# Council Meeting Agenda

**Borden Room, Nova Scotia Barristers’ Society**

**Date:** Friday, September 27, 2019  
**Time:** 9:00 a.m. – 4:30 p.m.  
**Chair:** Carrie Ricker, President

<table>
<thead>
<tr>
<th>ITEM</th>
<th>TOPIC</th>
<th>TIME ALLOTTED</th>
<th>SPEAKER</th>
<th>MATERIALS (Pg #)</th>
<th>ACTION</th>
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<tbody>
<tr>
<td>1.</td>
<td>INTRODUCTORY MATTERS/CALL TO ORDER</td>
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<tr>
<td>1.1</td>
<td>Introductory Remarks</td>
<td>10</td>
<td>C. Ricker</td>
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<td>2.</td>
<td>DISCUSSION OF BIG ISSUE (EDI &amp; TRC)</td>
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</table>
| 2.1  | TRCWG Report  
Angelina Amaral will present the report from the TRCWG | 30 | A Amaral  
A Tomer | | Update |
| 2.2  | Equity Lens Toolkit  
Equity & Access Manager, Angela Simmonds, will provide a draft version of the Equity Lens Toolkit | 60 | A Simmonds  
R. Wright | | Update; Discussion |
| 3.   | POLICIES/PROCESSES | | | | |
| 3.1  | CPLED Proposal  
Council will discuss the CPLED proposal and provide direction | 15 | J. Mullenger  
C. Canning QC | | Discussion; Decision |
| 3.2  | Strategic Goals & Objectives Rollout  
Council will discuss the rollout of the 2019-2022 Strategic Goals & Objectives | 15 | C. Ricker | | Discussion; Decision |
| 3.3  | Report from GNC on Court Liaison Task Force / Proposed Regulatory Amendments  
Council will review and, if appropriate, approve the proposed regulatory amendments to reg. 2.9.2 and the proposed amendment to Council Policy 18 -- stemming from the Task Force's report and recommendations | 10 | T. Pillay QC | | Discussion; Approval |
| 3.4  | Regulatory Risk Project Plan Update  
Professional Responsibility Director, Victoria Rees, will provide Council with an update on the Regulatory Risk Project Plan | 15 | V. Rees | | Update |
| 3.5  | LIANS Report to Council  
Director of LIANS, Lawrence Rubin, will present his report | 15 | L. Rubin | | Update |
| 3.6  | Public Website Redevelopment Project | 15 | C. Deschenes | | Update; Discussion |
### Communications Officer, Collette Deschenes, will provide Council with an update and overview of our website revamp

3.7 Communications to Committee Chairs Council will discuss communications to committee Chairs re interim reports and updated Work Plans

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<td>10</td>
<td>T. Pillay QC</td>
<td>Discussion; Decision</td>
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### IN-CAMERA

3.8 Executive Director’s Performance Goals Update

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<td>10</td>
<td>T. Pillay QC</td>
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### 4. APPROVALS

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<td>4.1</td>
<td>Client ID Rules Council will review the memo prepared by Professional Responsibility Counsel, Elaine Cumming and consider approval to distribute this information to the membership. Regulatory amendments required – Regulations 4.12, 4.13, 10.1.1, 10.2.9-10.2.10</td>
<td>10</td>
<td>E. Cumming</td>
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<td>4.2</td>
<td>Memo from GNC – Splitting Committee Council will review and, if appropriate, approve the recommendation from GNC that GNC be split into two committees and that a subcommittee be struck to draft the ToRs for both committees for review by GNC and Council</td>
<td>20</td>
<td>C. Ricker</td>
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<td>4.3</td>
<td>Trust Accounts – Dual Authorization Council will review the memo from the Trust Account Working Group and, if appropriate, approve the recommended amendments to subregulations 10.6.3 and 10.6.3.1 regarding the requirement for a dual authorization on trust cheques</td>
<td>10</td>
<td>K. Shewan</td>
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### 5. CONSENT AGENDA

The Consent Agenda matters are proposed to be dealt with by unanimous consent and without debate. Council members may seek clarification or ask questions without removing a matter from the consent agenda. Any Member may request that a consent agenda item be moved to the regular agenda by notifying the President or the Governance, Planning & Policy Advisor (Jane Willwerth) prior to the meeting

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<tr>
<td>5.1</td>
<td>Minutes of July 19, 2019, meeting</td>
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<td>5.2</td>
<td>Distinguished Service Award Council will review and, if appropriate, approve the proposed revisions to the DSA Administrative Policy and Procedure and the DSA Nomination Criteria</td>
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<td>5.3</td>
<td>National Discipline Standards Council will review and, if appropriate, approve the adoption of the amended National Discipline Standards approved by Federation Council to take effect January 1, 2020</td>
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<tr>
<td>5.4</td>
<td>Reappointment of Robert MacKeigan QC as Chair of Board of Law Foundation of Nova Scotia; and</td>
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Version 3

Updated Sept. 19, 2019
<table>
<thead>
<tr>
<th></th>
<th>Reappointment of Douglas Ruck QC as member of Board -- both for two years from January 1, 2020, to December 31, 2021</th>
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<tr>
<td>5.5</td>
<td>Appointment of Darryl Tracey to the TRCWG</td>
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<td>5.6</td>
<td>Resignation of Paul Marquis from the LFCCC; Resignation of Heather McNeill QC from the REC; Resignation of Theresa Graham from the Professional Standards (Real Estate) Committee; and Resignation of Kim Sweeny from the GEC</td>
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<td>5.7</td>
<td>Resignation of Sunil Sharma</td>
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<td>6.</td>
<td>FOR INFORMATION</td>
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<tr>
<td>6.1</td>
<td>2019-2020 Council Calendar</td>
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<td>6.2</td>
<td>2019 Activity Plan</td>
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<td>6.3</td>
<td>2019-2020 Engagement Calendar</td>
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<td>6.4</td>
<td>President’s Report</td>
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<td>6.5</td>
<td>Executive Director’s Report</td>
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<td>6.6</td>
<td>MDP Update</td>
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<td>6.7</td>
<td>Posthumous Calls to the Bar</td>
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<td>6.8</td>
<td>Report and Recommendation from the Utah Work Group on Regulatory Reform</td>
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<td>7.</td>
<td>IN CAMERA</td>
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<td>8.</td>
<td>WRAP UP</td>
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<td>9.</td>
<td>The 2 Minute Evaluation</td>
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<td>Council members are asked to complete the evaluation</td>
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<td>10.</td>
<td>MEETINGS</td>
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<tr>
<td></td>
<td>• November 22, 2019, at 9:00 a.m.</td>
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<td>• January 24, 2020, at 9:00 a.m.</td>
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<td></td>
<td>• March 27, 2020, at 9:00 a.m.</td>
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<td></td>
<td>• April 24, 2020, at 9:00 a.m.</td>
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<td></td>
<td>• May 22, 2020, at 9:00 a.m.</td>
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<td></td>
<td>• June 12, 2020 (Council Session), at 1:00 p.m.</td>
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<td>• June 13, 2020 (Annual Meeting), at 8:30 a.m.</td>
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<td>• July 24, 2020, at 9:00 a.m.</td>
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<td>• September 25, 2020, at 9:00 a.m.</td>
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<td></td>
<td>• November 27, 2020, at 9:00 a.m.</td>
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MEMORANDUM TO COUNCIL

From: TRC Working Group
Date: September 27, 2019
Subject: Update on the Activities of the TRC Working Group

For: Approval □ Introduction □ Information ■

Over the summer months, the TRC Working Group hired an Indigenous law student, Alex Tomer, to be our Community Liaison worker. The main focus of our summer work was to begin introducing the TRC Working Group to the legal and Indigenous communities. We also began activities for the Environmental Scan and have begun informing the TRC Action Plan.

Environmental Scan Activities

- Held a one-day community gathering in partnership with the Mi’kma’ki Provincial Network, in July, with community service providers from across Nova Scotia. Presentations were given on current initiatives at the Nova Scotia Barristers’ Society (NSBS) to implement the TRC Calls to Action. We also held four revolving break-out groups to gather input and feedback on what the NSBS can do to remove barriers between Indigenous communities and the legal profession in Nova Scotia.

- In-person interviews were conducted with two urban organizations, the Mi’kmaw Native Friendship Center’s, 7 Sparks Healing Path; and the Mi’kmaw Legal Support Network, Court Worker Program.

- We have developed a survey to all lawyers in Nova Scotia as part of the environmental scan. The information collected from the scan will be used to inform the development of a TRC Action Plan for Council.

- Information from all these meetings has been documented and used to formulate a list of community-driven recommendations that will be used to inform the TRC Action Plan being developed for Bar council.

- Additional community meetings will be held to continue to build relationships and trust with the Indigenous and First Nations communities in Nova Scotia.

Presentations and Meetings

- Annual Lawyers meeting, June 15, 2019.
- NSBS Staff Lunch and Learn, July 21, 2019.
- Co-Chairs of the Racial Equity Committee, August 14, 2019.
- Mi’kmaw Health Authority, August 19, 2019.
Education Sessions

- We are planning three education sessions for this year (October, January, and April).
- The first will be on Treaty Education. We have contacted Mi’kmaw Kina’matnewey (MK) to access the speakers Bureau and we are currently working with them to develop the session. Expected date: October 24, 2019.
- We are currently developing educational materials and resources for a webpage.

Eastern Door Indigenous Bar Association

- A sub-committee has been established to plan a gathering of Indigenous lawyers and law students in Nova Scotia.
- Sub-committee members include:
  - Tuma Young;
  - Mary Jane Abram; and
  - Diane Rowe
- We have up-dated the list of Indigenous lawyers and law students in Nova Scotia.

New TRC Working Group Membership

- Darryl Tracey, Mi’kmaw Court Worker, MLSN;
- Still need a south shore representative

Next Steps

- Assist in coordinating a Council meeting in a community (possibly May date);
- Attend the Maw-Kleyu’kik Knijannaq: Child Welfare Symposium (November 20, 2019);
- Identify and gather input from Chiefs into how the NSBS can respond to the TRC Calls to Action;
- Identify topics and areas of interest of the Bar Council to assist with coordinating education sessions for the year;
- Identify and approach a practicing lawyer in the South Shore area to become a member
MEMORANDUM TO COUNCIL

From: Angela Simmonds, Equity & Access Manager
Date: September 9, 2019
Subject: Concepts of Cultural Competence and Humility for the Legal Profession

For: Approval □ Introduction □ Information ■

The purpose of this memo is to assess the concept of cultural competency, and more specifically to lay out how the concept of cultural humility can help members of the legal profession to become culturally competent.

The goal of this analysis for the concepts of cultural humility and cultural competency is to provide information on how to integrate cultural humility into a standard of cultural competency for lawyers.

I. Definitions

Cultural Competence: an ability to interact effectively with people of different cultures. It comprises five essential capacities:

- Understand our own cultural positions and how they differ from and are similar to others
- Understand the social and cultural reality in which we live and work and in which our clients live and work
- Cultivate appropriate attitudes towards cultural difference
- Be able to generate and interpret a wide variety of verbal and non-verbal responses
- Understand structural oppression and demonstrate awareness and commitment to social justice

Cultural Humility: humbly acknowledging oneself as a learner in order to understand another’s experience. It has three core elements:

- Institutional and individual accountability,
- Lifelong learning and critical self-reflection, and
- Mitigating power imbalances

It offers a deeper foundation to begin the work of eliminating inequity, emphasizing an understanding of personal and systemic biases to develop and maintain respectful processes and relationships.

Cultural Proficiency: the policies and practices of an organization that enable that organization to interact effectively with clients, colleagues, and the community using the essential elements of cultural competence. It is an inside-out approach that encourages a deliberate exploration and reflection of deeply rooted cultural assumptions, thereby relieving members of historically disadvantaged groups from the responsibility of doing all of the adapting. Ultimately, it involves integrating knowledge of other cultures into specific standards, policies, practices and attitudes to increase the quality of services to all.

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II. Analysis of Cultural Competence and Cultural Humility

Cultural Competence

Cultural competence as a concept focuses heavily on what you learn in order to develop the skill sets to manage relationships. It carries a risk of overconfidence and a risk of relying on stereotypes (after studying the culture, they maintain the belief that they are competent). Cultural competence gives us a standard, but it fails to emphasize the practical tools required to achieve it.

Cultural Humility

Cultural humility as a concept allows us to position ourselves to learn from others. It is based on an understanding that culture weighs heavily on thoughts, beliefs, habits and choices made in life. It can give lawyers the lens to see that they are the experts on the law, but not on the culture of their clients. It is process-oriented and promotes lifelong learning.

Cultural humility acknowledges the power differentials in relationships and asserts that problems do not often arise from lack of knowledge, but rather, the need for a change in self-awareness and attitudes towards diverse clients.

<table>
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<tr>
<th>Table 1 Comparison of Cultural Humility and Cultural Competence</th>
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<tr>
<td><strong>Cultural competence</strong></td>
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<td><strong>Perspective on culture</strong></td>
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<tr>
<td>• Challenges stereotypes</td>
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<td>• Difference is seen in the context of systemic discrimination</td>
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<tr>
<td><strong>Assumptions</strong></td>
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<tr>
<td>• Assumes the problem is a lack of knowledge, awareness and skills to work across lines of difference</td>
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<td>• Individuals and organizations develop the values, knowledge and skills to work across lines of difference</td>
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<tr>
<td><strong>Components</strong></td>
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<tr>
<td>• Knowledge</td>
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<td>• Skills</td>
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<td>• Behaviors</td>
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<tr>
<td><strong>Stakeholders</strong></td>
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<tr>
<td>• Practitioner (primarily)</td>
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<tr>
<td><strong>Critiques</strong></td>
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<tr>
<td>• Focus on knowledge acquisition</td>
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<td>• Issues of social justice not inherent</td>
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<td>• Regarded as a ‘cookbook’ approach</td>
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<td>• Leads to stereotyping the ‘other’</td>
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<td>• Suggests an endpoint</td>
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Cultural humility can be viewed as an evolution of cultural competency, as it goes beyond the limitations of cultural competency, as we know it, and also how others see the term. It gives individuals a foundation to begin the journey towards practicing cultural competence.

III. Integration of Cultural Humility into a Cultural Competence Standard for Lawyers

The goal of a cultural humility approach is to improve communication and understanding between lawyers, their colleagues and clients. This is done by:

- Acknowledging the role of difference and culture in service delivery,
- Reflecting on cultures that influence their own experiences and behaviours, and
- Assuming the role of learner by asking questions about clients’ lived experiences.7

The legal profession lags behind other communications-based professions in terms of adopting measures designed to mitigate the effects of cultural bias on service delivery.8 Research has shown that implicit biases affect human behavior and first-voice stories have shown that misunderstandings and biases can pose significant problems.9

To understand culture, one must understand that norms associated with a particular culture may change and people who associate with a given culture may diverge significantly in their practices and beliefs. The concept of cultural humility can help lawyers to achieve cultural competence by providing them with the tools and more specific instructions on how to do so in practice.

IV. The End Vision: A Culturally Proficient Legal Profession

Cultural proficiency is about making visible and addressing equity issues that were previously ignored.10 To progress beyond just knowledge (competence) and towards accountability (humility) calls on individuals and institutions not only just to understand, but to act. We can learn about others and how to increase the quality of legal services to others only after we know ourselves. We must become aware of our own thoughts and reactions.

The integration of cultural humility into cultural competence standards would encourage lawyers to advocate in a way that changes our legal system to level the playing field in order to promote equity and access.

7 Debra Chopp. (2017) "Addressing Cultural Bias in the Legal Profession." NYU Rev. of L. and Soc. Change 41:3
8 Debra Chopp. (2017) "Addressing Cultural Bias in the Legal Profession." NYU Rev. of L. and Soc. Change 41:3
9 Council in Community discussions and TRC Community Engagement (Alex’s document): community voices express concern about lack of knowledge of their history and how lawyers are to practice cultural competency when situations are in front of them. Community seems to be looking for accountability (first element of cultural humility)
Equity Lens (long version)
Author’s Name/Author’s Title
Introduction

*Welcome to our equity lens guidelines.*

Advancing diversity and fostering inclusion is the responsibility of every lawyer. These guidelines are a starting point for lawyers, law firms, Society staff and volunteers who want to understand how they can apply an equity lens to their work, decision-making and interactions with others.

This handbook describes how specific groups of people are at risk of being excluded and are impacted by systems of oppression including racism, sexism, ableism, and ethnocentrism. It can help you become more aware of the diversity around you; develop and deliver services that are responsive to clients and communities you work with every day; create positive changes within your work environment and our profession, ultimately addressing systemic barriers and inequities people from equity seeking groups face.

We tend to design our processes to be used by people who seem similar to us, which allows many exclusionary practices to persist. Instead of “treating people the way that you’d like to be treated,” we should instead treat people the way that *they* would like to be treated and avoid providing services based on our own preferences. This approach, which supports and respects the diverse skills and experiences of members of equity-seeking groups¹, is called *inclusion*.

**THE CASE FOR AN EQUITY LENS**

As lawyers, we strive to provide excellent service to our clients, whomever they may be. Through our work, we seek to uphold our Society’s most important values: justice, fairness and freedom from discrimination. Even though someone may have a background and expertise in a specific area, does not mean they will always remember to consider equity, diversity and inclusion in their decision-making. The hope is this tool can help you consider these issues in an intentional way as you go about your work.

**HOW DOES EXCLUSION HAPPEN?**

We tend to make decisions based on our own abilities and biases. We make assumptions, both conscious and unconscious, about gender, age, language ability, technical ability, access to particular social networks, race, etc. In short, we tend to design our processes to be used by people who are most like us.

Our justice system often entrenches such assumptions, through both formal and informal systems with its policies, procedures and practices. While the justice system and the legal profession becomes more diverse and formally equitable, members of equity-seeking groups often report the legal services received lack the cultural awareness, knowledge, attitude and skills required to meet their needs.

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¹ Equity-seeking groups include women, Indigenous peoples, racialized peoples, persons with disabilities and persons seeking equality on the basis of their sexual orientation and gender identity
WHO GETS EXCLUDED?

When we design services or make decisions for “the average person,” we make the assumption that these are accessible to all. In reality, this makes them inaccessible to many people in our community.

WHY DOES INCLUSION MATTER?

Nova Scotia’s justice system must be examined by acknowledging the historical injustices specific to the conditions of Indigenous Peoples and African Nova Scotians. Today, the justice system is filled with examples of how biases create inequities that have a negative impact on all equity seeking groups, and ultimately make legal services less accessible to all.

This history includes:

➢ The inquiry into the wrongful conviction of Donald Marshall Jr, which revealed how assumptions about the neutrality of processes are actually culturally biased, which results in unjust outcomes. The inquiry demonstrated the importance of lawyers being aware of Nova Scotia’s colonial history, lacking cultural competence, having knowledge of unconscious bias, and awareness of how their own culture lens affects how they interpret the actions of others.

➢ The report of the Truth & Reconciliation Commission of Canada, which showed us how:
  o Our “objective” government systems and services were built with colonial attitudes, including the justice system.
  o Even when these formal colonial structures are dismantled, informal structures replicate their effects.
  o Aboriginal law impacts all aspects of the legal system, which means we have a particular obligation to be equitable in our decision making and practice.

➢ The history of anti-black racism in Nova Scotia:

  Our province’s formal and informal social structures were designed to exclude Black Nova Scotians from the moment they arrived here over 400 years ago. The history of anti-black racism impacts all aspects of civic life for Black Nova Scotians. However, there are also specific ways this history of anti-black racism lives in the justice system, and lawyers are obligated to have a general awareness of this history to be effective advocates for their clients.

Additionally, advancing diversity and fostering inclusion is the duty of every lawyer, as set out in:

➢ The Society’s Regulatory Objectives, which describe the Society’s goal to “Promote diversity, inclusion, substantive equality and freedom from discrimination in the delivery of legal services and the justice system.” This is only achieved when all of us work together to be more equitable in every decision we make, every process we create, and how we practice every day. This commitment is reflected in the Code of Professional Conduct.
The Management System for Ethical Legal Practice, which requires lawyers to work to improve diversity, inclusion and substantive equality; and to improve the administration of justice and access to legal services. Society staff are dedicated to supporting lawyers in fulfilling these obligations.

THE EQUITY LENS DEFINED:

A lens is a way of looking at policies and practices to see how they address certain issues – which can be applied by asking ourselves a series of questions. An equity lens, therefore, is a series of considerations to guide us as we seek to understand how our decisions and actions either break down or reinforce the barriers that prohibit equal participation and benefit in the legal profession and the justice system.

Applying an equity lens allows you to make decisions while:

- Reflecting the needs of people with a range of experiences;
- Applying a knowledge of history, including the history of racism in Nova Scotia;
- Finding a diversity of ways for people to participate (no one-size-fits-all); and
- Understanding how and why exclusion happens, resulting in actionable steps to take

THE EQUITY LENS COMPONENTS

- **Identify** barriers where they occur
- **Eliminate** barriers by making adaptations that reflect the lived experience of those affected
- **Create** new ways of working by considering inclusion at the earliest stages rather than at the end
Identifying barriers

Our justice system was built in a way that is explicitly discriminatory against many communities: rights under the law, and to practice law, were accessible only to the elite. Notions of “the average person” described the most privileged in society.

Changes in societal attitudes over time brought about the dismantling of formal laws prohibiting the full participation of equity-seeking groups in civic society. These efforts reflected the move towards formal equality: we were taught that treating people equally meant ignoring differences among communities and people. This is often called the “colour-blind” approach.

The “colour-blind” approach is based on the belief that dismantling formal equality in our laws would inevitably result in improved outcomes, but this has not always been the case. The discrimination that continues to exist even when discriminatory laws are struck down is called systemic discrimination.

Today, a new approach is emerging that sees us embracing difference rather than denying it. We recognize that having people bring different perspectives based on our unique identities makes our workplaces better. This approach also recognizes that being inclusive means working to eliminate instances of systemic discrimination in our justice system.

Inequity occurs when someone tries to access an opportunity or a service that was not built with them in mind. When somebody encounters a situation where their identity disrupts “the way things are normally done,” we call this a barrier.

Barriers can take many forms. Examples include:

- A wheelchair user who cannot ascend steps to an office
- A racialized client whose lawyer fails to recognize how race is relevant to their matter
- A young female lawyer who wonders if “small talk” about family during an interview is an attempt to learn if she plans to have a child
- A racialized lawyer who struggles to fit in at their firm because informal conversation subjects often focus on topics relevant to dominant white culture
- An Indigenous lawyer who takes on less work because he is pressured by his firm to be the face of diversity initiatives
- A client experiencing poverty being told resolving their matter will cost “only” $500
- A lawyer who identifies as non-binary who begins working at a firm without gender-neutral washroom facilities.

The first step to eliminating barriers is identifying them.

To identify barriers, ask yourself:

- What assumptions do you make about who accesses your services/is impacted by your decisions? Assumptions could include ones about:
  - Accessibility (for example, does your firm remove physical barriers that prohibit full use of your space by those with disabilities?)
- **Representation** (for example, does your firm mitigate unconscious bias when building your candidate pool?)
- **Substantive knowledge** (for example, does your firm ensure staff have the understanding of systemic discrimination and racism required to address these issues in the context of their work, including when representing clients?)
- **Relationships with communities** (for example, does your firm have signage that indicates universal access to your space?)
Eliminating barriers

*The equity lens prioritizes inclusion at the start of a process, rather than trying to force them in after a process has already been created.*

Once you have identified a barrier in your practice, the next step is to eliminate it.

Providing excellent service requires more than a rote application of the law: we know that our clients need to feel that they were treated with respect and dignity. Inclusion puts people at the start of a design – whether that is for a physical space, a legal strategy, or a casual conversation. Inclusion centers the individual and their needs.

It can be difficult to know where to start – it is not easy to put yourself in someone else’s shoes, especially if their identities are different from yours. The best place to start is with *people’s stories.*

People who have used lawyers, or who have worked in law firms, developed ways to make these interactions more comfortable for them. These adaptations can teach us how to make our services and our workplaces more inclusive.

Many of these stories are available for us to read and learn from, an approach described by Dr. Fyre Jean Graveline as “First Voice.” They can be read in reports and news articles, be heard at conferences, and shared around water coolers. They describe how people have *adapted* to get around barriers in our workplaces. If we listen to these stories and think about how to add to more positive experiences, we can learn how to change them by making our workplaces more inclusive.

To eliminate barriers, start by seeking out these stories. They can be found through:

- **Self-study/research** (e.g. articles, courses, guides)
- **Internal consultation** (e.g. equity office, in-house equity committee or HR)
- **External consultation** (e.g. hiring a consultant, striking an advisory group, surveying clients)

Then, with these stories in mind, consider:

- Where are people forced to adapt to your needs?
- Where can you work to adapt to the needs of others?
Creating new ways of working

Sometimes, people think that improving access to legal services for equity-seeking groups involves creating niche solutions for statistically small populations. However, everyone benefits from inclusion: things like plain language documents and transparent hiring criteria were all initially developed with the specific intention of creating inclusive environments.

Consider the origins of the legal profession: originally designed without imagining that people of different socioeconomic backgrounds, genders and races would become lawyers. Now that more people in the community are increasingly able to access legal services, the practice of valuing and including diverse lawyers in each legal workplace provides a benefit in servicing the whole community. Lawyers who have different life experiences bring additional experiential knowledge and attitudes that can help to shift the culture of the workplace and positively enhance client relationships and trust.

Rather than being equipped only to serve niche populations, providing inclusive service simply means providing good service.

Now is the time to turn these thoughts into action.

To create new ways of working:

- Use the exercise pages below to get started.
- Visit our Equity Portal, which provides lawyers and legal services organizations with guidance on employment equity and cultural competence. It includes introductory information, model policies, educational videos and assessment tools.
Appendix: Exercises
EXERCISE: SELF-REFLECTION

Purpose: To encourage the user to consider how bias may influence their decision-making, and to identify ways to curtail it.

Instructions: Reflect on the following questions regularly. Identify areas in need of improvement, and create goals to address them.

Have you ever…

- Educated yourself about the experiences of people from backgrounds other than your own?
- Reflected on your upbringing in order to understand your own biases?
- Examined your own behaviour and attitudes to identify how they may either contribute or combat prejudice?
- Changed how you use language to eliminate terms that may be hurtful to others?
- Caught yourself generalizing someone based on one of their group identities?
- Discredited someone’s identity (for example, by saying something like “I don’t even think of you as _____”)?
- Comfortably discussed issues of racism, prejudice, or systemic discrimination with others?
- Spoken up when other people use prejudicial language or behaviour?
- Openly received feedback about how your behaviour may be insensitive or offensive to others?
- Made a conscious effort to ensure people can contribute to a conversation, regardless of their background?
- Worked to ensure that your workplace, staff, volunteers, etc. reflect the diversity of your community?
- Critically consumed media (e.g. news, fictional programming, social media posts) with negative stereotypes or biases in mind?
EXERCISE: INTERVIEWING FOR EQUITY COMPETENCY

Purpose: To assess a job candidate’s awareness of equity issues and experience working with diverse populations.

Instructions:

1. Probe for past experiences and lessons learned. Past behavior is the best predictor for future behavior, so prompt the candidate to tell stories about their experiences and takeaways. Here are two questions you can ask:

   To what extent has pursuing racial or other types of equity and inclusion been a priority in your work, and how did you approach it?
   - Why was this important to you?
   - What were some of your core challenges?
   - What have you learned from these experiences?

   Can you talk about a time you navigated dynamics around race or other identities in your work? What did you do?
   - What do you think were the root causes of those dynamics?
   - What were some of your core challenges?
   - What lessons did you learn?

2. Use scenarios and simulations to see your candidate in action and observe their ability to spot and manage complex issues of identity. Give them a chance to complete an exercise that is similar to what they would be doing on the job and include an equity and inclusion component.

   Below are two examples:

   For a lawyer position: “Here’s a fact pattern describing a hypothetical matter. What are some equity considerations that arise for you?”

   For an IT position: “We serve people of many different ages, backgrounds and experiences, and our staff and interns reflect this diversity. Given this, how would you approach training and supporting our staff in meeting their technology needs?”

3. Weave in opportunities for your candidate to demonstrate their competence throughout the process. Testing someone’s ability to navigate issues of equity and identity should not just be relegated to an “equity section” of your interview process. It should be integrated throughout. Here are two ways to weave it in:

   - Get your candidate to demonstrate their understanding in the context of other topics by asking specific follow-up questions, like:
     - How did you account for equity and inclusion when you were setting recruitment goals for your firm?
     - Do you think there were any differences in race/gender/other identities that influenced how that conflict played out?
   - Have them interact with a cross-section of your team that is diverse both in role and across identities. Then observe and ask for feedback from those people, with an eye for patterns or discrepancies.

Adapted from: 3 Ways to Test for Racial Equity & Inclusion Competency, The Management Center
EXERCISE: ACCESSIBILITY

Purpose: To improve physical accessibility to your space by attempting to use your services while simulating temporary and situational limitations.

Instructions:

1. Choose a specific area of your office that you want to focus on (for example, the moment a prospective client enters your office for the first time).

2. Write the sequence of steps the user will take during this process (for example, locate building, walk up steps, open door, find receptionist, etc.).

3. From the Temporary/Situational Limitation reference card, choose one limitation.

4. Recreate this limitation for yourself.

5. Go through the sequence of steps you wrote in #1.

6. Note what could be improved.

7. Repeat with a different limitation.
EXERCISE: LEARNING FROM REAL CLIENTS – PLAIN LANGUAGE COMMUNICATION

Purpose: To learn how to incorporate client-centered thinking into your practice, using a real story from a client submitted through the #TalkJustice initiative.

Instructions: Read the story below, and then consider the questions that follow.

“When I bought my first house, I had some difficulties communicating with my lawyer. He was a great lawyer and tried to make sure I understood and asked me in each meeting that if I had any questions. The problem was I did not have much knowledge on this. A lot of time I did not understand what he was talking about so I could not raise any questions or my questions were about simplest things that hardly be a question.”

• How do you think this situation happened? Try to imagine:
  o How the conversation between lawyer and client might have unfolded
  o How you might know the client could be feeling this way

• Is this an experience someone could have in your workplace?
  o If not, why not? What processes or training do you have that would prevent this from happening?
  o If so, what can you change to reduce the chance of something like this happening?
EXERCISE: QUICK QUESTIONS TO GET STARTED

Ask yourself:

What is the culture of my workplace? Are minority groups represented and do all individuals feel included?
  • E.g. Does it have pictures on the wall that reflect a commitment to make all people feel welcome?
    Are there other artifacts or materials in the reception area/lobby that foster a sense of belonging in all
    people that enter?

Does my workplace take opportunities to be more representative? Do groups feel that they can bring their culture
to work?

Are there ways to expand the culture to include the life experiences and personalities of diverse groups of people?
  • E.g. Am I valuing extensive work/volunteer experience with marginalized groups the same as other
    experience?

Does my workplace offer formal learning opportunities to learn about diverse issues and groups?

Are work social activities representative of the values of the dominant group? Do all employees feel comfortable
attending?
  • E.g. Do they always take place at a bar? Are food options varied to accommodate all peoples’
lifestyles?

Does my workplace encourage employees to attend events in the community that would allow them to learn about
systemic discrimination and first-hand experiences? Does my workplace welcome people into “our space”?
  • Do I actively listen to and believe the lived experiences of community members without external
    validation and without judgment?

Does my workplace celebrate equity-seeking groups all year long or only during designated periods?
  • E.g. Pride Month, National Indigenous History Month, Mi’kmaq History Month, African Heritage
    Month, International Day of Persons with Disabilities, Women’s History Month etc.

Thinking outside of the dominant culture at my workplace, would people who are not like me feel free to be
themselves at work?
  • How can I encourage all employees to be their authentic selves, including myself?

What assumptions do we make as we carry out our work? What equity implications do these assumptions have?
  • E.g. As a client walks into my office, am I assuming anything about them based on stereotypes or
    assuming that they are like me? Am I letting them tell their story and asking questions after?

Ask your clients:

Is there anything else you think I should know about your background so I can better represent you?

Is there anything that we discussed that I could explain better? How do you feel about the services I have
provided you with so far? Is there anything I can do to help you further?
REFERENCE: GETTING COMFORTABLE WITH TERMINOLOGY

Purpose:

For many people, identifying the right terminology to use when speaking with or about equity-seeking groups is a source of concern. They want to know what the “correct” term is, to avoid causing offense. While there are no simple answers to this concern, we can articulate some basic principles to assist readers with navigating these conversations.

Instructions:

When identifying appropriate terminology, keep the following principles in mind:

1. Because there will never be consensus over which terms are correct, it is best to defer to more formal language at first.
   - For example, use “2SLGBTQ+” rather than “gay.”

2. When referring to a personal characteristic, use adjectives rather than nouns.
   - Examples include using “people in the Black community” rather than “the Blacks,” or “persons with a disability” rather than “the disabled.”

3. Keep abreast of which terms are considered outdated.
   - For example, terms like “Oriental,” “visible minority,” or “Indian” are considered outdated in Canada. Use “East Asian,” “People of Colour” or “Racialized people,” or “Indigenous” instead.
   - Consider keeping up to date with terminology to be part of your ongoing self-education, as you engage with individuals and other cultures. Helpful resources include, but are not limited to:
     - Queen’s University’s Inclusive Style Guidelines
     - British Columbia Public Service’s Guidelines on using inclusive language in the workplace

4. Avoid use of “in-group language.”
   - Sometimes, people from equity-seeking groups will refer to each other using terms that are widely considered slurs or are otherwise offensive. It is not appropriate for people outside the group to use these words. Even if someone in your social circle has granted you “permission” to use such words in their presence, do not use them elsewhere. It is also inappropriate to use them under the guise of quoting song lyrics, television shows, or other pop culture artifacts.

5. Only refer to descriptors of these characteristics if they are relevant.
   - Referring to characteristics superfluously can cause as much offense as using an outdated or inappropriate term.

6. Above all else, defer to the preferences of the person about whom you are speaking.
   - Listen to how the person with whom you are speaking describes themselves, and echo this terminology.
   - There is nothing wrong with asking, for example, “Do you have a preference for which term I should use?”
REFERENCE: KEY TERMS

Racism: prejudice, discrimination or antagonism directed against someone of a different raced based on the belief that one’s own race is superior, and whose views are reinforced by systems of power.

Anti-Black Racism: policies and practices embedded in Canadian institutions that reflect and reinforce attitudes, prejudice, stereotyping, and/or discrimination with the belief in Black inferiority - in relation to other racial classifications, White is at the top and Black at the bottom. It is directed at people of African descent and is rooted in their unique history and experience of enslavement and colonization.

Cultural competence: an ability to interact effectively with people of different cultures. Cultural competence comprises four essential capacities:

- We must understand our own cultural positions and how they differ from and are similar to others (critical cultural self-analysis)
- We must understand the social and cultural reality in which we live and work and in which our clients live and work
- We must cultivate appropriate attitudes towards cultural difference
- We must be able to generate and interpret a wide variety of verbal and non-verbal responses
- Understand structural oppression and demonstrate awareness and commitment to social justice

Cultural Humility: humbly acknowledging oneself as a learner in order to understand another’s experience. It has three core elements – institutional and individual accountability, lifelong learning and critical self-reflection, and mitigating power imbalances. It offers a deeper foundation to begin the work of eliminating inequity, emphasizing an understanding of personal and systemic biases to develop and maintain respectful processes and relationships.

Cultural Proficiency: the policies and practices of an organization that enable that organization to interact effectively with clients, colleagues, and the community using the essential elements of cultural competence. It is an inside-out approach that encourages a deliberate exploration and reflection of deeply rooted cultural assumptions, thereby relieving members of historically disadvantaged groups from the responsibility of doing all of the adapting. Ultimately, it involves integrating knowledge of other cultures into specific standards, policies, practices and attitudes to increase the quality of services to all

Ethnocentrism: a conscious or unconscious bias where someone considers their own culture to be superior or natural.

Heteronormativity: refers to the commonplace assumption that all people are heterosexual and that everyone accepts this as “the norm”. It describes prejudice against people that are not heterosexual, and is less overt or direct and more widespread or systemic in society, organizations, and institutions. This form of systemic prejudice may even be unintentional and unrecognized by the people or organizations responsible.

Intersectionality: the complex, cumulative way in which the effects of multiple forms of discrimination combine, overlap, or intersect especially in the experiences of historically excluded groups. The term was originally coined by Kimberlé Crenshaw in her analysis of the experiences of Black women with racism and sexism.

Equity: the absence of barriers, biases, and obstacles that impede equal access and opportunity to succeed in society.
**Diversity**: differences in race, colour, place of origin, religion, immigrant and newcomer status, ethnic origin, ability, sex, sexual orientation, gender identity, gender expression, and age.

**Inclusion**: active engagement of equity and diversity concepts in all aspects of your decision-making. This includes fostering a sense of belonging for all, making all people feel included, and having those values reflected in all that is said and done in your work. Lawyer and diversity and inclusion consultant Ritu Bhasin explains the difference between diversity and inclusion as follows:

*Diversity* in the workplace is important in that it tells us which groups are represented within our organizations – for example, the number of people of colour, women and members of other diverse groups who are present. But this is strictly quantitative.

*Inclusion* is the qualitative experience: do diverse professionals feel that they have equal access to opportunities within their organization? Do they feel that they are able to bring their differences to work, and that they can leverage these differences for success? Inclusion is where real change lives – and it is through inclusion that we can better distribute power and privilege throughout all echelons of our society.

**Systemic Discrimination**: the result of organizational policies, practices and cultures that perpetuate unequal treatment of individuals or groups.

**Unconscious Bias**: social stereotypes about certain groups of people that individuals form outside their own conscious awareness. Everyone holds unconscious beliefs about various social and identity groups, and these biases stem from one’s tendency to organize social worlds by categorizing. Unconscious bias is far more prevalent than conscious prejudice and often incompatible with one’s conscious values. Certain scenarios can activate unconscious attitudes and beliefs. For example, biases may be more prevalent when multi-tasking or working under time pressure.

**Privilege**: unearned power, benefits, advantages, access and/or opportunities that exist for members of the dominant group(s) in society.

**References**:

Colin A. Palmer: [Defining and Studying the Modern African Diaspora](#)

Canada Research Chairs: [Equity, Diversity and Inclusion: A Best Practices Guide for Recruitment, Hiring and Retention](#)

Melanie Tervalon & Jann Murray-Garcia: [Cultural Humility versus Cultural Competence](#)

Brock University: [Five Questions with Ritu Bhasin](#)

University of California, San Francisco, Office of Diversity and Outreach: [What is Unconscious Bias?](#)

Ontario Human Rights Commission: [Appendix 1: Glossary of human rights terms](#)

The 519: [Glossary of terms facilitating shared understandings around equity, diversity, inclusion and awareness](#)
MEMORANDUM TO COUNCIL

From: Jacqueline Mullenger, Director, Education & Credentials

Date: August 15, 2019

Subject: PREP Course

For: Approval X

Introduction

Information

Recommendation/Motion:

Be it resolved that:

Upon the recommendation of the Credentials Committee and staff, the Society will agree to become partners with CPLED in the PREP course and will move forward with the necessary steps to begin offering the PREP course in September 2020.

Further, be it resolved that Council will appoint a subcommittee or working group of Council members to study the options for financing the PREP course.

Analysis:

At its last meeting, Council received information regarding the PREP course. Both Cheryl Canning QC and I answered numerous questions and discussed the issues that Council had raised at an earlier meeting. Attached for your reference is the July memo.

At the conclusion of the discussion, Council asked that staff gather additional information about three issues:

1. Whether or not the PREP course will be accessible to students who are visually impaired or have other accessibility challenges;
2. Whether the PREP course will be accessible to students in remote areas where internet is not as fast as in cities;
3. What the financial ramifications would be of maintaining the present course, specifically if there is a “break-even point” with the cost of the new course.

I will address each item in turn:

1. **Accessibility for persons with a disability** – As stated at the last meeting, all Law Societies have a legal obligation to ensure that our programs are accessible to all potential students and members. However, staff have done some investigation since the last meeting and can advise that the platform used by CPLED for the PREP course is committed to being accessible to all people. In fact, they have won awards and certification from the National Federation of the Blind for their nonvisual accessibility. We do not anticipate this being a problem as we have always ensured that we are accessible and are committed to doing so. No matter the issue, we have and will find a way to removed hurdles for any applicant wishing to take the course or become a member.

2. **Accessibility for those who live and work in remote areas** – Again, the Society has an obligation to be accessible. CPLED is currently piloting the new program with students who are both in the city and in rural areas. They do not anticipate any problems with students accessing the program; however, they are committed to ensuring that every student will have full access to the program no matter where they live. As a reminder, we currently have online modules and our students in Nova Scotia have been able to access them. Again, the Society is committed and legally required to ensure that students are able to meet any and all admission requirements and that we do not create unnecessary barriers.

3. **Costs Associated with maintaining the current course** – First, it is important to note that the Society is not able to maintain the status quo. We have known for some time that our current Bar Exam Consultant is retiring and we are not able to purchase these services in a cost effective manner anywhere else. In addition, because CPLED is moving to the PREP program, we will no longer be able to purchase their online modules that we have been using for some years.

   Therefore, the Society must make a change in order to move forward. Joining CPLED in offering the PREP program is the most logical, cost effective and sensible alternative for tall the reasons we have set forth previously. We are not being asked to pay for any of the start-up costs for the PREP program, which we will have if we determine that we need to retool our own course.

   In addition to the cost of creating our own new modules (approximately $500,000), we will also have to pay a platform provider to host our online modules. We understand that the cost to have Desire2Learn host our new modules would be approximately $272,000 in the first year and then $104,000 yearly (Desire2Learn is the platform CPLED uses). In addition, we will need to increase the full-time staff in the E&C department to develop and
maintain the modules and teach in our own Skills Course. Finally, all other costs saved from moving to the new program will go back into the budget. Essentially, there is no break-even point – see calculation in the attached Schedule A.

It also does not make sense from a duplication of effort and use of resources point of view. It is far better for the Society and, ultimately, the public, if four provinces join together to share resources and expertise to provide the very best Admissions Program possible. This will ensure that our students are given the tools they need and are assessed properly before they are given a license to practice.

Finally, it has been the purpose of the Skills Course, from its inception, to ensure that all new lawyers have entry-level competence and to bridge the gap between law school and practice. Staff are of the opinion that the best way to continue to ensure the competence of new lawyers is to join CPLED and provide the students will the tools, experience and skills they need to be successful in practice.

Attachment
Appendix A

Based on the estimates provided, and our previous analysis, the following is a summary of the calculation:

1. Start-up cost of creating our own program.
   a. Initial development of content programming: $400,000
   b. Initial cost of online platform development and training: $272,000
      Total initial cost $672,000

2. Incremental Annual costs to manage our own system (on top of existing education costs)
   a. Online platform annual licensing, support and maintenance $103,000
   b. Incremental staff required (in addition to current staff) $133,000
      (including Salary, deductions, benefit, RSP)
      Incremental annual cost to maintain our own online system $236,000

3. Incremental annual cost to outsource to CPLED
   a. Per student cost $6,100/student x 80 students $488,000
      (Note, our previous estimates were based on 72 students -- moving to 80 has added approx. $49,000)
   b. Costs eliminated from current education costs ($166,000)
      (From previous analysis)
   c. Costs reimbursed for services provided ($137,000)
      (From previous analysis)
      Incremental annual cost of utilizing CPLED $185,000
MEMORANDUM TO COUNCIL

From: Jacqueline Mullenger

Date: July 5, 2019

Subject: Skills Course Changes

For: Approval

Introduction

Information

Section 28(1)(c) of the Legal Profession Act provides that the Society has the authority to make regulations establishing, and maintaining or otherwise supporting a bar admission program and courses for lawyers from foreign jurisdictions seeking the right to practise in Nova Scotia.

Sections 3.6.1 and 3.6.2 of the regulations provide as follows:

3.6.1 The Society shall offer a Bar Admission Course which shall consist of the following components:

(a) the Skills Course;
(b) the Bar Examination;
(c) such seminars as are prescribed by the Committee.

3.6.2 The purpose of the Bar Admission Course is to determine that those who successfully complete each required component possess the particular level of competence required of:

(a) an articled clerk being called to the Bar as a lawyer;
(b) a lawyer being called to the Bar in the province on transfer from a foreign jurisdiction;
(c) a member changing category of membership to become a practising lawyer, or
(d) a person resuming membership as a practising lawyer.

The Bar Admission course has had several iterations over the years. For the last decade, the Course has consisted of a three-week in-person course and a series of on-line learning modules which the Society has offered in conjunction with the Canadian Center for Legal Education (“CPLED”). CPLED is now in the process of replacing their existing skills course with a new course that will be known as Practice Readiness Preparation Program or PREP, as it is being referred to. As a result of this change, CPLED has offered to work collaboratively with the Society and have us join as a full partner in the course. If we choose not to join then we will no longer have access to the on-line program. The
Society has not been asked to contribute to the capital of the program, which has cost the CPLED organization millions of dollars. As a result of this change and other changes, taking place in our own program the Society finds itself at a crossroads. We need to determine if we should move forward with the partnership or abandon the relationship and create our own on-line modules.

Council has had the benefit of a memo written by Cheryl Canning, on behalf of the Credentials Committee. The purpose of this memo is to provide Council with additional information to assist in your discussion of this issue.

A. Background:

At the January 2019 Council meeting, staff presented a report to Council about the existing Skills Course and the work that was being undertaken with CPLED as they work toward a new way to prepare articulated clerks to be evaluated on their readiness to enter the practice of law. That memo is attached as Appendix “A” for the benefit of the new Council members.

In March 2019, Dr. Kara Mitchelmore, the CEO of CPLED made a presentation to Council about the PREP course being created by CPLED. Dr. Mitchelmore went through the basic design of the course and answered Council’s questions. Her slides are attached as Appendix “B”.

As we move forward, Council has two decisions to make, which I will address in this memo. The questions are:

1. Should The Society join as full partner in the PREP course and implement a new Bar Admissions Program?
2. If the Society joins CPLED how will the PREP course be funded?

I will answer each question in turn.

1. Should The Society join as full partner in the PREP course and implement a new Bar Admissions Program?

In order to answer the question, Council must first consider what the “new” course will look like.

The PREP program is not entirely different from what we are currently doing. All of the same skills and competencies will still be taught and evaluated. It will be piloted in Alberta and Manitoba in the fall of 2019.

It is important to note that with the new program there will no longer be a separate Bar Examination. That being said, the law will be tested in the actual components of the PREP course. In order to demonstrate competency the student will have to know the law sufficiently well to perform the various skills that are assessed.

The program consists of four segments and focuses on spiral learning to prepare the articulated clerks for the final stage, the Capstone evaluation. The segments of the program are as follows:
I. Foundation Modules

These modules will run from August to October. This segment contains eight online modules which introduce articled clerks to the various areas they will be covering throughout the year. The modules describe for articled clerks the key concepts in the various areas and contain interactive components to engage the articled clerks in the content. These include videos, interactive assessments and an e-portfolio.

The modules covered in this segment are:

   a. Indigenous Law, Cultures and People
   b. Professional Ethics and Character
   c. Oral Communications Skills: Interviewing, Negotiating, Advocacy and Client Relationship Management
   d. Written Communication Skills: Drafting and Legal Writing
   e. Legal Research, Fact Gathering and Case Management
   f. The Effective Lawyer: Personal Attributes and Relationships
   g. Practice Management and Trust Accounting Fundamentals
   h. Technological Skills and Tools

After completing the reading and interactive components of the modules the articled clerks will enter into a multimedia segment which will given them an opportunity to see various skills in action and to begin working on those skills. A number of the assignments they will complete during this segment will be reviewed in the Foundation Workshop.

II. Foundation Workshop

The Foundation Workshop will be a one-week workshop which will take place in November. Given the number of articled clerks we currently enroll, we will be running three or four sessions in the month of November.

The Foundation Workshop will contain many elements similar to our current in-person Skills Course. The articled clerks will work on various scenario to practice their lawyering skills and gain feedback on their performance. All of the topics covered in the Foundation Modules will be touched on during the Foundation Workshop. It will also be used to introduce the articled clerks to the Virtual Law Firm.

The current proposed schedule for the Foundation Workshop is as follows:

Day 1: Interviewing Workshops – 2 scenarios

Day 2: Negotiation Workshops – 2 scenarios
      Legal Writing Workshop – Opinion Letter

Day 3: Legal Drafting Workshops – Affidavit or Contract
      Oral Advocacy Workshops – Ex parte application

Day 4: Oral Advocacy Workshop – Contested application
      Legal Drafting Workshop – Will
      Legal Research Workshop – Legal Memorandum
Day 5: Professional Ethics
   The Effective Lawyer
   Cross Cultural Communication
   Practice Management
   Technology

III. Virtual Law Firm

The virtual law firm will include three rotations of a month each. The purpose of this segment of PREP is to simulate the law firm experience and to increase the articled clerks proficiency in the various lawyering skills. This segment will run from January to March and will cover the areas of business law, criminal law and family law/real estate.

During this portion of PREP the articled clerks will be monitored by a Practice Manager who will be their mentor and will be responsible for evaluating their practice management skills. The articled clerks will be assessed in each of the skill areas during each rotation with the expectation that their proficiency will increase as they move through the rotations.

In this segment the articled clerks will be provided with various tools to assist them in their learning. These will include access to LexisNexis and use of Clio (practice management software).

IV. Capstone Evaluation

The Capstone Evaluation will be a one-week comprehensive summative simulation and assessment. Articled clerks will be assessed in all the modules and will need to demonstrate competency in all areas.

What does Council need to consider?

Essentially Council needs to determine if it is prepared to move ahead with becoming a full partner in the CPLED organization and committing resources to implementing that program.

If the Society chooses not to become a partner in the program then we will no longer have access to the four on-line skills modules that we currently use. Those are Legal Writing, Legal Drafting, Client Management and Practice Management.

These would be online modules and based on the cost that CPLED has incurred to create these modules, the Society is looking at a capital cost to develop four modules of at least $400,000, in addition to the cost of finding a host for our course, IT support and the ongoing maintenance and updating of the modules. In addition, if we do not move forward with the new program Council will need to decide what we are going to do with the current Bar Examination. Our current exam consultant is nearing retirement. As a result, decisions will need to be made about moving forward.

Ms. Canning has set out the reasons for moving to the PREP program succinctly in her memo. Without repeating her submissions, moving to this program makes sense for the following reasons:

1. Better test of student competency
2. Harmonization across some provinces
3. Increased efficiencies by pooling resources
4. Reduction in resources committed to Skills Course

It is also important to note, as was stated in Ms. Canning’s memo that CPLED is currently in discussions with both the PEI and NL law societies about joining CPLED and implementing the PREP program in those provinces. From the point of view of having national admission standards, the more harmonization there is across the country the better it is for both the public and the lawyers in those provinces.

The issues raised by Credentials that Council needs to grapple with in determining if the Society should adopt the PREP program are: accessibility of the PREP course, transfer applications, messaging to firms and risks involved in outsourcing. Of these issues, only one is unique to Nova Scotia. That would be the issue around outsourcing. In an effort to assist Council’s discussion around these topics, we offer the following:

A. Accessibility of the PREP course

Staff have been communicating with CPLED and are aware that CPLED is working on ways to make the entire PREP course accessible to all kinds of students. That will continue to be a priority for both the Society and CPLED. Every province offering a Skills course or Bar Admission program must ensure that all applicants are accommodated.

B. Transfer applications

Staff have begun to look at how to deal with applications for transfer. There will be different processes for domestic transfers and foreign transfers. For domestic transfers it may be that a different reading requirement is set to assist them in transitioning to Nova Scotia. We must also consider whether that is necessary given that they have an ethical obligation to practice only where they are competent and also whether a reading requirement is any longer proactive, principled and proportionate. For foreign transfers it is likely that we will want to treat them the way they are treated in the other provinces that have the PREP program for consistency and fairness. Those candidates will have to be assessed and a determination will have to be made about whether they have to take any or all of the modules in the PREP program. Staff are currently talking to the other jurisdictions to gather information on this issue.

C. Messaging to firms

The Society will need to create and implement a communication plan to assist principals in understanding the needs of the students and the expectations on them while taking the course. The Director and staff will meet with as many as possible in person to discuss the new program and to assist principals/firms in coordinating the articling work and the PREP course work. This is an opportunity for clerks to work on managing competing priorities and learning how to navigate a process that will resemble what they are required to do when practising.

D. Risks involved in outsourcing

While we appreciate this concern, it is noteworthy that CPLED has been in existence for more than a decade and the prairie provinces have invested a significant amount of money and resources into this new program. While there is always a risk with outsourcing, Society staff will continue to be involved in
the program and if there was to be a wind up the Society has the ability and resources to re-establish our own Skills Course should the need arise.

2. If the Society joins CPLED how will the PREP course be funded?

Once Council determines whether to move to the PREP course, the key issue becomes how the course will be funded. The two most obvious options are either requiring the students/firms with clerks to pay the full amount of the tuition or to subsidize the cost of the course.

In terms of joining CPLED, both Ms. Canning and I have provided Council with the information about the cost of the current course and the cost should we move to the PREP course.

As Ms. Canning pointed out, the current tuition for our course is $3750 per student. The actual cost to the Society for the Skills Course is approximately $6000 per student. The amount varies depending on the number of students we have each year.

The Credentials Committee has identified a number of issues that may arise if the total cost of the course is put on students and/or their firms. I will now address the Committee’s issues:

a. Cost to students

As the Committee points out, costs to students is a very real issue and one that Council identified at your January meeting. If the tuition for the PREP course is set at $6100 the increase in tuition would be $2350. That is a significant increase whether the clerk is paying the full tuition or if the firm is paying for the clerk.

In terms of the clerks paying, staff have investigated the situation with the clerks from last year to get a benchmark for Council. Of the 76 students who took the course, 8 paid for the course on their own. The Society covered the tuition for two students from the Ku’TawTinu initiative. For those of you who are not aware of this initiative, it was created to assist Mi’kmaq students in securing articling positions in an effort to improve the administration of justice.

As indicated in Ms. Canning’s memo to Council we are also working with the Law Foundation in an effort to secure a grant which would provide tuition for at least 10 students who have financial hardship. As stated in that memo, we have been advised that the Law Foundation Board is supportive of our efforts in this regard.

We have been working with Finance and Administration to understand the cost of moving to the PREP course and how this will affect the Society’s finances as well as the impact on students and firms paying for the course.

The cost of the PREP program is estimated by CPLED to be $6,100 per student, or $439,000 (based on 72 students, which is our average number). Our current cost of running the Skills Course program and the Bar Exam are approximately $415,000 or $5,764 per student. It varies from year to year depending on the number of students and the students who are in the Ku’TawTinu initiative (the Society waives the fee for these students).
By moving to CPLED, we would be able to eliminate some, but not all of the existing expenses. Some expenses which will continue may be reimbursable by CPLED if they continue to be incurred in the delivery of the PREP course.

Of the $414,000 existing costs, we anticipate that $166,000 of costs will be eliminated by reducing our expenses. Of course, we will also lose $286,000 in revenue. The residual cost is then $248,000.

Please note that the most recent CPLED documentation suggested $88,000 reimbursable for work done by NSBS, the additional $49,000 we are estimating is mostly for facilitation and consulting work carried out by staff).

Of the $248,000, $110,000 of remaining costs relate primarily to the rental cost of the classroom ($60,000 of costs remaining), office space rental for staff ($19,000), salaries and related costs for staff working on the skills course where these salary and related costs are neither eliminated or reimbursed ($29,000). If the classroom and office space is not re-purposed, it could potentially be eliminated at the time of the lease renewal in March 2022.

Council should keep in mind that although the entire rent for the classroom is assigned to the Skills Course the classroom is used for many other purposes. In addition, the calculation for the portion of salaries and rental space is an inexact science given that it is very difficult to determine an exact proportion of work that is for just the Skills Course. We have done our best, but it is, at best, an estimate. The point being that with or without a Skills Course, the remaining $248,000 would still be a cost to the Society in order to fulfill the credentialing, LSS and MCPD mandate.

Recognizing that increasing the tuition for students from $3750 to $6100 is a drastic increase, Council may want to consider whether, instead, the Society should be considering further subsidies for the cost of the course. It is important to note that currently Alberta, Manitoba and Saskatchewan all receive subsidies from their law foundations for their courses. Alberta receives $923,000 Manitoba receives $63,000 and Saskatchewan receives $96,000. The proposed subsidies for each of those provinces are $1,000,000, $121,000 and $208,000 respectively if students charge a tuition of $3750.

With the PREP program, if the students pay their tuition of $3750 directly to CPLED, that would total $232,500 for 62 students who pay and $61,000 for 10 students paid for by the Law Foundation which will total $293,500. CPLED will be expecting $439,200 for 72 students. The difference between the two numbers is $145,700. As CPLED is crediting us with $137,000 the actual money changing hands would be $8,700. See Appendix “C”.

Although the Society would only pay $8,700 to CPLED, the total “cost” to the Society of the program is $256,862, which is 129,362 more than the current cost. Therefore, the Society is currently subsidizing the course at the cost of $63.75 per member. If Council wishes to subsidize the increased cost, it would amount to an additional $64.68 per member. That would mean that each member of the Society would be subsidizing the course in the amount of $128.43 per member, per year.

Of course, there are other options. The Society could increase the portion of the tuition that students/firms pay. Council could increase the tuition to 4000 or more, depending on what level they feel is appropriate. Any increase in tuition would offset the amount the Society has to subsidize the course.
There may also be additional savings in that the Society may actually receive additional credits from CPLED depending on the work the Society undertakes on CPLED’s behalf.

