop creative, pragmatic and mutually-beneficial ways of supporting each other in practice, a mode of cooperation that the new regulatory scheme will actively encourage. Accordingly, rather than each lawyer being individually responsible for every aspect of compliance, space-sharing lawyers will be able to find ways to exploit efficiencies by meeting particular compliance obligations together.

40. Again, it is important that the unique practice circumstances of these groups are supported, not burdened, by the overarching regulatory design. In the next phase of its work, the Task Force will continue to consider how facilitating group compliance for space-sharing lawyers may best be achieved.

Pro bono and non-profit legal organizations

41. The Task Force recognizes that organizations which exclusively provide pro bono or non-profit legal services play a unique role in the provision of legal services within BC. Accordingly, the Task Force recommends undertaking a detailed analysis of the merits of their inclusion or exclusion from law firm regulation as part of the next phase of regulatory development, once critical design elements are in place.

Government lawyers and in-house counsel

42. As a collective, lawyers working within government and as in-house counsel operate in a very different context than private law firms, particularly given that they are not providing legal advice directly to the public. Consequently, some of the principles that underpin the

[8] See CBA Resolution 16-19-A "Entity Regulation and Unique Circumstances of Small and Sole Practitioners". Online at: https://www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2016/Entity-Regulation-and-Unique-Circumstances-of-Smal/16-19-A-ct.pdf

new regulatory framework may not be as relevant or applicable as they are to those in private practice.

43. On this basis, the Task Force recommends that government lawyers and in-house counsel not be included in the scope of law firm regulation at this stage. This position aligns with that of the CBA, which also supports more study and consultation before law firm regulation is extended to these groups of lawyers.[9] The Law Society of Upper Canada also suggests an incremental approach to the application of law firm regulation to government lawyers, corporate and other in-house counsel. [10]

44. Accordingly, the inclusion of these 'firms' into the regulatory scheme will be reconsidered at a later date.

Alternative business structures

45. The question of whether to allow non-lawyer controlling ownership of legal service providers is a distinct issue from the matter of law firm regulation. Consequently, when determining what type of regulatory framework is most suitable for law firm regulation, and establishing the associated regulatory elements, the Task Force will not address whether the Law Society should be engaged in the regulation of other kinds of entities.

46. Notwithstanding the proposed inclusions and exclusions detailed above, the Task Force envisages a multi-phased introduction of the new regulatory program such that some, if not all, of the practice structures initially identified as falling outside the ambit of law firm regulation may be subject to new regulatory requirements at a later date. Throughout the implementation process, the Task Force will continue to reflect on the appropriateness of the framework's application to pro bono and non-profit legal organizations, as well as government and in-house counsel.

Regulatory Framework Foundation: "Professional Infrastructure Elements"

47. Much of the Task Force's work-to-date has focused on determining where injecting aspects of regulation that specifically target firms would support or supplement the existing regulatory system. This includes areas where it may be more appropriate to entirely shift responsibility away from the individual lawyer and place it on the firm.

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[9]Letter from the Canadian Bar Association to the Federation of Law Societies and the Law Society of Upper Canada (February 26, 2016).
[10] Law Society of Upper Canada, "Promoting Better Legal Practices" (2016). Online at : https://www.lsuc.on.ca/with.aspx?id=2147502111

48. Aided by consultation with the Law Society membership, a review of regulatory frameworks of other jurisdictions implementing law firm regulation, and a review of the *Legal Profession Act*, Law Society Rules and Code of Professional Conduct, the Task Force has identified eight specific areas where it is appropriate for firms to take responsibility to implement policies and procedures that support and encourage appropriate standards of professional conduct and competence.

49. These eight elements, which the Task Force has called "professional infrastructure elements," correlate to core professional and ethical duties of firms. They are designed to be sufficiently high level and flexible to be adapted to different forms of practice, yet concrete enough to establish clear, basic standards for firm conduct.

50. Under the new framework, firms would be required to put in place – if they have not done so already – policies and procedures in relation to each of the professional infrastructure elements. Firms would be left to determine how to most effectively create and implement these policies rather than being subject to prescriptive rules. The expectation is that firms will use these professional infrastructure elements to guide best practices and to evaluate their compliance with the overarching regulatory requirements.

> **Recommendation 4 –** Adopt a set of professional infrastructure elements

51. The Task Force recommends adopting the set of eight professional infrastructure elements set out below. These elements reflect a refinement of the Task Force's considerable work on this issue and represent the key areas for which law firms bear some responsibility for the professional conduct of their lawyers. The proposed elements will be accompanied by associated guidance questions that will assist firms in determining how to interpret and satisfy each particular principle.

52. Firms may design their own policies and procedures addressing these elements. The Law Society will also aim to develop model policies in key areas that firms may choose to adopt or modify, which may be of particular benefit to small firms and sole practitioners who do not already have policies in place or do not have sufficient resources to develop them on their own.

53. Regardless of how policies are created or implemented, it is ultimately a firm's responsibility to decide how to comply with the professional infrastructure elements, taking into account the nature, scope, size and characteristics of their practice.

Proposed Professional Infrastructure Elements

	Element	Description	Rationale
1.	**Competence and effective management of the practice and staff**	Ensuring the firm provides for the delivery of quality and timely legal services by persons with appropriate skills and competence. This includes ensuring that: • issues or concerns about competence are handled in a constructive and ethically appropriate fashion, • the delivery, review and follow up of legal services are provided in a manner that avoids delay, • the firm enables lawyers to comply with their individual professional obligations, and • the firm provides effective oversight of the practice, including succession planning.	Issues relating to competence give rise to significant risks for the public and clients, including exposing law firms and lawyers to negligence claims and complaints. These issues can result from poor oversight of work products and the practice more generally.
2.	**Client relations**	Providing for clear, timely and courteous communication with clients, client relations and delivery of legal services so that clients understand the status of their matter throughout the retainer and are in a position to make informed choices. This includes having an effective internal complaints process available to clients in the event	Of the complaints received by the Law Society, many stem from a lack of appropriate communication with the client or delay resulting in the client feeling neglected. Many complaints are closed at the Law Society staff level, which means they are not serious enough to be referred to a regulatory committee; however, they account for a significant proportion of complaints. Law firms are well

		of a breakdown in the relationship.	positioned to influence lawyer behaviour in a positive manner and prevent these types of complaints from occurring in the first place.
3.	**Confidentiality**	Ensuring client information, documents and communications are kept confidential and free from access, use, disclosure or disposal unless the client consents or it is required or permitted by law.	Solicitor-client privilege and confidentiality are principles of fundamental justice and civil rights of supreme importance in Canadian law.[11] One of a lawyer's most important ethical obligations is to uphold and protect these principles. Failure to do so is to violate significant professional obligations. Further, law firms in BC are subject to privacy legislation which sets out a series of obligations concerning the collection, storage and use of personal information. Nevertheless, the Law Society receives a number of errors and omissions claims and complaints relating to lost or missing documents.[12] Lawyers are also required to report lost or improperly accessed records, or records that have not been destroyed in accordance with instructions, to the Law Society under Rule 10-4. Given the vast amount of personal information about clients in the possession of law firms, the potential for human error in this regard is high.

[11] *Lavallee, Rackell and Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209

12 The Law Society of British Columbia, Practice Material: Practice Management (February 2013) at p. 24. Online at: http://www.lawsociety.bc.ca/page.cfm?cid=300

4.	**Avoiding conflicts of interest**	Ensuring conflicts of interest are avoided from the outset and, where not avoided, ensuring they are resolved in a timely fashion.	Law firms have an important role to play in educating lawyers and non-legal staff about recognizing conflicts of interest and related issues. Conflict allegations accounted for about 8% of new complaints received by the Law Society in 2015. In some cases, the conflict could have been avoided had the firm had an appropriate system for performing a conflicts check.
5.	**Maintaining appropriate file and records management systems**	Providing appropriate file and records management systems to ensure that issues and other tasks on a file are noted and handled appropriately and in a timely manner. This includes providing for the appropriate storage and handling of client information to minimize the likelihood of information loss, or unauthorized access, use, disclosure or destruction of client information.	Requiring firms to maintain appropriate file and records management systems will reduce the risk of negligence claims for missed dates and lost file materials and the number of client dissatisfaction complaints.
6.	**Charging appropriate fees and disbursements**	Clients are charged fees and disbursements that are fair and reasonable and that are disclosed in a timely fashion.	A significant number of complaints received by the Law Society stem from dissatisfaction with fees. Much of the dissatisfaction could be avoided with clear written communication about fees at the outset and ongoing updates as to costs as the matter proceeds.
7.	**Financial management**	Ensuring compliance with accounting requirements and	Clients must have confidence that lawyers will handle their trust

		procedures, including the provision of appropriate billing practices.	funds in strict compliance with the rules. Mishandling of trust funds poses a complaints and claims risk and undermines the confidence the public should have in lawyers.
8.	**Compliance with legal obligations relating to safe and respectful workplace**	The firm provides a workplace that complies with legal obligations under the *BC Human Rights Code*, *Workers Compensation Act* and regulations made under that Act relating to freedom from discrimination and protection against bullying and harassment.	It is not intended that law firm regulation duplicate existing legislative requirements in relation to maintenance of a healthy law firm culture for lawyers and staff. However, recognizing the importance of these legal obligations, law firms should be required to have policies in place to ensure compliance with these obligations. Often there are red flags in a law firm or when lawyers or staff need help, and if issues are caught and addressed early, complaints and claims could be avoided and the public would be better protected.

Recommendation 5 – Develop mechanisms to establish compliance with professional infrastructure elements as a regulatory requirement

54. In order to ensure that firms take responsibility for their role in law firm regulation, the Task Force also recommends developing new rules that *require* firms to have adequate policies and procedures in place to address each of the professional infrastructure elements.[13] New rules should also require the policies and procedures to be in writing and kept at firm's place of business. This will provide clarity about the nature and scope of firm policies, ensure they

[13] Amendments to the *Legal Profession Act* (s. 11) permit the Benchers to make rules for the governing of law firms.

are readily available to staff at the firm and that they can be easily be provided to the Law Society, upon request. Further commentary on the enforcement of new regulatory requirements, including the requirement to have policies and procedures in place that satisfy the professional infrastructure elements, are detailed in the last portion of this report.

55. The Task Force recognizes that a transitional period will likely be required so that firms have sufficient time to understand the new rules and to develop and implement firm policies and procedures addressing the professional infrastructure elements. The Task Force will establish timelines for rolling out the new regulatory scheme in the next phases of its work.

Additional Aspects of the Regulatory Framework

Firm registration

56. It is essential that the Law Society is able to establish precisely who falls under the new regulatory framework. In considering how to achieve this, the Task Force has analyzed two different approaches: one requiring firms to complete a detailed authorization process (akin to licensing) administered by the regulator, the other simply requiring firms to register with the regulator.

57. The former process is requirements-based, such that the firm is essentially applying for permission to offer legal services. This is the approach taken in the England and Wales, where the Solicitors Regulation Authority looks carefully at the entity and its proposed activities as part of the process for determining whether the firm will be granted a Certificate of Authorization and thus, can provide legal services. This approach appears to be fairly onerous and requires considerable resources on the part of the regulatory body to administer.

58. In contrast, registration is largely informational in nature. This is the approach taken in some Australian jurisdictions, where law practices are required to provide the regulator with basic information, including a firm name, address and a list of lawyers, so that a register of law practices can be maintained. Firms must also notify the regulator when commencing or ceasing the practice of law, or when lawyers join or leave firms.

59. Given the administrative burden and costs associated with authorization, and the fact that there is already a licensing process at the individual lawyer level,[14] the Task Force recommends that initially, firms not be required to go through a formal process in order to obtain a license to provide legal services. At this stage of regulatory development, registration will suffice.[15] Information collected through the registration process would

[14]Requiring licensing of law firms could result in the double regulation of sole practitioners, essentially requiring them to license twice: once, as an individual lawyer and a second time, as a firm.

[15] The registration approach is also being favoured by Alberta, Saskatchewan and Manitoba as part of the development

include the details of the firm address, contact person(s), names of partners and staff lawyers and areas of practice. Mechanisms should be in place to ensure this information is regularly updated.

