The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 4

Report to Convocation
April 27, 2017

Professional Regulation Committee

Committee Members
William C. McDowell (Chair)
Malcolm Mercer (Vice-Chair)
Jonathan Rosenthal (Vice-Chair)
Fred Bickford
John Callaghan
Gisèle Chrétien
Suzanne Clément
Seymour Epstein
Carol Hartman
Michael Lerner
Brian Lawrie
Virginia MacLean
Susan Richer
Raj Sharda
Jerry Udell

Purpose of Report: Decision and Information

Prepared by the Professional Regulation Division
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COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on April 6, 2017. In attendance were William C. McDowell (Chair), Malcolm Mercer (Vice-Chair), Jonathan Rosenthal (Vice-Chair), Fred Bickford, John Callaghan, Gisèle Chrétien, (by telephone), Suzanne Clément, Seymour Epstein, Michael Lerner (by telephone), Brian Lawrie, Susan Richer, Raj Sharda (by telephone), and Jerry Udell.

2. Members of the Paralegal Standing Committee also attended the meeting.

3. The Complaints Resolution Commissioner (CRC) (Bernard Morrow) attended the meeting, as did Miriam Weinfeld and Lisa Steinberg of Mr. Morrow's office to discuss the 2016 CRC Annual Report.

4. The following Law Society staff members attended the meeting: Karen Manarin, Naomi Bussin, Juda Strawczynski, Jim Varro and Margaret Drent.

Tab 4.1

FOR DECISION

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT REGARDING COMMUNICATING WITH WITNESSES

MOTION

5. **That Convocation approve amendments to Sections 5.3 and 5.4 of the Rules of Professional Conduct and Commentary respecting Interviewing and Communicating with Witnesses as set out at Tab 4.1.1.**

NATURE OF THE ISSUE

6. The Federation of Law Societies of Canada's Standing Committee on the Model Code ("Federation") has developed the Model Code of Professional Conduct (Model Code). Federation Council adopted amendments to the Model Code in this area in March 2016.

7. The Committee has reviewed the proposed amendments and is proposing to adopt them. The Committee also proposes to retain some of the existing guidance in the Law Society's Rules of Professional Conduct.

8. The Committee is grateful to the Law Society Rules drafter, John-Mark Keyes, for his drafting assistance.

SUMMARY OF PROPOSED AMENDMENTS - RULES 5.3-1, 5.4-1 AND COMMENTARY

9. As noted in materials provided by the Federation, the Model Code approach in this area is intended to be principles-based, recognizing that there are a range of practices in different jurisdictions governing communicating with witnesses, and this variation creates a challenge in amending the Code.

10. The Model Code amendments are intended to draw attention to a key principle underlying the Rules – prohibiting coaching of witnesses, and witness tampering.

11. A "clean" version of the proposed amendments is attached to this report as **Tab 4.1.2**.

12. Federation Council approved the deletion of Rule 5.3-1, which is identical to current Law Society Rule 5.3-1 and which provides

> 5.3-1 Subject to the rules on communication with a represented party set out in rules 7.2-4 to 7.4-8.2, a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer shall disclose the lawyer's interest and take

care not to subvert or suppress any evidence or procure the witness to stay out of the way.

13. The Committee has reviewed the Model Code materials, and has noted that the guidance in this Rule has been incorporated into proposed Rules 5.4-1, 5.4-2, and Commentary. As a result, the Committee recommends the corresponding deletion of Rule 5.3-1 in the Rules of Professional Conduct to Convocation.

14. The Committee recommends the adoption of two new paragraphs of Commentary in the Model Code below Rule 5.4-1. The Committee's proposed modifications are described below.

15. With respect to the new Model Code Commentary regarding expert witnesses, the Committee recommends its adoption into the Rules of Professional Conduct. The Committee further recommends the addition of guidance regarding legal constraints on speaking with the treating physicians of adverse parties, and is proposing that an additional sentence be added to the Commentary, shown in the attached redline.

16. The Committee proposes the addition of Commentary below Rule 5.4-1 that would be unique to the Law Society of Upper Canada. This addition is explained in the following paragraphs.

17. New Rule 5.4-1(a) provides that "a lawyer may seek information from any potential witness, provided that the lawyer before doing so, the lawyer discloses the lawyer's interest in the matter".

18. During the course of its deliberations, the Committee noted that the police may conduct inquiries in the course of an investigation; this information may be used during a prosecution. To ensure that the adoption of this Rule does not have a chilling effect on defence counsel, who may sometimes retain investigators to conduct inquiries to gather information on behalf of their clients, the Committee proposes the following:

    [1.1] Rule 5.4-1(a) does not apply to inquiries made by an investigator or other third party retained by a lawyer on behalf of a client.

19. The Committee is recommending the adoption of new Rules 5.4-2 and 5.4-3, as these Rules provide useful guidance

SUMMARY OF PROPOSED AMENDMENTS – RULE 5.4-2 AND 5.4-3 AND COMMENTARY

20. Rules 5.4-2 and 5.4-3 are new. Consistent with the approach described above, these new Rules provide important guidance on key principles, emphasizing that the coaching of witnesses and witness tampering are inconsistent with the regulatory framework. The Committee recommends their adoption to Convocation.

21. The Commentary to Rule 5.4-3 is also new. The Committee has reviewed the proposed Model Code Commentary proposes to adopt it, with some variations described below.

    a. Model Code Commentary paragraph [4] provides in part that "lawyers should become familiar with the rules and practices of the relevant tribunal governing communication with witnesses during examination-in-chief and cross-examination, and prior to or during re-examination." This guidance is already provided in the Law Society's Rules, and would be reproduced in the opening flush of Rule 5.4-3.1, which provides that "subject to the direction of the tribunal, the lawyer shall observe the following rules respecting communication with witnesses giving evidence…"

       The Committee proposes to adopt the following guidance instead: "the opportunity to conduct a fully ranging and uninterrupted examination, cross-examination and re-examination is fundamental to the adversarial system".

    b. The Committee also proposes to adopt Model Code paragraph [8] in the Rules of Professional Conduct. The first sentence of this Commentary provides guidance regarding the scope of application of the Rules. The Committee proposes to add the phrase "the discovery process during a preliminary inquiry" to this sentence, which currently refers to "examinations under oath or affirmation that are not before a tribunal including examinations for discovery, examinations on affidavits, and examinations in aid of execution".

    c. The paragraphs of Commentary that are not being adopted are shown in the attached redline as "FLSC Not in Use". The Committee makes this recommendation mindful that some of this guidance would appear in Rule 5.4-3.1, currently Rule 5.4-2 in the Rules. The Committee wishes to retain this detailed and specific guidance. It would be redundant for it to appear both in Rule 5.4-3.1 as well as in the Commentary below Rule 5.4-3.

    d. The Commentary to Rule 5.4-3.1 would be unique to the Rules of Professional Conduct. Convocation adopted this Commentary several years ago following the Committee's recommendation when the Model Code was adopted in Ontario. The Committee is of the view that these two paragraphs of Commentary contain useful guidance, and should be retained.