Moving to the PREP program will also free up time and resources within the E&C department to devote to the LSS work which is increasing as the program moves forward.

The alternative to the PREP program is to keep our current course and create and implement our own on-line modules, which would require up-front investment over the next twelve months of at least $500,000 and ongoing cost associated with hosting and running our own on-line modules. In addition, the Society will need to determine how to deal with the Bar Examination and what we do moving forward with that process.

As the course is already costing close to $6,000 per student adding a $500,000 expense will either significantly increase the tuition or the subsidy for the course.

b. Fewer Articling positions

I addressed this issue in the above paragraphs. Although there are a minimal number of students who currently pay for the course on their own and we may adjust for that with the Law Foundation grant, it is also true that firms may take fewer clerks if they have to pay 6100 for each of their clerks to be assessed. One way to deal with this is to consider subsidizing the course so that each member pays towards the training and assessment of new members of the profession.

I hope this provides you with the information you need to make a decision. Should you need any additional information or have questions I would be happy to answer them.

All of which is respectfully submitted,

Jacqueline L. Mullenger
Director,
Education & Credentials
### Appendix C

<table>
<thead>
<tr>
<th></th>
<th>Current Situation</th>
<th>Estimated with CPLED</th>
<th>Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paying CPLED</td>
<td>0</td>
<td>$8,700*</td>
<td>$8700</td>
</tr>
<tr>
<td>NSBS Expenses</td>
<td>$414,000</td>
<td>$248,162</td>
<td>($166,024)</td>
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<tr>
<td>Total Expenses</td>
<td>$414,000</td>
<td>$256,862</td>
<td>$135,000</td>
</tr>
<tr>
<td>Bar exam revenue and Course Fee Revenue @ $3,750</td>
<td>($286,500)</td>
<td>(0)</td>
<td>(0)</td>
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<tr>
<td>Net cost to NSBS (Subsidy)</td>
<td>$127,500</td>
<td>$256,862</td>
<td>$129,362</td>
</tr>
</tbody>
</table>

* Tuition owing to CPLED for 72 students $439,200
  Tuition paid by students (3750 x 62) ($232,500)
  Tuition paid by Law Foundation (10 x6100) ($61,000)

$145,700

Credit to NSBS for services rendered ($137,000)

Owing to CPLED from NSBS $8,700
MEMORANDUM TO COUNCIL

From: Credentials Committee
Date: June 4, 2019
Subject: Skills Course and CPLED PREP course

For: Approval

Introduction X

Information

Last year, Council was advised that the Society was discussing the possibility of collaborating with the Canadian Center for Legal Education ("CPLED") to offer a new Bar Admission Course in Nova Scotia.

CPLED is the organization that offers the Bar Admission Course in Alberta, Saskatchewan and Manitoba. The bar admission course offered by CPLED in the western provinces is similar to the course in Nova Scotia. It offers both in-person and on-line modules. Clerks are tested in all of the Skills that Nova Scotia currently assesses, which includes Legal Writing, Legal Drafting, Negotiation, Interviewing, Oral and Written Advocacy, Practice Management and Client Management. It follows the National Admission Standards that were agreed to by all provinces.

In 2017, after conducting a thorough review of its program, CPLED determined that the program needed to be revamped and that CPLED needed a different governance structure. As a result, CPLED now has its own Board of Directors and a CEO. The CEO is Dr. Kara Mitchelmore who was previously the CEO and also VP of Program Development for CMA Alberta. Council met Dr. Mitchelmore at its March 2019 meeting.

For many years now, Nova Scotia has been partnering with CPLED to offer our on-line portions of our course. These are Legal Writing and Drafting, Practice Management and Client Relationship Management. These modules are modeled after the CPLED modules and are hosted on the CPLED server for an annual fee.
As part of the re-working of CPLED, their program has undergone a major overhaul. The new course will be called PREP. It will be described in detail later in this memo.

The prairie provinces have committed substantial funds to the capital fund to create the new program. Nova Scotia has not been asked to contribute to the building of the program but we have been collaborating and assisting in focus groups, work groups and meetings to determine what the new program should look like and how it will be offered.

Nova Scotia has been invited to become a full partner in the new program and we will need to decide if it wants to do so. If we choose not to do so, we will no longer have access to the modules that we are currently using. As a result of the way the new course is being constructed, each province will have to be all in or all out. CPLED is planning on piloting the new program in Alberta and Manitoba in the fall of 2019 and beginning the new program throughout the three provinces in 2020. If Nova Scotia is to join, it will need to make a decision in the coming months.

Dr. Mitchelmore made a presentation to Council in March 2019, which provided details of how the program would operate. The new program is not entirely different from what we are currently offering in terms of the skills and competencies being taught and evaluated. There are advantages to moving in this direction for both the Nova Scotia public and for the students whose competency is being assessed.

One of our goals as we move forward is to make the bar admission programs across the country harmonized. That was the vision when the National Admission Standards were created and agreed to by all provinces. The intention was that clients in any province could be assured that wherever they were in Canada their lawyers had been held to the same admission standards. It also gives more certainty to those being evaluated that the same standards of competency are being expected of them wherever they are articling.

Secondly, the program that is being designed will better test the student’s actual competency in readiness for practice because they will have more opportunity to demonstrate their competency in a manner that more closely resembles the real world. Students will be placed in virtual law firms and will learn and be tested in the competencies in an integrated fashion. They will be assigned a file and will work from retainer to closure incorporating all the skills listed. They will be assessed at four levels rather than simply testing interviewing or negotiation, etc. At each level as they move through the program they will be expected to become more and more competent. They will receive feedback along the way from lawyers trained as learning group facilitators. All students will be tested for competency at the same time, near the end of their articles rather than at all different stages which is now the case.

Thirdly, collaborating across provinces allows societies to create, implement and maintain a more effective program because of the integration of resources both human and financial. Should Nova Scotia decide to do this work on its own it would involve far more money and additional human resources to develop and maintain our own on-line modules and competency assessments. Working with CPLED provides Nova Scotia the opportunity to
capitalize on resources and perhaps realize some savings of our own, while offering an innovative and effective means of testing competency of new lawyers.

Finally, as mentioned earlier, four provinces working together and harmonizing their bar admission course is what the National Admission Standards actually envisaged. It supports the notion of national mobility and also responds to government’s concern that lawyers in each province are being subjected to the same requirements and that they have the same competencies. The more provinces who join, the more defensible the requirements will be for the profession. CPLED is currently talking to other provinces about the possibility of them joining as partners. In addition, the Society Executive Director have an opportunity to participate on the CPLED Board and therefore will be able to bring Nova Scotia ideas and/or concerns to the table.

In working on this project, the Society has identified that the actual cost per student of the current Bar Admission Course, including the Bar Exam is $6,000 per student. At present, we charge each student $3750. From that analysis, it is clear that the Society is substantially subsidizing the program. The new course has not yet set a price for the course but it will be somewhere in the $6,000 range per student.

In considering this increase it must be borne in mind that the cost of delivering the program is going to increase for the Society regardless. If we do not join CPLED, the Society will need to create and run our own on-line components which will cost the Society substantially more money. Staff have discussed the creation of new modules with CPLED and they have indicated that each new module costs them upwards of $100,000. That means Nova Scotia could potentially be looking at spending at least $400,000 to create four new modules that are effective and defensible. In addition, our Exam consultant is preparing to retire which means we have to make decisions about our Bar Examination.

In either case, the cost of the Bar Admission Course is going to increase over the next few years. One main difference between Nova Scotia and most other provinces is that Nova Scotia receives no funding from the Law Foundation for our bar admission program. Almost all other law societies receive substantial funding/subsidies for their courses. Our Executive Director has reached out to the Law Foundation to discuss the possibility of the Law Foundation providing some type of funding for students who need assistance with the cost of the program. We are now in the process of applying for a grant from the Law Foundation to assist students who have financial hardship and have to pay for the course on their own. We understand that our request has the support of the Board. That application will be filed in September.

The committee had the benefit of a presentation at our last meeting as well as regular updates and advice from Society staff. We are prepared to make a recommendation to Council that we move forward with this project and accept CPLED’s offer to become a full member of the program.
The committee identified several issues that Council should take into consideration when moving forward:

1. **Cost to students**: The committee is mindful that there are some students who are paying for the course out of their own pockets. As a result, increasing the cost to $6100 (estimate) will be a significant burden to those students who may already have increased financial challenges as a result of articling either for no or very low remuneration. The Committee recommends that Council consider whether the increased cost of the course should be subsidized by the membership as a whole rather than placing the burden on those students or on the firms who are paying for their clerks to take the course.

2. **Fewer articling positions**: The committee asks Council to consider whether fewer firms will take clerks if the cost of the course is increased by $2350 per student. Again, we are mindful of the fact that, although there is not an articling crisis *per se*, we would not want to do anything that would reduce the number of articled clerk positions in the province. That is not to say that we think the Society should not move forward with the new program, but rather that serious consideration needs to be given to how the course will be paid for.

3. **Messaging to firms**: Given that the students will only spend two weeks at the Society in the classroom and instead, much of their time engaged in online course work while at the firm, the Committee wants to ensure that there is proper messaging and dialogue with the firms so that they provide sufficient time to the students to complete their course work.

4. **Transfer applications**: Council will need to consider how to deal with both foreign and domestic transfers when the new program is put into place. At the current time, domestic transfers are asked to review the Bar Review Outlines before being called to the bar in Nova Scotia. Foreign transfers are required to write the Nova Scotia Bar examination before being called to the bar. Given that the new program will not have a bar examination, how will these transfers be dealt with? Will there be some other type of reading requirement for domestic transfers and will foreign transfers be required to take the PREP course? Council may want to look to the other CPLED jurisdictions for answers to these questions.

5. **Regulation changes**: Council will need to consider what, if any, changes need to be made to the articling, admission and transfer regulations to implement the new program. There will, in all likelihood need to be a major review and overhaul to both regulations and the policies that complement those regulations.

6. **Accessibility of PREP course**: Council will need to ensure that any new course is accessible to all differently abled applicants. Additional resources may be required to give each applicant an equal footing in the program.

7. **Risks involved in outsourcing**: The committee also discussed the fact that there are inherent risks in outsourcing any of our mandated obligations. Council may want to look for assurances as to how the Society would proceed should CPLED decide to abandon the project or wind up at some point in the future.
Finally, the committee is in support of this very important step forward in the Society’s assessment of competency for those beginning the practice of law. We are satisfied that the PREP course will better assess students so that the Society can be confident in the lawyers starting out in the practice of law. We have raised the above issues as considerations for implementation rather than bars to moving forward.

We would be happy to answer any questions.

All of which is respectfully submitted,

Cheryl Canning QC
On behalf of Credentials Committee
NOVA SCOTIA BARRISTERS’ SOCIETY

STRATEGIC GOALS and OBJECTIVES

2019 - 2022

August 12, 2019
PURPOSE

The purpose of the Society is to uphold and protect the public interest in the practise of law.

MISSION

Our mission is to regulate the legal profession in the public interest in a manner that is proactive, inclusive and supportive so our members deliver competent and ethical legal services.

VALUES

The core values that guide how we approach our purpose and our work are:

- Excellence
- Fairness
- Respect
- Integrity
- Diversity and Inclusion
- Accountability
- Visionary leadership
- Transparency

VISION

Acting in the public interest, the Society is the trusted and respected regulator of the legal profession. We provide leadership, value and support to a competent, ethical, diverse and engaged legal profession. We work with the legal profession to enhance access to legal services and to uphold the rule of law.

STRATEGIC GOALS AND OBJECTIVES

Goal #1: The Society regulates the legal profession in the public interest in a proactive, principled and proportionate manner. We will:

- Support members at every stage of their careers;
- Communicate and engage with members;
- Develop and maintain a mentorship initiative;
- Support members in delivering competent and ethical legal services;
- Facilitate education and provide resources and support to members to be culturally competent in the delivery of legal services;
- Facilitate education and provide resources and support to members in becoming more proficient in using technology;
- Investigate and implement, if appropriate, differential membership fee models;
- Review and assess the viability of paralegal regulation in Nova Scotia;
Identify and remove regulatory barriers to support innovation in the delivery of legal services;
Explore, and where appropriate, support the viability of innovative models of legal services delivery (e.g. MDPs, “sand boxes”);
Review and replace the current Bar Admission course.

Goal #2: More Nova Scotians will have access to ethical and competent legal services. We will:

Identify and provide supports to address the challenges and needs of rural members;
Provide guidance and advice on having appropriate succession planning in place;
Facilitate the placement of articling and summer students in underserviced areas of the Province;
Establish a Council committee that is dedicated to the support of sole practitioners and small firms;
Facilitate and support the provision of pro bono services by addressing regulatory barriers;
Advocate, where appropriate, for funding or services that will address gaps in access to legal services;

Goal #3: Nova Scotians will be served by a legal profession that is diverse, inclusive and culturally competent. We will:

Continue to develop cultural humility, awareness and understanding of issues and barriers in the justice system affecting equity-seeking groups;
Develop mechanisms to hold members accountable for the delivery of culturally competent legal services;
Continue to implement meaningful responses to the TRC Calls for Action and MMWG Calls to Justice;
Honouring the recommendations of the Royal Commission on the Donald Marshall Jr. Prosecution, the Society will pay particular attention to the needs of Mi’kmaq and African Nova Scotians throughout all of its work;
Facilitate and encourage entry into the legal profession of members from diverse and equity-seeking groups by partnering with community organizations to educate community members about the role of the lawyer and the role of the regulator;
Identify and address barriers that affect the retention and advancement of members from diverse and equity-seeking groups in the profession;
Continue the integration of the equity and inclusion lens through all Society, Council and committee decision making and policies.

* “Equity-seeking groups” include women, Aboriginal peoples, racialized peoples, persons with disabilities and persons seeking equality on the basis of their sexual orientation and gender identity. [Council Policy #2]
About the Nova Scotia Barristers’ Society

Who We Are and What We Do

As the regulator of Nova Scotia's legal profession, the Nova Scotia Barristers' Society (NSBS) exists to uphold and protect the public interest in the practice of law.

We fulfill our public interest mandate by ensuring that lawyers deliver competent and ethical legal services in accordance with our standards for legal professionals.

Our responsibilities include:

- Accrediting articling clerks and lawyers through a rigorous admissions and licensing process;
- Establishing ethical standards through its Code of Professional Conduct;
- Ensuring the professional responsibility of lawyers, including by receiving and investigating complaints concerning lawyers’ quality of service and allegations of professional misconduct;
- Setting practice standards and competency requirements for lawyers;
- Striving to improve the administration of justice in the province. This includes working with the Courts, government departments and participants in the justice system and facilitating dialogue and cooperation that will improve all aspects of the justice system for Nova Scotians.

The Society’s membership is currently comprised of over 2000 lawyers.

Our Governance

Council is the Society's governing body and includes 21 voting members who are elected lawyers from across the province, as well as five appointed public representatives. Council is supported by numerous committees, hundreds of volunteers and a dedicated staff, led by the Society’s Executive Director.

Council ensures that the Society fulfils its purpose by striving for excellence in regulation of the profession, promoting the highest standards of competence and ethical conduct of lawyers and striving for equity, diversity and inclusion within the profession.

Council establishes our strategic direction. Following a series of consultations with members, stakeholders and the public in 2019, Council created a set of Strategic Goals and Objectives to guide its work for the next three years (2019-2022).

Review our 2019-2022 Strategic Goals and Objectives at nsbs.org/strategicplan.
Our Foundational Activities

Society staff and volunteers ensure that we operate in a responsible, effective and efficient manner. Our foundational activities include:

- leading national regulatory initiatives and adopting best practices in all areas of its work including credentialing and monitoring the competence and conduct of lawyers;
- maintaining an outcomes-focused and risk-based regulatory model;
- promoting and maintaining effective relationships through sincere, substantive and sustained engagement; and
- focusing on the future and making sound, informed financial decisions.

Our Values

We carry out our work in alignment with the following values:

- **Diversity and Inclusion**: We promote substantive equality and encourage the profession to embrace the value of diversity and inclusion. We are inclusive and supportive of people from diverse backgrounds, cultures, practice environments and life experiences.

- **Excellence**: We promote excellence in the profession and strive for excellence in all aspects of our work. We adopt appropriate and best policies, procedures and practices.

- **Fairness**: We operate fairly and impartially. We are proactive, principled and proportionate.

- **Respect**: We treat everyone with dignity and respect. We listen, consider and seek to understand other points of view.

- **Integrity**: We approach our work in an ethical, honest and principled fashion.

- **Accountability**: We are open, objective and fiscally responsible in our independent governance and regulation of the profession.

- **Transparency**: We are transparent in our decision-making and processes.

- **Visionary leadership**: We actively seek out and assess what is happening provincially, nationally and globally that affects the regulation of the legal profession. We anticipate and respond to a rapidly changing environment and have the courage to initiate change.
Our ‘Triple P’ Approach to Regulating and to Decision Making

We regulate Nova Scotia lawyers in a manner that is risk focused, proactive, principled and proportionate. We embed this “Triple P” approach of being proactive, principled and proportionate in all of our activities.

Proactivity: We do not simply react, but we engage the legal profession and Nova Scotia’s communities to discuss challenges and opportunities.

Principled: We set a regulatory framework that is aspirational and focused on our public interest mandate rather than based solely on narrowly prescriptive rules.

Proportionate: We apply efficient and effective regulatory measures to achieve objectives using, among others, risk assessment and risk management tools. It calls for a balancing of interests and a ‘proportionate’ response, both in terms of how we regulate, and how we address issues of non-compliance.

Our Triple P regulation gives appropriate consideration to the risks to the public and the profession. It encourages innovative approaches to risk reduction, providing a regulatory system that serves the best interests of the public in having access to competent and ethical legal services.

Accountability for our Strategic Goals and Objectives

Council, assisted by the Executive Director, adopts an Annual Activity Plan establishing specific outcomes, initiatives and timelines to achieve the Society’s priorities and initiatives arising from the Strategic Goals and Objectives.

Council revisits the Activity Plan at each of its meetings and reviews the status of the Strategic Goals and Objectives annually.

Council’s executive members, namely the President, monitors Council’s activities respecting the Strategic Goals and Objectives and the Annual Activity Plan.

The Executive Director supports Council in achieving the Strategic Goals and Objectives by providing regular status reports to Council.

An update on the Strategic Goals and Objectives is included in the Society’s Annual Report tabled at the Annual General Meeting.
The Society regulates the legal profession in the public interest in a proactive, principled and proportionate manner.

More Nova Scotians will have access to ethical and competent legal services.

Nova Scotians will be served by a legal profession that is diverse, inclusive and culturally competent.
MEMORANDUM TO COUNCIL

From: Tilly Pillay QC
Date: August 16, 2019
Subject: Policy Change and Regulatory Amendments to Implement Recommendations of GNC Court Liaison Committees Task Force

GNC has recommended that the Court Liaison Committees essentially remain as committees advisory to the Executive Director and that they be allowed to continue their current processes and procedures without having to follow the requirements of a Council Committee. They have also recommended that changes be made to Council Policy 18 as follows:

Council Policy 18 - Executive Expectations of the Executive Director should be amended to include a clause specific to the Court Liaison Committees including mechanisms for the committees to:

- obtain input from the Society;
- share information with the ED; and
- disseminate information from the committees to the membership

In order to give effect to these recommendations, we have amended Council Policy 18 and the regulations relating to committees. You will find those changes in the attached documents. Please note that we have also taken the opportunity to “tidy up” the regulations relating to committees and make reference to the new standards committee that Council approved in its last term.

Should Council adopt GNC’s recommendation, Council is also being asked to approve the proposed policy changes and the proposed regulatory amendments.

Attachments
MEMORANDUM

To: Governance and Nominating Committee

From: Loretta Manning, Q.C., Chair, Court Liaison Committee Task Force

Date: July 23, 2019

Subject: Final Report and Recommendations

The Court Liaison Committee Task Force is pleased to provide this final report with recommendations to the Governance and Nominating Committee and, eventually, Council.

MANDATE:

The mandate of the Task Force was to advice GNC and Council as to whether the work of the Court Liaison Committees aligns with elements of the Society’s legislative mandate, Strategic Framework and Regulatory Objectives and if they should continue as Society Committees.

OVERVIEW:

The Task Force reviewed all available background information and resources from the Society, including the Society’s Legislative mandate, Strategic Framework and Regulatory Objectives. We also reviewed materials provided by the Committees themselves and met several times. Following in-depth discussions, the Task Force concluded that the Court Liaison Committees’ work aligns with the Society’s legislative mandate, Strategic Framework and Regulatory Objectives. The work of the Court Liaison Committees:

- is partly focused on improving the administration of justice in the Province;
- provides a forum for the Society to engage with justice sector players to enhance access to legal services and the justice system; and
- is consistent with the Society’s regulatory objective to “Promote access to legal services and the justice system.”

The Task Force reached a unanimous decision that the Court Liaison Committees should continue as Society committees.

The Task Force then considered whether the Court Liaison Committees should be Executive Director Committees or Council Committees. As well, the Task Force considered issues such as how appointments are made, whether there should be mandated work plans and term limits and
a mechanism for effective liaison between each committee and the Society. After reviewing relevant documentation and hearing from the Executive Director, and considering the fact that each Court Liaison Committee is unique, the following determinations were made by the Task Force:

A. The Court Liaison Committees should not be Council Committees and should remain advisory to the Executive Director;
B. Status Quo on composition;
C. Each Court Liaison Committee should continue to determine the nature of their work and can determine their own work plans and term limits;
D. Council Policy 18 - Executive Expectations of the Executive Director should be amended to include a clause specific to the Court Liaison Committees, including mechanisms for the committees to:
   • obtain input from the Society;
   • share information with the ED; and
   • disseminate information from the committees to the membership.

A copy of the proposed amendment to Council Policy 18 is attached.

The Executive Director has advised that, if the recommendations of the Task Force are accepted, regulatory amendments will be required so that these committees do not fall under the requirements of Council Committees. In addition, Council will need to approve changes to Council Policy 18. However, this does not fall within the mandate of the Court Liaison Committee Task Force.

RECOMMENDATION:

The Court Liaison Committee Task Force recommends the following:

1. The Court Liaison Committees should continue as Society committees;
2. The Court Liaison Committees should remain advisory to the Executive Director;
3. There should not be any change to how members of the Court Liaison Committees are appointed;
4. Each Court Liaison Committee should continue to determine the nature of their work and can determine their own work plans and term limits; and
5. Council Policy 18 - Executive Expectations of the Executive Director should be amended to include a clause specific to the Court Liaison Committees including mechanisms for the committees to:
   • obtain input from the Society;
   • share information with the ED; and
   • disseminate information from the committees to the membership.

On behalf of the Task Force, thank you for the opportunity to consider this important issue.

Loretta Manning, Q.C.
Chair, Court Liaison Committee Task Force

Attachment
Appointments of members of outside bodies

18.26 Upon request for the Society to appoint representatives and board members to external bodies, the Executive Director, in consultation with the Governance and Nominating Committee, will assess whether such representation is appropriate within the Society’s purposes and current priorities.

18.26.1 If the Executive Director is to make the appointment, Council shall be advised in writing of the names of the intended appointees before the appointments are made.

18.26.2 The Executive Director will appoint the required representatives.

18.26.3 The Executive Director will ensure Council makes the appointments if it is required to do so.

18.26.4 The Society’s appointee shall provide information reports as appropriate, to be determined by the Executive Director at the time of appointment.

18.26.5 These outside bodies include:

• Canadian Lawyers’ Insurance Association Advisory Board**

Advisory Committee on Judicial Appointments – Federal. **

• Federation of Law Societies of Canada Council**

• Law Foundation of Nova Scotia**

• Law Reform Commission of Nova Scotia**

• Lawyers’ Insurance Association of Nova Scotia** Board of Directors

• Legal Information Society of Nova Scotia (LISNS)

• Nova Scotia Legal Aid Commission**

• Provincial Judicial Appointments Advisory Committee**

• QC Appointments Advisory Committee

• Small Claims Court Adjudicators Advisory Committee

• Statutory Costs and Fees Committee

• The Indigenous Blacks and Mi’kmaq Initiative Advisory Council

• The Judicial Council of Nova Scotia

• Government Liaison Committees (and their subcommittees)

• The Nova Scotia Civil Procedure Rules Committee

**These appointments require Council approval

Court Liaison Committees

18.27 Court Liaison Committees support effective liaison between the Society, members of the Society and the courts by, among other things, identifying policy and other issues relating to the administration of justice, and recommending means for addressing these issues.

18.27.1 Appointments by the Society to Court Liaison Committees must be made by the Executive Director, in consultation with the Governance and Nominating Committee.

18.27.2 The Executive Director shall ask the Court Liaison Committees to provide periodic reports to Council, through the Executive Director, with respect to their work.

18.27.3 The Executive Director may ask the Court Liaison Committees to consider issues that would assist with furthering the purpose, the regulatory objectives and strategic plan of the Society.
### Existing Regulation

**2.9 Committees**

**2.9.1** Council shall appoint the following committees:

(a) REPEALED July 2010;

(b) LAWYERS’ FUND FOR CLIENT COMPENSATION COMMITTEE, to carry out the responsibilities assigned to it under Part IV of the Act and Part 11 of the Regulations;

(c) COMPLAINTS INVESTIGATION COMMITTEE, to carry out the responsibilities assigned to it under Part III of the Act and Part 9 of the Regulations and in accordance with the Objects of the professional responsibility process;

(d) CREDENTIALS COMMITTEE, to oversee the Regulations with respect to admission to membership in the Society, the Bar Admission Course, changes in category of membership in the Society, and resumption of membership in the Society;

(e) EXECUTIVE COMMITTEE, to review matters to be dealt with by Council to ensure they are ready for Council consideration, to undertake those matters that are delegated to it by Council, and to act on behalf of Council in matters of urgency;

(f) FINANCE COMMITTEE, monitors the finances of the Society, acts on behalf of Council in regard to the annual audit of the Society’s finances and acts on behalf of Council.

### Proposed Regulation

**2.9 Committees**

**2.9.1** Council shall **must** appoint the following **statutory** committees:

(a) REPEALED July 2010;

(b) LAWYERS’ FUND FOR CLIENT COMPENSATION COMMITTEE, to carry out the responsibilities assigned to it under Part IV of the Act and Part 11 of the Regulations;

(c) COMPLAINTS INVESTIGATION COMMITTEE, to carry out the responsibilities assigned to it under Part III of the Act and Part 9 of the Regulations and in accordance with the Objects of the professional responsibility process;

(d) CREDENTIALS COMMITTEE, to oversee the Regulations with respect to admission to membership in the Society, the Bar Admission Course, changes in category of membership in the Society, and resumption of membership in the Society;

(e) EXECUTIVE COMMITTEE, to review matters to be dealt with by Council to ensure they are ready for Council consideration, to undertake those matters that are delegated to it by Council, and to act on behalf of Council in matters of urgency;

(f) FINANCE COMMITTEE, monitors the finances of the Society, acts on behalf of Council in regard to the annual audit of the Society’s finances and acts on behalf of Council.

### Rationale

Legal Profession Act

**12 (1)** The Council may establish committees and may authorize a committee to do any act or exercise any power or jurisdiction that, by this Act, the Council is authorized to do or to exercise, except the power to make regulations.

(2) The Council may make regulations:

(a) defining a committee's mandate and authority;

(b) governing the membership of a committee;

(c) governing meetings of a committee;

(d) governing the practice and procedure for proceedings before a committee.

**Complaints Investigation Committee**

**34 (1)** The Council shall appoint a Complaints Investigation Committee made up of lawyers and persons who are not members of the Society and may make regulations…

**34A (1)** The Council shall establish a Fitness to Practise Committee composed of members of the Society and persons who are not members of the Society as prescribed by the regulations…
<table>
<thead>
<tr>
<th>Existing Regulation</th>
<th>Proposed Regulation</th>
<th>Rationale</th>
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<tbody>
<tr>
<td>in respect to the management of the Society’s investments;</td>
<td>in respect to the management of the Society’s investments;</td>
<td>Hearing Committee and regulations</td>
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<td>(fa) FITNESS TO PRACTISE COMMITTEE, to carry out the responsibilities assigned to</td>
<td>(f) FITNESS TO PRACTISE COMMITTEE, to carry out the responsibilities assigned to</td>
<td>41 (1) The Council shall appoint a Hearing Committee made up of lawyers</td>
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<td>it under the Act and regulations;</td>
<td>it under the Act and regulations;</td>
<td>and persons who are not members of the Society and may make regulations…</td>
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<td>(g) HEARING COMMITTEE, to carry out the responsibilities assigned to it under Part</td>
<td>(g) HEARING COMMITTEE, to carry out the responsibilities assigned to it under Part</td>
<td>This change reflects the most recent update to the Committee’s Terms of</td>
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<td>III of the Act and Part 9 of the Regulations and in accordance with the Objects</td>
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<td>of the professional responsibility process;</td>
<td>the professional responsibility process;</td>
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<td>(h) GENDER EQUITY COMMITTEE, monitors, and provides Council with advice about,</td>
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<td>matters that address issues of gender in the legal profession;</td>
<td>matters that address issues of gender, gender identity and gender expression in</td>
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<td>(i) REPEALED June 2010;</td>
<td>the legal profession;</td>
<td>the Committee’s Terms of Reference.</td>
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<td>(j) GOVERNANCE AND NOMINATING COMMITTEE, assist Council in the recruitment,</td>
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<td>appointment and election of members of Council and Officers of the Society and</td>
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<td>support Council’s commitment to the principles and practices of good governance;</td>
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<td>(k) REPEALED July 2010;</td>
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<td>(l) RACIAL EQUITY COMMITTEE, monitors, and provides Council with advice about,</td>
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<td>programs that address issues of racism and discrimination in the legal profession</td>
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<td>and in relation to access to justice, including programs to increase access to the</td>
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<td>legal profession;</td>
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<td>(m) COMPLAINTS REVIEW COMMITTEE, to carry out the responsibilities assigned to it</td>
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<td>under Part 9 of the Regulations in accordance with the objects of the professional</td>
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<td>responsibility process;</td>
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<td>(n) REPEALED June 23, 2007;</td>
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<td>(o) REPEALED July 2010;</td>
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<td>(p) PROFESSIONAL RESPONSIBILITY POLICY &amp; PROCEDURES COMMITTEE, to consider and recommend to Council changes to the Act, Regulations and policies, and develop procedures for the professional responsibility process; (q) REPEALED July 2010; (r) REPEALED July 2010; (s) PROFESSIONAL STANDARDS (Real Estate) COMMITTEE, develops professional standards for the area of real estate law; (t) PROFESSIONAL STANDARDS (Family) COMMITTEE, develops professional standards for the area of family law; (u) PROFESSIONAL STANDARDS (Criminal) COMMITTEE, develops professional Standards for the area of criminal law; (v) PROFESSIONAL STANDARDS (Law Office Management) COMMITTEE, develops professional standards in the area of law office management.</td>
<td>(l) PROFESSIONAL RESPONSIBILITY POLICY &amp; PROCEDURES COMMITTEE, to consider and recommend to Council changes to the Act, Regulations and policies, and develop procedures for the professional responsibility process; (q) REPEALED July 2010; (r) REPEALED July 2010; (m) PROFESSIONAL STANDARDS (Real Estate) COMMITTEE, develops professional standards for the area of real estate law; (n) PROFESSIONAL STANDARDS (Family) COMMITTEE, develops professional standards for the area of family law; (o) PROFESSIONAL STANDARDS (Criminal) COMMITTEE, develops professional Standards for the area of criminal law; (p) PROFESSIONAL STANDARDS (Law Office Management) COMMITTEE, develops professional standards in the area of law office management; (q) PROFESSIONAL STANDARDS (Wills, Powers of Attorney and Personal Directives) COMMITTEE, develops professional standards in the area of wills, powers of attorney, personal directives and estates.</td>
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**Additional Committees**

2.9.2 Council may appoint such other committees or task forces as it deems desirable, and may fill a vacancy or add to any committee or task force.

**Additional Committees**

2.9.2 Council may appoint such other committees, working groups or task forces as may be necessary to further the purpose of the Society it deems desirable, and may fill a vacancy or add to any committee, working group or task force.
<table>
<thead>
<tr>
<th>Existing Regulation</th>
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<tr>
<td><strong>Additional Powers of Committee</strong></td>
<td>2.9.3 A committee, in addition to the powers and duties granted it by the Act or Regulations shall have such additional powers as the Council may from time to time prescribe. <strong>Chair of Committee</strong> 2.9.4 Council shall appoint a Chair of each committee and may appoint a Vice-Chair.</td>
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<td>2.9.2.1 Unless Council otherwise determines, any committee, working group or task force may determine its own procedure. <strong>Additional Powers of Committee</strong> 2.9.3 A committee, in addition to the powers and duties granted it by the Act or Regulations <strong>shall will</strong> have such additional powers as the Council may from time to time prescribe. <strong>Chair of Committee</strong> 2.9.4 Council shall <strong>must</strong> appoint a Chair of each committee and may appoint a Vice-Chair.</td>
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<td><strong>Composition of the Executive Committee</strong></td>
<td>2.9.4.1 The Executive Committee will be made up of the officers and, if determined by Council, one or two additional members. <strong>Duties of the Executive Committee</strong> 2.9.4.2 The Executive Committee has the following powers and duties: (a) appoint members to committees in the event of a vacancy and in circumstances where it determines the appointment should not wait until the next Council meeting; (b) to approve r resignations from membership in the Society in circumstances where it determines the resignation should not wait until the next Council meeting; and (c) to undertake any other work assigned or delegated by Council.</td>
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<td><strong>Composition of the Complaints Investigation Committee</strong>&lt;br&gt;2.9.5 The Complaints Investigation Committee will be made up of not fewer than twelve (12) people and unless Council otherwise determines, must include at least one member of the Society from each of the four judicial districts and two persons who are not members of the Society.</td>
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<tr>
<td><strong>Chair of Complaints Investigation Committee</strong>&lt;br&gt;2.9.6 The members of the Complaints Investigation Committee should be representative of the Society’s demographically diverse membership.</td>
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<tr>
<td><strong>Composition of Hearing Committee</strong>&lt;br&gt;2.9.7 The Hearing Committee must be composed of at least 12 persons, none of whom may be members of Council and, unless Council otherwise determines, include at least two members of the Society from each of the four judicial districts and two persons who are not members of the Society.</td>
<td><strong>Composition of Hearing Committee</strong>&lt;br&gt;2.9.8 The Hearing Committee must be composed of at least 12 persons, none of whom may be members of Council and, unless Council otherwise determines, include at least two members of the Society from each of the four judicial districts and two persons who are not members of the Society.</td>
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<td><strong>Responsibility of the Chair of the Hearing Committee</strong>&lt;br&gt;2.9.8 The Chair of the Hearing Committee is responsible for</td>
<td><strong>Responsibility of the Chair of the Hearing Committee</strong>&lt;br&gt;2.9.10 The Chair of the Hearing Committee is responsible for</td>
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(a) appointing a chair of a hearing panel,
(b) empanelling members of the Committee to sit as a hearing panel, and ensuring that at least one member of the hearing panel is a person who is not a member of the Society.

2.9.8.1 The Chair must empanel three members of the Committee to sit as a hearing panel.

Additional Members
2.9.9 Whenever, for any reason, a quorum of the Hearing Committee is not available for a hearing into a charge, Council may, for the purpose of such hearing only, appoint to the Committee such additional members of the Society as are needed for a quorum.

2.9.10 If one member of the panel ceases to be able to sit on the panel before the hearing of evidence has commenced the Chair of the Hearing Committee will appoint another member of the Committee to the panel.

2.9.10.1 If one member of a panel ceases to be able to sit on the panel after the hearing of evidence has commenced, the hearing will be ended and the Chair of the Hearing Committee will empanel a new hearing panel, which will reschedule the hearing from the beginning, unless the parties otherwise agree.

Remuneration
2.9.10.2 Members of the Hearing Committee may be entitled to receive remuneration from the Society for serving on a hearing panel.

(a) appointing a chair of a hearing panel,
(b) empanelling members of the Committee to sit as a hearing panel, and ensuring that at least one member of the hearing panel is a person who is not a member of the Society.

2.9.11 The Chair must empanel three members of the Committee to sit as a hearing panel.

Additional Members
2.9.12 Whenever, for any reason, a quorum of the Hearing Committee is not available for a hearing into a charge, Council may, for the purpose of such hearing only, appoint to the Committee such additional members of the Society as are needed for a quorum.

2.9.13 If one member of the panel ceases to be able to sit on the panel before the hearing of evidence has commenced the Chair of the Hearing Committee will appoint another member of the Committee to the panel.

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Remuneration
2.9.15 Members of the Hearing Committee may be entitled to receive remuneration from the Society for serving on a hearing panel.
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<tr>
<td><strong>Composition of the Fitness to Practise Committee</strong></td>
<td><strong>2.9.16</strong> The Fitness to Practise Committee shall <strong>must</strong> be made up of not fewer than five (5) people and, unless Council determines otherwise, shall include at least two (2) persons who are not members of the Society.</td>
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<tr>
<td><strong>2.9.17</strong> Council shall <strong>must</strong> appoint a Chair and Vice-Chair of the Fitness to Practise Committee.</td>
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<tr>
<td><strong>Ex Officio</strong></td>
<td><strong>2.9.11</strong> For the purpose of this part “ex officio” means non-voting and an ex officio member is not counted for quorum of a committee.</td>
<td>Moved</td>
</tr>
<tr>
<td><strong>2.9.12</strong> The President is a member ex officio of each committee except the Hearing Committee.</td>
<td><strong>2.9.12</strong> The President is a member ex officio of each committee except the Hearing Committee.</td>
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<td><strong>Executive Committee</strong></td>
<td><strong>2.9.18</strong> Council will appoint an Executive Committee to review matters to be dealt with by Council to ensure they are ready for Council consideration, to undertake those matters that are delegated to it by Council, and to act on behalf of Council in matters of urgency.</td>
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<td><strong>Composition of the Executive Committee</strong></td>
<td><strong>2.9.19</strong> The Executive Committee will be made up of the officers and, if determined by Council, one or two additional members.</td>
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<td><strong>Duties of the Executive Committee</strong></td>
<td><strong>2.9.20</strong> The Executive Committee has the following powers and duties:</td>
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<tr>
<td>Existing Regulation</td>
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<td>(a) appoint members to committees in the event of a vacancy and in circumstances where it determines the appointment should not wait until the next Council meeting; (b) to approve resignations from membership in the Society in circumstances where it determines the resignation should not wait until the next Council meeting; and (c) to undertake any other work assigned or delegated by Council.</td>
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**Composition of the Fitness to Practise Committee**

2.9.13 The Fitness to Practise Committee shall be made up of not fewer than five (5) people and, unless Council determines otherwise, shall include at least two (2) persons who are not members of the Society.

2.9.13.1 Council shall appoint a Chair and Vice-Chair of the Fitness to Practise Committee.

**2.10 Quorum**

2.10.1 A quorum of any committee shall be three members.

Adjourned Meeting

2.10.2 When a meeting of a committee is adjourned for any reason, the committee, when it resumes the meeting, shall be deemed to be duly constituted and shall not lose jurisdiction to deal with a matter that was before it at the adjourned meeting.

2.10.1 A quorum of any committee must be three members.

Adjourned Meeting

2.10.2 When a meeting of a committee is adjourned for any reason, the committee, when it resumes the meeting, will be deemed to be duly constituted and will not lose jurisdiction to deal with a matter that was before it at the adjourned meeting.
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<tr>
<td><strong>Notice of Meeting</strong></td>
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<tr>
<td>2.10.3 Meetings of any committee may be convened by 24 hours’ notice, oral or written, but in extraordinary circumstances a quorum of the committee may abbreviate the notice requirement.</td>
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<td><strong>Effect of Lack of Notice</strong></td>
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<tr>
<td>2.10.4 Failure of one or more committee members to receive adequate or any notice of a meeting shall not invalidate the proceedings, and nothing herein shall preclude subcommittee members from waiving notice of meetings.</td>
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<td><strong>Procedure of Committee</strong></td>
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<td>2.10.5 Except as provided in the Act or in these Regulations, a committee may determine its own procedure.</td>
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<td>2.10.6 For the purpose of this part “ex officio” means non-voting and an ex officio member is not counted for quorum of a committee.</td>
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MEMORANDUM TO COUNCIL

From: Victoria Rees, Director of Professional Responsibility

Date: September 17, 2019

Subject: Regulatory Risk Update

For: Approval Introduction Information X

Recommendation/Motion:

This memo provides Council with an update on the Society’s Regulatory Risk Project.

Background

On July 20, 2018 Council reviewed and approved the Regulatory Risk project plan, copy attached. The plan summarizes the work to be undertaken over a two-year period. We are currently at the end of year one, and on track.

At the March 2019 Council meeting, a workshop was held, facilitated by Andy Norton from the Law Society of Alberta, which informed Council of the status of our regulatory risk work, the approach of the LSA in this area, and allowed Council to work through various scenarios to learn how to apply risk and other lenses to its work.

Council was advised that between October 2018 and January 2019, the Management Team focused on analyzing current risks to the Society and Council of meeting our public protection mandate and achieving our goals. This was followed by brainstorming exercises focused on each department, where different types of risks were identified. A risk ‘theming’ session was held in February 2019. This work has enabled the Management Team to complete Steps 1, 2 and 3 of the Project Plan: establishing the context, risk identification and risk analysis/evaluation.

The outcomes from this work include:

i. Circulation of education materials amongst the Management Team;
ii. An environmental summary of the contexts within which risk is occurring; and
iii. Development of a new draft Risk Index.
Analysis

Attached is a copy of the new structure for the revised draft Risk Index. It identifies the risk themes developed by the Management Team, examples of such risks, categorizes risks by broad type (simple, complex, etc), and will in time include mitigation strategies. The Management Team has undertaken a review of the current mitigation strategies in use and available under our Act and regulations for addressing specific risks, and has begun identifying gaps in our treatment or mitigation strategies to guide our work in the near future; i.e. what keeps us up at night.

Council will note that there are 12 risk themes:

1. Compliance  
2. Information Management  
3. Processes and Procedures  
4. Judgement and Discretion  
5. Organization Management and Culture  
6. Technology  
7. Resources  
8. Governance  
9. Communications  
10. External Reputation  
11. External Advice and Information  
12. External Forces

Themes 1 – 5 fall into the ‘green’ area, which are risks we believe are fully within our control.

Themes 6 - 7 are in the lighter green area, meaning that these risks are mostly under our control but not fully.

Themes 8 - 9 are yellow, meaning that staff may have some level of control but also have to rely on others, such as Council and committees.

Themes 10 – 12 fall into red areas, meaning that we believe we have little or no control over these risks, other than to be prepared should these risk come to life.

This type of analysis helps us determine where resources are needed, what type of mitigation or response strategies we can employ, and what we can realistically avoid.

For purposes of Council’s focus in September, this update expands on why “Governance” is listed as an area of regulatory risk, and suggests considerations Council should keep in mind to avoid or minimize such risks.

Governance as a Regulatory Risk

In December 2018, a report was released titled “An Inquiry into the Performance of the College of Dental Surgeons of British Columbia and the Health Professions Act”, prepared by Harry Cayton for the Minister of Health in BC. The fact that the report was commissioned by the government to respond to concerns with the self-governance of the College, is alarming. More alarming are the findings of Mr. Cayton in respect of problems with the College’s governance, and the risks to the public this created.
One area of focus in this report was with regard to the manner in which the College has been governed by their volunteer Board. Cayton then concludes:

*It is my conclusion that changes to the HPA [Health Professions Act] alone will be insufficient to create the flexible, public focused, team-based and efficient regulatory system needed to support the delivery of safe healthcare in future. A complete overhaul of the way health professional regulation is conceived and delivered is required. I have set out a new structure to improve governance, performance, fairness, efficiency and cost effectiveness... .*

The Cayton report illustrates that an organization’s governance structure and operation can be a significant source of risk, and one which is very much on the radar of government.

Another example where a risk lens may not have been effectively employed relates to the way the Law Society of Ontario rolled out a mandatory “Statement of Principles” for the membership. The purpose for this initiative was certainly well-founded: to ensure members formally adopt policies against harassment and discrimination in their workplaces. However, the manner in which this was rolled out met with significant backlash by factions of members who did not believe it was the Law Society’s mandate to act as ‘thought police’ and to interfere in ‘non-regulatory’ matters. In fact, the criticism from the membership was so severe that various interest groups aligned themselves to ensure that they ended up with Bencher seats following the most recent election.

This risk may well have been previously hidden to the LSO: the ability of those hostile to notions of equity and diversity to organize effectively in such a manner. Not only did this incident cause harm to the reputation of the Law Society among both members and the public, but it created a significant distraction from the daily governance of the organization. Another consequence has been the rolling back of several important equity and diversity initiatives at the LSO, with potential farther-reaching impact on racialized licensees and clients.

This is not to suggest that such risks exist in respect of our Council’s functioning, but it is important to be aware of and alive to the types of risks that can arise in any governance structure. Examples of specific risks include:

i. A failure by Council to develop and effectively implement a strategic plan, and/or to adopt such a plan but fail to actually ‘buy in’ and follow through – this can impact staff and financial resources, as well as the reputation of the Society;

ii. Council adopts regulations that are not proportionate to the risks to the public they are intended to mitigate – in our context, this would include both permitting a ‘creep’ of regulatory over-reach which deviates away from our adopted Triple P approach, or alternatively permitting under-regulation in areas of higher risk.

iii. Council and key stakeholders such as LIANS or the government fail to maintain an effective working relationship.

iv. Council committees are not held accountable for their work plans, and undertake work which deviates from the Strategic Plan.

v. Council fails to serve as fiscally responsible trustees for the financial resources of the Society, made up primarily of members’ fees.

vi. Council fails to ensure they make informed decisions, and fails to inform themselves of key regulatory operations of the Society.
As always, Council has an important role to play in balancing the risks of inaction against any proposed actions, and applying all appropriate lenses to its work.

**Bringing a Regulatory Risk Lens to Council’s Work**

As we discussed in March, in addition to applying Triple P and equity & diversity lenses, Council should keep the following questions in mind as it considers issues and makes policy decisions:

1. By what means does Council currently adhere to standards for good governance and best practices? Make yourselves aware of these standards and practices, including the Council Governance Policies.

2. What are the regulatory and other risks relating to the matter at hand, and is Council employing an appropriate risk mitigation strategy in respect of the matter?

3. What can you do as an individual Council member to help mitigate risks?

4. Are there any areas of risk in respect of Council’s responsibilities that keep you up at night? If so, bring them to the table.

**Attachments:**
*Regulatory Risk Management at NSBS – July 12, 2018*
*Draft 2019 Risk Index*
From: Victoria Rees, Director, Professional Responsibility

Date: July 12, 2018

Subject: Regulatory Risk Management at NSBS

Date – July 17, 2018  Management Team  Discussion
Date – July 20, 2018  Council  For Introduction

Background

As the Society has now attained the level of ‘embedded’ in terms of the five-year Maturity Model for implementation of our Triple-P approach (principled, proactive, and proportionate) to regulation, it is time to turn more of our attention toward developing and embedding the necessary risk-focus to regulation. Our enterprise risk management (ERM) processes have been identified and implemented, and developing strong regulatory risk management processes is an essential component of the Society’s overall risk framework.

Council’s Strategic Plan for 2016-19 includes “Regulatory Risk Management” as a key internal process for development. Further, Council’s current Annual Plan specifically references the importance of this work in AP #1.1:

Objective: As part of implementing legal services regulation, develop an evaluation system to report to Council on all aspects, including that:
- Systems are outcomes focused
- Regulatory risks are refined, monitored and reported on
- Regulatory Objectives and Regulatory Outcomes are being addressed and advanced

Outcome: The Society’s mandate to regulate in the public interest is supported by an effective approach to risk focused and proactive, principled and proportionate regulation across the organization.

Risk-focused regulation

First, it is important to clarify the meaning of risk. For any regulator considering employing a risk-
focused approach to regulation, defining risk is a critical task that will establish its approach to regulation and risk management. Given the Society’s objectives and current context, risk can be defined as follows:

A **risk** is a potential event that, if it were to occur, would negatively impact the Society’s ability to achieve its objectives as a regulator.

Simply put, risk is the probability that something negative will happen. It is important to note that this definition splits risk into two dimensions: probability and impact.

With this understanding of risk, what does it mean to be a risk-focused regulator? The definition below represents an amended version of one presented by Julia Black, a professor at the London School of Economics and Political Science and current board member of the Solicitors Regulatory Authority in the UK:

A **risk-focused regulator** uses the identification and analysis of risk as an evidence-based means of targeting the use of resources and of prioritizing attention to the highest risks in accordance with a transparent, systematic and defensible framework.

In short, a risk-focused regulator identifies and evaluates risks to its objectives in order to ensure consistent decision-making and effective allocation of resources. A risk-focused approach to regulation is different from traditional approaches as it focuses on risks to objectives rather than the rules (regulations) already set in place. While some regulators would prefer to enforce all rules with equal force, all the time, most are limited in doing so by available resources. By doing so, these regulators could fail to identify the most significant threats to their objectives. With a more modern, risk-focused approach to regulation, the regulator has a systematic framework in which to best achieve its ultimate goal within available resources – that being protection of the public interest.

At the heart of this new approach is a clear framework for risk management. Risk management can be thought of as the identification, analysis, evaluation (prioritization), and treatment of risks, whereas a risk management framework represents the formal systems and processes that support and enable effective risk management. A successful risk management framework (RMF) is cyclical, a process in itself, and is built on a foundation of transparency and continuous improvement. The structure of RMFs vary depending on the context in which they are applied, however, they share the following components:

**Step 1  Establishing the Context**

Defining the objectives of the regulator, the environment (internal and external) in which they are operating, and the regulator’s risk tolerance (how much risk they are willing to accept).
Step 2  **Risk Identification**

Identifying the events that have the potential to negatively impact the regulator’s pursuit of its objectives.

Step 3  **Risk Analysis and Evaluation**

Risks are analyzed to determine the scope and scale of the potential impact and the likelihood of the risk occurring. Risks are then evaluated and prioritized. Resources are allocated to match these priorities.

Step 5  **Risk Treatment**

The regulator treats the identified risks through preventative, reduction, or financing measures (which lessen probability, lessen impact, or insurance losses, respectively).

Step 6  **Monitor and Improvement**

Risk treatment is monitored, and outcomes are measured and assessed. The cycle begins again with this new knowledge and experience.

**Risk Management Framework in Other Organizations**

Risk Management Frameworks have been implemented by regulatory bodies worldwide such as the Australian Taxation Office (ATO) and the Bar Standards Board (BSB).

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**Figure #1:** Framework published by the Australian / New Zealand Standard, in their Risk Management Set, which is used by the ATO.

**Figure #2:** Framework published by the BSB, in their Risk Framework summary.
Introduction to the NSBS Regulatory Risk Management Project
In 2015, the Society put significant effort towards defining the Society’s objectives, identifying and analyzing risks to these objectives, and creating a risk treatment plan based on the identified risks, which resulted in the MSELP and LSS initiatives. As these programs continue to grow, there remains a desire to revisit the identified risks and create a more expansive plan for integrating a risk focus across the organization. The Management Team is proposing a Regulatory Risk Management Project, which would implement a risk management framework and improve the Society’s treatment of risks to its Regulatory Objectives.

Regulatory Risk Management Project

Project Objective:

The Society’s primary objective is to transition from its current approach to regulation to one more strategically and intentionally focused on achieving the Regulatory Objectives through effective risk management.

Project Scope:

The scope of the project includes the following:

i. Implementation of a Risk Management Framework. This includes:
   a. Establishing the regulatory and environmental context;
   b. Determining the risk appetite of the Society;
   c. Identifying, analyzing, and evaluating risks to the Society’s Regulatory Objectives;
   d. Treating risks; and,
   e. Outcome measurement.

ii. Creation of new or amended organizational activities to support the RMF and treat risks. This could include:
   a. Information gathering systems, such as the complaints intake process and annual reports;
   b. Information management systems;
   c. Information sharing activities, such as meetings, reports, and accessibility; and
   d. Systems for analysis of data.

It is also within the scope of this project to create new or amended internal policies and procedures that allow staff to realize the maximum value of the organizational activities.

This project will generate several tangible deliverables.

i. **Educational Materials**: Used by NSBS staff to guide risk-based activities.

ii. **Environmental Summary**: Summarizing the internal and external context in which risk management is occurring.

iii. **Risk Index**: Listing of all risks identified by the Society.

iv. **Risk Analysis Report**: Detailing the likelihood of each risk occurring and its impact on
the Society’s individual objectives as well as outlining the Society’s highest priority items. The analysis can be visually represented in a matrix.

v. **Regulation & Activities Assessment Report**: Outlines the weaknesses and strengths of regulations, organizational activities, and risk treatment activities related to high-priority risks and proposes options for risk treatment along with a recommendation.

vi. **Risk Treatment Action Plan** (or Plans): Details the resources and steps required to implement a risk treatment strategy (or strategies) selected by the Management Team.

vii. **Risk Outcomes Report**: Outlines the effect of the risk treatment activities on the membership and the public.

viii. **Risk Outlook Summary**: Summarizes the risks to the Society, the results of the Regulatory & Activities Assessment, risk treatment activities and their outcomes. This is the capstone of the risk management framework cycle.

**NSBS Objectives**

The Society has two different sets of objectives: regulatory objectives, which relate to the Society’s duty to protect the public interest; and enterprise objectives, which relate to the Society’s HR, IT, and Finance functions. The regulatory risk management framework that is being proposed is solely focused on achieving the Society’s objectives as a regulator. There is already an established risk management framework focused on the enterprise objectives in place at the Society.

As established by Council in March, 2016, the final Regulatory Objectives for the Society are as follows:

i. Protect those who use legal services;

ii. Promote the rule of law and the public interest in the justice system;

iii. Promote access to legal services and the justice system;

iv. Establish required standards for professional responsibility and competence for lawyers and legal entities;

v. Promote diversity, inclusion, substantive equality and freedom from discrimination in the delivery of legal services and the justice system; and,

vi. Regulate in a manner that is proactive, principled, and proportionate.

Failure to achieve a regulatory objective negatively impacts the public and / or the Society’s membership. Consequently, this negatively impacts the reputation of the Society, hindering the Society’s ability to provide service to both the public and the membership. Potential events that would negatively impact the Society’s reputation in a severe fashion are referred to as **reputational risks**.

The Regulatory Objectives are intended to produce the following Regulatory Outcomes:

i. Lawyers and legal entities provide competent legal services;

ii. Lawyers and legal entities provide ethical legal services;

iii. Lawyers and legal entities safeguard client trust money and property;
iv. Lawyers and legal entities provide legal services in a manner that respects and promotes diversity, inclusion, substantive equality and freedom from discrimination; and

v. Lawyers and legal entities provide enhanced access to legal services.

The Regulatory Outcomes can be used as guiding principles for measuring the effectiveness of the risk management framework.

**Approach Summary**

A multi-phase approach to this project is proposed.

**Phase 1 Discovery and Analysis**

The first phase of the project will be focused on establishing the internal and external context, identifying and analyzing risks to the Society and prioritizing resources.

**Phase 2 Plan**

The second phase of this project is focused on developing a strategic plan to reduce and / or prevent the highest priority risk items, which is driven by an assessment of the current regulatory environment and the Society’s activities.

**Phase 3 Do**

The third phase of this project is the implementation of the risk treatment (management) strategies over the short and long-term.

**Phase 4 Monitor and Review**

The last phase of this project is focused on outcomes measured and public communications.

Throughout each phase of the project, the Society will also focus on communicating with staff and the membership in order to inform, educate, and at times, solicit feedback.

A visual breakdown of the project phases, activities, deliverables, and timeline is provided in **Figure #3**. A detailed breakdown of the approach is outlined in **Appendix A**.
Project Governance

Persons involved with the implementation of the regulatory risk management will be as follows:

i. **Management Team.** The Society’s management team will be primarily responsible for making key decisions and setting the direction for the project at various stages of completion.

ii. **Project Sponsor.** The Project Sponsor is the champion of the initiative within the Society and assists the Project Manager and Management Team, working to resolve project issues that may cause delays. They are also responsible for approving deliverables and confirming priorities, gathering input from the Management Team as necessary. It is recommended that the Society select one project sponsor, preferably from the Management Team.
iii. **Project Manager.** The Project Manager will coordinate project activities and ensure all work is completed according to an agreed-upon Project Charter (this document, in another form, could be used as the project charter). The Project Manager will perform research, create reports and summaries, facilitate working sessions and liaise with teams. They must have a base-level of understanding of risk management, project management, the activities of the Society, and preferably experience in change management or communications. The Project Manager could be an NSBS staff member, a team of two or three staff members, or an external project manager or consultant. Regardless of who fills this role, for the purpose of this project, it is assumed that they would be working on this project part time (up to 2 days / week).

iv. **Action Teams.** Action teams are teams that are created in the second phase of the project and who are responsible for assessing current regulation and organizational activities, developing a strategic plan and proposing it to the management team, and putting the plan into action. These teams are comprised of two to five key internal stakeholders, and in some cases will include existing committees.

v. **Key Stakeholders.** These include a) key internal stakeholders, i.e. staff members who have specific operational and / or regulatory knowledge, and b) key external stakeholders, i.e. members of the Society or general public. Internal stakeholders will be most involved with the planning and implementation of risk treatment activities and measurement of the outcomes, while external stakeholders will be most affected by the implementation of risk treatment activities. External stakeholders will also likely contribute directly to the measurement of risk treatment outcomes.

