

## **PROFESSIONAL RESPONSIBILITY MONITORING REPORT 2017-18**

*Note: This report covers the period May 1, 2017 to April 30, 2018 – edited for publication*

In this PR Monitoring Report (PRMR – we love acronyms) for 2017-18, you will see a fresh new format. It's important that Council and others understand the nature of this work, and we want to present the information in a way that makes it easier and more interesting to read.

This PRMR will tell you:

- Who is PR?
- How do we do our work?
- What does it cost?
- What's changing?

The Report is divided into six main sections, and now includes reference to the committees that support the work of PR within each relevant section:

- i. Introduction and Costs
- ii. Early Resolution
- iii. Investigation and adjudication
- iv. Legal Services support, regulation and risk
- v. Other business
- vi. What's ahead

### **i. Introduction**

#### **Who are we?**

The Professional Responsibility department manages many of the Society's key public protection and regulatory risk management processes and tools. It is responsible for taking steps to ensure that lawyers comply with the *Legal Profession Act* and Regulations, the (former) *Legal Ethics Handbook*, the *Nova Scotia Barristers' Society Code of Professional Conduct* and, where applicable, the *Land Registration Act*, as well as assisting members with adherence to Professional Standards.

Our role is essential to the Society achieving its goals and values of public protection, public confidence in the regulation of lawyers, excellence in regulation, accountability and enhancing access to justice. Further, the Professional Responsibility process supports each one of the Society's Regulatory Objectives. Sections 33 to 55 of the Act and Part 9 of the Regulations set out the authority of Committees and staff with regard to complaints, investigations and hearings, and the Fitness to Practise Program.

#### **What do we do?**

Our role with regard to risk management, compliance and public protection includes the following:

- i. Complaints intake, early resolution, dismissal and Letters of Advice;

- ii. Complaints investigation;
- iii. Prosecutions and hearings;
- iv. The Fitness to Practise Program;
- v. Unauthorized practice concerns;
- vi. Ethics education, advice and legal services support;
- vii. Regulatory risk management;
- viii. Custodians, Receivers and wind-up assistance; and
- ix. The Lawyers' Fund for Client Compensation.

The Society's values of excellence, fairness, respect, integrity, visionary leadership, diversity and accountability, and the Regulatory Objectives guide all PR work. Our role is to proactively enhance the competence of lawyers and assist them in adhering to the rules of professional conduct and practice standards. A foundational principle is to identify as proactively as possible opportunities to educate, assist, monitor and guide lawyers where problems have been found or reported, and to only use 'disciplinary' measures where required in the public interest. What is referred to public hearing and reported in the media represents only about one per cent of the work of this department and its committees.

## **How do we do it and what's changing?**

### **Excellence in Regulation**

The PR department now consists of five staff, including four lawyers who bring a high level of professionalism and consistency to this important work. Earlier this year, two fulltime staff positions were moved out of PR and in to the Department of Finance & Administration. The result is that all Trust Assurance work is now fully housed in F&A, with our new internal Auditor, Trust Assurance, as the vast majority of this work requires more education than intervention to achieve compliance.

As a small team, we continually seek to develop new ways to integrate the Triple P approach – proactive, principled and proportionate – and risk focus, into our processes. Like all other Law Societies, we strive to adhere to every aspect of the Federation of Law Societies' National Discipline Standards: for the third year running, we have achieved or exceeded all standards, with the exception of not having sufficient staff resources to answer all complaint intake calls within two business days. This will be cured by adding resources to the intake responses.

Below are some current examples of things we are changing in order to achieve an even higher level of excellence:

### **Changing the conversation with complainants and lawyers from the beginning**

We have been expanding our tools and resources to help educate lawyers and the public, encouraging informal dispute resolution at every appropriate stage, and seeking to achieve more reasonable expectations of our processes. This year, we redesigned the Compliance Officer position to become a new Officer, Early Resolution. This Officer handles the large majority of complaint intake calls and quickly engages with callers to identify concerns, discern issues within our authority, and work with callers and lawyers to resolve problems earlier, without need of a written complaint. While this can take multiple hours and phone calls, the rate of success in achieving early resolution is continuing to rise, leaving both parties more satisfied at the end of the experience. (see section below)

Another important change is our plan to move away from the language of 'complaints' as a starting point, to 'inquiries' and 'responses to requests for information'. In the near future, those with concerns

about a number of things including lawyer conduct, will complete an information request form. These requests will be reviewed with a legal services support focus, and allow the Society to determine whether an inquiry should be treated as a request for information, rather than a ‘complaint’ from the outset. In addition to the goal of reducing complaints which do not require a ‘PR’ response or investigation, this should help create efficiencies in response time, enhanced risk response through non—disciplinary means, and hopefully increase satisfaction by members and the public with the outcomes.

This process is closely tied to our legal services support goals to engage in dialogue with members and firms to improve client, file and practice management systems without need for a formal escalated response. Our move away from ‘disciplinary’ language will be further supported by proposed amendments to the *Legal Profession Act* to replace “Charge” with “Citation”, and eliminate language which originated in criminal law, where appropriate.

### **Sharing of risk information among departments**

This involves considering the ‘organization’ as an umbrella for confidential information, rather than just the PR department; and participating in regular multi-department Rounds meetings to engage in more holistic and accurate risk assessment and response. The responsibility for regulatory risk managerial leadership has now been assigned to PR, to support risk regulation in all departments.

### **Considering creative solutions**

Staff and the Complaints Investigative Committee (CIC) are moving beyond traditional responses to ethical violations and risk: lawyer and law firm education is more effective than a counsel or caution letter; in-person interviews and meetings with the CIC are much more effective in getting to the bottom of the causes for repetitive ethical violations; all components of the PR system are even more focused on changing behaviour rather than ‘punishment’. This has included increased use of mentors and practice supervisors; increased s. 36(2) and other less formal meetings of the CIC with members; longer term monitoring to achieve success; and working with firms rather than just individual lawyers to enhance ethical decision making. (See section below)

### **Applying a restorative lens to problem-solving**

Council’s Activity Plan for this year included Item 1.4: “Revise the Professional Responsibility process to establish an early resolution and assessment system founded on a restorative approach to complaints handling.” The desired outcome is that the public and members are better served by an intake process which is resolution-oriented, Triple P and risk-focused, and which facilitates early identification of matters appropriate for resolution or investigation.