TAB 4.1.1

REDLINE SHOWING PROPOSED AMENDMENTS

SECTION 5.3 INTERVIEWING WITNESSES [deleted]

~~**Interviewing Witnesses**~~

~~5.3-1 Subject to the rules on communicating with a represented party set out in rules 7.2-4 to 7.2-8.2, a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer shall disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.~~

~~[*Amended – November 2007*]~~

SECTION 5.4 COMMUNICATION WITH WITNESSES GIVING EVIDENCE

Communication with Witnesses Giving Evidence

5.4-1 ~~[FLSC – not in use]~~ A lawyer may seek information from any potential witness, provided that

(a) before doing so, the lawyer discloses the lawyer's interest in the matter;

(b) the lawyer does not encourage the witness to suppress evidence or to refrain from providing information to other parties in the matter; and

(c) the lawyer observes Rules 7.2-6 to 7.2-8 on communicating with represented parties.

Commentary

[1] There is generally no property in a witness. To achieve the truth-seeking goal of the justice system, any person having information relevant to a proceeding should be free to impart it voluntarily and in the absence of improper influence. A lawyer should not advise a potential witness to refrain from speaking to other parties except as provided in this rule.

[1.1] Rule 5.4-1(a) does not apply to inquiries made by an investigator or other third party retained by a lawyer on behalf of a client.

Expert Witnesses

[2] Special considerations may apply when communicating with expert witnesses. Depending on the area of practice and the jurisdiction, there may be legal or procedural limitations on the permissible scope of a lawyer's contact with an expert witness, including the application of litigation or solicitor-client privilege. This may include notifying an opposing party's counsel prior to communicating with that party's expert witness. Lawyers should also be mindful of legal constraints on speaking the treating physicians of adverse parties.

Conduct During Witness Preparation and Testimony

5.4-2 A lawyer shall not influence a witness or potential witness to give evidence that is false, misleading or evasive.

5.4-3 A lawyer involved in a proceeding shall not obstruct an examination or cross-examination.

Commentary

General Principles

[1] The ethical duty against improperly influencing a witness or a potential witness applies at all stage of a proceeding, including while preparing a witness to give evidence or to make a statement, and during testimony under oath or affirmation. The role of an advocate is to assist the witness in bringing forth the evidence in a manner that ensures fair and accurate comprehension by the tribunal and opposing parties.

[2] A lawyer may prepare a witness, for discovery and for appearances before tribunals, by discussing courtroom and questioning procedures and the issues in the case, reviewing facts, refreshing memory, and by discussing admissions, choice of words and demeanour. It is, however, improper to direct or encourage a witness to misstate or misrepresent the facts or to give evidence that is intentionally evasive or vague.

Communicating with Witnesses Under Oath or Affirmation

[3] During any witness testimony under oath or affirmation, a lawyer should not engage in conduct designed to improperly influence the witness' evidence.

[3.1] The opportunity to conduct a fully ranging and uninterrupted examination, cross-examination and re-examination is fundamental to the adversarial system.

[4] FLSC – Not In Use

[5] FLSC – Not In Use

[6] FLSC – Not In Use

[7] FLSC – Not In Use

[8] Rules 5.4-2 and 5.4-3 also apply to examinations under oath or affirmation that are not before a tribunal including examinations for discovery, examinations on affidavits, examinations in aid of execution, and to the discovery process during a preliminary inquiry. Lawyers should scrupulously avoid any attempts to influence witness testimony, particularly as the tribunal is unable to directly monitor compliance. This rule is not intended to prevent discussions or consultations that are necessary to fulfil undertakings given during such examinations.

5.4-3.1~~2~~ Subject to the direction of the tribunal, the lawyer shall observe the following rules respecting communication with witnesses giving evidence:

(a) during examination-in-chief, the examining lawyer may discuss with the witness any matter that has not been covered in the examination up to that point;

(b~~a~~.~~1~~) during examination-in-chief by another legal practitioner of a witness who is unsympathetic to the lawyer's cause, the lawyer not conducting the examination-in-chief may discuss the evidence with the witness;

(c~~a.2~~) between completion of examination-in-chief and commencement of cross-examination of the lawyer's own witness, the lawyer ought not to discuss the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief;

(d~~b~~) during cross-examination by an opposing legal practitioner, the witness's own lawyer ought not to have any conversation with the witness about the witness's evidence or any issue in the proceeding;

~~(c) [FLSC – not in use]~~

(e~~c.1~~) between completion of cross-examination and commencement of re-examination, the lawyer who is going to re-examine the witness ought not to have any discussion about evidence that will be dealt with on re-examination;

(f~~c.2~~) during cross-examination by the lawyer of a witness unsympathetic to the cross-examiner's cause, the lawyer may discuss the witness's evidence with the witness;

(g~~c.3~~) during cross-examination by the lawyer of a witness who is sympathetic to that lawyer's cause, any conversations ought to be restricted in the same way as communications during examination-in-chief of one's own witness; and

(h~~c.4~~) during re-examination of a witness called by an opposing legal practitioner, if the witness is sympathetic to the lawyer's cause the lawyer ought not to discuss the evidence to be given by that witness during re-examination. The lawyer may, however, properly discuss the evidence with a witness who is adverse in interest.

[Amended – June 2009]

Commentary

[1]] If any question arises whether the lawyer's behaviour may be in violation of this rule, it will often be appropriate to obtain the consent of the opposing legal practitioner or leave of the tribunal before engaging in conversations that may be considered improper.

[2~~7~~] This rule applies with necessary modifications to examinations out of court.