![Figure #4: Organization of Key Individuals](image)
Guiding Principles

In 2016, the Society adopted the Triple-P approach to regulation, which means that the Society regulates members in a principled, proactive, and proportionate manner. The Triple-P approach can also inform this project’s guiding principles (listed below) which will guide the planning, development, and implementation of a regulatory risk management framework and changes to the organization to support this framework.

Principle 1  **Act with transparency**

Staff are aware of the risk-based approach to regulation and will be kept up to date on the status of the project. Information and work critical to the success of the project will be communicated and available to the Management Team and Action Teams at all times to help align individual efforts. Expectations of staff members about the implementation of a regulatory risk management framework will be communicated early and clearly. Additionally, a communication plan will be developed for educating and informing the membership and / or the public. The final piece of this plan will be the Risk Outlook Summary.

Principle 2  **Engage and communicate with those impacted by changes**

The Project Manager and Action Teams will engage key internal stakeholders to solicit feedback on work and proposed changes in order to facilitate delivery and lessen internal pushback. The Society may also engage the membership or the public when a proposed change has the potential to significantly impact their work and / or interactions with the Society. For example, changes to the complaints intake process would benefit from the feedback of individuals who have experienced the process first-hand.

Principle 3  **Proportionate allocation of time and resources**

The amount of time and resources that the Society allocates to project activities should be proportionate to the amount of value gained through said activities. It is assumed that resources will be limited on this project, and this principle will help the Society gain the maximum value for the resources it has. It is critical that the budget and time constraints are defined early, and this document be updated to include those details.

Project Considerations

The Project Manager’s objectives are to deliver this project on schedule with the support of the organization. The primary risks to the successful completion of these objectives are as follows:
Consideration 1  **Resource Availability**

With any project, there is a risk that the project plan underestimates the amount of time and resources required, and as a result the delivery of the project experiences delays. For the Society, it will be critically important for the Management Team to consider the availability of staff and budgetary constraints when creating Action Teams and selecting risk treatment strategies.

A lack of staff availability is a large risk. Departments within Society typically experience condensed periods of work due to items like exams, fee deadliness, and report submissions. This prevents them from focusing on other activities, like the proposed regulatory risk management project. Additionally, all staff have a full workload and thus cannot set aside large periods of time to attend facilitation sessions or document processes. Therefore, assigned responsibilities and deadlines will have to be realistic and carefully considered.

Consideration 2  **Leadership**

Strong and consistent leadership will be critical to the success of the proposed project, for a few reasons. First, the scope of the project is expansive, and will require contributions from individuals across the Society. Strong leadership is necessary to coordinate these individuals and keep the project on track. Second, the main outcome of this project, a regulatory risk management framework, is new to the organization and therefore needs a champion to communicate its importance. Third, the objective of this project is to institute change, and therefore the responsibilities of staff members will be impacted. An engaged leadership team will help facilitate the transition and manage the concerns of stakeholders.

Consideration 3  **Staff Departures**

Departures of key staff could negatively impact the timeline and effectiveness of the proposed project. Key staff includes any person involved with the implementation of the project (Management Team, Project Sponsor, etc.). In the event of a staff departure, the schedule of the project will likely be delayed due to constrained resources. This is magnified if NSBS is unable to replace the lost team member in a short time frame. Furthermore, if the departed staff member has unique operational, regulatory, or project knowledge, their departure would negatively impact the final quality of the risk management framework. To reduce the impact of staff departures, a high level of transparency (documentation and knowledge sharing) should be held among key staff, so that if a staff member leaves their knowledge does not leave as well.
Risk (example)

Lack of Council buy-in
Regulatory authority used in way disproportionate to risks
Failure to maintain effective relationships with other bodies
Ineffective strategic or activity planning
Council governs ineffectively
New Council rejects or undoes major initiatives approved or completed by previous Council
Decision to audit all firms in response to misconduct by single firm
LISNS/NSBS boards not aligned on "big issues"
Council/committees do not adhere to workplans
Council gridlock; no decisions being made
Problem type

Complex
Complicated
Complex
Complex
Complex
Treatments (examples)

Effective communications and expectations-setting between staff, Executive, and Council
Decision matrix explicitly includes Triple-P analysis
Ongoing communication between boards
Ongoing engagement between Council and Committees; President/Council make expectations of Council and committees clear
Effective Council orientation, President keeps Council on task
TO: Council, Nova Scotia Barristers Society

FROM: Lawrence Rubin, Director of Insurance
Lawyers’ Insurance Association of Nova Scotia

DATE: September 27, 2019

RE: LIANS Report to Council for the Period January 1, 2019 through June 30, 2019

Pursuant to Regulation 12.5.4 under the Legal Profession Act, I am pleased to provide the following summary of the Lawyers’ Insurance Association of Nova Scotia’s (LIANS) activities for the period January 1, 2019 through June 30, 2019.

Part I: Company Information and Governance

LIANS, a partner of the Members, conducts the mandatory professional liability (errors and omissions or E&O) insurance program for their benefit. Established by the Legal Profession Act, LIANS is managed by a Board of Directors assisted by the Director (who is responsible for the day-to-day operations) and five committees. Three of these committees - Audit, Investment and Governance - have responsibilities not unlike similar corporate committees. The other committees are the Claims Review Committee (akin to an insurer’s large loss committee) that advises on active matters that come within its mandate and the Lawyers Assistance Program Committee that oversees the Lawyers Assistance Program (LAP).

As part of its mandate, LIANS provides risk and practice management (“RPM”) advice and services to the Membership. Some of these efforts are now in conjunction with the Society’s Legal Services Support (“LSS”) group.

Though an insurance program that subscribes to a reciprocal (Canadian Lawyers’ Insurance Association (“CLIA”)) rather than being an insurer in its own right, LIANS operates in a manner akin to an insurer retaining similar outside advisors, to wit:

(i) an external auditor to prepare its annual financial statements,
(ii) an actuary to determine the annual practising levy and necessary capital reserves, and
(iii) an investment manager responsible for investing LIANS’ capital to ensure adequate resources are available for claims and the long-term financial health and viability of the program.

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1 CLIA is an Alberta regulated insurance reciprocal
Governance, in the context of a not-for-profit organization, focuses on the processes for making and implementing decisions that will continue to advance the organization’s principles and mission and provide strategic leadership.\(^2\) Governance, be it in the not-for-profit sphere or in the financial institution sphere, is not a static exercise. It is an ongoing exercise, as important for LIANS as for any other similar organization.

With this in mind, LIANS’ Governance Committee and Board recently completed a review and update of its governance policies and strategic plan. With the completion of this review and update, the Board has directed that LIANS’ Governance Committee should review the governance policies no later than every five years and the strategic plan no later than every three years, subject to an intervening event that would necessitate an earlier review of any of the policies or strategic plan.\(^3\)

**Board of Directors**

The members of LIANS’ Board for the period of this report (January 1, 2019 through June 30, 2019) year were:

David Reid, Chair
Robyn Elliott, QC, Vice Chair
Greg Barro, QC
Glen Campbell
Sean Foreman, QC
Oliver Janson

Joshua Martin
Tara Miller, QC
Jennifer Palov
Tilly Pillay, QC
Charles Thompson

The Board is composed of lawyers from throughout the province representing various firm types (i.e. firms large and small, sole practitioners and in-house departments) and areas of practice. Board members (save the Executive Director of the Society) are required to sit on at least one of LIANS’ five standing committees.

Changes in Board membership are on the horizon. At the end of this year, David Reid (the current Chair) and Tara Miller will be stepping down as a result of their reaching the term limit and I would like to take this opportunity to thank them for their service to LIANS. They have been very active during their tenures and their input and guidance will be missed.

I anticipate that on the agenda for Council at its November meeting will be the appointment of new directors, the new Chair and the new Vice-Chair, all to take effect in January 2020. You will be receiving a memorandum setting out the recommendations of LIANS Board. If LIANS’ Governance Committee has not completed its work by LIANS’ October Board meeting, the matter will be on the agenda of an early 2020 Council meeting.

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\(^3\) The governance policies cover, among other areas, conflict of interest, confidentiality, external communications, conflict resolution and Board performance.
Notice of the upcoming Board vacancies was posted at the end of July and by the time of this Council meeting, the applicant’s particulars will have been forwarded to the Governance Committee. In support of their applications, applicants have provided resumes and completed LIANS’ skills matrix. The Governance Committee will review all applications and make candidate recommendations to the Board.

LIANS’ Governance Committee has also recommended new non-Board appointments to the LAP Committee effective January 2020 and will be making recommendations to the Board for Committee appointments.

**Staff**

Director of Insurance: Lawrence Rubin
Claims Counsel: Patricia Neild
Claims Counsel: Lisa Wight
Database and Information Officer: Cynthia Nield
Administrative Assistant: Alex Greencorn
Executive Assistant: Emma Pink

**LIANS Committees**

As of the date of this report, all committees have the requisite number of members to operate though some have room for additional non-Board volunteers. LIANS welcomes applications from Members interested in joining its committees. Non-Board committee members are important because today’s non-board committee volunteer may become a future board member simplifying succession when a board member steps down.

**Standards Committees**

During the period of this report, LIANS supported two of the Society’s four professional standards committees – real estate and criminal. Commencing this month, LIANS will support the new Wills, Powers of Attorney and Personal Directives Standards Committee but to do so, staffing of the Criminal Standards Committee will be reassigned to the Society.

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4 The Skills Matrix requires responses to questions in three areas: Skills, Knowledge and Expertise, Governance and Demographics and Diversity. There is also room for applicants to list any additional skills and relevant experience.
Part II: Insurance Program

LIANS’ primary function is to provide the Members with their mandatory primary professional liability insurance coverage.\(^5\) The coverage has an occurrence limit of $1,000,000 with an annual aggregate limit of $2,000,000, coverage being subject to the policy’s terms and conditions.\(^6\)

The policy wording is provided by CLIA, is the same for all its subscribing jurisdictions and covers claims arising from Professional Services and Incidental Services as defined.\(^7\) That said, it is possible that lawyers in a particular province provide services incidental to the practice of law that the policy does not recognize as an Incidental Service. In those cases, the policy would not respond to a claim arising from that activity.\(^8\) If an activity undertaken by lawyers in a particular province evolves into something that is truly incidental to the practice of law in that province, I am of the opinion that LIANS should consider providing coverage for the activity provided there is a business case and the cost and risks are acceptable.\(^9\) If so, and subject to the approval of CLIA’s underwriting committee, the activity can be endorsed on. By the time you read this report you will have received a copy of the renewal policy effective July 1, 2019 which shows a new Incidental Service added to coverage.

If you refer to the 2019 – 2020 policy, you will also be aware of changes to the loss limits in Part D – Cyber. For the Privacy Breach Notification and Mitigation Expense Coverage, System Failure and Digital Data Asset Rectification Expense Coverage and Cyber Threat and Extortion Expense Coverage, the loss limit for firms of up to 25 lawyers has been increased to match the respective limit for firms of 26 or more lawyers.

The Part A occurrence limit is the same as last year with LIANS having a self-insured retention of $500,000 per occurrence with the next $500,000 provided by CLIA for the $1,000,000 total occurrence limit. The current policy carries a per claim individual deductible of $5,000. There is also a stop loss built into the program. The stop loss varies by policy year as determined by CLIA’s actuary. For the 2019 – 2020 policy year, the stop loss is $3,205,000.

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\(^5\) Regulation 12.1.3 states that LIANS shall conduct the mandatory professional liability program for the benefit of practicing lawyers.

\(^6\) Excess coverage is available through CLIA. Information is available at www.clia.ca or on LIANS’ website at http://www.lians.ca/services/insurance/excess-insurance.

\(^7\) The policy itself is in four parts, Part A is the primary professional liability coverage, Part B is CLIA’s excess insurance wording, Part C is the trust protection indemnification coverage and Part D is the cyber coverage. The subscribing jurisdictions are NL, PEI, NS, NB, MB, SK, YU, NT and NU.

\(^8\) This comment is unrelated to MDPs, any discussion of which has to consider the policy definition of Ancillary Activities (i.e. non-legal activities) that the policy expressly excludes from coverage.

\(^9\) The factors considered and process are set out in the Director’s Report to the Membership in LIANS’ 2018 Annual Report.
Claims

Typically, LIANS has between 350 and 425 open files at any one time. There have been times where the file count is out of that range but this is the typical range. As of June 30, 2019, LIANS had 351 open files. This compares to 355 at December 31, 2018.

The first half of 2019 saw 144 new files opened. This compares to 126 in the first half of 2018 and 111 in the second half of 2018. We closed 134 files in the first half of 2019.

I regularly speak of two types of claim complexity. One that I call complexity of resolution relates to claimants who are uncooperative and / or have unrealistic and unchecked expectations that complicate the path to resolution. This was noted in a recent N.S. Supreme Court decision involving land that we were involved in where the Court described the protagonists as “opportunistic” and concluded that they had not established an entitlement to compensation under the Land Registration Act.

Unrealistic positions are neither uncommon nor unexpected in insurance claims. However, they often cause matters to drag out over an unreasonable amount of time thus increasing costs. Matters in litigation are more expensive (from a defence cost perspective) than matters not in litigation; if those former matters take longer to resolve, particularly for arbitrary reasons, they will be more expensive. Paid defence costs in 2018 were 8% higher over the prior year.

The Claims Review Committee reviews all claims with a combined damage and defence incurred of $125,000 or greater. As of June 5, 2019 there are 16 claims before the Committee. The average damages incurred is $134,989 (median $105,821) and the average defence costs incurred is $97,100 (median $91,106).

LIANS’ preferred approach to claim handling is to be proactive whenever appropriate, quickly addressing issues raised by claimants or reported by lawyers. When given the opportunity, we work with the insured to repair, remediate and otherwise resolve issues before there is a loss. Because of the Members’ trust and confidence in LIANS, potential issues that could lead to serious claims are reported promptly and effectively handled in the interest of the Member. Claims that are frivolous or vexatious, unreasonable or excessive, are strongly defended, thus preserving the integrity of the program.

Financial Position

LIANS’ financial position remains stable. The following is the summary of LIANS financial position as at December 31, 2018, as published in the 2018 Annual Report:

---

10 Incurred for this purpose means the sum of amounts paid and amounts reserved.

11 One the 16 matters has been resolved but remains open as we are waiting for counsel’s final account. If that matter is removed, the average damages incurred increases slightly to $136,486 (median $100,000) and the average defence costs incurred drops slightly to $96,509 (median $88,091).
Statement of financial position as at December 31

<table>
<thead>
<tr>
<th></th>
<th>2018</th>
<th>2017</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Assets</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Current</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cash</td>
<td>1,423,821</td>
<td>1,151,136</td>
</tr>
<tr>
<td>Accounts receivable</td>
<td>210,167</td>
<td>327,329</td>
</tr>
<tr>
<td>Government remittances</td>
<td>23,640</td>
<td>34,677</td>
</tr>
<tr>
<td>Levy receivable</td>
<td>650,370</td>
<td>611,367</td>
</tr>
<tr>
<td>Prepaid expenses</td>
<td>152,751</td>
<td>159,159</td>
</tr>
<tr>
<td>Recoverable unpaid claims and expenses</td>
<td>1,035,394</td>
<td>1,705,223</td>
</tr>
<tr>
<td>Investments</td>
<td>17,892,044</td>
<td>17,885,803</td>
</tr>
<tr>
<td>Property and equipment, net</td>
<td>4,651</td>
<td>6,073</td>
</tr>
<tr>
<td><strong>Total assets</strong></td>
<td>21,392,838</td>
<td>21,880,767</td>
</tr>
<tr>
<td><strong>Liabilities</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Current</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accounts payable and accrued liabilities</td>
<td>1,506,657</td>
<td>1,696,540</td>
</tr>
<tr>
<td>Unearned levy</td>
<td>1,613,683</td>
<td>1,508,631</td>
</tr>
<tr>
<td><strong>Total current liabilities</strong></td>
<td>3,120,340</td>
<td>3,205,171</td>
</tr>
<tr>
<td>Provision for levy deficiency</td>
<td>54,900</td>
<td>26,554</td>
</tr>
<tr>
<td>Provision for unpaid claims and expenses</td>
<td>9,641,561</td>
<td>10,923,412</td>
</tr>
<tr>
<td><strong>Total liabilities</strong></td>
<td>12,816,801</td>
<td>14,155,137</td>
</tr>
<tr>
<td><strong>Net assets</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Professional liability insurance reserve</td>
<td>8,576,037</td>
<td>7,725,630</td>
</tr>
</tbody>
</table>

Statement of revenue and expenditure for the year ended December 31

<table>
<thead>
<tr>
<th></th>
<th>2018</th>
<th>2017</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Revenue</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Insurance premiums</td>
<td>(311,265)</td>
<td>(339,486)</td>
</tr>
<tr>
<td><strong>Net revenue</strong></td>
<td>2,998,180</td>
<td>3,848,758</td>
</tr>
<tr>
<td><strong>Claims and expenses</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Payments</td>
<td>1,810,371</td>
<td>1,512,931</td>
</tr>
<tr>
<td>Group deductible reimbursement</td>
<td>—</td>
<td>(24,046)</td>
</tr>
<tr>
<td><strong>Total claims and expenses</strong></td>
<td>1,810,371</td>
<td>1,488,885</td>
</tr>
<tr>
<td>Current period expense</td>
<td>(583,676)</td>
<td>1,040,874</td>
</tr>
<tr>
<td><strong>Total administration</strong></td>
<td>921,078</td>
<td>1,139,009</td>
</tr>
<tr>
<td><strong>Total expenditures</strong></td>
<td>2,147,773</td>
<td>3,668,768</td>
</tr>
<tr>
<td><strong>Excess (Deficiency) of revenue over expenditure before undernoted</strong></td>
<td>850,407</td>
<td>179,990</td>
</tr>
<tr>
<td>Return of CLIA surplus subscriber’s equity</td>
<td>—</td>
<td>738,833</td>
</tr>
<tr>
<td><strong>Excess (deficiency) of revenue over expenditure</strong></td>
<td>850,407</td>
<td>918,823</td>
</tr>
<tr>
<td>Professional liability insurance reserve, beginning of year</td>
<td>7,725,630</td>
<td>6,806,807</td>
</tr>
<tr>
<td>Excess of revenue over expenditures</td>
<td>850,407</td>
<td>918,823</td>
</tr>
<tr>
<td><strong>Professional liability insurance reserve, end of year</strong></td>
<td>8,576,037</td>
<td>7,725,630</td>
</tr>
</tbody>
</table>

For both the year ended December 31, 2018 and the six month period ending June 30, 2019, LIANS was within its projections for claim and administrative costs combined. Breaking down claim costs, for the year ending December 31st, damage payments were under our 2018 projection whereas defence costs were over our projection.
Though within our projections for both damage and defence payments as at June 30, 2019, for defence costs, we were also within our projection at the same time last year but ended the year over our projection. The reason is that there is unbilled time incurred in the first half of the year and we require all time in a calendar year to be billed by year end. For damages, we cannot predict what will resolve and what will not and it is not uncommon for there to be an uptick in matters resolving later in the year.

Turning to the investment portfolio, the fund eked out a very modest gain in 2018. Like most investment funds that have equity components, December 2018 was not kind.

The portfolio itself is a balanced fund with the targeted allocations being 50% fixed income, 35% equities and 15% alternative investments. All these investments are in funds.

The investment portfolio’s year runs November 1 through October 31st. For the period from November 1, 2018 through June 30, 2019, the portfolio increased in value by 6.8% with all components of the portfolio producing positive returns in the first half of 2019.

The primary goal of the fund is capital preservation meaning we are prepared to accept modest growth in exchange for a reduced risk of loss. To mitigate against future significant fluctuations in equities, the Investment Committee in consultation with the investment manager, reallocated approximately 5% of the assets from equities to fixed income. This reallocation has returned the portfolio to its target investment allocations.12

Risk and Practice Management

LIANS continues to provide resources to the membership through information and education. LIANS also administers the mentorship program. Going forward, this program will continue to evolve with the advent of Legal Services Support (“LSS”) and LIANS is working with LSS to provide these services and advice.

Lawyers Assistance Program

The LAP service provider is Homewood Health. The program offers confidential short-term counseling, as well as a variety of online health and wellness resources. We do send the Membership reminders of the program. In 2018 we added the Dalhousie Law School students to the program. Though the university is paying the cost, LIANS does receive usage statistics. If we see commonalities between the student’s usage and that of younger lawyers, there may be opportunities to explore programs with the school to address those issues.

12 The plans asset mix targets are 50% fixed income, 35% equities and 15% alternative investments, all with an acceptable band of +/- 5%.
Part III: Conclusion

LIANS maintains a proactive cost-effective approach to claim handling, assists Members in their practices and provides resources through its website and other initiatives. While providing these services, LIANS never loses sight of its mandate to conduct the mandatory professional liability insurance program for the benefit of Nova Scotia’s practicing insured lawyers.

I am available for questions and comments.

Respectfully submitted,

Lawrence Rubin
Director of Insurance
MEMORANDUM TO COUNCIL

From: Collette Deschenes, Communications Advisor
Date: Sept. 27, 2019
Subject: NSBS Website Redesign

This report was prepared for information

Project Update

The NSBS website redesign is progressing with the goal to launch late fall 2019.

We are currently in the design stage of the project and we are working closely with Think Marketing to bring this new website to life. We are also planning and implementing communications for the launch of the new website to ensure users are aware of the changes to come.

We recently surveyed nsbs.org website users to seek feedback on their experience using our current site and to gain insight into the changes and features they would like to see implemented on the Society’s new website. This feedback has helped to inform the site navigation, design and user experience.

The 117 survey respondents highlighted the following as aspects of the website that need improvement:

- Navigation & User Experience
- Design
- News & Blog

Navigation

Several users noted that the nsbs.org website is difficult to navigate. Navigation is central to user experience so we spent May-July developing a user experience plan.

Survey comments related to navigation:

- “I find the menu headings very confusing. I have to do a lot of digging to find things.”
- “The NSBS website could be more user friendly. The interface needs a serious upgrade.”
• “As a member for 20 years, this website has been an ongoing source of frustration and is well overdue for an upgrade.”

• “More intuitive layout and menus. Less small text and clutter.”

• “Better dropdown menu.”

• “The website is constantly crashing. There are also often “broken” hyperlinks.”

• “Speed it up!”

• “Items like current members of committees or Council materials are buried deep in the site.”

The primary menu & navigation on the current nsbs.org website

Our website’s usefulness and engagement depends on the user’s experience navigating content to find what they are looking for. The feedback we received aligns with our direction for the new nsbs.org website as we aim to streamline navigation for our audiences.

Public/Legal Profession Toggle: The new nsbs.org website will have a toggle navigation at the top and middle of the homepage so users can navigate the website under public or legal profession view. This is similar to the navigation on financial institution websites where the navigation changes based on the audience you select. The menu items/navigation will change depending on if you are in public view or legal profession view.
Example of toggle top navigation on BMO website:

The toggle navigation on the new nsbs.org site will improve user experience, as users will find the content they are looking for in less clicks.

Broken links and out of date content, issues indicated by respondents on the survey, create a negative user experience. Over the last three months, we have thoroughly reviewed website content to ensure the content moving over to the new website is relevant, clear and concise.

**Design**

**Survey comments related to site design:**

- “Less cluttering/disorganization of information”
- “Less small text and clutter.”
- “Cleaner look.”
- “It could use a fresh coat of paint and tidying up.”
- “The interface needs a serious upgrade.”
- “Higher quality pictures.”

Our current website lacks visuals and structured page layouts. This affects the way a user interacts with our website. We are working with the team at Think to ensure the design of the new site is clean, organized, and visual while also ensuring it is accessible and mobile friendly. Think’s creative team is currently developing the user interface design for the site, assisting with select photography and creating custom design elements.

**News & Blog**

Many survey respondents noted that they use the Society’s website as a means to find events, latest Society & legal profession news. Users also identified the need for a clear news and events page(s).

- “I’d love to see a more prominent, easy to follow 'news' section. As a lawyer practicing in a more rural area, it would also be nice to see a 'getting to know' section or something
highlighting what members are up to - we have a lot of lawyers in the province doing great things but it's hard to stay connected when you're not based in the main centre.”

- “I think the website could be more engaging, succinct and have more content geared towards law students and articling students. The blog post pages and news could also be redesigned to improve how the information is communicated.

- “Easier to find info about the Society’s governance & Council news.”

The new website will have an organized and easy to filter page for both news and events. The website will also feature a new Society blog.

This blog will feature Society news, blog style updates from Council and articles that align with our new strategic priorities. The blog will have a comment section (moderated by the communications advisor) to encourage two-way communications. This is an opportunity to gain valuable feedback, respond to inquiries about the Society’s work, clarify Society initiatives and engage with our members, stakeholders and the public.

**Next Steps**

Over the next few months, we will continue to refine content and work with Think to ensure the website is launched late fall. At the November Council meeting, we hope to have a preliminary site to share.

Once we launch the new nsbs.org website, users will have another opportunity to provide feedback directly on the website as we aim to improve user experience and keep the dialogue open with our website users.

**Questions?** Please connect with Collette at cdeschenes@nsbs.org.
MEMORANDUM TO COUNCIL

From: Tilly Pillay QC
Date: August 16, 2019
Subject: Council Committees – Proposed Changes to Processes and Reporting Requirements

In January 2019, Council changed the timeframe for appointing its committees. Committees used to be appointed to coincide with the Council year (that is from June to May). However, it was determined that it might be a better idea to have committees go from January to December so as to ensure continuity of members even when there may be turnover of Council members every two years in June.

While the committee appointment term has been changed, changes to relevant Council Policies have not yet been made. The Executive Committee reviewed this issue at its last meeting and would like to have the benefit of Council’s feedback and input into proposed changes in committee processes and reporting requirements.

Here is what is being proposed:

1. Committees currently have a two-year term. Typically, they would provide their work plan to Council for approval early in the year. At the end of the year, they would report to Council on the results of the work that they have completed. This results in a short time frame to complete the work on the work plan and also can be an onus on the Chair with respect to the annual reporting. Therefore, should we have committees submit a two-year work plan early in their term to Council for approval and then have them provide an interim update at the end of their first year and a final report at the end of their two-year term?

2. Instead of committees providing only written reports to Council for their review, should we adopt a practice whereby we have committee chairs join Council on an annual basis? That would mean, early on in the term of a committee, the chair would attend Council to provide a brief overview of the work plan for Council’s approval. The chair would then return early in the second year to provide an interim update to Council as to what the committee has been able to achieve and
what is yet to be accomplished. This provides an opportunity for direct communications between Council and its committee chairs on a regular basis.

Should Council approve these changes to committee processes and reporting requirements, of course Council Policies will also be amended to reflect Council’s decision.
MEMORANDUM TO EXECUTIVE COMMITTEE

From: Elaine Cumming
Date: September 17, 2019
Subject: Application of “no cash” rule – Regulation 4.12

<table>
<thead>
<tr>
<th>Date – September 5, 2019</th>
<th>Executive Committee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date –</td>
<td>Council</td>
</tr>
</tbody>
</table>

Recommendation/Motion:

It is recommended that the amendments to Regulations 4.12, 4.13 and 10.2 as drafted by the Federation of Law Societies’ Anti-money Laundering and Terrorist Financing Working Group be approved.

Background:

In drafting this final version of the Model Rules, the Working Group reviewed the law society rules and regulations based on the previous version of the Model Rules and related trust account rules. It also carefully reviewed the report of the FATF’s mutual evaluation of Canada, released in September 2016. This review led to the conclusion that amendments were required to ensure that the Model Rules remain as robust and effective as possible. Some of the specific amendments included in the Model Rules are as follows:

**Highlights of some of the amendments to the Model Rules:**

“No Cash” rule:
- specify that the exceptions to the cash limit apply only where the lawyer or law firm is providing legal services
- delete the exemption for cash received “pursuant to a court order, or to pay a fine or penalty” because it was determined to be of limited value and may present a risk of money laundering and terrorist financing
- add definitions of terms used in the rule: disbursements, expenses, financial institution, financial services cooperative and professional fees
The draft amendments were provided to the Hearing Committee at their annual professional development day in November 2017. They were then circulated to a small group of stakeholders in December 2017 with an invitation to participate in a Working Group who could review the regulations and report back to the National Working Group. This group of stakeholders included lawyers who work in the areas of law most impacted by the regulatory amendments (ex. real estate, corporate commercial) and law firm administrators/CFOs. The group proved difficult to convene, and a few telephone interviews were conducted instead.

A request for comment from the membership was circulated via InForum, on the Society’s website and on Twitter in February 2018. We received little feedback, but the comments that were received were shared with the National Working Group. The draft amendments were provided to Council for their information in March 2018 and they were introduced for adoption in May 2019 and again in July 2019.

At the July 2019 meeting, a concern was raised by Stephen Kingston, a member of the foreclosure Bar, regarding the deletion of what is currently regulation 4.12.3(b)(ii):

**Regulation does not apply**

4.12.3 Regulation 4.12 does not apply to a practising lawyer when
(a) engaged in activities referred to in subregulation 4.12 on behalf of their employer, or
(b) receiving or accepting currency
   (i) from a peace officer, law enforcement agency or other agent of the Crown,
   (ii) pursuant to a court order, or
   (iii) in his or her capacity as executor of a will or administrator of an estate.

[emphasis added]

Council was advised that prior to the 2013 decision in *RBC v. Moffatt*, foreclosure sales in Nova Scotia were conducted exclusively by Sheriffs, at rates set by the Province. Those rates had steadily increased over the years. It was recognized by the Court that the sales could be conducted by lawyers at less cost and with greater efficiency. It appears that the large majority of foreclosure sales in Nova Scotia are now conducted by lawyers appointed by the Court to act as Auctioneers.

Mr. Kingston has provided further information about this process:

- The appointment of the lawyer as Auctioneer is made by the Court as part of the Order for Foreclosure, Sale and Possession;
- The Court has established a number of criteria to be satisfied by the proposed Auctioneer – who must submit an Affidavit to the Court providing the required information as part of the Motion seeking the Foreclosure Order;
- One of the conditions is that the proposed Auctioneer must provide proof of insurance coverage;
- The Court requires that the foreclosure auctions be conducted at a Court House;
- The lawyer appointed as Auctioneer acts at all times as an Officer of the Court, and is ultimately responsible to the Court for the conduct of the sale;
- The Auctioneer deposits sale proceeds in his/her firm’s trust account and disburses funds as per the Foreclosure Order and Civil Procedure Rules; and
- The Auctioneer must file a written report with the Court as regards the sale once the sale has been concluded.

The Foreclosure Orders specifically appoint the lawyer as Auctioneer and direct him/her to conduct the sale of the mortgaged property at public auction in accordance with the terms of the Order and the standard procedure for
foreclosure sales under Practice Memo # 1 – Foreclosure Procedures “Instructions for Conduct of Foreclosure Auction” (which is incorporated by reference in the Order). The Terms of Sale are set out in the Practice Memo:

**Terms of sale**
You will read aloud, or deliver a copy of, the following terms at the time of the auction and before you call for bids:

1. The auctioneer will ignore a bid less than the sum of the auctioneer's fees, the cost of the tax certificate, and municipal taxes that form a charge on the lands ahead of the mortgage under foreclosure, which sum is referred to in these instructions as the minimum bid.
2. The purchaser must pay a deposit of ten percent of the sale price, or the amount of the minimum bid, whichever is greater to the auctioneer immediately after the auction.
3. The purchaser must pay the ten percent by cash, bank draft, solicitor's trust cheque, or cheque certified by a recognized financial institution.
4. The purchaser must pay the balance to the auctioneer no later than fifteen days after the sale.
5. The purchaser and the plaintiff may agree in writing to extend the deadline for payment of the balance to as many as thirty days after the sale.
6. In exchange for payment of the balance of the purchase price, the auctioneer will deliver to the purchaser a deed referencing the mortgage under foreclosure and its registration or recording details and conveying whatever interest in the lands the mortgagor had when the mortgage was made or afterwards. If moveables are included, the auctioneer will deliver a bill of sale describing them.
7. The deposit is forfeited if the purchaser fails to pay the balance of the purchase price by the deadline.
8. The sale is also governed by the terms of the order for foreclosure, sale, and possession, any other order pertaining to the auction or the sale, the published advertisement of the auction, and the laws about public auctions and foreclosure and sale.

Mr. Kingston has advised that it is not unusual for a lawyer/Auctioneer to receive more than $7500 in cash from a purchaser, and that such funds are deposited into the lawyer’s trust account. The lawyers/firms who do this work have apparently been relying on the exception in regulation 4.12.3.

**The Regulations**

The current regulations provide as follows:

**Application of regulation**

**4.12.2** Regulation 4.12 applies to a practising lawyer when engaged in any of the following activities on behalf of a client, including giving instructions on behalf of a client in respect of those activities:

(a) receiving or paying funds, other than those received or paid in respect of professional fees, disbursements, expenses or bail;
(b) purchasing or selling securities, real property or business assets or entities; or
(c) transferring funds or securities by any means.

[emphasis added]

**Regulation does not apply**

**4.12.3** Regulation 4.12 does not apply to a practising lawyer when

(a) engaged in activities referred to in subregulation 4.12 on behalf of their employer, or
(b) receiving or accepting currency
   (i) from a peace officer, law enforcement agency or other agent of the Crown,
   (ii) pursuant to a court order, or
   (iii) in his or her capacity as executor of a will or administrator of an estate.

[emphasis added]

**Limit on transaction**

4.12.4 While engaged in an activity referred to in subregulation 4.12.2 a practising lawyer must not receive or accept an amount in currency of $7,500 or more in the course of a single transaction.

The concern that Mr. Kingston has raised is that with the amendment to this regulation, the lawyer/Auctioneers will be offside the Regulations if/when they accept more than $7500 in cash from purchasers, as there will no longer be an exception for cash received pursuant to a court order.

**Analysis:**

It is my view that the “no cash” regulations do not now and will not after amendment apply to lawyers acting as Auctioneers. The current regulation 4.12.2 applies specifically to a “practicing lawyer when engaged…on behalf of a client”. The amended rule also refers specifically to client matters, being engaged on behalf of a client, giving instructions on behalf of a client or providing legal services:

**Limitation on cash**

4.12.2 A lawyer must not receive or accept cash in an aggregate amount of greater than $7,500 Canadian in respect of any one client matter. [new]

…

**Application**

4.12.4 Subregulation 4.12.2 applies when a lawyer engages on behalf of a client or gives instructions on behalf of a client in respect of the following activities:

   (a) receiving or paying funds;
   (b) purchasing or selling securities, real properties or business assets or entities;
   (c) transferring funds by any means. [amended]

**Exception**

4.12.5 Despite subregulation 4.12.4, subregulation 4.12.2 does not apply when the lawyer receives cash in connection with the provision of legal services by the lawyer or the lawyer’s firm

   (a) from a financial institution or public body,
   (b) from a peace officer, law enforcement agency or other agent of the Crown acting in his or her official capacity,
   (c) pursuant to pay a fine, penalty, or bail, or
   (d) for professional fees, disbursements, or expenses, provided that any refund out of such receipts is also made in cash. [amended]

[emphasis added]

When a lawyer is acting as a court appointed Auctioneer, they lawyer does not have a client and is not providing legal services. Practice Memo #1 states as follows:
Introduction
These are instructions to a sheriff, deputy sheriff, or lawyer who conducts a public auction under an order for foreclosure, sale, and possession. They are to be followed, unless an order provides otherwise.

There is nothing in the Practice Memo that would suggest that a solicitor-client relationship has been created by the appointment of the Auctioneer, nor that legal services are to be provided by the lawyer to any party involved in the transaction. The Practice Memo contemplates that a sheriff may also be an Auctioneer, which indicates that the ability to provide legal services is not required for this role. If there is no client and no legal services, the requirements of the Regulations are not engaged. This issue has been canvassed with the Federation’s AMLTF Working Group who also agree that without a solicitor-client relationship or the provision of legal services, the “no cash” regulations do not apply.

However, there remains a concern about lawyers accepting large amounts of cash for the purchase of real estate. Large cash real estate transactions are a significant red flag for money laundering, and lawyers would be wise to be very careful in accepting cash deposits that exceed the $7500 limit. It is my understanding that in the majority of these matters, the financial institution that holds a first mortgage on the property is typically the purchaser of the property at auction. If such a purchaser is not a recognized Canadian financial institution, the lawyer ought to consider whether a certified cheque or bank draft should be required.

Conclusion:

The “no cash” regulations, both current and the proposed amendments, do not capture lawyers who are working as court appointed Auctioneers because there is no client and no provision of legal services. As a result, no amendment to the proposed regulations is required, nor should these lawyers require an exception or waiver of the requirement to comply with the Regulations. However, there is a risk of these lawyers and the foreclosure process being used as a tool to launder money via large cash transactions. It is my understanding that this issue has been raised with several practice groups, and has now been raised directly with the Bench (meeting occurred on September 10/19). I have been advised that there will be further consideration by the Court over the coming weeks.

There does not appear to be a reason to permit cash deposits aside from expediency, and requesting that the Practice Memo #1 be amended to delete the reference to “cash” seems to be the most appropriate resolution to this issue.

If the Practice Memo #1 is not amended to remove the reference to “cash” in paragraph 3 of the Terms of Sale, an alternative would be to preclude the payment of the deposit in cash in the Order for Foreclosure itself. The standard form of Order that is general used includes the following paragraph:

4. Pursuant to paragraph 3 herein, this Honourable Court appoints and directs NAME to conduct the public auction pursuant to the terms of this order and the Instructions for Conduct of Foreclosure Auction except only to the extent varied by this order or further order of this Honourable Court.

In the event that such an addition to the form of Order is not acceptable to the Court, the lawyer/Auctioneer will need to exercise their professional judgement to determine whether accepting the deposit in cash might result in the facilitation of fraudulent conduct. If so, the lawyer/auctioneer could require the purchaser to return with a certified cheque.
While I understand the interest of those lawyers who regularly act as Auctioneers in this process to be “exempted” from the regulatory requirements regarding cash payments, creating a regulation that would specifically permit a lawyer to accept cash in excess of the $7500 threshold would be antithetical to the work of the FLSC’s AMLTF Working Group. The Federation, through the Working Group, staff and volunteers, have spent considerable time and effort over the last 10+ years to assure the Federal Government that Canadian law societies are doing an excellent job of regulating their members in a way that adequately manages the risk of lawyers participating in money laundering or terrorist financing. Any exception to the rules would be viewed dimly by our counterparts on a national basis, and may put at risk the gains we have made with the Federal Government.

**Exhibits/Appendices:**

Appendix A – Draft Regulations 9.12, 9.13 and 10.2
## Existing Regulation

<table>
<thead>
<tr>
<th>Regulation</th>
<th>Proposed Regulation</th>
<th>Rationale</th>
</tr>
</thead>
</table>

### 4.12 Cash Transactions

#### 4.12.1 For the purposes of Regulation 4.12

(a) foreign currency is to be converted into Canadian dollars based on

(i) the official conversion rate of the Bank of Canada for that currency as published in the Bank of Canada's Daily Memorandum of Exchange Rates in effect at the relevant time, or

(ii) if no official conversion rate is published as set out in subparagraph (a)(i), the conversion rate that the client would use for that currency in the normal course of business at the relevant time, and

(b) two or more transactions made within 24 consecutive hours constitute a single transaction if the lawyer knows or ought to know that the transactions are conducted by, or on behalf of, the same client.

#### Application of regulation

4.12.2 Regulation 4.12 applies to a practising lawyer when engaged in any of the following activities on behalf of a client, including giving instructions on behalf of a client in respect of those activities:

#### Definitions

4.12.1 In Regulation 4.12

(a) “cash” means coins referred to in section 7 of the Currency Act, notes issued by the Bank of Canada pursuant to the Bank of Canada Act that are intended for circulation in Canada and coins or bank notes of countries other than Canada;

(b) “disbursements” means amounts paid or required to be paid to a third party by the lawyer or the lawyer’s firm on a client’s behalf in connection with the provision of legal services to the client by the lawyer or the lawyer’s firm which will be reimbursed by the client;

(c) “expenses” means costs incurred by a lawyer or law firm in connection with the provision of legal services to a client which will be reimbursed by the client including such items as photocopying, travel, courier/postage, and paralegal costs;

(d) “financial institution” means

(i) a bank that is regulated by the Bank Act, and

(ii) an authorized foreign bank within the
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<td>(a) receiving or paying funds, other than those received or paid in respect of professional fees, disbursements, expenses or bail; (b) purchasing or selling securities, real property or business assets or entities; or (c) transferring funds or securities by any means.</td>
<td>meaning of section 2 of the Bank Act in respect of its business in Canada, (iii) cooperative credit society, savings and credit union or caisse populaire that is regulated by a provincial or territorial Act, (iv) an association that is regulated by the Cooperative Credit Associations Act (Canada), (v) a financial services cooperative, (vi) a credit union central, (vii) a company that is regulated by the Trust and Loan Companies Act (Canada), (viii) a trust company or loan company that is regulated by a provincial or territorial Act, (ix) a department or an entity that is an agent of Her Majesty in right of Canada or of a province or territory when it accepts deposit liabilities in the course of providing financial services to the public, or (x) a subsidiary of the financial institution whose financial statements are consolidated with those of the financial institution.</td>
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<td>Regulation does not apply 4.12.3 Regulation 4.12 does not apply to a practising lawyer when (a) engaged in activities referred to in subregulation 4.12 on behalf of their employer, or (b) receiving or accepting currency (i) from a peace officer, law enforcement agency or other agent of the Crown, (ii) pursuant to a court order, or (iii) in his or her capacity as executor of a will or administrator of an estate.</td>
<td>(e) “financial services cooperative” means a financial services cooperative that is regulated by An Act respecting financial services cooperatives, CQLR, c. C-67.3, or An Act respecting the Mouvement Desjardins, S.Q. 2000, c.77, other than a caisse populaire.</td>
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<td>Limit on transaction 4.12.4 While engaged in an activity referred to in subregulation 4.12.2 a practising lawyer must not receive or accept an amount in currency of $7,500 or more in the course of a single transaction.</td>
<td>(f) “funds” means cash, currency, securities and negotiable instruments or other financial instruments that indicate the person’s title or right to or interest in them;</td>
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<td>(g) “professional fees” means amounts billed or to be billed to a client for legal services provided</td>
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<td>or to be provided to the client by the lawyer or the lawyer’s firm;</td>
<td>(h) “money” includes cash, cheques, drafts, credit card sales slips, post office orders and express and bank money orders.</td>
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<td>(i) “public body” means</td>
<td>(i) a department or agent of Her Majesty in right of Canada or of a province or territory, (ii) an incorporated city, town, village, metropolitan authority, township, district, county, rural municipality or other incorporated municipal body in Canada or an agent in Canada of any of them, (iii) a local board of a municipality incorporated by or under an Act of a province or territory of Canada including any local board as defined in the Municipal Act (Ontario) [or equivalent legislation] or similar body incorporated under the law of another province or territory, (iv) an organization that operates a public hospital authority and that is designated by the Minister of National Revenue as a hospital under the Excise Tax Act (Canada) or an agent of the organization, (v) a body incorporated by or under an Act of a province or territory of Canada for a public purpose, or (vi) a subsidiary of a public body whose financial statements are consolidated with those of the public body.</td>
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<td>Limitation on cash</td>
<td><strong>4.12.2</strong> A lawyer must not receive or accept cash in an aggregate amount of greater than $7,500</td>
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<td>Canadian in respect of any one client matter.</td>
<td><strong>Foreign currency</strong>&lt;br&gt;4.12.3 For the purposes of this Regulation, when a lawyer receives or accepts cash in a foreign currency the lawyer will be deemed to have received or accepted the cash converted into Canadian dollars at&lt;br&gt;(a) the official conversion rate of the Bank of Canada for the foreign currency as published in the Bank of Canada’s Daily Noon Rates that is in effect at the time the lawyer receives or accepts the cash, or&lt;br&gt;(b) if the day on which the lawyer receives or accepts cash is a holiday, the official conversion rate of the Bank of Canada in effect on the most recent business day preceding the day on which the lawyer receives or accepts the cash.</td>
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<td>Application&lt;br&gt;4.12.4 Subregulation 4.12.2 applies when a lawyer engages on behalf of a client or gives instructions on behalf of a client in respect of the following activities:&lt;br&gt;(a) receiving or paying funds;&lt;br&gt;(b) purchasing or selling securities, real properties or business assets or entities;&lt;br&gt;(c) transferring funds by any means.</td>
<td><strong>Exception</strong>&lt;br&gt;4.12.5 Despite subregulation 4.12.4, subregulation 4.12.2 does not apply when the lawyer receives cash in connection with the provision of legal services by the lawyer or the lawyer’s firm&lt;br&gt;(a) from a financial institution or public body,</td>
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(b) from a peace officer, law enforcement agency or other agent of the Crown acting in his or her official capacity,
(c) pursuant to pay a fine, penalty, or bail, or
(d) for professional fees, disbursements, or expenses, provided that any refund out of such receipts is also made in cash.

4.12.6 Every lawyer, in addition to existing financial recordkeeping requirements to record all money and other property received and disbursed in connection with the lawyer’s practice, shall maintain
(a) a book of original entry identifying the method by which money is received in trust for a client, and
(b) a book of original entry showing the method by which money, other than money received in trust for a client, is received.

4.12.7 Every lawyer who receives cash for a client shall maintain, in addition to existing financial recordkeeping requirements, a book of duplicate receipts, with each receipt identifying the date on which cash is received, the person from whom cash is received, the amount of cash received, the client for whom cash is received, any file number in respect of which cash is received and containing the signature authorized by the lawyer who receives cash and of the person from whom cash is received.

4.12.8 The financial records described in subregulations 4.12.6 and 4.12.7 may be entered and posted by hand or by mechanical or electronic means, but if the records are entered
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<td>and posted by hand, they shall be entered and posted in ink.</td>
<td>4.12.9 The financial records described in subregulations 4.12.6 and 4.12.7 shall be entered and posted so as to be current at all times.</td>
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<td>4.12.10 A lawyer shall keep the financial records described in subregulations 4.12.6 and 4.12.7 for at least the six year period immediately preceding the lawyer’s most recent fiscal year end.</td>
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### 4.13 Client Identification

#### Definitions

4.13.1 In Regulation 4.13

(a) “electronic funds transfer” means an electronic transmission of funds conducted by and received at a financial institution or a financial entity headquartered in and operating in a country that is a member of the Financial Action Task Force, where neither the sending nor the receiving account holders handle or transfer the funds, and where the transmission record contains a reference number, the date, transfer amount, currency and the names of the sending and receiving account holders and the conducting and receiving entities;

(b) “financial institution” means (i) an authorized foreign bank within the meaning of section 2 of the Bank Act in respect of its

4.13.1 In Regulation 4.13

(a) “credit union central” means a central cooperative credit society, as defined in section 2 of the Cooperative Credit Associations Act, or a credit union central or a federation of credit unions or caisses populaires that is regulated by a provincial or territorial Act other than one enacted by the legislature of Quebec.

(b) “disbursements” means amounts paid or required to be paid to a third party by the lawyer or the lawyer’s firm on a client’s behalf in connection with the provision of legal services to the client by the lawyer or the lawyer’s firm which will be reimbursed by the client;

(c) “electronic funds transfer” means an electronic transmission of funds conducted by
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<td>business in Canada or a bank to which the Bank Act applies, (ii) a cooperative credit society, savings and credit union or caisse populaire that is regulated by a provincial Act, (iii) an association that is regulated by the Cooperative Associations Act (Canada), (iv) a company to which the Trust and Loan Companies Act (Canada) applies, (v) a trust company or loan company regulated by a provincial Act, or (vi) a department or agent of Her Majesty in right of Canada or of a province where the department or agent accepts deposit liabilities in the course of providing financial services to the public; or (vii) a subsidiary of the financial institution whose financial statements are consolidated with those of the financial institution; (c) “funds” mean cash, currency, securities and negotiable instruments or other financial instruments that indicate the person’s title or interest in them; (d) “organization” means a body corporate, partnership, fund, trust, cooperative or an unincorporated association; (e) deleted.</td>
<td>and received at a financial institution or a financial entity headquartered in and operating in a country that is a member of the Financial Action Task Force, where neither the sending nor the receiving account holders handle or transfer the funds, and where the transmission record contains a reference number, the date, transfer amount, currency and the names of the sending and receiving account holders and the conducting and receiving entities.</td>
<td>(d) “expenses” means costs incurred by a lawyer or law firm in connection with the provision of legal services to a client which will be reimbursed by the client including such items as photocopying, travel, courier/postage, and paralegal costs; (e) “financial institution” means (i) a bank that is regulated by the Bank Act, (ii) an authorized foreign bank within the meaning of section 2 of the Bank Act in respect of its business in Canada, (iii) a cooperative credit society, savings and credit union or caisse populaire that is regulated by a provincial or territorial Act, (iv) an association that is regulated by the Cooperative Credit Associations Act (Canada), (v) a financial services cooperative, (vi) a credit union central, (vii) a company that is regulated by the Trust and Loan Companies Act (Canada), (viii) a trust company or loan company that is regulated by a provincial or territorial Act; (ix) a department or an entity that is an agent of Her Majesty in right of Canada or of a province.</td>
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<td>(f) “proceedings” means a legal action, application or other proceeding commenced before a court of any level, a statutory tribunal in Canada or an arbitration panel or arbitrator established pursuant to provincial, federal or foreign legislation and includes proceedings before foreign courts</td>
<td>or territory when it accepts deposit liabilities in the course of providing financial services to the public; or</td>
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<td>(g) “public body” means (i) a department or agent of Her Majesty in right of Canada or of a province, (ii) an incorporated city, town, village, metropolitan authority, township, district, county, rural municipality or other incorporated municipal body or an agent of any of them, (iii) a municipality incorporated by or under an Act of a province or territory of Canada including any body governed by the Municipal Government Act, SNS 1998, c.18 (iv) an organization that operates a public hospital and that is designated by the Minister of National Revenue as a hospital authority under the Excise Tax Act (Canada) or an agent of the organization; (v) a body incorporated by or under the law of an Act of a province or territory of Canada for a public purpose; or</td>
<td>(x) a subsidiary of the financial institution whose financial statements are consolidated with those of the financial institution. (f) “financial services cooperative” means a financial services cooperative that is regulated by An Act respecting financial services cooperatives, CQLR, c. C-67.3, or An Act respecting the Mouvement Desjardins, S.Q. 2000, c.77, other than a caisse populaire.</td>
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<td>(g) “funds” means cash, currency, securities and negotiable instruments or other financial instruments that indicate the person’s title or right to or interest in them;</td>
<td>(h) “lawyer” means, in the Province of Quebec, an advocate or a notary and, in any other province or territory, a barrister or solicitor;</td>
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<td>(i) “organization” means a body corporate, partnership, fund, trust, co-operative or an unincorporated association;</td>
<td>(j) “professional fees” means amounts billed or to be billed to a client for legal services provided or to be provided to the client by the lawyer or the lawyer’s firm;</td>
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<td>(k) “public body” means (i) a department or agent of Her Majesty in right of Canada or of a province or territory,</td>
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<td>(vi) a subsidiary of a public body whose financial statements are consolidated with those of the public body;</td>
<td>(ii) an incorporated city, town, village, metropolitan authority, township, district, county, rural municipality or other incorporated municipal body in Canada or an agent in Canada of any of them,</td>
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<td>(h) “reporting issuer” means an organization that is a reporting issuer within the meaning of the securities laws of any province or territory of Canada, or a corporation whose shares are traded on a stock exchange designated under the Income Tax Act (Canada) and operates in a country that is a member of the Financial Action Task Force, and includes a subsidiary of that organization or corporation whose financial statements are consolidated with those of the organization or corporation;</td>
<td>(iii) a local board of a municipality incorporated by or under an Act of a province or territory of Canada including any local board as defined in the Municipal Act (Ontario) [or equivalent legislation] or similar body incorporated under the law of another province or territory,</td>
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<td>(i) “securities dealer” means a person or entity that is authorized under provincial legislation to engage in the business of dealing in securities or any other financial instruments or to provide portfolio management or investment advising services</td>
<td>(iv) an organization that operates a public hospital authority and that is designated by the Minister of National Revenue as a hospital under the Excise Tax Act (Canada) or an agent of the organization,</td>
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<td>(l) “reporting issuer” means an organization that is a reporting issuer within the meaning of the securities laws of any province or territory of Canada, or a corporation whose shares are traded on a stock exchange that is designated under section 262 of the Income Tax Act (Canada) and operates in a country that is a member of the Financial Action Task Force, and includes a subsidiary of that organization or corporation whose financial statements are consolidated with those of the organization or corporation.</td>
<td>(v) a body incorporated by or under an Act of a province or territory of Canada for a public purpose, or</td>
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### Client identity- exclusion from rule

4.13.2 Subregulations 4.13.3 – 4.13.16 do not apply to:
(a) a lawyer who provides legal services, or is engaged in or gives instructions in respect of any activities on behalf of his or her employer;
(b) a lawyer;
(i) who is engaged as agent by the lawyer for a client to provide legal services to that client, or
(ii) to whom a matter for the provision of legal services is referred by the lawyer for a client, or
(iii) a lawyer providing legal services as part of a duty counsel program sponsored by a non-profit organization, except where the lawyer engages in or gives instructions in respect of the receiving, paying or transferring of funds other than an electronic funds transfer.

### Requirement to record client identification

4.13.3 Subject to subregulation 4.13.2, a lawyer who is retained by a client to provide legal services must comply with these regulations and shall obtain and record the following information:
(a) the client’s full name;

### Existing Regulation

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<td>(m) &quot;securities dealer&quot; means persons and entities authorized under provincial or territorial legislation to engage in the business of dealing in securities or any other financial instruments or to provide portfolio management or investment advising services, other than persons who act exclusively on behalf of such an authorized person or entity.</td>
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### Requirement to Identify Client

4.13.2 Subject to subregulation 4.13.4, a lawyer who is retained by a client to provide legal services must comply with the requirements of this Rule in keeping with the lawyer's obligation to know their client, understand the client’s financial dealings in relation to the retainer with the client and manage any risks arising from the professional business relationship with the client.

4.13.3 A lawyer's responsibilities under this Rule may be fulfilled by any member, associate or employee of the lawyer's firm, wherever located.

4.13.4 Subregulations 4.13.5 through 4.13.31 do not apply to
(a) a lawyer when he or she provides legal services or engages in or gives instructions in respect of any of the activities described in subregulation 4.13.6 on behalf of his or her employer;
(b) a lawyer
(i) who is engaged as an agent by the lawyer for a client to provide legal services to the client, or
(ii) to whom a matter for the provision of legal services is referred by the lawyer for a client,
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<td>(b) the client’s business address and business telephone number, if applicable; (c) if the client is an individual, the client’s home address and home telephone number; (d) if the client is an organization, other than a financial institution, public body or reporting issuer the organization’s incorporation or business identification number and the place of issue of its incorporation or business identification number, if applicable; (e) if the client is an individual, the client’s occupation or occupations; (f) if the client is an organization, (i) other than a financial institution, public body or reporting issuer, the general nature of the type of business or businesses or activity or activities engaged in by the client, where applicable; and (ii) the name and position of and contact information for the individual(s) authorized to provide and giving instructions to the lawyer with respect to the matter for which the lawyer is retained; (g) if the client is acting for or representing a third party, information about the third party as set out in paragraphs (a) to (f) as applicable.</td>
<td>when the client’s lawyer has complied with subregulations 4.13.5 through 4.13.31, or, (c) a lawyer providing legal services as part of a duty counsel program sponsored by a non-profit organization, except where the lawyer engages in or gives instructions in respect of the receiving, paying or transferring of funds other than an electronic funds transfer.</td>
<td>4.13.5 A lawyer who is retained by a client as described in subregulation 4.13.2 must obtain and record, with the applicable date, the following information: (a) for individuals: (i) the client’s full name, (ii) the client’s home address and home telephone number, (iii) the client’s occupation or occupations, and (iv) the address and telephone number of the client’s place of work or employment, where applicable; (b) for organizations: (i) the client’s full name, business address and business telephone number, (ii) other than a financial institution, public body or reporting issuer, the organization’s incorporation or business identification number and the place of issue of its incorporation or business identification number, if applicable, (iii) other than a financial institution, public body or a reporting issuer, the general nature of the type of business or businesses or activity or activity or activities engaged in by the client, where applicable;</td>
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<td>client and the individual authorized to provide and giving instructions to the lawyer with respect to the matters for which the lawyer is retained, using what the lawyer reasonably considers to be reliable independent source documents, data or information.</td>
<td>activities engaged in by the client, where applicable, and (iv) the name and position of and contact information for the individual who is authorized to provide and gives instructions to the lawyer with respect to the matter for which the lawyer is retained,</td>
<td>(c) if the client is acting for or representing a third party, information about the third party as set out paragraphs (a) or (b) as applicable.</td>
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<td><strong>4.13.5</strong> A lawyer's responsibilities under this Regulation may be fulfilled by any member, associate or employee of the lawyer's firm, wherever located.</td>
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<td><strong>4.13.6</strong> The verification required under this subregulation must be carried out at the time the lawyer engages in or gives instructions regarding receiving, paying or transferring, funds.</td>
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<td><strong>Independent source documents</strong></td>
<td><strong>4.13.6</strong> Subject to subregulation 4.13.7, subregularion 4.13.8 applies where a lawyer who has been retained by a client to provide legal services engages in or gives instructions in respect of the receiving, paying or transferring of funds.</td>
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<td><strong>4.13.7</strong> For purposes of subregulation 4.13.4, independent source documents may include: (a) if the client or third party is an individual, valid original government issued identification, including a driver’s licence, birth certificate, provincial or territorial health insurance card, passport or similar record; (b) if the client or third party is an organization such as a corporation or society that is created or registered pursuant to legislative authority, a written confirmation from a government registry as to the existence, name and address of the organization, including the name of its directors and officers, where applicable, such as: (i) a certificate of corporate status issued by a public body,</td>
<td><strong>Exemptions re: certain funds</strong></td>
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<td>(iv) paid by or to a financial institution, public body or a reporting issuer; (ii) received by a lawyer from the trust account of another lawyer; (iii) received from a peace officer, law enforcement agency or other public official acting in their official capacity; (iv) paid or received to pay a fine, penalty, or bail; or</td>
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<td>(ii) a copy obtained from a public body of a record that the organization is required to file annually under applicable legislation, or (iii) a copy of a similar record obtained from a public body that confirms the organization’s existence; and (c) if the client or third party is an organization, other than a corporation or society, that is not registered in any government registry, such as a trust or partnership, a copy of the organization’s constituting documents, such as a trust or partnership agreement, articles of association, or any other similar record that confirms its existence as an organization.</td>
<td>(v) paid or received for professional fees, disbursements, or expenses; (c) to an electronic funds transfer.</td>
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**Exemptions re certain funds**

**4.13.8** Subregulation 4.13.4 does not apply where the client is a financial institution, public body, or reporting issuer, or in respect of funds: (a) paid by or to a financial institution, a public body, or a reporting issuer; (b) received by a lawyer from the trust account of a lawyer in Canada; (c) received from a peace officer, law enforcement agency or other public official acting in their official capacity; (d) paid or received pursuant to a court order or to pay a fine or penalty; (e) paid or received as a settlement of any legal or administrative proceedings; or (f) paid or received for professional fees, disbursement, expenses or bail.

