The Law Society of Manitoba
INCORPORATED 1877 | INCORPORÉ EN 1877

AGENDA

Benchers

Date: Thursday, September 9, 2021

Time: 9:00 am

Location: Via Videoconference

ITEM	TOPIC	TIME (min)	SPEAKER	MATERIALS	ACTION
1.0 PRESIDENT'S WELCOME AND TREATY ACKNOWLEDGEMENT					
	The President will welcome benchers and guests to the meeting.				
2.0 IN MEMORIAM					
	Paul Gregory Saranchuk, who passed away on June 8, 2021 at the age of 70. Mr. Saranchuk received his call to the Bar on June 24, 1975. After serving as in-house counsel with Manitoba Public Insurance for four years, Mr. Saranchuk relocated to Alberta where he practised for eight years. In 1987 he returned to Winnipeg, joining D'Arcy & Deacon LLP in practice for 24 years. Mr. Saranchuk retired from practice in 2012.				

	John Douglas Fraser Strange, who passed away on July 10, 2021 at the age of 75. Mr. Strange received his call to the Bar on June 28, 1972. He practised as an associate and partner in several Winnipeg firms for 13 years. In 1985 he joined Manitoba Public Insurance where he served as in-house counsel until his retirement in 2001. **Darius Bramha Hunter**, who passed away on August 11, 2021 at the age of 25. Mr. Hunter received his Juris Doctor degree from the University of Manitoba, Faculty of Law on May 19, 2021. He then joined Phillips, Aiello to complete his articles while registered as a student under the PREP program. **Alan William Scarth, C.M., Q.C.,** , who passed away on August 13, 2021 at the age of 99. Mr. Scarth received his call to the Bar on May 27, 1948. He practised as a partner with Scarth Honeymoon Scarth for eight years and then Scarth, Simonsen for 28 years. In 1987 Mr. Scarth joined Thompson Dorfman Sweatman LLP, where he practised for 18 years. He practised as a sole practitioner for an additional two years before retiring in 2007. Mr. Scarth was appointed Queen's Counsel in 1962 and in 2001 was appointed a Member of the Order of Canada. **Colleen Ann McDuff**, who passed away on August 25, 2021 at the age of 53. Ms McDuff received her call to the Bar on June 23, 1994. She served as a Crown Attorney with Justice Manitoba - Public Prosecutions for 16 years and also as a sole practitioner for one year. Ms McDuff retired from practice in 2017.				
ITEM	**TOPIC**	**TIME (min)**	**SPEAKER**	**MATERIALS**	**ACTION**
3.0 CONSENT AGENDA The Consent Agenda matters are proposed to be dealt with by unanimous consent and without debate. Benchers may seek clarification or ask questions without removing a matter from the consent agenda. Any Bencher may request that a consent agenda item be moved to the regular agenda by notifying the President or Chief Executive Officer prior to the meeting.					
3.1	Minutes of June 17, 2021 Meeting	5		Attached	Approval
3.2	CPLED Appeals Sub-Committee Member			Attached	Approval
3.3	Complaints Investigation Committee Report			Attached	Approval
3.4	Discipline Committee Reports			Attached	Information
3.5	Indigenous Advisory Committee			Attached	Information

ITEM	TOPIC	TIME (min)	SPEAKER	MATERIALS	ACTION
4.0	**EXECUTIVE REPORTS**				
4.1	President's Report	5	Grant Driedger	Attached	Briefing
4.2	CEO Report	10	Leah Kosokowsky	Attached	Briefing
4.3	Strategic Plan	10	Leah Kosokowsky	Attached	Briefing
5.0	**DISCUSSION/DECISION**				
5.1	Rule Amendments - Complaints Investigation and Discipline	15	Rennie Stonyk	Attached	Discussion/ Decision
5.2	Rule Amendments - Admissions and Membership	10	Rennie Stonyk	Attached	Discussion/ Decision
5.3	Model Code Consultation on Discrimination, Harassment and *Ex Parte* Proceedings	15	Darcia Senft	Attached	Discussion/ Decision
6.0	**MISCELLANEOUS BUSINESS**				
6.1	Financial Statements - July 31, 2021	10	Leah Kosokowsky	Pending	Briefing
6.2	Investment Compliance - June 30, 2021	5	Leah Kosokowsky	Attached	Briefing
6.3	The College of Patent Agents and Trademark Agents	5	Leah Kosokowsky	Attached	Briefing
6.4	Interim Report and Update on Library Hub and On-Line Portal Pilot Project	10	Darcia Senft	Attached	Briefing
6.5	Farewell to Student Bencher Christine Williams	5	Grant Driedger		

ITEM	TOPIC	TIME (min)	SPEAKER	MATERIALS	ACTION
7.0	**FOR INFORMATION**				
7.1	Benchers' Meeting and Strategic Planning Schedule - September 9 & 10, 2021			Attached	Information
7.2	Reimbursement Claims Fund Committee			Attached	Information
7.3	Media Reports			Attached	Information

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MEMORANDUM

To:	Benchers
From:	Leah Kosokowsky
Date:	September 1, 2021
Re:	**Strategic Plan 2017 - 2020 - Progress Report**

As we head into the strategic planning retreat, you will want to be aware of the progress that is being made at the operations level under the four strategic objectives of the current strategic plan. Accordingly, we have prepared brief bullet points regarding the work that is underway.

COMPETENCE

Trust Safety Program

- Development of resources to assist trust account supervisors to establish controls over firm trust accounting policies and procedures

Practice Management Check-Up program

- Operations plan to commence in the fall of 2021

Practice Management Resources

- Practice management assessment tool in final stages to launch as a resource

Health and Wellness

- Diversion Program - framework and policy manual in progress
- Peer Support Program -- new board of directors appointed and corporate filings underway
- Expanded outreach on resources

- October issue of Communiqué to be devoted to health and wellness to coordinate with World Mental Health Day on October 10th
- National Well-Being Survey closed with excellent response rate

ACCESS TO JUSTICE

- A2J Coordinator (aka Captain Zoom) met extensively with stakeholders throughout the summer
- Stakeholders meeting scheduled in mid-September
- Event planning underway for National Access to Justice Week in late October
- Communication plan in development for CSOs, inclusive of charitable organizations
- Application and approval process developed for CSOs
- Benchers support development of sandbox concept for legal service providers
- Library Hub restarting with Pro Bono Students Canada

STAKEHOLDER CONFIDENCE

- Communication plan in development for CSO outreach
- Public Survey and communication plan in development for unmet legal needs
- On-line payment platform launched for continuing professional development programs
- Assistance and coordination with the Faculty of law to develop a Students' Code of Conduct
- Media release regarding establishment of Indigenous Advisory Committee

EQUITY, DIVERSITY & INCLUSION

- First meeting of Indigenous Advisory Committee held; second meeting in early October
- CPD on Treaties 1 and 2 planned for September 17th
- Pilot proposal for part-time practising fees in development
- Staff community initiatives to commemorate Orange Shirt Day

Atc.

The Law Society of Manitoba
Strategic Plan 2017 - 2020

June 2021

Mission Statement

The aim of the Law Society is a public well-served by a competent, honourable and independent legal profession.

Competence

Regulate proactively to protect the public interest by ensuring that legal services are delivered by competent and ethical lawyers.

- Implement a "Cradle to Grave" approach by assessing and addressing the competence of lawyers at all stages of practice.
- Proactively assist lawyers and law firms to mitigate risk.
- Proactively ensure that lawyers are fit to practice by addressing members' capacity issues.
- Safeguard client property.

Benchers approve an incremental approach to the regulation of entities and the use of self-assessments November 2018

Registration of law firms commences April 1, 2019

On-line Trust Safety module commences delivery April 1, 2019 with trust account supervisors approved by October 1, 2019

Benchers approve adoption of a practice review/audit program to assist lawyers in meeting competency standards in their practices May 2019

Practice and Ethics Committee issues Report on Practice Audit/Reviews May 2019

Consideration of health and wellness issues by benchers September 2019; FLSC Conference on Health and Wellness in St. John's Newfoundland October 2019

President's Special Committee on Delivering Legal Services begins work November 2019

Rules on Anti-Money Laundering and Terrorist Financing approved October 31, 2019 and implemented January 1, 2020

Continuing Professional Development programming delivered September to December 2019; Best Practice resources and checklists developed and shared with the Benchers and the profession

CPLED 2.0 pilot project commences in Alberta August 2019

Cont'd

Access to Justice

Demonstrate leadership in the advancement, promotion and facilitation of increased access to justice for all Manitobans.

- Explore giving up the profession's monopoly over the delivery of legal services.
- Increase and improve collaboration with the Courts and other justice system stakeholders to advance, promote and increase access to justice.
- Promote the unbundling of legal services as a way to increase access to justice.

Participation in National Access Committee Summit April 2019

Benchers approve Report from the President's Special Committee on the Delivery of Legal Services to permit legal services to be delivered by providers who are unregulated, persons acting under the supervision of a lawyer, persons with a limited license and legal entities, including associations of lawyers and non-lawyers such as Civil Society Organizations May 2019; Report shared with Department of Justice

June 2018 the Law Society seeks amendments to the *Legal Profession Act*

Report on Hub Project proposal shared with stakeholders November 2019. Funding secured through Manitoba Law Foundation

Law Library Hub commences delivery of services in February 2020. (Currently on hold due to COVID)

Application for Manitoba Law Foundation to fund Access to Justice Coordinator in January 2020 (Currently on hold due to COVID)

March 2020 the Province of Manitoba issues Bill 28 to amend the *Legal Profession Act* to create a class of limited practitioners and permit the benchers to expand the exemptions under the *Act* from unauthorized practice

May 2020 President's Special Committee on Regulating Legal Entities presents report to benchers. Recommendations include further work on the expansion of exemptions from the unauthorized practice provisions and development of infrastructure to support delivery of legal services through Civil Society Organizations (CSOs)

Cont'd

President's Special Committee on Health and Wellness presents recommendations to benchers in April 2020 for a diversion program and other initiatives to support health and wellness in the profession. Recommendations approved with work to continue in 2020/2021

PREP Pilot project commences in Manitoba January 30, 2020

Report to benchers on survey results on the articling experience September 2019. Report shared with Equity Committee

Meeting of national counterparts in St. John's, Newfoundland to discuss updates on entity regulation initiatives October 2019

Law Society endorses national study on health and wellness in the legal profession facilitated by the Federation of Law Societies of Canada

PREP commences delivery in four CPLED provinces June 2020

Working group established to create Peer Support Group March 2021

Contractor hired to operationalize Diversion Program April 2021

Inaugural session of CPLED concludes May 2021

Peer Support Group delivers Action Plan Proposal June 2021

National Well-Being Study launched June 2021

Law Library Hub recommences services virtually January 2021

Bill 24 – Amendments to *The Legal Profession Act* receives Third Reading April 2021

Law Society Rules permitting legal services though Civil Service Organizations receive bencher approval February 2021 (English) and April 2021 (French)

Access to Justice Coordinator hired February 2021 (start May 2021)

Bill 24 - Amendments to *The Legal Profession Act* receives Royal Assent May 2021

Stakeholder Confidence

Build public and stakeholder confidence in the Law Society as the regulator of the legal profession.

- Communicate effectively with the public and other stakeholders about the Law Society's mandate as a regulator to protect the public interest.
- Increase the Law Society's engagement with and education of the public.
- Increase the Law Society's engagement with the profession.

Engagement with profession through surveys on articling May 2019

Engagement with profession through annual attendance at Welcoming Ceremony at Faculty of Law and sponsorship of reception September

Engagement with profession through development of survey on part-time practising fees; Draft survey shared with Equity Committee October 2019 with formal survey to be circulated to the profession September 2020

Engagement with profession through bi-annual 50 Year Lunch

Nominating Committee consideration of issues around increasing engagement of the profession in the electoral/appointment process December 2019

Cont'd

Equity, Diversity and Inclusion

Promote and improve principles of equity, diversity and inclusion in the regulation of the legal profession and in the delivery of legal services.

- Demonstrate commitment to equity, diversity and inclusion.
- Promote, support and facilitate equity, diversity and inclusion within the legal profession.
- Address the Calls to Action of the Truth and Reconciliation Committee.

Equity Committee focusing on cultural competency, equity and diversity initiatives for profession, benchers and staff

Equity Committee develops Roadmap for Increasing Cultural Competency

Expansion of gender categories in Annual Member Report April 2019

Annual Co-Host SOGIC Pride Reception

Benchers and Equity Committee consider issues relating to part-time practising fees;

Engagement with Indigenous community in relation to Indian Day Schools Settlement Agreement August/September 2019

Cont'd

New branding of LSM implemented through new signage installed on LSM premises, introduction of new logo through the Communiqué December 2019

Website unveiled January 2020
Information Session on Becoming a Bencher held February 2020

Consultation Report regarding unmet needs in Family Law posted and circulated December 2020 – March 2021

Consultation with the Judiciary February 2021

Sponsor reception for sacred eagle feather gifting ceremony September 2019

Engagement with Indigenous Bar November 2019

Engagement with Indigenous articling and law students through Building Connections event January 2020

Nominating Committee Report to Benchers February 2020 recommending diversity in appointed benchers

Terms of Reference for Indigenous Advisory Committee approved February 2021

Programming delivered on Black Lives Matter February 2021

Appointment of Chair of Indigenous Advisory Committee February 2021

Virtual Building Connections Event March 2021

Nominating committee recruitment of diverse volunteer committee members March 2021

Indigenous Advisory Committee membership approved June 2021

The Law Society of Manitoba
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MEMORANDUM

To:	Benchers
From:	Rennie Stonyk
Date:	September 1, 2021
Re:	**Rule Amendments – Part 2 - Division 8 – Members** **Part 5 - Division 8 – Discipline Proceedings**

At the May 2021 bencher meeting, after reviewing the Monitoring Report of the Complaints Resolution Department and Discipline Department, you gave direction to make several amendments to the Law Society Rules and to the Benchers' and Committee Members' Code of Conduct ("Bencher Code of Conduct").

Receipt and relief of member bankruptcy undertakings - Rules 2-78(1) - (6) and Rule 2-79(2)

You directed that the rules be amended to grant authority to the chief executive officer to receive and relieve members of undertakings related to bankruptcy matters.

Continuation of a discipline hearing with two panel members, and other discipline process-related rule amendments – Part 5, Division 8 (Rules 5-93 – 5-101.1)

You decided that in circumstances where a member of a hearing panel is unable to complete the hearing, the rules should allow for the hearing to proceed with the two remaining panel members, unless all parties to the matter consent to a new hearing panel being convened. You directed that draft rule amendments be provided for your consideration in due course.

You agreed that the rules related to discipline proceedings ought to be amended generally to better articulate the rules and responsibilities of the Independent Chair and the Discipline Committee.

Process for complaints against Benchers, members of the Complaints Investigation Committee and Law Society staff lawyers – Bencher Code of Conduct - Section 7

You also decided that while complaints regarding benchers, members of the Complaints Investigation Committee (CIC) and Law Society staff lawyers should continue to be referred to outside counsel, given the time and cost involved in engaging outside counsel, it would be appropriate for the investigation of complaints involving other volunteer committee members to be conducted by Law Society staff.

Notwithstanding the above you agreed that it would be appropriate for Law Society staff lawyers to handle "no merit" complaints involving benchers, CIC members and Law Society staff, given that all such decisions are subject to review by the Complaints Review Commissioner.

Attached as Appendices A and B you will find amendments to the Law Society Rules and attached as Appendix C you will find amendments to the Bencher Code of Conduct, reflecting the above directions. If the rule amendments meet with your approval, we will have the amendments translated into French and return them to you for final approval. If the amendments to the Bencher Code of Conduct meet with your approval, we will update the Governance Policies to reflect the amendments to Part 3, Section G – Benchers' and Committee Members' Code of Conduct.

RLS

Appendix A
Rule Amendments
Part 2 - Division 8 – Members

Current Wording	Amended Wording	Comments
Notice of bankruptcy **2-78(1)** A member or law corporation must notify the chief executive officer immediately upon: (a) making a proposal, (b) making a voluntary assignment in bankruptcy, or (c) being petitioned into bankruptcy, under the Bankruptcy and Insolvency Act (Canada) and must provide the chief executive officer with: (d) copies of all material filed in connection with the proceeding; (e) a written undertaking to the complaints investigation committee, in a form acceptable to the committee, that the member will not sign cheques drawn on any trust bank account; and (f) a written undertaking to the complaints investigation committee, in a form acceptable to the committee, that no director, officer, shareholder or employee of the law corporation will sign trust cheques drawn on any trust bank account.	**Notice of bankruptcy** **2-78(1)** A member or law corporation must notify the chief executive officer immediately upon: (a) making a proposal, (b) making a voluntary assignment in bankruptcy, or (c) being petitioned into bankruptcy, under the Bankruptcy and Insolvency Act (Canada) and must provide the chief executive officer with: (d) copies of all material filed in connection with the proceeding; (e) a written undertaking ~~to the complaints investigation committee,~~ in a form acceptable to the chief executive officer ~~committee~~, that the member will not sign cheques drawn on any trust bank account; and (f) a written undertaking ~~to the complaints investigation committee~~, in a form acceptable to the chief executive officer, ~~committee~~ that no director, officer, shareholder or employee of the law corporation will sign trust cheques drawn on any trust bank account.	Provides the CEO with authority to receive undertakings from bankrupt members and to relieve members from their undertaking.