> **Recommendation 6 –** Establish a registration process for law firms

60. In addition to enabling the Law Society to clearly establish who is being regulated, information collected during the registration process may also be used for a variety of other purposes, including compiling statistics for the annual report, providing data to aid with future identification of risk and obtaining the details of the designated contact persons at the firm.

61. As neither the *Legal Profession Act* nor the Law Society Rules currently require firms to register with the Law Society, new rules will need to be developed outlining the registration process. Rules should detail the type of information firms should provide to the Law Society, the frequency and manner in which registration information is provided or updated and the extent to which this information can be shared.

62. During the next phase of its work, the Task Force will further refine what registration information should be collected, as well as considering the most appropriate method for obtaining, updating and sharing this information.

Designated contact individual

63. Most jurisdictions regulating law firms include a requirement to designate a person with responsibility for certain activities of the firm or its lawyers. The extent of the responsibilities of these contact persons vary widely, from substantial obligations to significantly less onerous roles.

64. At one end of the spectrum, law firms in England and Wales are required to appoint two compliance officers: one who is responsible for the oversight of legal practice, and the other for the firm's finance and administration. Persons occupying these positions have ultimate

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of their law firm regulation. See "Innovating Regulation: A Collaboration of the Prairie Law Societies" Discussion Paper (November 2015) at p. 41.Online at: https://www.lawsociety.sk.ca/media/127107/INNOVATINGREGULATION.pdf. Nova Scotia requires all law firms to file an annual report that details names of lawyers and the nature of their role within the firm, as well as the location and particulars of the firm's trust accounts. All LLPs must register with the Executive Director. See Regulations made pursuant to the *Legal Profession Act*, S.N.S. 2004, c. 28 at 7.2.1 and 7.4 Online at: http://nsbs.org/sites/default/files/cms/menu-pdf/currentregs.pdf

responsibility for any firm misconduct. The SRA intends to retain these roles, notwithstanding other significant anticipated changes to their regulation of law firms.[16]

65. Until the recent implementation of the new *Legal Profession Uniform Law*[17], incorporated legal practices in some Australian jurisdictions were required to appoint a legal practitioner director who was responsible for the implementation of "appropriate management systems" (the equivalent of the professional infrastructure elements), for taking reasonable action to ensure that breaches of professional obligations do not occur and to ensure that, if breaches do occur, appropriate remedial action is taken. The legal practitioner director was liable for disciplinary action if these obligations were not met.[18]

66. Even in the absence of full-scale law firm regulation, Nova Scotia requires law firms to designate a contact person to receive official communications from the regulatory body, including complaints against the firm.[19] Alberta requires law firms to designate a lawyer who is "accountable" for controls in relation to trust accounts as well as the accuracy of all filing and reporting requirements.[20] Ontario is also considering a designated contact as part of their evolving law firm regulation. It is expected that this individual will be tasked with receiving notice of complaints and taking steps to address a firm's failure to meet its regulatory responsibilities.[21]

67. In the context of a regulatory scheme that seeks to establish a regulatory partnership between the Law Society and firms, and the resulting increase in interactions between the two bodies, the Task Force recommends that firms be required to nominate one or more of their lawyers as a designated contact person.

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[16] The SRA is currently undertaking a comprehensive review of its regulatory approach. See Solicitors Regulation Authority, "Consultation, Looking to the Future – Flexibility and Public Protection" (June 2016). Online at: https://www.sra.org.uk/sra/consultations/code-conduct-consultation.page at p. 19.

[17] In July 2015 the *Legal Profession Act*, 2004 was replaced by the *Legal Profession Uniform Law Application Act*, 2014, which will govern both New South Wales and Victoria.

[18] Christine Parker, "Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible" (2004) 23:2 University of Queensland Law Journal 347 at 371 and 373. Online at: http://www.austlii.edu.au/au/journals/UQLawJl/2004/27.pdf

[19] This individual has no personal responsibility for the activities of the firm or the conduct of lawyers associated with it. See Regulations made pursuant to the *Legal Profession Act*, *supra* note 15.

[20] The Rule of the Law Society of Alberta at 119.1. Online at: http://www.lawsociety.ab.ca/docs/default-source/regulations/rules698a08ad53956b1d9ea9ff0000251143.pdf?sfvrsn=2

[21] Law Society of Upper Canada, Professional Regulation Committee Report "Convocation, Professional Regulation Committee Report" (April 2015) at para 52. Online at: http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2015/convocation-april-2015-professional-regulation.pdf

Recommendation 7 – Establish a role for the designated contact person that includes responsibilities related to general communications, reporting and complaints.

68. The Task Force proposes that the designated contacts' responsibilities should fall on the "less onerous" end of the spectrum; that is, the contact should not be held responsible for creating policies or ensuring a firm meets other regulatory obligations, nor should they be subject to personal liability for firm non-compliance. The Task Force suggests four possible areas of responsibility for the designated contacts, as detailed below:

Acting as the primary administrative liaison between the Law Society and the firm

69. The designated contacts' responsibilities would include ensuring that firms have registered and that the Law Society is apprised of any material changes in registration information. Designated contacts would also receive official correspondence from the Law Society.

Reporting on compliance with the professional infrastructure elements

70. The designated contacts' reporting responsibilities could include documenting whether firms have policies and procedures in place that address the professional infrastructure elements and providing evaluations as to the extent these policies and procedures have been followed.[22] The Task Force does not suggest making the designated contacts personally responsible for the accuracy of the reports submitted on the firms' behalf. Rather, the designated contacts would be expected to provide the relevant information to the Law Society in a timely fashion, if requested, with the ultimate responsibility for compliance falling to the firm.

Receiving notice of, and responding to complaints against the firm or lawyers at the firm

71. The role of the designated contacts with respect to the complaints process has generated considerable discussion. The Task Force recommends that these persons should be required to cooperate with the Law Society in the investigation of complaints about their firms and the firms' lawyers by coordinating responses that respond fully and substantially to the complaint. However, the process surrounding the *reporting* of complaints — both by the

[22] This could be done by way of the completion of self-assessment on behalf of the firm, as detailed later in this report.

designated contact to the Law Society and by the Law Society to the designated contact — is still under consideration.

72. With respect to complaints against the firm itself, the Task Force is considering the level of discretion designated contacts should have in reporting complaints of which they become aware to the Law Society. Similarly, when a complaint is made about a specific lawyer within the firm, the Task Force is also evaluating the extent of the designated contacts' discretion in reporting this to Law Society and the timing and informational content of any such reports.

73. Conversely, the Task Force also continues to discuss the degree of discretion the Law Society should exercise in reporting complaints or investigations against lawyers to firms' designated contacts (e.g. whether all complaints received by the Law Society against a particular lawyer should be reported, or only those that meet a certain threshold), as well as the amount of information provided to a firm by the Law Society in the wake of a complaint or investigation against one of its lawyers.

74. The principles by which this discretion will be exercised will be further refined in the next stage of the Task Force's work. In carefully examining these issues, the Task Force recognizes the benefits associated with information sharing, as well as the need to balance the privacy rights of the individual with the public interest in informing firms of the misconduct of one of its lawyers, such that the firms could take steps to remedy the behaviour before it escalates or recurs. The Task Force is also cognizant of the discretion already exercised by the Professional Conduct department as part of their existing complaints process involving individual lawyers.

75. The *Legal Profession Act* does not contain a general requirement for law firms to nominate a designated contact for the purposes of communicating with the Law Society on administrative or other matters. Accordingly, a new rule is needed to require law firms to nominate one or more practising lawyers as a designated contact for the firm. The rules would also need to clearly set out the responsibilities of these person(s), as recommended above.

76. Unproclaimed amendments of the *Legal Profession Act* also refer to a "representative of a law firm or respondent law firm" for the purposes of appearing in front of a hearing panel on a discipline matter.[23] The legislative amendments therefore contemplate the designation of a law firm representative for the purposes of disciplinary action. Rules regarding the designated contacts' responsibilities related to disciplinary action may therefore be advisable.

[23] Section 41(2) *Legal Profession Act* (unproclaimed).

77. Further, if a decision is made to permit the Law Society to disclose complaints against lawyers to the firm's designated contact, new rules to this effect will also be necessary. Currently, the rules prohibit information sharing of this type.

Compliance and Enforcement

Tools for monitoring compliance

78. The purpose of the principled, outcomes-based regulatory approach is to ensure that firms implement policies and procedures such that the principles identified by the professional infrastructure elements are satisfied. While firms are given significant autonomy and flexibility in how they meet their obligations, a method for reviewing and evaluating progress towards these outcomes is necessary in order to determine whether compliance is being achieved.

79. Other jurisdictions engaged in law firm regulation have also seen value in assessing and monitoring compliance and have focused two main tools to do so: self-assessment and compliance reviews.

Self-assessment

80. Self-assessment, completed by an individual at the firm on behalf of the firm, can range from a requirement to fill out an online form rating basic compliance with established regulatory principles[24] (e.g. professional infrastructure elements) through to providing the regulator with a detailed informational report that includes documentation of all material breaches of regulatory principles.[25]

81. Australian studies have suggested that the effects of self-assessment may be beneficial, with the requirement for firms to assess their own compliance with their implementation of "appropriate management systems" resulting in a statistically significant drop in complaints.[26] Additionally, the self-assessment process acts as an education tool by requiring

[24] This was the approach taken by the Office of the Legal Services Commissioner in New South Wales, in which a legal practitioner director was required to rate the firm's compliance with each of the ten established objectives of the regulatory scheme, using a scale ranging from "non-compliant" to "fully compliant plus". In July 2015, the *Legal Profession Act, 2004* was replaced with the *Legal Profession Uniform Law Application Act, 2014*, under which there appears to be no requirement to complete a self-assessment process. Nova Scotia's proposed self-assessment asks regulated entities to assess themselves as: "not-applicable," "non-compliant," "partially compliant" or "fully compliant" with the management systems set by the regulator. Online at: http://nsbs.org/draft-self-assessment-process-legal-entities

[25] This is the responsibility of firms' compliance officers in England and Wales, who must report to the Solicitors Regulation Authority.

[26]The authors of the study contributed this to the learning and changes prompted by the self-assessment process rather than to the actual (self-assessed) level of implementation of management systems. See Tahlia Gordon, Steve Mark and

firms to review and revise their policies, a learning exercise that improves client services.[27] Self-assessment can also be used to measure the success of law firm regulation; for example, statistics generated from responses obtained through self-reporting may help identify areas of the regulatory scheme that are functioning well or need improvement.

82. Self-assessments have been recommended for inclusion as part of developing law firm regulation in Ontario[28], Saskatchewan, Manitoba and Alberta[29]. As a part of their implementation of law firm regulation, Nova Scotia is currently launching a pilot project evaluating the self-assessment tool they have developed to measure firms' compliance with their "management systems for ethical legal practice." [30]

83. The Task Force is generally in favour of the use of self-assessment and recommends its incorporation into the law firm regulation framework.[31] The primary goal of the assessment exercise is to ensure that firms turn their minds to the policies and procedures that address the professional infrastructure elements and to regularly evaluate the extent to which they are being followed. The effectiveness of the self-reporting scheme should be assessed after a period of time to determine whether it is meeting the goals or whether a more robust scheme is necessary.

> **Recommendation 8 –** Adopt the use of self-assessment to monitor compliance

84. For example, the self-assessment form could set out the eight professional infrastructure elements and require firms to evaluate whether they are fully, partially compliant or non-compliant with a policy that supports these elements. If a firm indicates it is only partially or non-compliant, it must explain why this is the case as part of the assessment. The Law Society could also use self-assessment as a tool to determine which firms are at risk of

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Christine Parker "Regulating Law Firms Ethics Management: An Empirical Assessment of the Regulation of Incorporated Legal Practices in NSW" (2010) Journal of Law and Society. Online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1527315

[27] Canadian Bar Association, "Assessing Ethical Infrastructure in Your Law Firm: A Practical Guide" (2013). Online at: http://www.cba.org/CBA/activities/pdf/ethicalinfrastructureguide-e.pdf

[28] See Law Society of Upper Canada, Compliance Based Entity Regulation Task Force "Report to Convocation" (May 2016) at p. 4. Online at: http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2016/convocation_may_2016_cber.pdf

[29] See "Innovating Regulation: A Collaboration of the Prairie Law Societies" Discussion Paper (November 2015) at p. 40. Online at: https://www.lawsociety.sk.ca/media/127107/INNOVATINGREGULATION.pdf

[30] See Nova Scotia Barristers Society, "Draft Self-Assessment Process for Legal Entities" *supra* note 24. Two derivatives versions of this self-assessment tool are also expected to specifically address the work of sole practitioners and small firms, and in-house counsel.