**Verification of organizations**

**Requirement to Verify Client Identity**

**4.13.8** When a lawyer is engaged in or gives instructions in respect of any of the activities described in subregulation 4.13.6 the lawyer must (a) obtain from the client and record, with the applicable date, information about the source of funds described in subregulation 4.13.6, and (b) verify the identity of the client, including the individual(s) described in subregulation 4.13.5(b)(iv), and, where appropriate, the third party using the documents or information described in subregulation 4.13.13.

**Use of Agent**

**4.13.9** A lawyer may rely on an agent to obtain the information described in 4.13.13 to verify the identity of an individual client, third party or individual described in 4.13.5(b)(iv) provided the lawyer and the agent have an agreement or arrangement in writing for this purpose as described in 4.13.11.

**4.13.10** Notwithstanding subregulation 4.13.9, where an individual client, third party or individual described in 4.13.5(b)(iv) is not physically present in Canada, a lawyer must rely on an agent to obtain the information described in subregulation 4.13.11 to verify the person’s identity provided the lawyer and the agent have
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| **4.13.9** A lawyer who is engaged in or gives instructions on behalf of a client or third party, that is an organization referred to in 4.13.7(b) or (c), in respect of the receiving, paying or transferring of funds, including non-face-to-face transactions, must (a) verify the identity of the individual or individuals authorized to provide and giving instructions on behalf of the organization with respect to the matter for which the lawyer is retained, upon engaging in or giving instructions; and (b) make reasonable efforts to obtain and if obtained, record, (i) the name and occupation of all directors of the organization, other than an organization that is a securities dealer; and (ii) the name, address and occupation of all persons who own 25 per cent or more of the organization or of the shares of the organization. | an agreement or arrangement in writing for this purpose as described in subregulation 4.13.11. | **Agreement for Use of Agent**  
**4.13.11** A lawyer who enters into an agreement or arrangement referred to in subregulations 4.13.9 or 4.13.10 must: (a) obtain from the agent the information obtained by the agent under that agreement or arrangement; and (b) satisfy themselves that the information is valid and current and that the agent verified identity in accordance with subregulation 4.13.13. |
| **Verify identity within sixty days**  
**4.13.10** A lawyer must verify the identity of a client that is an organization within sixty days of engaging in or giving instructions in respect of the receiving, paying or transferring funds, other than an electronic funds transfer. | **Clients elsewhere in Canada**  
**4.13.11** When a lawyer engages in or gives instructions in respect of the receiving, paying or transferring of funds, other than an electronic funds transfer, including non-face-to-face | **Documents and information for verification**  
**4.13.13** For the purposes of subregulation 4.13.8(b), the client’s identity must be verified by referring to the following documents, which |

**Verify identity within sixty days**  
**4.13.10** A lawyer must verify the identity of a client that is an organization within sixty days of engaging in or giving instructions in respect of the receiving, paying or transferring funds, other than an electronic funds transfer.
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<th>Existing Regulation</th>
<th>Proposed Regulation</th>
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<td>transactions, for a client or third party who is an individual who is not physically present before the lawyer but is present elsewhere in Canada, the lawyer must verify the client’s identity by obtaining an attestation from a commissioner of oaths in Canada, or a guarantor in Canada, that the commissioner or guarantor has seen one of the documents referred to in subregulation 4.13.7(a).</td>
<td>must be valid, original and current, or the following information, which must be valid and current, and which must not include an electronic image of a document: (a) if the client or third party is an individual, (i) an identification document containing the individual’s name and photograph that is issued by the federal government, a provincial or territorial government or a foreign government, other than a municipal government, that is used in the presence of the individual to verify that the name and photograph are those of the individual; (ii) information that is in the individual’s credit file if that file is located in Canada and has been in existence for at least three years that is used to verify that the name, address and date of birth in the credit file are those of the individual; (iii) any two of the following with respect to the individual: (A) Information from a reliable source that contains the individual’s name and address that is used to verify that the name and address are of those of the individual; (B) Information from a reliable source that contains the individual’s name and date of birth that is used to verify that the name and date of birth are those of the individual, or (C) Information that contains the individual’s name and confirms that they have a deposit account or a credit card or other loan amount with a financial institution that is used to verify that information.</td>
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<td>(c) the type and number of the identifying document provided by the client, third party, or instructing individual.</td>
<td>(b) For the purposes of subregulation 4.13.13(a)(iii)(A) to (C), the information referred to must be from different sources, and the individual, lawyer and agent cannot be a source.</td>
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<td><strong>Guarantors</strong></td>
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<td><strong>4.13.14</strong> For purposes of subregulation 4.13.11, a guarantor must be a person employed in one of the following occupations:</td>
<td>(c) To verify the identity of an individual who is under 12 years of age, the lawyer must verify the identity of one of their parents or their guardian.</td>
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<td>(a) dentist;</td>
<td>(d) To verify the identity of an individual who is a least 12 years of age but not more than 15 years of age, the lawyer may refer to information under subregulation 4.13.13(a)(iii)(A) that contains the name and address of one of the individual’s parents or their guardian and verifying that the address is that of the individual.</td>
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<td>(b) medical doctor;</td>
<td>(e) if the client or third party is an organization such as a corporation or society that is created or registered pursuant to legislative authority, a written confirmation from a government registry as to the existence, name and address of the organization, including the names of its directors, where applicable, such as</td>
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<td>(c) chiropractor;</td>
<td>(i) a certificate of corporate status issued by a public body,</td>
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<td>(d) judge;</td>
<td>(ii) a copy obtained from a public body of a record that the organization is required to file annually under applicable legislation, or</td>
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<td>(e) magistrate;</td>
<td>(iii) a copy of a similar record obtained from a public body that confirms the organization’s existence; and</td>
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<td>(f) lawyer;</td>
<td>(f) if the client or third party is an organization, other than a corporation or society, that is not registered in any government registry, such as a</td>
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<td>(g) notary (in Quebec);</td>
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<td>(h) notary public;</td>
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<td>(i) optometrist;</td>
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<td>(j) pharmacist;</td>
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<td>(k) professional accountant who is a member of one of the following bodies: APA – Accredited Public Accountant, CA - Chartered Accountant, CGA - Certified General Accountant, CMA - Certified Management Accountant, PA - Public Accountant or RPA - Registered Public Accountant;</td>
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<td>(l) professional engineer who holds the designation of P. Eng in a province other than Quebec or Eng in Quebec;</td>
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<td>(m) veterinarian;</td>
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<td>(n) peace officer;</td>
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<td>(o) paralegal licensee in Ontario;</td>
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<td>(p) nurse; or</td>
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<td>(q) school principal.</td>
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<td><strong>Verification of independent source documents</strong>&lt;br&gt;<strong>4.13.15</strong> The verification of the identity of a client, third party, or individual authorized to provide and giving instructions to the lawyer on the matter may, and in the case of a non-face-to-face transaction involving a client who is not present in Canada, must be carried out by an agent on behalf of the lawyer provided that:&lt;br&gt; (a) the lawyer and the agent have an agreement in writing for that purpose; and&lt;br&gt; (b) the lawyer obtains from the agent the information obtained by the agent to verify the client’s identity.</td>
<td>trust or partnership, a copy of the organization’s constating documents, such as a trust or partnership agreement, articles of association, or any other similar record that confirms its existence as an organization.</td>
<td><strong>Requirement to Identify Directors, Shareholders and Owners</strong>&lt;br&gt;<strong>4.13.14</strong> When a lawyer is engaged in or gives instructions in respect of any of the activities in subregulation 4.13.6 for a client or third party that is an organization referred to in subregulation 4.13.13(e) or (f), the lawyer must:&lt;br&gt; (a) obtain and record, with the applicable date, the names of all directors of the organization, other than an organization that is a securities dealer; and&lt;br&gt; (b) make reasonable efforts to obtain, and if obtained, record with the applicable date, (i) the names and addresses of all persons who own, directly or indirectly, 25 per cent or more of the organization or of the shares of the organization, (ii) the names and addresses of all trustees and all known beneficiaries and settlors of the trust, and (iii) in all cases, information establishing the ownership, control and structure of the organization.</td>
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<td>Existing Regulation</td>
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<td><strong>Record keeping and retention</strong></td>
<td><strong>4.13.16</strong> A lawyer must keep a record, with the applicable date(s), that sets out the information obtained and the measures taken to confirm the accuracy of that information.</td>
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<td>4.13.18 A lawyer must obtain and retain a copy of every document used to verify the identity of any individual or organization pursuant to this Regulation.</td>
<td><strong>4.13.17</strong> If a lawyer is not able to obtain the information referred to in subregulation 4.13.14 or to confirm the accuracy of that information in accordance with subregulation 4.13.15, the lawyer must: (a) take reasonable measures to ascertain the identity of the most senior managing officer of the organization; (b) determine whether (i) the client’s information in respect of their activities; (ii) the client’s information in respect of the source of the funds described in subregulation 4.13.6, and (iii) the client’s instructions in respect of the transaction are consistent with the purpose of the retainer and the information obtained about the client as required by this Rule; (c) assess whether there is a risk that the lawyer may be assisting in or encouraging fraud or other illegal conduct; and (d) keep a record, with the applicable date, of the results of the determination and assessment under paragraphs (b) and (c).</td>
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<td>4.13.19 The documents referred to in subregulation 4.13.18 may be kept in a machine-readable or electronic form, if a paper copy can be readily produced from it.</td>
<td><strong>Timing of Verification for Individuals</strong></td>
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<td>4.13.20 A lawyer must retain a record of the information and any documents obtained for the purposes of subregulations 4.13.4 and 4.13.7 and copies of all documents received for the purposes of subregulation 4.13.9 for the longer of (a) the duration of the lawyer and client relationship and for as long as is necessary for the purpose of providing service to the client; and (b) a period of at least six years following completion of the work for which the lawyer was retained.</td>
<td><strong>4.13.18</strong> A lawyer must verify the identity of (a) a client who is an individual, and</td>
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<td><strong>Application</strong></td>
<td><strong>4.13.21</strong> Subregulations 4.13.3, 4.13.4, 4.13.9 and 4.13.11 do not apply to matters in respect of which a lawyer was retained before this regulation comes into force but they do apply to all matters for which he or she is retained after that time regardless of whether the client is a new or existing client.</td>
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<td><strong>Criminal activity, duty to withdraw at time of taking information</strong></td>
<td><strong>4.13.21</strong> Subregulations 4.13.3, 4.13.4, 4.13.9 and 4.13.11 do not apply to matters in respect of which a lawyer was retained before this regulation comes into force but they do apply to all matters for which he or she is retained after that time regardless of whether the client is a new or existing client.</td>
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<td><strong>4.13.22</strong> In the course of obtaining information and taking the steps required by this regulation, a lawyer must act in accordance with the <em>Code of Professional Conduct</em> and if the lawyer withdraws from representing the client, they must record the reasons for doing so.</td>
<td>(b) the individual(s) authorized to provide and giving instructions on behalf of an organization with respect to the matter for which the lawyer is retained, upon engaging in or giving instructions in respect of any of the activities described in subregulation 4.13.6.</td>
<td><strong>Rationale</strong></td>
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| **4.13.23** Subregulation 4.13.22 applies to all matters, including new matters for existing clients, for which a lawyer is retained after this Regulation comes into force. | **Criminal activity, duty to withdraw after being retained**
**4.13.24** While retained by a client, a lawyer must act in accordance with the *Code of Professional Conduct* and if the lawyer withdraws from representing the client, they must record the reasons for doing so. | **Timing of Verification for Organizations**
**4.13.20** A lawyer must verify the identity of a client that is an organization upon engaging in or giving instructions in respect of any of the activities described in subregulation 4.13.6, but in any event no later than 30 days thereafter. |
| **Application**
**4.13.25** This Regulation applies to all matters for which a lawyer was retained before this Regulation comes into force and to all matters for which they are retained after that time. | **4.13.19** Where a lawyer has verified the identity of an individual, the lawyer is not required to subsequently verify that same identity unless the lawyer has reason to believe the information, or the accuracy of it, has changed. | **Timing of Verification for Organizations**
**4.13.22** A lawyer must verify the identity of a client that is an organization upon engaging in or giving instructions in respect of any of the activities described in subregulation 4.13.6, but in any event no later than 30 days thereafter. |
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<td><strong>4.13.23</strong> Where the lawyer has verified the identity of a client that is an organization and obtained information pursuant to subregulation 4.13.20, the lawyer is not required to subsequently verify that identity or obtain that information, unless the lawyer has reason to believe the information, or the accuracy of it, has changed.</td>
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**Record keeping and retention**

**4.13.24** A lawyer must obtain and retain a copy of every document used to verify the identity of any individual or organization for the purposes of subregulation 4.13.8.

**4.13.25** The documents referred to in subregulation 4.13.24 may be kept in a machine-readable or electronic form, if a paper copy can be readily produced from it.

**4.13.26** A lawyer must retain a record of the information, with the applicable date, and any documents obtained for the purposes of subregulation 4.13.5, 4.13.14 and 4.13.31(b) and copies of all documents received for the purposes of subregulation 4.13.8 for the longer of (a) the duration of the lawyer and client relationship and for as long as is necessary for the purpose of providing service to the client, and (b) a period of at least six years following completion of the work for which the lawyer was retained. |
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<td><strong>4.13.27</strong> Subregulations 4.13.2 through 4.13.26 do not apply to matters in respect of which a lawyer was retained before this Regulation comes into force but they do apply to all matters for which he or she is retained after that time regardless of whether the client is a new or existing client.</td>
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<td><strong>Criminal activity, duty to withdraw at time of taking information</strong></td>
<td>If in the course of obtaining the information and taking the steps required in subregulation 4.13.5 and subregulations 4.13.8, 4.13.14 and 4.13.17, a lawyer knows or ought to know that he or she is or would be assisting a client in fraud or other illegal conduct, the lawyer must withdraw from representation of the client.</td>
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<td><strong>4.13.29</strong> This section applies to all matters, including new matters for existing clients, for which a lawyer is retained after this Regulation comes into force.</td>
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<td><strong>Monitoring</strong></td>
<td>During a retainer with a client in which the lawyer is engaged in or gives instructions in respect of any of the activities described in subregulation 4.13.6, the lawyer must monitor on a periodic basis the professional business relationship with the client for the purposes of determining whether (a) the client’s information in respect of their activities,</td>
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<td>(b) the client’s information in respect of the source of the funds described in section 4, and (c) transactions are consistent with the purpose of the retainer and the information obtained about the client as required by this Regulation.</td>
<td>4.13.31 In addition to the requirements set out in subregulation 4.13.30, the lawyer must (a) assess whether there is a risk that the lawyer may be assisting in or encouraging fraud or other illegal conduct; and (b) keep a record, with the applicable date, of the measures taken and the information obtained with respect to the requirements of subregulation 4.13.30.</td>
<td>Duty to withdraw 4.13.32 If while retained by a client, including when taking the steps required in subregulations 4.13.30 and 4.13.31, a lawyer knows or ought to know that he or she is or would be assisting the client in fraud or other illegal conduct, the lawyer must withdraw from representation of the client.</td>
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<td>Application 4.13.33 This section applies to all matters for which a lawyer was retained before this Regulation comes into force and to all matters for which he or she is retained after that time.</td>
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## Existing Regulation

### PART 10
**TRUST ACCOUNTS**

### 10.1 Definitions

1. **10.1.1** In this Part
   (a) “data source” means an electronic file which can be used to generate books of original entry, client ledger cards, and other source documents and which maintains an audit trail of changes;
   (b) “financial institution” means a chartered Canadian Schedule I bank, credit union or Caisse Populaire legally entitled to carry on business in the Province;
   (c) “general account” means a deposit account in a financial institution maintained by a practising lawyer or law firm in connection with the practice of law, other than a trust account;
   (d) “general trust account” means a deposit account in a financial institution maintained by a practising lawyer or law firm and designated as a trust account into which the practising lawyer or law firm deposits trust money;
   (e) “overdraft” means an amount below that which is required to meet the practising lawyer’s or law firm’s obligations, whether or not the trust account is overdrawn;
   (f) “specific trust account” means a deposit account or instrument in a financial institution, maintained by a practising lawyer or law firm on behalf of a specific client, and designated as a trust account on behalf of that client, into which a practising lawyer deposits money received in trust;

## Proposed Regulation

### PART 10
**TRUST ACCOUNTS**

### 10.1 Definitions

1. **10.1.1** In this Part
   (a) “data source” means an electronic file which can be used to generate books of original entry, client ledger cards, and other source documents and which maintains an audit trail of changes;
   (b) “financial institution” means a chartered Canadian Schedule I bank, credit union or Caisse Populaire legally entitled to carry on business in the Province;
   (c) “general account” means a deposit account in a financial institution maintained by a practising lawyer or law firm in connection with the practice of law, other than a trust account;
   (d) “general trust account” means a deposit account in a financial institution maintained by a practising lawyer or law firm and designated as a trust account into which the practising lawyer or law firm deposits trust money;
   (e) “money” includes cash, cheques, drafts, credit card transactions, post office orders, express and bank money orders and electronic transfer of deposits at financial institutions;
   (f) “overdraft” means an amount below that which is required to meet the practising lawyer’s or law firm’s obligations, whether or not the trust account is overdrawn;
   (g) “specific trust account” means a deposit account or instrument in a financial institution,
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<td>maintained by a practising lawyer or law firm on behalf of a specific client, and designated as a trust account on behalf of that client, into which a practising lawyer deposits money received in trust;</td>
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<td>Requirement for Trust Relationship 10.2.9 A practising lawyer must not use a trust account where there is no trust relationship.</td>
<td>Requirement for Trust Relationship 10.2.9 A practising lawyer must not use a trust account where there is no trust relationship. 10.2.9.1 A practising lawyer must pay into and withdraw from, or permit the payment into or withdrawal from, a trust account only money that is directly related to legal services that the practising lawyer or law firm is providing. 10.2.9.2 A practising lawyer must pay out money held in a trust account as soon as practicable upon completion of the legal services to which the money relates.</td>
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<td>Proper Delegation Allowed 10.2.10 The tasks required to be performed by the practising lawyer or law firm pursuant to Regulations 10.2 may be performed by a person other than a lawyer if that person is working under the supervision of a lawyer in a manner authorised by the Code of Professional Conduct.</td>
<td>Proper Delegation Allowed 10.2.10 The tasks required to be performed by the practising lawyer or law firm pursuant to Regulations 10.2 may be performed by a person other than a lawyer if that person is working under the supervision of a lawyer in a manner authorised by the Code of Professional Conduct.</td>
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MEMORANDUM TO COUNCIL

From: Frank E. DeMont QC, Chair, Governance and Nominating Committee

Date: September 18, 2019

Subject: Report from the Governance and Nominating Committee – Splitting Committee

Background

The GNC has recently considered dividing the GNC into two committees -- one to fulfill the governance mandate and the other to manage appointments and nominations. GNC directed a sub-committee to consider the question and report back to GNC. The sub-committee reported to GNC at its September meeting.

The GNC sub-committee considered three options: 1. Status quo; 2. Division into two committees, Governance and Nominating; and 3. Maintain the GNC and create two sub-committees – one Governance and the other Nominations.

The status quo was rejected, largely for the reasons set out below.

The two subcommittees’ option was rejected because of the duplication of effort that would be required.

The best and recommended option as considered by the sub-committee is the creation of two committees, a Governance Committee and a Nominations Committee.

Recommendations

The sub-committee’s recommendation was endorsed by the GNC and, as a result, the GNC recommends to Council that they:

1. Approve the winding up of the GNC and the creation of two new committees: a Governance Committee, and a Nominations Committee.

2. Direct the GNC to consider and develop Terms of Reference for each of the two proposed committees – dividing the work of GNC appropriately between them.
Should Council approve these two recommendations at its September Council meeting, GNC will develop Terms of Reference (including consulting with the Equity Committees) for consideration at its November 7, 2019, meeting and report to Council for its November 22, 2019, meeting.

It is anticipated that the GNC will continue its work until it reports its nominee for 2nd Vice-President in January of 2020 and, thereafter, the work be divided between the two proposed committees in accordance with their respective Terms of Reference.

Considerations

Some of the key factors in making this recommendation include:

- An acknowledgement that the governance and nomination functions require distinct skill sets;
- Recognition that there is duplication of effort in the current model, particularly relating to committee appointments;
- The creation of two sub-committees of GNC whose work would be subsequently reviewed by a GNC committee of the whole, would further result in duplication of effort;
- Due to the nominations demands, governance work of the GNC has not been a priority;
- Critical mandates of each area need specific time and attention;
- The importance of using volunteer time effectively and efficiently.

The Work of the GNC

The GNC held 13 meetings last year, estimated to have taken about 34 hours.

The method of population of committees has shifted significantly in the last two years. The most recent committee appointment process involved the creation of a large and diverse sub-committee. This was a relatively time intensive process for the sub-committee and required a special meeting of GNC. This nominations work required an additional 8 hours of meetings.

Over the last 12-18 months, much of the work of the GNC has focused on nominations. It is recognized that this is due in part to the bench elevation of two Vice-Presidents and the change in timing of committee appointments. However, it has left a backlog of outstanding governance work, which includes Review of Council Policies and, in particular, Executive Director Policies 17 – 19.

There is a need to finish the review of Council composition and to undertake a review of the elections processes and procedures. Furthermore, it is timely to review the committee appointments processes and procedures.
There is also a need for:
> review of all Council Policies due to the adoption of the new strategic plan;
> consideration of Council’s self-evaluation mechanisms;
> evaluation of our Skills and Attributes matrix;
> consideration of governance best practices.

It is not reasonable to ask volunteers to carry out the amount of work required of the GNC. The GNC believes for this work to be executed properly the most efficient and effective manner for doing so is to split the GNC into two committees with separate governance and nomination mandates.

GNC committee members will be available for questions. A full copy of the sub-committee’s report to GNC is available for distribution.
MEMORANDUM TO GNC

From: Frank DeMont, Q.C, Michelle Higgins, and Carrie Ricker, Sub-Committee

Date: August 21, 2019

Subject: Potential Splitting of Governance And Nominating Committee

Recommendation:

Given recent process changes which have increased GNC participation in committee appointments, anticipated GNC workload, and available options, the Sub-Committee recommends that GNC seek approval from Council to proceed with the division of GNC into two committees; one to fulfill the governance mandate and the other to manage appointments and nominations. In anticipation of Council approval, it is recommended that GNC create a sub-committee to draft terms of reference for the two committees to be reviewed at GNC’s November meeting.

Key factors in making this recommendation include:

- each committee’s function requires distinct skill sets
- there is a duplication in effort in the current model (and in the creation of sub-committees whose work would be subsequently reviewed by a committee of the whole)
- because of the nominations demands, governance work has not been prioritized
- critical mandates of each area need specific time and attention
- the importance of using volunteer time effectively and efficiently

GNC Mandate and Responsibilities

The Governance and Nominating Committee’s current mandate is to support Council in the governance of the Society by:

- Assisting with the recruitment, appointment and election of members of Council and Officers of the Society;
- Supporting Council’s commitment to the principles and practices of good governance.
Its responsibilities are to:

- Establish and ensure an open and transparent nominating and election process for Council positions that provides candidates for all positions;
- Recruit a Second Vice-President nominee;
- Recruit candidates for Public Representatives on Council for appointment by Council;
- Consult with the Equity Officer, the Racial Equity Committee and other relevant organizations prior to finalizing nominations;
- Recommend to Council recipients of the Distinguished Service Award, and other Honours and Awards, as appropriate;
- Support Council’s governance of the Society, including but not limited to:
  - recommending changes to the Legal Profession Act and Regulations and changes to Council Policies;
  - Monitor and review Council governance policies;
  - Support, as requested by the Executive Committee or by Council, the regular evaluation of Council or its Committees;
- Annually recommend, for Council approval, committee appointments.

Updating of GNC’s mandate and responsibilities, as well as its policies, is required as part of its anticipated governance work.

**History**

GNC’s current mandate and responsibilities date back a number of years. Although the Sub-Committee was not able to locate any specific documentation or guidance in relation to the original reasoning for creating a single governance and nominating committee, it is believed that to the extent that it was an intentional decision, it was done in the hopes that a committee which understood the governance structures and operations of the Society would be well positioned to understand the skills needed when making nominations.

The focus of GNC’s work has varied over the years. In some years, the Committee has focused largely on nominations, particularly years with committee turnover. From 2014-2016, GNC undertook a number of governance activities including:

- creating more procedure documents (Public Rep, Council Committee, 2VP, and FLSC recruitment process documents) including establishing timelines for the recruitments;
- reviewed the Elections process;
- considered and drafted the Council Evaluation questionnaire, and the 2-minute evaluation;
- reviewed and updated existing Council Policies (except for the ED policies);
- discussed and provided background for Council orientation;
• built the initial skills Matrix and regularly updated it. The Committee populated it and then used it for analysis of gaps on Council and Committees;

Over that time, governance work was generally performed at “regular meetings” and special meetings were held for the nomination process.

During this time, interviews of prospective candidates for Vice-President 2nd, Federation of Law Societies and Public Representatives were generally conducted by a small group as opposed to the whole committee. Committee turn-over was more limited and often committee appointments were approved by GNC based on the recommendation of the Executive Director.

**More Recent Activities and Changes to Processes**

In 2014 – 2015 it was determined that having only a limited number of members interview candidates did not provide the Committee with much opportunity for consideration and feedback. Consequently, GNC changed their process to have all available members conduct interviews of potential candidates for the various appointments. This appears to have been more satisfactory to the Committee, but it does create additional logistical concerns and may be more intimidating for the candidates.

The Society and the GNC have also increased their efforts to recruit members with diverse backgrounds for Society work. This has impacted the work of GNC in two ways:

1) The number of members of GNC has increased in order to ensure that GNC has a broad knowledge of the membership, skills and attributes to be able to recruit diverse members from a variety of equity seeking and cultural communities, and with varied geographic, practice areas and experience.

2) The use of the skills matrix, identification of gaps in skills and attributes and the establishment of candidate pools have become of greater importance and require greater time commitments for GNC.

The manner in which the Society approaches the population of committees has shifted significantly in the last two years. Committees are now populated for two-year terms beginning in January. The most recent Committee appointment process involved the creation of large and diverse sub-committee. All Society members were invited to apply for Committees of interest and following a review of all applicants (more than 60) and consultation with Committee Chairs and Staff, the sub-committee recommended a slate of candidates to GNC. After its review, GNC recommended a slate to Council. This was a relatively time intensive process for the sub-committee and required a special meeting of GNC.
The Society has also changed its process for appointment to external committees. Previously these appointments were handled by the Executive Director. Now when there is a request for an NSBS appointee to an external body, an expression of interest request is issued to the whole of the membership and the expressions are reviewed by GNC for selection. This has provided some timing challenges as external committees may be looking for responses more quickly than GNC meets.

In addition to its regularly scheduled committee meetings, members are also asked to participate in special scheduled meetings, subcommittees and interviews. The following table reflects the number of meetings and hours associated with the meetings over the last year:

<table>
<thead>
<tr>
<th>Meeting Date</th>
<th>Type of Meeting</th>
<th>Activities</th>
<th>Total Hours</th>
</tr>
</thead>
<tbody>
<tr>
<td>September 6, 2019</td>
<td>Regular</td>
<td>- 3 council committee appointments</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Discussion of January repopulation of committees process</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Discussion of process to fill now vacant 2nd VP position</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Review of council composition memo</td>
<td></td>
</tr>
<tr>
<td>October 11, 2019</td>
<td>Special</td>
<td>- Create and populate subcommittee to develop slate of new committee</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>appointments for January</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Begin 2nd VP short-list and review interview timelines</td>
<td></td>
</tr>
<tr>
<td>November 6, 2019</td>
<td>Special (Interviews)</td>
<td>- Interview 2nd VP candidates and make recommendation</td>
<td>4</td>
</tr>
<tr>
<td>November 8, 2019</td>
<td>Regular</td>
<td>- Update on committee appointment sub-committee</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Discussion of 2nd VP process and suggested improvements</td>
<td></td>
</tr>
<tr>
<td>November 20, 2018</td>
<td>Special (via teleconference)</td>
<td>- Review, discussion and approval of slate of</td>
<td>2</td>
</tr>
<tr>
<td>Date</td>
<td>Type</td>
<td>Notes</td>
<td></td>
</tr>
<tr>
<td>-----------------</td>
<td>---------------</td>
<td>----------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>December 5, 2018</td>
<td>Special</td>
<td>- Select 2nd VP interviewees&lt;br&gt;- Discussion of revised interview questions&lt;br&gt;- One external committee appt.&lt;br&gt;- Review draft work plan for 2019</td>
<td></td>
</tr>
<tr>
<td>January 10, 2019</td>
<td>Special (Interviews)</td>
<td>- 2nd VP interview and discussion</td>
<td></td>
</tr>
<tr>
<td>January 10, 2019</td>
<td>Regular</td>
<td>- New member orientation&lt;br&gt;- Finalize work plan&lt;br&gt;- Review elections process and communications plan to engage equity-seeking communities in seeking diverse candidates&lt;br&gt;- Additional committee appointments approvals</td>
<td></td>
</tr>
<tr>
<td>January 24, 2019</td>
<td>Special</td>
<td>- Selection of additional candidates to interview for 2nd VP</td>
<td></td>
</tr>
<tr>
<td>January 30, 2019</td>
<td>Special (Interviews)</td>
<td>- Interviews of additional 2nd VP candidates</td>
<td></td>
</tr>
<tr>
<td>February 28, 2019</td>
<td>Regular</td>
<td>- Develop process for addressing vacancy in southwest district&lt;br&gt;- Multiple external committee appointments&lt;br&gt;- Review memo from REC and GEC re: council composition&lt;br&gt;- Public rep recruitment&lt;br&gt;- Update on court liaison committees</td>
<td></td>
</tr>
<tr>
<td>May 2, 2019</td>
<td>Regular</td>
<td>- Determine interviewees for southwest district and public representative council positions&lt;br&gt;- Populate new standards committee re: wills and estates</td>
<td></td>
</tr>
</tbody>
</table>
Review court liaison committee ToR and work plan  
- Appoint sub-committee to look at GNC split

<table>
<thead>
<tr>
<th>Date</th>
<th>Activity</th>
<th>Interview Candidates for Council and make recommendations</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>May 15, 2019</td>
<td>Special (Interviews)</td>
<td></td>
<td>6</td>
</tr>
<tr>
<td>Total</td>
<td>13</td>
<td></td>
<td>34</td>
</tr>
</tbody>
</table>

In addition, the sub-committee for the appointments to council committees for January 2019 met on November 16, 2018 for 8 hours.

**Environmental Scan**

Although it is not uncommon from a governance perspective to see a combined governance and nominating committee, it is not always required. It is critical for any high functioning board to be able to recruit appropriately, but also to ensure that it is meeting its governance responsibilities through education and evaluation of the board and review of governance best practices. The nature of these committees varies by organization based on its structure and needs.

A scan of other law societies did not reveal other societies having a combined governance and nominating committee. [see attached scan]

**Upcoming Governance and Nomination Work**

In the previous 12-18 months much of the work of the GNC has focused on nominations. It is recognized that this is due in part to the bench elevation of two vice-presidents and the change in timing of committee appointments. It has, however, left a backlog of outstanding governance work that is required.

The current GNC Workplan includes a number of significant governance tasks to be undertaken over the next 5-10 months including:

a) Review of Court Liaison Task Force Report and Recommendations – This is scheduled for the September 5th meeting and depending on the nature of the recommendations and direction of Council there may be work required of GNC to implement changes.

b) Review of process for committee appointments and determination of changes required before next committee appointment process for January 2021 – one of the recommendations was to begin the selection process earlier and therefore the process is likely to begin in summer/early fall 2020
c) Review of council evaluation policies and processes – The Council Evaluation survey has grown in length without necessarily offering improved results and useful feedback. A critical review of the survey to eliminate overlap with other evaluation tools, bring focus to the purpose of the survey and to ensure best practices would be valuable prior to May 2020. Policies and procedures in relation to evaluation as a whole need to be reviewed and updated.

d) Review of Council Composition – the issue of whether a change to the manner of council appointment (elected v. appointment of certain Council positions to ensure diversity of candidates) remains outstanding. A memo was provided from GEC and REC last year, providing detailed questions and suggestion the review continue after this round of Council elections.

e) Review of Executive Director policies 17-19 – this has remained outstanding for 2 years due to GNC workload. Executive and the ED will be taking the lead on updating Policy 19 with the assistance of an external consultant, however, policies 17-18 remain to be reviewed.

Changes to the work of GNC based on this report will impact on consideration of committee appointment process moving forward.

In addition to the work already identified in the GNC Work Plan, based on Council’s new strategic plan and identified goals, there are a number of additional tasks and work that might be anticipated for GNC including:

   a) Review and amendment of council policies for compliance with new strategic plan, including approved equity lens.
   b) Amendments to policies to reflect change to committee population in January.
   c) Review of election processes including recruitment of candidates and increasing voter turn-out.
   d) Consideration of the skills matrix and its ongoing use and effectiveness;
   e) Review of current governance best practices and recommendations for updates and changes to NSBS policies.

In addition to its governance activities, GNC will also continue to be involved in the appointment process for various positions and committees. A rough estimate of the time requirement for GNC over the next 12 months is included for each. These time estimates do not include review and preparation time for Committee members outside of GNC meeting times.

   a) Incoming 2nd VP selection – November – January [2-3 hours for short-listing, 6 hours for interviews and discussion]
   b) 1-2 public representative appointments – March-May [2 hours for shortlisting, 4-6 hours for interviews and discussion]
c) Committee gaps – There continue to be identified skills gaps on certain Council committees and this may continue if Committee members leave before the end of their term. [2 hours]

d) External appointments – There will continue to be external bodies and committees who seek representation from NSBS. It is anticipated that we would continue to seek expressions of interest from members and rely on GNC for nominations. [2 hours]

e) New committees – Given the strategic plan and new directions, it is anticipated that over the next 12-18 months there will be several new committees that will require population (i.e. sole practitioner and small firms committee). [3 hours]

f) Ongoing Creation of Public Representative candidate pool – for appointment to committees and Council [1-2 hours]

**Options**

Based on the foregoing, it is the view of the Sub-Committee that it will be challenging GNC to complete its governance and nominating work for 2019-2020 within the currently allotted meeting times.

The Sub-Committee has identified three possible options for addressing GNC’s workload and achieving its mandate moving forward:

1) Maintain status quo but increase the number of meetings throughout the year, including establishing dedicated governance meetings.
2) Create two separate committees.
3) Maintain one overall GNC committee but create sub-committees i.e. nomination subcommittee that submits slates or shortlists to GNC, interview committee, policy review sub-committee.

Pros and cons for each option, as well as mitigations are provided below:
<table>
<thead>
<tr>
<th>OPTION</th>
<th>PRO</th>
<th>CON</th>
<th>Mitigation</th>
</tr>
</thead>
</table>
| Status Quo | • Current Committee has full compliment  
• No changes to bylaw/governance required | • Governance work is likely to continue to be delayed  
• There may be delay in filling positions  
• Full Committee attendance at meetings may be hard to achieve | • Schedule more frequent meetings  
• Schedule dedicated governance meetings |
| Create two separate committees | • Committee can better target for required skill set  
• Time commitment for members may be less  
• Allows for better focus of both priorities  
• Most other jurisdictions follow this model | • Less diversity (geographic, experience, cultural) among smaller committee membership  
• Smaller committee may lack contact for recruiting/vetting members  
• Will require restructuring of existing committee  
• Nominating committee may have less knowledge of committees and skills required  
• May require additional staff time or resources | • Consider appropriate balancing for diversity  
• Where necessary utilize contacts to ensuring nominees are recruited and vetted  
• Ensure continuity from existing GNC on both committees, as well as ensuring officers have continued role with both |
| One Committee with dedicated subcommittees that report back to Committee of the whole and/or make recommendations directly to Council | • Continue with current committee membership  
• Allows for members to participate in various areas of committee work  
• Subcommittees can be populated based on skills/experience  
• Committee of the whole can still make suggestions for targeted recruitment and add input into Council recommendations  
• Time commitments may be more appropriate and attract more people willing to serve | • May require extra meetings to assess subcommittee reports  
• Members may not feel fully responsible for work of subcommittee without full details  
• Full committee attendance at meetings may be hard to achieve  
• Subcommittees may effectively operate as distinct committee  
• There may be limited synergy between the subcommittees  
• Could be delays in needing approval at sub-committee and GNC | • Establish meeting schedule year in advance  
• Provide subcommittee reports in advance of full meetings  
• Provide members opportunity to identify interests/skills for subcommittees  
• Consider some consistent members between various subcommittees |
• Memberships in subcommittees could be fluid depending on work loads

Committee level before Council

Attachment: Jurisdictional Scan of Nominating and Governance Committees
MEMORANDUM TO COUNCIL

From: Trust Account Working Group

Date: August 23, 2019

Subject: Trust Accounts – Dual Authorization

For: Approval X

Introduction □
Information □

Recommendation/Motion:

It is recommended that the amendments to subregulations 10.6.3 and 10.6.3.1 regarding the requirement for a dual authorization on trust cheques be approved.

Executive Summary:

Dual authorization is generally considered to be an important control to prevent errors and fraud. The intention is that a second set of eyes on a cheque will help reduce any unintended errors or detect a fraudulent transaction. The current Regulations require that any withdrawal from trust be made by two persons, at least one of whom is a practising lawyer (reg. 10.3.5(b)). Lawyers and law firms are required to report any failures to comply with this regulatory requirement on their annual trust account report. The Society then has the opportunity to have a follow-up discussion with the designated lawyer regarding this exception.

A survey of the other Law Societies indicates that the only province that requires dual authorization for trust withdrawals is PEI. However, British Columbia requires dual authorization on Electronic Funds Transfers and sets out a very prescriptive process for such transactions in their Rules.

While larger firms have sophisticated processes for cheque requisitions and other accounting functions that include dual authorization for all trust withdrawals, sole practitioners and small firms tend to be much more pragmatic in their trust operations. Sole practitioners have long been exempted from the requirement to have an additional signatory for their trust withdrawals (reg. 10.3.6). However, issues have arisen regarding the definition of “sole practitioner”, and when space-sharing lawyers lose that status. As well, there have also been issues for lawyers who were working alone and then take on an associate. They lose their status as a sole practitioner and must add an additional signatory to their trust account. In some of these situations, the original lawyer does not want the associated lawyer to have access to or management of the trust account. The associated lawyer may not
want to assume any responsibility for the account’s operation either. The lawyer may then choose to add a spouse, who may have no other connection to the firm’s operation, as a signing officer on the account. There are no regulatory restrictions on who may be the second signatory. The alternative would be to add the (junior) associate or a staff person as the second signatory. It is difficult to imagine that any of these possible signatories are actually serving the risk management role that was intended. The spouse is unlikely to have the requisite information on which to assess the appropriateness of any transaction (and may be a beneficiary of any malfeasance) and the associated lawyer or staff person is relying on the lawyer for employment and may be less inclined to question any particular transaction. We have also been advised by representatives of several major financial institutions that their systems rarely identify dual signature cheques that have only one (or zero) signatures.

Finally, and unfortunately, we know from experience that lawyers and staff will misappropriate trust money regardless of the requirement for two signatures. The trust accounting rules are complied with by the vast majority of lawyers, but those who intend to commit theft will do so regardless of the regulatory requirements.

The second signatory on a trust account for purposes of withdrawals is a risk management tool, but without meaningful oversight, offers little in that regard. As a result, this Working Group is recommending that the requirement for a second signature for all withdrawals be deleted from the Regulations. It places an administrative burden on small firms that has no corresponding, identifiable benefit from a risk management perspective.

**Exhibits/Appendices:**

Appendix A – draft amendments to subregulations 10.6.3 and 10.6.3.1
## REGULATION AMENDMENTS

<table>
<thead>
<tr>
<th>Requirements for all Withdrawals</th>
<th>Proposed Regulation</th>
<th>Rationale</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>10.3.5</strong> Any withdrawal of funds from a trust account must (a) be made to a named payee; (b) be made by two persons, at least one of whom must be a practising lawyer who has received approval to operate a trust account pursuant to subregulation 4.10.4; (c) identify the trust account from which the funds are withdrawn and the date on which the funds are withdrawn; (d) not be released or effected until the practising lawyer or law firm is in possession of sufficient funds for the credit of the client on whose behalf the withdrawal is made; and (e) not be released or effected until the practising lawyer has sufficient knowledge of the withdrawal to ensure that the client’s interests are protected.</td>
<td><strong>10.3.5</strong> Any withdrawal of funds from a trust account must (a) be made to a named payee; (b) be made by two persons, at least one of whom must be a practising lawyer who has received approval to operate a trust account pursuant to subregulation 4.10.4; (c) identify the trust account from which the funds are withdrawn and the date on which the funds are withdrawn; (d) not be released or effected until the practising lawyer or law firm is in possession of sufficient funds for the credit of the client on whose behalf the withdrawal is made; and (e) not be released or effected until the practising lawyer has sufficient knowledge of the withdrawal to ensure that the client’s interests are protected.</td>
<td></td>
</tr>
<tr>
<td><strong>10.3.5.1</strong> Notwithstanding subregulation 10.3.5(b), all practicing lawyers who have signing authority on a trust account as of December 31, 2018 may continue as signatories even if they have not received approval pursuant to subregulation 4.10.4.</td>
<td><strong>10.3.5.1</strong> Notwithstanding subregulation 10.3.5(b), all practicing lawyers who have signing authority on a trust account as of December 31, 2018 may continue as signatories even if they have not received approval pursuant to subregulation 4.10.4.</td>
<td></td>
</tr>
<tr>
<td>Existing Regulation</td>
<td>Proposed Regulation</td>
<td>Rationale</td>
</tr>
<tr>
<td>---------------------</td>
<td>---------------------</td>
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</tr>
<tr>
<td><strong>One Signature Permitted for Sole Practitioner</strong> 10.3.6 If the practising lawyer is a sole practitioner, a withdrawal of funds from a trust account may be made by the lawyer only.</td>
<td><strong>One Signature Permitted for Sole Practitioner</strong> 10.3.6 If the practising lawyer is a sole practitioner, a withdrawal of funds from a trust account may be made by the lawyer only.</td>
<td></td>
</tr>
<tr>
<td><strong>Sole Practitioner</strong> 10.3.6.1 For the purposes of this Regulation, a sole practitioner does not include a lawyer who is (a) a partner or an employee of the lawyer or that lawyer’s law corporation; or (b) represented or held out to the public to be a partner or person associated in the practice of law with such lawyer or law corporation based on the extent to which the lawyers’ practices are integrated, physically and administratively, whether or not there is in fact a partnership or association.</td>
<td><strong>Sole Practitioner</strong> 10.3.6.1 For the purposes of this Regulation, a sole practitioner does not include a lawyer who is (a) a partner or an employee of the lawyer or that lawyer’s law corporation; or (b) represented or held out to the public to be a partner or person associated in the practice of law with such lawyer or law corporation based on the extent to which the lawyers’ practices are integrated, physically and administratively, whether or not there is in fact a partnership or association.</td>
<td></td>
</tr>
</tbody>
</table>
MEMORANDUM TO COUNCIL

From: Tilly Pillay QC
Date: August 16, 2019
Subject: Request from Distinguished Service Award Committee to approve amendments to the DSA Nomination Criteria and the DSA Policy and Procedure

As Council will recall, Aleta Cromwell QC, Chair of the Distinguished Service Award Committee, attended the Council meeting in July 2019 to present the committee’s recommendation for this year’s recipient of the Distinguished Service Award (Lee Cohen QC).

Aleta also advised that the committee wishes to make some amendments to the Nomination Criteria (which is part of the Nomination form) and to the Policy and Procedure that they follow in determining whom to recommend. The change that is proposed is to strike out the requirement that a potential recipient needs to have made contributions to the Society. The committee felt that significant contributions to the community and the legal profession, in general, is sufficient.

Attached to this memo are the revised DSA Nomination Criteria and revised DSA Policy and Procedure. The changes are marked in the versions provided.

The DSA Committee seeks Council’s approval to make these changes to these two documents.

Attachments
The Nova Scotia Barristers’ Society is pleased to request nominations for the Distinguished Service Award.

The Distinguished Service Award is presented to a member of the Barristers’ Society who has made significant contributions to the community and/or the profession and the Society. It is open to both practising lawyers and non-practising members (including retired and life members). In some circumstances, it may be granted posthumously.

Nominations for the award may be submitted by members of the Society and the public before May 31, 20XX.

The name of the recipient and the date of the function at which the award will be presented will be published in InForum and posted on the Society’s website.

The committee will choose a recipient based on the following criteria:

- **Integrity**
  The recipient is of unimpeachably good character, with a reputation for the highest professional integrity.

- **Professional Achievement**
  The recipient is amongst the leaders in the practice of law or the academic realm.

- **Service to the Profession**
  The recipient has made long-term, exceptional volunteer contributions to elevate the legal profession and the Society, through work with one or more of the following: the Society, the justice system, legal scholarship or otherwise.

- **Community Service**
  The recipient is an outstanding contributor to the community, through volunteer service and a commitment to making the world a better place.

- **Reform**
  The recipient has made an outstanding contribution to the betterment of the law or the improvement of the justice system.

- **Overall**
  The recipient espouses the highest ideals of the legal profession and is a person to whom all members can look for inspiration.
Administrative Policy and Procedure

<table>
<thead>
<tr>
<th>NAME OF POLICY</th>
<th>DISTINGUISHED SERVICE AWARD</th>
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</thead>
<tbody>
<tr>
<td>PURPOSE</td>
<td>To provide policy and procedures for nomination and awarding of the Award</td>
</tr>
<tr>
<td>Approved by</td>
<td>Effective June 2013</td>
</tr>
<tr>
<td></td>
<td>Reviewed July 2019</td>
</tr>
<tr>
<td></td>
<td>Revised July 2019</td>
</tr>
</tbody>
</table>

**Introduction**

The Distinguished Service Award is presented to a member of the Nova Scotia Barristers’ Society who has made significant contributions to the community, and the profession. It is open to both practising lawyers and non-practising members (including retired and life members of the Society).

In appropriate circumstances, the award may be granted posthumously to a former member.

**Considerations**

The Distinguished Service Award Committee (DSA Committee) in reviewing nominations will consider the following:

**Integrity**

The recipient is of unimpeachably good character, with a reputation for the highest professional integrity.

**Professional Achievement**

The recipient is or has been amongst the leaders in the practice of law or the academic realm.

**Service to the Profession**

The recipient has made long-term, exceptional volunteer contributions to elevate the legal profession and the Society, through work with one or more of the following: the Society, the justice system, legal scholarship or otherwise.

**Community Service**

The recipient is an outstanding contributor to the community, through volunteer service and a commitment to making the world a better place.
Reform

The recipient has made an outstanding contribution to the betterment of the law or the improvement of the justice system.

Overall

The recipient exemplifies the highest ideals of the legal profession and is a person to whom all members of the profession can look for inspiration.

The Distinguished Service Award Subcommittee

The DSA Committee is appointed by Council annually and operates in accordance with its approved Terms of Reference.

Procedure

In April of each year, the Society will provide a notice to the membership regarding the awarding of the Distinguished Service Award together with the purpose of the award and the considerations. The notice will be published in InForum. Specific notices will be directed to presidents of county bars. The Racial Equity and Gender Equity Committees will be advised of the call for nominations.

A public call for nominations will be made in April of each year.

The call for nominations will fix a date by which nominations close by May 31.

All nominations should be submitted on a nomination form, which is attached to this Policy and Procedure as Appendix A.

All nominations will be provided to the DSA Committee for its review.

The DSA Committee may ask a nominator for additional information to ensure the nomination is complete and speaks to all of the criteria.

The DSA Committee may choose not to review more than five letters received in a nomination package.

The DSA Committee will provide its recommendation to Council regarding the recipient of the Distinguished Service Award for that year.

Approved by the Distinguished Service Award Committee on March 26, 2019.
MEMORANDUM TO COUNCIL

From: Victoria Rees, Director of Professional Responsibility

Date: August 13, 2019

Subject: Federation of Law Societies’ National Discipline Standards – Implementation Report and Proposed Amendments

For: Approval X Introduction □ Information □

Recommendation/Motion:

That Council adopt the amended National Discipline Standards approved by Federation Council to take effect January 1, 2020.

Background

The National Discipline Standards were developed between 2012 – 2014 to promote best practices and aspirational high standards of performance in this essential area of professional regulation. Every jurisdiction in Canada, regardless of size, has adopted these Standards and agreed to strive to achieve them to the extent possible. The standards are regularly reviewed to ensure they are measureable, meaningful and relevant.

Since adoption of the original Standards, the Standing Committee on National Discipline Standards, on which I have served for over four years, has engaged in continuous monitoring and review of jurisdictional implementation and experiences with the Standards. This is accomplished by:

- Annual implementation reports filed by each jurisdiction, resulting in a comparative national report tracking progress [see attached]
- Liaison between provincial discipline leaders and the Standing Committee
- Engagement at annual national discipline conferences
- Development of a Peer Review pilot project (explained below)
- A commitment to communicate national annual results to Benchers and Council members to ensure transparency and accountability
As a result of this ongoing monitoring and analysis of experiential data, the Standing Committee regularly proposes amendments to respond to concerns or challenges expressed by jurisdictions, or to raise the bar further once a Standard has been fully achieved.

**Assessment**

The Federation Council has approved the following amendment to the Standards, which is reflected in the attached *National Discipline Standards Implementation Guide June 2019*:

**Standard 2** – **95% of written complaints are acknowledged within three business days.**

Rationale: The current standard is 100%, which most jurisdictions have found to be unattainable for various reasons.

**NSBS Achievement of Standards**

The NSBS Professional Responsibility Department has consistently achieved the highest level of attainment of these Standards since their inception [refer to the *2018 Implementation Report*, attached]. The only recent problems we have experienced have been at the lowest end of the spectrum: Standards 1 and 2 relating to timeliness in responding to complaint intake calls and acknowledging receipt of written complaints. In both these areas, we have experienced delays of 1 – 3 days due to staff illness and absences, and/or volume of calls and complaints. This is not unusual for smaller Law Societies with limited resources.

We have addressed these areas in the following way:

i. Changes have been made to the intake call process to limit time spent with repeat callers, or those we cannot assist;

ii. Advanced staff training has been provided on managing difficult callers;

iii. Cross-training has allowed for calls to be returned by more than just intake staff, and for complaints to be acknowledged by others.

**Attachments:**

*National Discipline Standards Implementation Guide* – revised June 2019

Standing Committee on National Discipline Standards *2018 Implementation Report*
National Discipline Standards

Implementation Guide

This guide is intended to be a tool for law societies in implementing the National Discipline Standards that were first approved by Council of the Federation in April, 2014, and revised in 2016, 2018 and 2019.

The standards were developed by the Discipline Standards Project Steering Committee. Between April 2012 and April, 2014, the standards were tested through a two-year pilot project to ensure that they were measurable, meaningful and worthwhile. The pilot phase resulted in a number of changes to the standards. By gathering compliance data, but also by gathering commentary and analysis from those charged with implementing the standards, we have developed a set of meaningful standards that can be used to measure law society performance in the discipline area.

The National Discipline Standards are intended to promote best practices and high standards of performance that are aspirational. Every participating jurisdiction has agreed to strive to achieve these standards and because of that, it is expected that transparency, timeliness, accessibility and quality will continuously improve. It is recognized that not all law societies will be able to meet all of the standards at this time. A Standing Committee on National Discipline Standards (the “Standing Committee”) is charged with monitoring implementation of and compliance with the standards. It will also identify refinements to the standards that may prove necessary as law societies gain additional experience with them.

Revised June 2019
PREAMBLE

The National Discipline Standards are intended to promote best practices and high standards of performance that are aspirational. Every participating jurisdiction has agreed to strive to achieve these standards and because of that, it is expected that transparency, timeliness, accessibility and quality will continuously improve.

It is recognized that meeting the standards is not always within law societies’ direct control. For instance, timeliness relating to scheduling of a hearing (Standard 9) and providing written reasons following a hearing (Standard 10) involve other parties who may not adhere to the time lines, including counsel for the lawyer or Québec notary, witnesses and the hearing panel members. In Québec, hearings are before the Office des professions du Québec and are subject to its rules, creating an additional challenge for the Barreau du Québec and the Chambre des notaires du Québec in meeting the standards. In addition, law societies should be mindful of the need to balance achieving the standard with avoiding suggestions that they have denied or attempted to deny procedural fairness to a respondent.

In small jurisdictions where there may be few hearings in a given year, a delay in one file can significantly skew the statistics (e.g. for Standard 8 on the time between authorization and issuance of the citation or notice of hearing). Consequently, the percentages reported may be less meaningful for smaller jurisdictions than for larger ones.

In spite of these limitations the early experience has been positive and national performance in attempting to meet these standards continues to improve.

GLOSSARY OF TERMS

Reporting Period
This is the period from January 1 to December 31 of the year in question. For example, for Standard 4A, you will capture only files for which the investigation phase was concluded in the reporting year; you will measure the time from when the complaint was received until the time the investigative phase is concluded. If a complaint was received in October 2014 and the investigation phase was concluded in March, 2016, this file was concluded in the reporting period and took 18 months to resolve/refer. Therefore, it is counted in the report on part two of the standard: 90% of all complaints are resolved or referred for a disciplinary or remedial response within 18 months.

Complaint
The term complaint refers to any written correspondence, or inquiry raising potential allegations about a lawyer or Québec notary’s competence or conduct. It is intended to capture only matters relevant to discipline. Matters that are not related to discipline need not be tracked. Such matters include, but are not limited to requests for legal advice and lawyer referral requests.

Discipline
The term discipline refers to professional regulation and conduct, and regulatory processes and procedures involved in complaints, investigation and discipline generally.
THE NATIONAL DISCIPLINE STANDARDS

Timeliness

1. Telephone inquiries:
   75% of telephone inquiries are acknowledged within one business day and 100% within two business days.
   
   **Commentary:**
   This standard measures how quickly we respond to first contact discipline inquiries. This is not intended to record how quickly we return general phone calls or subsequent calls from the same complainant.

   This standard requires you to record when a message is received from a complainant and when you first attempted to return that call, even if you are not successful in reaching the person at that time. You will need to record those times and calculate how long each call took to return.

   Include only telephone enquiries that relate to complaints and discipline, as defined in the glossary. In other words, do not track and record enquiries that are not relevant to the discipline process (e.g. lawyer referral requests or matters for which the law society does not have jurisdiction, such as complaints about a judge).

   The standard does not allow for flexibility during busy times or when people are away for illness or vacation, which may make it difficult to meet for some law societies.

2. Written Complaints:
   100% of written complaints are acknowledged in writing within three business days.
   
   *(Note: this requirement will be set at 95% effective January 1, 2020. The law society report for 2019 should be based on the current 100% requirement.)*
   
   **Commentary:**
   This standard does not require that the complaint be resolved, just acknowledged. Record when you receive a written complaint and when you send out a written acknowledgement. Calculate how many business days that took and record that.

3. Early Resolution:
   There is a system in place for early resolution of appropriate complaints.
   
   **Commentary:**
   The goal of this standard is to allow law societies to deal promptly and effectively with complaints that can be resolved without a full, formal investigation.

   Examples of complaints include matters such as failing to respond to client contacts in a timely manner, poor communication, rude behavior, and failing to move a matter along expeditiously (e.g. quality of service), among others.