Current Wording	Amended Wording	Comments
Discharge of undertaking **2-78(4)** Upon receipt of the absolute order of discharge, the chief executive officer must provide the order to the complaints investigation committee, and the committee must discharge the undertaking given in subsection (1).	**Discharge of undertaking** **2-78(4)** Upon receipt of the absolute order of discharge, the chief executive officer must discharge the undertaking given in subsection (1). ~~provide the order to the complaints investigation committee, and the committee must discharge the undertaking given in subsection (1).~~	
Appearance before committee **2-78(6)** Following notification to the chief executive officer under subsection (1), the complaints investigation committee may request the member or a voting shareholder of the law corporation to appear before the committee to discuss the proposal, voluntary assignment in bankruptcy or petition into bankruptcy, and such other matters as the committee considers appropriate. Failure to appear in answer to the request of the committee, without reasonable excuse, may constitute professional misconduct.	**Appearance before committee** **2-78(6)** Following notification to the chief executive officer under subsection (1), the chief executive officer may refer the matter to the complaints investigation committee, which may request the member or a voting shareholder of the law corporation to appear before the committee to discuss the proposal, voluntary assignment in bankruptcy or petition into bankruptcy, and such other matters as the committee considers appropriate. Failure to appear in answer to the request of the committee, without reasonable excuse, may constitute professional misconduct.	
Appearance before committee **2-79(2)** Following notification to the chief executive officer under subsection (1), the complaints investigation committee may request the member or a voting shareholder of the law corporation to appear before the committee to discuss the judgment, the financial resources and ability of the member or law corporation to satisfy the judgment, and such other matters as the committee considers appropriate. Failure to appear in answer to the request of the committee, without reasonable excuse, may constitute professional misconduct.	**Appearance before committee** **2-79(2)** Following notification to the chief executive officer under subsection (1), the chief executive officer may refer the matter to the complaints investigation committee, which may request the member or a voting shareholder of the law corporation to appear before the committee to discuss the judgment, the financial resources and ability of the member or law corporation to satisfy the judgment, and such other matters as the committee considers appropriate. Failure to appear in answer to the request of the committee, without reasonable excuse, may constitute professional misconduct.	

Appendix B
Rule Amendments
Part 5 - Division 8 – Discipline Proceedings

Current Wording	Amended Wording	Comments
Definitions **5-93(1)** In this division, **"chairperson"** means the chairperson of the discipline committee or his or her designate; **"committee"** means the discipline committee. **General** **5-93(2)** Repealed 05/07 **Appointment of chairperson** **5-93(2.1)** The Benchers must appoint a chairperson who shall be responsible for the function and administration of the committee. (ENACTED 01/15) **Duties of chairperson** **5-93(2.2)** The chairperson may conduct a hearing where the purpose is to: (a) set a hearing date or dates for the continuation of a hearing; (b) request an adjournment of a hearing; (c) order or conduct a pre-hearing conference and give such directions and impose such terms as may facilitate the just disposition of the proceedings; (d) hear and determine preliminary motions; and (e) make an order for substitutional service.	**Definitions** **5-93(1)** In this division, "committee" means the discipline committee **Appointment of committee members** **5-93(2)** The benchers must appoint not less than six benchers to serve as members of the committee, and may appoint non-members to serve as members of the committee. **Duties of the committee** **5-93(3)** The duties of the committee are to: (a) hold hearings into charges against members; (b) set dates for a hearing or the continuation of a hearing; (c) determine preliminary motions; (d) order or conduct pre-hearing conferences; (e) hear reinstatement applications; (f) hear pardon applications; and (g) transact such other business as may come before them. **Appointment of chairperson** **5-93(4)** The Benchers: (a) shall appoint a chairperson of the committee who must be a member of the society and who is not a bencher, officer or employee of the society; (b) may appoint a vice-chairperson who	Allows a discipline hearing panel of 3 to carry on with 2 members if the 3rd panel member is unable to complete the hearing. A new panel can be convened with the consent of the parties. Rules 5-93 and 5-94 have been rearranged and reworded.

Current Wording	Amended Wording	Comments
(ENACTED 01/15) **Duties of the committee** **5-93(3)** The members of the committee shall meet to: (a) hold hearings into charges laid against members; (b) set dates for a hearing or the continuation of a hearing; (c) determine preliminary motions; (d) order or conduct pre-hearing conferences; (e) hear reinstatement applications; (f) hear pardon applications; and (g) transact such other business as may come before them. (AM. 03/05)(01/15) **Composition of committee** **5-93(4)** The benchers must appoint not less than six benchers to serve as members of the committee. **Composition of discipline panels** **5-94(1)** Subject to rule 5-93(2.2), the duties of the committee under rule 5-93(3) must be exercised by a panel of three members of the committee. One of the panel members must be a public representative. Two of the three panel members must have current practising certificates, unless it is not reasonably practicable to have two practising members on the panel, in which case the chairperson may appoint one	must be a member of the society and who is a bencher. **General duties of the chairperson** **5-93(5)** The chairperson shall be responsible for the function and administration of the committee. When the chairperson is not available, the vice-chairperson may perform any function otherwise reserved to the chairperson. **Selection of panel members** **5-93(6)** The chairperson shall select members of the committee to a panel to conduct a hearing into the charges against a member. **Composition of panels** **5-93(7)** Each panel shall consist of three members of the committee, where: (a) one of the panel members must be a public representative; and (b) two panel members must be members of the Society. **Exception to panel committee** **5-93(8)** If a member of a panel appointed under Rule 5-93(7) who has participated in a hearing becomes unable, for any reason, to complete the hearing: (a) the remaining two panel members may complete the hearing, as if fully constituted; or (b) all parties to the matter may consent to a new panel being convened. **Administration of hearings** **5-93(9)** The chairperson, a panel of the	

Current Wording	Amended Wording	Comments
practising member and one non-practising or inactive member to sit on the panel. (AM. 05/12, 01/15) **Exception** **5-94(2)** Repealed 01/15	committee, or a single member of the committee designated by the chairperson, may: (a) set a schedule for a hearing or continuation of a hearing; (b) adjourn a hearing; (c) order a pre-hearing conference; (d) conduct a pre-hearing conference; (e) give such directions and impose such terms as may facilitate the just disposition of a disciplinary proceeding; (f) make an order for substitutional service; (g) hear and determine preliminary motions; and for any such purposes hold a hearing in such form as the chairperson, designated member, or panel may direct. **Panel required to hear and determine certain matters** **5-93(10)** Only a panel of the committee may hear and determine the substance of: (a) the charges against a member; (b) an application for reinstatement; or (c) a pardon application; and such panel need not be the same panel as a panel appointed for the purposes set out in Rule 5-93(9).	

Current Wording	Amended Wording	Comments
Composition of discipline panels **5-94(1)** Subject to rule 5-93(2.2), the duties of the committee under rule 5-93(3) must be exercised by a panel of three members of the committee. One of the panel members must be a public representative. Two of the three panel members must have current practising certificates, unless it is not reasonably practicable to have two practising members on the panel, in which case the chairperson may appoint one practising member and one non-practising or inactive member to sit on the panel. (AM. 05/12, 01/15)	~~**Composition of discipline panels**~~ ~~**5-94(1)** Subject to rule 5-93(2.2), the duties of the committee under rule 5-93(3) must be exercised by a panel of three members of the committee. One of the panel members must be a public representative. Two of the three panel members must have current practising certificates, unless it is not reasonably practicable to have two practising members on the panel, in which case the chairperson may appoint one practising member and one non-practising or inactive member to sit on the panel. (AM. 05/12, 01/15)~~	5-94(1) has been moved to 5-93(7).
Disqualification **5-95** A member of the committee must not sit as a member of a hearing panel where: (a) the committee member or any other member of his or her law firm: (i) is the complainant or has advised the complainant in connection with the matter that is the subject of the hearing; (ii) will be a witness; (iii) conducted the pre-hearing conference in the matter that is the subject of the hearing; or	**Disqualification** **5-95** A member of the committee must not sit as a member of a ~~hearing~~ panel where: (a) the committee member or any other member of his or her law firm: (i) is the complainant or has advised the complainant in connection with the matter that is the subject of the hearing; (ii) will be a witness; (iii) conducted the pre-hearing conference in the matter that is the subject of the hearing <u>unless the parties consent to the member sitting as a member of the panel;</u> or	Throughout this Division 8 the reference to "panel" has been made consistent by changing "hearing panel" and "discipline panel", as the case may be, to simply say "panel" so that the same terminology is used throughout. Allows for the parties to consent to an individual sitting as a member of more than one panel to the matter.

Current Wording	Amended Wording	Comments
(b) a member of his or her firm: (i) is the member whose conduct or competence is the subject of the hearing; (ii) is appearing as counsel; or (iii) the committee member sat as a member of the complaints investigation committee when it considered the matter that is the subject of the hearing.	(i) a member of his or her firm: (i) is the member whose conduct or competence is the subject of the hearing; (ii) is appearing as counsel; or (iii) the committee member sat as a member of the complaints investigation committee when it considered the matter that is the subject of the hearing.	
Chairperson to appoint panel **5-96(1)** Once a charge has been served on a member, the chairperson must select a discipline panel to conduct a hearing and make a determination.	~~**Chairperson to appoint panel**~~ ~~**5-96(1)** Once a charge has been served on a member, the chairperson must select a discipline panel to conduct a hearing and make a determination.~~	5-96(1) has been moved to 5-93(6).
Right to counsel **5-96(2)** A member whose conduct or competence is the subject of a hearing is entitled to be represented by counsel.		
Law society counsel **5-96(3)** The chief executive officer may appoint counsel employed by the society or retain other counsel to draft and prosecute a charge.		
Setting and serving notice of a hearing date **5-96(4)** The date, time and place for a hearing must be set by agreement between counsel for the society and the member or his or her counsel or failing agreement, by the chairperson. Notice of the date, time and place of		

Current Wording	Amended Wording	Comments
the hearing must be served on the member or his or her counsel. (AM. 09/13) **Method of service** **5-96(4.1)** Service of the notice under subsection (4) may be effected in accordance with rules 5-78(3) and 5-78(4). (ENACTED 09/13)		
Resolution of panel **5-96(5)** After hearing and considering the evidence and representations made, a discipline panel must make and record a resolution stating: (a) which, if any, of the acts or omissions stated in the charge have been proved to the satisfaction of the panel; and (b) whether or not, by the acts or omissions so proved, the member is guilty of professional misconduct or conduct unbecoming a lawyer or student, or incompetence.	**Resolution of panel** **5-96(5)** After hearing and considering the evidence and representations made, a ~~discipline~~ panel must make and record a resolution stating: (a) which, if any, of the acts or omissions stated in the charge have been prove**n**~~d~~ to the satisfaction of the panel; and (b) whether or not, by the acts or omissions so proved, the member is guilty of professional misconduct or conduct unbecoming a lawyer or student, or incompetence.	
Dismissal of charge **5-96(6)** When a discipline panel finds that a member is not guilty of professional misconduct or conduct unbecoming a lawyer or student, or incompetence, it must dismiss the charge.	**Dismissal of charge** **5-96(6)** When a ~~discipline~~ panel finds that a member is not guilty of professional misconduct or conduct unbecoming a lawyer or student, or incompetence, it must dismiss the charge.	
Penalties **5-96(7)** When a discipline panel finds that a member is guilty of professional misconduct or of conduct unbecoming a lawyer or student or incompetence, it may impose one or more of the penalties set out under sections 72 and 73 of the Act.	**Consequences ~~Penalties~~** **5-96(7)** When a ~~discipline~~ panel finds that a member is guilty of professional misconduct or of conduct unbecoming a lawyer or student or incompetence, it may impose one or more of the consequences ~~penalties~~ set out under sections 72 and 73 of the Act.	Change “penalties” to “consequences” to align with the language in the Act.

Current Wording	Amended Wording	Comments
Costs **5-96(8)** When a discipline panel finds that a member is guilty of professional misconduct or of conduct unbecoming a lawyer or student, or incompetence, it may, pursuant to section 72 of the Act, order the member to pay all or any part of the costs incurred by the society in connection with any investigation or proceedings relating to the matter in respect of which the member was found guilty including, but not limited to, the following items: (a) all reasonable disbursements incurred by the society in investigating and proceeding to the hearing; (b) audit fees for time spent by auditors/investigators employed by the society in investigating and proceeding to the hearing, at rates set from time to time by the chief executive officer. These rates must reflect the actual costs connected with the investigation and hearing; (c) counsel fees for time spent by lawyers in investigating and preparing for proceeding to the hearing, but excluding the time spent at the hearing of the matter, at rates set from time to time by the chief executive officer. These rates must reflect the actual costs connected with the investigation and hearing; (d) $500 for each one-half day of	**Costs** **5-96(8)** When a ~~discipline~~ panel finds that a member is guilty of professional misconduct or of conduct unbecoming a lawyer or student, or incompetence, it may, pursuant to section 72 of the Act, order the member to pay all or any part of the costs incurred by the society in connection with any investigation or proceedings relating to the matter in respect of which the member was found guilty including, but not limited to, the following items: (a) all reasonable disbursements incurred by the society in investigating and proceeding to the hearing; (b) audit fees for time spent by auditors/investigators employed by the society in investigating and proceeding to the hearing, at rates set from time to time by the chief executive officer. These rates must reflect the actual costs connected with the investigation and hearing; (c) counsel fees for time spent by lawyers in investigating and preparing for proceeding to the hearing, but excluding the time spent at the hearing of the matter, at rates set from time to time by the chief executive officer. These rates must reflect the actual costs connected with the investigation and hearing; (d) $500 for each one-half day of hearing, including the hearing of	

Current Wording	Amended Wording	Comments
hearing, including the hearing of motions, arguments and other proceedings; and (e) honoraria paid to members of the discipline panel who sit on a hearing, including the hearing of motions, arguments, and other proceedings. **Public access to record of hearing** **5-96(9)** The chief executive officer may disclose the record of the hearing to the members of the society and to the public, except for any parts of the record pertaining to proceedings held in camera. **Record of hearing** **5-96(10)** The record of the hearing must include, but is not limited to: (a) the citation of the charges laid under rule 5-78(1); (b) the exhibits submitted in evidence at the hearing; (c) the transcript of the hearing; and (d) the written reasons of the discipline panel or the transcript of the panel's oral reasons. **Service of decision on member** **5-97** Following a hearing, the chief executive officer must serve a copy of the written reasons of the discipline panel on the member or his or her counsel. When a member has been found guilty of professional misconduct or of	motions, arguments and other proceedings; and (e) honoraria paid to members of the ~~discipline~~ panel who sit on a hearing, including the hearing of motions, arguments, and other proceedings. **Record of hearing** **5-96(10)** For the purposes of Rule 5-96(9), **t**~~T~~he record of the hearing ~~must~~ include**s**, but is not limited to: (a) the citation of the charges laid under rule 5-78(1); (b) the exhibits submitted in evidence at the hearing; (c) the transcript of the hearing; and (d) the written reasons of the ~~discipline~~ panel or the transcript of the panel's oral reasons. **Service of decision on member** **5-97** Following a hearing, the chief executive officer must serve a copy of the written reasons of the ~~discipline~~ panel on the member or his or her counsel. When a member has been found guilty of professional misconduct or of conduct	Clarifies that the record of the hearing does not only consist of the list of items, but includes them.