[31] This position is aligned with that of the Canadian Bar Association. See the CBA Committee's Ethical Best Practices Self Evaluation Tool. Online at: http://www.lians.ca/sites/default/files/documents/00077358.pdf

misconduct and to initiate dialogue with firms that are failing to meet the regulatory requirements, in an effort to help them achieve full compliance.

85. The Task Force has not decided on the precise mode or frequency of self-assessment. In the next phase of its work, the Task Force intends to explore who should be required to complete self-assessments and how frequently they should be undertaken (e.g. all firms at regular intervals, on an ad-hoc basis in response to complaints against particular firms, at reduced frequency for firms that demonstrate consistent compliance). The Task Force will also consider how self-assessments should be administered; for example, whether they should be included as part of an annual practice declaration or trust report or as a stand-alone process, and whether assessments should be filed on paper or through an on-line portal.

86. Rules may be necessary to further guide the administration of the self-assessment process.

Compliance reviews

87. The Task Force has also discussed the extent to which compliance reviews may assist in monitoring compliance with the new regulatory framework. These audit-type processes would be designed to emphasize compliance by helping firms to identify areas requiring improvement rather than serving as a mechanism for penalizing for non-compliance.

88. Compliance reviews are currently being considered for inclusion as part of law firm regulation in Ontario,[32] Alberta, Saskatchewan and Manitoba,[33] and are supported by the Canadian Bar Association.[34] Australian jurisdictions also conduct compliance audits if there are reasonable grounds to do so based on conduct or complaints relating to either the law practice or one or more of its associates.

> **Recommendation 9 –** Consider adopting the use of compliance reviews to monitor compliance

89. The Task Force is considering utilizing compliance reviews to assist in monitoring firms' compliance with the new regulatory framework. Components of the review could include confirming that policies and procedures relating to each of the professional infrastructure elements are in place, identifying areas where the implementation or maintenance of these policies or procedures is inadequate and providing guidance as to how these inadequacies can be remedied.

[32] *Supra* note 28
[33] *Supra* note 15.
[34] *Supra* note 9.

90. The Task Force is also considering when a compliance review might be triggered. Possibilities include: routine reviews at defined intervals; a review resulting from a firm failing to complete the self-assessment process or providing inadequate or inaccurate information; a review following a self-assessment that indicates a firm is only partially compliant or non-compliant; a review in response to a complaint against the firm; or a review deemed necessary due to other indications that appropriate policies and procedures are not being implemented or maintained (e.g., a concern about accounting arises in the context of a trust audit).

91. The Task Force will undertake further analysis before recommending how, and by whom, compliance reviews would be conducted. Particular attention will be given to the potential financial and resource implications for the Law Society of including a compliance review component in the regulatory framework.

Enforcement

92. The Task Force has not discussed enforcement in any degree of detail. Further analysis on how the disciplinary process should unfold in relation to firm misconduct is necessary with the assistance of staff in the Professional Conduct and Discipline departments who have detailed knowledge of how disciplinary action does, and could, work. However, for the purposes of this report, it is sufficient to provide a few high-level statements with respect to the anticipated enforcement strategy.

93. As discussed throughout this report, the model of law firm regulation recommended by the Task Force will primarily be a proactive, principled and outcomes-based framework that focuses on compliance. This light-touch approach emphasizes prevention over punishment such that discipline against firms is not anticipated to be pursued frequently. However, unless the framework includes enforcement capabilities in the form of disciplinary action or sanctions, there is no ability to ensure compliance with regulatory obligations. Consequently, determining what situations might warrant disciplinary action and developing a suite of enforcement tools will also be necessary.[35]

> **Recommendation 10 –** Continue to develop policies and rules to address non-compliance with new regulatory requirements

[35] The Solicitors Regulation Authority has also emphasized the need to develop a defined enforcement strategy in addition to new rules as part of its phased review of their regulatory approach to regulating both lawyers and firms. Further consultations on that enforcement policy will occur later this year. *Supra* note 16 at pp. 10 and 13. Notably, the SRA has proposed two separate Codes of Conduct – one for solicitors and one for firms – which are intended to provide greater clarity to firms as to the systems and controls they need to provide good legal services for consumers and the public, and greater clarity to individual lawyers with respect to their personal obligations and responsibilities.

Situations that may warrant disciplinary action

94. There are two types of situations whereby firms may find themselves subject to disciplinary measures. First, a firm may be found to be non-compliant with new regulatory requirements. For example, if there is a requirement to have policies and procedures in place that address the professional infrastructure elements and a firm fails to implement such policies or procedures, the Law Society may undertake disciplinary action to address this non-compliance. Similarly, if there is a new rule requiring firms to register, a firm that fails to register could be subject to a sanction.

95. Second, the law firm may be subject to a specific complaint that may warrant some form of disciplinary action. Amendments to the *LPA* include the addition of a definition of "conduct unbecoming the profession," which is broad enough to capture the conduct of firms as well as individual lawyers.[36]

Focus of disciplinary action

96. The Task Force discussed the need to develop guidance around when regulatory intervention should be focused at the firm level, when the focus is more appropriately placed on individual lawyers, and when both the lawyer and the firm should be subject to some form of disciplinary action.

97. In some cases, it will be clear where regulatory efforts should be directed. For example, if the Law Society received a complaint about a conflict of interest and, upon conducting an investigation, found that a firm had failed to develop policies and procedures on conflicts, the firm could be subject to disciplinary action. Conversely, if a compliance review revealed that the firm had strong policies and procedures regarding conflicts, but a lawyer failed to disclose all relevant facts to the firm or failed to raise pertinent information with the firm's conflicts committee, and was subsequently found to be in a conflict of interest, it may be that the lawyer, but not the firm, becomes the subject of disciplinary action. A third situation may arise in which the firm is found to have a conflicts policies and procedures in place, but upon review by the Law Society, the policies and procedures are determined to be inadequate. A lawyer has nevertheless followed the policies and procedures and is found to be in a conflict of interest. It is possible that disciplinary action would only be pursued against the firm and not the lawyer.

[36]"Conduct unbecoming the profession" includes a matter, conduct or thing that is considered, in the judgment of the benchers, a panel or a review board a) to be contrary to the best interest of the public or of the legal profession, or b) to harm the standing of the legal profession. Section 38 of the *LPA* has also been amended to include references to "conduct unbecoming the profession". See sections 1(b) and 27 of the *Legal Profession Amendment Act, 2012*. Neither of these amendments are in force.

98. This example highlights the need to develop some general parameters and policies around when the Law Society should pursue matters with individual lawyers, with firms, or both.

99. As previously noted, the Task Force is also continuing to evaluate the extent to which information regarding disciplinary action against a lawyer by the Law Society should be shared with the lawyer's firm. Open communication has the benefit of facilitating the involvement of firms early in the process of addressing problems with its lawyers; even if not the ultimate 'resolver' of the complaint, the firm may be able to play a role in finding a solution. Finding non-disciplinary outcomes for low level complaints is one area where law firms may be particularly well-suited. However, this approach must be balanced against the privacy interests of individual lawyers.

Type of enforcement responses

100. Although law firm regulation is primarily proactive and outcomes-based, it will be necessary to incorporate prescriptive rules and associated sanctions to address those situations where firms fail to comply with certain aspects of the regulatory framework.[37]

101. The Task Force is considering a wide spectrum of disciplinary options in the event of a lack of compliance with one or more regulatory requirements. Early responses to non-compliance could include those that are "remedial" in nature; for example, contacting the firm to discuss the reason for non-compliance or undertaking a compliance review to assist the firm ensuring it has implemented policies and procedures that address the professional infrastructure elements.

102. However, there may be instances where misconduct is so severe or widespread that some form of disciplinary action may be more appropriate; for example, non-compliance with the professional infrastructure elements after repeated remedial intervention by the Law Society, or systemic behaviour that presents a substantial risk to the public and that cannot otherwise be mitigated may warrant sanctions.[38] This is consistent with the approach taken today with regulation of individual lawyers.

103. Amendments to the *Legal Profession Act* provide the Benchers with the authority to make rules that could encompass a wide range of disciplinary measures, including examinations or investigations of firms' books, records and accounts; producing records, evidence and

[37] Note that the Law Society Rules have provide for the discipline of law corporations since 1988.

[38] The SRA take a similar approach of incremental supervision and enforcement. They may engage with firms in response to particular events (e.g. a complaint); use "desk-based supervision" and "visit-based supervision" involving telephone or in-person contact with regulatory officials to firms; participate in "constructive engagement" with the aim of assisting firms in tackling risks and improving standards; and finally, if there is a serious non-compliance with SRA principles or a risk to the public exists that cannot be mitigated, enforcement action will be taken, which may include warnings, fines, revoking or suspending the authorization of the firm, or an intervention in which the SRA takes possessions of the client documents and funds.

providing explanations in the course of an investigation; requiring a firm to appear before a hearing panel or a Committee to discuss firm conduct; or issuing citations. Amendments also provide that, if a hearing panel finds a firm has engaged in conduct unbecoming the profession, as defined in the *LPA,*[39] a firm may be reprimanded, conditions or limitations may be placed on the firms' practice or fines of up to $50,000 may be issued.[40]

104. In the next phase of its work, the Task Force intends to explore how the particulars of the disciplinary process and its associated rules may need to be adapted to accommodate the regulation of law firms.

Resource Implications

105. At this early stage of development, a detailed analysis of the potential resource implications for the Law Society of the new regulatory scheme has not yet been undertaken. However, the Task Force is aware that in order to establish an regulatory framework that supports the Law Society, the profession and the public interest more generally, additional financial and human resources must be provided throughout both the development and implementation phases of the project. Costs associated with completing and launching the new regulation will include: the development of model policies, self-assessment tools and rules; consultation and communication with the profession; designing specially tailored education, training and mentorship programs for target groups (e.g. sole practitioners); and increasing the regulatory functions of the law society.

106. Once law firm regulation is implemented, it is expected that the Professional Conduct and Discipline departments will initially see an increase in work load, as both firms and the Law Society navigate the new regulatory scheme. For example, investigations into complaints against firms will add to the work the Law Society does with respect to regulating individual lawyers. Compliance reviews, to the extent that they become part of the final regulatory design, will also require additional resources. However, over the longer term, the regulatory program will strive to become cost-neutral, as regulatory efficiencies are enhanced and complaints decrease as a consequence of firms becoming increasingly engaged in governing the professional and ethical behaviours of their lawyers

107. Additional analysis on the resources implications of law firm regulation will be part of the next phase of the Task Force's work.

[39] *Supra* note 35 (not yet in force).
[40] *Legal Profession Amendment Act* 2012 at s. 24 and s. 27. These provisions are not yet in force.

Summary of Recommendations

108. A summary of the recommendations contained in this interim report is provided below:

Recommendations

1. Focus on the development of professional infrastructure elements as a means of achieving the desired outcomes of law firm regulation;
2. Emphasize a proactive, outcomes-based regulatory approach;
3. Include traditional law firms and sole practitioners within law firm regulation, while considering the inclusion of pro bono and non-profit legal organizations, government lawyers and in-house counsel at a later stage of regulatory development.
4. Adopt a set of professional infrastructure elements;
5. Establishing compliance with professional infrastructure elements as a regulatory requirement;
6. Establish a registration process for law firms;
7. Establish a role for the designated contact person that includes responsibilities related to general communications, reporting and complaints;
8. Adopt the use of self-assessment to monitor compliance;
9. Consider adopting the use of compliance reviews to monitor compliance;
10. Continue to develop policies and rules to address non-compliance with new regulatory requirements.