   Early resolution processes might include formal and informal steps taken to resolve a complaint before an investigation is commenced. It is understood that this standard may be challenging for the north, where early resolution practices do not presently exist.
Timeliness

4A. Timeline to resolve or refer complaint:

80% of all complaints are resolved or referred for a disciplinary or remedial response within 12 months.

90% of all complaints are resolved or referred for a disciplinary or remedial response within 18 months.

Commentary:
Standard 4A is intended to measure the time it takes until an investigation is concluded, with a goal to have 90% concluded within less than a year and a half. The report should capture only investigations concluded during the reporting period.

Measure the time from when the complaint is received until the time the investigative phase is concluded. The complaint is deemed to be received when it is first communicated to the law society, regardless of when it is deemed to be an official ‘complaint file’. Any informal processes that precede the investigation are included.

We all have different processes but whether the investigation ends with closure at the staff level, referral for charging, a remedial response or dismissal, the measurement period ends with the conclusion of the investigative phase, subject to standards 4B and 4C.

4B. Where a complaint is resolved and the complainant initiates an internal review or internal appeal process:

80% of all internal reviews or internal appeals are decided within 90 days.

90% of all internal reviews or internal appeals are decided within 120 days.

Commentary:
Standard 4B addresses situations in which the complainant initiates an internal review or internal appeal of a decision. A new time period commences for this step.

An internal review or internal appeal process contemplates a review or appeal by a law society committee, individual or panel; it does not include a court process (e.g. judicial review).

4C. Where a complaint has been referred back to the investigation stage from an internal review or internal appeal process:

80% of those matters are resolved or referred for a disciplinary or remedial response within a further 12 months.

90% of those matters are resolved or referred for a disciplinary or remedial response within a further 18 months.

Commentary:
Standard 4C addresses situations in which the matter has been referred back to the investigation stage. A new time period commences for this step.

An internal review or internal appeal process contemplates a review or appeal by a law society committee, individual or panel; it does not include a court process (e.g. judicial review).
5. Contact with complainant:
   For 90% of open complaints there is contact with the complainant at least once every 90 days during the investigation stage.

Commentary:
For complaints that originate from a judge, the media, an audit process, etc., law societies should use their discretion as to whether to have contact with the person or body issuing the complaint in accordance with this standard.
See also Commentary under Standard 6 below.

6. Contact with lawyer or Québec notary:
   For 90% of open complaints there is contact with the lawyer or Québec notary at least once every 90 days during the investigation stage.

Commentary:
Standards 5 and 6 may require some law societies to institute a new procedure, sending status reports regularly to the complainant and the lawyer or Québec notary. There is no standard for what the content of that contact needs to be as the main purpose of this standard is to measure how well we keep in touch.
You will need to keep a record on the file (a copy of the letters for example), to assess if the standard has been met and to record performance as against this standard on each file.
Please note that the standard only applies once the lawyer or Québec notary has been notified of the complaint. Contact should be every 90 days after that.
Contact can be by any reasonable means you choose: email, regular mail, phone etc.
This standard applies to all files that are being investigated (i.e. open files) during the reporting period.

7. Interim Measures:
There is authority and a process for the law society to obtain an interlocutory or interim suspension, restrictions or conditions on a member’s practice of law, as the public interest may require.

Commentary:
For the purposes of this Standard, the words 'interlocutory' and 'interim' have similar meanings, and refer to a proceeding, which takes place prior to final adjudication of a matter or complaint, for purposes of suspending or placing restrictions or conditions on a member’s practice of law.
‘Practice restrictions' and 'practice conditions' have similar meaning and are intended for the purpose of this Standard to refer to any limitation placed on a member’s practice of law as a result of an interlocutory or interim decision, including such restrictions or conditions as a prohibition on practicing in one or more areas of law, practicing on one’s own, operating a trust account, requiring a practice supervisor, or requiring that certain steps be taken or education completed prior to returning to practice. (continued)
This standard speaks to the need for every law society to have authority to take timely steps to protect the public in situations of urgency and risk presented by a member’s continued practice of law. Such proceedings are “interlocutory” or “interim” because the risk to the public has arisen before the end of a final adjudicative process. Where there is evidence of risk that creates an urgent need to protect the public, and no lesser measures will protect the public, an interim process should be available.

There are various factors to consider when assessing whether the applicable thresholds have been met for an interim proceeding, and for suspension, restrictions or conditions, including:

- notice to the member;
- whether the proceedings can proceed ex parte;
- what disclosure will or may be provided and when;
- the means by which decisions will be communicated by the decision-maker(s) (preferably allowing for both oral and/or timely written reasons);
- publication of the decision.

These factors should serve as a guide and in each jurisdiction, should be influenced by the common law and any applicable legislation.

It is recommended that in the public interest, there be provisions for publication or posting, as the case may be, of any decisions to suspend, restrict or set conditions on a member’s practice of law.

**Hearings:**

8. **75% of citations or notices of hearings are issued and served upon the lawyer or Québec notary within 60 days of authorization.**

95% of citations or notices of hearings are issued and served upon the lawyer or Québec notary within 90 days of authorization.

**Commentary:**

Each law society has a slightly different method of authorizing charges, but in all cases the timeframe begins to run when the decision is made to charge the lawyer or Québec notary, and ends when the lawyer or Québec notary is served with the initiating document (a citation or notice of hearing).

9. **75% of all hearings commence within 9 months of authorization.**

90% of all hearings commence within 12 months of authorization.

**Commentary:**

A hearing commences when the adjudicative body first convenes to hear evidence or preliminary motions. Preliminary appearances do not constitute commencement of the hearing unless they are for the purpose of hearing preliminary motions. A good rule of thumb is whether the appearance is before the panel that will hear the substantial matter.

The goal of this standard is to provide access to timely justice, avoiding delays in the formal process and balancing this with the need to be thorough and protect the public.
10. **Reasons for 90% of all decisions are rendered within 90 days from the last date the panel receives submissions.**

**Commentary:**
This is a standard that will require some delicacy to achieve. We generally stay away from trying to influence any part of the decision-making process. The hope is that by establishing this standard and making it known to adjudicators as part of their orientation and training, we will encourage them to strive to meet it.

The ninety (90) day standard is for receipt of the reasons for the decision (if written reasons are to follow an oral decision). Count all cases including those where reasons are delivered orally (those should be easy to report), and decisions in relation to both hearings on the merits and sentencing hearings.

**Public Participation**

11. **There is public participation at every stage of discipline, e.g. on all hearing panels of three or more, at least one public representative; on the charging committee, at least one public representative.**

**Commentary:**
This standard will be challenging for some jurisdictions with a limited number of public representatives to call upon. In jurisdictions where charging decisions are made by one individual and not by committee, the standard does not apply to that part of the process.

This commentary is intended to confirm that the process currently used by the Barreau du Québec and other law societies in which lawyers appointed externally are used to review these kinds of complaints, would meet the standard. The use of lay benchers for this process would also meet the standard.

12. **There is a complaints review process in which there is public participation for complaints that are disposed of without going to a charging committee.**

**Commentary:**
Public participation can include a lawyer or Québec notary if appointed by an outside body, or a public representative.

**Transparency**

13. **Hearings are open to the public.**

**Commentary:**
You will not be in breach of this standard if a hearing is closed periodically on the application of one of the parties (see standard 14).
14. Reasons are provided for any decision to close hearings.

**Commentary:**
The reasons do not need to be in writing (they can be delivered orally).

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

16. Notices of hearing dates are published at least 60 days prior to the hearing, or such shorter time as the pre-hearing process allows.

**Commentary:**
The rationale for this standard is to ensure that the public (and the media) can easily find out about upcoming hearings and attend them if they wish.

It is understood that currently not everyone can meet this standard. There is no standard for the form of publication, but the advertising of hearings is not required. Notices on your website will meet the standard; however simply responding to inquiries about upcoming hearings will not.

17. A law society can share information about a lawyer or Québec notary, either upon request or at its own initiative, with any other law society, or can require a lawyer or Québec notary to disclose such information to all law societies to which they are a member. All information must be shared in a manner that protects solicitor-client privilege.

**Commentary:**
The purpose of this revised standard is to ensure that law societies have the authority and/or discretion to share information with one another about a lawyer or Québec notary when the law society considers it appropriate in the public interest to do so. The standard provides two options for compliance: law societies can share this information either in response to a request from another law society or on their own initiative; alternatively, law societies may require the lawyer or Québec notary in question to disclose information to all other law societies to which they are a member. The standard requires that all information be shared in a manner that protects solicitor-client privilege.

The language of this standard is intentionally worded broadly to give law societies the discretion to determine the circumstances under which sharing is necessary, and to allow for a range of information to be shared.

This standard does not require you to monitor or provide data on actual reporting to other law societies. It simply requires the ability to share information, or as an alternative, the ability to require the lawyer or Québec notary to do so.

The Standing Committee on National Discipline Standards has developed and distributed a model rule to assist law societies in implementing this standard.
18. There is an ability to report to police about criminal activity in a manner that protects solicitor/client privilege.

Commentary:
This standard does not measure whether you actually report to police but whether you have the ability to do it and also, if you can do it in a way that protects privilege. It does not require that the reporting be mandatory.

It is within your discretion to determine the time frame for reporting.

Protection of the public interest is paramount to the decision to report to police. In making that decision, you may wish to consider the following factors:

- The seriousness of the allegations;
- Any risk to the public;
- When the events occurred;
- Whether there is someone else who can report the matter;
- Whether a report will impede ongoing professional responsibility proceedings;
- Whether information in your possession is confidential or subject to solicitor/client privilege, and if so, how that confidentiality and privilege can be appropriately addressed.

This is not a determinative list. Law societies should weigh the above factors amongst any others that are particular to their jurisdictional context or the specific situation that has led to consideration of reporting.

Accessibility

19. A complaint help form is available to complainants.

Commentary:
This requires that you have available some tool to assist complainants in making their complaints. There is no specific format for this form and it can be on-line or on paper.

This standard does not test the use of the form, only if a form is available.

20. There is a directory available with status information on each lawyer or Québec notary, including easily accessible information on discipline history.

Commentary:
Discipline history means any finding by the ultimate decision making body, after an adjudicative process or by consent, that a lawyer has committed conduct deserving of sanction. It includes decisions on conditions and restrictions on a lawyer’s practice and/or any other matters that were arrived at through a public process.

This standard is intended to permit the public to determine easily if a lawyer or Québec notary has a discipline history. The commentary defines what that means. We are not talking about charges or matters that are dealt with informally.

The directory need not be online but there does need to be a directory that contains this information. Merely responding to individual inquiries will not satisfy this standard.
Qualification of Adjudicators and Volunteers

21. There is ongoing mandatory training for all adjudicators, with refresher training no less often than once a year, and the curriculum for mandatory training will comply with the national curriculum.

Commentary:
Each law society must conduct training of its adjudicators with refresher training at least once per year. It is expected that refresher training will vary according to the training needs of adjudicators in each jurisdiction. Law societies should assess what topics would be appropriate for inclusion in the refresher training, and the length and format of the training, taking into consideration any gaps in training, new developments that warrant review, etc. For example, a smaller law society might rotate training on the core competencies in the National Adjudicator Training Curriculum on a three year cycle, and the annual refresher training could include core competencies that have not been addressed for one or two years. The annual refresher training might also include issues of importance to the jurisdiction, for instance indigenous cultural competence or new developments in the law or in the society’s practices and procedures.

22. There is mandatory orientation for all volunteers involved in conducting investigations or in the charging process to ensure that they are equipped with the knowledge and skills to do the job.

Commentary:
This standard applies to jurisdictions that use volunteers (benchers and others) to conduct investigations and/or on charging bodies. All such volunteers must receive an orientation. While the content is not specified, it should be sufficient to ensure they have the knowledge and skills to do the job. We will not be asking you to report on whether the orientation does that, only on whether it exists for all volunteers involved in those processes.

This Standard is intended for those who are not employed by a law society; it is presumed that law society staff is appropriately trained.

Reporting on Standards

23. Each law society will report annually to its governing body on the status of the standards
Standing Committee on
National Discipline Standards

2018 IMPLEMENTATION REPORT

July 2019
Introduction

1. The National Discipline Standards are aspirational in nature. They are designed to promote uniformly high benchmarks for complaint and discipline processes for members of the legal profession. It was recognized from the outset of the project that not all law societies would be able to achieve all of the standards and there are various reasons for their inability to do so. For example, legislation may prohibit standards from being met or the law society's discipline scheme may render certain standards inapplicable. Also, fluctuating staff resources and volume of matters may have an impact on the ability to meet certain standards. Law societies chose to set challenging standards with the goal that they would promote a culture of performance improvement, including recognition and adoption of best practices.

2. The Standing Committee on National Discipline Standards (the "Standing Committee") monitors the implementation of the standards and recommends amendments as required.

3. Law societies are asked to provide annual status reports to the Standing Committee for the purpose of monitoring progress on meeting the standards and to ascertain whether the standards are reasonable and achievable in practice. The annual status reports help to identify challenges in meeting the standards and where changes are required.

Purpose of the Implementation Report

4. This Implementation Report is prepared for internal law society use and distribution only. It is the third report prepared by the Standing Committee since the standards were implemented in 2015. It provides a high-level analysis of law society performance against the standards in 2018, including notable changes from 2017 (and previous years where appropriate). Where it is not possible to draw trends or issues, this report flags observations about law society performance or responses that may be of interest to the law societies.

Background

5. The National Discipline Standards project grew out of a recognition and desire to strengthen and harmonize the ways in which complaint and discipline processes are dealt with across the country. The project was launched in 2010.

6. Twenty three standards were pilot tested between 2012 and 2014. The pilot phase resulted in refinements to the standards. In April, 2014, the Federation Council approved 21 standards relating to timeliness, public participation, transparency, accessibility, and the qualification and training of adjudicators and investigators. The standards were officially implemented across all law societies on January 1, 2015.

7. In June 2016, Council approved revisions to Standards 3 and 9. The standards are here.

8. In June 2018, Council approved further revisions including the addition of two new standards – on early resolution and interim measures – and revisions to Standards 16 and 20, resulting in the reordering of the Standards, which now number 23. The revised National Discipline Standards took effect on January 1, 2019 and can be found here. These changes are not included in this report since the analysis is based on reporting from the 2018 calendar year.
How to Read the Implementation Report

9. This report should be understood in the context of the aspirational nature of the standards and the obstacles to meeting the standards, many of which are outside law societies’ control.

10. A review of the data must also take into account the relatively small sample size (i.e., 14 jurisdictions) and the reality that a number of the standards are either inapplicable to, or elicit few matters, for the smaller jurisdictions. As such, any small change, for example one outlier case, can skew the data significantly. Also, law societies were often very close to meeting a standard but because the threshold was not met (e.g., 98% of complaints were acknowledged within 3 days but not 100% for Standard 2), the standard was recorded as ‘not met’. The fact that a standard was almost met is not captured in the data analysis. For these reasons law societies should be cautious not to draw too many conclusions from this data without a deeper analysis of why changes have occurred.

Law Society Annual Status Reports

11. Law societies are provided with an annual report template early in the calendar year that requests data from January to December of the previous year. It seeks information about whether law societies met the standards or if the standards were applicable, and information about why a standard was not met.

12. For the 2018 reporting, the template was revised to include a column that seeks information about what actions law societies are taking or have planned in response to any standards reported as “unmet”. This was done so the committee could get a better sense of law societies’ progress in working towards meeting the standards.

13. All fourteen law societies submitted their annual report for 2018.

Analysis Methodology

14. This report sought law society responses on the 21 standards in effect in 2018. The analysis identifies which standards were met or not met and why. Appendix A provides the overall number of standards met by each law society in each year and the corresponding percentage calculation. This information is captured in the second row entitled “overview of performance”.

15. Appendix A also provides a comparative snapshot of overall performance by standard. This information is captured in the last column entitled “standard totals”. The chart makes it easy to compare performance on the standards at a glance from year to year and across law societies1. A check mark indicates that the standard was met; an “x” indicates that it was not. For standards with two components, a check mark and an “x” indicate that only one part of the standard was met.

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1 However, please note that due to amendments approved by Federation Council in June 2018, it may not be possible to do a year to year comparison for some standards next year.
16. In addition, not all law societies report on all the standards each year. In some cases, a standard is not applicable, which is represented in the chart as "N/A". For example, if a law society had no hearings in the year in question, all of the standards that deal with hearings will be marked "not applicable". In 2018 ten law societies reported one or more standards as not applicable, which is the same as in 2017 but an increase from seven in 2016. When a standard is marked as not applicable, it is removed from the performance calculations to avoid skewing the results.

General Findings

17. This section provides an overview of law society performance globally from 2016 to 2018. Information is also provided on trends in meeting the standards and variances in performance from year to year. This more detailed information may be of greatest interest to those individuals working directly with the standards. Reporting from 2015 has not been included in this analysis as several changes have been made to the standards since that time.

18. In 2018, law societies met on average 78% of all standards. This represents an increase from 2017 (76%) but a decrease since 2016 (79%). It is worth noting however, that only 13 law societies reported in 2016, which may account for the difference.

19. Since implementation of the standards in 2015, no law society has met all of the standards in their entirety.

20. As with past years, there were fluctuations in law societies’ progress in meeting the standards between 2017 and 2018. Law societies showed improvement in meeting seven standards (3(b), 4, 6, 7, 11, 16, and 17), a decrease in meeting six standards (1, 3(c), 5, 8, 20, and 21) and no change in meeting the remaining ten standards. Of the seven standards where improvements were made, the most significant change was to standard 15 (i.e. an increase of 39%) where only one law society reported being unable to meet it in 2018 (up from 7 in 2017). This may be attributed in part to the new model rule developed by the Standing Committee in 2018. Generally speaking, the decreases in meeting standards were minor and in many cases were due to administrative or process changes, or things outside of a law society’s control.

Standards Met by Most Law Societies

21. Standard 18 (accessible complaint help form) is the only standard that has been met by all fourteen law societies since 2016.

22. In addition, since 2016 the following standards have been consistently met by all law societies that deemed them applicable: Standard 12 (hearings open to public), Standard 13 (reasons for decision to close hearing), Standard 14 (publication of notice of charge or citation), and Standard 15 (publication of notice of hearing dates).

23. As has been reported in prior years, the following standards have been met by all but one or two law societies (where they were deemed applicable): Standard 1 (telephone inquiries), Standard 9 (annual reporting to governing body), and Standard 11 (complaints review process). Standards 16 (ability to share information) and 17 (ability to report to police) fell in this category for the 2018 reporting year as there was an increase in the number of law societies that were able to meet them, as mentioned above. It is anticipated that Standard 2 will fall into
this category for the 2020 reporting year as a result of the Council-approved change to the
standard in June 2019.

Most Challenging Standards

24. The most challenging standard for law societies to meet in 2018 was Standard 8 (time
line for reasons for decisions). Only five out of eleven law societies were able to meet the
standard (45%) which is a change from six out of 10 (60%) law societies in 2017. The reasons
for not being able to meet the standard varied (e.g. reduction in size of review board, changes in
reporting process, lack of control over review panel). Of the five law societies that failed to meet
the standard, two missed the mark by 5% or less (i.e. one case fell outside of the window).
These responses seem to suggest that law societies are not experiencing significant challenges
with meeting Standard 8 generally speaking, but rather their shortfall was attributable to process
changes or factors lying out of their control. Moreover many have already put their minds to
what they will do to remedy these challenges for next year.

25. The second most challenging standard to meet was Standard 7 (time line for
commencement of hearings). This standard was the most challenging to meet in 2017. In both
the 2017 and 2018 reporting years only five of twelve law societies were able to meet both parts
of the standard. Including those law societies that partially met the standard, the overall
performance increased slightly from 50% to 54% in 2018. The reasons provided for not meeting
the standard are largely due to delays caused by the parties, but one law society also cited
resource challenges. It may be worth exploring these challenges further and discussing whether
there are tools that could be developed to assist these law societies.

Notable Trends / Observations

26. There were a few cases in which a law society set its own standard (or target) that
differs from the National Disciplinary Standard. Nova Scotia reported meeting part one of
Standard 1 (75% of telephone inquiries are acknowledged within one business day) in 2017 and
2016 but in 2018 they reported this standard as unmet because their standard is two business
days. This is a new development due to an increase in the incidence of calls from high conflict
personalities. Nova Scotia has indicated that, as a result, they are aiming to return calls within
three days, and have amended their process to permit the return of calls via email to reduce the
amount of time dedicated to repeat callers.

27. Similarly, Ontario has repeatedly reported for Standards 4 (for 90% of open complaints
there is contact with complainant at least once every 90 days) and 5 (for 90% of open
complaints there is contact with lawyer or notary at least once every 90 days) that their target for
making contact is once every 120 to 150 days.

28. Between 2016 and 2018 there appeared to be some confusion with reporting on
Standard 19 (law society directory for information on discipline history) whereby some members
reported this standard as "unmet" when other law societies in the same situation reported the
standard as "met". The work of the database subcommittee, once finalized, should help to clarify
the criteria for when this standard is met and not met for future reporting.

29. Reporting on Standard 20 (mandatory adjudicator training) highlighted that three of the six
law societies that did not meet the standard are looking into purchasing the Law Society of
Alberta’s adjudicator training curriculum. The Alberta curriculum has been designed to meet the
National Adjudicator Training Curriculum, enabling law societies to meet Standard 20. This is a great example of how law societies can assist one another in meeting the standards, and benefit from each other’s work or experience.

30. The new reporting column in the 2018 template labeled “actions taken or planned” was a helpful tool for the purposes of this analysis. Generally it highlighted that where challenges remain, law societies are committed to identifying or implementing solutions to be able to meet the standards. It also provided more context around what the challenges are, which may be useful to the Standing Committee when reviewing the standards. Here are some examples of law society responses in this column broken down by theme:

- No action is required (i.e. exceptional circumstance or unusual case).
- Law society is changing its processes, adding or improving training, hiring more staff, etc.
- Law society is continually working towards the goal, making changes that improve efficiency or optimize resources, or looking for ways to improve.
- Law society has planned to conduct a review, assessment, system upgrade, etc.
- The challenge is outside of the law society’s control or due to insufficient resources.
- Law society needs a legislative amendment to meet the standard.
- Law society is looking to borrow other law society’s work.

31. Overall, the law societies’ progress in meeting the standards between 2017 and 2018 has remained consistent, which suggests that the National Discipline Standards project has hit a period of stability. While there may be fluctuations from year-to-year in a law society’s ability to meet the standards, the existence of the standards has generally resulted in law society process and performance enhancements. As the National Discipline Standards project evolves, the Standing Committee has recognized there is merit in identifying tools, model rules, best practices or other resources to better support law societies in meeting the standards that continue to present challenges.
### Appendix A - National Discipline Standards Implementation Report 2016-2018

This summary highlights the law societies' progress in meeting the discipline standards in the last three years of implementation. It is based on the data contained in law societies' 2016, 2017 and 2018 annual reports.

#### Overview of Performance by Law Societies

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<th>LSBC</th>
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<th>LSS</th>
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<td>98%</td>
<td>83%</td>
<td>79%</td>
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**Average:** 78%
**Average:** 75%
**Average:** 73%

#### Standard 1

**Telephone inquiries**

<table>
<thead>
<tr>
<th>Year</th>
<th>2018</th>
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<tbody>
<tr>
<td></td>
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**Standard 2**

**Written complaints**

<table>
<thead>
<tr>
<th>Year</th>
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<th>2017</th>
<th>2016</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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**Standard 3**

**Timeline to resolve or refer complaint (amended starting 2017)**

<table>
<thead>
<tr>
<th>Year</th>
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</tr>
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<tr>
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</tr>
<tr>
<td></td>
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</table>

**Standard 3 a)**

**Complaint resolved or referred for a disciplinary or remedial response**

<table>
<thead>
<tr>
<th>Year</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>X/V</td>
<td>√</td>
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</table>

**Standard 3 b)**

**Complaint initiates an internal review or appeal**

<table>
<thead>
<tr>
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<th>2017</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>X</td>
<td>X/V</td>
</tr>
</tbody>
</table>

Legend: √ = Standard Met, X = Standard Not Met, N/A = Standard Not Applicable (e.g. no hearings held in year)
Appendix A - National Discipline Standards Implementation Report 2016-2018

This summary highlights the law societies' progress in meeting the discipline standards in the last three years of implementation. It is based on the data contained in law societies' 2016, 2017 and 2018 annual reports.

| Standard 3 c) | 2018 | ✓ | ✓ | N/A | ✓/✓ | ✓ | N/A | N/A | ✓ | N/A | N/A | N/A | N/A | 6.5/7 | 93% |
| Complaint referred back to investigation from an internal review or appeal | 2017 | N/A | ✓ | N/A | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 7/7 | (100%) |
| | 2016 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | | |

| Standard 4 | 2018 | ✓ | ✓ | X | X | X | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | X | 9/14 | 64% |
| Contact with complainant | 2017 | ✓ | ✓ | ✓ | X | X | X | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 8/14 | (57%) |
| | 2016 | ✓ | ✓ | ✓ | X | X | X | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 11/13 | (85%) |

| Standard 5 | 2018 | ✓ | ✓ | X | X | X | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 8/14 | 57% |
| Contact with lawyer or Québec notary | 2017 | ✓ | ✓ | ✓ | X | X | X | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 8/13 | (62%) |
| | 2016 | ✓ | ✓ | ✓ | X | X | X | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 9/12 | (75%) |

| Standard 6 | 2018 | ✓ | ✓ | ✓/✓ | X | ✓/✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 6.5/10 | 65% |
| Issuance of citations or notices of hearings | 2017 | ✓ | ✓ | ✓/✓ | X | ✓/✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 7/12 | (58%) |
| | 2016 | ✓ | ✓ | ✓/✓ | X | ✓/✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 8/12 | (67%) |

| Standard 7 | 2018 | X | X | ✓ | X | ✓/✓ | ✓ | ✓ | ✓ | X | ✓ | ✓ | ✓ | 6.5/12 | 54% |
| Commencement of hearings | 2017 | X/✓ | X | ✓ | X | ✓/✓ | ✓ | ✓ | ✓ | X | ✓ | ✓ | ✓ | 6/12 | (50%) |
| | 2016 | ✓ | ✓ | ✓ | X | ✓ | ✓ | X | ✓ | ✓ | ✓ | ✓ | ✓ | 7.5/11 | (68%) |

| Standard 8 | 2018 | X | X | X | ✓ | X | ✓ | ✓ | ✓ | N/A | ✓ | ✓ | ✓ | 5/11 | 45% |
| Reasons for decisions | 2017 | X | ✓ | X | ✓ | X | ✓ | ✓ | ✓ | N/A | ✓ | ✓ | ✓ | 6/10 | (60%) |
| | 2016 | X | X | ✓ | X | X | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 7/12 | (58%) |

Legend: ✓ = Standard Met - X = Standard Not Met - N/A = Standard Not Applicable (e.g. no hearings held in year)
## Appendix A - National Discipline Standards Implementation Report 2016-2018

This summary highlights the law societies' progress in meeting the discipline standards in the last three years of implementation. It is based on the data contained in law societies' 2016, 2017 and 2018 annual reports.

<table>
<thead>
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</tr>
</tbody>
</table>

| Standard 11 | 2018 | ✓ | ✓ | X | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | X |
| Complaints review process | 2017 | ✓ | ✓ | X | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | N/A | N/A |
| 2016 | ✓ | ✓ | X | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | N/A | N/A |

| Standard 12 | 2018 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | N/A | ✓ | ✓ |
| Hearings open to public | 2017 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | N/A | ✓ | ✓ |
| 2016 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | N/A | ✓ | ✓ |

| Standard 13 | 2018 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | N/A | N/A | N/A |
| Reasons for decision to close hearings | 2017 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | N/A | N/A | N/A |
| 2016 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | N/A | N/A | N/A |

| Standard 14 | 2018 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | N/A | N/A |
| Publication of notices of charge or citation | 2017 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | N/A | N/A |
| 2016 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | N/A | N/A |

### Totals

| 13/14 | 93% |
| 13/13 | (93%) |

| 10/14 | 71% |
| 8.5/12 | (71%) |
| 9/13 | (66%) |

| 10.5/12.5 | 84% |
| 10/12 | (83%) |
| 10/12 | (83%) |

| 13/13 | 100% |
| 13/13 | (100%) |
| 12/12 | (100%) |

| 10/10 | 100% |
| 11/11 | (100%) |
| 10/10 | (100%) |

| 12/12 | 100% |
| 12/12 | (100%) |
| 12/12 | (100%) |

**Legend:** ✓ = Standard Met - X = Standard Not Met - N/A = Standard Not Applicable (e.g. no hearings held in year)
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| Standard 15 | 2018 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | N/A | ✓ | ✓ | ✓ | N/A | 12/12 (100%) |
| Publication of notices of hearing dates | 2017 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | N/A | ✓ | ✓ | 12/12 (100%) |
| 2016 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | N/A | ✓ | ✓ | 12/12 (100%) |

| Standard 16 | 2018 | ✓ | X | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 13/14 (93%) |
| Ability to share information with other law societies | 2017 | X | X | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 7/13 (54%) |
| 2016 | X | X | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 6/13 (46%) |

| Standard 17 | 2018 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 12/14 (86%) |
| Disclosure to police about criminal activity | 2017 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 13/13 (100%) |
| 2016 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 13/13 (100%) |

| Standard 18 | 2018 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 14/14 (100%) |
| Accessible complaint help form | 2017 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 14/14 (100%) |
| 2016 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 13/13 (100%) |

| Standard 19 | 2018 | X | X | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 10/14 (71%) |
| Availability of status information directory | 2017 | X | X | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 10/14 (71%) |
| 2016 | X | X | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 8/13 (61%) |

| Standard 20 | 2018 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 8.5/14 (60%) |
| Ongoing mandatory training for adjudicators | 2017 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 10.5/14 (75%) |
| 2016 | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | 8/13 (62%) |

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<table>
<thead>
<tr>
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</table>

Legend: ✓ = Standard Met - X = Standard Not Met - N/A = Standard Not Applicable (e.g. no hearings held in year)
National Discipline Standards

Implementation Guide

This guide is intended to be a tool for law societies in implementing the National Discipline Standards that were first approved by Council of the Federation in April, 2014, and revised in 2016, 2018 and 2019.

The standards were developed by the Discipline Standards Project Steering Committee. Between April 2012 and April, 2014, the standards were tested through a two-year pilot project to ensure that they were measurable, meaningful and worthwhile. The pilot phase resulted in a number of changes to the standards. By gathering compliance data, but also by gathering commentary and analysis from those charged with implementing the standards, we have developed a set of meaningful standards that can be used to measure law society performance in the discipline area.

The National Discipline Standards are intended to promote best practices and high standards of performance that are aspirational. Every participating jurisdiction has agreed to strive to achieve these standards and because of that, it is expected that transparency, timeliness, accessibility and quality will continuously improve. It is recognized that not all law societies will be able to meet all of the standards at this time. A Standing Committee on National Discipline Standards (the “Standing Committee”) is charged with monitoring implementation of and compliance with the standards. It will also identify refinements to the standards that may prove necessary as law societies gain additional experience with them.

Revised June 2019
PREAMBLE

The National Discipline Standards are intended to promote best practices and high standards of performance that are aspirational. Every participating jurisdiction has agreed to strive to achieve these standards and because of that, it is expected that transparency, timeliness, accessibility and quality will continuously improve.

It is recognized that meeting the standards is not always within law societies’ direct control. For instance, timeliness relating to scheduling of a hearing (Standard 9) and providing written reasons following a hearing (Standard 10) involve other parties who may not adhere to the time lines, including counsel for the lawyer or Québec notary, witnesses and the hearing panel members. In Québec, hearings are before the Office des professions du Québec and are subject to its rules, creating an additional challenge for the Barreau du Québec and the Chambre des notaires du Québec in meeting the standards. In addition, law societies should be mindful of the need to balance achieving the standard with avoiding suggestions that they have denied or attempted to deny procedural fairness to a respondent.

In small jurisdictions where there may be few hearings in a given year, a delay in one file can significantly skew the statistics (e.g. for Standard 8 on the time between authorization and issuance of the citation or notice of hearing). Consequently, the percentages reported may be less meaningful for smaller jurisdictions than for larger ones.

In spite of these limitations the early experience has been positive and national performance in attempting to meet these standards continues to improve.

GLOSSARY OF TERMS

Reporting Period
This is the period from January 1 to December 31 of the year in question. For example, for Standard 4A, you will capture only files for which the investigation phase was concluded in the reporting year; you will measure the time from when the complaint was received until the time the investigative phase is concluded. If a complaint was received in October 2014 and the investigation phase was concluded in March, 2016, this file was concluded in the reporting period and took 18 months to resolve/refer. Therefore, it is counted in the report on part two of the standard: 90% of all complaints are resolved or referred for a disciplinary or remedial response within 18 months.

Complaint
The term complaint refers to any written correspondence, or inquiry raising potential allegations about a lawyer or Quebec notary’s competence or conduct. It is intended to capture only matters relevant to discipline. Matters that are not related to discipline need not be tracked. Such matters include, but are not limited to requests for legal advice and lawyer referral requests.

Discipline
The term discipline refers to professional regulation and conduct, and regulatory processes and procedures involved in complaints, investigation and discipline generally.
THE NATIONAL DISCIPLINE STANDARDS

Timeliness

1. Telephone inquiries:
   75% of telephone inquiries are acknowledged within one business day and 100% within two business days.

   **Commentary:**
   This standard measures how quickly we respond to first contact discipline inquiries. This is not intended to record how quickly we return general phone calls or subsequent calls from the same complainant.

   This standard requires you to record when a message is received from a complainant and when you first attempted to return that call, even if you are not successful in reaching the person at that time. You will need to record those times and calculate how long each call took to return.

   Include only telephone enquiries that relate to complaints and discipline, as defined in the glossary. In other words, do not track and record enquiries that are not relevant to the discipline process (e.g. lawyer referral requests or matters for which the law society does not have jurisdiction, such as complaints about a judge).

   The standard does not allow for flexibility during busy times or when people are away for illness or vacation, which may make it difficult to meet for some law societies.

2. Written Complaints:
   100% of written complaints are acknowledged in writing within three business days.

   *(Note: this requirement will be set at 95% effective January 1, 2020. The law society report for 2019 should be based on the current 100% requirement.)*

   **Commentary:**
   This standard does not require that the complaint be resolved, just acknowledged. Record when you receive a written complaint and when you send out a written acknowledgement. Calculate how many business days that took and record that.

3. Early Resolution:
   There is a system in place for early resolution of appropriate complaints.

   **Commentary:**
   The goal of this standard is to allow law societies to deal promptly and effectively with complaints that can be resolved without a full, formal investigation.

   Examples of complaints include matters such as failing to respond to client contacts in a timely manner, poor communication, rude behavior, and failing to move a matter along expeditiously (e.g. quality of service), among others.

   Early resolution processes might include formal and informal steps taken to resolve a complaint before an investigation is commenced. It is understood that this standard may be challenging for the north, where early resolution practices do not presently exist.
Timeliness

4A. Timeline to resolve or refer complaint:

80% of all complaints are resolved or referred for a disciplinary or remedial response within 12 months.

90% of all complaints are resolved or referred for a disciplinary or remedial response within 18 months.

Commentary:
Standard 4A is intended to measure the time it takes until an investigation is concluded, with a goal to have 90% concluded within less than a year and a half. The report should capture only investigations concluded during the reporting period.

Measure the time from when the complaint is received until the time the investigative phase is concluded. The complaint is deemed to be received when it is first communicated to the law society, regardless of when it is deemed to be an official ‘complaint file’. Any informal processes that precede the investigation are included.

We all have different processes but whether the investigation ends with closure at the staff level, referral for charging, a remedial response or dismissal, the measurement period ends with the conclusion of the investigative phase, subject to standards 4B and 4C.

4B. Where a complaint is resolved and the complainant initiates an internal review or internal appeal process:

80% of all internal reviews or internal appeals are decided within 90 days.

90% of all internal reviews or internal appeals are decided within 120 days.

Commentary:
Standard 4B addresses situations in which the complainant initiates an internal review or internal appeal of a decision. A new time period commences for this step.

An internal review or internal appeal process contemplates a review or appeal by a law society committee, individual or panel; it does not include a court process (e.g. judicial review).

4C. Where a complaint has been referred back to the investigation stage from an internal review or internal appeal process:

80% of those matters are resolved or referred for a disciplinary or remedial response within a further 12 months.

90% of those matters are resolved or referred for a disciplinary or remedial response within a further 18 months.

Commentary:
Standard 4C addresses situations in which the matter has been referred back to the investigation stage. A new time period commences for this step.

An internal review or internal appeal process contemplates a review or appeal by a law society committee, individual or panel; it does not include a court process (e.g. judicial review).
5. **Contact with complainant:**

For 90% of open complaints there is contact with the complainant at least once every 90 days during the investigation stage.

**Commentary:**
For complaints that originate from a judge, the media, an audit process, etc., law societies should use their discretion as to whether to have contact with the person or body issuing the complaint in accordance with this standard.

See also Commentary under Standard 6 below.

6. **Contact with lawyer or Québec notary:**

For 90% of open complaints there is contact with the lawyer or Québec notary at least once every 90 days during the investigation stage.

**Commentary:**
Standards 5 and 6 may require some law societies to institute a new procedure, sending status reports regularly to the complainant and the lawyer or Québec notary. There is no standard for what the content of that contact needs to be as the main purpose of this standard is to measure how well we keep in touch.

You will need to keep a record on the file (a copy of the letters for example), to assess if the standard has been met and to record performance as against this standard on each file.

Please note that the standard only applies once the lawyer or Québec notary has been notified of the complaint. Contact should be every 90 days after that.

Contact can be by any reasonable means you choose: email, regular mail, phone etc.

This standard applies to all files that are being investigated (i.e. open files) during the reporting period.

7. **Interim Measures:**

There is authority and a process for the law society to obtain an interlocutory or interim suspension, restrictions or conditions on a member’s practice of law, as the public interest may require.

**Commentary:**
For the purposes of this Standard, the words ‘interlocutory’ and ‘interim’ have similar meanings, and refer to a proceeding, which takes place prior to final adjudication of a matter or complaint, for purposes of suspending or placing restrictions or conditions on a member’s practice of law.

‘Practice restrictions’ and ‘practice conditions’ have similar meaning and are intended for the purpose of this Standard to refer to any limitation placed on a member’s practice of law as a result of an interlocutory or interim decision, including such restrictions or conditions as a prohibition on practicing in one or more areas of law, practicing on one’s own, operating a trust account, requiring a practice supervisor, or requiring that certain steps be taken or education completed prior to returning to practice. *Continued*
This standard speaks to the need for every law society to have authority to take timely steps to protect the public in situations of urgency and risk presented by a member’s continued practice of law. Such proceedings are "interlocutory" or “interim” because the risk to the public has arisen before the end of a final adjudicative process. Where there is evidence of risk that creates an urgent need to protect the public, and no lesser measures will protect the public, an interim process should be available.

There are various factors to consider when assessing whether the applicable thresholds have been met for an interim proceeding, and for suspension, restrictions or conditions, including:

- notice to the member;
- whether the proceedings can proceed ex parte;
- what disclosure will or may be provided and when;
- the means by which decisions will be communicated by the decision-maker(s) (preferably allowing for both oral and/or timely written reasons);
- publication of the decision.

These factors should serve as a guide and in each jurisdiction, should be influenced by the common law and any applicable legislation.

It is recommended that in the public interest, there be provisions for publication or posting, as the case may be, of any decisions to suspend, restrict or set conditions on a member’s practice of law.

**Hearings:**

8. **75% of citations or notices of hearings are issued and served upon the lawyer or Québec notary within 60 days of authorization.**

95% of citations or notices of hearings are issued and served upon the lawyer or Québec notary within 90 days of authorization.

**Commentary:**

Each law society has a slightly different method of authorizing charges, but in all cases the timeframe begins to run when the decision is made to charge the lawyer or Québec notary, and ends when the lawyer or Québec notary is served with the initiating document (a citation or notice of hearing).

9. **75% of all hearings commence within 9 months of authorization.**

90% of all hearings commence within 12 months of authorization.

**Commentary:**

A hearing commences when the adjudicative body first convenes to hear evidence or preliminary motions. Preliminary appearances do not constitute commencement of the hearing unless they are for the purpose of hearing preliminary motions. A good rule of thumb is whether the appearance is before the panel that will hear the substantial matter.

The goal of this standard is to provide access to timely justice, avoiding delays in the formal process and balancing this with the need to be thorough and protect the public.
10. **Reasons for 90% of all decisions are rendered within 90 days from the last date the panel receives submissions.**

   **Commentary:**
   This is a standard that will require some delicacy to achieve. We generally stay away from trying to influence any part of the decision-making process. The hope is that by establishing this standard and making it known to adjudicators as part of their orientation and training, we will encourage them to strive to meet it.

   The ninety (90) day standard is for receipt of the reasons for the decision (if written reasons are to follow an oral decision). Count all cases including those where reasons are delivered orally (those should be easy to report), and decisions in relation to both hearings on the merits and sentencing hearings.

**Public Participation**

11. **There is public participation at every stage of discipline, e.g. on all hearing panels of three or more, at least one public representative; on the charging committee, at least one public representative.**

   **Commentary:**
   This standard will be challenging for some jurisdictions with a limited number of public representatives to call upon. In jurisdictions where charging decisions are made by one individual and not by committee, the standard does not apply to that part of the process.

   This commentary is intended to confirm that the process currently used by the Barreau du Québec and other law societies in which lawyers appointed externally are used to review these kinds of complaints, would meet the standard. The use of lay benchers for this process would also meet the standard.

12. **There is a complaints review process in which there is public participation for complaints that are disposed of without going to a charging committee.**

   **Commentary:**
   Public participation can include a lawyer or Québec notary if appointed by an outside body, or a public representative.

**Transparency**

13. **Hearings are open to the public.**

   **Commentary:**
   You will not be in breach of this standard if a hearing is closed periodically on the application of one of the parties (see standard 14).
14. **Reasons are provided for any decision to close hearings.**

   **Commentary:**
   The reasons do not need to be in writing (they can be delivered orally).

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

16. **Notices of hearing dates are published at least 60 days prior to the hearing, or such shorter time as the pre-hearing process allows.**

   **Commentary:**
   The rationale for this standard is to ensure that the public (and the media) can easily find out about upcoming hearings and attend them if they wish.

   It is understood that currently not everyone can meet this standard. There is no standard for the form of publication, but the advertising of hearings is not required. Notices on your website will meet the standard; however simply responding to inquiries about upcoming hearings will not.

17. A law society can share information about a lawyer or Québec notary, either upon request or at its own initiative, with any other law society, or can require a lawyer or Québec notary to disclose such information to all law societies to which they are a member. All information must be shared in a manner that protects solicitor-client privilege.

   **Commentary:**
   The purpose of this revised standard is to ensure that law societies have the authority and/or discretion to share information with one another about a lawyer or Québec notary when the law society considers it appropriate in the public interest to do so. The standard provides two options for compliance: law societies can share this information either in response to a request from another law society or on their own initiative; alternatively, law societies may require the lawyer or Québec notary in question to disclose information to all other law societies to which they are a member. The standard requires that all information be shared in a manner that protects solicitor-client privilege.

   The language of this standard is intentionally worded broadly to give law societies the discretion to determine the circumstances under which sharing is necessary, and to allow for a range of information to be shared.

   This standard does not require you to monitor or provide data on actual reporting to other law societies. It simply requires the ability to share information, or as an alternative, the ability to require the lawyer or Québec notary to do so.

   The Standing Committee on National Discipline Standards has developed and distributed a model rule to assist law societies in implementing this standard.
18. There is an ability to report to police about criminal activity in a manner that protects solicitor/client privilege.

Commentary:
This standard does not measure whether you actually report to police but whether you have the ability to do it and also, if you can do it in a way that protects privilege. It does not require that the reporting be mandatory.

It is within your discretion to determine the time frame for reporting.

Protection of the public interest is paramount to the decision to report to police. In making that decision, you may wish to consider the following factors:

- The seriousness of the allegations;
- Any risk to the public;
- When the events occurred;
- Whether there is someone else who can report the matter;
- Whether a report will impede ongoing professional responsibility proceedings;
- Whether information in your possession is confidential or subject to solicitor/client privilege, and if so, how that confidentiality and privilege can be appropriately addressed.

This is not a determinative list. Law societies should weigh the above factors amongst any others that are particular to their jurisdictional context or the specific situation that has led to consideration of reporting.

Accessibility

19. A complaint help form is available to complainants.

Commentary:
This requires that you have available some tool to assist complainants in making their complaints. There is no specific format for this form and it can be on-line or on paper.

This standard does not test the use of the form, only if a form is available.

20. There is a directory available with status information on each lawyer or Québec notary, including easily accessible information on discipline history.

Commentary:
Discipline history means any finding by the ultimate decision making body, after an adjudicative process or by consent, that a lawyer has committed conduct deserving of sanction. It includes decisions on conditions and restrictions on a lawyer’s practice and/or any other matters that were arrived at through a public process.

This standard is intended to permit the public to determine easily if a lawyer or Québec notary has a discipline history. The commentary defines what that means. We are not talking about charges or matters that are dealt with informally.

The directory need not be online but there does need to be a directory that contains this information. Merely responding to individual inquiries will not satisfy this standard.
Qualification of Adjudicators and Volunteers

21. There is ongoing mandatory training for all adjudicators, with refresher training no less often than once a year, and the curriculum for mandatory training will comply with the national curriculum.

Commentary:
Each law society must conduct training of its adjudicators with refresher training at least once per year. It is expected that refresher training will vary according to the training needs of adjudicators in each jurisdiction. Law societies should assess what topics would be appropriate for inclusion in the refresher training, and the length and format of the training, taking into consideration any gaps in training, new developments that warrant review, etc. For example, a smaller law society might rotate training on the core competencies in the National Adjudicator Training Curriculum on a three year cycle, and the annual refresher training could include core competencies that have not been addressed for one or two years. The annual refresher training might also include issues of importance to the jurisdiction, for instance indigenous cultural competence or new developments in the law or in the society’s practices and procedures.

22. There is mandatory orientation for all volunteers involved in conducting investigations or in the charging process to ensure that they are equipped with the knowledge and skills to do the job.

Commentary:
This standard applies to jurisdictions that use volunteers (benchers and others) to conduct investigations and/or on charging bodies. All such volunteers must receive an orientation. While the content is not specified, it should be sufficient to ensure they have the knowledge and skills to do the job. We will not be asking you to report on whether the orientation does that, only on whether it exists for all volunteers involved in those processes.

This Standard is intended for those who are not employed by a law society; it is presumed that law society staff is appropriately trained.

Reporting on Standards

23. Each law society will report annually to its governing body on the status of the standards.
Normes de discipline nationales

Guide de mise en application

Ce guide a été conçu dans le but de servir d’outil pour aider les ordres professionnels de juristes à mettre en application les normes de discipline nationales qui ont été approuvées par le Conseil de la Fédération en avril 2014 et révisé en 2016, 2018 et 2019.

Les normes ont été élaborées par le Comité directeur du projet sur les normes de discipline nationales. Entre les mois d’avril 2012 et avril 2014, les normes ont été mises à l’essai dans le cadre d’un projet pilote de deux ans pour s’assurer qu’elles sont mesurables, concrètes et appréciables. Par suite de la phase pilote, plusieurs changements ont été apportés aux normes. En recueillant non seulement les données concernant l’observation des normes, mais également les commentaires et les analyses des personnes responsables de leur mise en application, nous avons élaboré une série de normes concrètes qui peuvent être utilisées pour mesurer le rendement des ordres professionnels de juristes en matière de discipline.

Les normes de discipline nationales se veulent ambitieuses. Les normes de discipline nationales visent à promouvoir des pratiques exemplaires et à inspirer des niveaux de performance élevés. Chaque juridiction participante a convenu de tout mettre en œuvre pour respecter ses normes et, pour cette raison, il est à prévoir que la transparence, la rapidité d’exécution, l’accessibilité et la qualité continueront à s’améliorer. Il est convenu que tous les ordres professionnels de juristes ne seront pas en mesure de répondre à toutes les normes. Un nouveau Comité permanent sur les normes de discipline nationales (le « Comité permanent ») aura le mandat de suivre de près la mise en application et l’observation des normes. Il déterminera aussi s’il est nécessaire de les modifier au fur et à mesure qu’elles sont mises en pratique par les ordres professionnels de juristes.

Révisé Juin 2019
PRÉAMBULE

Les normes de discipline nationales visent à promouvoir des pratiques exemplaires et à inspirer des niveaux de performance élevés. Chaque juridiction participante a convenu de tout mettre en œuvre pour respecter ses normes et, pour cette raison, il est à prévoir que la transparence, la rapidité d’exécution, l’accessibilité et la qualité continueront à s’améliorer.

Il est convenu que le respect des normes puisse parfois échapper au contrôle direct des ordres professionnels de juristes. À titre d’exemple, la rapidité à fixer les dates d’audience (norme 9) et à fournir des raisons écrites suite à l’audience (norme 10) implique d’autres parties qui ne respectent pas nécessairement les délais, y compris le conseil pour l’avocat ou le notaire, les témoins et les membres des jurys d’audition. Au Québec, les audiences se tiennent devant l’Office des professions du Québec et sont soumises à ses règles, créant ainsi un défi supplémentaire pour le Barreau du Québec et la Chambre des notaires du Québec pour respecter les normes. En outre, les ordres professionnels de juristes doivent être conscients de la nécessité de concilier la réalisation d’une norme en évitant de suggérer qu’ils aient pu refuser ou tenter de refuser d’accorder l’équité procédurale au répondant.

Dans les petites juridictions, où dans une année peuvent ne se tenir que quelques audiences, le délai que peut connaître un dossier peut fausser considérablement les statistiques (p.ex., pour la norme 8, à propos du délai entre l’autorisation et l’émission de la citation ou de l’avis d’audience). Par conséquent, les pourcentages rapportés peuvent être moins pertinents dans le cas des plus petites juridictions par rapport aux plus grandes.

Malgré ces réserves, cette première expérience s’avère positive et le rendement national démontre un respect des normes en constante amélioration.

GLOSSAIRE DES TERMES

Période de déclaration
Cette période s’échelonne du 1er janvier au 31 décembre de l’année visée. Par exemple, pour la norme 4A, vous ne devez recueillir que les dossiers dont l’enquête s’est conclue au cours de l’année sur laquelle porte le rapport; vous devez compter la période de temps écoulée entre la réception de la plainte et le moment où se termine l’enquête. Si une plainte est reçue en octobre 2014 et que l’étape de l’enquête se termine en mars 2016, ce dossier est considéré comme ayant été conclu au cours de la période de déclaration et avoir pris 18 mois à se régler ou à être renvoyé. Il est donc rapporté dans la deuxième partie de la norme : On règle ou on renvoie à une mesure disciplinaire ou corrective 90 % de toutes les plaintes dans un délai de 18 mois.

Plainte
Le terme plainte désigne toute correspondance écrite ou enquête soulevant des allégations potentielles envers la compétence ou la conduite d’un avocat ou d’un notaire. Elle ne vise qu’à saisir les questions disciplinaires. Les questions n’ayant pas trait à la discipline n’ont pas à être suivies. Ces questions comprennent, sans toutefois s’y limiter, les demandes d’avis juridiques et les demandes de renvoi à un avocat.

Discipline
Le terme discipline fait référence à la réglementation et à la conduite professionnelles, ainsi qu’aux processus et procédures réglementaires associées aux plaintes, aux enquêtes et à la discipline en général.
LES NORMES DE DISCIPLINE NATIONALES

Rapidité

1. Demandes de renseignements par téléphone :

On répond à 75 % des demandes de renseignements par téléphone dans un délai d’un jour ouvrable et à 100 % dans un délai de deux jours ouvrables.

Commentaire :
Cette norme mesure à quelle vitesse nous répondons aux demandes de renseignements initiales en matière de discipline. Il ne s’agit pas de déterminer le temps écoulé avant de répondre aux appels téléphoniques de nature générale ou les appels ultérieurs venant du même plaignant.

En vertu de cette norme, vous devez noter à quel moment un message est reçu d’un plaignant et à quel moment vous avez tenté pour la première fois de le rappeler, même si vous n’arrivez pas à communiquer avec lui à ce moment. Vous aurez à noter ces tentatives et à calculer le temps écoulé avant qu’on réponde à chaque appel.

Il ne faut inclure que les demandes téléphoniques liées à des plaintes ou à la discipline, tel que défini dans le glossaire. En d’autres termes, il n’est pas nécessaire de suivre ou de relever les demandes qui ne se rapportent pas au processus disciplinaire (p.ex., les demandes ou les questions de renvoi aux avocats qui ne sont pas de la juridiction d’un ordre professionnel de juristes, telles que les plaintes adressées à un juge).

La norme ne prévoit aucune flexibilité pour les heures de pointe ou en cas d’absences pour cause de maladie ou de vacances, ce qui la rend difficile à observer pour certains ordres professionnels de juristes.

2. Plaintes écrites :

On accuse réception par écrit de 100 % des plaintes écrites dans un délai de trois jours ouvrables.

(Remarque : Cette exigence sera fixée à 95 % à compter du 1er janvier 2020. Le rapport 2019 des ordres professionnels de juristes doit être basé sur l’exigence actuelle.)

Commentaire:
Cette norme n’exige pas qu’on règle la plainte, mais simplement qu’on accorde réception de la plainte. Notez à quel moment vous recevez une plainte écrite et à quel moment vous envoyez l’accusé de réception écrit. Calculez combien de jours ouvrables se sont écoulés pour faire toute cette démarche et notez-les.

3. Règlement rapide :

Un système est en place pour régler certaines plaintes rapidement.

Commentaire:
Le but de cette norme est de permettre aux ordres professionnels de juristes de traiter dans les meilleurs délais et de manière efficace les plaintes qui peuvent être réglées sans être soumises à une enquête officielle complète.

Ces plaintes comprennent notamment le fait de ne pas répondre à une personne-ressource du client en temps opportun, un manque de communication, un comportement grossier et le fait de ne pas faire avancer un dossier diligentement (ex. qualité des services).

Les processus de règlement rapide peuvent consister à prendre des mesures officielles ou non officielles pour résoudre une plainte avant le début d’une enquête. Cette norme pourrait s’avérer difficile pour les territoires du Nord puisqu’ils n’ont pas encore de mécanisme de règlement rapide des plaintes.
Rapidité

4A. Délai pour régler ou renvoyer une plainte :

On règle ou on renvoie à une mesure disciplinaire ou corrective 80 % de toutes les plaintes dans un délai de 12 mois.

On règle ou on renvoie à une mesure disciplinaire ou corrective 90 % de toutes les plaintes dans un délai de 18 mois.

Commentaire :

La norme 4A permet de mesurer la durée des enquêtes dans le but de pouvoir régler 90 % de ces enquêtes dans un délai de moins d’un an et demi. Le rapport ne devrait inclure que les enquêtes conclues au cours de cette période de déclaration.

Veuillez mesurer cette durée à partir du moment où la plainte est reçue jusqu’au moment où l’étape de l’enquête prend fin. Une plainte est considérée comme étant reçue lorsqu’elle est transmise pour la première fois à un ordre professionnel de juristes, peu importe le moment où elle est classée comme un « dossier de plainte » officiel. Tout processus informel précédant l’enquête est inclus.

Nous suivons tous un processus différent, mais peu importe si l’enquête prend fin au niveau du personnel ou qu’elle mène à un renvoi pour une mise en accusation, à une mesure corrective ou à un rejet, la durée de temps à mesurer se termine lorsque l’étape de l’enquête prend fin, conformément aux normes 4B et 4C.

4B. Quand une plainte est résolue et que le plaignant entame un réexamen interne ou amorce un processus d’appel interne :

80 % de tous les réexamens ou processus d’appel internes se décident dans un délai de 90 jours.

90 % de tous les réexamens ou processus d’appel internes se décident dans un délai de 120 jours.

Commentaire :

La norme 4B se réfère aux situations où le plaignant entame un réexamen interne ou amorce un processus d’appel interne d’une décision. Une nouvelle période de temps débute à cette étape.

Un réexamen interne ou un processus d’appel interne a trait à un réexamen ou à un appel d’un comité, d’un jury ou d’un membre d’un ordre professionnel de juristes; il ne comprend pas les processus judiciaires (p.ex., le contrôle judiciaire).

4C. Quand une plainte est renvoyée à l’étape de l’enquête par le biais d’un réexamen interne ou d’un processus d’appel interne :

80 % de ces questions sont résolues ou renvoyées à une mesure disciplinaire ou corrective dans un délai additionnel de 12 mois.

90 % de ces questions sont résolues ou renvoyées à une mesure disciplinaire ou corrective dans un délai additionnel de 18 mois.

Commentaire :

La norme 4C se réfère aux situations où la question a été renvoyée à l’étape de l’enquête. Une nouvelle période de temps débute à cette étape.

Un réexamen interne ou un processus d’appel interne a trait à un réexamen ou à un appel d’un comité, d’un jury ou d’un membre d’un ordre professionnel de juristes; il ne comprend pas les processus judiciaires (p.ex., le contrôle judiciaire).
5. Communication avec le plaignant :
Dans 90 % des dossiers ouverts, on communique avec le plaignant au moins une fois tous les 90 jours durant l’étape de l’enquête.