Current Wording	Amended Wording	Comments
conduct unbecoming a lawyer or student, or incompetence, the chief executive officer must also notify the member or his or her counsel of the member's right to appeal the decision under section 76 of the Act.	unbecoming a lawyer or student, or incompetence, the chief executive officer must also notify the member or his or her counsel of the member's right to appeal the decision under section 76 of the Act.	
Report to complaints investigation committee **5-98** Following a hearing, the chief executive officer must provide a report, to include a copy of the written reasons of the discipline panel, to the chairperson of the complaints investigation committee.	**Report to complaints investigation committee** **5-98** Following a hearing, the chief executive officer must provide a report, to include a copy of the written reasons of the ~~discipline~~ panel, to the chairperson of the complaints investigation committee.	
Report to benchers **5-99** The discipline panel must report its findings and disposition to the benchers at the first bencher meeting following the hearing.	**Report to benchers** **5-99** The ~~discipline~~ panel must report its findings and disposition to the benchers at the first bencher meeting following the hearing.	
Publication of disbarment, suspension, resignation, restrictions on practice **5-100(1)** When a lawyer is disbarred or suspended from practising law or permitted to resign his or her membership in the society or restrictions are imposed on the lawyer's practice that he or she refrain from practising in respect of certain areas of the law or where the permit of the lawyer's law corporation is revoked or suspended as a result of a finding of: (a) professional misconduct; (b) conduct unbecoming a lawyer; or (c) incompetence; the chief executive officer must place a notice of the action taken in one issue of a newspaper that is in circulation:		

Current Wording	Amended Wording	Comments
(d) in the area where the lawyer or law corporation has an office and from which the lawyer or law corporation practises; or (e) where the lawyer or law corporation is no longer practising, in the area where the lawyer or law corporation last practised and from which the lawyer or law corporation last practised. (AM. 06/03; 06/09)		
Notice when member found guilty **5-100(2)** When a member is found guilty of professional misconduct, or conduct unbecoming a lawyer or student, or incompetence, the chief executive officer must give notice of the finding to the members of the society, to any party whose complaint gave rise to the charge against the member, to each other governing body of the legal profession in Canada of which the member is a member and the chief executive office may disclose the conviction in any database of membership information operating to facilitate the mobility of lawyers in Canada. The notice must include: (a) the name of the member; (b) the name of the member's law corporation, if the member is the sole voting shareholder; (c) the nature of the charge pursuant to which the member was found guilty, including brief particulars; (d) the penalty imposed, including	**Notice when member found guilty** **5-100(2)** When a member is found guilty of professional misconduct, or conduct unbecoming a lawyer or student, or incompetence, the chief executive officer must give notice of the finding to the members of the society, to any party whose complaint gave rise to the charge against the member, to each other governing body of the legal profession in Canada of which the member is a member and the chief executive office may disclose the conviction in any database of membership information operating to facilitate the mobility of lawyers in Canada. The notice must include: (a) the name of the member; (b) the name of the member's law corporation, if the member is the sole voting shareholder; (c) the nature of the charge pursuant to which the member was found guilty, including brief particulars; (d) the penalty imposed, including any restrictions; and	

Current Wording	Amended Wording	Comments
any restrictions; and (e) any costs imposed. The discipline panel may direct the chief executive officer to publish to the public such information concerning its findings as it considers appropriate in the circumstances in such manner and by such means as it may determine. **Notice when member found not guilty** **5-100(3)** When a member is found not guilty of professional misconduct, or conduct unbecoming a lawyer or student or incompetence, the chief executive officer must: (a) give notice of the decision to any party whose complaint gave rise to the charge; and (b) give notice of the finding to the members of the society. This notice must include the nature of the charge but must not disclose the name of the member or the name of the member's law corporation without the member's consent. The discipline panel may direct the chief executive officer to publish to the public such additional information concerning its findings as it considers appropriate in the circumstances in such manner and by such means as it may determine. (AM. 02/13)	(e) any costs imposed. The ~~discipline~~ panel may direct the chief executive officer to publish to the public such information concerning its findings as it considers appropriate in the circumstances in such manner and by such means as it may determine. **Notice when member found not guilty** **5-100(3)** When a member is found not guilty of professional misconduct, or conduct unbecoming a lawyer or student or incompetence, the chief executive officer must: (a) give notice of the decision to any party whose complaint gave rise to the charge; and (b) give notice of the finding to the members of the society. This notice must include the nature of the charge but must not disclose the name of the member or the name of the member's law corporation without the member's consent. The ~~discipline~~ panel may direct the chief executive officer to publish to the public such additional information concerning its findings as it considers appropriate in the circumstances in such manner and by such means as it may determine. (AM. 02/13)	

Current Wording	Amended Wording	Comments
Further investigation **5-101** When, in the course of a hearing, a matter concerning the conduct or competence of a member comes to the attention of the discipline panel, and it is of the opinion that the conduct or competence requires investigation, the discipline panel may refer the matter to the chief executive officer for investigation under division 6 of this Part. **Application for a pardon** **5-101.1(1)** Subject to subsection (2), in circumstances where: (a) a member's conduct was censured by the Complaints Investigation Committee and the member accepted a formal caution; or (b) a discipline panel found a member guilty of professional misconduct or conduct unbecoming a lawyer or student or incompetence and imposed a reprimand or fine, with or without an order of costs, and no other order, action or penalty was imposed on the member by the discipline panel as a result of that conviction, the member may apply to the discipline committee for a pardon. (ENACTED 03/05) **Definition of pardon** **5-101.1(2)** A pardon is evidence of the fact	**Further investigation** **5-101** When, in the course of a hearing, a matter concerning the conduct or competence of a member comes to the attention of the ~~discipline~~ panel, and it is of the opinion that the conduct or competence requires investigation, the ~~discipline~~ panel may refer the matter to the chief executive officer for investigation under division 6 of this Part. **Application for a pardon** **5-101.1(1)** Subject to subsection (2), in circumstances where: (a) a member's conduct was censured by the Complaints Investigation Committee and the member accepted a formal caution; or (b) a ~~discipline~~ panel found a member guilty of professional misconduct or conduct unbecoming a lawyer or student or incompetence and imposed a reprimand or fine, with or without an order of costs, and no other order, action or penalty was imposed on the member by the ~~discipline~~ panel as a result of that conviction, the member may apply to the ~~discipline~~ committee for a pardon. (ENACTED 03/05)	

Current Wording	Amended Wording	Comments
that the Society no longer considers the censure or conviction to reflect adversely on the member's character. (ENACTED 03/05) **Application criteria** **5-101.1(3)** At the time a member makes an application under subsection (1), the following criteria must be satisfied: (a) ten years have passed since the date of the censure or conviction; (b) since the date of the censure or conviction the member has not accepted any other formal cautions and has not been found guilty of any other charges of professional misconduct, conduct unbecoming a lawyer or student or incompetence; (c) there are no charges pending against the member; (d) there are no complaints about the member under investigation; (e) the member has paid the society all money owing by the member to the society; and (f) a discipline panel has not granted any previous application by the member under this rule. (ENACTED 03/05) **Convening a hearing** **5-101.1(4)** Where the chairperson of the discipline committee is satisfied that the applicant has met the criteria set out in subsection (3), the chairperson must establish a discipline panel to	**Application criteria** **5-101.1(3)** At the time a member makes an application under subsection (1), the following criteria must be satisfied: (a) ten years have passed since the date of the censure or conviction; (b) since the date of the censure or conviction the member has not accepted any other formal cautions and has not been found guilty of any other charges of professional misconduct, conduct unbecoming a lawyer or student or incompetence; (c) there are no charges pending against the member; (d) there are no complaints about the member under investigation; (e) the member has paid the society all money owing by the member to the society; and (f) a ~~discipline~~ panel has not granted any previous application by the member under this rule. (ENACTED 03/05) **Convening a hearing** **5-101.1(4)** Where the chairperson of the ~~discipline~~ committee is satisfied that the applicant has met the criteria set out in subsection (3), the chairperson must establish a ~~discipline~~ panel to	

Current Wording	Amended Wording	Comments
hear the application and make a determination. A hearing date must be set and notice provided to the applicant in accordance with rule 5-96(4). (ENACTED 03/05)	hear the application and make a determination. A hearing date must be set and notice provided to the applicant in accordance with rule 5-96(4). (ENACTED 03/05)	
Role of panel **5-101.1(5)** A panel may grant a pardon if it determines that: (g) the member has met all the criteria set out in subsection (3); and (h) under all the circumstances, a pardon is appropriate. (ENACTED 03/05)		
Service of decision on applicant **5-101.1(6)** Following a hearing, the chief executive officer must serve a copy of the written decision of the discipline panel on the member or his or her counsel in accordance with rules 5-78(3) and 5-78(4). (ENACTED 03/05)	**Service of decision on applicant** **5-101.1(6)** Following a hearing, the chief executive officer must serve a copy of the written decision of the ~~discipline~~ panel on the member or his or her counsel in accordance with rules 5-78(3) and 5-78(4). (ENACTED 03/05)	
Disclosure of pardoned censure or conviction **5-101.1(7)** A determination by a discipline panel to grant a pardon does not set aside the censure or conviction or relieve the society of any obligation to disclose the censure or conviction under the Act or these rules. Any disclosure of a censure or conviction that has been pardoned must also disclose that the member has received a pardon and that the Society no longer considers the censure or conviction to reflect adversely on the member's character. (ENACTED 03/05)	**Disclosure of pardoned censure or conviction** **5-101.1(7)** A determination by a ~~discipline~~ panel to grant a pardon does not set aside the censure or conviction or relieve the society of any obligation to disclose the censure or conviction under the Act or these rules. Any disclosure of a censure or conviction that has been pardoned must also disclose that the member has received a pardon and that the Society no longer considers the censure or conviction to reflect adversely on the member's character. (ENACTED 03/05)	

Appendix C
Benchers' and Committee Members' Code of Conduct Amendments

Current Wording	Amended Wording	Comments
7. Complaints against Benchers and Legal Staff: a. The investigation into complaints within the meaning of Rule 5-60 against Benchers or legal staff employed by the Society shall be supervised by experienced, independent counsel who shall: (20-05-10) i. exercise all investigatory powers of the Chief Executive Officer in connection with the investigation; and (20-05-10) ii. include in a report written recommendations as to the proper disposition of the complaint. (20-05-10) b. Upon receipt of the investigatory report and recommendations referred to in subparagraph (a), the Complaints Investigation Committee shall proceed to dispose of the matter as it deems	**7. Complaints against Benchers, non-Bencher Committee Members and Staff Lawyers:** It is important that the public have confidence in the governing body of the Society; therefore, investigations into complaints made against Benchers, non-Bencher committee members, and Society staff lawyers must be conducted in a fair and impartial manner. The following provisions are designed to address such complaints fairly and impartially while balancing the need for expediency in the investigation process. a. Subject to subsection (c), independent legal counsel shall conduct the investigation into complaints within the meaning of Rule 5-60 against Benchers, members of the Complaints Investigation Committee, or Society staff lawyers. b. Upon completion of the investigation under subsection (a), the independent legal counsel shall provide a written	Permits Law Society Staff lawyers to conduct investigations of complaints against volunteer committee members (except for CIC). "No merit" complaints against benchers, volunteer committee members (including CIC) and Law Society staff lawyers can be handled by Law Society staff lawyers.

appropriate within the scope of the Rules of the Society. (20-05-10) c. It being important that the public have confidence in the governing body of the Society, it is desirable that Benchers and non-Bencher members of committees of the Society refrain from attending at and participating in Bencher and committee meetings, deliberations and activities during any period of time when there is an outstanding and unresolved charge of professional misconduct, conduct unbecoming or incompetence against that individual.	report and recommendation to the Complaints Investigation Committee for the disposition of the complaint. Upon receipt of the ~~investigatory~~ report and recommendation~~s referred to in subparagraph (a)~~, the Complaints Investigation Committee shall proceed to dispose of the matter as it deems appropriate within the scope of the Rules of the Society. c. Notwithstanding subsection (a), where a complaint is received about a Bencher, a member of the Complaints Investigation Committee or a Society staff lawyer, if Society staff lawyers determine, pursuant to Rule 5-62(1), that the complaint does not have merit, then the Society staff lawyers may dispose of the complaint on that basis, provided that the complainant is advised of the right to have the disposition reviewed by the Complaints Review Commissioner in accordance with Rules 5-62(2) and 5-63. d. ~~It being important that the public have confidence in the governing body of the Society, it is desirable that Benchers and non-Bencher members~~	

	~~of committees of the Society refrain from attending at and participating in~~ A Bencher or committee member shall not attend or participate in Bencher ~~and~~or committee meetings, deliberations ~~and~~or activities during ~~any~~the period of time there is an outstanding and unresolved charge of professional misconduct, conduct unbecoming or incompetence against that individual.	

The Law Society of Manitoba
INCORPORATED 1877 | INCORPORÉ EN 1877

MEMORANDUM

To:	Benchers
From:	Rennie Stonyk
Date:	September 1, 2021
RE:	**Rule Amendments – Part 5 - Division 1 – Admissions** **Part 2 - Division 8.1 – Professional Development** **Part 2 - Division 9 – Fees and Assessments** **Part 2 - Division 10 – Suspensions for Failure to Pay**

At the April 2021 bencher meeting, after considering the report of the Admissions and Education Committee, you resolved to authorize a number of amendments to the Law Society Rules.

In light of the changes to the PREP program, you resolved to extend the period within which students must complete both the bar admission program and their articling term from two years to three years, with discretion for the Chief Executive Officer to extend the period further in exceptional circumstances.

For individuals who have been administratively suspended for a period exceeding 30 days pursuant to Rule 2-81.1 (failure to complete mandatory continuing professional development) or Rule 2-86 (failure to pay practising fees or to contribute to the professional liability claims fund), you resolved to require those individuals to apply to resume active practise.

You also agreed that we ought to repeal the outdated rule requiring members to participate in Code of Professional Conduct training by April 1, 2012.

Although not considered at the April bencher meeting, in preparing the rule amendments, we identified outdated wording in Rule 2-86 that requires the Society to mail fee notices to members. We are recommending that the word “mail” be changed to “sent”.

Attached as Appendices A and B you will find the rule amendments that have been drafted to reflect the resolutions and recommendation outlined above. If these amendments meet with your approval, we will have the amendments translated into French and return them to you for final approval.

RLS

Appendix A
Rule Amendments
Part 5 - Division 1 - Admissions

Current Wording	Amended Wording	Comments
Definitions **Articling and Bar Admission Program** **5-5(1)** Subject to subsection (4), every articling student must: (a) successfully complete the bar admission program and the term of articles within 2 years from the date of commencement of either the bar admission program or the student's articles, whichever is commenced earlier; (b) serve, unless abridged by the chief executive officer, at least 52 weeks of full-time articles, or part-time articles which are equivalent to 52 weeks of full-time articles, as approved by the chief executive officer. Abridgments of more than four weeks may only be granted in exceptional circumstances. (AM. 04/04; 05/07; 10/08; 05/11; 06/15; 05/20)	**Articling and Bar Admission Program** **5-5(1)** Subject to subsection (4), every articling student must: (a) successfully complete the bar admission program and the term of articles within ~~2~~3 years from the date of commencement of either the bar admission program or the student's articles, whichever is commenced earlier. The chief executive officer may extend the completion time for the bar admission program and the term of articles beyond 3 years in exceptional circumstances; (b) serve, unless abridged by the chief executive officer, at least 52 weeks of full-time articles, or part-time articles which are equivalent to 52 weeks of full-time articles, as approved by the chief executive officer. Abridgments of more than four weeks may only be granted in exceptional circumstances. (AM. 04/04; 05/07; 10/08; 05/11; 06/15; 05/20)	Extends Bar Admission Program and articles completion from 2 to 3 years and grants CEO discretion to extend for a longer period in exceptional circumstances.

Appendix B
Rule Amendments
Part 2 - Division 8.1 - Professional Development
Part 2 - Division 9 – Fees and Assessments
Part 2 - Division 10 - Suspensions for Failure to Pay

Current Wording	Amended Wording	Comments
Mandatory Code of Professional Conduct training **2-81.1(4)** All practising lawyers must successfully complete a society training program on the Code of Professional Conduct before January 1, 2012. (ENACTED 02/11) (AM. 05/11) **Mandatory Code of Professional Conduct training for other members** **2-81.1(5)** When a non-practising, inactive or suspended member applies to resume active practice and has not completed a society training program on the Code of Professional Conduct, he or she must successfully complete a program within six months of resuming active practice. (ENACTED 02/11) (AM. 05/11) **Extension of time for completion of training or reporting** **2-81.1(6)** The chief executive officer may extend the time for completion of the requirements set out in subsections (3), (4) and (5). (ENACTED 02/11) (AM. 05/11) **Failure to comply** **2-81.1(7)** Failure to complete the requirements set out in subsections (3), (4) (5) and (11), without reasonable excuse, may constitute professional misconduct. (ENACTED 02/11) (AM 05/11)	~~**Mandatory Code of Professional Conduct training**~~ ~~**2-81.1(4)** All practising lawyers must successfully complete a society training program on the Code of Professional Conduct before January 1, 2012. (ENACTED 02/11) (AM. 05/11)~~ ~~**Mandatory Code of Professional Conduct training for other members**~~ ~~**2-81.1(5)** When a non-practising, inactive or suspended member applies to resume active practice and has not completed a society training program on the Code of Professional Conduct, he or she must successfully complete a program within six months of resuming active practice. (ENACTED 02/11) (AM. 05/11)~~ **Extension of time for completion of training or reporting** **2-81.1(6)** The chief executive officer may extend the time for completion of the requirements set out in subsection~~s~~ (3)~~, (4) and (5)~~. (ENACTED 02/11) (AM. 05/11) **Failure to comply** **2-81.1(7)** Failure to complete the requirements set out in subsections (3)~~, (4) (5)~~ and (11), without reasonable excuse, may constitute professional misconduct. (ENACTED 02/11) (AM 05/11)	Repeals requirements for mandatory participation in a training program for the Code of Professional Conduct.

Current Wording	Amended Wording	Comments
Mandatory continuing professional development **2-81.1(8)** Commencing January 1, 2012, and subject to subsection (10), a practising lawyer must complete one hour of eligible activities for each month or part of a month in a calendar year during which the lawyer maintained active practising status. Where the lawyer maintained active practising status for three or more months in the calendar year, one and a half hours of the total eligible hours must relate to ethics, professional responsibility or practice management. (ENACTED 05/11) **Failure to complete continuing professional development activities** **2-81.1(12)** Where a practising lawyer fails to comply with subsection (8), the chief executive officer may send a letter to the lawyer advising that he or she must comply with the requirements within 60 days from the date the letter is sent. A member who fails to comply within 60 days is automatically suspended from practising law until such time as the requirements have been met and a reinstatement fee paid. (ENACTED 05/11) (AM. 09/13)	**Mandatory continuing professional development** **2-81.1(8)** ~~Commencing January 1, 2012, and~~ **S**~~s~~ubject to subsection (10), a practising lawyer must complete one hour of eligible activities for each month or part of a month in a calendar year during which the lawyer maintained active practising status. Where the lawyer maintained active practising status for three or more months in the calendar year, one and a half hours of the total eligible hours must relate to ethics, professional responsibility or practice management. (ENACTED 05/11) **Failure to complete continuing professional development activities** **2-81.1(12)** (a) Where a practising lawyer fails to comply with subsection (8), the chief executive officer may send a letter to the lawyer advising that he or she must comply with the requirements within 60 days from the date the letter is sent. A member who fails to comply within 60 days is automatically suspended from practising law until such time as the requirements have been met and a reinstatement fee paid. (b) Where a member is suspended under subsection (a) for a period of 30 days or less, the member must be reinstated on the date of payment, provided the requirements under rule 2.81.1(8) have been met.	Requires a member who has been administratively suspended for a period exceeding 30 days to apply to resume active practise.