Next Steps

109. The proposed next step is for the Task Force to conduct a second round of consultation with the legal profession on the proposed framework for regulating law firms. In addition to seeking input from across the province, consultation will also include focus groups designed to elicit feedback from specific types of practice structures, such as sole practitioners and space-sharing lawyers.

110. The Task Force will undertake internal consultations with relevant departments at the Law Society concerning the proposed changes and how to develop model policies addressing the professional infrastructure elements.

111. The Law Firm Regulation Task Force aims to present a final report to Benchers once these steps have been completed. That report will include final recommendations of the Task Force, discussion of the results of the second round of consultation with the legal profession, a timeline for implementing the proposed law firm regulation framework and discussion of resource implications for the Law Society. Time must also be allowed for the proclamation of amendments in the *Legal Profession Act* which are currently not in force and are necessary for the full functioning of the regulatory framework.

112. It is envisaged that law firm regulation will be implemented in two phases. The first phase would be a 'soft' implementation, which will include the requirement for law firms to register with the Law Society and appoint a designated a contact person. It is not anticipated that compliance and enforcement elements would be introduced at this stage. This approach will provide law firms with sufficient time to understand the new requirements and implement the required policies and procedures prior to them being enforced.

113. The second phase will bring the compliance and enforcement elements of law firm regulation into effect. While the timeline for implementation has not yet been determined, it is expected that the second phase will be launched no earlier than a year after the beginning of the first phase to allow sufficient time for the education and transitional components of the framework to be completed.

Conclusion

114. The introduction of law firm regulation represents a significant shift to the regulatory environment within BC, and in turn, the role of the Law Society in supporting and overseeing the work of the profession. The conduct of firms of all sizes will now be regulated, resulting in both new responsibilities and new opportunities that will serve to improve the provision of legal services across the province.

115. The Law Society is dedicated to working collaboratively with firms in implementing the proposed regulatory framework and assisting them in achieving compliance. As the framework continues to evolve, the Law Society will also be engaged in monitoring and fine-tuning elements of the regulatory design to ensure that the move toward this new mode or regulation is progressive, considered and reflective in nature.

116. Law firm regulation is an important, if not essential step into a more fair and efficient regulatory landscape, one that will address the conduct of some of the most influential actors

in the profession – law firms – and in so doing, enhance both the protection of the public interest and the Law Society's effectiveness as a regulator.

The Law Society of British Columbia

Memo

To:	Benchers
From:	Access to Legal Services Advisory Committee
Date:	October 3, 2016
Subject:	Do lawyers have a professional responsibility to promote access to justice and make their services available to the public?

Purpose of Memorandum

The purpose of this memorandum and supporting materials is to assist the Benchers in a policy discussion about the extent to which lawyers, as a collective, have (or ought to have) a professional obligation to promote access to justice and make their services available to the public.

Format and Objectives of the Discussion

The Committee will present the topic, outlining some of the considerations the Committee has given to the topic. Following the presentation, the plan is to have a discussion amongst the Benchers, to see how the topic might be developed and next steps identified.

The objectives of the discussion are:

1. To get the Benchers to begin a discussion that ultimately will enable to the Law Society to better articulate the scope of responsibility lawyers, as a collective, have to foster access to justice and their services;

2. To identify whether such an obligation exists, or does not exist, and explore what some of the implications of such a policy statement might be;

3. To identify next steps in the further development of the topic, including the need to obtain better information about the current efforts of lawyers to promote access to justice

and access to legal services, and what innovations law firms might undertake to better achieve those goals.

Discussion

For several meetings the Committee discussed whether lawyers have, or should have, a professional responsibility to promote access to justice and make their services more available. The Committee reviewed a range of materials, including academic writing on professionalism, mandatory pro bono, evaluating the benefit of legal services to society, and the Law Society's own policies regarding funding pro bono and access to justice. While the materials the Committee considered were not exhaustive of the subject, they were sufficiently wide-ranging to provide varied perspectives on the topic. To this material the Committee considered policy opinions from staff, and brought their own experience and perspectives to bear in formulating a framework for discussion by the Benchers.

The Committee thinks it is important for the Benchers to engage in this discussion because it will better enable the Benchers to direct Law Society resources towards principled access to justice initiatives in the future. In much the same way that the mandate of the Legal Aid Task Force requires the creation of a principled vision for legal aid, one can argue that establishing a principled understanding of lawyers' professional responsibility to promote access to justice will better enable the Law Society to develop sound policy in this area.

Section 3 of the *Legal Profession Act* clearly supports the concept that the Law Society has an obligation to promote access to justice and access to legal services. The Law Society's Strategic Plan reflects this obligation, as do the various initiatives it has undertaken to advance access to justice. These projects include: becoming the first law society to create rules to foster the delivery of limited scope legal services (unbundling), expanding the scope of services articled students and paralegals can perform, developing principles for funding pro bono and access to justice initiatives and increasing funding for those purposes, approving the policy objective of seeking a legislative amendment to credential and regulate new class(es) of legal service provider to address areas of unmet and under-served legal need, and extending insurance coverage for retired and non-practising lawyers doing pro bono through an approved service provider.

What is less clear is the extent to which, as a collective, the profession has an obligation to promote access to justice and access to their legal services. Do lawyers have a professional obligation, and if so, what is the source of that obligation? If an obligation exists, does it have its origins in the role of law as a *profession*? Does the origin lie in the various privileges lawyers enjoy, such as the independence of the bar, the right to appear in court, the relative exclusivity lawyers have to practice law for a fee? If these privileges do not carry with them obligations regarding access to justice and access to legal services, how is the public interest in the administration of justice secured? Is the scope of obligation limited to how lawyers provide their

services, or is it broad enough to contemplate what services are provided and to whom? These are difficult but important questions if the Law Society is to discharge its mandate to the best of its ability.

For the purposes of its analysis and for the discussion with the Benchers, the Committee did not seek to define what access to justice and access to legal services means. The Committee was concerned that simply limiting the discussion to an exploration of mandatory versus voluntary pro bono, for example, would foreclose the possibility of arriving at a deeper understanding of the access to justice challenges we face. Fostering access to justice might include pro bono, low bono, legal aid, various forms of volunteerism, as well as a host of day-to-day professional legal services lawyers provide. However, the Committee observes that much of the Law Society's efforts are focused on particular types of legal work to improve access to the more marginalized members of society. If the Law Society's access efforts properly define the scope of improving access to justice and access to legal services, then the reality is that some lawyers will be doing this work and others will not.

The discussion in November will benefit from the Benchers being able to articulate, for the purpose of the question to be considered, what fostering access to justice and legal services means. Is it limited to certain types of services and/or certain portions of society? If so, why? If it is not limited in this way, why not? And in both cases, what are some of the implications of such a policy decision? From this, we can start exploring whether lawyers have or ought to have a professional responsibility to foster access to justice and access to their services, and sketch out what that might mean.

The Committee intends the discussion to be the beginning of a dialogue, out of which the Benchers may provide direction for the Committee how to develop the topic for further consideration by the Benchers.

Next Steps

To a certain extent the next steps will depend on the discussion by the Benchers. However, the Committee is of the view that in order to advance this issue, the Law Society should seek to obtain better information from the profession.

At present, lawyers are required to indicate on their Annual Practice Declarations how many hours of pro bono they perform. The Committee is of the view the Law Society should attempt to get a better understanding of what types of pro bono is taking place. At the same time, it would be a good idea to better understand the other efforts lawyers are making to foster greater access to their services by people of low income or moderate means.

The Committee is also of the view that the Law Society should survey firms to find out what sort of access to justice and legal services the firms are prepared to undertake.

The idea of these “surveys” would be to better understand what lawyers are doing at present to promote access to justice and legal services, and what innovations might take place.

The Committee is of the view that the Law Society, armed with better information about what is taking place and what the profession views as possible, can develop policies that better encourage and foster access to justice and legal services.

/DM

/Attachments

Agenda materials Pages 96-134, Richard Devlin, "Bend or Break: Enhancing the Responsibilities of Law Societies to Promote Access to Justice" (Manitoba Law Journal, Vol. 38, 2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2774309

The (So-Called) Professional Responsibility to Foster Access to Justice

by Adam Dodek, Slaw, June 8, 2016

There are many excellent recommendations in the CBA's *Reaching Equal Justice* report.

As a law professor and a member of the Legal Education and Training Team of the CBA's Legal Futures initiative, I naturally focused on those relating to law schools, including this one:

All graduating law students should have a basic understanding of the issues relating to access to justice and know that fostering access to justice is an integral part of their professional responsibility.

This sounds great but there is a problem. *Reaching Equal Justice* assumes that access to justice is part of a Canadian lawyer's professional responsibility. Except that it isn't – if we take Codes of Professional Conduct as the starting point for defining Canadian lawyers' professional responsibilities.

The CBA's own *Code of Professional Conduct* is embarrassingly silent on fostering access to justice as a professional responsibility.

Surprisingly, perhaps, there is no chapter on Access to Justice in the CBA Code. There is however a chapter on "Practice by Unauthorized Persons". In fact, the term "access to justice" does not even appear in the CBA Code. To say that access to justice is not an important part of the CBA's Code is therefore a colossal understatement. It barely registers.

In this the CBA is not unique. The Federation of Law Societies of Canada's *Model Code of Professional Conduct* takes a similarly disinterested view towards access to justice as a professional responsibility of Canadian lawyers (although it does at least mention access to justice in the commentary to Rule 4.1-1).

In contrast, most Canadian law schools are already teaching their students that there is a professional obligation to foster access to justice. I imagine that most entering law students heard such inculcations on their first day of law school from their Dean or from a keynote speaker. For many years, the Faculty of Law at Windsor has led the way with a year-long course devoted to Access to Justice. Osgoode introduced a 40 hour public interest requirement years ago. At Ottawa, access to justice infuses the curriculum and we have over 200 students each year applying for 80 Pro Bono Students Canada placements. Every law school in Canada has similar programs.

In the now-mandatory Professional Responsibility course, most law schools use the text *Lawyers' Ethics and Professional Regulation* by Alice Woolley, Richard Devlin, Brent Cotter and John M. Law which devotes one of thirteen chapters to Access to Justice (full disclosure: I contributed to two shorter chapters on other subjects in this text).

From my experience, the problem isn't that we don't teach enough about access to justice in law schools, it's that our students don't have an outlet for their passions for access to justice when they enter the profession.

Codes of Conduct are important because they reflect the ethos of the profession. They serve an educational function, inculcating new members of the profession and radiating out into the general public. Codes of conduct then are powerful symbols of the legal profession.

We can do better in Canada.

The ABA's Model Rules of Professional Responsibility provides that "Every lawyer has a professional responsibility to provide legal services to those unable to pay." (Rule 6.1). The ABA Rule then sets an aspirational target of 50 pro bono hours for all lawyers.

I hope the CBA, the Federation of Law Societies and provincial law societies follow the recommendations in *Reaching Equal Justice*, and explicitly identify fostering access to justice as "an integral part" of Canadian lawyers' professional responsibility.

American Bar Association

ABA Model Rule 6.1

Voluntary Pro Bono Publico Service

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Comment

[1] Every lawyer, regardless of professional prominence or professional workload, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory lawyers' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

Model Code Comparison

There was no counterpart of this Rule in the Disciplinary Rules of the Model Code. EC 2-25 stated that the "basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . .. Every lawyer, regardless of professional prominence or professional work load, should find time to participate in serving the disadvantaged." EC 8-9 stated that "[t] he advancement of our legal system is of vital importance in maintaining the rule of law . . . [and] lawyers should encourage, and should aid in making, needed changes and improvements." EC 8-3 stated that "[t] hose persons unable to pay for legal services should be provided needed services."

The Law Society of British Columbia

Financial Report

September 30, 2016

Prepared for: Finance & Audit Committee Meeting – November 3, 2016

Bencher Meeting – November 4, 2016

Prepared by: Jeanette McPhee, CFO & Director Trust Regulation

Financial Report – To September 30, 2016

Attached are the financial results and highlights for the nine months ended September 30, 2016.