Commentaire:
Dans le cas des plaintes provenant d’un juge, des médias, d’un processus de vérification, etc., les ordres professionnels de juristes doivent user de leur pouvoir discrétionnaire pour décider de prendre contact ou non avec la personne ou l’entité qui émet une plainte, conformément à la présente norme.

Voir aussi le commentaire sous la norme 6.

6. Communication avec l’avocat ou le notaire du Québec :
Dans 90 % des dossiers ouverts, on communique avec l’avocat ou le notaire du Québec au moins une fois tous les 90 jours durant l’étape de l’enquête.

Commentaire:
Pour respecter les normes 5 et 6, certains ordres professionnels de juristes auront peut-être à instaurer une nouvelle procédure, soit d’envoyer régulièrement des rapports d’étape au plaignant et à l’avocat ou au notaire du Québec. Aucune norme ne prescrit ce que cette communication doit contenir. Le but principal de cette norme est de mesurer l’efficacité des communications.

Vous aurez à tenir un dossier (une copie des lettres, par exemple) pour déterminer si la norme a été respectée et pour noter le rendement relativement à chaque dossier.

La norme s’applique uniquement lorsque l’avocat ou le notaire du Québec a été avisé de la plainte. La communication devrait se faire tous les 90 jours par la suite.

La communication peut se faire par tout moyen raisonnable que vous choisissez : par courriel, par la poste, par téléphone, etc.

Cette norme s’applique à tous les dossiers sous enquête (c.-à-d. les dossiers ouverts) au cours de la période de déclaration.

7. Mesures provisoires :
L’ordre professionnel de juristes a le pouvoir et un processus en place pour obtenir une suspension interlocutoire ou provisoire ou imposer des restrictions ou des conditions à l’exercice du droit d’un membre, tel qu’il pourrait être nécessaire de le faire dans l’intérêt du public.

Commentaire:
Aux fins de cette norme, les termes « interlocutoire » et « provisoire » ont une signification similaire et se rapportent à une procédure qui se déroule avant la décision définitive relativement à une affaire ou une plainte visant à suspendre l’exercice du droit par un membre ou d’imposer des restrictions ou des conditions à l’exercice du droit par un membre.

Les termes « restrictions d’exercice » et « conditions d’exercice » ont le même sens et, aux fins de cette norme, se rapportent à toute limite imposée à l’exercice du droit par un membre en raison d’une décision interlocutoire ou provisoire, incluant toute restriction ou condition telle que l’interdiction d’exercer dans un ou plusieurs domaines du droit, d’exercer seul ou de gérer un compte en fidéicommis ou l’exigence de faire appel à un superviseur professionnel ou de prendre certaines mesures ou terminer une certaine formation avant de reprendre l’exercice du droit. (suite)
Cette norme résulte du fait que tous les ordres professionnels de juristes doivent avoir le pouvoir de prendre des mesures en temps opportun pour protéger le public en cas d’urgence et du risque qui peut se poser si le membre continue d’exercer le droit. Une telle procédure est « interlocutoire » ou « provisoire » parce que le risque pour le public se présente avant la fin du processus d’arbitrage définitif. Lorsque la preuve du risque crée un besoin urgent de protéger le public et qu’aucune mesure moins rigoureuse ne protégera le public, un processus provisoire doit être prévu.

Divers facteurs sont à prendre en considération au moment de déterminer si les seuils applicables ont été atteints pour une procédure provisoire, ainsi que pour une suspension, des restrictions ou des conditions, notamment :

- un avis au membre;
- si les procédures peuvent se dérouler ex parte;
- qu’est-ce qui sera ou pourra être divulgué et à quel moment;
- par quels moyens les décisions seront communiqués par le ou les décideurs (de préférence en prévoyant des motifs exposés oralement et par écrit en temps opportun);
- la publication de la décision.

Ces facteurs devraient servir de guides et être influencés, dans chaque province ou territoire, par la common law et toute loi applicable.

Il est recommandé, dans l’intérêt du public, d’inclure des dispositions pour la publication sur papier ou en ligne, selon le cas, de toute décision de suspendre ou restreindre l’exercice du droit par un membre ou d’y imposer des conditions.

**Audiences :**

8. **On signifie 75 % des citations et avis d’audience à l’avocat ou au notaire du Québec dans un délai de 60 jours suivant l’autorisation.**

On signifie 95 % des citations et avis d’audience à l’avocat ou au notaire du Québec dans un délai de 90 jours suivant l’autorisation.

**Commentaire:**

Chacun de nous suit une méthode légèrement différente pour autoriser les mises en accusation, mais dans tous les cas le délai commence au moment où on prend la décision d’accuser l’avocat ou le notaire du Québec et prend fin lorsque l’acte introductif d’instance (citation ou avis d’audience) est signifié à l’avocat ou au notaire du Québec.

9. **On commence 75 % de toutes les audiences dans un délai de 9 mois suivant l’autorisation.**

On commence 90 % de toutes les audiences dans un délai de 12 mois suivant l’autorisation.

**Commentaire:**

Une audience commence lorsque l’organe décisionnel entend pour la première fois la preuve ou les motions préliminaires. Les comparutions préliminaires ne constituent pas le début de l’audience à moins qu’elles aient pour but d’entendre des motions préliminaires. Une bonne façon de faire cette détermination est de voir si la comparution est devant le jury qui entendra les questions de fond.

Le but de cette norme est de permettre d’avoir accès à la justice en temps opportun, d’éviter les retards dans le processus officiel et de respecter ces exigences tout en tenant compte du fait qu’il est nécessaire de suivre le processus de façon méthodique et de protéger le public.
10. **On rend les raisons de 90 % de toutes les décisions dans un délai de 90 jours suivant la dernière date à laquelle le jury reçoit les observations.**

**Commentaire:**
Cette norme nous demandera d’agir avec délicatesse. Généralement, nous tâchons de ne jamais influencer le processus décisionnel. En établissant cette norme et en la portant à l’attention des membres du jury dans le cadre de leur orientation et leur formation, nous espérons les encourager à répondre à la norme.

La norme de quatre-vingt-dix (90) jours s’applique à la réception des raisons de la décision (si des raisons écrites doivent suivre une décision rendue oralement). Veuillez compter tous les dossiers, incluant ceux où les raisons sont données oralement (ceux-ci seront faciles à signaler), ainsi que les décisions concernant les audiences sur le fond et les audiences de détermination de la peine.

**Participation du public**

11. **Le public participe à toutes les étapes du processus disciplinaire, p. ex., au moins un représentant du public faisant partie de tous les jurys d’audition de trois personnes ou plus, et au moins un représentant du public faisant partie du comité d’inculpation.**

**Commentaire :**
Cette norme sera difficile pour certains ordres professionnels de juristes qui ne peuvent faire appel qu’à un nombre limité de représentants du public. Dans le cas d’un ordre professionnel de juristes où les décisions d’inculpation sont prises par une personne plutôt qu’un comité, la norme ne s’applique pas à cette partie du processus.

Ce commentaire vise à confirmer que le processus que suit actuellement le Barreau du Québec et d’autres ordres professionnels de juristes – selon lequel des avocats nommés par un organisme externe examinent ces types de plaintes – répondrait à la norme. Si on fait appel à des conseillers non juristes pour ce processus, on répond aussi à la norme.

12. **Un processus d’examen des plaintes est en place, comptant la participation du public, pour les plaintes qui sont réglées sans être renvoyées à un comité d’inculpation.**

**Commentaire:**
Un représentant du public peut être un avocat ou un notaire du Québec s’il est nommé par un organisme externe, ou un conseiller non juriste.

**Transparence**

13. **Les audiences sont publiques.**

**Commentaire:**
Vous n’irez pas à l’encontre de cette norme si une audience est parfois tenue à huis clos, à la demande d’une des parties (voir la norme 14).
14. **Si on décide de tenir une audience à huis clos, on donne les raisons de cette décision.**

   **Commentaire :**
   Il n’est pas nécessaire de donner les raisons par écrit (elles peuvent être données de vive voix).

15. **Les avis d’accusation ou de citation sont rendus publics dans les meilleurs délais une fois la date de l’audience fixée.**

16. **Les avis des dates d’audience sont rendus publics au moins 60 jours avant l’audience, ou dans un délai plus court selon ce que permet le processus préalable à l’audience.**

   **Commentaire :**
   La raison de cette norme est de s’assurer que le public (et les médias) peuvent facilement être informés des audiences prévues et y assister s’ils le souhaitent.

   Il est entendu que tous ne peuvent pas répondre à cette norme présentement. Aucune norme n’est imposée relativement au type de publication, mais il n’est pas nécessaire de faire de la publicité pour annoncer les audiences. Les avis sur votre site Web suffiront pour répondre à la norme, mais une simple réponse à une demande de renseignements concernant une audience à venir ne sera pas suffisante.

17. **Un ordre professionnel de juristes peut échanger des renseignements concernant un avocat ou un notaire du Québec avec un autre ordre professionnel de juristes, si on lui en fait la demande ou de sa propre initiative, ou peut exiger qu’un avocat ou un notaire du Québec communique ces renseignements à tous les ordres professionnels de juristes dont il est membre. Tous les renseignements doivent être communiqués d’une façon qui protège le privilège du secret professionnel.**

   **Commentaire :**
   L’objet de cette norme révisée est de s’assurer que les ordres professionnels de juristes ont le pouvoir, à leur discrétion, d’échanger entre eux des renseignements concernant un avocat ou un notaire du Québec lorsqu’ils le jugent opportun dans l’intérêt du public. La norme prévoit deux possibilités pour s’y conformer : les ordres professionnels peuvent échanger ces renseignements en réponse à une demande d’un autre ordre professionnel de juristes ou de leur propre initiative; autrement, l’ordre professionnel de juristes peut exiger que l’avocat ou le notaire du Québec en question communique les renseignements à tous les autres ordres professionnels de juristes dont il est membre. En vertu de la norme, tous les renseignements doivent être communiqués d’une façon qui protège le privilège du secret professionnel.

   Cette norme est délibérément formulée de façon générale afin de laisser aux ordres professionnels de juristes le soin de déterminer dans quelles circonstances il est nécessaire d’échanger des renseignements et de permettre l’échange de divers renseignements.

   Cette norme ne vous demande pas de suivre de près ou de fournir des données sur une déclaration elle-même à d’autres ordres professionnels de juristes. Elle demande simplement d’être en mesure de donner ces renseignements ou, sinon, d’exiger que l’avocat ou le notaire du Québec le fasse.

Le Comité permanent sur les normes de discipline nationales a élaboré et distribué un règlement type pour aider les ordres professionnels de juristes à mettre cette norme en application.
18. **Il est possible et requis de signaler une activité criminelle à la police d’une façon qui protège le privilège du secret professionnel du juriste.**

**Commentaire :**
Cette norme n’indique pas si vous signalez réellement une activité à la police, mais plutôt si vous êtes en mesure de le faire et, dans l’affirmative, si vous pouvez le faire d’une façon qui protège le privilège du secret professionnel. Elle n’exige pas que le signalement soit obligatoire.

Vous êtes libre de déterminer le délai pour faire un signalement.

La protection de l’intérêt public est primordiale au moment de décider de faire un signalement à la police. En prenant cette décision, vous pourriez prendre en considération les facteurs suivants :

- la gravité des allégations;
- tout risque pour le public;
- à quel moment les événements se sont produits;
- s’il quelqu’un d’autre peut signaler la situation;
- si un signalement peut entraver une instance relative à la responsabilité professionnelle qui est en cours;
- si les renseignements que vous avez sont confidentiels ou protégés par le privilège du secret professionnel et, dans l’affirmative, comment cette confidentialité ou ce privilège peut être abordé de façon appropriée.

Cette liste n’est pas déterminante. Les ordres professionnels de juristes devraient tenir compte de ces facteurs parmi tous les autres qui sont propres au contexte dans leur territoire ou à la situation particulière qui les a amenés à examiner la possibilité de faire un signalement.

**Accessibilité**

19. **Un formulaire d’information sur les plaintes est offert aux plaignants.**

**Commentaire :**
En vertu de cette norme, vous devez avoir un outil pour aider les plaignants à déposer leur plainte. Aucune présentation particulière n’est prescrite pour ce formulaire, lequel peut être en ligne ou sur papier.

Cette norme ne permet pas de vérifier si ce formulaire est utilisé, mais uniquement si le formulaire est offert.

20. **Un répertoire est offert et inclut des renseignements sur le statut de chaque avocat ou notaire du Québec, notamment des renseignements faciles d’accès sur les antécédents disciplinaires.**

**Commentaire :**
Des antécédents disciplinaires signifient tout verdict de l’organe décisionnel de dernière instance déclarant, suite à un processus juridictionnel ou par consentement, que le juriste s’est conduit d’une façon qui mérite d’être sanctionnée. Sont incluses les décisions sur les conditions et restrictions entourant la pratique d’un juriste ou toute autre question réglée par un processus public.

Le but de cette norme est de permettre au public de déterminer facilement si un avocat ou un notaire du Québec a des antécédents disciplinaires. Le commentaire définit les antécédents disciplinaires. Il ne s’agit pas d’accusations ou de dossiers qui sont réglés de manière non officielle.

Il n’est pas nécessaire de pouvoir consulter le répertoire en ligne, mais ce répertoire doit contenir ces renseignements. Le simple fait de répondre aux demandes de renseignements individuellement ne permettra pas de répondre à cette norme.
Compétences des personnes chargées de prendre les décisions et des bénévoles

21. **Toutes les personnes chargées de prendre les décisions sont assujetties à une formation continue obligatoire ainsi qu’à une formation d’appoint au moins une fois par année, et le curriculum de la formation obligatoire sera conforme au curriculum national.**

**Commentaire :**
Chaque ordre professionnel de juristes doit former ses arbitres et leur offrir une formation d’appoint au moins une fois par année. On s’attend à ce que la formation d’appoint varie selon les besoins de formation des arbitres de chaque ordre professionnel. Les ordres professionnels de juristes devraient déterminer les sujets qui conviendraient à la formation d’appoint, ainsi que la durée et la façon de donner la formation, tout en tenant compte des lacunes dans la formation, des faits nouveaux qui justifient un réexamen de la formation, etc. Par exemple, un plus petit ordre professionnel de juristes pourrait alterner la formation portant sur les compétences de base dans le Curriculum national de formation des arbitres selon un cycle de trois ans, et la formation d’appoint annuelle pourrait inclure les compétences de base qui n’ont pas été abordées depuis un ou deux ans. La formation d’appoint annuelle pourrait également inclure des questions importantes pour l’ordre professionnel, telles que les compétences culturelles autochtones ou les faits nouveaux relativement à la loi ou aux pratiques et procédures de l’ordre professionnel.

22. **Une orientation obligatoire est prévue pour tous les bénévoles participant à la conduite d’une enquête ou au processus d’inculpation afin de s’assurer qu’ils possèdent les connaissances et les compétences pour faire leur travail.**

**Commentaire :**
Cette norme s’applique aux ordres professionnels de juristes qui font appel à des bénévoles (conseillers et autres) pour mener des enquêtes, ainsi qu’aux personnes chargées de prendre les décisions. Ces bénévoles doivent participer à des séances d’orientation. Bien que le contenu ne soit pas précisé, il doit être suffisamment exhaustif pour s’assurer que ces personnes acquièrent les connaissances et les compétences requises pour faire leur travail. Vous n’aurez pas à nous indiquer si l’orientation répond à cette exigence, mais uniquement si elle est offerte à tous les bénévoles participant à ces processus.

Cette norme vise les individus qui ne sont pas à l’emploi d’un ordre professionnel de juristes; on présume que le personnel des ordres professionnels de juristes ont reçu une formation adéquate.

**Compte rendu sur les normes**

23. **Chaque ordre professionnel de juristes présentera un compte rendu annuel de la situation relative aux normes à son organisme dirigeant.**
MEMORANDUM TO COUNCIL

From: Tilly Pillay QC
Date: August 16, 2019
Subject: Reappointment to the Law Foundation of Nova Scotia

The Chair of the Law Foundation is Robbie MacKeigan QC. His term expires in December 2019. Pursuant to ss. 72(4), the Chair of the Board is to be appointed upon the joint recommendation of the Attorney General and the Society. The Department of Justice and the Society have been very pleased with Mr. MacKeigan’s service as Chair of the Board over the years and would recommend that he be reappointed for another two-year term, which would expire in December 2021.

Douglas Ruck QC is a current member of the Law Foundation of Nova Scotia Board appointed by Council. Mr. Ruck’s term expires in December 2019. The Society recommends that Mr. Ruck continue on the Law Foundation of Nova Scotia Board for an additional term of two years. His term, therefore, will also expire in December 2021. Robbie MacKeigan QC, the Chair, supports the extension of Mr. Ruck’s appointment. Mr. Ruck also represents diversity on the Board.

Council is asked to approve Robbie MacKeigan QC continuing as the Chair of the Law Foundation of Nova Scotia and Douglas Ruck QC being reappointed for a further two-year term, both terms to expire in December 2021.
# Council Year: July 2019 – June 2020

<table>
<thead>
<tr>
<th>JULY</th>
<th>AUGUST</th>
<th>SEPTEMBER</th>
<th>OCTOBER</th>
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<tbody>
<tr>
<td>Council Meeting – July 19</td>
<td>No Council meeting</td>
<td>Council Meeting in the Community (?) – September 27</td>
<td>No Council Meeting</td>
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<tr>
<td><strong>Big Issue: Strategic Plan</strong></td>
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<td><strong>Big Issue: EDI &amp; TRC</strong></td>
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<tr>
<td>• Credentials Monitoring Report</td>
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<td>• LIANS Report to Council</td>
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<tr>
<td>• TA Update and TARWG Update</td>
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<td>• MDP Update (info)</td>
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<td>• DSA Recipient Announced</td>
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<td>• Report from GNC on Court Liaison Task Force and Consideration of splitting GNC</td>
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<tr>
<td><strong>Other Activities</strong></td>
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<td>• Client ID Rules</td>
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<tr>
<td>• CBA SOGIC Panel - July 16 (Halifax Public Library)</td>
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<td>• DSA Policy amendments (Consent agenda)</td>
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<td>• Pride Parade – July 20</td>
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<td>• CPLED</td>
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<td>• Pride Reception - July 25</td>
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<td>• TARWG Report</td>
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<td>• Comms Update - Website</td>
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<td></td>
<td></td>
<td>• Communications to Committee Chairs</td>
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<td>• Posthumous Calls to the Bar</td>
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<td>• Strategic Plan Rollout</td>
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</table>

**Other Activities**

- Wickwire Lecture – Schulich School of Law – September 26 at 4:30 or 5:00 pm

<table>
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<tr>
<th>NOVEMBER</th>
<th>DECEMBER</th>
<th>JANUARY</th>
<th>FEBRUARY</th>
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<tbody>
<tr>
<td>Council Meeting – November 22</td>
<td>No Council Meeting</td>
<td>Council Meeting – January 24</td>
<td>No Council Meeting</td>
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<tr>
<td><strong>Big Issue: Strategic Plan &amp; Activity Plan</strong></td>
<td></td>
<td><strong>Big Issue: Review of Strategic Plan</strong></td>
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<tr>
<td>Council in the Community (Where?)</td>
<td></td>
<td>• Approval of 2020 Activity Plan</td>
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<tr>
<td>• Introduction of 2020 Activity Plan</td>
<td></td>
<td>• Report from GNC re 2nd VP nominee</td>
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<tr>
<td>• Committees’ Interim Reports</td>
<td></td>
<td>• 2020 Committee Work Plans</td>
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<tr>
<td>• Public Website Redevelopment Project</td>
<td></td>
<td>• TARWG Report</td>
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<tr>
<td>• Report on 2019 Annual Lawyer Report</td>
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<td><strong>Other Activities</strong></td>
<td></td>
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<td></td>
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<td>• GNC interviews for 2nd VP (early January)</td>
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</tbody>
</table>

**Other Activities**

- Nominations for 2nd VP close – February 14
### Council Year: July 2019 – June 2020

<table>
<thead>
<tr>
<th>MARCH</th>
<th>APRIL</th>
<th>MAY</th>
<th>JUNE</th>
</tr>
</thead>
</table>
| Council Meeting – March 27  
**Big Issue: Budget introduction/debate/preliminary approval**  
- LIANS Report to Council  
- Equity & Access Monitoring Report  
Other Activities  
- 2nd VP Election – if required  
- Dara Gordon Event – Date TBD (or April?)  | Council Meeting – April 24  
**Big Issue: Fee/Budget approval/LIANS Levy**  
Other Activities  
- Call to the Bar – April 17 @ 10:30am  
- Review ED Performance Evaluation Process and Participation  | Council Meeting – May 22 –  
Council in the Community –  
Pictou Landing First Nation  
**Big Issue: Review of Strategic Plan**  
- Draft Annual Lawyer Report presented  
- PR Monitoring Report  
Other Activities  
- Complete Council Evaluation and ED Performance Evaluation Surveys  | Council Session – June 12 @ 1:00pm  
Other Activities  
- Main Call to the Bar – June 5 @ Pier 21 10:00am  
- REC Event Honouring Articled Clerks from Racialized & Indigenous Communities – Date TBD  
- Council Dinner – June 12  
- Annual Meeting – June 13 @ Schulich School of Law  
- Annual Lawyer Report filings due – June 30  
- All Fees due – June 30  |

### To be slotted in:
- Retroactive application of PRPPC Remuneration Policy
- Outcomes Measurement
- Regulatory Risk – next steps
- Communications strategy
- Communications Monitoring Report
Council Year: July 2019 – June 2020

Updated: August 9, 2019
## Objective

### 1. To improve the REGULATION AND GOVERNANCE of the legal profession

#### 1.1 Implementation of Legal Services Regulation and Legal Services Support

<table>
<thead>
<tr>
<th>Activities</th>
<th>Timelines</th>
<th>Outcomes</th>
<th>Indicators</th>
</tr>
</thead>
<tbody>
<tr>
<td>ED</td>
<td>December 2019 – 1st Tranche of law firms completed;</td>
<td>1.1.1 MSELP Rollout continues on track for implementation of 3-year cycle for completion by all firms</td>
<td>All firms are on a three-year cycle; 1st Tranche firms have a “Confidential Planner”</td>
</tr>
<tr>
<td>ED</td>
<td>February 2019 LSS Council (Update) May 2019 LSS Council Update November LSS Council Update</td>
<td>1.1.2 Legal Services Support team is established; 1.1.3 Processes and protocols established to assess ongoing member support</td>
<td>Membership has access to and is using LSS team; Process for measuring usage is established; Council reviews and considers data</td>
</tr>
<tr>
<td>Task Description</td>
<td>Responsible Entity</td>
<td>Timeframe</td>
<td>Status/Notes</td>
</tr>
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<td>--------------------------------------------------------------------------------</td>
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<tr>
<td>Council, Executive; PRPPC, COPCC, ED</td>
<td>December 2019</td>
<td>1.1.3 If amendments to Legal Profession Act are passed in the Legislature, timing dependent on legislative agenda</td>
<td>Regulations in support of approved amendments to LPA are adopted by Council</td>
</tr>
<tr>
<td>LOMC, ED</td>
<td>December 2019</td>
<td>1.1.4 Development of Succession Planning guidance and support is complete</td>
<td>Relevant resources, templates and education are in place to assist lawyers in creating and implementing succession plans</td>
</tr>
<tr>
<td>LOMC</td>
<td>December 2019</td>
<td></td>
<td>Checklists and guidelines for file retention and destruction are created and distributed to membership</td>
</tr>
<tr>
<td>1.2 Develop and promote restorative processes and approaches with</td>
<td>ED</td>
<td>Council update March 2019</td>
<td>Council has received training in restorative processes</td>
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209
<table>
<thead>
<tr>
<th>Council and Committees</th>
<th>Staff and Committee Chairs</th>
<th>developed and implemented within the Society, at Council and committees of Council</th>
<th>Training plan developed for educating committees on restorative processes</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Further training by December 2019</td>
<td></td>
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<tr>
<td>1.3 Ensure regulatory risk issues are at the forefront in all work of the society</td>
<td>ED</td>
<td>March 2019</td>
<td>1.3.1 Additional education sessions around regulatory risk are offered</td>
</tr>
<tr>
<td></td>
<td>Council, ED</td>
<td>May 2019</td>
<td>1.3.2 Preliminary risk information informs Council’s strategic planning and decision making on priorities</td>
</tr>
<tr>
<td></td>
<td>ED</td>
<td>November 2019</td>
<td>1.3.3 Tools developed for ensuring assessment of regulatory risks is considered in committee work</td>
</tr>
<tr>
<td>1.4 Develop and promote an outcomes measurement lens in</td>
<td>ED</td>
<td>March 2019 and ongoing</td>
<td>1.4.1 Education session on Outcomes Measurement developed and delivered</td>
</tr>
<tr>
<td>1.4.2 An outcomes measurement lens is applied by Council to strategic planning</td>
<td>2019-2022 Strategic Plan includes objectives and measurable outcomes</td>
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<tr>
<td>1.4.3 Council and Committees consider and incorporate measurable outcomes in work plans and projects.</td>
<td>All Committees have workplans that have clear and measurable goals and objectives</td>
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<tr>
<td>1.5 A Trust Assurance Program and Regulations are in place that reflect the Society’s Triple-P approach.</td>
<td>Updated Trust Assurance Program in place.</td>
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<thead>
<tr>
<th>1.4.2 An outcomes measurement lens is applied by Council to strategic planning</th>
<th>2019-2022 Strategic Plan includes objectives and measurable outcomes</th>
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<tr>
<td>1.4.3 Council and Committees consider and incorporate measurable outcomes in work plans and projects.</td>
<td>All Committees have workplans that have clear and measurable goals and objectives</td>
</tr>
<tr>
<td>1.6 Continue to develop and support budgets using 3-year forecasting, sound financial management and reporting</td>
<td>Finance Committee</td>
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<tr>
<td>Finance Committee</td>
<td>Proposed policy and regulation changes brought to Council regularly</td>
</tr>
<tr>
<td><strong>2. To promote, support and improve Administration of Justice in the Nova Scotia Legal System</strong></td>
<td><strong>2.1 Promotion of access to legal services</strong></td>
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<tr>
<td></td>
<td>COPCC</td>
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<td>COPCC; PRPPC</td>
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<tr>
<td>Section</td>
<td>Details</td>
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<tr>
<td>2.2</td>
<td>Promotion of Substantive Equality and Freedom from Discrimination in Delivery of Legal Services and the Justice System</td>
</tr>
<tr>
<td></td>
<td>Standards Committees</td>
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<tr>
<td>2.3</td>
<td>Engagement with justice sector players and equity-seeking communities to enhance access to legal services and the justice system</td>
</tr>
<tr>
<td></td>
<td>ED</td>
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<tr>
<td>2.4 Establishment of and support provided to the TRC Working Group in response to TRC Call to Action #27</td>
<td>TRCWG; FLSC TRC Working Group, REC</td>
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<tr>
<td>2.4.1 Planning continued for education and materials to be developed which reflect a response to Call to Action #27</td>
<td>TRCWG report is a standing item on Council agenda</td>
</tr>
<tr>
<td>2.4.2 Provide prompt, supportive and substantive support to the TRC Working Group and the Racial Equity committee as they complete their own TRC work</td>
<td></td>
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<tr>
<td>2.5 Promotion of Equity, Diversity and Inclusion in the Legal Profession</td>
<td>Equity Committees, GNC; ED</td>
</tr>
<tr>
<td>2.5.1 Council will leverage its education, experience and networks to promote equity, diversity and inclusion in the legal profession</td>
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<tr>
<td>3. Additional Strategic Activities</td>
<td>3.1 Development of Society Strategic Plan for 2019-2021</td>
</tr>
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<tr>
<td></td>
<td>Strategic Planning Steering Committee, Consultant</td>
</tr>
<tr>
<td>3.2 Review of bar admission training program</td>
<td>Director of Education and Credentials, Credentials Committee</td>
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# Engagement Calendar 2019-2020

<table>
<thead>
<tr>
<th>JULY</th>
<th>AUGUST</th>
<th>SEPTEMBER</th>
<th>OCTOBER</th>
</tr>
</thead>
<tbody>
<tr>
<td>• July 10, 4:30pm: Kings County Bar visit</td>
<td></td>
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<td>• September 20, 10 am: Antigonish-Guysborough County Bar visit, Nova Scotia Legal Aid Office</td>
<td>• October 10, 12:00pm: Cumberland County Bar visit, Savoie Kitchen, Amherst</td>
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<td>• September 21: Western County Bar visit (at the Western County Bar AGM – The Villages of Mountain Gap Resort)</td>
<td>• October 23, 12:00pm: Pictou County Bar visit, New Glasgow Swiss Chalet</td>
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<td>• September 26, 4:30pm: Wickwire Memorial Lecture - Room 105, Weldon Law Building</td>
<td>• October 24, 10:00am: Treaty rights education session – Hotel Halifax</td>
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<thead>
<tr>
<th>NOVEMBER</th>
<th>DECEMBER</th>
<th>JANUARY</th>
<th>FEBRUARY</th>
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<tbody>
<tr>
<td>• November 22, 4:00pm: Recognition Reception, Bluenose Room, Hotel Halifax</td>
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<th>MARCH</th>
<th>APRIL</th>
<th>MAY</th>
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*To be added: other County Bar visits, Law Firm visits, Posthumous Bar call, other Society events*
MEMORANDUM TO COUNCIL

From: Carrie Ricker, President
Date: September 27, 2019
Subject: President’s Report

Greetings,

As we transition from summer to fall, it is a time of transition for the Society as well. Our new Strategic Goals and Objectives have been approved and the work now begins of implementing this ambitious plan.

Encouraging and facilitating two-way engagement with the membership is a key objective of the new plan. You will note Council materials now include an Engagement Calendar outlining upcoming meetings, events and activities that offer the opportunity for direct engagement with members and communities. I would encourage everyone to seek opportunities to participate in as many of these activities as possible.

In September, Society staff and I will be meeting with the Antigonish, Guysborough and Western Counties Bar Associations and members, including at the latter’s Annual General Meeting. LSS Staff will also be presenting guidance on succession planning for members at that event. Meetings are also scheduled with the Pictou and Cumberland County Bars for October, and an update on these meetings will be included with my November report.

Again, along the theme of transitions and new beginnings, I was honoured to attend the opening day of classes at the Schulich School of Law at Dalhousie University to provide brief remarks about the development of professional identity. I focused on the benefits of professional identity, including compassion, empathy, and collaboration, and the value in encouraging and highlighting the voices of others. Later that week, I was equally honoured to represent the Society at the ceremony celebrating the appointments of the Hon. Justice Deborah K. Smith as Chief Justice of the Supreme Court of Nova Scotia and the Hon. Samuel Moreau to the Supreme Court of Nova Scotia (Family Division).

The Executive Director and I also attended a meeting in August with the Minister of Justice, the Deputy Minister and representatives of the Department of Justice to discuss shared priorities including continuing work to increase diversity and inclusion, education
and training in relation to cultural competence and proficiency, and opportunities for future collaboration on access to justice issues. We look forward to continuing these discussions.

Representatives from the Truth and Reconciliation Working Group will be presenting to Council at its September meeting and will provide an update on upcoming education and training sessions, including a session scheduled for October 24 in relation to treaty rights. The session will be open to all members and we hope to have it available for streaming. I hope that all Council members will be able to attend.

The evening before our upcoming September council meeting is also the annual F.B. Wickwire Memorial Lecture in Professional Responsibility & Legal Ethics, co-sponsored by the Schulich School of Law and the Society. This year’s panel of speakers will explore "The Ethical and Professional Responsibilities of Business Lawyers: Business, Human Rights, and the Sustainable Development Goals.", looking at ways that businesses can promote creativity and innovation to address increasing sustainability concerns, while also ensuring compliance with ethical and legal requirements. The lecture will take place in Room 105 at the Schulich School of Law on Thursday September 26, 2019, from 4:30 PM to 6:30 PM. It is free and open to everyone.

For the first time, the Canadian Association of Black Lawyers (“CABL”) is hosting its Continuing Professional Development Conference and a Gala Dinner in Halifax. In recognition of CABL’s 23rd anniversary, the conference will take place on Friday, October 18, 2019, and the gala on Saturday, October 19, 2019, at the Halifax Convention Centre. Angela Simmonds, as the Society’s Equity Manager, has been part of the organizing of the conference and gala. As part of the Gala celebration, there will be an acknowledgment of the 30-year anniversary of the Schulich School of Law, Indigenous Blacks & Mi’kmaq Initiative (IB&M). If you are able to attend, more information and registration is available at www.cabl.ca/events.

Also in October will be the Federation of Law Societies of Canada (FLSC) conference and meetings taking place in St. John’s, Newfoundland. You will recall that FLSC President Ross Earnshaw highlighted at the July meeting that the conference theme this year is lawyer wellness. Topics for discussion at the meeting of the Societies’ Presidents and Vice-Presidents are anticipated to focus on strategies for regulators to improve equity, diversity and inclusion in the profession. The Federation Council will be looking at a number of issues, including recommended changes to the Model Code of Professional Conduct to add a reference to technological competence to the commentary to Model Code 3.1-2 (Competence). Further updates to come in November.

As always, if anyone has any questions, concerns or ideas, please reach out!
MEMORANDUM TO COUNCIL

From: Tilly Pillay QC, Executive Director
Date: September 27, 2019
Subject: Executive Director’s Report

Over the summer, we have been focussing on the year ahead and how to turn our Strategic Goals and Objectives into action.

You will see a new version of Council’s Activity Plan for the year in the meeting materials. We hope it is more user friendly for Council and also provides more transparency as to what we hope to accomplish and how we will get there. Your feedback will be crucial in shaping that document as we move forward.

Our support of the TRC Working Group and Equity initiatives have continued since my last report and we have made some concrete strides - in having subgroups set up to focus on some of the work plan items and devising an education program for the next year. You will hear more details about this work from those directly involved.

We are excited by the Equity Lens Toolkit that Angela and her team have put together and hope that it will be a helpful starting place for ourselves as well as our members.

Another key focus for us is developing a communications and engagement strategy in relation to both our members and the public. Our revamped website will be part of that strategy, as well as all of us taking a leadership role in sharing with others what we do at the Society as well as obtaining feedback from them as to how we can do things better.

Finally, we have seen and will continue to see some employee changes in the next few months. Firstly, Jane Willwerth is going to be acting as our Governance Advisor for the next year, so you will see her at Council meetings and supporting us in our work throughout. We are very excited to have Jane take on this role - her skills and knowledge of the organization will be a huge asset to us as we embark on your new three-year plan.

Secondly, we will begin recruitment in October to fill the role of Director, Professional Responsibility, as Victoria has announced her retirement. We will keep you posted on developments as they occur.

I look forward to a busy and productive year ahead!
MEMORANDUM TO COUNCIL

From: Code of Professional Conduct Committee

Date: September 20, 2019

Subject: Multidisciplinary Practice Project Update

For: Approval Introduction Information

Recommendation/Motion:

This memo is to update Council on the work of the Code of Professional Conduct Committee (CPCC) with respect to developing a framework to permit operation of multidisciplinary practices (MDPs) in NS.

Background

In Council’s 2016-2019 Strategic Plan, it directed the CPCC to consider whether permitting the development of MDPs in NS would align with the Society’s Regulatory Objectives, Council’s Strategic Directions and the public interest. The CPCC provided a comprehensive report on its research and made recommendations in January 2019 (attached). At that time, Council expressed support for the committee’s recommendations, and gave approval for it to continue to research and develop a framework for MDPs in NS.

In March 2019, Council engaged in an education workshop focused on understanding concepts of regulatory risk, which included an exercise in applying different lenses (Triple P, risk, equity & access) to the MDP project. Once again, Council expressed support for MDPs, while remaining curious about how they may both foster innovation in and potentially support access to affordable legal services. It was agreed that the Objective is:

To create a high level regulatory and policy framework to support authorization of MDPs in Nova Scotia by January 2020, including amendment of Chapter 3.6-7 of the Code of Professional Conduct respecting fee sharing.

The Outcome was confirmed to be:

MDPs are permitted to provide legal and other services in Nova Scotia and to share professional fees.

Following the March meeting, the CPCC developed and approved a Project Charter and Plan for Development of MDPs (attached). This sets out the project scope, purpose, objectives and outcomes, deliverables, timeframe, success factors, risks and dependencies.
Council’s new 2019-2022 Strategic Plan has confirmed development of MDPs as a Strategic Goal:

**Goal #1: The Society regulates the legal profession in the public interest in a proactive, principled and proportionate manner. We will:**

...  
- Identify and remove regulatory barriers to support innovation in the delivery of legal services;  
- Explore, and where appropriate, support the viability of innovative models of legal services delivery (e.g. MDPs, “sand boxes”)

**Assessment**

The CPCC has been working through the various policy issues identified in the January 2019 memo to Council, with assistance from Crispin Passmore, a consultant in regulatory reform formerly with the Solicitors’ Regulatory Authority in the UK. To date, general consensus has been reached that the following policy recommendations should ultimately be referred to Council for consideration:

i. There should not be a requirement for majority ownership by lawyers in an MDP, consistent with other jurisdictions;  
ii. Lawyers should only be permitted to work with other regulated professionals in an MDP, although the definition of ‘regulated professional’ will not be unduly restrictive;  
iii. Based on legal research, there appear to be adequate protections in the *Code* and in common law for the protection of confidentiality and privilege within MDPs;  
iv. The prohibition on fee sharing in the *Code* should be amended to exclude lawyers practicing in an authorized MDP;  
v. Members will need clear guidance as part of the authorization process to ensure that clients make informed decisions about the benefits and any potential risks to retaining a lawyer in an MDP; and  
vi. A Pilot Project will be recommended whereby those interested in operating through MDPs may be granted temporary license to do so, through a ‘sand box’ approach which may include waivers of certain regulations and/or compliance reports, to give us time to evaluate the public benefits and risks, make any necessary corrections, and adjust the final regulatory framework as appropriate.

The next main policy area for exploration relates to professional liability insurance, including excess insurance and a meeting was held in this regard with Dave Jackson, CEO of CLIA, and Lawrence Rubin, Director of LIANS, on August 20, 2019. In advance of this, research was conducted into how the other Canadian jurisdictions which permit MDPs deal with insurance coverage, and whether there are any lessons to be learned. The CPCC reviewed a research memo on this topic at their September 20, 2019 meeting.

A draft communications and engagement plan was also reviewed by the CPCC at this meeting, which includes the following:

- Ongoing updates to and feedback from Council  
- preliminary identification of potential stakeholders – these will include existing MDPs in Canada and a selection of international businesses including the large accounting firms, to assess interest; other professional regulators in NS; and our membership  
- outreach to other law societies including the Law Society of Alberta, who has recently expressed an interest in this initiative and our preliminary model, and  
- development of talking points for members of Council and the Executive when speaking about or responding to questions from members and stakeholders about MDPs [see below].
It should be noted that informal, exploratory discussions have already begun with accountants, the College of Physicians & Surgeons, and others.

With regard to next steps, once the discussions surrounding changes to the Bar Admission Course are finalized, and the course for 2019 is well underway:

i. the Education & Credentials Department will be asked to develop the authorization process for MDPs, similar to the current new law firm registration process

ii. the PRPPC will consider any regulatory or policy amendments needed to support the handling of complaints and investigations involving lawyers in MDPs, and

iii. the Legal Services Support Team will consider additions to the MSEL P self-assessment tool, resources, and be trained to respond to questions from those interested in pursuing an MDP.

In the meantime, Council is asked to engage with members and on committees in discussion of MDPs as a means for innovative delivery of legal services, and help members consider the possibilities this would present, as part of the stakeholder consultation process, and to provide this feedback to the Executive Director and/or Chair of the CPCC, Frank DeMont QC or Victoria Rees. The proposed Discussion Points are attached.

The CPCC will return to Council January 2020 with more details for the proposed framework of regulations, rules of ethics and policies to support MDPs in NS.

Attachments:

Draft v. 8 2019-09-20 MDP Project Charter
Development of MDPs in NS – Discussion Points
NSBS Development of Multidisciplinary Practices (MDPs)

1. Project Scope and purpose

MDPs offer advantages to clients who seek a more holistic solution to a problem or need in situations where a legal solution is only one component of the overall solution or approach; for example, small family business start-up. MDPs represent an innovative model for delivery of legal services in conjunction with complimentary services from other professionals, such as financial and estate management. Clients with life, personal and/or business problems can look to MDPs to have them avoided, managed or resolved under one roof. Imagine a MDP which offers under one roof childcare, counselling, family law, and financial management.

There are also many advantages to law firms and lawyers delivering legal services through a MDP: these include sharing of fees between professionals within the MDP (currently not permitted under the Code); sharing of office space and resources in cases where a sole practitioner cannot feasibly operate an office on their own; offering holistic problem-solving solutions to clients, thereby attracting new clients; and enhanced practice management systems through innovation and sharing systems and standards for client service.

For the Society, permitting legal services to be delivered through MDPs demonstrates in real terms our willingness to be receptive to and supportive of new models for legal services delivery, to help create opportunities for innovation and creativity for Nova Scotia lawyers and law firms, while supporting competent and ethical practice in the public interest. It says, “We are open for business!”

The purpose of this project plan is to develop and design the ethical, regulatory and policy framework to support authorization of MDPs in NS by the NSBS. This initiative supports Council’s Strategic Direction of ‘achieving excellence in regulation and governance’, and in particular, the goal of “developing processes to support legal services regulation, together with Council’s stated desire to help lawyers foster innovation in the delivery of legal services.” Council recently identified that innovation in the delivery of legal services is a priority, and therefore, continuing to work toward authorizing MDPs falls under Council’s future strategic plan.

Development of MDPs as a model for delivery of legal services supports the Society’s Regulatory Objectives, and in particular, the promotion of access to legal services, competence in the delivery of legal services, and demonstrates an appropriate form of proactive regulation.

Authorization of MDPs will be supported by the existing MSELP and Legal Services Support programs, as well as the new firm registration process.

Successful MDPs will:

- Offer holistic and innovative solutions to clients’ needs, through a combination of legal and other professional services
- Permit and support NSBS members in providing legal services in full compliance with the Legal Profession Act, Regulations and the Code of Professional Conduct
- Adopt new and/or innovative business models for delivery of legal services which support the MSELP
- Ensure that clients have the opportunity to make fully informed decisions about the services available to them, how their information and interests will be protected, and how the fees they pay will be allocated

Outside the scope of this project is development of a regulatory framework which seeks to regulate professionals other than lawyers. The NSBS is responsible for protection of the public and member support in relation to its own members. The NSBS will regulate the delivery of legal services by members within an MDP, and ensure that the manner in which the MDP operates supports the rules and regulations by which lawyers must conduct their practices.
2. Stakeholders

<table>
<thead>
<tr>
<th>NSBS Members</th>
<th>NSBS staff</th>
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<tbody>
<tr>
<td>Public and clients, including current MDPs</td>
<td>Other Law Societies and FLSC</td>
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<tr>
<td>Other regulated professionals</td>
<td>PRPPC, CPCC, Council</td>
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<td>Other regulators</td>
<td>LIANS, CLIA</td>
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3. Objectives and Outcomes

The following objectives will be attained upon completion of this project plan:

3.1 Code of Professional Conduct
 Amendments to the Code to support MDPs, including the rule prohibiting fee sharing, and any other amendments needed to create appropriate ethical standards and guidance unique to this model for delivery of legal services in the public interest. Proposed amendments will not fall offside the FLSC Model Code in spirit or effect.

3.2 Regulations
 Development of the regulatory framework for authorization and operation of MDPs.
3.3 Policy framework
Development of a policy framework to support the regulations and rules of conduct relevant to operation of MDPs.

3.4 Authorization process
In conjunction with the Education & Credentials staff, development of the regulations, procedures and forms required for registration and authorization of MDPs, addressing such matters as the public interest and risk management criteria for MDPs, the role of the Executive Director with respect to approval, the process for appeal of Executive Director decisions not to authorize, and ongoing reporting requirements. The basis upon which MDPs may be de-authorized will be clearly articulated; e.g. in relation to conduct concerns or failure to comply with reporting requirements.

3.5 Reports
Development of the authorization and ongoing reporting requirements for MDPS, including with respect to trust accounts operation, annual firm/MDP reports, compliance and risk-based reports, including reports from the Responsible Lawyer for the MDP.

3.6 Insurance
Confirmation from LIANS and CLIA of adequate professional liability coverage including excess insurance for lawyers providing legal services through an MDP model. This will have included liaison with other professional regulators regarding potential areas for coverage gaps and mitigation strategies.

3.7 Legal Services Support
In conjunction with the Legal Services Support Team, the self-assessment tool and resources will be reviewed to ensure support is available for this new model for delivery of legal services in terms of achieving the ten elements under the MSELIP.

3.8 Equity and access
Throughout the development process for MDPs, we will ensure that where applicable, the strategic goals in respect of fostering access to legal services, and supporting equity and access initiatives, are engaged and supported. This will have included liaison with the Gender Equity and Racial Equity Committees, and the Equity and Access Manager.

3.9 Conduct and compliance
The current regulations will be amended as required to ensure they address concerns with ethical violations, professional misconduct, conduct unbecoming, professional incompetence and professional incapacity in the practice of law by individual lawyers or teams of lawyers working within an MDP, in the public interest. We will have liaised with other professional regulators to develop protocols for information sharing in respect of complaints and investigations, as appropriate in the public interest. We will develop the basis upon which MDPs may be de-authorized and/or Administrators appointed e.g. in relation to conduct concerns or failure to comply with reporting requirements.

3.10 Stakeholder Consultation
Throughout this project, we will engage in timely stakeholder communications and consultations, including engaging with other professional regulators whose members may foreseeably have an interest in providing services in conjunction with lawyers in a MDP. We will engage with existing MDPs in Canada and elsewhere who may have an interest in expansion into NS.

4. Deliverables

<table>
<thead>
<tr>
<th>4.1 Code of Professional Conduct</th>
<th>Proposed amendments to Code re fee sharing. Other proposed amendments as required.</th>
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<tbody>
<tr>
<td>4.2 Regulations</td>
<td>Proposed amendments to the regulations, in particular Parts 4, 5, 7 and 9</td>
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<tr>
<td>4.3 Policy framework</td>
<td>Proposed policies to support regulatory amendments, including ED’s exercise of discretion to authorize, and sharing of information between regulators</td>
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4.4 Authorization process  
Application and other forms for on-line registration and authorization of MDPs, and appeals.  
Technology platform for maintenance of relevant data.

4.5 Reports  
Amended Trust Account Report and Accountant’s Report on Lawyer Trust Account Report for MDPs  
Annual MDP Report of Responsible Lawyer

4.6 Insurance  
Confirmation of LIANS and CLIA coverage (including excess insurance) for lawyers and clients of lawyers when legal services are delivered through a MDP, and any required policy amendments

4.7 Legal Services Support  
Enhancements to the self-assessment tool and resources to support lawyers in MDPs  
Development of pilot project to waive certain regulatory requirements in support of testing innovative approaches to legal services delivery, including MDPs

4.8 Equity & access  
Liaison with Equity and Access Manager, REC and GEC through development process

4.9 Conduct and compliance  
Proposed amendments to Part 9 regulations, and PR policies to address ethical violations and conduct concerns with members providing legal services through a MDP  
Proposed amendments to Part 10 regulations respecting operation of trust accounts and protection of client trust monies and property within a MDP  
Memoranda of understanding between other professional regulators in respect of sharing complaint information in the public interest

4.10 Stakeholder consultation  
Communications plan

5. Milestones and Timeframe  
March – October 2019

- Project Plan confirmed  
- CPCC and PRPPC work through policy issues (see CPCC memo to Council 2019-01-30, p. 17, attached)  
- CPCC considers specific Code amendments (Sept.)  
- MDP goal confirmed through May Strategic Planning process  
- Review of plan with Management Team and LSS  
- Engagement with LIANS and CLIA re insurance coverage (Aug.)  
- Council update with Project Charter (Sept)  
- Develop communications and engagement plan  
- Communication by Officers and ED with member stakeholders continues  
- Research re policy issues including privilege
November 2019 – July 2020
Draft authorization process developed
Ongoing engagement with LIANS and CLIA re coverage
Continued engagement with LSS re MSEL and SAT resources
CPCC and PRPPC completes consideration of policy issues
Technology re fillable forms and reporting implemented
Regulation amendments re Part 9 complaints and investigation drafted
Liaison with REC, GEC, E&C
Stakeholder engagement continues

August – December 2020
Regulatory, policy and Code framework for MDPs introduced to Council
Confirmation of LIANS and CLIA coverage
Pilot Project and waiver process developed (i.e. innovation sandbox)
Council approves framework
Pilot Project gets underway

6. Critical Success Factors
• amendments to the Code of Professional Conduct including the rule prohibiting fee sharing between
  lawyers and non-lawyers
• amendments to the Regulations policies and procedures to authorize and monitor compliance by
  MDPs
• agreements with other professional regulators to support effective regulation and compliance
• liaison with stakeholders including those likely interested in forming MDPs to identify and minimize
  regulatory and other barriers, and maximize success
• gaining buy-in from law firms to minimize fear of loss of business
• effective communications with members and the public to promote the benefits to all of MDPs
• adequate staff resources to support the project across the organization
• commitment by Council and Committee to achieve the agreed upon project timelines, and approve
  proposed amendments
• development of effective means for authorization of MDPs in the public interest
• achievable and measureable outcomes

7. Risks
• Breaking new ground in NS legal services delivery
• Developing a model different than other provinces
• The new regulatory structure for MDPs does not positively impact or improve delivery of legal services,
  and in fact discourages take-up
• Impact on national mobility regime
• Impact on regulation of interjurisdictional law firms
• Adopting new regulations and procedures to support and enforce compliance by lawyers within a MDP
• New model fails to adequately support competence and adherence to ethical rules by lawyers
  practicing in MDPs, thereby creating greater risk to the public interest

8. External Dependencies
• Interest and buy-in from other professionals
• Interest and buy-in from members

9. Resources
• Small budget for external consultancy assistance
• Staff and volunteer time
• Development of existing technology (adjunct to current in use) to facilitate approval and authorization
  of MDPs, and monitor compliance
Multidisciplinary Practices (MDPs)

Key Messages

- Nova Scotia lawyers should have the freedom to work within a wide range of businesses and legal service delivery models and remain bound by the same competence and professional responsibility rules and regulations.

- We want to remove outdated and unnecessary restrictions, while maintaining core individual requirements on lawyers to provide ethical and competent legal services.

- MDPs are an innovative legal services delivery model in conjunction with complimentary services from other professionals (e.g. financial and estate management).

- There are many advantages to law firms and lawyers delivering legal services through a MDP:
  
  o sharing of fees between professionals within the MDP (currently not permitted under the Code);
  o sharing of office space and resources in cases where a sole practitioner cannot feasibly operate an office on their own;
  o offering holistic problem-solving solutions to clients, thereby attracting new clients; and
  o enhanced practice management systems through innovation and sharing systems and standards for client service.

Background

Regulatory Approach & Strategic Priorities

- We have changed our regulatory approach over the last six years and have adopted a Triple P (proactive, principled and proportionate) and risk-focused approach to regulation. This change led to the development and implementation of the Management System for Ethical Legal Practice (MSELP) and the self-assessment tool (SAT).

- We (Society & Council) have focused on our strategic priority of supporting equity, diversity and access in the legal profession, as well as access to justice and to affordable legal services.

- Our new 2019-2022 Strategic Plan reaffirms our commitment to supporting both these goals, in part through supporting innovation in new models of delivery of legal services.
To achieve our goal of regulating in a “Triple P” manner, we will identify and remove regulatory barriers to support innovation in the delivery of legal services; and explore, and where appropriate, support the viability of innovative models of legal services delivery including multidisciplinary practices (MDPs).

We will continue to evolve our regulatory approach and remain relevant to the legal services market, and the wider environment in which lawyers operate.

It is essential that new models for delivery of legal services fully support lawyers in providing competent and ethical services to clients. This is a key goal of our MSEL.P.

The Society focuses on public protection and Triple P principles as priorities when assessing whether to authorize and implement a new delivery of legal services model.

Other Advantages of MDPs

- MDPs support clients who seek a holistic solution to a problem or need in situations where a legal solution is only one component of the overall approach (e.g. small family business start-up).

- Clients with life, personal and/or business problems can work with a MDPs to have them avoided, managed or resolved under one roof. Imagine a MDP which offers under one roof childcare, counselling, family law, and financial management.

- We want to create innovative opportunities for Nova Scotia lawyers and law firms, while supporting competent and ethical practice in the public interest.

- Currently, the Law Societies of BC, Quebec and Ontario permit MDPs and there has been take-up with no evidence of increased risk. Other law societies are now expressing an interest in MDPs.

Feedback

- Over the next number of months, we are seeking feedback from NS lawyers (and other stakeholders) to find out who might be interested in considering offering legal services in conjunction with other professionals, and in what areas.

- Your feedback will help us design a regulatory and policy framework that is relevant and appropriate.

- **Questions, thoughts & comments?** Please send us your thoughts and questions through Elaine Cumming, Society PR Counsel, or Frank DeMont QC, Chair of the Code of Professional Conduct Committee.
MEMORANDUM TO COUNCIL

From: Jacqueline Mullenger, Director, Education & Credentials
Date: August 15, 2019
Subject: Posthumous Call to the Bar
For: Approval

Introduction

Information X

The Society has been contacted by Patrick Shea of Gowling WLG to request that we commemorate WWI by holding a honorary call to the bar for law students who were killed in WWI. I am attaching a letter from Mr. Shea that was sent to Rebecca Hiltz-Leblanc who sits on the Credentials Committee. The law societies in Ontario, Alberta and Newfoundland have honoured the request and held honorary calls to the bar.

Two members of our Credentials Committee, Rebecca Hiltz-Leblanc and Mark Everett kindly agreed to take the lead on this project. They have reached out to the Chief Justice and asked if the court would be prepared to participate. Chief Justice Wood has responded favourably. I have attached the correspondence to this memo.

So far, 12 possible candidates have been identified. Rebecca and Mark are working to set a date for the call, as well as finding family members or others to attend on behalf of the student who will receive the honorary call. The hope is that the call will take place in November, if possible, to coincide as closely as possible with Remembrance Day.

Rebecca is a retired member of the Armed Forces and as a result, the committee is of the view that having her present the candidates to the court would be appropriate. Regulation 3.9.3 provides that candidates for admission must be presented to the court by a member of Council. In this case, however, the committee is of the view that if a member of Council commences the proceeding, they can then hand it over to Rebecca to read the biographies and present the candidates.

I am attaching the invitation and program used in Newfoundland to this memo to give you a preview of what a program might look like.
We would hope that as many members of Council as possible will attend the ceremony. The Society will hold a small reception at the conclusion of the ceremony.

We will advise you of the date as soon as it is set.

Attachments: 1. Letter from Gowling
2. Leblanc letter to Justice Wood
3. CJ Wood letter
4. NL invitation
5. NL program
6. NL insert
15 January 2019

Delivered by Mail

Rebecca L. Hiltz LeBlanc
Boyne Clarke LLP
P.O. Box 876
Dartmouth Main
Halifax, N.S. B2Y 3Z5

Re: Honorary/Posthumous Call for WWI Law Students

You are receiving this letter because you are on a list I prepared of lawyers with connections to the Canadian Forces.

In 2014, the Law Society of Ontario provided honorary calls to the Ontario law students who were killed in WWI. This was followed in 2017 with honorary calls for the Ontario law students who were lost in WWII. In 2016, the Law Society of Newfoundland and Labrador gave honorary calls to its law students who were killed in WWI or who were unable to continue their studies as a result of their service in WWI. This year, the Law Society of Alberta provided posthumous calls to its law students who were killed in WWI.

I have written to the Law Societies in British Columbia, Manitoba, Saskatchewan, Nova Scotia and Quebec—there were no law students from New Brunswick or Prince Edward Island killed in WWI—requesting that they do something in 2019 or 1920 to commemorate their own law students who were killed in WWI. Had these young men survived the War they would likely have been called in 1919 or 1920. 2019 and 2020 provide an opportunity to recognize the fallen law students on the 100th anniversary of what would have been their year of call. I think that it is fitting that we do something as a profession now, before another hundred years pass, to recognize the law students who were lost in WWI and their families.

I am hoping that you will reach out to the Law Society in your jurisdiction and encourage them to do something along the lines of what has been done in Ontario, Alberta, and Newfoundland and Labrador. With your support and assistance, I am hopeful that something can be done to commemorate the sacrifice of the hundreds of law students from across Canada who were killed in WWI and provide closure to their families.

Should you have any questions or require additional information please do not hesitate to contact me. Thank you for any assistance that you might be able to provide.

Sincerely,

E. Patrick Shea, LSM, CS

TOR_LAW 9720235\1

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June 27, 2019

The Honourable Chief Justice Michael J. Wood  
Nova Scotia Court of Appeal  
The Law Courts  
1815 Upper Water Street  
Halifax, NS  B3J 1S7

My Lord:

Re: Honourary/Posthumous Call for WWI Law Students and Articled Clerks

On November 11, 2018, the world marked the 100th anniversary of the Armistice which officially ended the fighting in the Great War. The month of June marked the 100th anniversary of the official end of the First World War with the signing of the Treaty of Versailles on June 28, 1919.

More than 650,000 women and men from Canada and Newfoundland served in the Great War. Of those who served, more than 66,000 lost their lives and more than 172,000 were wounded. Included among the brave service men and women were law students and articled clerks who put their studies and careers on hold to serve. Had they not lost their lives in the conflict, these law students and articled clerks most likely would have been called to the Nova Scotia bar in 1919 or 1920.