Current Wording	Amended Wording	Comments
	(c) Where a member is suspended under subsection (a) for a period exceeding 30 days, then in addition to meeting the requirements under rule 2.81.1(8) and paying the reinstatement fee, the member must apply to resume active practice under rule 5-28.2.	
Notice from society – practising fees **2-86(1)** The chief executive officer must send to each practising lawyer and non-practising member written notice of: (a) the amount of the annual practising and non-practising fees and the amount of the contributions to the reimbursement and education funds. The notice must be mailed on or before March 1st in each year; (b) the amount of any special fee, levy or assessments under rule 2-85; (c) the due date for payment, in full and by instalments, of any fee, contribution, levy or assessment. (AM. 02/04; 10/07)	**Notice from society – practising fees** **2-86(1)** The chief executive officer must send to each practising lawyer and non-practising member written notice of: (a) the amount of the annual practising and non-practising fees and the amount of the contributions to the reimbursement and education funds. The notice must be sent ~~mailed~~ on or before March 1st in each year; (b) the amount of any special fee, levy or assessments under rule 2-85; (c) the due date for payment, in full and by instalments, of any fee, contribution, levy or assessment. (AM. 02/04; 10/07)	Changes the requirement to "mail" written notice of practising fees and contribution to claims fund to "send", to allow for other methods of providing notice.
Notice from society – contribution to claims fund **2-86(2)** The chief executive officer must send to each practising lawyer written notice of the amount of the contribution to the	**Notice from society – contribution to claims fund** **2-86(2)** The chief executive officer must send to each practising lawyer written notice of the amount of the contribution to the professional liability claims fund. The notice must be sent ~~mailed~~	

Current Wording	Amended Wording	Comments
professional liability claims fund. The notice must be mailed on or before June 1st in each year and include the due dates for payment in full and by instalments. (ENACTED 10/07)	on or before June 1st in each year and include the due dates for payment in full and by instalments. (ENACTED 10/07)	
Reinstatement fee **2-89** A member who is suspended from practising law under rule 2-88 must pay a reinstatement fee in addition to any fee or penalty owing in order to be reinstated to practice. The member must be reinstated on the date of payment.	**Reinstatement fee** **2-89(1)** A member who is suspended from practising law under rule 2-88 must pay a reinstatement fee in addition to any fee or penalty owing in order to be reinstated to practice. **2-89(2)** If the member is suspended under rule 2-88 for a period of 30 days or less, **t**~~T~~he member must be reinstated on the date of payment. **2-89(3)** If the member is suspended under rule 2-88 for a period exceeding 30 days, then in addition to paying a reinstatement fee and any other fees or penalties owing, the member must apply to resume active practice under rule 5-28.2.	Requires a member who has been administratively suspended for a period exceeding 30 days to apply to resume active practise.
Automatic suspension **2-91** A member is automatically suspended from practising law if he or she, within 30 days of the due date or within 30 days of any later date that the chief executive officer, upon application, has approved: (a) fails to pay any fine or costs ordered to be paid by a discipline panel under subsections 72(1) and 72(2) of the Act; (b) fails to pay the costs of the inspection of his or her accounts and records as required under rule 5-47(9);		

Current Wording	Amended Wording	Comments
(c) fails to pay any deductible owing under a group insurance contract under subsection 45(5) of the Act; or (d) fails to reimburse the society for expenses incurred by the society in carrying out a custodial order obtained under subsection 57(1) of the Act or in winding up a member's practice under rule 2-74.		
Reinstatement fee **2-92** A member who is suspended from practising law under rule 2-91 must pay a reinstatement fee in addition to the fees, costs, fines or expenses owing in order to be reinstated to practice. The member must be reinstated on the date of payment.	**Reinstatement fee** **2-92<u>(1)</u>** A member who is suspended from practising law under rule 2-91 must pay a reinstatement fee in addition to the fees, costs, fines or expenses owing in order to be reinstated to practice. **<u>2-92(2)</u>** <u>If a member is suspended under rule 2-91 for a period of 30 days or less, T</u>~~t~~**<u>t</u>**<u>he</u> member must be reinstated on the date of payment. **<u>2-92(3)</u>** <u>If a member is suspended under rule 2-91 for a period exceeding 30 days, then in addition to paying a reinstatement fee and any other fees, costs, fines or expenses owing, the member must apply to resume active practice under rule 5-28.2.</u>	

The Law Society of Manitoba
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MEMORANDUM

To:	Benchers
From:	Leah Kosokowsky and Darcia Senft
Date:	September 1, 2021
Re:	**Model Code Consultation on Discrimination, Harassment and *Ex Parte* Proceedings**

I. Proposed Model Code Amendments

Nearly a decade ago, when you revised Manitoba's *Code of Professional Conduct,* the amendments generally were made in step with amendments to the national *Model Code* of *Professional Conduct* ("*Model Code*"). You agreed that it was beneficial to adopt a harmonized approach to rules about professional conduct, especially in light of increased mobility within the profession. From time to time, further amendments to the *Model Code* are recommended with the goal that the 14 law societies will arrive at wording that is acceptable to all. Reaching consensus inevitably requires some compromise.

In mid-July, the Federation of Law Societies' Standing Committee on the Model Code circulated its second consultation report on proposed changes to the *Model Code*, specifically Rule 6.3 concerning discrimination and harassment and ex parte communications under Chapter 5 relating to the administration of justice. The report is attached as **Appendix I**.

You were not provided with the initial consultation in 2020 and it was not considered by one of our committees. Our Law Society was, however, involved previously through its participation on the Federation's Law Societies Equity Network which provided the initial impetus for an examination of the harassment and discrimination rules and commentaries. We were also advised of the Standing Committee's intention to conduct a limited second consultation with law societies.

The Standing Committee received extensive feedback to its first consultation report. There were challenges associated with considering and integrating the important feedback. Nonetheless, you will note from Appendix I that many of the recommendations were adopted and where they were not, an explanation has been provided.

After further revising the draft rule amendments, the Standing Committee now seeks final comment, signaling the hope that all law societies recognize the enormous work that has gone into this project, both in the initial drafting of amendments and in response to suggestions made following the first consultation.

II. Further Amendments

In reviewing the detailed report and keeping in mind the over-arching harmonization goal, we identified three areas where it may be appropriate to suggest final amendments. Each will be outlined below followed by the question as to whether we ought to make the recommendation. When considering the issues and determining whether we ought to take the recommendations to the Standing Committee, you will want to weigh the importance or significance of the change as against the desire for consensus.

In addition, you may have other concerns with respect to the amendments that we have not identified in this memo.

1) Rule 6.3-2 – Commentary 2(g) (Appendix A)

In commentary 2(g) of Rule 6.3-2, an example of behavior that constitutes harassment is described as "assigning work inequitably." In the explanatory memo, the Standing Committee said at paragraph 24, that the intent of this description was to address abuses of authority and assignments of work that are demeaning to someone's expertise or abilities.

Recommendation
In our view, the words "assigning work inequitably" may be too vague and it may be preferable to replace those words with the language contained in the Committee's memo (i.e. "assigning work that is demeaning to someone's expertise or abilities").

Question No. 1: Do you agree with the above recommendation relating to Rule 6.3-2, Commentary 2(g)?

2) Rule 6.3-4

Throughout the *Model Code*, each Rule is drafted in terms of what lawyers "must do" or "must not do." In contrast, the Commentaries provide guidance about how to comply with the Rules and use words such as a lawyer "should" do "x".

The amendment to Rule 6.3-4 causes concern as it represents a departure from the wording used in the rest of the *Model Code*. That is, the words "must not" have been replaced with "are prohibited". It appears that the change in language is intentional but we do not understand the shift to the proposed wording as it does not appear to change the substance of the rule.

Recommendation
For the sake of consistency, we recommend that you express support relating to the original wording used in the Rules. That is, we recommend that Rule 6.3-4 not be amended as proposed and that they revert to the original wording of: *"A lawyer must not engage or participate in reprisals against a colleague, employee, client or any other person…"*

Question No. 2: Do you agree with this recommendation relating to the use of consistent language throughout the Rules contained within the *Model Code*?

3) Rule 5.2-1B – Commentary 3 (Appendix B)

Appendix B of the consultation report deals with *Ex Parte* (no notice) Proceedings. Commentary 3 of Rule 5.2-1B deals with a lawyer communicating with the tribunal. We note the intention of the Commentary is to clarify that the Rule does not prohibit communication with a tribunal on routine administrative or procedural matters. However, the second sentence in the commentary only goes so far as to say that a lawyer "should consider notifying" the other party or their lawyer of administrative communications with the tribunal.

In our own dealings with complaint matters, we have come across situations where one lawyer decides to treat a communication as a routine/administrative matter and does not advise opposing counsel of the communication in circumstances where opposing counsel would not have agreed to a hearing date, for example.

Recommendation
In our view, it would be preferable to remove the word "consider" in Commentary 3 such that the second sentence should read: "A lawyer should notify the other party or their lawyer of administrative communications with the tribunal…" An amendment to this effect would reduce potential for misunderstandings or mischief to occur.

Question No. 3: Do you agree that lawyers should be given direct guidance about notifying opposing counsel of administrative communications with tribunals as recommended?

Atc.

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

MODEL CODE OF PROFESSIONAL CONDUCT

SECOND CONSULTATION REPORT ON DISCRIMINATION, HARASSMENT AND *EX PARTE* PROCEEDINGS

JULY 13, 2021

INTRODUCTION

1. The Model Code of Professional Conduct (the "Model Code") was developed by the Federation of Law Societies of Canada (the "Federation") to synchronize as much as possible the ethical and professional conduct standards for the legal profession across Canada. First adopted by the Council of the Federation in 2009, the Model Code has now been adopted by 13 of the 14 provincial and territorial law societies. It is amended from time to time, most recently in 2019.

2. The Federation established the Standing Committee on the Model Code of Professional Conduct (the "Standing Committee") to review the Model Code on an ongoing basis to ensure that it is both responsive to and reflective of current legal practice and ethics. The Standing Committee is mandated by the Federation to monitor changes in the law of professional responsibility and legal ethics, to receive and consider feedback from law societies and other interested parties regarding the rules of professional conduct, and to make recommendations for amendments to the Model Code.

3. In accordance with its mandate, the Standing Committee engages in an extensive process of review, analysis, consultation and deliberation before recommending amendments to the Model Code.

REQUEST FOR FINAL COMMENT

4. In January of 2020, the Standing Committee issued its Consultation Report ("the 2020 Consultation Report") addressing duties related to non-discrimination and harassment and *ex parte* communications with courts and tribunals.

5. It is important to note that in the months following the release of the Standing Committee's 2020 Consultation Report, the Federation formally committed to reconciliation with Indigenous peoples and adopted Guiding Principles for Fostering Reconciliation that inform all aspects of Federation work.

6. The events of the past year have further underscored the need for robust rules and commentary on discrimination and harassment in the legal profession. The death of George Floyd and the demands of the Black Lives Matter movement, continuing violence against First Nations, Inuit, and Métis peoples in Canada, the shadow pandemic of gender-based violence and the disproportionate job losses experienced by women, particularly racialized women, all suggest that justice system stakeholders – including the legal profession - must examine their roles in perpetuating social inequalities.

7. The response to the Standing Committee's 2020 Consultation Report was significant, complex and lengthy. The Standing Committee took great care in reviewing and understanding all the feedback received and is now recommending further changes to the discrimination, harassment, and proposed *ex parte* language. The proposed amendments are attached as Appendices A and B to this report.

8. The Standing Committee has decided to do a limited second consultation with law societies. This is an extraordinary step and is meant to display transparency about the Standing Committee's deliberations.

9. The Standing Committee offers here a comprehensive summary of its decision-making about the feedback received. The proposed further amendments resulting from the Standing Committee's consideration of the consultation feedback are appended to this Second Consultation Report.

10. The Standing Committee hopes to present its final amendments to the Council of the Federation for approval in December 2021. The Standing Committee is inviting final comment from law societies on the proposed amendments and requests that they be sent directly to Karin Galldin, Senior Policy Counsel and staff support to the Standing Committee, at kgalldin@flsc.ca by **Friday, October 1, 2021**.

11. It has been challenging to integrate the extensive and important feedback received by the Standing Committee. The Standing Committee is grateful for the thoughtfulness of the law societies in responding to its work and assures law societies and other stakeholders that their feedback will also inform future conversations about responsibilities towards First Nations, Inuit and Métis peoples, systemic barriers in the profession, and professionalism generally.

I. DISCRIMINATION AND HARASSMENT

12. The Standing Committee is proposing further amendments to Model Code Rule 6.3 concerning discrimination and harassment, as set out in Appendix A to this report. The Standing Committee proceeded with gender-neutral language in the drafting of these proposed further amendments, which it will endorse as a Model Code drafting convention going forward.

Background

13. The Law Societies Equity Network ("LSEN") provided the initial impetus for the examination of Rule 6.3 on Harassment and Discrimination, communicating in June 2019 its belief that the existing rules and commentary may not adequately reflect the importance of preventing discrimination and harassment. Appreciating the considerable empirical and anecdotal evidence that discrimination, harassment and bullying remain prevalent in the legal profession, the Standing Committee determined in 2019 that it was essential to clarify the harassment and discrimination provisions of the Model Code and to include specific guidance on bullying.

The Standing Committee's 2020 Consultation Report

14. In its report issued in January of 2020, the Standing Committee proposed that Rule 6.3 be amended to clarify the relevant obligations. The prohibition on discrimination was moved to Rule 6.3-1, and was followed by commentary that defined discrimination, offered examples of discriminatory conduct, and provided an exception for ameliorative programs. The new proposed Rule 6.3-2 prohibited and defined harassment for the purposes of the Model Code and reiterated that intent is not required to establish harassment. The proposed commentary provided

examples of behaviours which constitute harassment, and also defined bullying. The existing prohibition on sexual harassment in Rule 6.3-3 was revised slightly to ensure its consistency with the proposed changes to the language in Rules 6.3-1 and 6.3-2, and related commentary defined sexual harassment, providing a non-exhaustive list of examples of behavior which amounts to sexual harassment.

15. The final paragraph of the proposed new commentaries for harassment and sexual harassment reminded counsel that the rule does not apply only to conduct related to or performed in the lawyer's office or legal practice. Finally, a proposed new Rule 6.3-4 prohibited reprisals against persons inquiring about their rights or the rights of others, complainants, witnesses, and those assisting in investigations or proceedings related to a complaint of discrimination, harassment or sexual harassment.

Feedback to 2020 Consultation Report

16. The Standing Committee received feedback from eleven (11) law societies (Alberta, Nunavut, Yukon, Northwest Territories, Newfoundland, Saskatchewan, British Columbia, New Brunswick, Nova Scotia and the Barreau du Québec). Other submissions were provided by the Canadian Bar Association (the CBA), the Canadian Association for Legal Ethics (CALE), the Advocates' Society, the Federation of Asian Canadian Lawyers of Ontario, the Canadian Defence Lawyers, the Women's Law Association of Ontario, and the Christian Legal Fellowship. The Standing Committee also spoke with representatives of the Indigenous Bar Association about its members' reactions to the proposed new Rules and Commentary pursuant to discussions held at their 2020 conference.

17. The responses were generally supportive of the spirit and intent of the proposed amendments. A great deal of the feedback involved minor edits, questions about specific language, and re-wording of the proposed amendments, which the Standing Committee considered in a line-by-line analysis of the proposed amendments. This feedback is described in general terms below.

18. However, key issues were also raised: whether a mere prohibition against discrimination and harassment sets a sufficiently high bar for the legal profession; whether the rules in their entirety should extend to out-of-office conduct; whether the proposed definition of discrimination sufficiently captures its contemporary meaning or evolving nature; whether the "subjective and reasonable experience" of the target is too vague and contradictory a concept in determining whether harassment or sexual harassment has occurred; and whether the importation of provincial human rights and workplace health and safety laws has the effect of diluting these protections. This summary explains the Standing Committee's decision-making on these issues.

General Feedback

19. The Law Society of Alberta was generally supportive but argued that the definition of discrimination should be updated; the law society also raised concerns about the proposed standard of knowledge required for a breach.

20. The Law Society of Saskatchewan supported the amendments but also took issue with the "subjective and reasonable" standard and identified a concern with the reference to human rights and workplace health and safety laws.

21. The Barreau du Québec raised an issue with the reference in the amendments to principles established in provincial and territorial health and safety laws. The Barreau suggested that this may limit law societies' disciplinary powers to the criteria established by such legislation, and thus curtail broader interpretations of professional responsibilities towards harassment and discrimination.

22. The Law Society of Nunavut supported the proposed changes; however, the law society suggested that the new language should not have the intent of imposing a mandatory obligation on members to report to their law societies.

23. The Law Society of Yukon was similarly supportive. Yukon pointed out that the types of behaviours that constitute sexual harassment should include unwanted contact or attention that occurs after the end of a consensual relationship, with which the Standing Committee agreed.

24. Also supportive was the Law Society of NWT. Similar to the LSA, the law society noted that the phrase "subjective and reasonable experience" is unclear and made a number of other drafting suggestions. The LSNWT asked why the Standing Committee included "assigning work inappropriately" as an example of harassment, noting that the particularities of their jurisdiction mean that young lawyers may get assigned more complex matters earlier than peers in other jurisdictions. The Standing Committee intended this to address abuses of authority and assignments of work that are demeaning to someone's expertise or abilities. In response, the Standing Committee re-drafted this example to "assigning work inequitably."

25. The Law Society of Newfoundland provided suggestions for consistency in drafting language, and while supportive of the amendments, asked if the proposed commentary should offer clearer examples of offending behaviour against colleagues, and whether the commentary should address behaviour in court. The Standing Committee believes that in-court behaviour is addressed by other relevant Code provisions. However, pursuant to other questions raised by the LSNL about the scope of a lawyer's responsibilities towards sexual harassment, the Standing Committee added commentary indicating that lawyers should avoid condoning or being wilfully blind to conduct in their workplaces that constitute sexual harassment.