Significant progress has been made on this front (refer to the section below on Early Resolution). A Restorative Approach Working Group began its work last Fall, and includes both staff and subject-area experts from outside the Society. In recent months it was decided that the goal should be expanded to include adoption of a restorative approach or lens to all regulatory decision-making across the organization, as well as in dealing with operational and HR matters, and in relation to governance. Staff training has begun, and a 12 month workplan is being developed. The NSBS will be the first law society in North America to adopt such an approach to regulatory decision-making, and this reflects our commitment to achieve lasting change and improvement in competent and ethical behaviour by our members. Council and committees will receive RA training in the coming year.

## Access to Justice

Council has two equally important strategic directions: excellence in the governance and regulation of lawyers; and enhancing access to justice. Further, Council has determined that in pursuing each of these strategic directions, these efforts should in most respects be intertwined, with the pursuit of one supporting the pursuit of the other.

The Professional Responsibility process supports Council's goals in enhancing access to legal services and justice in a number of ways, including by:

- having a simple and accessible means for the public to raise concerns and/or file complaints about their lawyers' conduct;
- making it a priority that concerns from the public are acknowledged and responded to in a timely manner;
- training PR staff to be culturally competent and aware of the importance of considering the cultural location of the public and lawyers we come into contact with as we do our work;
- assisting those who are unable to follow the standard complaints process, including the use of interpreters or accepting complaints in non-traditional ways;
- enhancing the diversity of all our committee volunteers, and engaging in regular cultural competence training;
- having a broad range of Triple P tools to meaningfully respond to concerns about lawyers' conduct at the staff and committee level, including the use of practice mentors, wellness and other consultants, and supervisors to provide meaningful guidance and advice;
- training staff and regulatory committees in concepts of a early resolution-focused and restorative approach and encouraging their application in decision making;
- enhancing the transparency of the PR process, including online access to decisions, precedents, advice and other tools;
- providing detailed, clear, plain language, written reasons for all regulatory decisions by staff and committees;
- having an independent process for review of staff decisions to dismiss complaints, chaired by a public representative;
- having public representatives involved in all regulatory committees and hearing panels;
- offering ethics advice to lawyers to assist them in making sound ethical decisions in the best interests of their clients and/or the public, which includes, where appropriate, reference to their own duties to be culturally competent and to promote access to justice;
- providing a diversionary process for lawyers suffering from an incapacity, which promotes a more dignified and supportive way to assist them in these challenging situations; and
- having legislation, regulations, education, policies and procedures that support a fair, transparent, competent and accountable hearing process.

## How much does it cost?

The costs of PR this past year were significantly lower than the previous year, and more in line with the average costs for the past five years.

**Total expenses in 2017/2018 were 31% lower than budgeted.** Cost reductions were achieved this year in all categories of external legal services, although some have been deferred to the new fiscal year due to the timing of one hearing.

The following chart compares the last three years' costs in key categories, noting the percentage (%) of total budget or actual costs the expense line represents, from 2015/16 forward.

### BUDGET BREAKDOWN

	2015-2016				2016-2017				2017-2018			
	Budget	%	Actual	%	Budget	%	Actual	%	Budget	%	Actual	%
<b>TOTAL</b>	<b>1,461,202</b>		<b>1,519,647</b>		<b>1,474,745</b>		<b>1,998,738</b>		<b>1,850,769</b>		<b>1,175,426</b>	
Investigations	143,400	10	212,189	14	213,298	14	225,805	11.3	209,500	11.3	89,838	7.6
Hearing (prosecutions)	95,600	6	193,339	13	123,516	8	715,488	36	452,800	25	155,522	13
Custodian/Receiver	116,800	8	121,937	8	139,810	9	164,301	8	125,000	7	89,031	7.5
External Legal Services	221,300	15	355,588	23	346,610	23	1,006,052	50	780,300	42	334,391	28.4

[NOTE: 2017-18 Actual costs are based on March 31, 2018; External Legal Services includes investigation (at staff and CIC levels), practice reviews, prosecution, Receiver/Custodian and wind-up costs.]

The comparison above shows a reduction of over 50% in hearing costs and external legal services overall, as compared with the previous year, which represented an unprecedented level of such costs as a result of the Lyle Howe proceedings. As compared with 2015-16, this year saw a reduction in investigation costs by about 50%, hearing and Custodian/Receiver costs meeting the average, and external legal services overall just above average.

#### Future plans to control and further reduce costs

During the past year, the Society moved the Trust Audit Program in house by hiring a Chartered Accountant to assume responsibility for the Society's trust audits, and provide internal expertise with trust accounts risk management and response, as well as education and investigations assistance where appropriate. As a result, the work associated with trust accounts monitoring and reporting moved out of PR and into Finance & Administration, which included a reduction in PR staff by two FTEs.

The next phase of enhancing our internal expertise and resources will be the filling of two new positions: General Counsel and Paralegal. With these resources, the Society will move in-house many of the legal services for which we have traditionally had to retain external counsel, in particular with regard to regulatory proceedings, and our Custodian/Receiver/Practice wind-up work. Our cost-benefit analysis estimates that this may result in slightly higher costs than average in this coming year of transition and training, with lower costs in 2019/20 and beyond. We are one of the last Law Societies to create such in-house positions, and while the Society has been exceptionally well-served by all external counsel in the past who have provided the highest quality of service in all areas, it is time to develop the internal skills, experience and resources to enable us to carry out much of this work internally, in an efficient and cost-effective manner.

The work of these new positions will be supported by existing counsel positions in PR, to further help manage costs of regulatory proceedings and other areas of legal services, and increase our capacity.

## Technology

An essential way to create capacity is to make best use of technology, and to streamline or re-engineer processes to increase efficiency and reduce costs or time. This year we will be developing the technical platform to permit electronic filing of complaints through online fillable forms permitting attachment of electronic documents in support of complaints and investigations.

Secondly, we are developing a new case management system which will be designed to facilitate the efficient and timely tracking of all matters in PR, combine databases which currently require duplicate data entry, replace our overwhelmed complaint intake database, and control deadlines and action items. This will result in time savings on a number of levels.

### ii. Early Resolution

#### Overview

This year we created the new position of Officer of Early Resolution, filled by a lawyer, to help field intake calls, to mediate complaints and to help employ our new restorative approach to intake calls and complaints.