[Amended – June 2009]

TAB 4.1.2

CLEAN SHOWING PROPOSED AMENDMENTS

RULES OF PROFESSIONAL CONDUCT

SECTION 5.3 INTERVIEWING WITNESSES [deleted]

SECTION 5.4 COMMUNICATION WITH WITNESSES GIVING EVIDENCE

Communication with Witnesses Giving Evidence

5.4-1 A lawyer may seek information from any potential witness, provided that

(a) before doing so, the lawyer discloses the lawyer's interest in the matter;

(b) the lawyer does not encourage the witness to suppress evidence or to refrain from providing information to other parties in the matter; and

(c) the lawyer observes Rules 7.2-6 to 7.2-8 on communicating with represented parties.

Commentary

[1] There is generally no property in a witness. To achieve the truth-seeking goal of the justice system, any person having information relevant to a proceeding should be free to impart it voluntarily and in the absence of improper influence. A lawyer should not advise a potential witness to refrain from speaking to other parties except as provided in this rule.

[1.1] Rule 5.4-1(a) does not apply to inquiries made by an investigator or other third party retained by a lawyer on behalf of a client.

Expert Witnesses

[2] Special considerations may apply when communicating with expert witnesses. Depending on the area of practice and the jurisdiction, there may be legal or procedural limitations on the permissible scope of a lawyer's contact with an expert witness, including the application of litigation or solicitor-client privilege. This may include notifying an opposing party's counsel prior to communicating with that party's expert witness. Lawyers should also be mindful of legal constraints on speaking the treating physicians of adverse parties.

Conduct During Witness Preparation and Testimony

5.4-2 A lawyer shall not influence a witness or potential witness to give evidence that is false, misleading or evasive.

5.4-3 A lawyer involved in a proceeding shall not obstruct an examination or cross-examination.

Commentary

General Principles

[1] The ethical duty against improperly influencing a witness or a potential witness applies at all stage of a proceeding, including while preparing a witness to give evidence or to make a statement, and during testimony under oath or affirmation. The role of an advocate is to assist the witness in bringing forth the evidence in a manner that ensures fair and accurate comprehension by the tribunal and opposing parties.

[2] A lawyer may prepare a witness, for discovery and for appearances before tribunals, by discussing courtroom and questioning procedures and the issues in the case, reviewing facts, refreshing memory, and by discussing admissions, choice of words and demeanour. It is, however, improper to direct or encourage a witness to misstate or misrepresent the facts or to give evidence that is intentionally evasive or vague.

Communicating with Witnesses Under Oath or Affirmation

[3] During any witness testimony under oath or affirmation, a lawyer should not engage in conduct designed to improperly influence the witness' evidence.

[3.1] The opportunity to conduct a fully ranging and uninterrupted examination, cross-examination and re-examination is fundamental to the adversarial system.

[4] FLSC – Not In Use

[5] FLSC – Not In Use

[6] FLSC – Not In Use

[7] FLSC – Not In Use

[8] Rules 5.4-2 and 5.4-3 also apply to examinations under oath or affirmation that are not before a tribunal including examinations for discovery, examinations on affidavits, examinations in aid of execution, and to the discovery process during a preliminary inquiry. Lawyers should scrupulously avoid any attempts to influence witness testimony, particularly as the tribunal is unable to directly monitor compliance. This rule is not intended to prevent discussions or consultations that are necessary to fulfil undertakings given during such examinations.

5.4-3.1 Subject to the direction of the tribunal, the lawyer shall observe the following rules respecting communication with witnesses giving evidence:

(a) during examination-in-chief, the examining lawyer may discuss with the witness any matter that has not been covered in the examination up to that point;

(b.) during examination-in-chief by another legal practitioner of a witness who is unsympathetic to the lawyer's cause, the lawyer not conducting the examination-in-chief may discuss the evidence with the witness;

(c) between completion of examination-in-chief and commencement of cross-examination of the lawyer's own witness, the lawyer ought not to discuss the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief;

(d) during cross-examination by an opposing legal practitioner, the witness's own lawyer ought not to have any conversation with the witness about the witness's evidence or any issue in the proceeding;

(e) between completion of cross-examination and commencement of re-examination, the lawyer who is going to re-examine the witness ought not to have any discussion about evidence that will be dealt with on re-examination;

(f) during cross-examination by the lawyer of a witness unsympathetic to the cross-examiner's cause, the lawyer may discuss the witness's evidence with the witness;

(g) during cross-examination by the lawyer of a witness who is sympathetic to that lawyer's cause, any conversations ought to be restricted in the same way as communications during examination-in-chief of one's own witness; and

(h) during re-examination of a witness called by an opposing legal practitioner, if the witness is sympathetic to the lawyer's cause the lawyer ought not to discuss the evidence to be given by that witness during re-examination. The lawyer may, however, properly discuss the evidence with a witness who is adverse in interest.

[Amended – June 2009]

Commentary

[1]] If any question arises whether the lawyer's behaviour may be in violation of this rule, it will often be appropriate to obtain the consent of the opposing legal practitioner or leave of the tribunal before engaging in conversations that may be considered improper.

[2] This rule applies with necessary modifications to examinations out of court.

[Amended – June 2009]

Tab 4.2

FOR DECISION

REPORT OF THE ADVERTISING & FEE ARRANGEMENTS ISSUES WORKING GROUP

MOTION

22. **That Convocation:**

    a. **approve the cap and regulate approach for referral fees which is generally described at paragraph 25 of this Report;**

    b. **approve amendments to the Rules of Professional Conduct regarding referral fees in Rule 3.6-6 as set out in Tab 4.2.1;**

    c. **approve amendments regarding making legal services available in Rule 4.1-3 of the Rules of Professional Conduct as set out in Tab 4.2.3;**

    d. **approve amendments to the Paralegal Rules of Conduct regarding referral fees in Rule 5.01 as set out in Tab 4.2.4 and request the Paralegal Standing Committee to amend the related Guidelines as set out in Tab 4.2.6;**

    e. **approve amendments to By-Law 9 regarding referral fees as set out in Tab 4.2.8.**

SUMMARY OF ISSUES UNDER CONSIDERATION

23. In this third report to Convocation, the Advertising and Fee Issues Working Group ("Working Group")[1] reports its recommendations regarding:

    i. the appropriate referral fee cap;

    ii. additional means of enhancing the transparency of the referral fee system in order to protect consumers of legal services;

[1] Since it was established in February 2016, the Working Group has been studying current advertising, referral fee and contingency fee practices in a range of practice settings, including real estate, personal injury, criminal law and paralegal practices, to determine whether any regulatory responses are required with respect to them. The history of the Working Group can be found on the Law Society's website at https://www.lsuc.on.ca/advertising-fee-arrangements/. The Working Group is chaired by Malcolm Mercer. Working Group members include Jack Braithwaite, Paul Cooper, Jacqueline Horvat, Michael Lerner, Marian Lippa, Virginia Maclean, Jan Richardson, Jonathan Rosenthal, Andrew Spurgeon and Jerry Udell. Benchers Robert Burd and Carol Hartman served on the Working Group until August, 2016.

iii. minor clarifying amendments to the Rules of Professional Conduct regarding marketing of legal services, directed by Convocation on February 23, 2017[2]; and

iv. certain more limited prohibitions that may be warranted in certain circumstances.