26. While it supported the spirit behind the proposed amendments, the Law Society of New Brunswick suggested the amendments were too extensive. In its view, a simpler approach to discrimination and harassment would allow some elasticity in the interpretation of the rules and would also allow more flexibility to address prospective changes in applicable legislation. The Standing Committee appreciates this feedback but felt that the overwhelming balance of opinion supported even more clarification and guidance within the proposed amendments.

27. The Nova Scotia Barristers' Society, while being supportive of the Standing Committee's work, asked whether the proposed definition of harassment was too broad. The Barristers' Society specifically inquired whether it would withstand a *Charter* challenge, referencing a finding of invalidity of the prohibitions on bullying within provincial cyber-bullying legislation in *Crouch v Snell,* 2015 NSSC 340. The Standing Committee was of the view that the Model Code, whose

purpose is to regulate the conduct of lawyers, can be differentiated from the impugned legislation, which dealt with an offence broadly applicable to the public.

28. The Law Society of British Columbia was generally supportive but asked some thought-provoking questions about the foundations of the responsibilities, wondering if at the end of the day the amendments sufficiently communicate what is needed for lawyers to direct their own conduct. For example, the law society pointed out that the discrimination language does not reference the basic respect that lawyers should demonstrate towards others, and that the harassment and sexual harassment provisions do not reference the power imbalances that underlie these behaviours. More generally, the law society asked the Standing Committee to consider if the examples of offending conduct are too broad and too vague, arguing that once the regulatory authority pushes the expectations beyond the context of a legal practice, there is a responsibility to give clear and adequate guidance. As explained below, the Standing Committee has decided to clarify its proposed language on out-of-office conduct in response to this and other concerns raised.

29. The LSBC also raised issue with the proposed prohibition against reprisal, suggesting it would be difficult for a lawyer to ensure self-compliance. In subsequent correspondence with the Standing Committee, the LSBC's Ethics Committee suggested the provision could include a greater sense of causation, as otherwise the draft reprisal provision might be used as a sword rather than a shield. The Standing Committee is of the view that prohibiting reprisals is an important aspect of the proposed rule and believes that reprisal has an established and well understood meaning in law. However, to clarify why this constitutes a professional responsibility, the Standing Committee added further commentary reiterating the purpose of the proposed rule.

The Proposed Amendments Should Include Positive Obligations

30. A number of representative organisations (i.e. the Federation of Asian Canadian Lawyers of Ontario, the Canadian Defence Lawyers, the Women's Law Association of Ontario, the Advocates Society) expressed their desire for the Model Code to establish higher, aspirational standards for legal professionals.

31. These submissions referenced the deeply entrenched structural and attitudinal barriers faced by members of racialized and equity-seeking communities along with the leadership and integrity that is expected from a self-governing legal profession. Some endorsed a positive requirement for lawyers to promote equality, diversity and inclusion in all interactions. The Standing Committee was of the view that such a positive requirement may result in unintended tensions for lawyers who are defending behaviors that society as a whole may find distasteful; similarly, lawyers working in certain practice areas (i.e. public sector lawyers defending a government body against claims of discrimination) may experience confusion about how to comport with such a rule. The Standing Committee ultimately felt that a positive requirement of this nature would prompt a divided reaction from the profession and would endanger overall passage of the proposed amendments.

32. The LSBC noted that none of the Standing Committee's proposed harassment and discrimination provisions include the word "respect." The law society would prefer a positive opening principle statement about respect and the importance of employing it in relationships with

others. As a result, the Standing Committee added additional opening commentary about lawyers' obligations to foster respectful and inclusive workplaces and services.

33. Rather than a broad over-arching positive duty, the Advocates' Society suggested that more distinct positive obligations for lawyers, i.e. to stay apprised of developments in the law of discrimination, to refrain from all forms of discrimination including direct, adverse effect, and systemic discrimination, to inform themselves of the role of unconscious bias in perpetuating systemic discrimination, and to provide accommodations to the point of undue hardship. The Standing Committee agreed that these are useful ways to frame lawyers' obligations and incorporated these elements into the further proposed amendments.

34. During conversation with representatives from the Indigenous Bar Association, the Standing Committee was asked whether lawyers should have to consider *Gladue*-type principles and/or the historic disadvantages of Indigenous peoples in managing their workplaces. An Indigenous advisory group with the LSEN had previously drafted commentary acknowledging the unique challenges that may be faced by Indigenous peoples. The Standing Committee agreed to incorporate this commentary, which also includes a warning for lawyers to take particular care to avoid engaging in, allowing, or being wilfully blind to actions which constitute discrimination or any form of harassment against Indigenous peoples. This addition is commensurate with the Federation's formal commitment to reconciliation and the Guiding Principles it has adopted to inform the Federation's work.

35. In summary, the Standing Committee was not prepared to explicitly require the promotion of diversity, inclusion and equality. However, the Standing Committee received suggestions about other possible positive obligations which the Standing Committee felt were applicable in the context of knowledge requirements and lawyer competency. The commentary now explains in greater detail why lawyers possess particular responsibilities in this area. It acknowledges the unique histories, realities, and systemic barriers faced by Indigenous peoples. It urges lawyers to approach professional relationships based on the distinct needs and circumstances of colleagues, employees, and clients, and to be alert to unconscious biases that may inform these relationships. Lawyers are also warned against any express or implicit assumption that another person's views, skills, capabilities and contributions are necessarily shaped or constrained by their gender, race, Indigeneity, disability or other personal characteristic.

All Proposed Rules Should Extend to Conduct Outside of Practice

36. Many respondents asked why the prohibition against discrimination did not extend beyond a lawyer's professional activities (whereas the prohibitions against harassment and sexual harassment did). Most respondents, including the Canadian Bar Association, expressed a firm view that that the scope of conduct for all prohibited conduct, including discrimination and reprisals, should extend to a lawyer's conduct outside office or outside legal practice.

37. A nuanced approach to this issue was suggested by CALE. Acknowledging that law society jurisdiction over conduct outside of one's practice already exists within Commentary [3] to Rule 2.1-1 ("Integrity"), CALE wondered if the proposed language should be clarified so as not to attract unnecessary opposition. CALE suggested clarifying this rule such that conduct outside a lawyer's practice or workplace will only attract the attention of law societies where it amounts to

conduct that either "brings into question the lawyer's professional integrity, impairs a client's trust in the lawyer, or otherwise undermines the administration of justice." Newfoundland had also suggested linking this rule to integrity.

38. The Christian Legal Fellowship shared their worry that the broad proposed meanings of discrimination and harassment could be misinterpreted to capture legitimate faith-based expressions that lawyers may publish, either publicly or privately, and similarly recommended the addition of qualifying language.

39. In response to this feedback, the Standing Committee created a proposed new Rule (6.3-5) which provides that Rules 6.3-1 to 6.3-4 are not limited to conduct related to, or performed in, the lawyer's office or in legal practice. The Standing Committee added commentary stating that the behaviour and conduct prohibited by this proposed Rule compromises a lawyer's integrity. The proposed commentary indicates that the application of this rule will be triggered by conduct that brings into question the lawyer's professional integrity, impairs a client's trust in the lawyer, or otherwise undermines confidence in the legal profession and our legal system.

The Proposed Definition of Discrimination Is Insufficient

40. Some of the feedback challenged the Standing Committee's characterisation of discrimination, arguing that discrimination is an evolving legal concept requiring the Standing Committee to employ more contemporary concepts than that enunciated in the *Andrews* decision. As example, the Law Society of Alberta noted that caselaw has evolved considerably since the *Andrews* decision.

41. A more complex critique of the *Andrews* decision emerged from the Standing Committee's discussions with representatives of the Indigenous Bar Association. They pointed out that the concluding sentence in proposed Commentary [3] ("distinctions based on an individual's merits and capabilities will rarely be (discriminatory)") is precisely the type of justification that enables discrimination against Indigenous peoples and other racialized communities. Referencing as an example the requirement that a Supreme Court justice be fluent in both French and English, the Indigenous Bar Association's representatives explained how merits and capabilities are commonly employed in the legal profession to screen out Black, Indigenous and people of color ("BIPOC") applicants. The Standing Committee agreed with this analysis and removed the mention of merits and capabilities within the proposed rule.

42. Representatives of the Indigenous Bar Association also questioned why the proposed definition failed to reference systemic discrimination, attributing this, in part, to the dated reference to *Andrews.* Finally, they noted that the Standing Committee's proposed language does not reference intersectionality, which refers to the complex ways in which the effects of multiple forms of discrimination combine, overlap, or intersect.

43. The Advocates' Society also recommended that the commentary acknowledge the evolving nature of the definition of discrimination and contain a positive obligation on lawyers to stay apprised of developments in the law in this area. The Advocates' Society suggested that the prohibition on discrimination should extend to all forms, including direct, adverse effect, and systemic discrimination, and that this be explicitly stated in the commentary to ensure lawyers understand the broad scope of their obligation not to discriminate.

44. This feedback resulted in extensive conversation at the Standing Committee. The Model Code describes the responsibilities of individual lawyers, which acts as a challenge to prohibitions on systemic barriers, patterns or attitudes within firms or legal workplaces. Despite this, the Standing Committee felt there is value in asking lawyers to reflect on their complicity in systemic racism and on the unconscious or implicit biases that may inform their perspectives. After further research on legal definitions of systemic discrimination, the Standing Committee agreed to incorporate reference to adverse effect and systemic discrimination in the further proposed commentary.

45. Similarly, the Standing Committee reviewed academic literature and caselaw on intersectionality. The Standing Committee has now included commentary to make lawyers aware of intersectionality and how the interplay of various protected grounds can result in unique experiences of oppression.

46. The Advocates' Society recommended referring to certain grounds of discrimination common within the profession (i.e. addictions, family status, mental health), suggesting such references would be illustrative in a professional context. The Standing Committee felt that setting out some grounds over others might be perceived as exclusive and might mislead the legal profession and/or the public. The Advocates' Society had also suggested examples of behaviours indicative of adverse effect or systemic discrimination. These examples were viewed as useful by the Standing Committee and were adopted in conjunction with other examples suggested by the law societies of Newfoundland and Nova Scotia.

47. The Standing Committee also heard that sexual harassment should include references to gender-based harassment. This resulted in follow-up dialogue with representatives of the Indigenous Bar Association and the Advocates' Society who urged greater inclusivity towards LGBTQIA2s peoples, and who also reiterated the prevalence of gender-based discrimination in the legal profession. The Standing Committee felt that the category of "gender," in its strict legal meaning, is not yet inclusive of sexual orientation, gender identity, and/or perceived gender identity, and that more direct language could help lawyers understand the conduct that is prohibited by the rules. As solution, the Standing Committee decided on additional commentary indicating that sexual harassment can be directed at others based on their gender, gender identity, gender expression, or sexual orientation.

The Subjective and Reasonable Experience Standard Is Contradictory and Vague

48. Some of our law society respondents (Alberta, Newfoundland, Saskatchewan, British Columbia and Northwest Territories) raised concerns about the proposed commentary indicating that harassment and/or sexual harassment will be determined through the subjective and reasonable experience of the person experiencing the behaviours in question. They felt the balance between a subjective analysis and a reasonable analysis was unclear.

49. In its consideration of this feedback, the Standing Committee agreed that the primary purpose behind the commentary is to reiterate that the intent of the lawyer engaging in the problematic conduct is not relevant to any determination of whether harassment occurred. Instead, an emphasis on impact ensures that any inquiry into harassment in the workplace focuses properly on the complainant's experience.

50. The Standing Committee agreed to rework the commentary related to culpability resulting from conduct that the offending party "knew or ought to have known" was unwelcome.

Potential Problems with Importation of Provincial and Territorial Human Rights and Workplace Health and Safety Laws

51. A smaller number of law society respondents were preoccupied with the commentary that acknowledged the application of the principles of human rights and workplace health and safety laws and related case law. They shared their concerns that the importation of provincial human rights and workplace health and safety laws may limit the powers of legal regulators or lead to inconsistent results amongst decision-making bodies with concurrent jurisdiction

52. For example, the Law Society of Saskatchewan was concerned that this language unnecessarily restricts the interpretation of these professional responsibilities since provincial laws make no reference to harassment. Along the same lines, the Barreau du Québec advocated against any reference to health and safety laws as they could also limit the interpretation of professional responsibilities.

53. The Standing Committee discussed this feedback but ultimately decided against making changes as it was of the view that the rules must necessarily be interpreted, as a baseline, in the context of applicable provincial or territorial laws.

II. *EX PARTE* COMMUNICATIONS

54. The Standing Committee is proposing further changes to the proposed new rules and commentary to Chapter 5: Relationship to the Administration of Justice addressing the obligations of legal practitioners when communicating *ex parte* with a court or tribunal, as set out in Appendix B to this report.

Background

55. This issue was first raised with the Standing Committee by the Law Society of Alberta, which raised concerns about lawyers engaging in *ex parte* communications with courts and tribunals contrary to the general rule against discussing specific cases with judges in the absence of the other party except in exceptional cases. After reviewing the issues, the Standing Committee concluded that the Model Code should be amended to provide greater guidance on *ex parte* proceedings and communications.

The Standing Committee's 2020 Consultation Report

56. The proposed new Rule 5.2-1A addresses the duties of counsel in *ex par*te proceedings. The following commentary reminds counsel of the exceptional nature of *ex parte* proceedings and the special obligations which arise as a result.

57. The proposed new Rule 5.2-1B sets out the established ethical principle that communicating with a tribunal in the absence of opposing counsel or parties is not permitted except (1) where authorized by law or the tribunal, (2) where the opposing counsel or party has been made aware of the content of the communications and has consented, or (3) where the opposing counsel or party has appropriate notice. The commentary that follows the rule provides guidance as to what types of *ex parte* communications are and are not permitted.

Feedback to 2020 Consultation Report

58. These proposed amendments attracted much less comment than the proposed changes to the discrimination and harassment provisions. The Law Society of the Northwest Territories asked if these obligations could be incorporated into Rule 5.1-2 (duties as an advocate). The Standing Committee remains of the view that an independent Rule is required since the aggregated prohibitions within Rule 5.1-2 would fail to draw enough attention to this issue.

59. The Law Society of Alberta welcomed a stand-alone rule on *ex parte* communications, detailing in its submissions the various ethical breaches that the law society has observed amongst its members. However, the law society believed the proposed rules should be even clearer in capturing lawyers' direct and unilateral communications with decision-makers outside of a court process or application (i.e. in anticipation of a case management meeting).

60. The Barreau du Québec was supportive of the amendments, noting that its *Code de déontologie des avocats* already addresses some parameters of *ex parte* hearings through, for example, its prohibitions on a lawyer misleading the court, a party, or a party's counsel. Submissions from Jonathan Brosseau, a legal practitioner with a focus on international arbitration, indicated that *ex parte* communications and proceedings are generally prohibited in international arbitration, subject to specific exceptions.[1]

61. The CBA supported the proposed rules, suggesting small edits to the Commentary. The CBA asked if the rules should remove references to "client's interests," where applicable, and replace it with the phrase "that party's interest" in acknowledgement of the fact that not all lawyers who conduct *ex parte* proceedings represent a client. The Standing Committee has adopted this recommendation.

62. The Law Society of Yukon was supportive but asked about the context for requiring a member to ensure that the *ex parte* proceeding is permitted by law. In the law society's view, the determination of whether an *ex parte* application is permitted or appropriate may require a decision of the Court based on the facts of the matter before them and is not something that can always be predetermined. The Standing Committee concluded that this is a legal question, not a matter of professional ethics.

63. The Law Society of Newfoundland was similarly supportive but shared its discomfort with the disclosure obligation as it may be in conflict with a client's best interest, using as an example an *ex parte* application for an injunction. The LSBC. raised a similar concern, observing that the assessment of material facts may not always be reasonably clear, thus risking "over-disclosure" by lawyers of facts contrary to their clients' interests. This led the Standing Committee to a

[1] IBA Guidelines on Party Representation in International Arbitration, the International Court of Arbitration's Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration, the Singapore Institute of Arbitrators Guidelines on Party Representative Ethics and a draft International Code of Ethics for Lawyers Practicing Before International Arbitral Tribunals.

detailed conversation about the nature of *ex parte* proceedings. The Standing Committee remains of the view that when a lawyer initiates an *ex parte* proceeding, they have an obligation to make full disclosure because the court otherwise does not have the benefit of the opposing party's position. If counsel cannot offer full disclosure it is incumbent on them to talk to their client about why an *ex parte* proceeding may not be in their best interests.

64. The LSBC further pointed out that unlike other Model Code rules prohibiting deception, as drafted, the proposed rule would make it a breach to fail to bring material information to the court's attention even if counsel did not know at the time that they were failing to do so, referencing information of which counsel is unaware at the time of the proceeding. The Standing Committee felt that the knowledge threshold was already captured in the proposed rule (i.e. what is already known to the lawyer).

65. The Law Society of Newfoundland recommended that the Supreme Court of Canada position on exceptional circumstances should be included for additional guidance, but the Standing Committee preferred to include a description of ethical responsibilities rather than incorporating substantive law into the Model Code.

66. The Advocates' Society indicated that the references throughout Rule 5.2-1 to the "tribunal" were confusing. The Society recommended instead distinguishing between communications with the court office, and communications with the decision-maker. Like concerns were shared by the LSNL and the LSBC, who inquired about further distinction between tribunals, registries and courts. The Standing Committee noted that the definition of "tribunal" in the Model Code includes courts and decided to maintain the use of "tribunal" for consistency throughout the Model Code. The Standing Committee preferred that lawyers understand their obligations in the context of the nature of their communications (rather than the identity of the receiving body) and revised the commentary to ensure distinction between administrative / procedural communications and substantive communications.