We have historically made a distinction between intake callers and written complainants. Written complaints trigger a fairly prescriptive regulatory regime and require certain processes to be followed, whereas intake calls are able to be handled without triggering those processes. We are currently modifying our process so that both intake calls and written complaints will instead be viewed as “inquiries” or “requests for information”. This approach is outcome focused. It will enable us to be responsive, without unnecessarily triggering a process which can be more adversarial by its nature; e.g. requiring written responses.

#### Intake Calls

##### Introduction

The intake line is a phone line available for members of the public to call when they have concerns about a lawyer’s conduct. It is one of the Society’s most direct connections with the public. Callers have the benefit of speaking with one of our lawyers who is familiar with lawyers’ obligations under the *Nova Scotia Barristers’ Society Code of Professional Conduct*, the *Legal Profession Act* and regulations, and the various Practice Standards.

We identify which issues can be resolved quickly and easily without the need for a written complaint. Our goal is to deal with intake calls using our Triple P approach: one that is principled, proactive and proportionate, yet also risk-focused: sometimes callers are concerned about one thing but we learn information which presents risks even the client doesn’t appreciate.

##### Who calls us?

The number of intake calls we receive has steadily increased and this year was no exception. **Call volume increased by 20% from last year.**

By and large the main reason people call us is because of lack of communication: they can't reach their lawyer, opposing counsel won't respond to their lawyer, their lawyer hasn't adequately managed expectations as to how long the court process may take, etc. These are considered quality of service calls. While not high risk, these are the kinds of lawyer behaviours that generate dissatisfaction, mistrust and complaints.

We work hard to help our callers understand the ethical obligations of our membership. We take the time to explain, for example, how being an advocate doesn't always mean agreeing with your client, or that the rules prohibit lawyers from engaging in sharp practice even where a client may want them to. We help manage clients' expectations of their lawyers so that our membership can focus on doing the legal work and we can spend more time on the complaints that give rise to serious ethical concerns and risks.

### **TREND: High Conflict Personalities – you might know them as “vexatious litigants”**

There are two major trends we have noticed with respect to the intake line this year:

1. An increase in the number of calls we receive; and
2. An increase in the number of high conflict personalities calling our intake line.

The first we've already talked about. The second is just as pressing. A person with a “high conflict personality” (“HCP”) is a person for whom minor problems become major disputes. A person with an HCP will persist in the dispute long after other parties have let go. Often people with HCPs become vexatious litigants. They are attracted to adversarial processes because of their preoccupation with assigning blame.

With a view to changing our processes to be more restorative and less adversarial, we are also asking:

- How can we work to address harm while also ensuring we aren't indulging frivolous complaints or complaints made for a corollary purpose?
- What do you do when an intake caller or a complainant will not accept the limits of your jurisdiction?

It appears our adversarial process has been attractive to people with HCPs. We want to spend less time indulging frivolous complaints by people with HCPs and more time looking into areas where risk has been identified.

We need to change our process to ensure that we still hear allegations like his in context – it's important he be heard and that we take the time to deduce whether there has been a breach of the Code – but we also need the ability to refuse to consider complaints that are not supported by the facts or are clearly made for a corollary purpose. We also hear from many individuals with mental health problems: these voices also need to be heard and options discussed, even though we are often not in a position to help them

### **Breaking down silos to transform regulation in the public interest**

The intake line also provides us with a unique opportunity to identify where enhanced access to legal services might be needed. We are reshaping our intake database and with it, the information we capture and track, so that we can start to see larger trends. We know that part of our role in regulating the profession means ensuring that our membership has the ability to meet their obligations under the Code and are not constrained in doing so.

As we continue to work towards our priorities set out in our Strategic Framework, we have begun to recognize our role in helping to enhance access to legal services and the justice system. We will be working closely with the Equity and Access Office to discuss broader systemic issues.

### Continuing to overhaul our complaint process

We are moving away from the somewhat adversarial process of exchanging positions and responses, to a more restorative approach to complaints. We don't want our membership bogged down responding to written complaints that could be dealt with in a simple phone call and we don't want members of the public waiting months for us to process a complaint that could have been easily resolved. Like our intake calls, the vast majority of our written complaints arise from concerns over quality of service, including poor communications, and delay in or failure to move matters forward.

We are currently overhauling our complaint process. It is important we hear from members of the public when they have concerns about the conduct of our members. It is also important that we spend less time processing complaints that we have no jurisdiction to deal with or that were made for a corollary purpose. Nearly 20% of our complaints during this reporting period were made because the complainant was unhappy with the outcome of their matter.

### Disposition of written complaints closed during the reporting period

	2014/2015	2015//2016	2016/2017	2017/2018
Resolved/other	17 (13%)	13 (10%)	20 (15%)	9 (10%)
Staff dismissals	84 (63%)	93 (71%)	67 (51%)	56 (64%)
Staff LOA	7 (5%)	17 (13%)	11 (8%)	3 (3%)
Complaints Investigation Committee Dispositions	23 (17%)	7 (5%)	34 (26%)	13 (15%)
Formal Hearings	1 (1%)	1 (1%)	0 (0%)	6 (7%)
Withdrawn by Complainant	n/a	n/a	n/a	3 (3%)
<b>Total</b>	<b>132</b>	<b>131</b>	<b>132</b>	<b>87</b>

### Dismissals

This year, over 64% of written complaints were dismissed at the staff level. Of those complaints dismissed at the staff level, over 77% were because the facts did not support a finding that the member breached the Code or because the evidence did not support the allegations set out in the complaint. The other 23% were dismissed because the subject matter of the complaint was outside of the jurisdiction of the Society.

### Reasons complaints have been dismissed at the staff level

	May 1, 2016 – April 30, 2017	May 1, 2017 – April 30, 2018
<b>Reason</b>	<b># of Complaints</b>	<b># of Complaints</b>
No jurisdiction – complaint is about fees	16	2
Frivolous, vexatious, abuse of process	10	2
Facts if proven do not support a finding of a breach of the Code	5	27
Lawyer is asked for their response to complaint and evidence does not support	17	12

the allegations		
Evidence does not support the allegations (both lawyer and complainant have been asked for further documentation)	19	1

We are engaging with people earlier by picking up the phone and calling them when a concern has arisen. We are giving our members a chance to directly respond to their clients’ concerns and to help us find resolutions where possible. Our goal is to resolve as many complaints as possible. One hurdle in accomplishing that is the trend of high conflict personalities participating in our process.