24. The Working Group reports through the Professional Regulation Committee with the general concurrence of the Paralegal Standing Committee.

25. The Committees are recommending that Convocation approve the following recommendations:

i. **REFERRAL FEE CAP:**

Referral fees be capped at 15% of the first $50,000 of legal fees paid to the referring licensee and 5% of all additional legal fees paid to the referring licensee, to an absolute cap of $25,000.

ii. **TRANPARENCY REQUIREMENTS:**

A series of transparency and reporting measures be implemented, comprised of the following requirements:

(i) Referral Agreement:
The referring licensee, licensee accepting the referral and client must sign a Referral Agreement, the form of which is provided by the Law Society.

(ii) Referral Fee Indicated on Account to Client:
The account to the client must clearly indicate the amount to be paid out of the fee charged as a referral fee.

(iii) Client Acknowledgement:
The client must sign an acknowledgement of the referral payment at the time that payment is made.

(iv) Enhanced Requirements for Books and Records:
It should be a requirement that licensee books and records clearly account for referral fees paid and received.

(v) Reporting of Referral Fees:
Licensees should be asked on their Annual Reports whether they have paid or received referral fees. If they have paid or received such fees,

[2] These amendments relate to paragraph 22(c) of the Motion and are intended to ensure consistency between the lawyers' and paralegals' Rules in this area.

they should be asked questions about the total amount of referral fees paid or received during the year (or other questions as may be determined to be appropriate).

iii. **REFERRAL FEES PROHIBITIONS**

The Committees also recommend that referral fees be prohibited in certain circumstances[3]. They recommend:

(i) Prohibiting up-front referral fees (i.e., payment of referral fees prior to payment of the referee's fee);

(ii) Continuing to prohibit paid referrals when the referring licensee has a conflict of interest, as per existing requirements; and

(iii) Prohibiting the payment of referral fees for referrals by licensees whose licenses are suspended.

iv. **Transition**

The Committees recommend that the required referral agreement, the referral fee caps and the new prohibitions should not apply to enforceable referral agreements entered into prior to the effective date of the new rules.

BACKGROUND

26. On February 23, 2017, the Working Group presented its second report to Convocation ("Second Report"). Based on this report, Convocation approved changes to advertising rules. Convocation also approved as a matter of policy the regulation of referral fees between licensees by imposing a monetary cap on such referral fees and introducing transparency measures to protect consumers of legal services. It instructed the Working Group to continue to develop approaches to capping and further regulation of referral fees, and the Committee to then return to Convocation with specific recommendations.[4]

27. The Working Group has subsequently considered appropriate recommendations. Its

[3] The Professional Regulation Committee and the Paralegal Standing Committee are considering further limitations recommended by the Working Group. It is expected that a further report will be made after those considerations are completed and the Working Group has had an opportunity to consider the views of these Committees.

[4] Report of the Advertising and Fee Arrangements Issues Working Group Second Report at paragraph 28, online at https://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2017/2017-Feb-Convocation-Professional-Regulation-Committee-Report.pdf.

findings and recommendations with respect to referral fees follow.

28. The Working Group continues to explore other issues related to contingency fee arrangements and separate issues related to real estate practice.

(a) REFERRAL FEE CAP

29. The rationale for the capping and further regulation of referral fees is found in the Working Group's Second Report. The stated advantages, as described in the Second Report, include the following:

    a. While unlimited referral fees are problematic, capped referral fees may facilitate access to legal services by allowing innovative referral systems to develop.

    b. A cap on referral fees addresses the problem raised by the excessive referral fees that can be demanded as a result of significant "brand" investment through direct advertising. A cap may be used to restore better proportionality between the amount of the referral fee and the nature of the service provided.

    c. A cap aligns economic incentives with the regulatory priority of reducing the risk of licensees keeping files that should be referred.

    d. A cap, rather than an absolute prohibition, has regard for the principle that regulation should be proportionate to the regulatory objectives sought to be realized and does not interfere with economic relationships more than is required.[5]

30. The Second Report also noted that "in response to [the Working Group's] Call for Feedback recommended caps ranged from the 5-10% level at the lower end to 30% of the net fee" and that "the Working Group favours a fee cap at the lower range".[6]

31. During the February 23, 2017 Convocation debate, comments regarding the appropriate amount for a cap tended to recommend a fee cap at the lower range.

32. In its deliberations, the Working Group considered the fact that too low a cap would have the same effect as a ban, and that this result would be inappropriate given Convocation's policy determinations made in February 2017. It was also mindful of the issues it has previously described with respect to high referral fees, such as fees that are disproportionate to the value provided to the client, concerns that high referral fees may exert an upward pressure on contingent fees, referrals going to the highest bidder rather than on the basis of licensee competency, and concerns around referral fee amounts

[5] *Ibid* at paragraph 52.

[6] *Ibid* at paragraph 55a.

potentially limiting how licensees accepting referrals are able to manage a file through to trial if necessary.[7]

33. The Working Group has been tasked by Convocation to find an appropriate cap. Determining a cap is not an exact science. There are a range of options that might be suitable. The Working Group considered a range of approaches to capping referral fee amounts, including:
    a. A cap which is a straight percentage of the fees paid for work done;
    b. A sliding cap based on higher percentage for the first prescribed amount of legal fees (or some other threshold), and a lesser percentage fee for additional amounts; and
    c. Either of the above, combined with an absolute cap.

34. The Working Group considered fixed percentage caps of 5% and 10%, absolute cap amounts, and various sliding cap options.

35. The Working Group recommends a cap of 15% of the first $50,000 of legal fees paid to the referree, 5% of all additional legal fees paid to the referee, to an absolute referral fee cap of $25,000.