General Fund

General Fund (excluding capital and TAF)

The General Fund operations resulted in a positive variance to budget of $1.0 million to September 30, 2016.

Revenue

Revenue is $17,598,000, $747,000 (4%) ahead of budget due to additional membership revenues, electronic filing revenue, and interest income. Some of this positive variance is a timing issue, and is expected to reverse by year end.

Operating Expenses

Operating expenses for the first nine months were $15,487,000, $286,000 (2%) under budget, with savings in external fees in the credentials and forensic accounting areas.

2016 Forecast - General Fund (excluding capital and TAF)

The General Fund results are expected to be over budget for the year, currently projecting a positive variance of $765,000 (3%).

Operating Revenue

Operating revenue is projected to have a positive variance of $500,000 (2%).

Practicing membership revenue is projected at 11,600 members, an additional 100 members over budget, or $150,000 in revenue. PLTC revenue will be lower than budgeted by $85,000, with 470 students, compared to a budget of 500. Electronic filing revenues are expected to be over budget by $185,000, as the result of higher real estate unit sales. Fines and recoveries are expected to be over budget by $165,000.

Operating Expenses

Operating expenses are projected to have a positive variance to budget of $265,000 (1%).

Additional external counsel fees in regulation of $100,000 are projected, offset by savings in credentials and forensic accounting fees of $300,000, along with other miscellaneous savings of $65,000.

TAF-related Revenue and Expenses

The first two quarters of TAF revenue was above budget by $695,000 due to much higher real estate unit sales. Real estate unit sales to date are up 22% from 2015, and we expect this trend will continue to the end of 2016.

The trust assurance program costs were under budget $172,000, due to savings in travel costs.

Special Compensation Fund

There has been minimal activity in the Special Compensation Fund, with a small amount of recovery income, offset by related collection costs.

Lawyers Insurance Fund

LIF operating revenues were $11.1 million for the first nine months, ahead of budget $277,000 (3%).

LIF operating expenses were $4.7 million, $460,000 (10%) below budget, mainly due to staff vacancies.

The market value of the LIF long term investments held by the investment managers is $156 million, an increase of $8.8 million in the first nine months. The year to date investment returns were 6.0%, compared to a benchmark of 4.9%.

The Law Society of British Columbia

Summary of Financial Highlights - September 2016
($000's)

2016 General Fund Results - YTD September 2016 (Excluding Capital Allocation & Depreciation)

	Actual*	Budget	$ Var	% Var
Revenue (excluding Capital)				
Membership fees	13,542	13,243	299	2%
PLTC and enrolment fees	987	1,008	(21)	-2%
Electronic filing revenue	744	499	245	49%
Interest income	386	262	124	47%
Credentials & membership services	405	441	(36)	-8%
Fines, penalties & recoveries	434	367	67	18%
Other revenue	227	155	72	46%
Building revenue & tenant cost recoveries	873	876	(3)	0%
	17,598	16,851	747	4%
Expenses (excl. dep'n)	15,487	15,773	286	2%
Results before spending on reserve items	**2,111**	**1,078**	**1,033**	
Approved spending from Reserves	57	-	57	
	2,054	1,078	976	

* Note: Actuals include $57,000 in costs related to Bencher approved items to be funded from the reserve

2016 General Fund Year End Forecast (Excluding Capital Allocation & Depreciation)

Practice Fee Revenue	**Avg # of Members**
2011 Actual	10,564
2012 Actual	10,746
2013 Actual	10,985
2014 Actual	11,114
2015 Actual	11,378
2016 Budget	11,500
2016 Forecast	**11,600**

	Actual Variance
Revenue	
Membership revenue projected to be above budget by 100 members	150
PLTC - 30 student less than budget of 500	(85)
Electronic Filing Revenue	185
Interest Income	85
Fines, Recoveries & Miscellaneous	165
	500
Expenses	
External Counsel Fees - Regulation/Legal Defence	(100)
Credentials/Forensic Fees	300
Miscellaneous savings	65
	265
2016 General Fund Variance (excl. reserve funded items)	765

Reserve funded amounts (Bencher approved):	Approved	Spent
2016 - Proactive practice standards project ($55K approved)	55	33
2015 - Year 2 - Articling student ($28K approved & remaining)	28	24
	83	57

Trust Assurance Program Actual

	2016 Actual	2016 Budget	Variance	% Var
TAF Revenue **	2,327	1,632	695	42.6%
Trust Assurance Department	1,743	1,915	172	9.0%
Net Trust Assurance Program	584	(283)	867	

** Q3 revenue not due until October 31

2016 Lawyers Insurance Fund Long Term Investments - YTD September 2016 *Before investment management fees*

Performance	6.0%
Benchmark Performance	4.9%

The Law Society of British Columbia
General Fund
Results for the 9 Months ended September 30, 2016
($000's)

	2016 Actual	2016 Budget	$ Variance	% Variance
Revenue				
Membership fees **(1)**	15,584	15,262		
PLTC and enrolment fees	987	1,008		
Electronic filing revenue	744	499		
Interest income	386	262		
Other revenue	1,067	963		
Building Revenue & Recoveries	873	876		
Total Revenues	19,641	18,870	771	4.1%
Expenses				
Regulation	5,786	5,891		
Education and Practice	2,674	2,607		
Corporate Services	1,942	2,116		
Bencher Governance	738	559		
Communications and Information Services	1,547	1,518		
Policy and Legal Services	1,551	1,702		
Occupancy Costs	1,707	1,892		
Depreciation	264	211		
Total Expenses	16,209	16,497	288	1.7%
General Fund Results before TAP	**3,432**	**2,373**	**1,059**	
Trust Administration Program (TAP)				
TAF revenues	2,327	1,632	695	43%
TAP expenses	1,743	1,915	172	9%
TAP Results	**584**	**(283)**	**867**	
General Fund Results including TAP	**4,014**	**2,090**	**1,924**	

(1) Membership fees include capital allocation of $2.04m (Capital allocation budget = $2.02m)

The Law Society of British Columbia
General Fund - Balance Sheet
As at September 30, 2016
($000's)

	Sep 30 2016	Dec 31 2015
Assets		
Current assets		
Cash and cash equivalents	193	82
Unclaimed trust funds	1,772	1,709
Accounts receivable and prepaid expenses	1,366	1,711
B.C. Courthouse Library Fund	1,274	676
Due from Lawyers Insurance Fund	13,030	28,065
	17,634	32,243
Property, plant and equipment		
Cambie Street property	12,568	12,810
Other - net	1,102	1,221
	31,304	46,273
Liabilities		
Current liabilities		
Accounts payable and accrued liabilities	1,636	5,657
Liability for unclaimed trust funds	1,772	1,709
Current portion of building loan payable	500	500
Deferred revenue	5,027	20,142
Deferred capital contributions	15	23
B.C. Courthouse Library Grant	1,274	676
Deposits	28	27
	10,251	28,734
Building loan payable	2,100	2,600
	12,351	31,334
Net assets		
Capital Allocation	3,056	2,011
Unrestricted Net Assets	15,898	12,928
	18,953	14,939
	31,304	46,273

The Law Society of British Columbia
General Fund - Statement of Changes in Net Assets
Results for the 9 Months ended September 30, 2016
($000's)

	Invested in Capital	*Working Capital*	Unrestricted Net Assets	Trust Assurance	Capital Allocation	2016 Total	2015 Total
	$	$	$	$	$	$	$
Net assets - At Beginning of Year	10,931	(653)	10,278	2,649	2,011	14,939	11,614
Net (deficiency) excess of revenue over expense for the period	(925)	2,313	1,388	584	2,041	4,014	3,325
Repayment of building loan	500	-	500	-	(500)	-	-
Purchase of capital assets:						-	
LSBC Operations	365	-	365	-	(365)	-	-
845 Cambie	132	-	132	-	(132)	-	-
Net assets - At End of Period	**11,003**	**1,660**	**12,663**	**3,233**	**3,055**	**18,953**	**14,939**

The Law Society of British Columbia
Special Compensation Fund
Results for the 9 Months ended September 30, 2016
($000's)

	2016 Actual	2016 Budget	$ Variance
Revenue			
Annual assessment	-	-	
Recoveries	75	-	
Interest income	-	-	
Other income	-	-	
Total Revenues	**75**	**-**	**75**
Expenses			
Claims and costs, net of recoveries	59	-	
Administrative and general costs	1	-	
Loan interest expense	(19)	-	
Total Expenses	**41**	**-**	41
Special Compensation Fund Results	**34**	**-**	**34**

The Law Society of British Columbia
Special Compensation Fund - Balance Sheet
As at September 30, 2016
($000's)

	Sep 30 2016	Dec 31 2014
Assets		
Current assets		
Cash and cash equivalents	1	1
Due from Lawyers Insurance Fund	1,386	1,352
	1,386	1,352
	1,386	**1,352**
Liabilities		
Current liabilities		
Accounts payable and accrued liabilities		
Net assets		
Unrestricted net assets	1,386	1,352
	1,386	1,352
	1,386	**1,352**

The Law Society of British Columbia
Special Compensation Fund - Statement of Changes in Net Assets
Results for the 9 Months ended September 30, 2016
($000's)

	Actual $	Budget $
Unrestricted Net assets - At Beginning of Year	1,352	1,335
Net excess of revenue over expense for the period	34	17
Unrestricted Net assets - At End of Period	**1,386**	**1,352**

The Law Society of British Columbia
Lawyers Insurance Fund
Results for the 9 Months ended September 30, 2016
($000's)

	2016 Actual	2016 Budget	$ Variance	% Variance
Revenue				
Annual assessment	11,130	10,853		
Investment income	8,566	4,980		
Other income	77	60		
Total Revenues	19,773	15,893	3,880	24.4%
Expenses				
Insurance Expense				
Provision for settlement of claims	11,027	11,027		
Salaries and benefits	1,873	2,239		
Contribution to program and administrative costs of General Fund	926	937		
Provision for ULAE	-	-		
Insurance	276	320		
Office	357	391		
Actuaries, consultants and investment brokers' fees	541	392		
Allocated office rent	219	218		
Premium taxes	5	7		
Income taxes	-	-		
	15,224	15,531		
Loss Prevention Expense				
Contribution to co-sponsored program costs of General Fund	544	670		
Total Expenses	15,768	16,201	433	2.7%
Lawyers Insurance Fund Results	**4,005**	**(307)**	**4,312**	

The Law Society of British Columbia
Lawyers Insurance Fund - Balance Sheet
As at September 30, 2016
($000's)

	Sep 30 2016	Dec 31 2015
Assets		
Cash and cash equivalents	8,484	28,216
Accounts receivable and prepaid expenses	140	169
Prepaid Taxes		4,131
Due from members	225	159
General Fund building loan	2,600	3,100
Investments	152,724	144,174
	164,173	**179,949**
Liabilities		
Accounts payable and accrued liabilities	215	1,154
Deferred revenue	3,526	7,331
Due to General Fund	13,030	28,065
Due to Special Compensation Fund	1,386	1,352
Provision for claims	58,202	58,240
Provision for ULAE	7,920	7,920
	84,278	104,060
Net assets		
Unrestricted net assets	17,500	17,500
Internally restricted net assets	62,394	58,388
	79,894	75,888
	164,172	**179,949**

The Law Society of British Columbia
Lawyers Insurance Fund - Statement of Changes in Net Assets
Results for the 9 Months ended September 30, 2016
($000's)

	Unrestricted $	Internally Restricted $	2016 Total $	2015 Total $
Net assets - At Beginning of Year	58,388	17,500	75,888	65,811
Net excess of revenue over expense for the period	4,005	-	4,005	10,077
Net assets - At End of Period	**62,394**	**17,500**	**79,894**	**75,888**

LEGAL EDUCATION

Building a Better Continuum Together

The Algonquin Resort
St. Andrews by-the-Sea
New Brunswick
October 19 – 22, 2016

Federation of Law Societies of Canada
2016 Annual Conference
Final Programme

LEGAL EDUCATION:
Building a Better Continuum Together

MEETING NOTES

CONFERENCE SCHEDULE

The Conference program begins on Wednesday, October 19, 2016 at 08:45 with the formal introduction and opening, and concludes at 12:00 on Thursday, October 20, 2016. Participants are free to make their return travel plans after that time. For those staying on for the Federation meetings, the final meeting to be held is the Federation Council Meeting, which is scheduled to end at 16:00 on Saturday, October 22. Times may be subject to change. Details of all sessions are enclosed.