**Resolutions**

The number of written complaints that we were able to successfully resolve remained steady over the last few years. We anticipate as we move forward with our restorative approach, we will be able to successfully resolve a greater number of complaints.

Additionally, what is not captured by the data above is the number of complaints we have avoided by successfully resolving concerns at the intake call stage. Even with an increase in intake calls by 20%, we have still managed to reduce the number of written complaints we received this year by 20%. This is lowest number of written complaints in many years.

Date Range	# of Complaints
May 1, 2016 – April 30, 2017	140
May 1, 2017 – April 30, 2018	111

We are currently upgrading our intake call database and will be able to capture this type of data going forward. Anecdotally, we can say that with our focus on early resolution, we have had a much higher number of successful mediations at the intake stage that have resolved the concerns of the caller.

Resolutions, as part of a restorative approach, more meaningfully address the harm done to the complainant and often result in a genuine reflection and change in behavior on the part of the lawyer. We have found that it is most often more effective to discuss the harm the client has suffered and to engage lawyers on how they might do better going forward, than it is to send them a letter of advice, reminding them of their obligations under the Code.

**Complaints Review Committee**

As discussed, most complaints are dismissed at the staff level under the delegated authority of the Executive Director to the Director of Professional Responsibility.

**Core Function**

The Complaints Review Committee (“CRC”) acts as a true appeal body from a complaint that is dismissed by the Director. The CRC is independent from the Society. The CRC is comprised of a public representative Chair and four lawyer members, none of whom may be serving on Council or have any current involvement in the Professional Responsibility process and related committees. A quorum for the CRC is 3 members.

The CRC cannot review new evidence. The standard of review is correctness. The CRC has the authority to either uphold the dismissal; or to refer the matter back to the Department of Professional Responsibility to commence or complete an investigation. In the latter cases, the matters are then referred to the Complaints Investigation Committee for final decision.

The Professional Responsibility Policies & Procedures Committee, with the assistance of staff, recently looked into CRC policies and procedures and created a “Request for Review” form, which has already begun aiding complainants in streamlining their appeal. The Request for Review form helps complainants understand that the CRC will only be reviewing what information was before the Director of Professional Responsibility when she made the decision to dismiss the complaint. It has effectively preempted complainants from filing voluminous additional documentary evidence that the CRC did not have the authority to consider as an appeal body.

The CRC reviewed 21 files this year (compared with 24 last year). They referred 3 files back for commencement or completion of investigation. In each case, the matters are then referred to the CIC. For these 3 matters, one resulted in the CIC issuing a caution relating to the lawyer’s unprofessional tone and communications with another lawyer (staff had negotiated an apology but this was not accepted by the complainant); and two dismissals were upheld.

### **iii. Investigation and Adjudication**

#### **Investigations**

##### **Values and principles**

We conduct almost all investigations of complaints at the staff level, often with the assistance of a member of the Complaints Investigation Committee who has experience in the area of law relevant to the complaint. The core values and principles we strive to bring to every investigation are fairness, respect transparency, empathy and cultural competence.

##### **New approach**

We have for over two years been approaching our investigations in a more principled, proportionate and proactive manner and have started to embed restorative approaches into how we conduct our investigations. This has manifested primarily in a reduction of requests for written responses and an increase in meetings and telephone conversations with lawyers to explain some of the concerns we may have with the way they approached a particular matter: we discuss some alternative approaches and any issues or difficulties the lawyer may be facing in her life or practice. These meetings and discussions are intended to be more conversational in nature (part of changing the dialogue) and are a departure from our traditional investigative interviews with lawyers involving mostly close-ended questions.

The hope is that through this new approach, lawyers will feel more comfortable openly discussing issues they may be facing in their practice or in dealing with a particular client or file, and we will have a better understanding of the context in which the lawyer acted and the challenges he or she may be facing in their practice. We also hope that by using a more educational and less “disciplinary” approach, we will better affect long-lasting behavioural changes in lawyers.

While we are still very much at the early stages of implementing this new approach and it is always challenging to assess the success of a change in process, we have seen a decrease in complaints against

certain lawyers who had a significant discipline history, following their meeting with staff or members of the CIC. A number of lawyers mentioned that a meeting and discussion with staff or CIC members was much more impactful and concerns raised resonated more clearly with them than any disposition letters they may have received in the past from staff or the CIC. The main challenge will continue to be trying to create a relationship of trust with lawyers that will make it so that lawyers feel comfortable sharing issues and concerns with us and being honest, candid and forthright with us.

## **Complaints Investigation Committee**

### Core function

The Complaints Investigation Committee carries out the functions assigned to it under Part III of the Act and Part 9 of the Regulations. It carries out its responsibilities in accordance with the objects of the professional responsibility process, and in a manner which is proactive (where possible), principled, proportionate and risk-focused. Its primary function is to consider and authorize appropriate action in response to reports of complaints and concerns with member conduct, in order to protect the public interest.

The CIC supports both of Council's strategic directions of excellence in regulation and access to justice. The CIC relies on clear legislative authority, as well as documented policies and procedures to ensure its decisions are within their authority, consistent, fair, well-documented and explained, and transparent. Precedents are relied upon where appropriate. The CIC strives to improve its policies and procedures on a regular basis, staying informed of developments in administrative law, working closely with the PRPPC, and engaging in regular professional development. The needs and wishes of complainants are front of mind. Understanding what drives lawyer conduct and how to improve ethical decision making has led to greater creativity and innovation in decision making, and efforts to work with the lawyer to change behaviour rather than punish. Working with law firms, rather than just individual lawyers, has also become a new reality.

### Matters before the CIC

This past year, the CIC reviewed 29 matters involving 17 lawyers during the course of the past year. The trend appears to be that the CIC is reviewing fewer matters, but the matters referred to the CIC are often more complex and the allegations of a more serious nature. The complaints reviewed by the CIC included issues surrounding **competence and quality of service, conflict of interest, honesty and candour, integrity, professional tone and demeanour, and duties to the court** (such as misleading the court, misstating evidence to the court, etc.).