67. While supporting the spirit of the proposed amendments, CALE had concerns about much of the terminology used. Most notably, CALE recommended that the language refer to "proceedings and communications without notice" rather than *ex parte* proceedings and communications. The Standing Committee adopted some of the drafting suggestions made by CALE (i.e. using "ability" instead of "right" to proceed *ex parte*), but was generally reluctant to use different language given its belief that *ex parte* is an established term of art.

68. CALE also took issue with the commentary stating that the obligation to make full and frank disclosure can be subject to lawyer-client confidentiality, arguing instead that the lawyer's obligation of confidentiality to the client must yield to the legal requirements of applicable civil procedure rules. CALE's approach contrasted with that of the Law Society of Alberta and of the Advocates' Society, both of which endorsed making the obligation subject to the lawyer's duty of confidentiality. Indeed, the LSA and the Advocates' Society both suggested that the obligation should be further curtailed by applicable rules of privilege. The Standing Committee agreed that counsel cannot disclose confidential or privileged information without express waiver by their clients. The proposed Commentary was amended accordingly to make disclosure also subject to privilege.

69. Finally, pursuant to feedback from the Law Society of Alberta and CALE, the Standing Committee made some changes to the Commentary to Rule 5.2-1B ("Communicating with the Tribunal") to ensure its contents are understood as mandatory obligations and to clarify its scope regarding communications on procedural matters.

REQUEST FOR FINAL COMMENT

70. As described in this report, the process by which the Standing Committee engaged with consultation feedback has been meaningful and prolonged. The Standing Committee appreciates that the amendments are of great importance to law societies and other stakeholders and is grateful for the opportunity to consider the feedback received. As indicated earlier, the Standing Committee hopes to present its final amendments to the Council of the Federation for approval in December 2021. The Standing Committee invites final comment from law societies on the proposed amendments and requests that they be sent directly to Karin Galldin, Senior Policy Counsel and staff support to the Standing Committee, at kgalldin@flsc.ca by **Friday, October 1, 2021**.

6.3 ~~HARASSMENT AND~~ DISCRIMINATION AND HARASSMENT

6.3-1 ~~The principles of human rights laws and related case law apply to the interpretation of this rule.~~ A lawyer must not directly or indirectly discriminate against a colleague, employee, client or any other person.

Commentary

[1] Lawyers are uniquely placed to advance the administration of justice, requiring lawyers to commit to equal justice for all within an open and impartial system. Lawyers are expected to respect the dignity and worth of all persons and to treat all persons fairly and without discrimination. A lawyer has a special responsibility to respect and uphold the principles and requirements of human rights and workplace health and safety laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights such laws.

[2] In order to reflect and be responsive to the public they serve, a lawyer must refrain from all forms of discrimination and harassment, which undermine confidence in the legal profession and our legal system. A lawyer should foster a professional environment that is respectful and inclusive, and should avoid being influenced by systemic biases, prejudices, and stereotypes when offering services to the public and when organizing their workplace.

[3] Indigenous peoples may experience unique challenges in relation to discrimination and harassment as a result of the history of the colonization of Indigenous peoples in Canada, ongoing repercussions of the colonial legacy, systemic factors, and implicit biases. Lawyers should take particular care to avoid engaging in, allowing, or being wilfully blind to actions which constitute discrimination or any form of harassment against Indigenous peoples.

[4] Lawyers should be aware that discrimination includes adverse effect and systemic discrimination, which arise from organizational policies, practices and cultures that create, perpetuate, or unintentionally result in unequal treatment of a person or persons. Lawyers should consider the distinct needs and circumstances of their colleagues, employees, and clients, and should be alert to unconscious biases that may inform these relationships and that serve to perpetuate systemic discrimination and harassment. Lawyers should guard against any express or implicit assumption that another person's views, skills, capabilities, and contributions are necessarily shaped or constrained by their gender, race, Indigeneity, disability or other personal characteristic.

[5] Discrimination is a distinction, intentional or not, based on grounds related to actual or perceived personal characteristics of an individual or group, which has the effect of imposing burdens, obligations or disadvantages on the individual or group that are not imposed on others, or which withhold or limit access to opportunities, benefits and advantages that are available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will typically constitute discrimination. Intersecting grounds of discrimination require

consideration of the unique oppressions that result from the interplay of two or more protected grounds in a given context.

[6] The principles of human rights and workplace health and safety laws and related case law apply to the interpretation of this Rule and to Rules 6.3-2 to 6.3-4. A lawyer has a responsibility to stay apprised of developments in the law pertaining to discrimination and harassment, as what constitutes discrimination, harassment, and protected grounds continue to evolve over time and may vary by jurisdiction.

[7] Examples of behaviour that constitute discrimination include, but are not limited to:

a. harassment (as described in more detail in the Commentary to Rules 6.3-2 and 6.3-3);
b. refusing to employ or to continue to employ any person on the basis of any personal characteristic protected by applicable law;
c. refusing to provide legal services to any person on the basis of any personal characteristic protected by applicable law;
d. charging higher fees on the basis of any personal characteristic protected by applicable law;
e. assigning lesser work or paying an employee or staff member less on the basis of any personal characteristic protected by applicable law;
f. using derogatory racial, gendered, or religious language to describe a person or group of persons;
g. failing to provide reasonable accommodation to the point of undue hardship;
h. applying policies regarding leave that are facially neutral (i.e. that apply to all employees equally), but which have the effect of penalizing individuals who take parental leave, in terms of seniority, promotion or partnership;
i. providing training or mentoring opportunities in a manner which has the effect of excluding any person from such opportunities on the basis of any personal characteristic protected by applicable law;
j. providing unequal opportunity for advancement by evaluating employees on facially neutral criteria that fail to take into account differential needs and needs requiring accommodation;
k. jokes or innuendos that cause humiliation, embarrassment or offence, or that by their nature are clearly embarrassing, humiliating or offensive;
l. instances when any of the above behaviour is directed toward someone because of their association with a group or individual with certain personal characteristics; or
m. any other conduct which constitutes discrimination according to any applicable law.

[8] It is not discrimination to establish or provide special programs, services or activities which have the object of ameliorating conditions of disadvantage for individuals or groups who are disadvantaged for reasons related to any characteristic protected by applicable laws.

6.3-2 ~~A term used in this rule that is defined in human rights legislation has the same meaning as in the legislation.~~ A lawyer must not harass a colleague, employee, client or any other person.

Commentary

[1] Harassment includes an incident or a series of incidents involving physical, verbal or non-verbal conduct (including electronic communications) that might reasonably be expected to cause humiliation, offence or intimidation to the person who is subjected to the conduct. The intent of the lawyer engaging in the conduct is not determinative. It is harassment if the lawyer knew or ought to have known that the conduct would be unwelcome or cause humiliation, offence or intimidation. Harassment may constitute or be linked to discrimination.

[2] Examples of behaviour that constitute harassment include, but are not limited to:

a. objectionable or offensive behaviour that is known or ought reasonably to be known to be unwelcome, including comments and displays that demean, belittle, intimidate or cause humiliation or embarrassment;
b. behaviour that is degrading, threatening or abusive, whether physically, mentally or emotionally;
c. bullying;
d. verbal abuse;
e. abuse of authority where a lawyer uses the power inherent in their position to endanger, undermine, intimidate, or threaten a person, or otherwise interfere with another person's career;
f. jokes or innuendos that are known or ought reasonably to be known to cause humiliation, embarrassment or offence, or that by their nature are clearly embarrassing, humiliating or offensive; or
g. assigning work inequitably.

[3] Bullying, including cyberbullying, is a form of harassment. It may involve physical, verbal or non-verbal conduct. It is characterized by conduct that might reasonably be expected to harm or damage the physical or psychological integrity of another person, their reputation or their property. Bullying includes, but is not limited to:

a. unfair or excessive criticism;
b. ridicule;
c. humiliation;
d. exclusion or isolation;
e. constantly changing or setting unrealistic work targets; or
f. threats or intimidation.

6.3-3 A lawyer must not sexually harass ~~any person~~a colleague, employee, client or any other person.

Commentary

[1] Sexual harassment is an incident or series of incidents involving unsolicited or unwelcome sexual advances or requests, or other unwelcome physical, verbal, or nonverbal conduct (including electronic communications) of a sexual nature. Sexual harassment can be directed at others based on their gender, gender identity, gender expression, or sexual orientation. The intent of the lawyer engaging in the conduct is not determinative. It is sexual harassment if the lawyer knew or ought to have known that the conduct would be unwelcome. Sexual harassment may occur:

a. when such conduct might reasonably be expected to cause insecurity, discomfort, offence, or humiliation to the person who is subjected to the conduct;
b. when submission to such conduct is implicitly or explicitly made a condition for the provision of professional services;
c. when submission to such conduct is implicitly or explicitly made a condition of employment;
d. when submission to or rejection of such conduct is used as a basis for any employment decision, including;

    i. Loss of opportunity;
    ii. The allocation of work;
    iii. Promotion or demotion;
    iv. Remuneration or loss of remuneration;
    v. Job security; or
    vi. Benefits affecting the employee;

e. when such conduct has the purpose or the effect of interfering with a person's work performance or creating an intimidating, hostile, or offensive work environment;
f. when a position of power is used to import sexual requirements into the workplace and negatively alter the working conditions of employees or colleagues; or
g. when a sexual solicitation or advance is made by a lawyer who is in a position to confer any benefit on, or deny any benefit to, the recipient of the solicitation or advance, if the lawyer making the solicitation or advance knows or ought reasonably to know that it is unwelcome.

[2] Examples of behaviour that constitute sexual harassment include, but are not limited to:

a. displaying sexualized or other demeaning or derogatory images;
b. sexually suggestive, intimidating or obscene, comments, gestures or threats;
c. jokes that cause humiliation, embarrassment or offence, or which by their nature are clearly embarrassing, humiliating or offensive;
d. innuendoes, leering or comments about a person’s dress or appearance;
e. gender-based insults or sexist remarks;
f. communications with sexual overtones;
g. inquiries or comments about a person’s sex life;
h. sexual flirtations, advances, propositions, invitations or requests;
i. unsolicited or unwelcome physical contact or touching;
j. sexual violence; or

k. persistent unwanted contact or attention, including after the end of a consensual relationship.

[3] Lawyers should avoid condoning or being wilfully blind to conduct in their workplaces that constitutes sexual harassment.

Reprisal

6.3-4 A lawyer ~~must not engage in any other form of harassment of any person.~~is prohibited from engaging or participating in reprisals against a colleague, employee, client or any other person because that person has:

a. inquired about their rights or the rights of others;
b. made or contemplated making a complaint of discrimination, harassment or sexual harassment;
c. witnessed discrimination, harassment or sexual harassment; or
d. assisted or contemplated assisting in any investigation or proceeding related to a complaint of discrimination, harassment or sexual harassment.

Commentary

[1] The purpose of this Rule is to enable people to exercise their rights without fear of reprisal. Conduct which is intended to retaliate against a person, or discourage a person from exploring their rights, can constitute reprisal. Examples of such behaviour include, but are not limited to:

a. refusing to employ or to continue to employ any person;
b. penalizing any person with respect to that person's employment or changing, in a punitive way, any term, condition or privilege of that person's employment;
c. intimidating, retaliating against or coercing any person;
d. imposing a pecuniary or any other penalty, loss or disadvantage on any person;
e. changing a person's workload in a disadvantageous manner, or withdrawing opportunities from them; or
f. threatening to do any of the foregoing.

6.3-5 ~~A lawyer must not discriminate against any person.~~Rules 6.3-1 to 6.3-4 are not limited to conduct related to, or performed in, the lawyer's office or in legal practice.

Commentary

[1] A lawyer's integrity is compromised by the behaviour and conduct prohibited by this Rule. The application of this Rule will be triggered by conduct that brings into question the lawyer's professional integrity, impairs a client's trust in the lawyer, or otherwise undermines confidence in the legal profession and our legal system.

Ex Parte Proceedings

5.2-1A In an *ex parte* proceeding, a lawyer must act with utmost good faith and inform the tribunal of all material facts, including adverse facts, known to the lawyer that will enable the tribunal to make an informed decision.

Commentary

[1] *Ex parte* proceedings are exceptional. The obligation to inform the tribunal of all material facts includes an obligation of full, fair and candid disclosure to the tribunal (see also Rules 5.1-1, 5.1-2).

[2] The obligation to disclose all relevant information and evidence is subject to a lawyer's duty to maintain confidentiality and privilege (see Rule 3.3).

[3] Before initiating *ex parte* proceedings, a lawyer should ensure that the proceedings are permitted by law and are justified in the circumstances. Where no prejudice would occur, a lawyer should consider giving notice to the opposing party or their lawyer (when they are represented), notwithstanding the ability to proceed *ex parte*.

5.2-1B Communicating with the Tribunal

A lawyer must not communicate with a tribunal in the absence of the opposing party or their lawyer (when they are represented) concerning any matter of substance, unless the opposing party or their lawyer has been made aware of the content of the communication or has appropriate notice of the communication.

Commentary

[1] It is improper for a lawyer to attempt to influence, discuss a matter with, or make submissions to, a tribunal without the knowledge of the other party or the lawyer for the other party (when they are represented).

[2] When a tribunal invites or requests a communication from a lawyer, the lawyer should inform the other party or their lawyer. As a general rule, the other party or their lawyer should be copied on communications to the tribunal or given advance notice of the communication.

[3] This Rule does not prohibit communication with a tribunal on routine administrative or procedural matters, such as scheduling hearing dates or appearances. A lawyer should consider notifying the other party or their lawyer of administrative communications with the tribunal. Routine administrative communications should not include any submissions dealing with the substance of the matter or its merits.

The Law Society of Manitoba
INCORPORATED 1877 | INCORPORÉ EN 1877

MEMORANDUM

To:	Benchers
From:	Leah Kosokowsky
Date:	September 1, 2021
Re:	**The College of Patent Agents and Trademark Agents**

The Government of Canada has passed legislation to establish a College to regulate the conduct of Patent Agents and Trademark Agents. When the regulations were drafted, the Federation of Law Societies of Canada made a submission to Innovation, Science and Economic Development Canada in which it raised concerns regarding:

- The overlapping jurisdiction with Canadian law societies given that approximately one third of the patent agents and trademark agents are lawyers who are already regulated; and

- The inadequate protection for solicitor-client privilege in the regulatory regime.

Attached to this memo you will find the English and French versions of the Federation's submission.

The College began operations on June 28, 2021, with Darrel Pink as the interim CEO and Registrar. Many of you will recall that Darrel was the long-term Executive Director of the Nova Scotia Barristers' Society. Darrel is alive to the issue of duplication in regulation and he has approached the Federation to discuss a national approach to address the issues. This is a very welcome development and the Federation is putting together a working group comprised of law society staff from various jurisdictions to work with the College.

We will keep you apprised of significant developments.

Atc.

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

Submission of the Federation of Law Societies of Canada to Innovation, Science and Economic Development Canada

Comments on the Regulations under the *College of Patent Agents and Trademark Agents Act* pre-published in Canada Gazette, Part I, Volume 155, Number 11, March 13, 2021

Ottawa, April 12, 2021

Introduction

1. The Federation of Law Societies of Canada (the "Federation") is the national coordinating body of Canada's 14 provincial and territorial law societies, which together govern Canada's 130,000 lawyers, Quebec's 3,800 notaries, and Ontario's nearly 11,300 paralegals in the public interest. The Federation promotes the development of national standards, encourages the harmonization of law society rules and procedures, and undertakes national initiatives as directed by its members, among other activities. The Federation also speaks out on issues critical to safeguarding the public's right to an independent legal profession, the protection of solicitor-client privilege and other issues relating to the administration of justice and the rule of law.

2. The Federation appreciates the opportunity to comment on the proposed regulations under the *College of Patent Agents and Trademark Agents Act* (the "Act") and consequential amendments to the *Patent Rules* and *Trademarks Regulations* pre-published in the *Canada Gazette* Part I, Vol. 155, No. 11 on March 13, 2021 (the "Regulations").

Submission Highlights

3. The Regulations will bring into force a new regime for the regulation of patent agents and trademark agents ("IP agents"). The Regulations address the composition of committees, agent licensing requirements, investigations, the by-laws of the College of Patent Agents and Trademark Agents (the "College"), and transitional matters.

4. The Federation is concerned that the Regulations provide inadequate protections for solicitor-client privilege and do nothing to clarify how the burden of regulatory duplication for lawyers and Quebec notaries who are IP agents, a problem created by the Act, will be addressed. These issues undermine the constitutionally-protected right to solicitor-client privilege and will likely result in unnecessary regulatory confusion and conflicts. The Federation submits that these consequences are not in the public interest – the government's stated purpose for creating the new regulatory regime for IP agents. The Regulations also raise additional concerns that the Federation would like to bring to the attention of Innovation, Science and Economic Development Canada ("ISED").

Inadequate Protection for Solicitor-Client Privilege

5. The Act outlines the powers of the College to conduct investigations of IP agents for professional misconduct or incompetence, including powers to take possession of information protected by solicitor-client privilege. The ISED has stated that "[w]ithout the ability to pierce solicitor-client privilege, the regulator would not be able to fully regulate lawyer-agents or agents working in a law firm."[1] The Federation has previously raised concerns about the risks this regime may pose to the constitutional protection of solicitor-client privilege.[2] In the Federation's view, the Regulations compound these problems and fail to adequately protect solicitor-client

[1] Innovation, Science and Economic Development Canada, *Frequently asked questions: College of Patent Agents and Trademark Agents*, https://www.ic.gc.ca/eic/site/693.nsf/eng/00167.html.
[2] Federation of Law Societies of Canada, *A Governance Framework for Intellectual Property Agents, Submission to Innovation, Science and Economic Development Canada and the Canadian Intellectual Property Office* (August 31, 2016).

privilege in accordance with the applicable law. It is the Federation's position, as discussed below, that clause 14(3)(a), in particular, is very likely unconstitutional.