FEDERATION OFFICE

Throughout the conference, the Federation office will be located in the Algonquin Room of the Algonquin Resort.

HOSPITALITY SUITE

The hospitality suite, located in the Right Whale Pub in the resort, will be open from 22:00 Wednesday, Thursday and Friday evening.

SCENT-FREE MEETINGS

We recognize that some people are sensitive to scented products. Perfumes and strong odors can prompt severe asthma attacks. Please limit the use of perfumes, scented hair spray, cologne, aftershave or any other highly scented products out of respect for these individuals. Thank you for your co-operation.

DRESS CODE

The dress code is business casual for all meetings and events except for the President's Reception and Law Society Dinner, which are scheduled for Wednesday evening, October 19. For these two events, the dress code is casual attire.

EVENT LOCATIONS

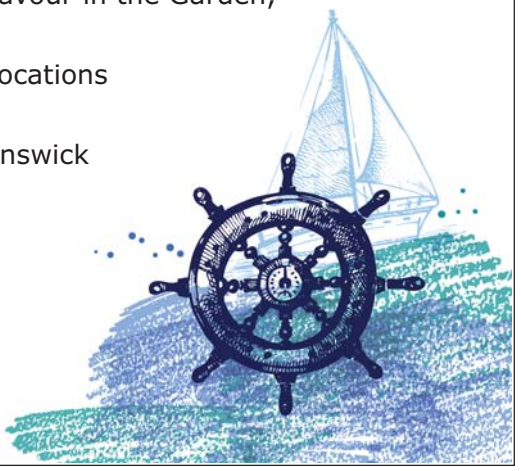
All events will be held at the Algonquin Resort Hotel except the following:

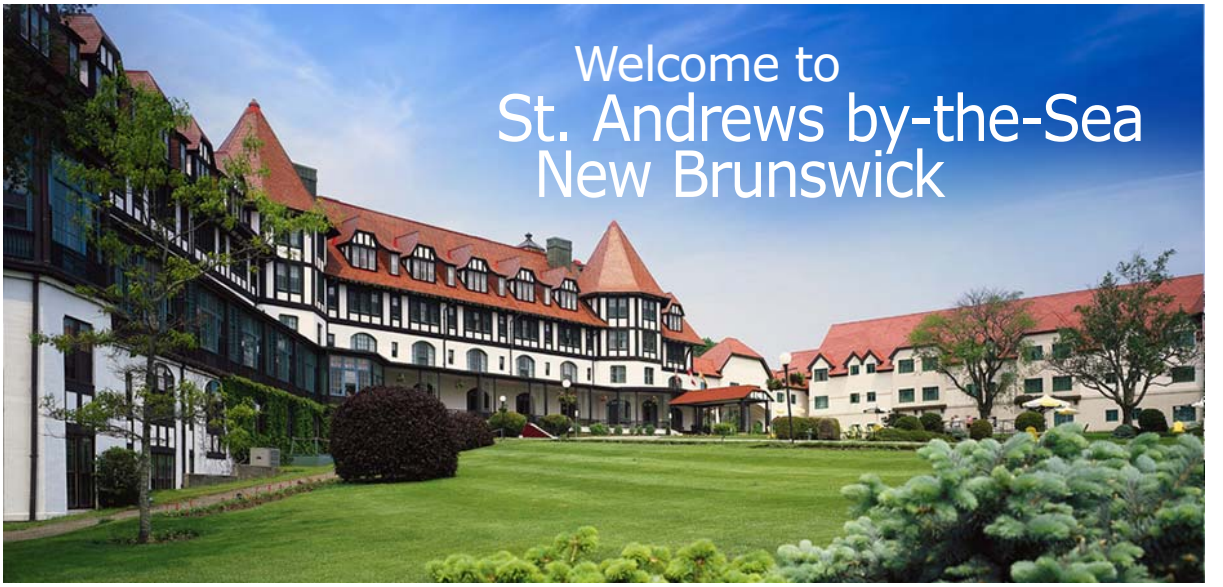
- The Council/Presidents' and Vice Presidents' Dinner on Thursday night will be held at the Rossmount Inn – 4599 Route 127 (506.529.3351).
- The CEOs' Dinner on Thursday night as well, will be held at Savour in the Garden, 220 King St. (506.529.4055).
- The law society delegation dinners on Friday night will be at locations determined by the law societies.

The main meeting room for our conference will be the New Brunswick Ballroom in the Algonquin Resort.

FIND OUT MORE

Brief biographies and photographs of our presenters are available on the Federation intranet.





The Law Society of New Brunswick is pleased to welcome you to the 2016 Annual Conference of the Federation of Law Societies of Canada.

We are delighted to be hosting this fall's Conference at the historic Algonquin Resort in picturesque St. Andrews by-the-Sea.

Chief Hugh Akagi of the Passamaquoddy Nation, on whose land our meeting takes place, will open the Conference with greetings on behalf of his People as we prepare to focus our attention on legal education.

This year's Annual Conference challenges us to reflect on legal education as a continuum from law school through to legal practice, and to think about how we can collaborate to better prepare law students and new lawyers for the realities of legal practice in a changing world. Law societies, law schools and Indigenous communities are among the key stakeholders that will shape the legal profession of the future. Through sharing of perspectives and lessons learned, we will address important questions, including the role of experiential learning in legal education and our responses to the Truth and Reconciliation Commission's Calls to Action. Together, we hope to chart a new course toward a better legal education continuum.

We would like to thank the Planning Committee members who have worked hard over the past few months to organize what promises to be a thought-provoking, informative and inspiring program.

We hope to engage everyone in meaningful discussion, plan for the future, and at the same time enjoy all that our unique province has to offer, including New Brunswick's legendary hospitality and magnificent scenery.

Enjoy your stay!

George P. L. Filliter, Q.C.

President, Law Society of New Brunswick

Richard J. Scott, Q.C.

Council Member representing the Law Society of New Brunswick

WEDNESDAY, OCTOBER 19, 2016

CONFERENCE BREAKFAST All Conference Participants	07:45 – 08:45	Shaughnessy Ballroom
OR		
NORTHERN LAW SOCIETIES BREAKFAST	07:45 – 08:45	St. Croix Room
OR		
ATLANTIC LAW SOCIETIES BREAKFAST	07:45 – 08:45	St. Andrews Room

LEGAL EDUCATION: Building a Better Continuum Together

CONFERENCE WELCOME AND OPENING — 08:45 – 9:00 — New Brunswick Ballroom

(All Conference Participants)

Thomas G. Conway
Federation Past President and Conference Chair

George P. L. Filliter, Q.C.
President, Law Society of New Brunswick

Chief Hugh Akagi of the Passamaquoddy Nation

*"Let's welcome them" in the Passamaquoddy-Maliseet language (said by welcomer in welcome dance)

WEDNESDAY, 0CTOBER 19, 2016

KEYNOTE ADDRESS 09:00 – 10:30 New Brunswick Ballroom

OUR CHANGING PROFESSION: CHALLENGES AND OPPORTUNITIES

Paula Littlewood
Executive Director
Washington State Bar Association

Lawyering as we know it and have known it for centuries may soon be a thing of the past. The shifting lawyer demographic, the changing needs and nature of clients, and the acceleration of technology are among the major forces challenging traditional models of legal practice. Moving into the future, we will be educating and regulating not just lawyers, but a legal services market with multiple types of legal professionals. Drawing on recent research and experiences in the United States, Paula Littlewood will discuss what these changes mean for legal education and regulation, and how collaboration among all parties in the education pipeline will be important for success in preparing tomorrow's legal professionals.

Paula Littlewood joined the staff of the Washington State Bar Association as deputy director in 2003 and has served as its executive director since 2007. Before joining the WSBA, Paula was assistant dean for administration and public relations at the University of Washington School of Law. Previously, she served as a professional campaign coordinator and fundraiser, working on statewide candidate and initiative campaigns as well as local legislative races.

Ms. Littlewood received her bachelor's degree from Claremont McKenna College *magna cum laude* and her law degree with honors from the University of Washington School of Law, where she also served as editor-in-chief of the Pacific Rim Law & Policy Journal. She also earned a master's degree in international studies, focusing on U.S.-Asian relations and studying Mandarin Chinese. Ms. Littlewood recently served on the American Bar Association's Commission on the Future of Legal Services, co-chairing its Regulatory Opportunities subcommittee, and also was a member of the ABA's Future of Legal Education Task Force.

Following the keynote presentation, Ms. Littlewood will be joined by Alan Treleaven, Director, Education & Practice at the Law Society of British Columbia, and Sébastien Lebel-Grenier, Dean, Faculty of Law, Université de Sherbrooke for a thirty-minute question and answer session with the audience.

WEDNESDAY, 0CTOBER 19, 2016

HEALTH BREAK

10:30 – 10:45 New Brunswick Foyer

THE GREAT DEBATE: ARE LAW SOCIETIES AND LAW SCHOOLS READY FOR CHANGE?

10:45 – 12:00 New Brunswick Ballroom

Moderator:

Lorne Sossin, Dean and Professor
Osgoode Hall Law School, York University

Debate Participants:

Paul B. Schabas
Treasurer, Law Society of Upper Canada

Stephen G. Raby, Q.C.
Federation Council Member representing the Law Society of Alberta

Dr. Lorna Turnbull
Professor, Faculty of Law, University of Manitoba

Adam Dodek
Professor, University of Ottawa

During this lively session, debaters from the law school and law society community will exchange views about how each group views the other, the pressures on both law societies and law schools to evolve, and how each group has responded to the calls for change. Prepare to be informed, inspired and entertained!

LUNCH

12:00 – 13:15 Shaughnessy Ballroom

All Conference Participants

WEDNESDAY, 0CTOBER 19, 2016

THE INDIGENIZATION OF LEGAL EDUCATION AND THE TRUTH AND RECONCILIATION COMMISSION CALLS TO ACTION

13:15 – 14:30 New Brunswick Ballroom

Moderator:

Shannon M. Cumming
President, Law Society of the Northwest Territories

Panelists:

E. David Crossin, Q.C.
President, Law Society of British Columbia

Angelique EagleWoman
Dean, Bora Laskin School of Law, Lakehead University

Koren Lightning-Earle
President, Indigenous Bar Association

Dr. Val Napoleon
Law Foundation Chair of Aboriginal Justice and Governance and
Provost's Community Engaged Scholar, Faculty of Law, University of Victoria

What is Indigenous Law? What does it mean to teach Indigenous Law or to train in Intercultural Competency? Where can we start? During this thought-provoking discussion, panelists will share their insights on these and other pressing questions. Participants will be invited to reflect on and share their thoughts on reconciliation, and how we can advance our collective thinking about and response to the TRC Calls to Action.

HEALTH BREAK

14:30 – 14:45 New Brunswick Foyer

EXPERIENTIAL LEARNING AND WHAT IT MEANS FOR FUTURE LAWYERS

14:45 – 15:45 New Brunswick Ballroom

Moderator:

Annie Rochette
Deputy Director, Professional Legal Training Course, Law Society of British Columbia

Panelists:

Bâtonnière Claudia P. Prémont, Ad.E.
Barreau du Québec

Lisa Cirillo
President, Association for Canadian Clinical Legal Education

Dr. Ian Holloway, P.C., Q.C.
Professor and Dean of Law, University of Calgary

Panelists will explores the what, why and how of experiential education, including the link between experiential learning and developing competencies, and how experiential learning can assist in training whole lawyers.

WEDNESDAY, OCTOBER 19, 2016

CHANGING MINDS

15:45 – 16:30 | New Brunswick Ballroom

This collection of videos highlights initiatives at law schools and law societies aimed at preparing and supporting tomorrow's graduates and current and future lawyers.