### CIC approach

The CIC has continued to hold more formal and informal meetings with lawyer, such the one described above, before making decisions about disposition of complaints. The CIC held five formal meetings with lawyers (under s. 36(2)) and one informal meeting with a lawyer in the past year. These meetings offer the lawyers a chance to provide all the information they feel the CIC should have before making a decision and it gives CIC members an opportunity to have a frank discussion about their concerns with the lawyer's conduct and provide assistance to lawyers in identifying possible areas of change to avoid similar issues occurring in the future. The CIC's focus has very much been on attempting to change lawyers' behaviours and understanding the root causes of lawyers' conduct issues or problems.

Another way the CIC has tried to affect changes in lawyers' behaviours has been to order reviews of certain lawyers' practices when the CIC has reasonable and probable grounds to believe that a lawyer is practising law in a manner contrary to the public interest. The threshold for ordering a review of a lawyer's practice is very high and therefore there were only three practice reviews conducted in the past year. These practice reviews have become more educational in nature with the reviewer providing precedents to lawyers, giving concrete recommendations to lawyers for possible changes in the lawyers practice to ensure future compliance with the rules of professional conduct, and providing advice on specific open or closed files. The CIC will often give the lawyer several months to implement the recommendations made by the practice reviewer and ask that a follow-up practice review be conducted to ensure that the lawyer has implemented the recommendations made to them by the practice reviewer.

### CIC dispositions and outcomes

In this period, the CIC:

- referred three matters involving one lawyer to hearing
- issued one caution letter, two letters of caution and counsel, and one letter of counsel
- dismissed two complaints that had been referred back for further investigation by the Complaints Review Committee
- issued a caution in a third matter referred back based on the lawyer's unprofessional tone and failure to de-escalate interactions with another lawyer
- closed one complaint without taking further action in light of the lawyer's declining health and inability to practise law
- decided to consider three complaints against one lawyer resolved following this lawyer successfully completing a period of several months of mentorship, which included mentorship in the areas of wellness, administrative processes and procedures, and practice management, and
- considered one complaint about a lawyer's competence in handling a real estate matter resolved after obtaining the lawyer's undertaking that she would no longer practise real estate law.

The CIC has also started making more use of mentorship relationships and practice supervisors in order to help lawyers build trusting relationships with mentors and supervisors, and have these individuals provide ongoing advice and assistance to lawyers to ensure that they are practising in an ethical and competent manner. The use of mentors and practice supervisors can be done in lieu of a formal disposition (such as a letter of caution or counsel, a Consent to Reprimand) or in addition to a formal disposition of complaints.

### CIC and staff training

The CIC had a half day training session which included presentations on the impact of technology and social media on conduct and investigations, and the use of restorative justice principles in our processes. Staff are receiving ongoing professional development through the Restorative Approaches Working Group to assist in identifying how we can make better use of restorative approaches in our work. In the next year, we will be looking at our department policies and processes with a view to finding all the ways in which staff can and should use and implement restorative approaches.

A number of areas of training have been identified at the organizational level to provide staff with the tools and competencies required to allow them to perform their assigned duties and pursue the Society's mandate to uphold and protect the public interest in the practice of law. Staff received training earlier this year on managing conflict and improving communications, as well as cultural competence. PR staff benefit greatly from the annual two-day national discipline counterparts' conference, and from participation on a number of national counterparts' committees and working groups.

## Hearings

The NSBS continues to have proportionally fewer matters referred to hearing than many other jurisdictions. One of the reasons for this positive trend is the existence of our Fitness to Practice Program (see below) which diverts matters involving member incapacity away from a formal, public hearing process. Another reason is the efforts of the Complaints Investigation Committee to take steps to change a member's behaviour and use more creative solutions to solve conduct problems, rather than laying charges. While these efforts sometimes take many months, the outcomes are often more impactful than a more punitive approach.

The Hearing Committee operates with the highest level of independence in the country in respect of those jurisdictions with volunteer adjudicators. The Committee currently consists of 18 lawyers and 5 public representatives: 17 of 23 members are male; five of 23 committee members identify as being from diverse communities; and 6 are female. With appointments over the past five years, focus has been on enhancing the diversity of committee members while maintaining the necessary skills and experience representing a broad range of practice areas and demographics. Some of the more recent appointments from diverse communities were subsequently appointed to the Bench, and representation from these communities continues to be a priority.

The Committee undertakes training in substantive and procedural areas each year, and this year they did so again over two days in conjunction with adjudicators from the Law Societies of New Brunswick and Prince Edward Island.

In the past year, one new matter was referred to hearing: Duane Rhyno was served with charges in September 2017, the hearing commenced on March 12, 2018 and is scheduled to continue on May 23<sup>rd</sup> and into July.

The first hearing in respect of Lyle Howe concluded in the summer of 2017, and the Hearing Panel decision on sanction in the Howe matter was delivered on October 20, 2017. This decision is under appeal, and the appeal is scheduled to be heard in December 2018. A Judicial Review application was withdrawn by Lyle Howe with the Society's consent. A second set of charges was filed against Lyle Howe in April 2017, and these charges are being held in abeyance by agreement of the parties and the Hearing Committee Chair, until the outcome of the appeal noted above.

There is one new matter to be referred to hearing this July, and another potential matter for hearing, the timing of which is uncertain at this point.

Once again, the types of matters referred to hearing in the past year have primarily involved **personal misconduct, lack of integrity, engaging in criminal activity, and conflict of interest**.

This year will see the retirement of Lawrence (Larry) Evans QC as Chair of the Hearing Committee. Larry has served on the Hearing Committee in one form or another for over 17 years, and has served as Chair for the past ten years. His knowledge, skill, experience and very capable leadership will be greatly missed.

#### iv. Legal services support, regulation and risk

The Society receives inquiries from members of the Society and law firm staff on a variety of topics that includes trust account management, interpretation of the Act and Regulations, opening new law firms and

winding down law practices/retirement, among many others. These questions can be received by a number of different staff members, and may overlap more than one staff member's area of responsibility or experience. In an effort to ensure consistent and fulsome advice to our members and to increase overall staff knowledge, the Society holds regular meetings amongst those staff members who field such calls. These meetings provide an opportunity for information sharing amongst staff which in turn enables consistent decision making and a growth in knowledge. This growth in the knowledge base amongst staff allows for proactive regulatory decision making that is based on risk indicators. As a result of these meetings, the appropriate staff person can be assigned to follow up with the lawyer involved, and responses are consistent and timely. In the coming year, technology will be implemented to allow us to capture in one program all regulatory risk information for response and action.