An initiative was undertaken in Ontario, Newfoundland and Labrador and Alberta to call law students who were killed, or unable to continue their studies as a result of their service in WWI. Similar initiatives are underway in various other provinces.

Nova Scotia would now like to do the same. The Credentials Committee of the Barristers’ Society has approved the call and we are now seeking Your Lordship’s permission to do so. We would like to hold the posthumous call in November of this year, at the Law Courts, with Your Lordship’s permission. The Credentials Committee is seeking the membership’s assistance to help identify law students and articled clerks who died in WWI and we have already compiled a list of twelve. We are seeking contact information for the students’ families, who we intend to invite to the call, if they are able to attend.

We would be pleased to discuss the initiative and planning with Your Lordship, should you wish to do so.
Thank you for Your Lordship's consideration of this request and we welcome the opportunity to discuss it further.

All of which is respectfully submitted.

BOYNECLARKE LLP

Rebecca L. Hiltz LeBlanc
RLL

NOVA SCOTIA POWER INC.

[Signature]

Mark G. Everett
Senior Solicitor
July 5, 2019

Rebecca L. Hiltz LeBlanc
Boyne Clarke
PO Box 876
Dartmouth NS B2Y 3Z5

Mark G. Everett
Nova Scotia Power Inc.
1223 Lower Water Street
Halifax NS B3J 3S8

Dear Ms. Hiltz LeBlanc and Mr. Everett:

Thank you very much for your letter of June 27, 2019 which I have shared with Chief Justice Deborah K. Smith of the Nova Scotia Supreme Court. We both think that this is a wonderful initiative and will give it our full support.

I have also spoken with Jennifer Stairs of the Court’s Executive Office and asked her to consider a communication strategy for this event.

It may be advisable to firm up a specific date and time in the near future in order to ensure that appropriate court facilities will be available.

I look forward to working with you on this interesting project.

Yours very truly,

Michael J. Wood

cc: Chief Justice Deborah K. Smith
Jennifer Stairs
Good Morning Everyone,

The following email has been sent to all membership.

S. Renee Whalen  
Administrative Assistant (Law Society)/Receptionist  
Law Society of Newfoundland & Labrador  
PO Box 1028  
196-198 Water Street  
St. John's, NL A1C 5M3  
Tel: (709) 722-4740  
Fax: (709) 722-2566  
Email: renee.whalen@lawsociety.nf.ca

Dear Law Society Members:

As you are aware, 2014 marked the 100th anniversary of the outbreak of the First World War. Remarkably, five students-at-law from our province suspended their studies to partake in the war effort but were either killed or gave up their prospective legal careers as a result: namely Cecil Bayly Clift; John Clift; William F.C. Hutchings; Janet M. Miller and Harris Rendell Oke.

Members of the Bar are invited to attend the Call to Bar Ceremony on **Friday, 14 October 2016 at 10:00 am**, which will be held in Court Room No. 1 at the Supreme Court of Newfoundland and Labrador, 309 Duckworth Street, St. John’s. At this Special Call, in addition to the regular Call to the Bar Convocation, the Court and the Law Society of Newfoundland and Labrador will recognize the extraordinary contributions of these five students-at-law, by ceremonially calling them to the Bar and by conferring on them the Honorary Degrees of Barrister-at-Law.

Following the Call to Bar Ceremony the Law Society is hosting a reception at The Fifth Ticket, 171 Water Street, St. John’s.

Please R.S.V.P. by contacting Erin Rowe by telephone at 758-0814 or by email at erin.rowe@lawsociety.nf.ca.

Thank you.  
Law Society of Newfoundland and Labrador
Friday, October 14, 2016

St. John's, Newfoundland and Labrador
Supreme Court of Newfoundland and Labrador
Court Room No 1

Call to the Bar Convocation

Law Society of Newfoundland and Labrador

Supreme Court of Newfoundland and Labrador

Executive Director of the Law Society
Don Downey

Linda Flint

Appointed Benchers
James E. Murnaghan, Q.C.

Janet W. Lowery

John Horgan

Robin K. Power

Adrianna E. Blundell

Amy A. Cosbie

Yvonne L. Appleby

Donna E. Anthony

Elected Benchers
R. Paul Burgess

Vice-President

Barry G. Fleming, Q.C.

President

Benchers of the Law Society

Supreme Court of Newfoundland and Labrador

Chief Justice of the Supreme Court

Lady Justice

P. S. Bowles

D. A. Cosgrove

D. P. Flett

D. G. Hall

D. R. Hunter

D. J. L. Williams

D. J. G. E. Wright
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**Candidates for Admission**

Shelley Organo
Registrar of the Supreme Court

President of the Law Society of Newfoundland and Labrador

The Honourable Raymond P. Whealan, Chief Justice

The second port of the Convocation, conducted as in the Constitution and during which a candidate receives the degree of barrister-at-law takes place according to the Convocation.

The new lawyers being in chambers, there is an opportunity to make an application. The next lawyer to address the Court is the Chancery Barrister, and the Chief Justice is the presiding judge.

The new lawyers are sworn in and receive their commissions.

The Convocation is conducted as in two parts.

The degree of barrister-at-law is conferred.

The Convocation is required to be conducted pursuant to the Constitution and during which a candidate receives the degree of barrister-at-law.

The new lawyers being in chambers, there is an opportunity to make an application. The next lawyer to address the Court is the Chancery Barrister, and the Chief Justice is the presiding judge.

The new lawyers are sworn in and receive their commissions.

The Convocation is conducted as in two parts.

The degree of barrister-at-law is conferred.
The President and Benchers

of

The Law Society of Newfoundland and Labrador

request the pleasure of your company at a

Reception

immediately following the Convocation

to be held at

The Fifth Ticket

171 Water Street

on Friday, the 14th day of October, 2016
Narrowing the Access-to-Justice Gap by Reimagining Regulation

Report and Recommendations from

THE UTAH WORK GROUP ON REGULATORY REFORM

August 2019
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INTRODUCTION: Toward Equal Access to Justice

“An estimated five billion people have unmet justice needs globally. This justice gap includes people who cannot obtain justice for everyday problems, people who are excluded from the opportunity the law provides, and people who live in extreme conditions of injustice.”¹ This predicament is not unique to third-world countries: According to the World Justice Project, the United States is presently tied for 99th out of 126 countries in terms of access to and affordability of civil justice.² An astonishing “86% of the civil legal problems reported by low-income Americans in [2016–17] received inadequate or no legal help.”³ Yet at the same time, access to justice should be the very hallmark of the American legal system. To quote Chief Justice John Marshall, the “essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws . . . .”⁴ And “[o]ne of the first duties of government is to afford that protection.”⁵

The Utah Judiciary, the branch of government with constitutional responsibility for the administration of justice, has been in the vanguard of initiatives aimed at solving the access-to-justice problem. The judiciary, under the leadership of the Utah Supreme Court (Supreme Court or Court) and the Judicial Council, has established state-wide pro bono efforts, moved to systematize court-approved forms and make them easily accessible online, established a new legal profession in Licensed Paralegal Practitioners (LPPs), and piloted an online dispute resolution model for small claims court. Each of these initiatives takes an important step toward narrowing the access-to-justice gap. But the most promising initiative, and the focus of this report, involves profoundly reimagining the way legal services are regulated in order to harness the power of entrepreneurship, capital, and machine learning in the legal arena.

In the latter part of 2018, the Supreme Court, at the request of the Utah State Bar (Utah Bar or Bar), charged Justice Deno Himonas and John Lund (past President of the Bar) with organizing a work group to study and make recommendations to the Court about optimizing the regulatory structure for legal services in the Age of Disruption. More specifically, the work

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⁴ Marbury v. Madison, 5 U.S. 137, 163 (1803).

⁵ Id.
Narrowing the Access-to-Justice Gap by Reimagining Regulation

group was charged with optimizing regulation in a manner that fosters innovation and promotes other market forces so as to increase access to and affordability of legal services. With this objective firmly in mind, members of the Utah court system and the Utah Bar, leading academics, and other experts, working closely together, have outlined what a new regulatory structure should look like. This new regulatory structure provides for broad-based investment and participation in business entities that provide legal services to the public, including non-lawyer investment in and ownership of these entities, through two concurrent approaches: (1) substantially loosening restrictions on the corporate practice of law, lawyer advertising, solicitation, and fee arrangements, including referrals and fee sharing; and (2) simultaneously establishing a new regulatory body (sometimes referred to as a regulator) under the supervision and direction of the Supreme Court to advance and implement a risk-based, empirically-grounded regulatory process for legal service entities. The new regulatory structure should also solicit non-traditional sources of legal services, including non-lawyers and technology companies, and allow them to test innovative legal service models and delivery systems through the use of a “regulatory sandbox” approach, which permits innovation to happen in designated areas while addressing risk and generating data to inform the regulatory process.6

Bridging the access-to-justice gap is no easy undertaking: it requires multi-dimensional vision, strong public leadership, and perseverance. It also requires timely action. And it is the view of the work group that the time for regulatory reform is now. Without such reform, it is our belief that the American legal system will continue to underserve the public, causing the access-to-justice gap to expand. Therefore, the work group respectfully urges the Supreme Court to adopt the recommendations outlined in this report.

THE UTAH WORK GROUP ON REGULATORY REFORM

The core mission of the work group is to optimize the regulatory structure for legal services in the Age of Disruption in a way that fosters innovation and promotes other market forces so as to increase access to and affordability of legal services.

In the fall of 2018 and winter of 2019, Supreme Court Justice Deno Himonas and John Lund, past president of the Utah Bar, gathered members of the Utah court system and the Bar, leading academics, and other experts to form the work group. Justice Himonas and Mr. Lund

6 The Utah work group is not going it alone in this space. Arizona, California, and the Institute for the Advancement of the American Legal System are all evaluating and moving toward regulatory reform in an effort to narrow the access-to-justice gap. See Brenna Goth & Sam Skolnik, Arizona Weighs Role of Non-Lawyers in Boosting Access to Justice, BLOOMBERG BIG LAW BUSINESS (Aug. 15, 2019), https://biglawbusiness.com/arizona-weighs-role-of-non-lawyers-in-boosting-access-to-justice (last visited Aug. 16, 2018); see also Institute for the Advancement of the American Legal System, Unlocking Legal Regulation, UNIVERSITY OF DENVER (forthcoming) (on file with author).
Narrowing the Access-to-Justice Gap by Reimagining Regulation

coa-chair the work group. In addition to Justice Himonas and Mr. Lund, the group is comprised of H. Dickson Burton, immediate past President of the Bar; Dr. Thomas Clarke, Vice President of Research and Technology for the National Center for State Courts (NCSC) (ret.); Cathy Dupont, Deputy Utah State Courts Administrator; Dr. Gillian Hadfield, Professor of Law and Professor of Strategic Management, University of Toronto Faculty of Law; Dr. Margaret Hagan, Director of the Legal Design Lab and Lecturer in Law at Stanford Law School; Steve Johnson, past Chair of the Court’s Advisory Committee on the Rules of Professional Conduct; Lucy Ricca, former Executive Director of and current Fellow with the Stanford Center on the Legal Profession; Gordon Smith, Dean of the J. Reuben Clark Law School at Brigham Young University and Glen L. Farr Professor of Law; Heather White, past Co-Chair of the Bar Innovation in Law Practice Committee; and Elizabeth Wright, General Counsel to the Bar.  

The impetus for the work group was a letter sent by Mr. Burton to the Court on behalf of the State Bar. The letter correctly noted that “[a]ccess to justice in Utah remains a significant and growing problem.” The Bar set forth its belief that, to help combat that problem, “a key step to getting legal representation to more people is to substantially reform the regulatory setting in which lawyers operate.” The Bar therefore requested that “the Court establish a small working group to promptly study possible reforms and make recommendations for revisions, possibly major revisions, to the rules of professional responsibility so as to permit lawyers to more effectively and more affordably provide legal services and do related promotion of those services.”

The work group understood from the outset that, as outlined in the letter to the Court, the charge involved “the consideration” and evaluation of “(1) the effect of modern information technology and modern consumer patterns on the current rules, (2) the potential value, in terms of making legal services accessible to clients, of non-lawyer investment and ownership in entities providing legal services and the related regulatory issues, (3) the prospect of broadening the availability of legal services through flat fee and other alternative fee arrangements not currently permitted by the rules, (4) whether there is continuing justification for the rules against direct solicitation, (5) whether and how to permit and structure lawyer use of referral systems such as Avvo in light of the rule against referral fees[,] and [(6)] the related trends and approaches being considered and/or implemented in other bars, such as Oregon and the [American Bar Association’s (ABA)] work in this area.”

7 A short biography for each member of the work group can be found at Appendix A. We would also like to extend a special thanks to Dolores Celio, Judicial Assistant to Justice Himonas, and Kevin Heiner (J.D. 2018, Columbia Law School) and John Peterson (J.D. 2016, Harvard Law School), law clerks to Justice Himonas, for their invaluable help researching, writing, and editing this report.

8 A copy of Mr. Burton’s letter is attached at Appendix B.
THE NEED FOR REGULATORY REFORM TO ADDRESS THE ACCESS-TO-JUSTICE GAP IN THE AGE OF DISRUPTION

Nelson Mandela poignantly observed that “[a] nation should not be judged by how it treats its highest citizens, but its lowest ones.” In the United States, millions of our citizens who experience problems with domestic violence, veterans’ benefits, disability access, housing conditions, health care, debt collection, and other civil justice issues cannot afford legal services and are not eligible for assistance from the civil legal aid system. This failure affects not only low-income people, but wide swaths of the population. The inability of these people to seek and obtain a remedy through the courts or through informal dispute resolution processes undermines the operation of the rule of law. Our justice system should be judged harshly by this failure.

This failure, however, should not be laid at the feet of lawyers. As a profession, lawyers have and continue to give generously of their time and money in an effort to mind the gap. But, as history has shown, we cannot volunteer or donate the problem away. Likewise, minor tweaks, while often helpful, are just that—minor. Serious reform requires recognition that our existing regulatory approaches are not working. And they are not working because they are not risk-sensitive and market-driven. Instead, they attempt to solve potential problems by imagining what could possibly go wrong and then dictating the business model for how legal services must be provided. This protectionistic approach has had catastrophic effects on access to justice. What follows is an examination of why and how we must shift from such a prescriptive approach based on abstract risk considerations to an outcomes-based and risk-appropriate paradigm.

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9 NELSON MANDELA, LONG WALK TO FREEDOM 23 (1994).
10 See, e.g., GILLIAN K. HADFIELD, RULES FOR A FLAT WORLD: WHY HUMANS INVENTED LAW AND HOW TO REINVENT IT FOR A COMPLEX GLOBAL ECONOMY 179 (2017).
The Access-to-Justice Gap

In this report, we describe the “access-to-justice gap” as the difference between the legal needs of ordinary Americans and the resources available to meet those needs. As noted, the civil justice system in the United States currently is tied for 99th out of 126 countries in terms of access and affordability.\(^{11}\) And the United States has consistently shown poorly when it comes to access and affordability of civil justice: in 2015, the U.S. ranked 65th out of 102 countries\(^ {12} \); in 2016, 94th out of 112\(^ {13} \); and in 2017-2018, 94th out of 112.\(^ {14,15} \) Without access to justice, “people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.”\(^ {16} \) In the U.S., many people “go it alone without legal representation in disputes where they risk losing their job, their livelihood, their home, or their children, or seek a restraining order against an abuser.”\(^ {17} \)

The access-to-justice gap is especially acute among low-income Americans. In 2017, the Legal Services Corporation (LSC) contracted with NORC at the University of Chicago to explore the extent of the access-to-justice gap. NORC conducted a national survey of “low-income households” (i.e., households at or below 125% of the Federal Poverty Level (FPL)) and analyzed data from LSC’s 2017 Intake Census, through which 133 LSC grantee programs “tracked the number of individuals approaching them for help with a civil legal problem whom they were unable to serve, able to serve to some extent (but not fully), and able to serve fully.”\(^ {18} \) The Census Bureau estimates that the number of people living below the FPL is about 60 million

\(^{15} \) The World Justice Project generates these rankings using data generated from questionnaires. The questionnaires are sent to people that the World Justice Project has identified as local experts. The responses to the questionnaires are codified as numeric values, normalized, and then subjected to a series of tests to identify possible biases and errors. The data are also subjected to a sensitivity analysis to determine the statistical reliability of the results. The data are then converted to country scores and rankings that represent the assessment of more than 120,000 households and 3,800 legal experts across the countries included in the rankings. See WORLD JUSTICE PROJECT, Rule of Law Index 2019, https://worldjusticeproject.org/sites/default/files/documents/WJP_RuleofLawIndex_2019_Website_reduced.pdf (last visited Aug. 12, 2019) (explaining methodology for the World Justice Project Rule of Law Index).
\(^{18} \) Id.
people, including roughly 19 million children. The three key findings of the report about this population are equal parts fascinating and disturbing:

1. Eighty-six percent [86%] of the civil legal problems faced by low-income Americans in a given year receive inadequate or no legal help;
2. Of the estimated 1.7 million civil legal problems for which low-income Americans seek LSC-funded legal aid, 1.0 to 1.2 million (62% to 72%) receive inadequate or no legal assistance; and
3. In 2017, low-income Americans will likely not get their legal needs fully met for between 907,000 and 1.2 million civil legal problems that they bring to LSC-funded legal aid programs due to limited resources among LSC grantees. This represents the vast majority (85% to 97%) of all the problems receiving limited or no legal assistance from LSC grantees.19

According to the LSC report, the most common civil legal problems relate to health (41% of low-income households) and consumer-finance (37% of low-income households) issues. Several other categories of civil legal problems—rental housing, children and custody, and education—affected more than one-fourth of low-income households.20

In a study conducted in 2015, two years before the LSC report, NCSC looked at the access-to-justice gap by examining the non-domestic civil caseloads in 152 courts in 10 urban counties. The resulting report, The Landscape of Civil Litigation in State Courts [hereinafter the Landscape],21 showed that civil litigation predictably clusters around a few subjects (debt collection, landlord/tenant cases, and small claims cases involving disputes valued at $12,000 or less) and results in very small monetary judgments (“three-quarters (75%) of all judgments were less than $5,200”), suggesting that, “[f]or most represented litigants, the costs of litigating a case through trial would greatly exceed the monetary value of the case.”22 Not surprisingly then, at least one party was self-represented in most cases (76%), proving that “[t]he idealized picture of an adversarial system in which both parties are represented by competent attorneys who can assert all legitimate claims and defenses is an illusion.”23 A majority of cases were disposed of through default judgments or settlements.24 The report concluded, “[t]he picture of

19 Id.
20 Id.
21 Civil Justice Initiative, The Landscape of Civil Litigation in State Courts, National Center for State Courts, https://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx (last visited Aug. 12, 2019). The “Landscape dataset consisted of all non-domestic civil cases disposed of between July 1, 2012[,] and June 30, 2015[,] in 152 courts with civil jurisdiction in 10 urban counties. The 925,344 cases comprise approximately five percent (5%) of state civil caseloads nationally.” Id.
22 Id.
23 Id.
24 Id.
Narrowing the Access-to-Justice Gap by Reimagining Regulation

civil litigation that emerges from the Landscape dataset confirms the longstanding criticism that the civil justice system takes too long and costs too much.” The result is predictable: “[M]any litigants with meritorious claims and defenses are effectively denied access to justice in state courts because it is not economically feasible to litigate these cases.”

Raw data from the Third District Court for the State of Utah suggest that its caseload tracks the caselogs studied in the Landscape report. In 2018, 54,664 civil and family law matters were filed in the Third District. Of these cases, 51% were debt collection, 7% were landlord/tenant, and approximately 19% were family law cases. Moreover, the data show that the idealized adversarial system in which both parties are represented by competent attorneys is not flourishing in Utah: At least one party was unrepresented throughout the entirety of the suit in 93% of all civil and family law disputes disposed of in the Third District in 2018.

And the public is taking notice. In the 2018 State of the State Courts-Survey Analysis commissioned by NCSC, “[a] broad majority (59%) say ‘state courts are not doing enough to empower regular people to navigate the court system without an attorney.’” And “[o]nly a third (33%) believe courts are providing the information to do so.

The Supreme Court and the Judicial Council are resolutely working toward narrowing the access-to-justice gap. To this end, they have established a statewide pro bono system to improve the delivery of free legal services to needy parties; established a new profession—the LPP—to deliver legal services in debt collection, landlord/tenant, and family law matters; and piloted an online dispute resolution model in small claims court. These efforts are important and should be supported and expanded. But they are not enough. As NCSC recognized in the Landscape, “civil justice reform can no longer be delayed or even implemented incrementally through mere changes in rules of procedure.” What “is imperative [is] that court leaders move with dispatch to improve civil case management with tools and methods that align with the

25 Id. A legal needs survey conducted by New York in 2010 demonstrates just how stark this problem is. For example, the New York Task Force found that, in New York City, 99 percent of tenants are unrepresented when faced with eviction and homelessness. The TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, Report to the Chief Judge of the State of New York 17 (Nov. 2010), http://ww2.nycourts.gov/sites/default/files/document/files/2018-04/CLS-TaskForceREPORT.pdf (last visited Aug. 12, 2019). In consumer credit card debt collection matters, 99 percent of New Yorkers were unrepresented, while 100 percent of the entities bringing the collections were represented. Id. at 16.

26 The data set forth in this paragraph were provided by court services personnel for the Administrative Office of the Courts of Utah.

27 For purposes of this report, the Third District Court includes all adult courts, including justice courts, in Salt Lake, Summit, and Tooele Counties.


29 Id.

realities of modern civil dockets to control costs, reduce delays, and ensure fairness for litigants.” And, perhaps, if we move efficiently and meaningfully enough, we can avoid a harsh but accurate assessment of our civil justice system by future generations.

**The Age of Disruption**

We live in an age where disruptive innovation is occurring non-stop. So-called “incumbent” institutions must continuously innovate to maintain and protect their positions and functions in society. The justice system is no exception. The shift of most court civil business to cases involving self-represented litigants, the rise of average education levels, and the unaffordability of lawyers has driven a new market for legal services serviced partly by non-traditional providers, which pushes the boundaries of what is the unauthorized practice of law.

Courts have struggled to adjust to a world in which unrepresented litigants are the norm. Many cases resolve by default or by failures to comply with required court processes. Judges either require special training to facilitate cases or must create special dockets where the rules of evidence are suspended. Civil and family caseloads are dropping as lawyers become ever more expensive and some litigants decide to proceed without assistance. At the same time, alternative providers of dispute resolution are enticing more and more litigants away from the courts at both the high end (complex civil cases) and the low end (parking tickets, consumer debt, simple divorces, etc.).

Technology has been the leading force in disrupting the way we acquire and consume goods, sleep, work, and play. And it has certainly already altered the practice of law as we have heretofore known it. It has enabled litigants to reduce the costs of litigation, from providing them with access to information about the legal system they did not previously have to pressuring lawyers to use tools that make the litigation process less costly. Automated forms have empowered litigants to represent themselves and helped generate effective documents ranging from transactional documents (such as those used in wills, real estate purchase contracts, and business formations) to litigation pleadings (such as those in divorces, debt collection actions, and contract disputes). Moreover, lawyers have been forced to compete by lowering prices by means such as using electronic communications and document storage and transmittal, eliminating copying costs, electronically Bates stamping discovery documents.

31 Id.
(reducing the time to do so from hours to seconds), and even employing artificial intelligence that can review thousands of pages of documents and pull relevant documents for review and use with greater accuracy than humans.

Lawyers have also benefitted from the rise of technology in several ways. Technology has enabled lawyers and law firms to dramatically cut costs in certain areas by streamlining communications with clients, simplifying and streamlining case management and billing, automating discovery, and enabling telecommuting—which allows lawyers to conduct business remotely rather than having to travel hundreds, if not thousands, of miles—just to name a few.

And, again, courts have not been immune from disruption. They, too, compete in this ever-changing world that continuing advances in technology bring. More access for litigants means a heavier workload for many already overburdened judges and their staff. Courts also have been required to handle more cases with unrepresented litigants, which increases the time spent reviewing arguments and theories and preparing rulings and orders that people without legal training can understand and follow without explanation from a lawyer. But not all disruption has created legal burdens. Disruption has also brought with it increases in efficiency, from electronic filing and storage to telephone conferences for discovery disputes and other non-dispositive matters. Information filed with the court is now more easily retrieved as well.

The potential benefits for access to justice from legal disruptions are significant. If legal services can be provided to litigants and those with potential legal problems in a much more cost effective way, then true access to justice becomes possible for millions of people who currently get no help and do nothing. Technology, especially online legal services, exponentially increases the potential to improve access to justice. But it also simultaneously increases the risk of legal and practical harm to users if those services are not of sufficient quality. However, the potential benefits are too large to pass up, so changing how legal services are regulated to both open the door to innovation and protect litigants and other users in responsible ways is critical.

Because of the assumed monopoly on the provision of legal services by lawyers (and a few related, sanctioned roles34), current regulation focuses on requirements for lawyers. If

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34 For example, Utah allows LPPs to assist clients in a limited number of areas in which the LPP is licensed. UTAH STATE BAR, Licensed Paralegal Practitioner, https://www.utahbar.org/licensed-paralegal-practitioner/ (last visited Aug. 12, 2019). Other states have similar programs. Washington allows limited license legal technicians to advise and assist people through divorce, child custody, and other family law matters, WASHINGTON STATE BAR ASSOCIATION, Limited License Legal Technicians (July 24, 2019), https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians (last visited Aug. 12, 2019), and permits limited practice officers to select, prepare, and complete certain approved documents used in loan agreements and the sale of real or personal property, WASHINGTON STATE BAR ASSOCIATION, Limited Practice Officers, https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-practice-officers (last visited Aug. 12, 2019). And Arizona
innovation brings a wide variety of legal services to consumers, then the strategy of regulating narrow roles will no longer suffice. There needs to be a way to regulate a broad array of legal services created and provided in different ways. This approach needs to be consistent, cost effective, and safe.

ACHIEVING REFORM—A ROADMAP TO SUCCESS

Fundamental reform of how legal services are regulated requires equal parts courage, caution, imagination, and deliberation. The current paradigm is deeply entrenched in the country’s justice system, in the hearts and minds of those who have dedicated themselves to the law, and even in our society at large. With rare exception, long gone are the days when an Abraham Lincoln could “read into” the practice of law. For over a century now, the entry point to be allowed to provide legal services has been territory controlled by law schools molding Juris Doctors (JDs) and courts and bar associations assessing the character and fitness and broad legal knowledge of those JDs. Oddly though, in most jurisdictions, once admitted—and subject only to continuing legal education and conduct requirements—an attorney may provide any legal service across the entire spectrum of needs, everything from writing a will or closing a major contract to defending a felony or filing a class action. While very few divorce lawyers would take on a major real estate deal, their licenses allow them to do just that. The regulatory scheme regulates the provider, not the service.

This approach, though faithfully followed for the past century, has not yielded a broad-based legal services industry that provides affordable legal services to all members of society. Far from it. And this approach is coming under more pressure on a daily basis. Technologies and market forces keep undermining the fundamental premise that lawyers, and lawyers alone, can provide suitable legal services as consumers are increasingly finding tools to meet their needs outside of the regulated legal profession.

As to what the future holds for legal services, hardly anything is clear. What the Greek philosopher Heraclitus said in the 5th century B.C. is as true now as it was then: “Life is flux.” The only constant is change. So, realistically, drafting a roadmap for the way forward is best viewed as attempting to chart a course in the right direction, watching how the winds blow, tending the lines carefully, and trimming the sails as needed.
To correctly set that course, we have studied other regulatory reform efforts and how they have fared. The most comprehensive example, and a good source of guidance and insight, is the United Kingdom’s Legal Services Act of 2007 (the LSA). We have provided a thorough discussion of the LSA and its strengths and weaknesses in Appendix C. The LSA is a broad-based reform that identifies key elements for success, such as independent regulators, a risk-based approach, use of guiding principles, and the articulation of the specific outcomes expected from the regulation. With these elements in place, room can be made both for new approaches by lawyers and for innovators with ideas for legal services that do not involve lawyers.

We have also spent a great deal of time thinking about, researching, and analyzing the rules of professional responsibility and the creation of a new regulator of legal services. Through our deliberative process we came to think of two tracks, both of which are critical to the path to successful reform.

**Track A: Loosening restrictions on lawyers**—To make room for new approaches by lawyers, we informed ourselves about movements across the county to loosen some of the restrictions on lawyers so that they can both compete and innovate. We collaborated with the Court’s Advisory Committee on the Rules of Professional Conduct. That committee participated in a design lab led by Professor Margaret Hagan of Stanford Law, which allowed for all who participated to imagine rule changes that would still fully protect clients without unduly hampering lawyers from harnessing the power of capital, collaboration, and technology. Our specific recommendations for changes to the Rules of Professional Conduct and the supporting rationale are set forth below.

**Track B: The creation of a new regulatory body**—Lawyers are no longer the only ones who provide legal services. There are now LPPs and other licensed paralegal professionals. There are companies providing online legal forms and assistance with court processes. There are referral services. There are even limited types of legal services being provided by other professionals, such as real estate professionals and tax preparers. And there are many others who would be fully capable of providing discrete legal services but who lack the required license to do so. If one considers the byzantine world of Social Security, there are undoubtedly clerks working for the Social Security Administration who, if they were allowed to, could give someone much better advice about how to process a claim than could all but a few of the lawyers licensed to practice law in Utah.

So should room be made for people other than lawyers and organizations other than law firms to provide certain legal services? The answer is clearly yes. We have concluded that allowing for greater competition, subject to proper regulatory oversight, will bring innovation

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36 Utah will license its first LPPs within the next few weeks.
to the legal services industry in ways that are not even imaginable today. Critically, we believe that allowing for that innovation will be the solution to the access-to-justice problem that plagues our country. The question is: How can we allow for that innovation without creating intolerable levels of risk for the consumers of legal services? Our full answer to that is the detailed recommendation set forth below and in Appendix D. But the key steps we recommend are first to create a regulatory body armed with a set of risk-based principles for regulation, and second to permit that body to allow providers to provisionally test and prove their services in a “regulatory sandbox” environment, where data can be gathered and innovation can be assessed and revised as needed before more permanent licensure is granted. This body would operate under the supervision and direction of the Supreme Court. Initial funding would be obtained through grants.37

Track A: Freeing Up Lawyers to Compete By Easing the Rules of Professional Conduct

Certain rules of professional conduct have been viewed by lawyers as impeding their ability to increase business and survive in the online world. Restrictions on lawyer advertising, fee sharing, and ownership of and investment in law firms by non-lawyers are concepts that need serious amendment if we are to improve competition and successfully close the access-to-justice gap.38 This is a step that we believe must be taken independent of the creation of a new regulatory body. Nor are we alone in this belief. “California has taken a step towards altering the role of lawyers after a state bar task force [in June 2019] advanced controversial proposals for new ethics rules that would allow non-lawyers to invest in law firms and tech companies to provide limited legal services.”39 And Arizona has recently followed suit.40

Lawyer Advertising

Traditionally, lawyer advertising was frowned upon as being undignified. Courts went so far as to say that advertising would undermine the attorney’s sense of self-worth and tarnish the dignified public image of the profession. This changed somewhat with the United States Supreme Court’s decision in Bates v. State Bar of Arizona, which recognized that the lawyer

37 By way of example, the Administrative Office of the Utah Courts should soon have the opportunity to enter into a Memorandum of Understanding (MOU) with the Institute for the Advancement of the American Legal System. As envisioned, the MOU would provide partial backing for this project. Implementation of the MOU would be subject to, among other items, the Court adopting the work group’s report and recommendations.
38 Some of these restrictions are already worked around and effectively bypassed through means such as litigation financing. By loosening these restrictions and bringing some of these workarounds within the purview of the new rules, we can ensure more effective regulation of those workarounds and provide better protection for consumers.
advertising ban in place in Arizona inhibited the free flow of information and kept the public in ignorance.\textsuperscript{41} The Court held that Arizona’s total ban on lawyer advertising violated the free speech guarantee of the First Amendment.\textsuperscript{42} This case opened the door to lawyer advertising across the country.

The \textit{Bates} Court did, however, allow states to ban false, deceptive, or misleading advertising, and to regulate the manner in which lawyers may solicit business in person. States can require warnings and disclaimers on advertising and impose reasonable restrictions on the time, place, and manner of advertising. And following the \textit{Bates} decision, most states included such restrictions in their rules of professional conduct. Utah was one of those states.

Despite \textit{Bates} and the many other court rulings since 1977 that removed restrictions on lawyer advertising, the belief on the part of some that lawyer advertising needs to be carefully constrained has persisted. As recently as 2013, the Bar submitted a petition to the Supreme Court requesting that lawyers be required to submit copies of all advertising and solicitations to a Lawyer Advertising Review Committee no later than the date of mailing or publishing of the advertisements or solicitations, so that the ads could be reviewed for appropriateness. The purpose of the proposed rule was to prevent Las Vegas-style advertising from creeping into Utah. Thankfully, the proposed rule was not adopted.

Last year, in recognition of the changing legal landscape, the ABA attempted to simplify the advertising and solicitation rules. Certain changes were made to the Model Rules of Professional Conduct, and states were encouraged to adopt similar rules. The Court’s Advisory Committee on the Rules of Professional Conduct has monitored these changes to the Model Rules and has a review and update of the Utah advertising rules on its agenda.

The Advisory Committee’s review includes an analysis of the purpose of the rules and the need to protect the public while simultaneously allowing the members of the public to be better-informed of the legal services available to them. The Committee must consider the reality that lawyers may advertise online and through attorney-matching services, pay-per-click ads, link-sharing, legal blogs, and social network accounts in order to promote services. The main concern should be the protection of the public from false, misleading, or overreaching solicitations and advertising. Any other regulation of lawyer advertising seems to serve no legitimate purpose; indeed, it is blunt, ex ante, and—like so many current regulations—neither outcomes-based nor risk-appropriate.

\textsuperscript{41} 433 U.S. 350, 365 (1977).
\textsuperscript{42} \textit{id.} at 384.
The Committee’s review of advertising standards is well underway and we understand that a proposal should be sent to the Court for its consideration within the next two months. We applaud the Committee’s efforts with respect to lawyer advertising.

**Lawyer Referral Fees**

Utah Rule of Professional Conduct 7.2 prohibits a lawyer from giving anything of value to a person for recommending the lawyer’s services or for channeling professional work to the lawyer. But use of paid referrals is one method for allowing clients to find needed legal services and one of the ways lawyers can find new clients. Again, this rule should be amended to balance the risk of harm to prospective clients with the benefit to lawyers and clients through an outcomes-based and risk-appropriate methodology.

**Ownership of Law Firms and Sharing Legal Fees with Non-Lawyers**

Non-lawyers have traditionally been prohibited from owning and controlling any interest in law firms. Utah Rule of Professional Conduct 5.4 provides that a “lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.” The rules also prohibit a lawyer from “practic[ing] with or in the form of a professional corporation or association authorized to practice law for a profit” if a non-lawyer owns any interest therein, if a non-lawyer is a director or officer or has a similar position of responsibility in the firm, or if a non-lawyer has a right to direct or control the professional judgment of the lawyer.

The ABA Ethics 2000 Commission vigorously debated the concept of non-lawyer ownership of law firms in 2000. The ABA House ultimately rejected a proposal to allow non-lawyer ownership of law firms. Since then, however, a number of jurisdictions have seen the need to reevaluate such proposals. In Washington, D.C., the rules of professional conduct now allow for non-lawyer ownership of firms under certain conditions. And as of June 2019, a state bar task force in California advanced a proposal that would allow non-lawyers to invest in law firms. Most notably, “[i]n a July 11 meeting, the Arizona task force voted to recommend...”

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43 Utah R. Prof’l Conduct 7.2(f).
44 Utah R. Prof’l Conduct 5.4(c).
45 Utah R. Prof’l Conduct 5.4(d).
46 D.C. R. Prof’l Conduct 5.4(b). Rule 5.4(b) permits non-lawyer ownership of firms if (1) the law firm has as its sole purpose the provision of legal services, (2) all persons having management duties of an ownership interest agree to abide by the rules of professional conduct for lawyers, (3) the managing lawyers in the firm undertake to be responsible for the non-lawyer participants, and (4) these conditions are set forth in writing. See id.
47 California has proposed two different amendments to its own rule 5.4. The first proposal is seen as an incremental evolution of the current rule. See State Bar of California Task Force on Access Through Innovation of...
scraping Rule 5.4 . . . in its entirety.” And, “[i]n a related move, the panel voted . . . to amend the state’s ethical rules to allow lawyers and nonlawyers to form new legal services businesses known as ‘alternative business structures.’” We believe the Arizona approach has much to offer. Indeed, we view the elimination or substantial relaxation of Rule 5.4 as key to allowing lawyers to fully and comfortably participate in the technological revolution. Without such a change, lawyers will be at risk of not being able to engage with entrepreneurs across a wide swath of platforms.

**Track B: The Creation of a New Regulatory Body**

Alongside the proposed revisions set forth in Track A, we propose developing a new regulatory body for legal services in the State of Utah. Rule revisions are necessary to propel any change, but our position is that wide-reaching and impactful change will only follow reimagining the regulatory approach. Therefore, as the Supreme Court moves forward with revising the rules of practice, we endorse the simultaneous creation of a new regulator, operating under the supervision and direction of the Supreme Court, for the provision of legal services.

The proposed regulator will implement a regulatory system:

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**LEGAL SERVICES, Recommendation Letter on Proposed Rule 5.4 [Alternative 1] (June 18, 2019),** [http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000024362.pdf](http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000024362.pdf) (last visited Aug. 12, 2019). The second proposal is much more comprehensive and is meant to create a major shift in how financial arrangements with non-lawyers are regulated. **See STATE BAR OF CALIFORNIA TASK FORCE ON ACCESS THROUGH INNOVATION OF LEGAL SERVICES, Recommendation Letter on Proposed Rule 5.4 [Alternative 2] (June 14, 2019),** [http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000024359.pdf](http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000024359.pdf) (last visited Aug. 12, 2019). This proposal allows for fee sharing between a lawyer or law firm and any person or organization not authorized to practice law if:

1. the lawyer or law firm enters into a written agreement to share the fee with the person or organization not authorized to practice law;
2. the client has consented in writing, either at the time of the agreement to share fees or as soon thereafter as reasonably practicable, after a full written disclosure to the client of: (i) the fact that the fee will be shared with a person or organization not authorized to practice law; (ii) the identity of the person or organization; and (iii) the terms of the fee sharing;
3. there is no interference with the lawyer’s independent professional judgment or with the lawyer-client relationship; and
4. the total fee charged is not unconscionable as that term is defined in rule 1.5 and is not increased solely by reason of the agreement to share the fee.

*Id.*


49 *Id.*
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1. Driven by clearly articulated policy objectives and regulatory principles (objectives-based regulation);
2. Using appropriate and state-of-the-art regulatory tools (licensing, data gathering, monitoring, enforcement, etc.); and
3. Guided by the assessment, analysis, and mitigation of consumer risk (risk-based regulation).\textsuperscript{50}

We suggest the following core policy objective for the new system: \textit{To ensure consumers access to a well-developed, high-quality, innovative, and competitive market for legal services.}

As the core policy objective indicates, the explicit goal of this approach is to develop a regulatory framework that allows, supports, and encourages the growth of a vibrant market for legal services in Utah and, ultimately, across the United States. At every regulatory step, the regulator should consider how its actions impact the core objective, choosing those paths that enhance, not diminish, the achievement of that objective. Potential impacts on the core objective, from either the regulator’s own decisions or from actions by participants in the market, will be measured and assessed in terms of risk to the core objective. The regulator will be guided by this primary question: What is the evidence of risk, if any, that this action will create in the consumer market for legal services? This is objectives-based, risk-based regulation.\textsuperscript{51}

\textbf{Examples:}

- \textit{What evidence do we see of consumer harm caused by improper influence by non-lawyer owners over legal decisions? What steps can we take to mitigate these risks in the market?}
- \textit{What do the data tell us about the risks of consumer harm from software-enabled legal assistance in an area such as will writing? Are the actual risks of harm more likely or more significant than the risks of a consumer acting on their own or through a lawyer?}\textsuperscript{52} How can the risks be mitigated?

\textsuperscript{51} Id.
\textsuperscript{52} In the U.K., for example, will writing is not a regulated legal activity. The government considered and ultimately rejected a proposal to make will writing a regulated legal activity because it found that there was not a sufficient showing that regulation was necessary or that other interventions could not address concerns around quality and service. See Catherine Fairbairn, \textit{Regulation of will writers, Briefing Paper No. 05683 16}, HOUSE OF COMMONS LIBRARY (Nov. 29, 2018), \url{http://researchbriefings.files.parliament.uk/documents/SN05683/SN05683.pdf} (last visited Aug. 21, 2019). The investigation by the government showed essentially the same error rate (about 1 in 4) in wills drafted by attorneys and non-attorney legal service providers. The error rate was the same across complex and simple wills. \textit{See LEGAL SERVICES CONSUMER PANEL, Regulating will-writing 3} (July 2011),
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- What do the data indicate about the risk of consumer harm from non-lawyers providing legal advice in the area of eviction defense? Is the risk of these kinds of harm more significant than the harm we currently see for pro se defendants? What steps should be required to ensure and maintain quality service?

- What are the data on the risks of cyber and data security to consumers of legal services? Where is the impact most likely and greatest, and what regulatory resources should be brought to bear?

This approach is meant to be open, flexible, and focused on the reality of the consumer experience with the law and legal services. The system we propose is designed specifically for the regulation of consumer-facing legal services and targeted at the risks posed to the purchasers of legal services. Opening the legal services market to more models, services, and competition will serve other important objectives including access to justice, the public interest, the rule of law, and the administration of the courts.

We propose development of the new regulatory system take place in two phases.

**Phase 1**

In Phase 1, the Supreme Court will set up an implementation task force much akin to the approach the Court took with respect to LPPs and online dispute resolution. The implementation task force will be responsible for, among other items, (1) obtaining funding for the regulator, primarily through grant applications, (2) recommending necessary rule changes to the Court, (3) creating and operating a Phase 1 regulator responsible for overseeing a legal regulatory sandbox for non-traditional legal services, (4) gathering and analyzing data and other information in order to evaluate and optimize the regulatory process, and (5) preparing a final report and recommendation to the Court regarding the structure of the Phase 2 regulator. We believe Phase 1 should last approximately two years.

In short, in Phase 1, the regulator will operate as a pilot and will focus on developing an empirical approach to objectives- and risk-based regulation of legal services. The regulator will operate within the Court as part of the implementation task force.

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53 The implementation task force may include representatives from the Court, from Bar leadership, and others with applicable expertise—including perhaps representatives from the legal technology sector.
During Phase 1, the regulator will operate alongside the Utah Bar, which will continue to have authority over lawyers and LPPs. The regulator will regulate non-traditional legal services: organizations offering legal services to the public that have ownership, a business structure/organization, or service offerings currently not authorized under Utah practice of law and professional conduct rules. Non-traditional legal entities could include: non-lawyer owned and/or managed corporations or non-profits or individuals/entities proposing to use non-lawyer human or technology expertise to provide legal assistance to the public. The regulator’s focus will be on the activity or service proposed and the risks presented to consumers by that activity or service.

Also during Phase 1, the regulator will oversee the limited market of legal entities admitted to participate in a legal regulatory sandbox. The regulatory sandbox is a policy structure that creates a controlled environment in which new consumer-centered innovations, which may be illegal (or unethical) under current regulations, can be piloted and evaluated. The goal is to allow the Court and aspiring innovators to develop new offerings that could benefit the public, validate them with the public, and understand how current regulations might need to be selectively or permanently relaxed to permit these and other innovations. Financial regulators have used regulatory sandboxes over the past decade to encourage more public-oriented technology innovations that otherwise might have been inhibited or illegal under existing regulations. In the legal domain, the United Kingdom’s Solicitors Regulation Authority (SRA) has also created a structure—the Innovation Space—that introduces a system of waivers of regulatory roles for organizations to pilot ideas that might benefit the public.

Establishing a legal regulatory sandbox is inherent to Phase 1 of our proposed new regulatory system. Although we are well aware that particular rules will need to be relaxed or

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54 Given the Bar’s expertise regulating lawyers, including in licensing and enforcement, the regulator may benefit from drawing on such expertise.

55 The United Kingdom’s Financial Conduct Authority created the first regulatory sandbox in 2016. Since then, it has overseen 4 cohorts of regulatory sandboxes to promote financial services innovation. The Monetary Authority of Singapore has run sandboxes to encourage experimentation with financial technology. Abu Dhabi’s Regulatory Lab set up a sandbox for financial technology that involved the Abu Dhabi Registration Authority, Financial Services Regulatory Authority, and the courts. Other financial technology sandboxes have been run in Australia, Mauritius, the Netherlands, Canada, Thailand, Denmark, and Switzerland. Some of the things being tested in financial sandboxes include new insurance, retirement, retail banking, investment, and retail lending offerings. In 2018, Arizona launched a regulatory sandbox for financial technology, specifically to promote entrepreneurship and investment around blockchain, cryptocurrencies, and other emerging technologies. See Arizona Attorney General, Welcome To Arizona’s FinTech Sandbox, STATE OF ARIZONA, https://www.azag.gov/fintech (last visited Aug. 21, 2019). And in May 2019, Utah launched its own financial technology sandbox. See Department of Commerce, Regulatory Sandbox, STATE OF UTAH, https://commerce.utah.gov/sandbox.html (last visited Aug. 21, 2019).

eliminated to permit innovation, we are less certain what might be on the other side of regulatory reform. What new regulations might be appropriate to ensure that new services do not generate unacceptable risks? Because the legal market has been so strictly limited, we cannot presently catalog the risks that might develop or the regulatory methods that might be effective to appropriately identify and manage those risks. Hence, the regulatory sandbox will be as much for the development of the regulator as for the development of the models, products, and services within. Below, we have put together the key features of our sandbox for Phase 1 of the project. These are features present in regulatory sandboxes around the world.

Three key features to the regulatory sandbox:

1. **Testing out what innovations are possible.** With the relaxation or elimination of the rules around unauthorized practice, fee sharing, and corporate practice of law, we can see how much and what kinds of new innovation might be possible in the legal sector. We expect to see innovations around business models (new financing, ownership or contracting models), services (new roles for experts in other fields, collaborating with lawyers), and technology (increased use of technology to offer legal advice and guidance, use of technologies such as artificial intelligence, blockchain, and mobile). Through the sandbox, we can learn what is possible, what benefits may be realized, and what risks these new offerings present. The sandbox enables the Court and the public to understand how much innovation potential there is in the legal ecosystem, beyond mere speculation that emerging tech has promise in the legal market if regulations were changed.

2. **Tailored evaluation plans focused on risk.** The sandbox model puts the burden on companies to define how their services should be measured in regard to benefits, harms, and risks. They must propose not only what innovation is possible, but also how it can be assessed. Risk self-assessment by companies participating in the sandbox will be a key requirement in order to further our regulatory goals.

3. **New sources of data on what regulation works best.** The sandbox will be the source for the new regulator’s data-driven, evidence-backed policy-making. Because sandbox participants gather and share data about their offerings’ performance (at least with the regulators, if not more publicly), the sandbox can help develop standards and metrics around data-driven regulation. This is particularly needed in the legal arena because we have so little data about how people engage with the legal world. It can incentivize more companies to evaluate their offerings through a rigorous understanding of benefits and
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harms to the public, and it can help regulators develop protocols to conduct this kind of data-driven evaluation.

Sandbox participants could be an accounting firm proposing to offer legal services provided by lawyers alongside its accounting services, a technology startup using AI-enhanced software to help consumers complete legal documents (wills, trusts, incorporations, etc.), or a non-profit proposing to allow its expert paralegal staff to offer limited legal advice to clients independent of lawyer supervision. To participate in the sandbox, each provider will have to agree to share relevant data with the regulator. The regulator will identify, measure, and assess potential consumer risk and then determine whether the provider will be permitted to participate in the sandbox and with what form of security (please see a more detailed outline of our proposed Phase 1 regulatory process at Appendix D). All consumer participants in the sandbox must provide informed consent. Over the course of the two-year Phase 1 sandbox, the regulator will build up its regulatory approach—in particular, its risk identification, quantification, and response approach.

Throughout Phase 1, the regulator will be in regular reporting and communication with the Supreme Court. It is the goal that, by the end of Phase 1, the regulator will have developed and refined a data-driven regulatory framework focused on the identification, assessment, mitigation, and monitoring of risk to consumers of legal services, and an enforcement approach designed to respond to evidence of consumer harm as appropriate to support the core objective. The regulator will then present a comprehensive report and proposal for Phase 2 to the Court for its review and approval.

Phase 1 needs from the Supreme Court include the following:

1. Establish the Phase 1 regulator as an implementation task force of the Court and delegate regulatory authority to set up and run the regulatory sandbox. The Court should also outline regulatory objectives and regulatory principles for the Phase 1 regulator. (Suggested principles may be found at Appendix D).
2. Establish by appropriate means that providers (including their ownership/management and their employees) approved to participate in the regulatory sandbox by the Phase 1 regulator are not engaged in the unauthorized practice of law in Utah.

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57 We wish to be quite clear that, as we have reinforced throughout the report, the regulator must be, and will be, subject to the supervision and direction of the Supreme Court.
3. Establish that licensed Utah lawyers will not be subject to discipline for entering into business with or otherwise providing services with providers approved by the Phase 1 regulator for participation in the sandbox.

Phase 2

In Phase 2, we anticipate some form of an independent, non-profit regulator with delegated regulatory authority over some or all legal services. However, we will not say much about Phase 2 in this report because we do not wish to put the cart before the horse. Phase 1 of this project allows for the carefully controlled research and development of objectives-based, risk-based regulation of legal services. Phase 2 may implement the regulatory approach across the Utah legal market more broadly.

It is our belief that the objectives- and risk-based regulatory approach should be the future of regulation for legal services in Utah, and indeed throughout the country. Utah has an opportunity to be a leader nationwide. Phase 2 could proceed in multiple different directions as long as the objectives-based, risk-based approach remains its key characteristic. The Court may determine that the regulator is best suited for entity regulation (i.e., regulation of non-traditional legal entities like companies) and should operate alongside the Bar, which will continue to regulate lawyers. It would then be up to the Bar, in cooperation with the Court, to assess whether and how it wants to implement objectives-based, risk-based regulation for lawyers.

The Court may, on the other hand, determine that the new regulator and the objectives-based, risk-based approach should be rolled out for all legal services in Utah. In that case, the Court will have to revise its delegation of authority to regulate the practice of law via Rule 14-102 from the Bar to the new regulator. The Bar could continue to function as a mandatory Bar with regulatory functions operated under the auspices of the Court, but now through the regulator. Alternatively, the Bar could function solely as a membership organization that awards professional titles and specialized practice certifications, maintains ethical standards,

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58 We also wish to be quite clear about the meaning of the word “independent.” By independent, we mean a regulator independent from management and control by those it regulates, i.e., lawyers. We do not mean independent of control of the Supreme Court. The independent regulator we propose in Phase 2 would, as the Bar is now, no longer be operating within the Court, but would, as the Bar also is now, still ultimately be answerable to the Court for achieving the core regulatory objective and would be subject to any requirements established by the Court.

59 The task force is aware that the Institute for the Advancement of the American Legal System presently intends to “develop a model for a regulatory entity that would focus on risk-based regulation for legal services and would operate across state lines.” Institute for the Advancement of the American Legal System, Unlocking Legal Regulation, UNIVERSITY OF DENVER (forthcoming) (on file with author).
engages in advocacy, and provides continuing education.\textsuperscript{60} It may be that those professional titles will be required by the regulator in certain oversight roles for legal service entities (e.g., Big Box Stores offering legal services to the public may be required to have Bar-approved lawyers in managerial roles) or that the Court will decide for public policy reasons that only Bar-approved lawyers may perform certain activities before the Court.

\textbf{CONCLUSION}

Decade after decade our judicial system has struggled to provide meaningful access to justice to our citizens. And if we are to be truly honest about it, we have not only failed, but failed miserably. What this report proposes is game-changing and, as a consequence, it may gore an ox or two or upend some apple carts (pick your cliché). Our proposal will certainly be criticized by some and lauded by others. But we are convinced that it brings the kind of energy, investment, and innovation necessary to seriously narrow the access-to-justice gap. Therefore, we respectfully request that the Supreme Court adopt the recommendations outlined in this report and direct their prompt implementation.

\textsuperscript{60} The professional titles offered by the Bar in this system could be market indicators of levels of education, qualification and, perhaps, service. It is possible the Bar could continue to tie access to titles and certification to ethical standards of service. However, the Bar would no longer have the authority to regulate the market for legal services and members of the Bar would be forced to compete in a larger market.
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APPENDIX A
DENO HIMONAS (CO-CHAIR)

Justice Deno Himonas was appointed to the Utah Supreme Court in 2015. For the decade prior, he served as a district court judge, where he was able to try hundreds of criminal, civil, and family law cases and run a felony drug court.

In addition to his judicial duties, Justice Himonas has taught at the S.J. Quinney College of Law at the University of Utah and has been a visiting lecturer at universities in Kiev, Ukraine. He is the 2017 Honorary Alumnus of the Year of the S.J. Quinney College of Law, a recipient of the Judicial Excellence award from the Utah State Bar, and a Life Fellow of the American Bar Foundation.

Justice Himonas is deeply involved in the access-to-justice movement and can often be found speaking about access-to-justice around the country. He currently chairs two access-to-justice task forces, one on licensed paralegal practitioners and the other on online dispute resolution, and co-chairs a third, which is reimagining the regulation of the practice of law.

Justice Himonas graduated with distinction from the University of Utah with a bachelor’s degree in economics and went on to receive his J.D. from the University of Chicago. Upon graduation, he spent fifteen years primarily litigating complex civil matters in private practice.
Narrowing the Access-to-Justice Gap by Reimagining Regulation

JOHN LUND (CO-CHAIR)

John Lund has practiced law the old-fashioned way since 1984. He is a shareholder with Parsons Behle & Latimer, where he represents clients in challenging litigation and trials throughout the West. Mr. Lund is recognized by Chambers USA as a Band 1 lawyer for commercial litigation and is also a Fellow of the International Academy of Trial Lawyers. Mr. Lund is the immediate past president of the Utah State Bar and has been involved in leadership of the Utah Bar for over a decade. He recently concluded two terms as the lawyer representative on Utah’s Judicial Council, which oversees Utah’s judicial branch. He has served on various committees and projects relating to improving access to justice and innovation in the practice of law. These include co-chairing the Utah Bar’s 2015 Futures Commission, developing the Utah Bar’s online interactive directory of lawyers, serving on the Utah Supreme Court’s task force for Licensed Paralegal Practitioners, serving on the Utah Supreme Court’s task force for reform of Utah’s attorney discipline system, and establishing Utah’s newly formed Access to Justice Commission. Currently, Mr. Lund co-chairs a joint task force of the Utah Supreme Court and the Utah Bar that is recommending significant and potentially disruptive changes to the regulation of legal services in order to bring innovation to legal services and thereby improve access to justice.
H. DICKSON BURTON

Mr. Burton is the past President of the Utah State Bar, completing his term in July 2019. In his day job, Mr. Burton is the Managing Shareholder of TraskBritt, a nationally-recognized Intellectual Property law firm, where he litigates patent, trademark, and trade secret matters in courts around the country. He is also frequently called upon to mediate or arbitrate patent and other complex intellectual property disputes, with mediation training and certification from both the World Intellectual Property Organization and Harvard Law School. He has also served as an Adjunct Professor at the University of Utah S.J. Quinney College of Law teaching patent litigation.

Mr. Burton is the current Chair of the Local Rules Committee for the U.S. District Court for the District of Utah, and is currently serving on the Magistrate Judge Merit Selection Panel for that court.

Mr. Burton has been honored for many years in peer-review lists including Best Lawyers, IP Stars, Chambers USA, and SuperLawyers, including being listed as one of the Top 100 of all lawyers in the Mountain States.
Tom Clarke has served for fourteen years as the Vice President for Research and Technology at the National Center for State Courts. Before that, Tom worked for ten years with the Washington State Administrative Office of the Courts first as the research manager and then as the CIO. As a national court consultant, Tom consulted frequently on topics relating to effective court practices, the redesign of court systems to solve business problems, access to justice strategies, and program evaluation approaches. Tom concentrated the last several years on litigant portals, case triage, new non-lawyer roles, online dispute resolution, public access/privacy policies, and new ways of regulating legal services.
CATHERINE DUPONT

Cathy Dupont is the Deputy State Court Administrator in Utah. Prior to serving as the Deputy State Court Administrator, Cathy was the Appellate Court Administrator and served as one of the Utah Supreme Court’s legislative liaisons during the 2019 Legislative Session. Before joining the courts, Cathy worked as the Director of Strategy and External Relations for the state’s Public Employee Health Plan and managed the Provider Relations Department and the Marketing and Communications Department. She also worked for over 20 years as an associate general counsel for the Office of Legislative Research and General Counsel, a non-partisan office responsible for drafting legislation and staffing legislative committees.
GILLIAN HADFIELD

Gillian Hadfield, B.A. (Hons.) Queens, J.D., M.A., Ph.D. (Economics) Stanford, is the Schwartz Reisman Chair in Technology and Society, Professor of Law and Professor of Strategic Management at the University of Toronto. She also serves as Director of the Schwartz Reisman Institute for Technology and Society. Her research is focused on innovative design for legal and dispute resolution systems in advanced and developing market economies; governance for artificial intelligence; the markets for law, lawyers, and dispute resolution; and contract law and theory. Professor Hadfield is a Faculty Affiliate at the Vector Institute for Artificial Intelligence in Toronto and at the Center for Human-Compatible AI at the University of California Berkeley and Senior Policy Advisor at OpenAI in San Francisco. Her book, Rules for a Flat World: Why Humans Invented Law and How to Reinvent It for a Complex Global Economy, was published by Oxford University Press in 2017.