36. The effect of this cap with respect to contingency fee matters is demonstrated through the following chart:

EXAMPLES OF REFERRAL FEE AMOUNTS BY OPTION

Claim Recovery	**Legal fees**	**STRAIGHT CAP:**	**STRAIGHT CAP:**	**SLIDING CAP:**	**RECOMMENDED OPTION:**
(Settlement or Award)	**33 1/3% Contingent Fee**	**5% of legal fees**	**10% of legal fees**	**15% for first $50,000 of legal fees with 5% thereafter**	**SLIDING CAP to a maximum of $25,000**
$50,000	$16,667	$833	$1,667	$2,500	$2,500
$100,000	$33,333	$1,667	$3,333	$5,000	$5,000
$150,000	$50,000	$2,500	$5,000	$7,500	$7,500
$250,000	$83,333	$4,167	$8,333	$9,167	$9,167
$500,000	$166,667	$8,333	$16,667	$13,333	$13,333
$1,000,000	$333,333	$16,667	$33,333	$21,667	$21,667
$5,000,000	$1,666,667	$83,333	$166,667	$88,333	$25,000

37. The Working Group recommends this sliding cap, to a maximum referral fee amount,

[7] *Ibid* at paragraphs 39-45.

given the current realities of claims pursued on a contingent fee basis in Ontario.

38. The 15% referral fee cap for the first $50,000 of paid legal fees would apply to most of the contingent matters referred by licensees. Most contingent matters do not result in $50,000 in legal fees. For example, in motor vehicle accident ("MVA") litigation, the 2014 *Automobile Insurance Third Party Liability Bodily Injury Closed Claim Study* ("Auto Insurance Study")[8] reported that 69% of claimants received third party payments amounting to less than $100,000 with 22% of the remainder receiving less than $300,000.[9] Applying a 33 1/3% contingent fee rate, a $50,000 contingent fee would be paid where the recovery is $150,000.

39. For these relatively lower to medium value cases, there can be real value in appropriate licensee referrals which help to ensure that the plaintiff (who, in MVA cases, is an injured party) is represented by a competent licensee. The Working Group considers that the 15% referral fee cap should provide sufficient economic incentive for licensees to refer files that should be referred, without allowing for disproportionate fees for the service provided. In fact, in most referred matters, it is expected that the referral fee will be under $5,000, payable only on successful completion of a contingency fee matter, and for other matters, only when the referee is paid for services rendered.

40. However, the Working Group has concluded that, as the value of a claim or the amount of legal services increases and if only limited to 15% of legal fees, referral fees can become inappropriately large even though a 15% referral fee would not be out of line with historic practices. The Working Group also remained deeply concerned that such high referral fee amounts risk leading to higher fees to the client, which would not be fair or reasonable. This is particularly noteworthy in personal injury cases, where, as previously reported, the Working Group has heard that referral fees may be higher for cases where there are more serious injuries.[10] The Working Group expressed its particular concern for the impact this could have for those who have been seriously injured as follows:

> Some of the factors that a licensee might consider in negotiating the fee for a particular case may negatively impact on the delivery of the service provided. A higher referral fee also creates pressure on the licensee to charge a higher fee to the client. While individual licensees may (or may not) resist this pressure, it is reasonable to be concerned that the trend toward increased referral fees has

[8] Online at 2014 *Automobile Insurance Third Party Liability Bodily Injury Closed Claim Study.*

[9] Appendix 8 to this report may be viewed online at https://www.fsco.gov.on.ca/en/auto/Documents/appendix-8.pdf. See p. 34.

[10] Second Report at paragraph 40.

> resulted in a trend toward increased contingent fees. This directly impacts the recovery obtained by injured people and is especially of concern in more serious cases.[11]

41. The Working Group therefore recommends a sliding cap, where the referral fee is reduced to 5% of legal fees beyond the first $50,000 in legal fees. This is intended to provide economic incentive to licensees to properly refer matters where appropriate, without overcompensating them for such efforts. It is also intended to reduce the pressure that high referral fees could have on licensees to charge higher fees to clients, particularly in high value cases where the adverse impact on injured persons could be most significant.

42. Finally, the Working Group recommends a $25,000 cap on referral fees. The Working Group recognizes that, on its face, this is a large amount. However, the Working Group has been advised of referral fee arrangements where significantly higher amounts are being paid. The percentage and cap on total referral fee amounts are both expected to contribute to lower referral fee amounts.

43. Moreover, it will only be the rarest of cases where the absolute referral fee cap would apply. For example, in the Auto Insurance Study, only four percent (4%) were reported to have received in excess of $500,000.[12] As the above chart notes, referral fees for contingency fee claims would only potentially meet the $25,000 cap on claims valued at well over one million dollars. It is rare to see multimillion dollar recoveries, but for such cases, the Working Group recommends an absolute cap of $25,000 on referral fees. The absolute cap of $25,000 may also serve as a benchmark from which clients and/or licensees may insist upon lower referral fee amounts.

(b) TRANSPARENCY MEASURES

44. The Working Group's Second Report described the rationale for transparency measures, and proposed a series of measures to support the capping of referral fees.[13] This included introducing:
    a. Further rule changes;
    b. A mandatory referral agreement, explained in greater detail below, that would need to be signed by the client, the referring licensee and the licensee accepting the client referral, and which would plainly state the key terms of the referral arrangement and

[11] Second Report at paragraph 41.

[12] Appendix 8 to the Pinnacle Actuarial Resources Inc. report may be viewed online at https://www.fsco.gov.on.ca/en/auto/Documents/appendix-8.pdf. Please see p. 34.

[13] Second Report at paragraph 55c.

the client's rights;

c. A requirement that clients be provided with choices of referral, except in certain limited circumstances (such as difficulties referring to more than one licensee due to geographic location or area of specialty); and

d. Enhanced record keeping requirements in licensee financial records.

45. The proposed amendments to the lawyers' and paralegals' Rules would, if approved by Convocation, incorporate a definition of the term "referral agreement". A referral agreement would be defined as "a signed written agreement between the referring lawyer or paralegal, the lawyer or paralegal who receives the referral, and the client, in the form provided by the Law Society from time to time," that includes seven mandatory elements. The mandatory referral agreement is attached to this report as **Tab 4.2.9**.

46. To assist lawyers and paralegals in explaining the referral agreement to their clients in plain language, a document titled "Law Society Requirements for Referral Fees – What Clients Need to Know" ("Law Society Requirements Document"), attached at **Tab 4.2.10**, has been prepared. This information sheet is to be used by lawyers and paralegals who are referring their clients to another licensee for a fee. Clients should be offered an opportunity to review and consider this document before signing the Referral Agreement. The information sheet would be attached to each Referral Agreement and initialled by the client.