The idea that there are many questions that benefit from the review by and consideration of more than one staff person is also at the heart of the Legal Services Support (LSS) model that has recently been adopted at the Society. It is not unusual that a lawyer who is intending to set up a sole practice for the first time has questions that touch on the work of a number of staff members as there will be issues related to the operation of a trust account, adoption of ethical frameworks (ex conflict of interest checklists or confidentiality agreements), or the requirements for a law corporation. The knowledge base to respond to such queries may not reside with one single staff person at the Society.

## **Ethics Advice for Members**

PR Counsel provides advice and guidance to both the membership and Society staff regarding interpretation of our governing documents including the Act, Regulations and the *Code of Professional Conduct*, the application and purpose of the rules related to money laundering and terrorist financing, and other regulatory or ethical issues.

In the past year, PR Counsel received more than 80 calls from lawyers, articled clerks, law professors and law students seeking assistance in the interpretation and application of the *Code of Professional Conduct*. This number is higher than previous years, which is very positive, and may be a result of our increased legal services support engagement with members and firms through the self-assessment process.

As might be expected, the majority of the ethics calls received come from lawyers who practice in the Halifax region (approximately 45%). The most common areas of inquiry involve **confidentiality and conflict of interest**, followed by inquiries related to **withdrawing from representation** and the **future harm exception to the duty of confidentiality**. The areas of law that were involved in these calls covers a wide range of practice areas including **family law, wills/estates, criminal and immigration**. More than 25% of the calls involved family law issues while wills/estates and real estate calls each totalled approximately 10% of the calls.

Our role is not to tell a lawyer what to do, it is to assist lawyers in interpreting and applying the rules as set out in the Code to the circumstances that they face – in other words, to serve as a sounding board to help lawyers focus on their ethical duties in the face of challenging circumstances. Ultimately it is for lawyers to exercise their own professional judgement to determine the appropriate course of action in the circumstances. Only the lawyer knows the client and the file well enough to make those sorts of judgement calls.

## **Ethics Advisory Committee**

The ethics inquiries above can sometimes involve complex and unique fact patterns that engage both legal and ethical issues, and in such situations, consideration by and feedback from the Ethics Advisory

Committee can be of significant assistance to members. This Committee considers ethics inquiries that are circulated to it by PR Counsel on a de-identified basis, usually by email which permits prompt, thoughtful and instructive advice that is relayed back to the inquiring lawyer.

This past year, the Annotated *Code of Professional Conduct* was launched on our website to provide a searchable Code with CIC and Hearing case digests and ethics advice available at the end of each Section of the Rules, where applicable. Further efforts are being made to capture and publish ethics advice to help lawyers become more self-sufficient in searching for ethics guidance.

## **Code of Professional Conduct Committee**

The Code of Professional Conduct Committee (CPCC) is an advisory committee to Council that is tasked with reviewing the *Code of Professional Conduct* and any amendments that may be proposed by the Federation of Law Societies of Canada. The Committee primarily supports Council's strategic direction of excellence in regulation.

During the last Committee year, the CPCC considered amendments to the Code proposed by the Federation's Standing Committee on the Model Code regarding the duties lawyers and firms have to clients when a lawyer departs the firm. As well, they have considered the Code's application to law firms in light of the amendments to the *Legal Profession Act* that are currently with the Department of Justice.

The CPCC has spent considerable time on the rule regarding fee-sharing and its application to multi-disciplinary practices. Currently, the prohibition on fee sharing as it appears in the Code is the only obvious ethical barrier to the creation of MDPs in Nova Scotia. MDPs are permitted in British Columbia, Ontario and Quebec, and represent an innovative way to provide clients with 'one-stop shopping' for professional services. The CPCC is considering whether a rule amendment is appropriate in order to open the door to this type of practice arrangement. Council will be asked to provide policy direction this summer.

In December 2016, the Federation of Law Societies of Canada created the Anti-Money Laundering and Terrorist Financing Working Group to review the "no cash" and client identification rules which were initially adopted on a national basis in 2008. This Working Group is made up of staff members of several Canadian Law Societies who have responsibility for their organization's rules in this regard, including PR Counsel. The amended rules that the Working Group has prepared will be presented to the Federation's Council in June 2018. In addition, the Working Group is preparing guidance documents for lawyers to assist them in interpreting the rules, and for Law Societies to assist them in enforcing and monitoring compliance with the rules.

## **Professional Responsibility Policies and Procedures Committee**

The PRPPC supports Council in its governance of the Society by recommending changes to the *Legal Profession Act* ("the Act"), Regulations and policies, and by developing procedures for the professional responsibility (PR) process. The focus of this committee's work is to enhance the legislation, policies and procedures which support all work in Professional Responsibility.

The PRPPC liaises closely with the CRC, CIC, Hearing Committee and Professional Responsibility staff to provide some measure of quality assurance, training, and support as well as guidance. Over the last Committee year, the PRPPC has been:

- Reviewing the regulations that govern the proceedings management process followed by hearing panels. This process was adopted several years ago in an effort to provide clear time frames and expectations for the parties to a hearing to ensure hearings move forward at a reasonable pace. Some issues have been raised by the Hearing Committee and others involved in the hearing process regarding the application and practicality of some of these regulations. As a result, the PRPPC determined that it was timely to review the regulatory structure.
- Examining the interim hearing process that the Complaints Investigation Committee has authority to conduct pursuant to section 37 of the Act. This process has become increasingly complex, formal and judicialized, and the CIC has raised some questions regarding its obligations for procedural fairness. The PRPPC is presenting to Council in May proposed regulation amendments to ensure best practices with this process.
- Considering issues related to self-represented litigants, particularly those who are vexatious or otherwise have difficulty with the Society’s complaint process and the limits of a self-regulated profession’s jurisdiction. One of the areas of concern is the complaints review process that is conducted by the Complaints Review Committee (CRC). The PRPPC reviewed that process with a view to limiting the amount of materials a complainant can submit on review. The CRC’s jurisdiction has always been limited by regulation to reviewing only that material that was before the Executive Director at the time the decision to dismiss a complaint was made. A new information and review form has been developed that makes clear to the complainant that no new materials will be accepted.
- Liaising with a Working Group established to consider ways to adopt a restorative approach to PR processes (see section above)
- Consider ways to embed the Society’s Triple P and risk-focused approach to all PR work.