CLOSING REMARKS

16:30– 16:45 | New Brunswick Ballroom

PRESIDENT'S RECEPTION

18:00 – 19:00 | Passamaquoddy Room

All Participants and Accompanying Spouses and Guests.
NOTE: Casual Attire

DINNER HOSTED BY THE LAW SOCIETY OF NEW BRUNSWICK

19:00 – 22:00 | Shaughnessy Ballroom

All Participants and Accompanying Spouses and Guests.
NOTE: Casual Attire

HOSPITALITY SUITE

22:00 | Right Whale Pub

THURSDAY, OCTOBER 20, 2016

BUFFET BREAKFAST
08:00 – 09:00 Shaughnessy Ballroom

All Conference Participants

OR

FEDERATION (AND CANLII) 101
07:45 – 09:00 St. Andrews Room

Conference newcomers and veterans alike will benefit from this overview of the Federation, what it does and where it's going. The presentation includes an introduction to CanLII initiatives. Breakfast is included.

LEGAL EDUCATION: Building a Better Continuum Together

WEAVING IT ALL TOGETHER: WHAT DID WE LEARN?
09:00 – 09:30 New Brunswick Ballroom

Moderator:

Frank O'Brien
Director of Legal Education, Law Society of Newfoundland and Labrador

Panelists:

Richard J. Scott, Q.C.
Council Member representing the Law Society of New Brunswick

Shauna Van Praagh
Professor, Faculty of Law, McGill University

John R. Williamson
Dean, Faculty of Law, University of New Brunswick

Panelists will review the themes and highlights from the first day of the Conference and share their insights on both similar and different interests and goals of the law societies and law schools. Opportunities for further learning, discussion and collaboration will be identified.

WORKSHOP ONE
09:30 – 10:25 New Brunswick Ballroom

Workshop Facilitators:

Dr. Fernand de Varennes
Dean, Faculty of Law, Université de Moncton

Sheila M. MacPherson
Vice President and Council Member representing the Law Society of the Northwest Territories

Participants will join two discussions on topics of their choosing relating to themes and issues explored throughout the Conference.

THURSDAY, OCTOBER 20, 2016

HEALTH BREAK
10:25 – 10:40 | New Brunswick Foyer

GROUP DISCUSSION
10:40 – 11:00 | New Brunswick Ballroom

Participants will discuss ideas and suggestions from small working groups.

WORKSHOP TWO
11:00 – 11:30 | New Brunswick Ballroom

Workshop Facilitators:

Dr. Fernand de Varennes
Dean, Faculty of Law, Université de Moncton

Sheila M. MacPherson
Vice President and Council Member representing the Law Society of the Northwest Territories

Participants will discuss opportunities for dialogue and collaboration among law societies, law schools, the Federation of Law Societies of Canada and Indigenous peoples.

GROUP DISCUSSION
11:30 – 11:50 | New Brunswick Ballroom

Participants will discuss ideas and suggestions from small working groups.

CONFERENCE CLOSING
11:50 – 12:00 | New Brunswick Ballroom

LUNCH
12:00 – 13:15 | Shaughnessy Ballroom

All Conference Participants

PRESIDENTS' FORUM
13:15 – 15:00 | New Brunswick Ballroom

Law society Presidents and Vice Presidents and Federation executive

OR

CEOs' FORUM
13:15 – 15:00 | Van Horne Ballroom

Law society and Federation CEOs and senior staff

HEALTH BREAK
15:00 – 15:15 | Foyer

THURSDAY, OCTOBER 20, 2016

PRESIDENTS' FORUM (CONT'D)	15:15 – 16:45	New Brunswick Ballroom
OR		
CEOs' FORUM (CONT'D)	15:15 – 16:45	Van Horne Ballroom
FEDERATION COUNCIL, PRESIDENTS' AND VICE PRESIDENTS' DINNER Federation Council, Law society Presidents and Vice Presidents	18:30 – 22:00	Rossmount Inn 4599 Route 127 506.529.3351
OR		
CEOs' DINNER Law society and Federation CEOs and senior staff	18:30 – 22:00	Savour in the Garden 220 King Street 506.529.4055
HOSPITALITY SUITE	22:00	Right Whale Pub

FRIDAY, OCTOBER 21, 2016

BREAKFAST	08:00 – 09:00	Shaughnessy Ballroom
STRATEGIC PLANNING WORKSHOP Law society Presidents and Vice Presidents, CEOs and Staff, Federation Council and Staff **Moderators:** Me Johanne Brodeur, Ad.E. Director, Legal Affairs, Union des producteurs agricoles Allan Fineblit, Q.C. Counsel, Thompson, Dorfman, Sweatman LLP	09:00 – 10:40	New Brunswick Ballroom
HEALTH BREAK	10:40 – 11:00	New Brunswick Foyer
STRATEGIC PLANNING WORKSHOP (CONT'D)	11:00 – 12:00	New Brunswick Ballroom
LUNCH	12:00 – 13:00	Shaughnessy Ballroom
STRATEGIC PLANNING WORKSHOP (CONT'D)	13:00– 15:00	New Brunswick Ballroom
HEALTH BREAK	15:00 – 15:30	New Brunswick Foyer
STRATEGIC PLANNING WORKSHOP (CONT'D)	15:30– 17:00	New Brunswick Ballroom
DELEGATION DINNERS	18:30	Locations as selected by each delegation
KARAOKE EXTRAVAGANZA	21:30	Right Whale Pub
HOSPITALITY SUITE	22:00	Right Whale Pub

SATURDAY, OCTOBER 22, 2016

BREAKFAST	08:00 – 09:00	Shaughnessy Ballroom
FEDERATION COUNCIL MEETING Federation Council and staff, all law society representatives who wish to attend as observers are welcome	09:00 – 10:15	New Brunswick Ballroom
HEALTH BREAK	10:15 – 10:30	New Brunswick Foyer
FEDERATION COUNCIL MEETING (CONT'D)	10:30 – 12:00	New Brunswick Ballroom
LUNCH	12:00 – 13:00	Shaughnessy Ballroom
FEDERATION COUNCIL MEETING (CONT'D)	13:00– 16:00	New Brunswick Ballroom

The Law Society of British Columbia

Memo

To: Benchers

From: Equity and Diversity Advisory Committee

Date: June 22, 2016

Subject: Engaging Newly Called Lawyers

Background

The Executive Committee discussed whether the Law Society's current governance structure provides an adequate mechanism through which newly called lawyers can bring forward issues and have them addressed. The Executive Committee thought the issue of "young" lawyers might fall under the mandate of the Equity and Diversity Advisory Committee, and has tasked this Committee with considering how the Law Society might better engage with "young" lawyers.

Based on a number of discussions, it seems as though the term "young lawyer" is intended to describe "newly called" lawyers. The year of call for what constitutes "new" has not been specified, but there is some rationale to support the timeframe for "new lawyers" as being lawyers who have been called for less than 7 years.

According to Law Society Rule 1-22(1)(b):

> To be eligible to be a candidate for election as a Bencher, a member of the [Law] Society must…have been in good standing for at least 7 years.

This restriction provides some basis for the concern that lawyers with less than 7 years call may feel alienated from Law Society governance. Because they are ineligible to run for Bencher election, there is no elected representative with less than 7 years call at the Bencher table.

Although newly called lawyers are expressly precluded from election to the Bencher table, other methods of engaging newly called lawyers in Law Society governance currently include: committee work, consultations, surveys, online discussion boards, and in-person discussions (such as Bencher interviews with articled students). Nevertheless, concerns have been expressed that these methods are insufficient, and improved interaction with newly called lawyers is required.

This memo will analyze options to improve Law Society engagement with newly called lawyers.

Options

A few options have been proposed:

1. Removing the year of call restriction from the Bencher candidacy requirement;
2. Designating a special seat for newly called lawyers at the Bencher table;
3. Creating a "newly called lawyers" working group; and
4. Improving age diversity in Law Society appointments.

Analysis

Option 1: Removing the 7 Year Restriction in order to be elected as a Bencher

Rule 1-22(1)(b) requires candidates for Bencher election to be members in good standing for at least 7 years. There are a few principles underlying this rule.

Benchers are leaders in the legal profession. Implicit in Rule 1-22(1)(b) is some acknowledgement that it takes at least a few years to build up a career that would generate a positive reputation to demonstrate the level of leadership required for this role. This reputational aspect is conveyed in the requirement for members to be "in good standing" for at least 7 years.

This is not to suggest that newly called lawyers are not capable of developing into leadership roles, but the rule indicates that some experience (i.e. at least 7 years) is required to perform the role effectively. Much of the committee work required of Benchers (e.g. discipline, credentials, ethics, practice standards, etc.) assumes that Benchers will have a considerable degree of experience in the practise of law, and will be able to apply their practical knowledge in the Law Society's core decision-making functions. There is a concern that newly called lawyers may not have sufficient experience to be effective on certain panels.

However, there is discretion in the appointment of panels, and the objective of the Law Society's Appointments Policy is "to ensure that well-qualified persons with the requisite character, knowledge, expertise, willingness and ability to undertake the responsibilities of the position are appointed." The Appointments Policy should suffice to prevent underqualified persons from being appointed to committees or panels that are beyond their competence. Moreover, hearing panels consist of three people (a Bencher, a non-Bencher lawyer, and a non-lawyer), so a newly called lawyer would never be making a decision alone.

Notably, no other law society in Canada restricts eligibility for Bencher nomination based on year of call (see Appendix A). Many law societies require candidates to be in good standing. Alberta specifies candidates are ineligible "if, within the 5-year period immediately before the

date of the election" the candidate was sanctioned or suspended for professional misconduct.[1] This prevents the nomination of candidates who have been found guilty of misconduct within the 5 years preceding an election, but does not prevent newly called lawyers from seeking nomination.

Some law societies, including the Law Society of British Columbia, also require candidates to be supported by other lawyers (see Appendix A), and some (including BC) also require the supporting lawyers to be in good standing. Such requirements are likely intended to demonstrate the candidate's positive reputation and perceived leadership within the legal profession.

There may be logistical factors that could dissuade newly called lawyers from seeking Bencher nomination. It is common for newly called lawyers to be required to work and bill many hours in order to climb the career ladder. Also, because they are at the beginning of their careers, newly called lawyers who practise in firms may not be afforded flexible schedules. Newly called lawyers in sole practice may find the need to develop marketing and client retention skills in addition to practice management skills, precluding the ability to take on much in the way of volunteer activity. A significant time commitment is required of Benchers, and this may not be compatible with the schedules of newly called lawyers.

Ironically, the Law Society's call for Bencher candidates invites "young lawyers" to run:

> The Benchers note that Aboriginal lawyers, solicitors, visible minority lawyers, women lawyers and young lawyers continue to be under-represented among elected Benchers. All lawyers who meet the qualifications for Bencher and want to contribute to the governance of the profession are encouraged to stand for election, but Aboriginal lawyers, visible minority lawyers, women lawyers, young lawyers and those practising predominantly in solicitors' fields are particularly encouraged to do so. The Benchers believe that the Law Society's mandate to protect the public interest in the administration of justice will be best served by leadership from diverse backgrounds and experience.

So while "young lawyers" are being encouraged to run for Bencher election, Rule 1-22(1)(b) prevents lawyers with less than seven years at the bar from doing so. For the Law Society to genuinely welcome age diversity at the Bencher table, it would be logical to remove the year of call restriction from Rule 1-22(1)(b).

There is also an equality consideration for removing the year of call restriction, which was put before the Benchers in 1995. The Law Society's demographic data indicates that women leave the practice of law at greater rates than men in the first five years of call;[2] there is a concern that

[1] *Alberta Legal Profession Act*, section 13.
[2] For example, of all women called to the bar in 2003, only 66% retained practicing status in 2008 compared to 80% of men called in the same year.

the 7 year call requirement disproportionately affects the participation of women at the Bencher table. Women continue to be underrepresented, currently occupying 12 of 31 seats (39%) at the Bencher table. Arguably, the eligibility requirement that Bencher candidates must be members in good standing for at least 7 years poses a systemic barrier to women's participation in Law Society governance because women leave legal practice at higher rates than men during their first few years of practice.