6. The Act authorizes a College investigator to seize privileged information and documents, including those protected by solicitor-client privilege except where the documents are not related to a patent, trademark, or other mark recognized by statute. Although the Act requires that all documents in the possession of legal counsel or a law firm be sealed and not viewed by the investigator, the prescribed process for protecting any information or documents protected by solicitor-client privilege is problematic. It places a positive obligation on legal counsel to take all reasonable steps to notify the holder of any privilege in the documents and, if the privilege holder cannot be found within the prescribed period of time, to notify the law society immediately. The Act also provides for a right to object to disclosure of privileged documents by making an application to the Federal Court and requires that sealed documents be handled in accordance with the Regulations.

7. The Regulations prescribe a period of 10 days for legal counsel to locate and notify any privilege holder before notifying the legal regulator, which, in the Federation's view, is inappropriately short given the importance of the right to solicitor-client privilege. The Regulations further undermine solicitor-client privilege by purporting to authorize the opening of sealed documents after 30 days, subject only to any Federal Court order that may have been made. The Regulations provide no exception to this authority in any circumstances including, for example, where proceedings may have been commenced in the Federal Court but not yet concluded. The blanket provision also sets no threshold or test for access to privileged information raising the very real possibility that privileged information that is irrelevant to an investigation may be viewed by an investigator and others involved in the College's investigation process.

8. The Supreme Court of Canada has been vigilant about protecting solicitor-client privilege in its past jurisprudence on the statutory powers of government and other administrative actors. The Supreme Court has repeatedly made it clear that solicitor-client privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary.[3]

9. In *Lavallee, Rackel & Heintz v. Canada (Attorney General)*[4] and its companion cases, the Supreme Court outlined the relevant constitutional principles that apply when federal legislation purports to grant the authority for an official to examine, copy or seize a document in the possession of legal counsel who asserts that the documents are subject to solicitor-client privilege. *Lavallee* dealt with a scheme under section 488.1 of the *Criminal Code* that purported to permit the mandatory disclosure of potentially privileged information when a claim of privilege has been made to the official, but no application to court has been made by the legal counsel or privilege holder. The Supreme Court concluded that the section was unconstitutional finding that mandatory disclosure of potentially privileged information "cannot be said to minimally impair the privilege…[and]…amounts to an unjustifiable vindication of form over substance, and it creates a real possibility that the state may obtain privileged information that a court could very well have recognized as such."[5]

10. In the submission of the Federation, the scheme set out in Act and the Regulations does not respect the important constitutional protections for solicitor-client privilege set out by the

[3] See *Alberta (Information and Privacy Commissioner) v. University of Calgary* 2016 SCC 53 (CanLII) at para. 43.
[4] 2002 SCC 61 (CanLII) (*Lavallee*).
[5] Ibid., at para. 43.

Supreme Court. It permits the automatic disclosure of privileged information without any requirement to first prove that access to the information is absolutely necessary and completely disregards the requirement that any infringement of solicitor-client privilege minimally impair the right. While it may be that the purpose of the proposed authority to unseal documents after 30 days is to facilitate an investigation into alleged misconduct or incompetence, it is not at all clear that this goal would meet the tests of absolute necessity or minimal impairment, particularly when alternatives – such as applying to the Federal Court – exist.

11. While the Act provides that the disclosure of solicitor-client privileged information to the College does not constitute a waiver of privilege this does not address problems of disclosure created by the Act and compounded by the Regulations. Any infringement must be measured through the eyes of the client. To a client compelled disclosure to a party outside of the privilege, as may occur under the proposed Regulations, compromises that privilege even if not disclosed further. The Supreme Court's jurisprudence firmly supports this position.[6]

12. In the Federation's view, the Regulations should provide that the unsealing of documents over which solicitor-client privilege has been claimed is permitted only by order of the Federal Court or with the consent of the privilege holder.

Regulatory Duplication

13. During ISED's consultations in 2016 on proposed options for an independent regulatory body to govern IP agents, the Federation expressed concerns about the prospect of regulatory duplication if IP agents who are also lawyers or Quebec notaries were subject to the new regulatory regime. The Federation argued that there was no public interest reason to subject lawyer and Quebec notary IP agents to regulation by two distinct regulatory bodies, and that the additional regulatory burden, potential conflicts, and likely confusion created by such duplication should be avoided.

14. The Federation proposed alternatives, including exempting IP agents who are already regulated by a Canadian law society or the Chambre des notaires from the new regulatory framework. The provision in the *Immigration and Refugee Protection Act* exempting lawyers and Quebec notaries from membership in the immigration consultant regulatory regime was cited as a precedent.

15. When the Act was introduced it ignored the fact that lawyers and Quebec notaries who are IP agents are already subject to comprehensive and effective regulation and proposed to include them within the scope of the proposed IP agent regulatory regime. This problem of regulatory overlap was not addressed during the legislative process and the Act, as adopted, extends to lawyers and Quebec notaries who are IP agents. As a consequence, the regulatory regime set out in the Act failed to address the serious issues that will arise from regulatory duplication, including but not limited to overlapping investigation and discipline processes.

16. Disappointingly, the pre-published Regulations also do nothing to clarify how that regulatory duplication might be managed in a way that is consistent with the public interest, the express purpose of the legislation. Further, this lack of clarification appears to fail to meet the

[6] See *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (CanLII) at paras. 2, 21-22.

government's own stated objective of "minimizing regulatory burden" for businesses and Canadians.[7]

17. It is the Federation's position that lawyers and Quebec notaries acting as IP agents are providing legal services. In our view, the federal government has no jurisdiction to regulate the legal profession in any way. Without prejudice to this position, the Federation suggests that there would be merit in providing greater clarity on how the overlapping jurisdiction of the College and the regulators of the legal profession will operate practically. The Regulations could, for example, require notice to a legal regulator of an investigation into a lawyer or Quebec notary who is an IP agent and address the possibility of collaboration with the applicable legal regulator in such circumstances. The Regulations might also provide guidance on when a matter might be referred by the College to another regulatory body as contemplated by section 41 of the Act. Further, although the Act requires IP agents to abide by a code of professional conduct and despite assurances from ISED that the code would align with those in place for the legal profession, the Regulations are silent both on the content of the code and how potential conflicts in professional obligations might be reconciled.

18. The Federation is also disappointed at the lack of early or meaningful engagement and consultation by ISED prior to the pre-publication of the Regulations. The federal government's Cabinet Directive on Regulation requires that departments engage in meaningful consultations with stakeholder and specifies that pre-publication of regulations "is not a substitute for early consultation"[8]. As the national coordinator of Canada's legal regulators, the Federation is an important stakeholder and is in a unique position to provide insightful comment on the development of a new professional regulatory regime and, more specifically, to explore ways to avoid problems of regulatory duplication through the Regulations.

Other Issues

19. The Federation also has concerns about provisions in the Regulations requiring that all IP agents must be Canadian residents and must meet, *inter alia*, requirements regarding physical and mental fitness set out in College by-laws. Given the short period of time provided for consultation, the Federation has not had time to consider these issues in detail but notes that they may raise human rights concerns and do not seem either necessary or logically connected to a valid regulatory purpose.

Conclusion

20. The Federation would welcome the opportunity to engage further with ISED on the issues raised in this submission, in particular, to address the problems caused by regulatory duplication and the risks to the fundamental right of solicitor-client privilege compounded by the Regulations.

[7] Cabinet Directive on Regulation: https://www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/requirements-developing-managing-reviewing-regulations/guidelines-tools/cabinet-directive-regulation.html.
[8] Ibid.

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

Observations de la Fédération des ordres professionnels de juristes du Canada présentées à Innovation, Sciences et Développement économique Canada

Commentaires sur le Règlement pris en application de la *Loi sur le Collège des agents de brevets et des agents de marques de commerce* publié de façon préalable dans la Gazette du Canada, Partie I, Volume 155, Numéro 11, le 13 mars 2021

Ottawa, le 12 avril 2021

Introduction

1. La Fédération des ordres professionnels de juristes du Canada (la « Fédération ») est l'organisme coordonnateur des 14 ordres professionnels de juristes provinciaux et territoriaux du Canada qui, ensemble, réglementent les 130 000 avocats du Canada, les 3 800 notaires du Québec et les quelque 11 300 parajuristes de l'Ontario, dans l'intérêt public. Dans le cadre de ses activités, la Fédération favorise notamment l'élaboration de normes nationales, encourage l'harmonisation des règles et procédures des ordres professionnels de juristes et entreprend des initiatives nationales selon les directives de ses membres. La Fédération se prononce également sur des questions essentielles à la préservation du droit du public à une profession juridique indépendante, à la protection du secret professionnel du juriste et à d'autres questions relatives à l'administration de la justice et la primauté du droit.

2. La Fédération est heureuse d'avoir l'occasion de présenter des observations sur le projet de règlement d'application de la *Loi sur le Collège des agents de brevets et des agents de marques de commerce* (ci-après, la « Loi ») et les modifications corrélatives aux *Règles sur les brevets* et au *Règlement sur les marques de commerces* publiés préalablement dans la Gazette du Canada, Partie I : volume 155, nº 11, le 13 mars 2021 (le « Règlement »).

Observations principales

3. Le Règlement mettra en vigueur un nouveau régime pour la réglementation des agents de brevets et des agents de marques de commerce (les « agents de propriété intellectuelle », ou « agents de PI »). Le Règlement traite de la composition des comités, des exigences relatives à la délivrance de licences aux agents, des enquêtes, des règlements administratifs du Collège des agents de brevets et des agents de marques de commerce (le « Collège ») et des mesures transitoires.

4. La Fédération exprime ses inquiétudes à l'égard du fait que le Règlement offre des protections inadéquates pour le secret professionnel du juriste, et n'explique pas comment régler la question du fardeau que représente le chevauchement de la réglementation pour les avocats et les notaires du Québec, qui sont des agents de PI, un problème créé par la Loi. Ces questions minent le droit au secret professionnel du juriste protégé par la Constitution, et entraîneront probablement de la confusion et des conflits superflus sur le plan de la réglementation. La Fédération soutient que ces conséquences ne sont pas dans l'intérêt du public, alors que le gouvernement affirme que l'intérêt du public constitue l'objectif justifiant la création du nouveau régime réglementaire pour les agents de PI. Le Règlement soulève également d'autres préoccupations que la Fédération aimerait porter à l'attention d'Innovation, Sciences et Développement économique Canada (« ISDE »).

Protection inadéquate du secret professionnel du juriste

5. La loi énonce les pouvoirs du Collège, notamment celui de mener des enquêtes sur les agents de propriété intellectuelle pour faute professionnelle ou incompétence, y compris les pouvoirs de prendre possession de renseignements protégés par le secret professionnel du juriste. L'ISDE a déclaré ceci : « Sans le pouvoir de passer outre au privilège conféré par le secret professionnel des avocats, l'organisme de réglementation ne sera pas en mesure de pleinement réglementer les agents qui sont des avocats ou qui travaillent au sein d'un cabinet d'avocats. »[1] La Fédération a déjà fait part de ses inquiétudes quant aux risques

[1] Innovation, Sciences et Développement économique Canada, *Foire aux questions : Collège des agents de brevets et des agents de marques de commerce,* https://www.ic.gc.ca/eic/site/693.nsf/fra/00167.html

que ce régime pourrait présenter pour la protection constitutionnelle des renseignements protégés par le secret professionnel du juriste[2]. De l'avis de la Fédération, le Règlement aggrave ces problèmes et ne protège pas adéquatement le secret professionnel du juriste selon la loi applicable. La Fédération est d'avis, comme nous le verrons plus loin, que l'alinéa 14(3)(a), en particulier, est très probablement inconstitutionnel.

6. La Loi autorise un enquêteur du Collège à saisir des renseignements et des documents protégés, y compris ceux qui sont protégés par le secret professionnel du juriste, sauf lorsque les documents ne se rapportent pas à un brevet, à une marque de commerce ou à une autre marque reconnue par la loi. Bien que la Loi exige que tous les documents en possession d'un avocat ou d'un cabinet d'avocats soient scellés et ne soient pas consultés par l'enquêteur, le processus prescrit pour protéger les renseignements ou les documents protégés par le secret professionnel du juriste pose problème. Il impose au juriste l'obligation positive de prendre toutes les mesures raisonnables pour aviser le détenteur de tout privilège sur les documents et, si le détenteur du privilège ne peut être trouvé dans le délai prescrit, d'aviser immédiatement l'ordre professionnel de juristes. La Loi prévoit également le droit de s'opposer à la communication de documents protégés par la présentation d'une demande à la Cour fédérale, et elle exige que les documents scellés soient traités conformément aux règlements.

7. Le Règlement accorde un délai de dix jours au juriste pour retrouver et aviser tout détenteur de privilège avant d'aviser l'organisme de réglementation de la profession juridique, ce qui, selon la Fédération, représente un délai excessivement court compte tenu de l'importance du droit au secret professionnel du juriste. Le Règlement mine davantage le secret professionnel du juriste en étant censé autoriser l'ouverture de documents scellés après 30 jours, sous réserve uniquement de toute ordonnance de la Cour fédérale qui aurait pu être rendue. Le Règlement ne prévoit aucune exception à cette autorisation, quelles que soient les circonstances, y compris, par exemple, lorsqu'une procédure a été intentée devant la Cour fédérale mais n'est pas encore terminée. La disposition générale n'établit pas non plus de seuil ou de critère pour l'accès aux renseignements protégés, ce qui soulève la possibilité très réelle que des renseignements protégés qui ne sont pas pertinents au regard d'une enquête puissent être consultés par un enquêteur et d'autres personnes participant au processus d'enquête du Collège.

8. La Cour suprême du Canada a été vigilante quant à la protection du secret professionnel du juriste dans sa jurisprudence concernant les pouvoirs conférés par la loi au gouvernement et à d'autres agents administratifs. La Cour suprême a clairement indiqué à plusieurs reprises que le secret professionnel du juriste doit demeurer aussi absolu que possible, et qu'on ne doit y porter atteinte que si cela s'avère absolument nécessaire[3].

9. Dans l'arrêt *Lavallee, Rackel & Heintz c. Canada (Procureur général)*[4] et dans les affaires connexes, la Cour suprême a énoncé les principes constitutionnels pertinents qui s'appliquent lorsqu'une loi fédérale vise à accorder à un fonctionnaire le pouvoir d'examiner, de copier ou de saisir un document en la possession d'un juriste qui affirme que les documents sont protégés par le secret professionnel du juriste. L'affaire *Lavallee* portait sur un régime prévu à l'article 488.1 du *Code criminel* qui visait à permettre la divulgation obligatoire de renseignements potentiellement protégés lorsqu'une revendication de privilège a été présentée au fonctionnaire, mais que l'avocat ou le titulaire du privilège n'a pas présenté de demande au tribunal. La Cour suprême a conclu que l'article était

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[2] Fédération des ordres professionnels de juristes du Canada, *Un cadre de gouvernance pour les agents de propriété intellectuelle, observations présentées à Innovation, Sciences et Développement économique Canada et à l'Office de la propriété intellectuelle du Canada* (31 août 2016).

[3] *Voir Alberta (Information and Privacy Commissioner) c. University of Calgary*, 2016 CSC 53 (CanLII), [2016] 2 RCS 555, au par. 43.

[4] 2002 CSC 61 (CanLII) *(Lavallee).*

inconstitutionnel, estimant « qu'on ne peut pas dire que cette communication obligatoire de renseignements potentiellement privilégiés porte atteinte le moins possible au privilège », et que « …[c]ette communication obligatoire revient à faire prédominer de façon injustifiable la forme sur le fond et crée la possibilité réelle que l'État obtienne des renseignements qu'un tribunal peut fort bien reconnaître comme étant privilégiés. »[5]

10. Selon les observations de la Fédération, le régime établi dans la Loi et le Règlement ne respecte pas les importantes protections constitutionnelles du secret professionnel du juriste établies par la Cour suprême. Il permet la communication automatique de renseignements protégés sans qu'il soit nécessaire de prouver au préalable que l'accès à ces renseignements est absolument nécessaire, et ne tient absolument pas compte de l'exigence selon laquelle toute violation du secret professionnel du juriste doit porter une atteinte minimale à ce droit. Bien qu'il soit possible que l'objectif du pouvoir proposé de lever les scellés après 30 jours est de faciliter une enquête sur des allégations d'inconduite ou d'incompétence, il n'est pas du tout clair que cet objectif répondrait aux critères de nécessité absolue ou d'atteinte minimale, en particulier lorsqu'il existe des solutions de rechange, comme le recours à la Cour fédérale.

11. Même si la Loi prévoit que la communication au Collège de renseignements protégés par le secret professionnel du juriste ne constitue pas une renonciation au privilège, cela ne règle pas les problèmes de communication créés par la Loi et aggravés par le Règlement. Toute atteinte doit être mesurée du point de vue du client. Pour un client la communication forcée à un étranger au privilège, comme cela peut se produire en vertu du règlement proposé, compromet ce privilège, même s'il n'est pas communiqué par la suite. La jurisprudence de la Cour suprême soutient fermement cet avis[6].

12. De l'avis de la Fédération, le Règlement devrait prévoir que la levée des scellés de documents à l'égard desquels le secret professionnel des avocats a été revendiqué ne peut se faire que sur ordonnance de la Cour fédérale ou avec le consentement du détenteur du privilège.