47. Amendments to the Referral Agreement and the Law Society Requirements Document would require the approval of the Professional Regulation and Paralegal Standing Committees, and would be reported to Convocation for its information.

48. The Working Group also recommends the following additional transparency measures:

a. The account to the client issued by the lawyer or paralegal who accepts the referral must clearly indicate the amount to be paid out of the fee being billed as a referral fee;

b. The client must sign an acknowledgement of the referral payment at the time that payment is made;

c. Lawyers and paralegals should be asked on their Annual Reports whether they have paid or accepted payment of referral fees. If so, they should be asked questions about the total amount of referral fees paid / accepted in the year (or other questions as may be determined to be appropriate).

49. The proposed rule changes to implement the referral fee cap and transparency requirements in the Rules of Professional Conduct and Paralegal Rules of Conduct are at **Tabs 4.2.1 and 4.2.3**. A "clean" version showing amendments to the Rules of Professional Conduct with changes accepted is attached as Tab **4.2.2**. A "clean" version showing amendments to the Paralegal Rules of Conduct with changes accepted is

attached as Tab **4.2.5**.

50. The proposed amendments to the Paralegal Guidelines are attached at **Tab 4.2.6**. A "clean" version showing the Guidelines with changes accepted is attached as **Tab 4.2.7**.

51. The enhanced record keeping requirements are found in the proposed By-Law 9 amendments at **Tab 4.2.8.**

52. Licensees will be responsible for issuing accounts that indicate the amounts to be paid out of the fee charged and obtain an appropriate signed client acknowledgement. Paragraph [4] of the Commentary to Rule 3.6-6.1(1), if approved by Convocation, would address this issue. The proposed amendments to the Paralegal Guidelines are similar.

(c) POTENTIAL PROHIBITIONS OF REFERRAL FEES IN SPECIFIC AREAS

53. The Working Group advised Convocation in its Second Report that it continues to be concerned by the use of up-front referral fees, and would also consider other areas where a prohibition of referral fees may be warranted.

Prohibiting Up-Front Referral Fees

54. In its June 2016 Report to Convocation ("First Report"), the Working Group noted that it was advised by licensees that referring firms are currently negotiating up-front flat-fee payments that at times can be very large, above high referral fees payable at the successful conclusion of the matter.[14] In its First Report, the Working Group described the issue as follows:

> The Working Group recognizes the concern that up-front flat referral fees incent referrals to the lawyer who will pay the most for the referral and provide no incentive to refer to the lawyer who will achieve the best result for the client. Payment of up-front flat fees, and/or referral fees that are a significant percentage of the fee charged by the referree may be disproportionate to the value provided by the referrer, and may compromise the net fee earned by the referree to an extent that compromises quality of service. The cost of acquiring the file through payment of referral fees may economically limit the ability of a counsel who has accepted the referral to take the matter to trial. These risks are of concern.[15]

55. It is Second Report, the Working Group recommended prohibiting up-front referral fees in contingency fee matters, on the basis that:

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[14] Advertising & Fee Arrangements Issues Working Group Report, June 23, 2016 at paragraph 44, online at https://www.lsuc.on.ca/uploadedFiles/Professional-Regulation-Committee-Report-Convocation-June-2016.pdf.

[15] *Ibid* at paragraph 90.

> The Working Group sees no competing reasons for permitting up-front referral fees. The Working Group is deeply concerned that up-front fees risk misaligning client and licensee interests, and detrimentally impacting the quality of service the client may receive.[16]

56. The rationale for prohibiting up-front referral fees with respect to contingency fee matters is to better ensure that the referrer has an interest in a referral that maximizes the client's potential recovery. This rationale does not apply where the fee charged is based principally on work done rather than on recovery obtained for the client. However, the Working Group is persuaded that it is undesirable to incent pre-taking of fees in order to fund referral fees. The Working Group therefore now recommends prohibiting up-front referral fees with respect to all matters. Up-front referral fees, i.e., payment of referral fees prior to receipt of the fee by the licensee actually doing the work for the client, should be prohibited in all areas.

57. The attached proposed changes to the Rules of Professional Conduct and Paralegal Rules of Conduct, attached at **Tabs 4.2.1** and **4.2.4,** reflect this recommendation.

Direct and Indirect Breaches of the Rules

58. Proposed Rule 3.6-7.1 in the Rules of Professional Conduct and Rule 5.01(20) in the Paralegal Rules of Conduct would, if approved by Convocation, provide that lawyers or paralegals may not indirectly contravene the prohibitions in Rules 3.6-5 to 3.6-7 in the Lawyers' Rules and Rules 5.01(11), (14) and (15) in the Paralegal Rules. Proposed Commentary to Rule 3.6-7.1 and in the Paralegal Guidelines at paragraphs 15-17 of Guideline 13 provide examples of breaches of the Rules.

59. Intentional breaches of these Rules may lead to significant penalties, including lengthy suspension or revocation if dishonesty, fraudulent conduct or ungovernability is found.

Prohibiting Paid Referrals When a Referrer Has a Conflict of Interest

60. The current lawyer and paralegal rules prohibit payment of referrals when the referrer has a conflict of interest. The Working Group recommends maintaining this prohibition.

Prohibiting Paid Referrals from Licensees with Suspended Licences Who Would Not Be Permitted to Act on the Matter

61. The Working Group also recommends prohibiting the payment of referral fees to licensees whose licences were suspended when the referral was made and who would not have been permitted to act on the matter. A licensee is not able to practice law or provide legal services while their licence is suspended. Licensees should not be permitted to profit from referrals made while subject to a suspension which prevents them from acting on matters. This is especially the case when the suspension arises as

[16] Second Report at paragraph 55d.

a penalty for licensee misconduct, as permitting the licensee to provide referrals and earn payments from referrals would be contrary to efforts at specific and general deterrence.

(d) TRANSITION PERIOD

62. The recommended changes to the Law Society's approach to referral fees raises questions about when the new rules will come into force, and how this might impact existing referral arrangements.

63. The Working Group recommends that the required Referral Agreement, the referral fee cap and the new prohibitions should not apply to enforceable referral agreements entered into prior to the effective date of the new rules. Licensees who are party to such agreements would still be subject to their general professional responsibilities to the client and the fees charged to the client would need to be reasonable. Referral agreements entered into after April 27, 2017 would be subject to the new requirements.