### **Fitness to Practise Committee**

The Fitness to Practise Program (FTP) is a consensual, diversionary program designed to deal more effectively with lawyers suffering from a physical, mental or emotional incapacity who are engaged in the professional responsibility process. “Capacity” means a lawyer’s ability to practise law with reasonable skill and judgment that is not substantially impaired by a physical, mental or emotional condition, disorder or addiction (s.2(ga) LPA). The goal in each matter is to try to find positive or more proactive ways to address a lawyer’s incapacity, while ensuring that the public is protected. This can often take months or even years to achieve.

Given the sensitive nature of issues addressed by this committee and the need for confidentiality, there is little that is public or transparent about the work it does, but the impact of this work is far-reaching and important. It remains a truly unique program in North America, and a model that other jurisdictions are now trying to emulate.

No two FTP files are the same – the Committee has worked with lawyers who are struggling with depression, anxiety, post-concussive syndrome, personality disorders, alcohol use/abuse and dementia. Sometimes these conditions overlap, and the beginning and end of each can be very unclear. These files can be referred to the Committee from the Executive Director or the Complaints Investigation Committee. Once the lawyer has given their written consent to the referral to FTP, staff will have a more detailed discussion with them about the next steps.

The file will then be reviewed by the Committee and an Interim Agreement is prepared which includes conditions or restrictions on the lawyer's practice (ex no family law files). Absent evidence that would indicate that the lawyer is currently unfit to practice law as a result of their health, the Committee will not require that the lawyer immediately cease the practice of law. The lawyer will always be required to attend for an independent medical examination (IME). The Committee has found that meeting with the lawyer in person is helpful to both the Committee and the lawyer to ensure that the agreement is appropriate and the lawyer understands the program and the expectations.

Following the receipt of the medical report from the IME, the Committee will reconvene to develop a Remedial Agreement. These agreements are tailored to address any recommendations made by the health professional, and could include the requirement that the lawyer enter an in-patient detox program, be assessed by another professional, withdraw from the practice of law (permanently or until the health condition improves), begin regular appointments with a psychiatrist etc. The Committee will then monitor compliance with the agreement as well as the rehabilitation of the lawyer. In circumstances where the lawyer's condition is permanent and/or progressive (ie dementia), the Committee will assist the lawyer with the wind up of their law practice to enable the lawyer to retire without the stigma of suspension or other public disciplinary outcome.

In some cases, the Committee has been unable to secure the compliance of the lawyer with a treatment plan and must refer the lawyer back to the traditional professional responsibility process. In such cases, the lawyers have typically been permitted to resign, either by Council or by a hearing panel.

The FTP Committee has received no new referrals during this Committee year. They have one active file that is currently being monitored. That lawyer has changed category to non-practising and is waiting on a referral to a specialist who may be able to assist with the complex medical issues the lawyer is facing.

## **v. Other Business**

### **Custodians, Receivers and wind-up assistance**

In accordance with the Society's mandate to protect the public, whenever a lawyer in active practice involuntarily ceases practice with little or no notice (due to ill health, death, or as a result of suspension or disbarment), if no plans have been made for transfer of the lawyer's practice to another lawyer or firm, or for a planned wind-down of the practice, then the Society will appoint a Receiver (by the CIC) or a Custodian (by the Court) to protect client interests and manage or wind-down the practice. The authority for this is found in Sections 51 and 53 of the Act. In each case, an external lawyer has been retained to serve as Receiver or Custodian, and these lawyers are provided professional and administrative support, as needed, by PR Counsel and the Director of Professional Responsibility.

The costs in relation to this work had been steadily increasing over the last several years, due in part to the aging of the profession, however this year saw fewer new matters opened, and more matters handled proactively through wind-up assistance.

The budget for 2017/18 was \$110,499, and the actual costs were \$86,232, representing a cost reduction of 22%. In 2015/16 the budget was \$116,800, but actual costs were \$200,000. For the 2016/17 year, the budget was set at \$128,400 and actual costs were \$166,354.

One of our ongoing cost management strategies has been the use of the experienced and dedicated team at Burchell MacDougall consisting of senior counsel John Rafferty QC, partner Kelly Mittelstadt, and legal assistant Krista McNutt, and by arranging for storage of as many files held by the Society as possible in one secure location, as well as inventorying and culling of these files. However, as noted in the Cost section above, plans are underway to move this work in house to achieve greater consistency and cost controls, as well as development of internal expertise in these matters.

During the 2017/18 year, there were 14 open receiverships and 18 open custodianships. These numbers include three new custodianship files. There remains one “informal” custodianship that was opened in 2013 and is ongoing. Many of these custodian and receiver files are now dormant and date back as far as 2003. The process of formally closing files has started, which in most cases will require an application to the Court to seek approval for disbursement of funds remaining in trust and destruction of files.

### **Unauthorized Practice**

Unauthorized practice (UAP) means practising law without being permitted to do so by the *Legal Profession Act*. UAP is monitored by the Nova Scotia Barristers’ Society, as we have the responsibility to protect the public by taking action against non-lawyers who illegally offer legal services or misrepresent themselves as lawyers. On receipt of the information suggesting the unauthorized practice of law, staff will gather appropriate information and begin to investigate the allegations. With the expansion of non-lawyers providing legal services/information, and changing attitudes toward this as a result of our Triple P and risk focus, UAP work continues to decrease.

The powers of the Society with respect to the unauthorized practice of law are found in Sections 17 and 18 of the *Legal Profession Act*, and include the ability to seek injunctions and to prosecute those who violate the Act. If there is some evidence that the person is engaged in unauthorized practice of a minor nature or if the specifics are not clear, staff will seek an undertaking from the person whereby he/she will provide a written commitment not to engage in unauthorized practice.

In the 2017/18 reporting year, four reports of UAP were received and followed up on by PR Counsel. All were contacted with a reminder about the prohibition on engaging in the unauthorized practice of law and the Society’s statutory authority in that regard; however, no formal action was taken. In the 2016/17 reporting year, five reports of UAP were received and followed up on by PR Counsel; in 2015/16 three reports of UAP and in 2014/15 there were four reports of UAP. Most of those contacted in relation to UAP allegations sign an undertaking to cease and desist offering legal services and the initiation of an injunction or other legal recourse has not been necessary.