Chevauchement de la réglementation

13. Au cours des consultations de l'ISDE tenues en 2016 sur les options proposées pour un organisme de réglementation indépendant qui régirait les agents de PI, la Fédération a exprimé des préoccupations quant à la perspective d'un chevauchement de la réglementation si les agents de PI, également avocats ou notaires du Québec, étaient assujettis au nouveau régime réglementaire. La Fédération a fait valoir qu'il n'y avait aucune raison d'intérêt public de soumettre les agents de PI, également avocats et notaires du Québec, à l'autorité de deux organismes de réglementation distincts, et qu'il fallait éviter le fardeau réglementaire supplémentaire, les conflits éventuels et la confusion probable créés par un tel chevauchement.

14. La Fédération a proposé des solutions de rechange, notamment la possibilité de soustraire au nouveau cadre réglementaire les agents de PI qui sont déjà réglementés par un ordre professionnel de juristes canadien. La disposition de la *Loi sur l'immigration et la protection des réfugiés* qui exempte les avocats et les notaires du Québec de l'adhésion au régime de réglementation des consultants en immigration a été invoquée à titre de précédent.

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[5] Ibid., au par. 43.
[6] Voir *Canada (Commissaire à la protection de la vie privée) c. Blood Tribe Department of Health,* 2008 CSC 44, aux par. 2 et 21-22.

15. Lorsque la Loi a été présentée, elle n'a pas tenu compte du fait que les avocats et les notaires du Québec, également agents de PI, sont déjà soumis à une réglementation complète et efficace, et a proposé de les inclure dans le champ d'application du régime réglementaire proposé pour les agents de PI. Ce problème de chevauchement de la réglementation n'a pas été abordé au cours du processus législatif et la Loi, telle qu'elle a été adoptée, vise les avocats et les notaires du Québec qui sont également des agents de PI. Par conséquent, le régime réglementaire établi dans la Loi n'a pas cherché à régler les graves problèmes qui découleront du chevauchement de la réglementation, notamment, mais sans s'y limiter, le chevauchement du processus d'enquête et du processus disciplinaire.

16. Il est regrettable que le règlement publié de façon préalable ne précise pas non plus comment ce chevauchement de la réglementation pourrait être réglé d'une manière conforme à l'intérêt public, l'objectif explicite de la Loi. De plus, ce manque de clarté ne semble pas répondre à l'objectif déclaré par le gouvernement de « réduire au minimum le fardeau réglementaire » qui pèse sur les entreprises et les Canadiens[7].

17. La Fédération est d'avis que les avocats et les notaires du Québec qui sont également agents de PI fournissent des services juridiques. À notre avis, la réglementation de la profession juridique ne relève en aucune façon de la compétence du gouvernement fédéral. Sans préjuger de cette opinion, la Fédération estime qu'il y aurait lieu de clarifier davantage la façon dont le chevauchement des compétences du Collège et des organismes de réglementation de la profession juridique fonctionnera en pratique. Le Règlement pourrait, par exemple, exiger qu'un organisme de réglementation de la profession juridique soit avisé lorsqu'un avocat ou un notaire du Québec, qui est un agent de PI, fait l'objet d'une enquête. Le Règlement pourrait également aborder la possibilité d'une collaboration avec l'organisme de réglementation de la profession juridique compétent dans de telles circonstances. De plus, le Règlement pourrait fournir des indications sur les cas où le Collège pourrait renvoyer une affaire à un autre organisme de réglementation, comme le prévoit l'article 41 de la Loi. En outre, bien que la Loi exige que les agents de propriété intellectuelle se conforment à un code de déontologie, et malgré les garanties fournies par l'ISDE que le code serait compatible avec ceux qui sont en place pour la profession juridique, le Règlement reste muet à la fois sur le contenu du code et sur la façon dont pourraient être conciliés les éventuels éléments contradictoires des obligations professionnelles.

18. La Fédération déplore également l'absence de consultation et d'engagement significatifs de la part de l'ISDE plus tôt avant la publication préalable du Règlement. La Directive du Cabinet sur la réglementation du gouvernement fédéral exige que les ministères prennent part à des consultations significatives avec les parties prenantes et précise que la publication préalable des règlements « ne remplace pas une consultation menée en début de projet. »[8] En tant que coordonnatrice nationale des organismes de réglementation de la profession juridique du Canada, la Fédération est une intervenante importante et se trouve dans une position unique pour fournir des commentaires éclairés sur l'élaboration d'un nouveau régime de réglementation professionnelle et, plus précisément, pour examiner les moyens de prévenir les problèmes que pose le chevauchement de la réglementation engendré par le Règlement.

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[7] Directive du Cabinet sur la réglementation : https://www.canada.ca/fr/gouvernement/systeme/lois/developpement-amelioration-reglementation-federale/exigences-matiere-elaboration-gestion-examen-reglements/lignes-directrices-outils/directive-cabinet-reglementation.html#to5

[8] Ibid.

Autres questions

19. La Fédération exprime également des préoccupations au sujet des dispositions du Règlement exigeant que tous les agents de PI soient des résidents canadiens et qu'ils satisfassent, entre autres, aux exigences relatives à l'aptitude physique et mentale énoncées dans les règlements administratifs du Collège. Étant donné la courte période prévue pour la consultation, la Fédération n'a pas eu le temps d'examiner ces questions en profondeur, mais elle note qu'elles peuvent soulever des préoccupations en matière de droits de la personne et qu'elles ne semblent ni nécessaires ni raisonnablement liées à un objectif réglementaire valable.

Conclusion

20. La Fédération serait heureuse d'avoir l'occasion de poursuivre la discussion avec l'ISDE sur les questions soulevées dans les présentes observations, en particulier pour aborder les problèmes causés par le chevauchement de la réglementation et les atteintes possibles au droit fondamental du secret professionnel du juriste, des problèmes qu'aggrave le Règlement.

The Law Society of Manitoba
INCORPORATED 1877 | INCORPORÉ EN 1877

MEMORANDUM

To:	Benchers
From:	Darcia Senft
Date:	September 1, 2021
Re:	**Interim Report and Update on Library Hub and On-Line Portal Pilot Project**

Phase One – Library Hub

Interim Report

In 2019, the Manitoba Law Foundation provided funds to the Law Library for a pilot project intended, among other things, to generate data about the unmet legal needs of self-represented litigants, increase the ability of members of the public to represent themselves competently, provide an opportunity for justice system stakeholders to work collaboratively on an initiative designed to increase access to justice, increase "legal literacy" and give law students an opportunity to engage in experiential learning. There was interest in exploring whether the Law Library could serve as a hub to provide legal information and assistance to those who need it, when they need it. The pilot was structured as a two-phase project.

In the first phase, the funding supported the creation of the Library Hub, through which legal services would be provided by supervised law students within the Law Library at the courthouse in Winnipeg. In phase 2 of the project, an on-line portal was to be established, to provide legal information to the public.

The Hub commenced operations in February 2020. Although it had to close almost immediately due to the emergence of the pandemic, they were able to shift to on-line services in January of 2021. Given the interruption to phase 1 of the project, we have not initiated phase 2.

From time to time, we provide you with information about the status of the pilot project. In June 2021, we received an Interim Report from Leah Klassen, a lawyer in private practice who was hired to coordinate the Hub and act as a supervisor for volunteer law students interested in providing

legal information and limited legal services to the public. A copy of Ms Klassen's Interim Report is attached as **Appendix A**.

Update

The Hub took a hiatus over the summer due in large part to the changeover of the deanship at Robson Hall. The change created some uncertainty in the ability to recruit student volunteers over the summer. However, during the summer months, Ms Klassen worked to develop a project with the Manitoba Chapter of Pro Bono Students Canada ("PBSC") at Robson Hall with the intention of using the existing structure of PBSC to provide student volunteers for the Hub. PBSC has responded eagerly and has indicated that the students are excited about the potential to work directly with clients. Through the PBSC, there will be six student volunteers available to provide Library Hub legal help services.

In October, we intend to return to the in-person model where the students and the supervising lawyer will provide limited legal help at the Manitoba Law Library. These plans are of course subject to change based on COVID-19 restrictions and guidance provided by health professionals. The students and the supervising lawyer will be at the Great Library on Monday afternoons, likely from 1:00 pm – 4:00 pm. Monday afternoon was chosen due to the fact that students need to be second or third year law school students and Monday afternoon was the time that worked best so they would not need to miss any mandatory course classes.

Within the Library, there are three physical work stations available that are separated by barriers. Ms Klassen expects that two "clients" could be assisted per hour, which affords students a sufficient amount of time to meet those seeking legal help while in an environment that can accommodate social distancing.

For the time being, we will resume providing assistance using an appointment-based model as opposed to providing assistance to those who may have otherwise sought legal help on a "drop in" basis. Currently, no one is allowed inside the courthouse unless they have a reason to be there. Karen Sawatzky and her team at the Great Library have agreed to take on the responsibility of scheduling appointments. In an advertisement for the Library Hub, information will be given on how to book an appointment using the email/phone number of the Manitoba Law Library and Ms Sawatsky will upload a calendar on the Manitoba Law Library website showing available appointment dates. Due to the restrictions of the student volunteers through PBSC, the Hub will not be operational over the exam/holiday season.

Files will be kept on external hard drives, on two laptops which have been provided by the Library and the Law Society, and maintained using a cloud-based system.

Since the Hub will need to operate on an appointment basis due to current COVID restrictions, we will continue to assess our ability to assist individuals using the income requirements set out in the Interim Report. We want to avoid service duplication and ensure that we are helping those who cannot access assistance through the Legal Help Centre or Legal Aid.

At some point, when it is possible to return to the original Hub model and provide services without prior appointments, we will be able to assess, on some level, the immediate needs of people attending the courthouse who seek legal help on a walk-in basis.

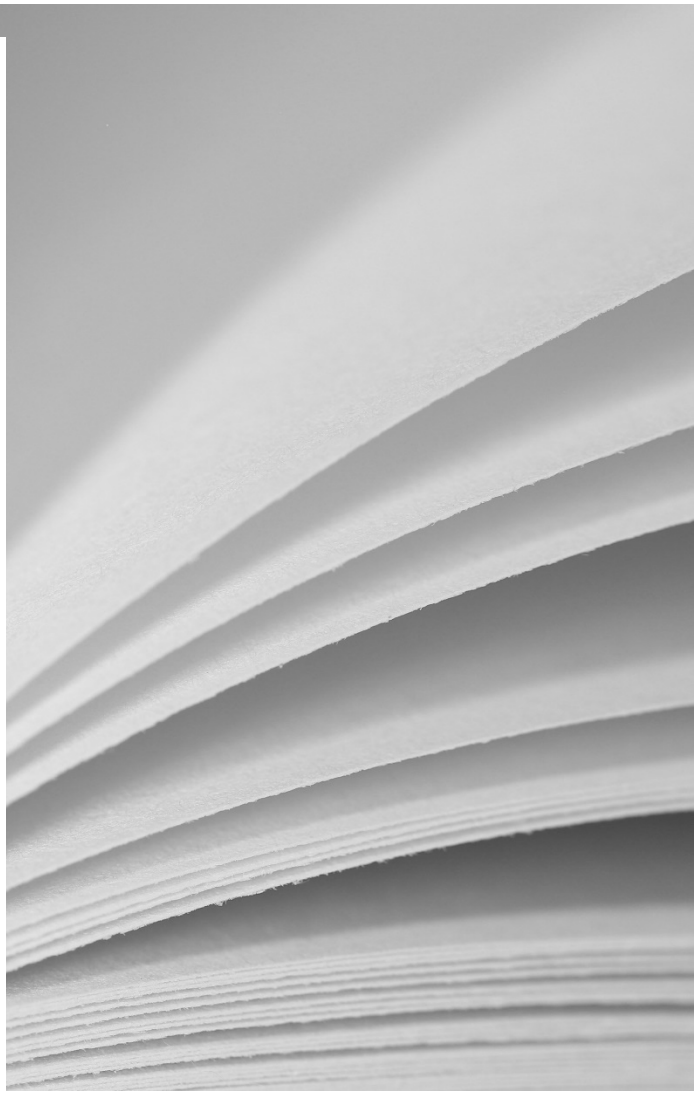
Phase Two – On-Line Portal

As noted above, a portion of the grant monies was earmarked for the development on an on-line portal that could be embedded into other websites through which members of the public could access legal information relating to different areas of law. The idea was that there would be "no wrong door" and individuals could find legal information by accessing the portal through a variety of websites. Unfortunately, there has not been an opportunity to give detailed consideration to phase two of the original pilot project.

Of some significance, the provincial government launched its new Family Law website in coordination with the rollout of the government's Family Law Modernization Project. We understand that there may be some interest on the part of the government in creating legal information content for other areas of law. We plan to discuss options with other justice system stakeholders so that we avoid duplicating efforts and will continue to explore further opportunities for collaboration.

Atc.

Interim Report on Library Hub



JUNE 1. **2021**

Authored by: Leah Klassen

INTERIM REPORT – Library Hub

Virtual: February 2021 – April 2021

Overview

The Library Hub began on an in-person basis in February of 2020 with students from the Legal Help Centre, from the Advanced Family Law course at Robson Hall, and with several student volunteers with no particular program.

When COVID-19 restrictions came into play, the Library Hub project was put on hiatus. It started back up again in a virtual capacity in February of 2021 with 3 students from Natasha Brown's Advanced Family Law course. It continued in this capacity until the end of the school term in April 2021.

During these three months, under the supervision of Leah Klassen, the three students were able to assist people who were referred to us from the Family Resolution Service at the Court of Queen's Bench, which is led by Laura Moore, the Family Resolution Service Lead Court Specialist. We coordinated with Laura Moore to ensure that the people who were referred to us were not eligible for other services, such as Legal Aid or the Legal Help Centre, so that our service would fill in the gaps of unmet needs.

Below is numerical and anecdotal data showing the services that were provided during this time.

Kind of Service Provided

Students would meet with attendees over Zoom in order to obtain an overview of their matter and what questions the attendee needed answering. The student would then meet with the supervising lawyer (Leah Klassen) to establish a plan for drafting documents, if applicable, or obtain answers to the attendee's question. The student would then draft the documents, have them reviewed by the supervising lawyer, and provide them to the attendee. They would also set up a further meeting with the attendee to answer any questions or obtain further information in order to draft the documents.

Clients Seen

From February 2021 until April 2021, there was a total of 23 people referred to the Library Hub.

4 of those people were referred by the Library Hub to the Legal Help Centre, as we determined that those people met LHC's income requirements.

The Library Hub assisted a total of 19 people. None of these people were eligible to receive assistance from Legal Help Centre or Legal Aid Manitoba.

In general, there were two categories of attendees, referenced as Group A and Group B here.

Group A

12 people that we assisted were in this group. This group can be generally categorized as those who required straightforward assistance. Most of the people in this group were looking to initiate a process, usually either a Petition/Petition for Divorce or a Notice of Motion to Vary, and did not know where to start.

Some examples of what are as follows:

- Explained and assisted with filling out Court of Queen's Bench forms such as Financial Statements, Petitions, Petitions for Divorce, Notices of Motion to Vary, Affidavits, Affidavits of Service and Triage documents;
- Explained how to note another party in default;
- Gave guidance on how to communicate with counsel who were representing the opposing party;
- Reviewed and drafted orders;
- Explained the flow of a family file with the Court of Queen's Bench and directed to the Court of Queen's Bench Act and Rules;
- Referred to appropriate websites and resources such as CLEA when needed;

- Answered general process questions

The students were able to provide substantial assistance to the people in this group under the supervision of the supervising lawyer.

Group B

7 people that we assisted were in this group. This group can be generally categorized as those who required assistance on very complicated matters. Many of the members of this group had Court of Queen's Bench files that stretched back 5 years and some up to 20 years. These attendees generally had previously had counsel representing them, but for a variety of reasons that they relayed to us, no longer were represented by counsel.

Some examples of why were as follows:

- that they could no longer afford counsel (regardless of fairly high income, in some cases), due to how long the matter had gone on;
- that they fired their counsel as they were not happy with how counsel had handled their file; or
- that they simply felt that they now knew enough about the legal system to be able to represent themselves effectively.

We were often unable to substantially assist the people in this group. Their questions were typically extremely specific and related to the extensive facts of their file. We typically would refer the members of this group to CLEA in order to obtain counsel, as there was little that we could do to assist.

Income

Below are the incomes of the attendees:

Household Income
$65,000 – not eligible for LHC due to household size
$65,000 – not eligible for LHC due to household size

$42,500 – referred to LHC – did not assist
$61,000 – not eligible for LHC due to household size
$30,000 – Referred to LHC – did not assist
$67,000 – not eligible for LHC due to household size
$34,000 – referred to LHC – did not assist
$65,000 – not eligible for LHC due to household size
$88,000
$100,000
$65,000 – not eligible for LHC due to household size
$23,000 – referred to LHC – did not assist
$10,000 (aprox) – on disability – had property in India and neither Legal Aid nor Legal Help Centre would assist her
$60,000 – not eligible for LHC due to household size
$85,000
$87,000
$56,000 – not eligible for LHC due to household size
$100,000
Over $100,000
$91,000
$104,000
$83,000
$100,000

The Law Society of Manitoba
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MEMORANDUM

To:	Benchers
From:	Leah Kosokowsky
Date:	September 1, 2021
Re:	**Reimbursement Claims Fund Committee**

Since the May 2021 bencher meeting, the Reimbursement Claims Fund Committee has approved two additional reimbursement claims for clients of Paul Hesse, each in the amount of $175,000.

With these two payments totalling $350,000, the approved claims total $2,978,860 and relate to 17 claimants.