64. Proposed rules to govern transition periods have been incorporated into the proposed amendments.

NEXT STEPS

65. The Working Group's consideration of remaining referral fees issues, advertising and fee issues in real estate, current practices related to contingency fee arrangements and the operation of the *Solicitors Act* is ongoing. The Working Group will report to and through the Professional Regulation Committee and the Paralegal Standing Committee once it has considered these issues further.

TAB 4.2.1

CAP AND FURTHER REGULATE REFERRAL FEES PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT

Division of Fees ~~and Referral Fees~~

3.6-5 With the client's consent, fees for a matter may be divided between lawyers or lawyers and paralegals ~~licensees~~ who are not in the same firm, if the fees are divided in proportion to the work done and the responsibilities assumed.

Referral Fees ~~Between Licensees~~

~~**Referral Agreement**~~

3.6-6.0 In this rule and rule 3.6-6.1,

"referral" includes recommending another lawyer or paralegal to do legal work for anyone except where the work is done through the same law firm in which the referring lawyer primarily practices

"referral agreement" means a signed written agreement between the referring lawyer or paralegal, the lawyer or paralegal who receives the referral and the client, in the form provided by the Law Society from time to time, which includes:

(a) confirmation that the client has been advised and understands that the client has no obligation to accept the referral;
(b) confirmation that the client has been provided with information about the Law Society's requirements for payment and receipt of referral fees and a reasonable opportunity to review and consider that information;
(c) confirmation that the referring lawyer or paralegal has recommended at least two lawyers or paralegals to the client and, if not, disclosure of the reason that it has not been reasonably possible to do so;
(d) a provision that the client is free to retain a lawyer or paralegal other than the one who receives the referral;
(e) the reason(s) that the referring lawyer or paralegal has recommended the specific referee to the client;
(f) full and fair disclosure of the relationship between the referring lawyer or paralegal and the lawyer or paralegal who receives the referral;
(g) confirmation that no referral fee will be paid or payable unless and until the lawyer or paralegal who receives the referral is paid his or her fee for legal services for the matter; and
(h) full and fair disclosure of the referral fee including the circumstances in which the referral fee is payable and the basis upon which the amount of the referral fee is determined.

~~(h)~~ "referral fee" includes any financial or other reward for the referral of a matter whether the referral fee is direct or indirect and whether the referral fee is past, current or future. However, a referral fee does not include a referral of other work by the licensee who received the referral.

~~**Referral Fees Between Licensees**~~

3.6-6.1 (1) A lawyer may accept and a lawyer may pay a fee for the referral of a matter provided that:

(a) the referral fee is fair and reasonable and does not increase the total amount of the fee payable by the client;

(b) a referral agreement has been entered into at the time of the referral or as soon as practicable after the referral;

(c) the lawyer or paralegal who receives the referral has the expertise and ability to handle the matter;

(d) the referral was not made because the referring lawyer or paralegal:

(i) has a conflict of interest;

(ii) was a lawyer or paralegal whose license was suspended when the referral was made and who was accordingly not permitted to act on the matter.

(e) the amount of the referral fee shall not exceed fifteen percent (15%) of the fees paid to the lawyer or paralegal who received the referral for the first fifty thousand dollars ($50,000) of such fees for the matter and five percent (5%) of any additional fees for the matter to a maximum referral fee of $25,000;~~.~~ and

(2) The lawyer who received the referral for which a referral fee is payable shall note the referral fee on the account sent to the client at the time the referral fee is paid or payable and obtain the client's acknowledgement of the referral fee failing which acknowledgement the lawyer must confirm in writing to the client that the client has been asked to so acknowledge but has declined to do so.

Transitional Requirements

(3~~2~~)(a) The provisions of subrule 3.6-6.1(1) do not apply to the payment of a referral fee pursuant to an enforceable agreement to pay and receive referral fees that was entered into before or on April 27, 2017.

In these circumstances, a lawyer who refers a matter to another lawyer or paralegal because of the expertise and ability of the other licensee to handle the matter and where the referral was not made because of a conflict of interest, the referring lawyer may accept and a lawyer who receives a referral may pay a referral fee provided that

(i) the fee is reasonable and does not increase the total amount of the fee charged to the client, and

(ii) the client is informed and consents.

(b) A lawyer who is entitled to receive referral fees pursuant to an unwritten agreement that was entered into before or on April 27, 2017 shall confirm in writing the terms of that agreement as soon as practicable to the other party to that agreement and shall provide a copy of such confirmation to the client.

(c) Where a referral was made before or on April 27, 2017 but there was no enforceable agreement for the payment of a referral fee as of that date, the requirement that the agreement has been entered into may be met by entering into a referral agreement at any time prior to payment of the referral fee.

Commentary

[1] A lawyer who refers clients to other lawyers or paralegals, and a lawyer who receives referrals from other lawyers or paralegals each have fiduciary duties to the referred clients. Referral of a client must be in the client's best interests.

[2] The decision about who to retain is that of the client. The requirements in this rule are intended to ensure that the client has all of the relevant information to make this decision, including information about fees.

[3] In the normal course, a lawyer who is referring a client should recommend more than one lawyer or paralegal to the client. There may be circumstances however in which there is only one suitable referral, for reasons such as expertise or geographic location, and this must be noted in the referral agreement.

~~[4] The referral fee should be noted on the account sent to the client at the time the referral fee is paid. The lawyer who received the referral should obtain the client's acknowledgement of the payment of the referral fee. If the client declines to so acknowledge, the lawyer should confirm in writing to the client that the client has been asked to so acknowledge but has declined to do so.~~

~~3.6-6 A lawyer who refers a matter to another licensee because of the expertise and ability of the other licensee to handle the matter and the referral was not made because of a conflict of interest, the referring lawyer may accept and the other licensee may pay a referral fee provided that~~

~~(a) the fee is reasonable and does not increase the total amount of the fee charged to the client, and~~

~~(b) the client is informed and consents.~~

Division of Fees and Referrals from Non-Lawyers/Paralegals~~Licensees~~

3.6-7 A ~~licensee~~ lawyer shall not

(a) directly or indirectly share, split, or divide their fees with any person who is not a lawyer or paralegal ~~licensee~~, or

(b) give any financial or other reward to any person who is not a lawyer or paralegal ~~licensee~~ for the referral of clients or client matters.