The requirement also poses a legal barrier that currently prohibits newly called lawyers from being elected to the Bencher table. The primary benefit of removing the requirement would be to remove systemic and legal barriers and help to improve Bencher diversity in relation to gender and age. The possibility of Bencher candidacy may also increase the interest of newly called lawyers in Law Society governance, and improve successorship at the Bencher table.

On the other hand, the logistical considerations of the first few years of legal practise (noted above) may dissuade newly called lawyers from Bencher seeking candidacy even if the year of call restriction is removed. Another difficulty is that newly called lawyers may not yet have sufficient "name recognition" to get a sufficient number of votes. Moreover, it may be difficult for representatives of "minority" groups to get elected by "majority" populations.

On balance, however, there are strong policy rationales for removing the barrier. If there are newly called lawyers who are willing to step up for governance roles because they believe they have something to offer, they should not be precluded from doing so. The nomination and election procedures, in combination with the Appointments Policy should provide sufficient "checks and balances" to facilitate the election of Benchers capable of fulfilling their roles.

Option 2: Designated Seat

Another option might be to create a designated seat at the Bencher table for a newly called lawyer. Manitoba applies this model, designating a seat for a student representative at the Bencher table. A designated seat would provide tangible assurance that the concerns of newly called lawyers are being represented at the Bencher table, and would also likely increase the level of engagement of newly called lawyers with Law Society governance. However, there are a number of problems with the designated seat model.

First, there is a concern about opening "flood gates" to other equity-seeking groups who may also have reasons to request a designated seat at the Bencher table.[3]

[3] For example, there have been discussions of designating a seat for an Aboriginal Bencher. Such a seat might be justifiable based on the unique constitutional position of Aboriginal peoples, and the reality that Aboriginal issues pervade a number of areas targeted in the Law Society's strategic plan. However, the proposed "special seat" has not been fully supported, even by Indigenous lawyers (for concerns about tokenism and isolation, which will be described below). While the Benchers acknowledged a need for Aboriginal representation at the Bencher table, they

Second, a designated seat could result in tokenism. The person occupying the designated seat might be expected to represent his/her group's perspective on various issues, despite varying opinions within the group.

A third and related point is that a designated seat could also lead to the isolation and detachment of "special interest" concerns away from the Law Society's core processes. Rather than addressing a particular equity-seeking group's concerns throughout the Law Society's mandate, policies, procedures, and practices, the designated seat may result in an overreliance on the individual representative to bring forward the interests of the equity-seeking group, as well as a relegation of all issues relating to the equity-seeking group to the individual representative. The designated seat would probably lead to piecemeal governance, whereas a more holistic approach would likely be more effective.

Option 3: Working Group

Another option that has been discussed is the creation of a newly called lawyers working group. While this idea may be popular, there are a few drawbacks to consider.

First, the aforementioned concerns about flood gates, tokenism, and detachment in relation to the "designated seat" option also apply to the creation of a working group.

Second, a Law Society group for newly called lawyers may be redundant. For example:

a) The Canadian Bar Association has a Young Lawyers Section for law students, articling students and lawyers who have been in practice for less than 10 years. The group provides opportunities for discussions and continuing legal education focused on issues which arise in the early years of legal practise. However, participation is limited to CBA members, and not all newly called lawyers belong to the CBA.

b) The Inns of Court program gives junior barristers an opportunity to discuss practical and professional issues with the judiciary and senior lawyers. However, there is a cost associated with this program, registration is limited to 25 participants, and it currently only operates in Vancouver.

It has been suggested that these groups are insufficient to meet the needs of newly called lawyers because they have no regulatory powers or authority. Nevertheless, they could be useful to identify issues that require action, and to bring these issues to the attention of the Benchers to address.

There is also some uncertainty about the mandate of any proposed newly called lawyers working group. The Law Society sometimes creates working groups to examine options and develop

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opted to specifically request the government of British Columbia to appoint an Aboriginal person as a Lay Bencher rather than to create a designated "Aboriginal seat" at the Bencher table.

recommendations in relation to various aspects of the legal system (e.g. the Alternative Business Structures Working Group, Civil Justice Reform Working Group, Cloud Computing Working Group, Family Justice Reform Working Group, etc.) However, the proposed newly called lawyers working group appears to have a different purpose than previous working groups. The purpose of the proposed newly called lawyers working group seems to be a consultative mechanism for newly called lawyers to bring their issues to the attention of the Benchers, rather than analyzing possible improvements to the legal system.

Another downside to the working group option is the increased administrative burden that would be required to operate and maintain the working group (e.g. scheduling meetings, generating agendas, recording minutes, following up on action items, etc.)

A consideration that relates to the concerns about "flood gates," piecemeal governance, and administrative burdens is that, historically, the Law Society had more advisory committees, but has moved to a more cohesive governance model in recent years. For example, there used to be a Gender Bias Committee and a Multiculturalism Committee, as well as a number of related working groups (e.g. the Aboriginal Law Graduates Working Group, the Disability Research Working Group, and the Interpreters Working Group, etc.). The objectives of all of these committees and working groups have now been integrated into the Equity and Diversity Advisory Committee's mandate under the more cohesive governance model. The more cohesive approach is intended to reduce redundancies, facilitate collaboration, and streamline administration.[4]

There is some rationale to support the integration of newly called representatives into the Law Society's existing governance structure. At a preliminary consultation with newly called lawyers, they identified issues related to mentoring, articles, student debt, legal aid, and technology. These issues fall within the mandates of existing Law Society committees and task forces, so it would likely be more efficient to ensure adequate representation of age diversity in existing committees and task forces instead of creating a separate working group for newly called lawyers.

Option 4: Age Diversity in Law Society Appointments

The Law Society promotes diversity in its *Appointments Policy*, but could improve its encouragement of age diversity. Section 1.1.4 of the *Appointments Policy* states:

> The Law Society promotes diversity in its internal and external appointments and should ensure adequate representation based on gender, Aboriginal identity, cultural diversity, disability, sexual orientation and gender identity.

Notably, neither age nor length of call to the bar is listed here.

[4] A potential downside of the integrated model is that the concerns of some equity-seeking groups may become overshadowed. For example, although the Equity and Diversity Advisory Committee acknowledges that lawyers with disabilities require support, it is difficult to maintain momentum for initiatives to support them.

There are a few reasons to encourage such diversity in Law Society appointments. Lawyers of different ages or length of call likely have unique perspectives and may be closer to certain issues. For example, newly called lawyers likely have fresher memories regarding admissions and articling experiences. They may also be more attuned to technological advancements than more experienced lawyers. At the other end of the spectrum, lawyers nearing retirement may also have distinct issues and perspectives for the Law Society to consider. Accordingly, age diversity should be added to the list of diversity markers being promoted in Law Society appointments.

Age has been considered as a relevant factor in the task force appointments in the past. For instance, newly called lawyers were targeted for appointment in the Admission Program Reform Task Force in 2001. The Law Society acknowledged that newly called lawyers would have recent experience with the Admission Program, would be significantly affected by reform, and would have valuable insights to inform the Task Force's work.

Newly called lawyers should be adequately represented on all committees and task forces with mandates that affect them. Many of the issues conveyed during the preliminary consultation with newly called lawyers relate to the Legal Education Advisory Committee's mandate. The Legal Education Advisory Committee often seeks input from law students and newly called lawyers (e.g. the Committee surveyed PLTC students and newly called lawyers as part of its Admission Program Review). Accordingly, it would likely be beneficial to have at least one newly called lawyer appointed to the Legal Education Advisory Committee.

Although the Executive Committee tasked the Equity and Diversity Advisory Committee with examining how the Law Society might better engage with newly called lawyers, none of the concerns raised during the preliminary consultation with newly called lawyers involved equity or diversity issues. While age diversity should be encouraged in the Equity and Diversity Advisory Committee, a specific seat for a newly called lawyer on this Committee is likely not required.

Recommendations

After considering a number of options to improve Law Society engagement with newly called lawyers, the Equity and Diversity Advisory Committee recommends:

1. The requirement candidates for Bencher election to be members in good standing for at least 7 years [under Rule 1-22(1)(b)] should be removed; and

2. Age or length of call to the bar should be added to the list of diversity markers being promoted in section 1.1.4 of the Law Society's Appointments Policy.

APPENDIX A: BENCHER ELIGIBILITY IN OTHER LAW SOCIETIES

Law Society	Eligibility
Alberta	*Legal Profession Act* s. 13(1) Only an active member resident in Alberta is eligible for nomination and election as a Bencher. (3) A member is ineligible for nomination or election as a Bencher if at any time before the date of the election the member was disbarred. (4) A member is ineligible for nomination or election as a Bencher if, within the 5-year period immediately before the date of the election, (a) the member was found guilty of conduct deserving of sanction without an order being made for the member's disbarment as a result of the finding, unless the Hearing Committee, the Benchers or the Court of Appeal, as the case may be, made an order directing that the member is not ineligible by reason of the finding, (b) an order of the Benchers was made…for the suspension of the membership of the member for a fixed period, (c) an order of the Benchers was made…for the suspension of the membership of the member for a fixed period, unless the Benchers made an order directing that the member is not ineligible by reason of the suspension order, or (d) the membership of the member was under suspension at any time during that 5-year period. (5) A member is not ineligible…if the disbarment order or finding of guilt was successfully appealed. Nomination must be supported by 5 active members.
Saskatchewan	All members, except members under suspension, are eligible as candidates in an election of benchers. (*Legal Profession Act*, section 17). Nomination must be supported by 2 lawyers in good standing.
Manitoba	To be eligible to be a candidate for election as a bencher, a member of the society must be a practising lawyer on the 1st Monday in March of the election year and have his or her name on the voting list on the 1st Monday in April of the election year. (Rule 2-5 (a)) Nomination must be supported by 5 active members.

Manitoba student bencher	Each year, on a date fixed by the chief executive officer, the students who are enrolled in the society's bar admission course must elect one student from among their number to be student bencher for a term of one year or until his or her successor is elected. The student bencher takes office at the first meeting of the benchers following his or her election. (Rule 2-30)
Ontario	Every licensee is qualified to be a candidate in an election of benchers if his/her license is not suspended. (By-Law 3, s. 7) Nomination must be supported by 5 lawyers whose licenses are not suspended.
Quebec Barreau	Must be a practising barrister. Cannot be: purely solicitor, retired, employed by Barreau in the 3 years preceding nomination, an administrator of a section of the Barreau, a member of the board of a professional association within the legal field, or a member of a board of an affiliated body to the Barreau (e.g. Bar Services Corporation of Québec, Professional Liability Insurance Fund of the Barreau du Québec, Bar Foundation, Pro Bono Quebec School, etc.).
New Brunswick	To be eligible for nomination…the candidate shall be a member in good standing and, if an incumbent, has not been elected in more than two immediately preceding elections. *Legal Profession Act* s. 8(4)
Nova Scotia	The nomination of a candidate for election to Council is valid only if it is in writing, signed by five members of the Society in good standing who are eligible to vote in the district in which the nominee seeks to be a candidate and the nominee consents in writing to the nomination. Rule 2.5.3 A member of Council who is found guilty of professional misconduct, conduct unbecoming or professional incompetence or found to be incapacitated under Part 3 of the Act shall be deemed to have resigned from Council. Rule 2.8.2
Prince Edward Island	The council shall consist of … members in good standing. (*LPA* s. 7(1)) A maximum of two members from each firm, partnership or employer are eligible to be nominated, elected or appointed to the council or to any office for the same year. *Legal Profession Act* s. 7(3)
Newfoundland and Labrador	A person who is a member in good standing and whose name is on the voting list on the day on which the election for benchers takes place is eligible for election as a bencher. *Legal Profession Act* s. 11

Yukon	A person is not eligible for nomination and election to the executive unless they are an active member resident in the Yukon. *Legal Profession Act* s. 8(1)
Northwest Territories	Every active member is eligible for nomination and election to the Executive. *Legal Profession Act* s. 4(1)
Nunavut	Every active member is eligible for nomination and election to the Executive. *Legal Profession Act* s. 4(1)