Professor Hadfield served as clerk to Chief Judge Patricia Wald on the U.S. Court of Appeals, D.C. Circuit. She was previously on the faculty at the University of Southern California, New York University, and the University of California Berkeley, and has been a visiting professor at the University of Chicago, Harvard, Columbia, and Hastings College of Law. She was a 2006-07 and 2010-11 fellow of the Center for Advanced Study in the Behavioral Sciences at Stanford and a National Fellow at the Hoover Institution in 1993. She has served on the World Economic Forum’s Global Future Council for Agile Governance, Future Council for the Future of Technology, Values and Policy, and Global Agenda Council for Justice. She is currently a member of the American Bar Association’s Commission on the Future of Legal Education and is an advisor to courts and several organizations and technology companies engaged in innovating new ways to make law smarter and more accessible.
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MARGARET HAGAN

Margaret Hagan is the Director of the Legal Design Lab at Stanford University, as well as a lecturer in the Institute of Design (the d.school). She is a lawyer, and holds a J.D. from Stanford Law School, a DPhil from Queen’s University Belfast, an MA from Central European University, and an AB from University of Chicago. She specializes in the application of human-centered design to the legal system, including the development of new public interest technology, legal visuals, and policy design. Her research and teaching focuses on the development and evaluation of new interventions to make the legal system more accessible. Her recent articles include “Participatory Design for Innovation in Access to Justice” (Daedalus 2019) and “A Human-Centered Design Approach to Access to Justice” (Ind. JL & Soc. Equal. 6, 199, 2018).
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STEVEN JOHNSON

Steven Johnson is a 1977 graduate of the J. Reuben Clark Law School at Brigham Young University. He has been a member of Utah State Bar since 1977, and of the State Bar of California since 1989. He has worked for a small Salt Lake City law firm, is the former general counsel for an international marketer of turkeys and turkey products, and is currently a solo practitioner in Highland, Utah, advising and representing clients in a variety of legal matters including business and corporate issues, real property matters, and contracts; and he has also served as an arbitrator and mediator in private practice and for the Better Business Bureau.

He has spent a good part of his career serving in the Bar and serving the courts of the State of Utah to enhance access to justice. He has served as an officer, including chair, of both the Corporate Counsel Section and of the Dispute Resolution Section of the Bar. He has been a member of Utah State Bar’s Fee Arbitration Panel since 1999, and chaired the Panel from 2006 to 2010. He was appointed as a member of the Supreme Court’s MCLE Board in 1999, and served as Trustee of the Board for 4 years. He served 7 years as an Associate Editor of the Utah Bar Journal beginning in his second year of law school, and served for 10 years as a member of the Bar’s Government Affairs Committee.

Mr. Johnson has served 20 years on the Supreme Court’s Advisory Committee on the Rules of Professional Conduct, and for the last 9 years has served as chair of that committee. He has served as a member of the Supreme Court’s Commissioner Conduct Commission for the past 9 years, and currently serves as a member of the Fourth District Justice Court Nominating Commission. He is a member of the Utah State Courts’ Certified Panel of Arbitrators.

The Supreme Court has also asked him to serve on three Court task forces—the Licensed Paralegal Practitioner Task Force, the Office of Professional Conduct Task Force, and the Task Force on Regulatory Reform.

In 2018, the Supreme Court awarded him the Service to the Courts Award for his contributions to Utah’s judicial system. In 2019, he was awarded the Utah State Bar’s Distinguished Service Award.

Mr. Johnson served on 3 different occasions in the countries of Ethiopia and Eritrea, teaching government employees how to organize and manage farmer cooperatives so that they can go out and teach farmers how to run cooperatives to better their economic status. He has helped them to amend their cooperative codes to eliminate inconsistencies and to fill in gaps in the laws.
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LUCY RICCA

Lucy Ricca is a Fellow and former Executive Director of the Stanford Center on the Legal Profession at Stanford Law School. Ricca was a Lecturer at the law school and has written on the regulation of the profession, the changing practice of law, and diversity in the profession. As Executive Director, Ricca coordinated all aspects of the Center’s activities, including developing the direction and goals for the Center and overseeing operations, publications, programs, research, and other inter-disciplinary projects, including development and fundraising for the Stanford Legal Design Lab. Ricca joined Stanford Law School in June 2013, after clerking for Judge James P. Jones of the United States District Court for the Western District of Virginia. Before clerking, Ricca practiced white collar criminal defense, securities, antitrust, and complex commercial litigation as an associate at Orrick, Herrington & Sutcliffe. Ricca received her B.A. cum laude in History from Dartmouth College and her J.D. from the University of Virginia School of Law.
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D. GORDON SMITH

D. Gordon Smith is the Dean and Glen L. Farr Professor of Law of the J. Reuben Clark Law School, Brigham Young University. Dean Smith is a leading figure in the field of law and entrepreneurship and has done foundational work on fiduciary theory. He has also made important contributions to the academic literature on corporate governance and transactional lawyering. For his work in promoting the study of corpus linguistics and design thinking in law schools, Dean Smith was included in the Fastcase 50 (2017), which honors “the law’s smartest, most courageous innovators, techies, visionaries, & leaders.”

Dean Smith earned a JD from the University of Chicago Law School and a BS in Accounting from Brigham Young University. He has taught at six law schools in the U.S., as well as law programs in Australia, China, England, Finland, France, Germany, and Hong Kong. Before entering academe, Dean Smith clerked for Judge W. Eugene Davis in the United States Court of Appeals for the Fifth Circuit and was an associate in the Delaware office of the international law firm Skadden, Arps, Slate, Meagher & Flom.
HEATHER S. WHITE

Heather White is a partner with the Salt Lake City-based law firm of Snow Christensen & Martineau, where she leads the firm’s Governmental Law Practice Group. Her primary focus is on the defense of government entities in high profile civil rights disputes. Heather is a 1996 graduate of the University of Utah, S.J. Quinney College of Law.

Heather defends governmental entities and their officers against complaints asserting the deprivation of civil rights. These include all types of claims of alleged misconduct, such as excessive force, search and seizure, wrongful arrest, false imprisonment, malicious prosecution, abuse of process and denial of medical care, to name a few. At any given time, Heather is involved in multiple officer-involved shooting cases from inception, including investigations by the Department of Justice and press inquiries, through conclusion.

With deep respect for her Utah police officer clients, and their dedication to society at great personal expense, Heather has become their trusted confidant and advisor. She listens closely to determine individual needs – whether in out-of-court settlements or in public trials – then presses forward assertively with a customized approach and legal strategy. To better understand and closely connect with her clients, and the matters they are involved in, Heather regularly joins officers in the field participating in police ride-alongs. She is certified by the Force Science Institute and conducts training sessions for law enforcement throughout the state, including both client and non-client entities.

Heather also represents the two primary insurers of government entities in the State of Utah—the Utah Risk Management Mutual Association and the Utah Local Governments Trust—as well as a number of self-insured governmental agencies. She believes in the importance of educating her clients on legally related elements of their complex, public careers. In this effort, Heather regularly speaks to agencies and insurers on police training issues, liability, risk management, and incident-prevention issues.

Heather has an extensive track record of governmental civil rights cases and trials, with multiple favorable defense verdicts in state and federal trial and appeals courts. In addition, Heather regularly defends governments against claims involving accidents with government vehicles and premises liability, such as “slip and fall” accidents that might involve sidewalks, water meters, or swimming pools, cemeteries, playgrounds, recreational centers and others.

Heather is a frequent trainer, presenter, and author, covering a wide range of governmental law topics and current governmental law headline subjects.

Heather is actively involved in professional and civic organizations including: American Academy of Trial Attorneys; Utah Bar Technology and Innovation Committee; Salt Lake County
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Bar, Utah State Bar, and Federal Bar Association; Model Utah Jury Instructions, Chair of Subcommittee on Civil Rights Instructions; Magistrate Merit Selection Panel; Defense Research Institute; Utah Defense Lawyers Association; and Utah Municipal Attorneys Association

Heather has maintained a steady 5.0 Martindale-Hubbell® Peer review rating; is consistently recognized as a Utah Super Lawyer by Super Lawyer Magazine; is regularly recognized as a Utah Legal Elite by Utah Business Magazine; is listed in Best Lawyers in America; and was named a Distinguished Faculty member by Lorman Education Services.
ELIZABETH A. WRIGHT

Elizabeth Wright is General Counsel for the Utah State Bar. She is a graduate of Hamilton College and Case Western Reserve School of Law. She is admitted in New York and Utah and was an Assistant Corporation Counsel for the City of New York before moving to Utah. Wright began working for the Utah State Bar in 2011 as the Coordinator of the New Lawyer Training Program. She became General Counsel in 2014. As General Counsel, Elizabeth represents the Bar and also works closely with Bar and Court committees to modify and propose rules governing the practice of law in Utah. Elizabeth served on both the Executive and Steering Committees for Utah’s Licensed Paralegal Practitioner Program helping to develop rules for the program. Elizabeth currently serves on the Utah Task Force on Legal Reform which is exploring changing the regulatory structure in Utah to foster innovation and promote market forces to increase access to and affordability of legal services.
APPENDIX B
Narrowing the Access-to-Justice Gap by Reimagining Regulation

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August 22, 2018

VIA EMAIL to cathyled@jcourts.gov

Justices of the Utah Supreme Court
c/o Appellate Court Administrator
450 S. State Street
P.O. Box 140230
Salt Lake City, UT 84114

Dear Justices of the Utah Supreme Court,

Access to justice in Utah remains a significant and growing problem. It can be readily seen in the data regarding self-represented parties in the Utah court system. However, it is a much broader and complex issue which not only involves all sort of legal needs but overlaps with a host of other challenges confronted by low and middle-income people living in Utah. We believe lawyers can and should be part of the solution to this problem. There are times well before a court action when some simple advice from an attorney could prevent a problem or resolve a conflict. Yet, as the Bar’s recent survey shows, very high percentages of individuals and businesses in Utah have no sense of the value lawyers can provide, they do not know how to find the right lawyer and they believe that it will be too costly to get a lawyer’s help.

There are undoubtedly many steps needed in many places. However, we believe a key step to getting legal representation to more people is to substantially reform the regulatory setting in which lawyers operate. We request the Court establish a small working group to promptly study possible reforms and make recommendations to the Court. The purpose of the working group would be to evaluate and make recommendations for revisions, possibly major revisions, to the rules of professional responsibility so as to permit lawyers to more effectively and more affordably provide legal services and do related promotion of those services. The specific areas of focus would be rules concerning (1) fee sharing, (2) advertising and (3) fee arrangements. There are also some conflict of interest issues sparked by some of the possible revisions in these areas.

The work would include consideration of (1) the effect of modern information technology and modern consumer patterns on the current rules, (2) the potential value, in terms of making legal services accessible to clients, of non-lawyer investment and ownership in entities providing legal services and the related regulatory issues, (3) the prospect of broadening the availability of legal services through flat fee and other alternative fee arrangements not currently permitted by the rules, (4) whether there is continuing justification for the rules against direct solicitation, (5) whether and how to permit and structure lawyer use of referral systems such as Avvo in light of the rule against referral fees and (5) the related trends and approaches being considered and/or implemented in other bars, such as Oregon and the ABA’s work in this area.

Serving the public. Working for justice.
In terms of the makeup of the group, we suggest that the group be co-chaired by a Supreme Court Justice and the immediate past president of the Bar, John Lund. We believe the Bar’s general counsel can provide support. We would also suggest including the chair of Court’s Committee on the Rules of Professional Responsibility and would also ask that Cathy Dupont be appointed to the committee. Importantly the group should be made up of people who will actually study and consider recommended changes. In that vein, we propose including one of the leaders from the Bar’s Innovation in Law Practice Committee, possibly Heather White, Co-chair of that Committee.

Once established, we believe the group could be expected to provide a report and recommendation to the Court within 6 months.

We would be most pleased to attend the Court’s Conference on August 27 and discuss our proposal in more detail and answer any questions or concerns from the members of the Court.

Sincerely,

H. Dickson Burton

CC:  Richard H. Schwermer (ricks@utahcourts.gov)
     John R. Lund (ljund@parsonsbahle.com)
     John Baldwin (jbaldwin@utahbar.org)
THE LEGAL SERVICES ACT OF 2007

The Legal Services Act (LSA) overhauled the regulation of legal services in the United Kingdom. The regulatory overhaul was precipitated by an overall push for regulatory reform across the U.K., looking particularly at how restrictive rules and norms in the professions impacted competition and the cost of legal services. The goal of the regulatory reform was explicitly consumer and competition focused: “Putting Consumers First.” Through these reforms, the U.K. legal profession lost its self-regulatory power. The profession is now regulated by an entity, not controlled by lawyers, answerable to Parliament.

Approach of the LSA

The LSA sought to create an objectives-based, risk-based system for the regulation of legal services in the U.K. The Act itself does not set out detailed, prescriptive rules of behavior to be followed by regulated entities. Rather, the Act sets out regulatory objectives and principles to guide the regulators. It is the responsibility of the regulators to develop the details of the system within those guidelines. “Regulation needs to be proportionate and targeted, focused on outcomes and reflecting real risks in the market. It needs to tackle risk of consumer detriment but, in doing so, stop short of creating an excessive burden that might stifle innovation or restrain competition.”

1. Objectives and Principles (set out in the LSA)
   a. Objectives:
      i. Protecting and promoting the public interest;
      ii. Supporting the constitutional principle of the rules of law;
      iii. Improving access to justice;
      iv. Protecting and promoting the interests of consumers;
      v. Promoting competition in the provision of regulated services;

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61 These reforms were limited to England and Wales. Scotland is independently assessing legal market reforms. The U.K. has always had a very different system from the U.S.—split bar system, several other legal roles, many services we consider to be practice of law are not so considered in the U.K. (including providing legal advice). See Stephen Mayson, Independent Review of Legal Services Regulation: Assessment of the Current Regulatory Framework (University College London Centre for Ethics & Law, Working Paper LSR-0, 2019), https://www.ucl.ac.uk/ethics-law/sites/ethics-law/files/irlsr_wp_lsr-0_assessment_1903_v2.pdf (last visited Aug. 13, 2019).


vi. Encouraging an independent, strong, diverse, and effective legal profession;

vii. Increasing public understanding of the citizen’s legal rights and duties; and

viii. Promoting and maintaining adherence to professional principles.

b. Principles:

i. Authorized persons should act with independence and integrity;

ii. Authorized persons should maintain proper standards of work;

iii. Authorized persons should act in the best interests of clients;

iv. Those who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorized persons should comply with their duty to the court to act with independence in the interests of justice; and

v. Affairs of clients should be kept confidential.65

What Is the Regulatory Structure?

The LSA establishes one overarching regulator, the Legal Services Board (LSB). The LSB is a government regulator accountable to Parliament. The primary duty of the LSB is to “promote the regulatory objectives” when carrying out its regulatory functions.66

The Lord Chancellor, a member of the U.K. Parliament and also Secretary of State for Justice, appoints the members of the LSB. The Board is made up of both lawyers and laypeople, and has a lay chairperson.67 The Act creates a Legal Services Consumer Panel made up of lay people that advises the LSB on various relevant topics, particularly those considering public interest.68 The Act also establishes a separate Office of Legal Complaints to address and help resolve consumer complaints.

Instead of directly regulating legal services providers, the LSB regulates multiple “front-line” regulators, which in turn regulate different sectors of the profession (see chart below for

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66 Id., Part 2, § 3, https://www.legislation.gov.uk/ukpga/2007/29 (last visited Aug. 13, 2019). The LSB does not have a standalone objective or the power to promote the regulatory objectives separate from its established regulator functions.
68 Id., Part 2, § 8, https://www.legislation.gov.uk/ukpga/2007/29 (last visited Aug. 13, 2019). The Consumer Panel has significant independent authority under the Act, including the ability to independently report to the public on advice that it gives the LSB.
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overview). The LSB has authority to set governance requirements and performance targets, review rules and procedures, and investigate the front-line regulators.  

The LSA defines certain regulated activities and persons. Both the activities and the persons follow historically grounded legal roles in the U.K. As will be discussed in more detail below, recent reviews of the effectiveness of the LSA reforms have offered strong criticism of the retention of these traditional activities and roles within the new regulatory regime.

The LSA designates six specific activities as “reserved activities”:

1. The exercise of a right of audience;
2. The conduct of litigation;
3. Reserved instrument activities (transactions involving real or personal property but not including wills);
4. Probate activities;
5. Notarial activities; and
6. The administration of oaths.

Those activities can only be performed by people (“authorized persons”) granted a license through one of the regulators. It is a criminal offense for an unauthorized person to perform any of the reserved activities. All activities other than these six are unregulated (such as the provision of ordinary legal advice or assistance with legal documents) and may be performed by any person or entity.

Nine roles are designated “authorized persons” under the LSA.

1. Solicitor;
2. Barrister;
3. Legal executive;
4. Notary;
5. Licensed conveyancer;
6. Patent attorney;


72 In June 2016, the LSB published a report on the unregulated market for legal services. It estimated that, in cases in which parties sought legal advice, 37% was sought from non-profit legal service providers and between 4.5–5.5% was sought from for profit providers. See LEGAL SERVICES BOARD, Research Summary: Unregulated Legal Services Providers (June 2016), https://research.legalservicesboard.org.uk/wp-content/media/Unregulated-providers-research-summary.pdf (last visited Aug. 13, 2019). Based on this data, the LSB decided not to extend their regulatory reach at this time.
7. Trademark attorney;
8. Costs lawyer, and
9. Chartered accountant.

Each group is authorized to perform certain reserved activities (e.g. barristers, solicitors, and legal executives can perform all reserved activities except for notarial activities).

The front-line regulators generally align with authorized persons roles (e.g. the Bar Standards Board (BSB) regulates the activities of barristers and the SRA regulates the activities of solicitors). There is certainly overlap, particularly when individuals are working within regulated entities (e.g. it is common for conveyancers, legal executives, and barristers to work in entities regulated by the SRA and almost all notaries are also solicitors).

The front-line regulators are required to promote the regulatory objectives. Pre-LSA, the front-line regulators were, like our bar associations, the trade associations for their associated groups. Post-LSA, they are required to separate any advocacy work from regulatory work.

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73 A costs lawyer is a specialist in the law governing the allocation of costs in the U.K. legal system. Unlike the American system, under British law, prevailing parties in litigation are routinely allowed to collect their “costs” (including attorneys’ fees) from losing parties. Also, clients may seek an assessment of their legal bills from a court, which is authorized to adjust the bill.

77 Id., Part 4, https://www.legislation.gov.uk/ukpga/2007/29 (last visited Aug. 13, 2019). The system is somewhat complex. Under the current approach, the designated regulators under the LSB are the traditional representative organizations for the legal role (i.e. the Law Society, the General Counsel of the Bar, the Association of Law Costs Draughtsmen). Under the LSA, those organizations are required to put the regulatory function beyond the representative function, leading to the creation of the current operating regulators (i.e., the Solicitors Regulation Authority, the Bar Standards Board, and the Costs Lawyer Standard Board). One of the bigger criticisms of the LSA reforms is that this approach does not go far enough to separate the regulatory function from the representative/advocacy function and the LSB is assessing changes to make that separation more complete.
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The LSA authorizes and regulates non-lawyer owned legal service entities that are called Alternative Business Structures (ABSs) (discussed in detail below).

**What Does This Actually Look Like: The Solicitors Regulation Authority**

The Solicitors Regulation Authority is the largest regulator of legal services in the U.K., regulating solicitors and ABSs. The SRA describes its regulatory approach as follows:

The outcomes-focused approach to regulation means that our goal is to ensure that legal services providers deliver positive outcomes for consumers of legal services and the public, in line with the intent of the LSA regulatory objectives. This is in contrast to our historical rules-based approach: we no longer focus on prescribing how those we regulate provide services, but instead focus on the outcomes for the public and consumers that result from their activities.  

The SRA establishes specific regulatory outcomes to measure its progress toward the LSA’s regulatory objectives.

- **Outcome 1**: The public interest is protected by ensuring that legal services are delivered ethically and the public have confidence in the legal system.
- **Outcome 2**: The market for legal services is competitive and diverse, and operates in the interests of consumers.

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- Outcome 3: Consumers can access the services they need, receive a proper service and are treated fairly.
- Outcome 4: Regulation is effective, efficient and meets the principles of better regulation.\(^7^9\)

The SRA outlines ten principles for regulated individuals and entities, including upholding the rule of law and the proper administration of justice, not allowing your lawyer independence to be compromised, acting in the best interests of the client, running a legal business in a way that encourages equality of opportunity and diversity, and protecting clients’ money and assets.\(^8^0\)

The SRA issues a Code of Conduct, which contains professional standards for people and entities under its jurisdiction. These are not “rules” but rather guidance of “indicative behaviours” that the SRA would expect to see to achieve objectives (e.g. to ensure Outcome 3, solicitors should explain the scope of their representation to their client, provide (in writing) a description of all involved parties, and explain any fee arrangements).\(^8^1\)

The SRA also issues specific rules in certain areas: accounts rules, authorization and practicing requirements, client protection (insurance and compensation fund), discipline and costs recovery, and specialist services.\(^8^2\)

Day-to-day regulatory activity at the SRA is guided by identified risks to the regulatory objectives and outcomes. Identification and prioritization of risks enables proportionate and responsive regulation.

\(^7^9\) Id.
The SRA uses a Regulatory Risk Index that groups risks into 4 categories:\(^3\)

1. Firm viability risks (Risks arising from the viability of the firm and the way it is structured)
2. Firm operational risks (Risks arising from a firm’s internal processes, people and systems)
3. Firm impact risks (Risk that firm or individual undertakes an action or omits to take action that impacts negatively on meeting the regulatory outcomes)
4. Market risks (Risks arising from or affecting the operation of the legal services market)\(^4\)

The SRA assesses these risks by impact (potential harm caused) and probability (likelihood of harm occurring), and categorizes risks along individual, firm, theme, and market.\(^5\) Risk informs the regulator’s decisions on admission, governance, monitoring, enforcement, and soft regulatory interventions (education, etc.). Using this approach enables interventions to be proactive and flexible, including:

1. instituting controls on how a firm or individual practices;
2. issuing a warning about future conduct;

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\(^3\) According to Crispin Passmore, former Executive Director of Supervision and Education of the SRA, the SRA is moving away from the Regulatory Risk Index and focusing more of its approach on proactive and thematic risk assessments.


\(^5\) See id.
3. closing a firm with immediate effect or imposing a disciplinary sanction, such as a fine;
4. informing the market about undesirable trends and risks;
5. adapting regulatory policy to minimize recurrence of an issue; and
6. setting qualification standards and ongoing competency requirements.\(^{86}\)

**Alternative Business Structures**

The LSA permitted participation in legal service providers by those who are not qualified lawyers: entities with lay ownership, management, or investment are designated ABSs under the Act.\(^{87}\)

Multiple regulators are approved to regulate ABSs, including the SRA, the BSB, the Council of Licensed Conveyancers, the Institute for Chartered Accountants, and the Intellectual Property Regulation Board.

An ABS is either (1) a firm where a “non-authorized person” is a manager of the firm or has an ownership-type interest in the firm or (2) a firm where “another body” is a manager of the firm or has an ownership-type interest in the firm and at least 10 percent of the “body” is controlled by non-lawyers.\(^{88}\)

ABSs may offer non-legal services alongside legal services.\(^{89}\) ABSs are regulated as entities and each authorized person within the entity is independently regulated and subject to discipline. The ABS must always have at least one manager who is an authorized person under the LSA.\(^{90}\) Regardless of ownership structure, control over the right to practice law must remain

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\(^{86}\) *Id.*


in the hands of licensed legal professionals: designated authorized role holders.91 The SRA requires ABSs to have both legal and financial compliance officers.92 These roles are responsible for ensuring that the entity and all of its interest holders, managers, and employees comply both with the terms of its license and with regulations applicable to its activities (reserved and potentially non-reserved depending on the terms of the license).93 If an entity, or those within it, violate the terms of the license or the rules of professional conduct, the compliance officer has a duty to correct and report to the regulator.

In keeping with the regulatory focus on opening the market and enabling competition, the bar to entry, at least within the SRA process, is relatively low. An applicant must outline which reserved activities the entity plans to offer, provide professional indemnity insurance information, and identify firm structure details (including authorized role holders) and incorporation details if applicable.94 To grant a license, the SRA needs to be satisfied that, for example, the proposed ABS will comply with professional indemnity insurance and compensation fund requirements, appropriate compliance officers have been appointed, the authorized role holders are approved, and the lawyer-manager is qualified. The SRA may refuse to grant the license if it is not satisfied that these requirements have been shown, or if the applicant has been misleading or inaccurate, or if it feels that the ABS is “against the public interest or inconsistent with the regulatory objectives” set out in the LSA.95 The SRA may also grant a license subject to any conditions it deems necessary.96

Impact of the LSA

There has been some debate about the impact of the LSA on the legal services market in the U.K. and on access to justice in particular.97 A paper produced by a workgroup chaired by Professor Stephen Mayson had this to say on the impact of the LSA:

The LSA’s reforms have gone some way in beginning to address the pressing issues of the time – independence of regulation, poor complaints handling, anti-competitive restrictions and the need for greater focus on the consumer.

92 Id.
93 Id.
96 Id.
97 It should be noted that as the reforms were implemented the Government dramatically reduced funding for legal aid across the U.K. and the world faced the global market downturn. See Dominic Gilbert, Legal Aid Advice Network “Decimated” by Funding Cuts, BBC NEWS (Dec. 10, 2018), https://www.bbc.com/news/uk-46357169 (last visited Aug. 13, 2019).
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Regulatory reform since then has been wide ranging. Regulators have increasingly simplified and focused their processes and removed barriers to market entry, enabling innovation among new and existing providers, improving consumer choice and competition.98

In the area of non-lawyer ownership (i.e., ABSs), the market has seen increased innovation in legal services offerings but change is unsurprisingly more incremental than revolutionary. As of February 2019, it appears that regulators have licensed over 800 entities as ABSs.99 Most entities seeking ABS licenses are existing legal services businesses converting their license; one-fifth are new entrants.100 Lawyer-ownership remains the dominant form with three-fifths of ABSs having less than 50 percent non-lawyer ownership.101 Approximately one-fifth of ABSs are fully owned by non-lawyers and approximately one-fifth are fully owned by lawyers with some proportion of non-lawyer managers.102 A 2014 report by the SRA sought to understand how firms changed upon gaining an ABS license. Most often, firms changed either their structure or their management under the new regulatory offering.103 Twenty-seven percent changed the way the business was financed. The SRA found that investment was most often sought for entry into technology, to change the services offered, and for marketing.104 A 2018 report by the LSB found that ABSs were three times as likely as traditionally organized entities to use technology, and ABSs, as well as newer and larger providers, have higher levels of service innovation.105

99 The SRA maintains a list of all registered ABSs at https://www.sra.org.uk/solicitors/firm-based-authorisation/abs/abs-search.page. This is likely a small percentage of all the legal firms in the United Kingdom. In 2015, for example, there were approximately 10,300 solicitors firms in the U.K. See Mari Sako, Big Bang or drop in the ocean?: The Authorized Revolution in legal services in England and Wales, THOMSON REUTERS FORUM MAGAZINE (Oct. 8, 2015), https://blogs.thomsonreuters.com/answerson/abs-ldp-drop-ocean-england-wales/ (last visited Aug. 13, 2019).
101 Id.
102 Id.
104 Id.
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The market continues to develop. LegalZoom has received an ABS license and has started purchasing solicitors firms in the U.K.106 Each of the Big Four accounting firms has an ABS license.107 Most importantly, there is little to no evidence of ABS-specific consumer harm.108

The SRA will be rolling out relatively significant changes in the form of new “Standards and Regulations (STARS)” in the coming months. Those changes are targeted at increasing liberalization of the market and increasing the efficiency of the regulatory response. Perhaps the most significant change is that solicitors will now be permitted to offer non-reserved legal activities out of unregulated businesses (i.e., a solicitor may now be employed by Tesco or a bank to offer non-reserved services like will writing).109

Challenges of the LSA

In December 2016, the Competition and Markets Authority (CMA) released a report reviewing the legal services market post-LSA.110 Professor Stephen Mayson’s reviews of the impact of the LSA are also illuminating to understand how the reforms of the LSA may have fallen short in opening the market.111

1. Retention of traditional roles/activities: As noted above, although the LSA sought to implement an objectives- and risk-based regulatory system, it also relied upon traditional legal roles and their associated activities as regulatory hooks. Both the CMA report and Professor Mayson’s work identify this continued reliance on traditional activities/roles as a proxy for regulatory strategy/intervention as problematic and limiting to the impact of the reforms. Authorized persons and reserved activities were essentially “grandfathered” or lobbied into the LSA (an “accident of history” or result of

110 See id.
political bargaining) and do not reflect a true assessment of risk. The CMA report recommended that “[A]n optimal regulatory framework should not try to regulate all legal activities uniformly, but should have a targeted approach, where different activities are regulated differently according to the risk(s) they pose rather than regulating on the basis of the professional title of the provider undertaking it.”

2. **Gold-plating of regulation vs. regulatory gap:** Some regulators regulate all activities of authorized persons (including non-reserved activities) while, at the same time, unreserved activities of unauthorized persons are not regulated at all (i.e., a solicitor who drafts a bad will can be subject to regulatory control but a shopkeeper who drafts a bad will is beyond legal regulatory authority because will writing is not a reserved activity). This causes excessive costs to be imposed on authorized persons, leaves possible high-risk activities beyond regulatory scope, and is very confusing to the consumer.

3. **No prioritization among regulatory objectives:** The regulatory objectives set out in the LSA are listed without any indication of how the LSB or the front-line regulators are to prioritize them or weigh them in the event of a conflict between objectives.

4. **Continuing challenges around consumer information gap, pricing challenges (level and transparency), and access to justice:** Consumers generally lack the experience and information they need to find their way around the legal services sector and to engage confidently with providers. Consumers find it hard to make informed choices because there is very little transparency about price, service and quality—for example, research conducted by the Legal Services Board (LSB) found that only 17% of legal services providers publish their prices online. This lack of transparency

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weakens competition between providers and means that some consumers do not obtain legal advice when they would benefit from it.\textsuperscript{117}

5. **Incomplete separation of regulatory and representative activities:** The separation of regulatory and representative activities, as required by the LSA, is incomplete and gives rise to tension.\textsuperscript{118}

Keeping in mind that the reforms are still relatively new (ABSs began being licensed in early 2012),\textsuperscript{119} the most appropriate conclusion appears to be that, while the LSA initiated much needed reforms to the regulatory process and began the process of opening up the legal services market, significant challenges remain and require continued focus.


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APPENDIX D
REGULATOR: DETAILED PROPOSAL

Our suggested proposal for the Phase 1 regulatory structure and approach is outlined below. Although we have put a great deal of thought into this proposal, we stress that this is just a proposal. Our model assumes that the Phase 1 period will be one of research and development regarding the regulator’s structure and framework and that both will likely change with increased data from the regulatory sandbox market and other inputs.

Framework (Phase 1)

The Court will operate the regulator as a task force of the Court. The Court should outline regulatory objectives for the regulator. We propose a single core objective:

To ensure consumers access to a well-developed, high-quality, innovative, and competitive market for legal services.

As discussed above, this objective purposely focuses the regulatory authority on the consumer market for legal services. The Court should also outline regulatory principles for the regulator. We propose five regulatory principles:

1. Regulation should be based on the evaluation of risk to the consumer. Regulatory intervention should be proportionate and responsive to the actual risks posed to the consumers of legal services.
2. Risk to the consumer should be evaluated relative to the current legal services options available. Risk should not be evaluated as against the idea of perfect legal representation provided by a lawyer but rather as against the reality of the current market options. For example, if 80 percent of consumers have no access to any legal help in the particular area at issue, then the evaluation of risk is as against no legal help at all.
3. Regulation should establish probabilistic thresholds for acceptable levels of harm. The risk-based approach does not seek to eliminate all risk or harm in the legal services market. Rather, it uses risk data to better identify and apply regulatory resources over time and across the market. A probability threshold is a tool by which the regulator identifies and directs regulatory intervention. In assessing risks, the regulator looks at the probability of a risk occurring and the magnitude of the impact should the risk occur. Based on this assessment, the regulator determines acceptable levels of risk in certain areas of legal service. Resources should be focused on areas in which there is both high probability of harm and significant impact on the consumer or the market. The thresholds in these areas will be lower than other areas. When the evidence of consumer harm crosses the established threshold, regulatory
action is triggered. Example: Under traditional regulatory approaches, the very possibility that a non-lawyer who interprets a legal document (a lease, summons, or employment contract, for example) might make an error that an attentive lawyer would not make has been taken to justify prohibiting all non-lawyers from providing any interpretation. However, if the risk is actually such that an error is made only 10% of the time, then a risk-based approach would recommend allowing non-lawyer advisors to offer aid (particularly if the alternative is not getting an interpretation from an attentive lawyer but rather proceeding on the basis of the consumer’s own, potentially flawed interpretation). If a particular service or software is actually found to have an error rate exceeding 10%, then regulatory action (suspension, investigation, etc.) would be taken against that entity or person.

4. **Regulation should be empirically-driven.** Regulatory approach and actions will be supported by data. Participants in the market will submit data to the regulator throughout the process.

5. **Regulation should be guided by a market-based approach.** The current regulatory system has prevented the development of a well-functioning market for legal services. This proposal depends on the regulatory system permitting the market to develop and function without excessive interference.

**Regulator Structure**

In Phase 1, the regulator will operate relatively leanly given that it will be overseeing a small marketplace (the regulatory sandbox); however, staffing needs to be sufficient to ensure that the regulator is successful from the start. The regulator must be able to respond to applicants, questions, and demands quickly and efficiently and be able to adequately monitor and assess the market’s development and respond appropriately and strategically.

We preliminarily envision an executive committee or senior staff made up of a Director, a Senior Economist, and, perhaps, a Senior Technologist. It is not necessary that these individuals be lawyers. The Director will be the face of the entity, responsible for strategy, development, budget, and reporting to the Court. The Senior Economist will be responsible for developing the quantitative analytical tools used by the regulator. The Senior Technologist will be responsible both for reviewing, assessing, and explaining the technological aspects of any proposed products or services as well as offering technological expertise on a strategic level (i.e., where regulatory resources should be targeted). The support staff would need to cover

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the following functions: operations, development, and communications. Finally, we envision creating a Board of Advisors made up of both legal and non-legal leaders, including particularly leaders in technology and academics well-versed in regulatory theory.

We propose that the regulator be funded primarily from fees collected from market participants. At the outset, however, we propose seeking grants for the establishment and support of the Phase 1 regulator.

**Regulatory Approach**

It is the regulator’s job to develop a system that, applying the regulatory principles, works to achieve the regulatory objective. Identifying, quantifying, understanding, and responding to risk of consumer harm using an empirical approach is prioritized in our regulatory principles. There are two major aspects to this: (1) assessing risk of consumer harm in the market as a whole (both now and over time); and (2) assessing risk of consumer harm in a particular applicant’s legal service offering.

We foresee the regulator using a risk matrix as its primary tool for identifying and understanding risk. A risk matrix is essentially a framework used to evaluate and prioritize risk based on the likelihood of occurrence and the severity of the impact. It is one of the most widespread tools used for risk evaluation. A simple example follows:
Developing the risk matrix should be the first task for the regulator in assessing the legal services market, and it should be revised and updated market-wide on an ongoing basis. The risk matrix also guides the regulator’s approach to individual regulated entities throughout the regulatory process.

We propose attention to 3 key risks:

1. Consumer achieves a poor legal result.
2. Consumer fails to exercise their legal rights because they did not know they possessed those rights.
3. Consumer purchases a legal service that is unnecessary or inappropriate for resolution of their legal issue.

Using the risk matrix, the regulator would consider likelihood and impact of each of the three key risks mentioned, as well as any other risks identified either in the market generally or as indicated for a particular participant or group of participants. For example, for an entity proposing to offer a software-enabled will drafting service (using perhaps machine learning enhanced guidance or advice or non-lawyer will experts answering questions), the regulator
would assess the likelihood that the consumer achieves a poor legal result (e.g. an unenforceable will or term) and the impact of that harm on the consumer (potentially significant, but rectifiable, in some cases).

The regulator should establish metrics by which those risks might be measured and identify the data regulated entities will be required to submit in order to assess risk on an ongoing basis. The regulated entities will be required to submit data on these in order to participate in the market. In the example above, the risk of a poor legal result can be measured through expert testing/auditing of the proposed product and through consumer satisfaction surveys. The regulator should consider what level of risk self-assessment should be required from applicants in addition to any key risks identified by the regulator.

**Regulatory Process**

The key points of the regulatory process should be as follows: (1) licensing; (2) monitoring; and (3) enforcement. Each defines a key interaction between the regulator and the market participant.

**Licensing**

The licensing approach would be guided by the following analysis:

1. What is the specific nature of the risk(s) posed to the consumer by this service/product/business model?
2. Where does the proposed service/product/business model lie within the risk matrix?
3. Can the applicant provide sufficient evidence on the risk(s)?
4. What mechanisms might mitigate those risks and how? What are the costs and benefits of those mechanisms?

The visual below illustrates the proposed licensing process:
Applicant initiates process: The applicant describes the service/product/business model offered. The explanation should be simple and short. The applicant should submit supplemental materials (visuals, etc.) as necessary.

Risk Assessment: Based on the description provided in the initial application, supplemented as necessary with information requests to the applicant, the regulator initiates the risk assessment process.

1. The regulator assesses the applicant’s proposal within the context of the risk matrix. Does the proposed service implicate one of the key risks, and what is the likelihood and impact of those risks being realized? The applicant must submit required data on these risks and any information on the mitigation of these risks and response to risk realization built into its model.

2. Self-assessment: the applicant will be expected to identify any risks to consumers not identified in the first step. These may be risks specific to the type of technology proposed, the business model, the area of law, or the consumer population targeted. For example, a blockchain platform for commercial smart contracting presents different concerns than a document completion tool used by self-represented litigants.

3. The regulator should develop a mechanism for sealed risk disclosures—to the extent that any necessary disclosures around technology or other risk mitigation processes should not be made public.
Fees: The applicant should submit licensing fees both at the outset of the licensing process and annually in order to maintain an active license. The fee regime will be developed to scale with the applicant’s statewide revenues.

Regulator Response—Risk Profile: The regulator will then use the application and its own research into such technical, economic, or ethical issues as necessary to develop an overall risk profile of the proposed service/product/business model. A risk profile is not a list of potential risks with little or no differentiation between them. Instead, the risk profile should assess the identified risks both in relation to each other (which are the most probable, which present the greatest financial risk, etc.) and in relation to the legal services market overall. The risk profile will also guide the regulator in its regulatory approach going forward, i.e., how frequently to audit, what kind of ongoing monitoring or reporting to employ, and what kinds of enforcement tools need to be considered.

Regulator Response—Determination on Licensure: If, based on the risk profile, the regulator finds that significant risks have been identified, but it is not clear how the applicant plans to address and mitigate those risks, the regulator can impose probationary requirements on the applicant targeted to address those risks or refuse licensure.

Monitoring and Data Collection

Once an entity is licensed, the regulatory relationship moves on to the monitoring and data collection phase. The purpose of monitoring is continual improvement of the regulatory system with respect to the core objective. Monitoring enables the regulator to understand risks in the market and identify trends and to observe, measure, and adjust any regulatory initiatives to drive progress toward the core objective. Monitoring is not the regulator simply checking the box on a list of requirements.

In monitoring, the regulator can use several different tactics. The regulator should develop requirements such that regulated entities periodically and routinely provide data on the three key risks. The regulator should have the flexibility to reduce or eliminate specific reporting requirements if the data consistently show no harm to consumers. The regulator should also conduct unannounced testing or evaluation of a regulated entities’ performance through, for example, “secret shopper” audits or expert audits of random samples of services or products.

The regulator should consider imposing an affirmative duty on regulated entities to monitor for and disclose any unforeseen impacts on consumers.

The regulator should also conduct consumer surveys across the market and consider how to engage with courts and other agencies to gather performance data.
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The regulator should use the data gathered to issue regular market reports and issue guidance to the public and regulated entities. The regulators in the U.K., the SRA in particular, provide strong examples of the reporting opportunities. The SRA issues regular reports on risk, regulatory activities, regulated population, consumer reports, and equality and diversity. On risk, the SRA issues quarterly and annual reports that span across the market, as well as thematic reports (a report on risks in conveyancing, for example) and reports on key risks, risks in IT security, risks to improving access to legal services, etc.

Enforcement

Enforcement is necessary where the activities of licensed entities are harming consumers. Ideally, the regulator will take action when evidence of consumer harm exceeds the applicable acceptable harm thresholds outlined in the risk matrix or individualized risk assessment. The regulator should strive to make the enforcement process as transparent, targeted, and responsive as possible.

The regulator should develop a process for enforcement: intake, investigation, and redress. Evidence of consumer harm can come before the regulator through multiple avenues:

1. Regulator finds evidence of consumer harm through the course of its monitoring, auditing, or testing of regulated entities.
2. Regulator finds evidence of consumer harm through its monitoring of the legal services market.
3. Consumer complaints.
4. Referrals from courts or other agencies.
5. Whistleblower reports.
6. Media or other public interest reports.

The regulator should develop a process by which members of the public can approach the regulator with complaints about legal service. The U.K. approach is informative on this issue. The LSA established a separate and independent entity, the Office of Legal Complaints (OLC) and its Legal Ombudsman to address the bulk of consumer complaints against legal service providers. Complaints around poor service are directed to the Ombudsman, which has the authority to identify issues and trends and refer those to the frontline regulators like the SRA. The frontline regulators like the SRA accept complaints that directly implicate significant

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123 See SOLICITORS REGULATION AUTHORITY, Providing information and intelligence to the SRA (Jan. 20, 2015) https://www.sra.org.uk/consumers/problems/report-solicitor/providing-information.page (last visited Aug. 13, 2019). The Ombudsman requires the consumer to complain to the service provider directly before accessing the
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consumer risk (financial wrongdoing, dishonesty, and discrimination for example). The SRA does
not, however, advocate individual complaints against service providers. Rather, the SRA will
accept the information and either (1) keep the information for future use if necessary ("no
engagement at present"), (2) use the information to supervise a firm more closely, or (3) use
the information in a formal investigation.124 Thus, the structure for complaints enables the
frontline regulator to retain its focus on risk at the firm and market level rather than dispensing
resources on investigating and managing every individual consumer complaint.

The regulator should consider establishing a Legal Ombudsperson role or office to focus
on consumer questions or complaints about poor legal service (issues such as poor
communication, inefficient service, trouble following client direction, etc.). This role could be
contained within the regulator, but requires proper structural independence and authority to
address complaints, require remedial action, and issue clear guidelines on what kinds of
information should be referred to the enforcement authority of the regulator.

If the regulator makes a finding of consumer harm that exceeds the applicable
threshold, then penalties are triggered. The penalty system should be clear, simple, and driven
by the core objective. The regulator should strive to address harm in the market without
unnecessarily interfering with the market.

office. See SOLICITORS REGULATION AUTHORITY, Reporting an individual or firm,
https://www.sra.org.uk/consumers/problems/report-solicitor.page (last visited Aug. 13, 2019); see also LEGAL
OMBUDSMAN, Helping the public, https://www.legalombudsman.org.uk/helping-the-public/ (last visited Aug. 13,
2019). The Ombudsman has the power to require the legal services provider to take remedial actions such as
return or reduce fees, pay compensation, apologize, and do additional work. See LEGAL OMBUDSMAN, Helping the
2019).

124 See SOLICITORS REGULATION AUTHORITY, Providing information and intelligence to the SRA (Jan. 20, 2015),
https://www.sra.org.uk/consumers/problems/report-solicitor/providing-information.page (last visited Aug. 13,
2019).
There should be a process to appeal enforcement decisions, both within the regulator and to the Supreme Court.

The regulator should make regular reports on enforcement data and actions to the Court.

**Other Regulatory Duties**

The regulator may have other duties that advance the core objective. These would obviously include its reporting duties to both the Court and the public. Reports would detail the overall state of the market, risks across the market, prioritized risk areas, and specific market sectors (by consumer, by area of law, etc.). The regulator may also have the authority to develop initiatives, including public information and education campaigns.

**Regulatory Sandbox**

This section presents an overview of regulatory sandboxes generally and insights into how our proposed regulatory sandbox could operate.

The regulatory sandbox is a policy structure that creates a controlled environment in which new consumer-centered innovations, which may be illegal under current regulations, can be piloted and evaluated. The goal is to allow regulators and aspiring innovators to develop new offerings that could benefit the public, validate them with the public, and understand how current regulations might need to be selectively or permanently relaxed to permit these and other innovations. Financial regulators have used regulatory sandboxes over the past decade to
encourage more public-oriented technology innovations that otherwise might have been inhibited or illegal under standard regulations.\textsuperscript{125} In the legal domain, the U.K.’s SRA has also created a structure—the Innovation Space—that introduces a system of waivers of regulatory roles for organizations to pilot ideas that might benefit the public.\textsuperscript{126}

The regulatory sandbox structure has been used most extensively in the financial services sector. This is an area with extensive and detailed regulations and a significant amount of technological development and innovation. While there are significant differences between financial services and legal services, there are insights to be drawn from regulatory sandbox operation in that sector. Below are some general characteristics of sandboxes:

1. **Testing out what innovations are possible.** The regulatory sandbox can allow the regulator to selectively loosen current rules to see how much and what kinds of new innovation might be possible in their sector.\textsuperscript{127} Regulators and the industry see that new types of technology developments, with the rise of artificial intelligence, digital and mobile services, blockchain, and other technologies, may bring new benefit to the public. Guarantees of non-enforcement in the sandbox can allow companies to raise more capital for experimental new offerings that may not otherwise be funded because of regulatory uncertainty about how the rules would apply to these new models. The regulators can use the sandbox to understand how much innovation potential there is in the ecosystem, beyond mere speculation that emerging tech has promise in their market if regulations were changed.

2. **Tailored evaluation plans focused on risk.** The sandbox model puts the burden on companies to define how their services should be measured in regard to benefits, harms, and risks. They must propose not only what innovation is possible, but also how it can be assessed.

3. **Controlled experimentation.** The sandbox allows for regulators to run controlled tests as to what changes to regulation might be possible, both in terms of what rules apply and how regulation is carried out. They can install safeguards to protect the experiments from spilling over into the general market, and they can terminate individual experiments or the entire sandbox if the evidence indicates that unacceptable harms are emerging.

\textsuperscript{125} See supra n.55.
\textsuperscript{127} The selective loosening or non-enforcement of different rules is less applicable in our proposed sandbox because, as noted, we have a good idea of what rules need to be revised or removed (unauthorized practice of law, corporate practice, and fee sharing rules). What we are less certain of is what risks might come to bear as a result of the loosening or non-enforcement of those rules (see point 2).
4. **New sources of data on what regulation works best.** The sandbox can be a new source of data-driven, evidence-backed policy-making. Because sandbox participants gather and share data about their offerings’ performance (at least with the regulators, if not more publicly), the sandbox can help develop standards and metrics around data-driven regulation. It can incentivize more companies to evaluate their offerings through rigorous understanding of benefits and harms to the public, and it can help regulators develop protocols to conduct this kind of data-driven evaluation.

Points 2 and 4 will be key for our regulatory sandbox: identifying and assessing risk and developing data to inform the regulatory approach.

**How Does A Regulatory Sandbox Work?**

A regulator can create a sandbox to incentivize greater innovation and to gather more data-driven evidence on how offerings and regulations perform in regard to benefits or harms to the public. The essential steps of a regulatory sandbox are as follows:

1. **The regulator issues a call for applications.** This call defines the essential rules of the sandbox: which regulations are open to being relaxed or removed and which cannot be. It also can specify what kinds of innovations will be accepted into the sandbox, the types of data and evaluation metrics that must be prepared, the non-enforcement letters or other certifications that successful applicants will receive, and other safeguards or criteria for possible applicants. Typically, this call is for a “class” of applicants that are all accepted at the same time and run in parallel (though it could be a rolling application instead).

2. **Companies submit applications.** Any type of organization can propose a new offering to be included in a sandbox class. Applicants must detail exactly what the new offering is (e.g., what the technology is, what it intends to accomplish, and how it functions); how they expect it to benefit the public; what risks or harms they expect might arise; how they will deploy and measure this offering; and which rules or regulations need to be relaxed in order for this offering to be allowed.
3. **Start of the sandbox.** The regulator reviews the applications and accepts those that have demonstrated an innovative new offering, a strong assessment plan, and a strong potential for public benefit. The regulator invites these approved participants to enter the sandbox and establishes how the data-sharing, auditing, and evaluation will proceed. If the participants agree to these arrangements, they receive a letter of non-enforcement from the regulator that gives them permission to develop and launch the agreed-upon offering, within the confines of the sandbox, without being subject to the identified regulations.

4. **Sandbox runs and rolling evaluation begins.** A typical sandbox period could be six months to two years. The participant companies work on developing their offerings, putting them on the market, and collecting data on their performance. When applicants bring a new offering to the public, they must conspicuously disclose that it is part of the sandbox and refer consumers to the regulator where they can learn more about the offering and give feedback or complaints. The regulator observes the performance of the offering to see if the public uses it, if the intended benefits result, if any of
the expected or unexpected harms result, and what complaints consumers have. The regulator can suspend or cancel the non-enforcement letter at any time if the company is not performing according to the agreement, if its offering does not engage an audience, or if the offering results in harms above what the regulator has deemed acceptable.

5. **Sandbox ends and company and regulator (potentially) continue on.** Once the designated period of the sandbox finishes, the company can continue with its approved offering if it so wishes, with the non-enforcement authorization still intact. The regulator can take stock of the participants, offerings, and data, and it can use this information to shape another round of applications—perhaps changing the terms of the safeguards; the protocols for evaluation of risks, harms, and benefits; or what types of innovation it solicits. The regulator might also use the data from the completed experiments to permanently relax or change the regulations for the entire market. In this way, the sandbox can be a way to experiment with and validate different regulations. The regulator may also formalize the protocols it uses to measure harm and benefit, moving those protocols from the sandbox experiments to all company offerings in the market.

A sandbox cycle ideally will result in a class of consumer-centered innovations that demonstrate how new kinds of technologies and services can offer value to the public. It can inform regulators about what rules and protocols work best to evaluate both sandbox innovations as well as existing offerings in the market. It can also incentivize more companies to enter the market with offerings that can both serve consumers and secure investment for the company. It may also make clear which types of technologies may be harmful to the public, how better to predict and assess what kinds of harms and benefits a given potential offering may result in, and what the public does and does not want.

**A Regulatory Sandbox for Legal Services**

As of mid-2019, there has not been a regulatory sandbox for legal services. But there have been calls, including in the UK and in Australia, for legal regulators to create sandboxes similar to those used in financial services, to test regulatory reform for innovation and new business structures that promote broader access to justice.¹²⁸

Our team held a workshop in April 2019 to explore the prospect of a legal regulatory sandbox in the U.S. Our goal was to understand whether there might be an appetite from law firms, legal technology companies, legal aid groups, foundations, and other organizations that might be entrants into a legal services regulatory sandbox. If a state was to issue a call for

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sandbox applications and the possibility to relax legal professional rules, would there be interest from groups to enter this sandbox, with an innovative offering to test?

We held the workshop as an invite-only follow-up to the Stanford Future Law conference, which is a pre-eminent gathering of those interested in legal innovation. The conference organizers helped us reach out to many attendees who might be possible sandbox entrants, including leading legal technology companies, law firms with innovation groups, venture capital groups that are interested in the legal market, other large financial and professional services companies, legal aid groups, justice technology non-profits, and foundations interested in access to justice. We then supplemented this recruitment with invites to attorneys, entrepreneurs, and funders who might be interested in new models of legal services.

The workshop was a two-hour, hands-on event. We had approximately 30 participants, which we assembled into small teams to work on exploring what ideas participants had for innovation, what current rules and regulations they might ask to have relaxed, and what concrete innovation offerings they might be interested in submitting to a sandbox. This workshop design was meant to have participants:

1. Reflect on whether a sandbox was needed,
2. Identify what kinds of innovation potential it might unlock, and
3. Validate if they would participate in a sandbox if it were to launch, and under what conditions.

Our team documented the work, discussions, and debrief of the sandbox workshop.

**Positive response to sandbox and new regulatory approach.** The participants were overwhelmingly positive towards the prospect of a sandbox—confirming that controlled tests were needed to encourage innovation in legal services, allow more capital investment in new technology and service models that currently would face regulatory uncertainty, and drive more benefit to the public regarding access to justice. They welcomed a risk-based, empirical approach to regulation of the legal services market. It was not difficult for them to understand the concept, and the financial services sandbox models made it easy to see how analogous models could work in law.

**Willingness to enter the sandbox with near-term or long-term innovations.** Many of the participants, including start-ups, alternative service providers, and consumer/legal technology companies, said that they would seriously consider entering the sandbox if it was to launch. There were near-term innovation experiments that participants would be ready to apply for within the next year. This could include projects such as chatbots that provide help and referrals to the public or a new technology-based proof-of-service offering to record digital
forms of service. There were also more long-term innovations that would only be ready for application to the sandbox once given more time and investment. Those included automated dispute resolution tools to create contract-based or court-order judgments and community-based arbitrators to resolve disputes with staffing models that include more non-lawyers and judges.

Some of the particular points raised by participants that indicate some of the conditions, safeguards, and concerns that a legal services sandbox may need to address include the following:

1. **Expanding the sandbox from legal professional rules to other rules.** Many people mentioned the possibility for a sandbox to not just suspend professional rules of conduct, but also to possibly change court rules and civil procedure rules in order to allow new services to flourish.

2. **Absolute importance of post-sandbox approval.** The participants all agreed that a crucial condition of the sandbox is that participants could continue with their offering, provided risks of harm were demonstrably within appropriate levels, after the sandbox class formally concluded. They would not invest in a new innovation if they were given a non-enforcement guarantee that would expire at the end of the sandbox. They were fine with the possibility that the guarantee might be rescinded if their offering did not perform as intended or if it harmed the public.

3. **Concern over access to evaluation data.** Participants were very concerned about who would be able to access the data that they would gather and share with the regulator about the performance and effects of their innovative offerings. Many asserted that the data should not, by default, be “public data” or subject to total transparency. They said that the prospect of having their data about acquisition cost, pricing, staffing, sales, profit and other performance analytics being shared with others would deter them from entering the sandbox. This is closely-guarded competitive information, and even sharing it with a regulator would be considered a possible threat to business strategies. They would be more comfortable sharing outcome data—such as data about number of users and outcomes of users—particularly if other competitors must share these data with the regulator as well.

4. **Concern over failed testing at the sandbox stage.** One concern of possible sandbox entrants was that a failed offering may receive more public scrutiny if it occurs as part of the sandbox than if the company stayed in the regular marketplace and had the same product failure. They expressed concern that the data about this failure would be publicly available and the story of that failure might turn out to be a liability for the company. They could instead
develop the offering in the current regulatory scheme, not expose the innovation explicitly to the regulator, and then choose how much attention to draw to their offering.

5. **More states involved, more entrants.** Several participants mentioned that they would be more likely to devote resources to entering the sandbox if there were multiple states involved in it. This multistate involvement could be explicit in the form of states as members of the sandbox, or states could be “watchers” of the sandbox with potential to also extend non-enforcement guarantees or open their markets to successful sandbox experiments. Such involvement would encourage more entrants, particularly if states with larger legal markets were to be involved. That said, participants agreed that being vetted and legitimated by a regulator in one state would be worthwhile, in the expectation that it could positively influence their relationship with other states’ regulators.

**A focus on access.** A final cluster of points that emerged from the workshop and subsequent conversations with interested parties was about the need to prioritize access to justice and equity in the sandbox design. Many reflected, after the workshop, that the sandbox most likely will lead to innovations, especially initially, that serve the middle and upper classes, who can afford unbundled legal service offerings. They questioned whether the sandbox could be designed to incentivize benefits to extend to people with less money to spend on services. Some specific ideas included:

1. **Obligation to distribute innovations to low-income communities.** As more offerings succeed in the sandbox, there might be obligations for the companies to give free licenses, software, or other access to people who cannot afford them.

2. **Matchmaking between technologists, legal aid, and social service groups.** Could a regulator, or associated group, help encourage more access-oriented entrants by bringing together experts with new technologies and business models with professionals who work closely with low-income communities? In this way, the regulator could help legal aid lawyers and social service providers better understand how they might harness emerging technologies and do “innovation” (when most of them do not have the resources to do this on their own). The regulator might also offer incentives and training to possible entrants who are focused on low-income consumers.

3. **Particular encouragements in the application call.** Participants also recommended that the regulator might specifically call for access-oriented innovations when it announces the sandbox. The regulator could identify promising uses of data, AI, staffing, and business models that the literature and experts have already identified for promoting access to justice.