### **Undistributed Trust Funds Applications**

The Society provides a means at least twice each year for members and firms to dispose of undistributed trust funds, through application to the Court, and payment of these funds to the Public Trustee. Members must have made reasonable efforts to identify the source of funds and to return the funds to those entitled, and have held the funds for at least two years.

The requirements for information to be included in a lawyer’s affidavit to be included in the application are set out on the Society’s website. It is specifically noted that lawyers must not include privileged or confidential information and that copies of trust ledgers and the like should not be attached as exhibits.

There was an application made in December 2017 on behalf of 22 lawyers and law firms with respect to funds totaling \$27,951.14 and an application made in June 2017 on behalf of 19 lawyers and law firms with respect to funds totaling \$9,247.37.

In 2015/16, two applications were made: The first was heard in June 2015 and included affidavits from 21 lawyers and law firms and paid out funds totalling \$45,745.85; the second application was made in March 2016 on behalf of 17 lawyers and law firms and included funds totaling \$41,556.76.

## **Lawyers' Fund for Client Compensation**

### **Core function**

The Lawyers' Fund for Client Compensation (the "Fund") was established under Part IV of the *Legal Profession Act* to provide compensation to persons who have sustained pecuniary losses due to misappropriation or wrongful conversion of the claimants' money or property by a member of the Society or by a law corporation.

The Fund is one of 'first resort,' and the payments are made on an *ex gratia* basis. The Lawyers' Fund for Client Compensation Committee has authority under the Regulations to approve claims for less than \$5,000, and Council receives Committee recommendations respecting payment or denial of claims over \$5,000.

Unlike other jurisdictions, claimants do not need to exhaust all possible avenues for recovery or await final discipline of the lawyer before claims will be considered. Additionally, with the benefit of a properly sourced Fund and catastrophic claims coverage of up to \$10 million through the Canadian Lawyers Insurance Association, the Society has ensured that funds will be available to satisfy most if not all claims in future. The Committee's policies and procedures are well documented and transparent, and these together with relevant precedents support consistency and fairness in decision making.

### **Recent trend**

In recent years, we have seen an increase in unearned retainer or "negligent misappropriation" claims, meaning that a lawyer charged the client a fee which was paid in full by the client, and the lawyer was unable, for a myriad of reasons (i.e. mental health or health problems, disciplinary suspension, etc.), to complete the work for which the lawyer was retained. A number of the lawyers who have 'negligently' misappropriated funds from clients were struggling with significant mental health issues. We have seen very few claims arising from a large defalcation on the part of a lawyer. Our focus in recent years on risk assessment, including with the Trust Audit Program, and the implementation of risk-based regulations and measures appear to have assisted in reducing the amount of large defalcations.

### **Claims in 2017/2018**

We received four new claims during the last fiscal year. One claim related to a lawyer being paid a lump sum to complete a client's divorce and the lawyer being unable to do any of the work required to complete the divorce due to the lawyer becoming unable to practise due to mental health issues. That claim was paid out in full by the Committee in the amount of \$3,761.80.

One claim related to a former client of a now-disbarred lawyer believing that she had not been paid a settlement from him many years ago. While there was little evidence to demonstrate that the lawyer had

misappropriated the funds, due to the fact that the lawyer had been disbarred for misappropriating client funds under similar circumstances some years ago, Council approved that claim in full in the amount of \$6,797.63 determining that there was a reasonable likelihood that the misappropriation had occurred.

One claim related to a now-deceased lawyer taking his executor's fee before an estate matter completed. The Probate Court assessed the amount that should have been paid to the lawyer for his role as executor of the estate to have been significantly lower than what the lawyer had taken. With the consent of the claimant and the representative for the lawyer's estate, we retained a lawyer to negotiate a mutually beneficial settlement between the parties. The settlement negotiations were successful and the claim was settled without the need for review by the Committee or Council.

One claim related to allegations that the lawyer had inappropriately and prematurely taken funds from a client settlement as payment under a Contingency Fee Agreement, which was later found to be invalid by the court. The claimant had started an action against the lawyer, claiming in part misappropriation on the part of the lawyer. Due to the ongoing litigation matter and the current lack of evidence that the lawyer had misappropriated or converted the funds he had taken as payment, Council decided to hold the claim in abeyance until the conclusion of the legal proceedings.

## Previous years

### 2016/2017

Total amount claimed: \$1,923.38  
Total number of claims: 1  
Number of claims denied: 0  
Total amount paid: **\$2,311.75**

### 2015/16

Total amount claimed: \$130,602.00  
Total number of claims: 5 (3 lawyers)  
Number of claims denied: 1  
Total amount paid: **\$1,659.63**

## LRA Compensation Fund

The Act and Regulation 11.2.2 establish a *Land Registration Act* (LRA) Compensation Fund for the purpose of reimbursement in the event the Minister of Finance is required to pay compensation pursuant to the LRA for claims arising out of dishonesty, fraud or criminal acts in the certifying of title by a practising lawyer.

No claims have been filed against this Fund in this or previous reporting years since inception of the LRA Compensation Fund.

## vi. What's Ahead?

There is a great deal of change underway and ahead which should in some ways revolutionize the work in PR. We may presently be the only law society in the world specifically striving to develop and apply a restorative lens to resolving, investigating and adjudicating complaints, and to address a wide range of regulatory issues. This approach fits well within our Triple P and risk-focused approach to regulation. It will take years to fully learn and embed this lens in our work, but early and important first steps are being taken.

Legal services support for our members comes from all areas of the Society, and counsel in PR have an important role to play. We are learning to lower the 'walls' between our departments and collaborate on problem-solving in the interests of members and the public, which creates a rich foundation on which to

support members to practice more effectively. This supports a more proactive and proportionate approach to regulation, and will be a focus again in the coming year.

Significant work is underway in the area of law firm regulation, both in terms of application of the *Code of Professional Conduct*, and in anticipated development of multi-disciplinary practices and other innovative means for the delivery of legal services within an appropriate ethical infrastructure.

With the addition of General Counsel and a Paralegal, legal services which have historically been referred out will over the next year be transitioned into the Society and PR. It will take time to learn and develop the level of expertise we have benefitted from with our external counsel, but we will have lots of support from these counsel and from our counterparts across the country.

Key to managing this new work is streamlining of processes and procedures, and enhancing the use of new technologies, including a new case management system and accepting on-line complaints.

With the support of our many volunteers on committees, and Council, this is going to be a year of significant growth and positive development.