[*Amended - April 2008, October 2014*]

Commentary

[1] This rule prohibits licensees from entering into arrangements to compensate or reward non- licensees for the referral of clients. However, this rule does not prohibit a licensee from:

(a) making an arrangement respecting the purchase and sale of a law practice when the consideration payable includes a percentage of revenues generated from the practice sold;

(b) entering into a lease under which a landlord directly or indirectly shares in the fees or revenues generated by the law practice;

(c) paying an employee for services, other than for referring clients, based on the revenue of the licensee's firm or practice.

(d) [FLSC - not in use]

[*New - May 2001, Amended - October 2014*]

3.6-7.1 A lawyer shall not do indirectly what the lawyer is prohibited from doing directly under Rules 3.6-5 to 3.6-7.

Commentary

[1] This rule is intended to ensure that lawyers do not avoid or evade Rules 3.6-5 to 3.6-7. .

[2] Where a lawyer does anything that has the effect of obtaining or giving financial or other reward for the referral of legal work, this rule is breached unless the lawyer may reasonably be considered to have done so primarily for bona fide purposes other than for obtaining or giving such a reward.

[3] Examples of breaches of this rule could include entering into transactions at non-market prices between the licensee who makes a referral and the licensee who receives the referral. Specific examples could include non-market leases or cost-sharing arrangements. Similarly, this rule could be breached where a licensee enters into a counsel, consulting or other relationship with a licensee who has received a referral for consideration that does not fairly reflect the work done as such.

Exception for Multi-discipline Practices and Interprovincial and International Law Firms

3.6-8 Rule 3.6-7 does not apply to

(a) multi-discipline practices of licensee and non-licensee partners where the partnership agreement provides for the sharing of fees, cash flows or profits among members of the firm; and

(b) sharing of fees, cash flows or profits by licensees who are

(i) members of an interprovincial law firm, or

(ii) members of a law partnership of Ontario and non-Canadian licensees who otherwise comply with the rules in Section 3.6.

[*Amended - June 2009*]

Commentary

[1] An affiliation is different from a multi-discipline practice established in accordance with the by-laws under the *Law Society Act*, an interprovincial law partnership or a partnership between Ontario licensees and foreign licensees. An affiliation is subject to rule 3.6-7. In particular, an affiliated entity is not permitted to share in the licensee's revenues, cash flows or profits, either directly or indirectly through excessive inter-firm charges, for example, by charging inter-firm expenses above their fair market value.

[*New - May 2001*]

TAB 4.2.2

CAP AND FURTHER REGULATE REFERRAL FEES "CLEAN" VERSION SHOWING PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT

Division of Fees

3.6-5 With the client's consent, fees for a matter may be divided between lawyers or lawyers and paralegals who are not in the same firm, if the fees are divided in proportion to the work done and the responsibilities assumed.

Referral Fees

3.6-6.0 In this rule and rule 3.6-6.1,

> "referral" includes recommending another lawyer or paralegal to do legal work for anyone except where the work is done through the same law firm in which the referring lawyer primarily practices
>
> "referral agreement" means a signed written agreement between the referring lawyer or paralegal, the lawyer or paralegal who receives the referral and the client, in the form provided by the Law Society from time to time, which includes:
>
> (a) confirmation that the client has been advised and understands that the client has no obligation to accept the referral;
> (b) confirmation that the client has been provided with information about the Law Society's requirements for payment and receipt of referral fees and a reasonable opportunity to review and consider that information;
> (c) confirmation that the referring lawyer or paralegal has recommended at least two lawyers or paralegals to the client and, if not, disclosure of the reason that it has not been reasonably possible to do so;
> (d) a provision that the client is free to retain a lawyer or paralegal other than the one who receives the referral;
> (e) the reason(s) that the referring lawyer or paralegal has recommended the specific referee to the client;
> (f) full and fair disclosure of the relationship between the referring lawyer or paralegal and the lawyer or paralegal who receives the referral;
> (g) confirmation that no referral fee will be paid or payable unless and until the lawyer or paralegal who receives the referral is paid his or her fee for legal services for the matter; and
> (h) full and fair disclosure of the referral fee including the circumstances in which the referral fee is payable and the basis upon which the amount of the referral fee is determined.

"referral fee" includes any financial or other reward for the referral of a matter whether the referral fee is direct or indirect and whether the referral fee is past, current or future. However, a referral fee does not include a referral of other work by the licensee who received the referral.

3.6-6.1 (1) A lawyer may accept and a lawyer may pay a fee for the referral of a matter provided that:

(a) the referral fee is fair and reasonable and does not increase the total amount of the fee payable by the client;

(b) a referral agreement has been entered into at the time of the referral or as soon as practicable after the referral;

(c) the lawyer or paralegal who receives the referral has the expertise and ability to handle the matter;

(d) the referral was not made because the referring lawyer or paralegal:

(i) has a conflict of interest;

(ii) was a lawyer or paralegal whose license was suspended when the referral was made and who was accordingly not permitted to act on the matter.

(e) the amount of the referral fee shall not exceed fifteen percent (15%) of the fees paid to the lawyer or paralegal who received the referral for the first fifty thousand dollars ($50,000) of such fees for the matter and five percent (5%) of any additional fees for the matter to a maximum referral fee of $25,000; and

(2) The lawyer who received the referral for which a referral fee is payable shall note the referral fee on the account sent to the client at the time the referral fee is paid or payable and obtain the client's acknowledgement of the referral fee failing which acknowledgement the lawyer must confirm in writing to the client that the client has been asked to so acknowledge but has declined to do so.

Transitional Requirements

(3)(a) The provisions of subrule 3.6-6.1(1) do not apply to the payment of a referral fee pursuant to an enforceable agreement to pay and receive referral fees that was entered into before or on April 27, 2017.

In these circumstances, a lawyer who refers a matter to another lawyer or paralegal because of the expertise and ability of the other licensee to handle the matter and

where the referral was not made because of a conflict of interest, the referring lawyer may accept and a lawyer who receives a referral may pay a referral fee provided that

(i) the fee is reasonable and does not increase the total amount of the fee charged to the client, and

(ii) the client is informed and consents.

(b) A lawyer who is entitled to receive referral fees pursuant to an unwritten agreement that was entered into before or on April 27, 2017 shall confirm in writing the terms of that agreement as soon as practicable to the other party to that agreement and shall provide a copy of such confirmation to the client.

(c) Where a referral was made before or on April 27, 2017 but there was no enforceable agreement for the payment of a referral fee as of that date, the requirement that the agreement has been entered into may be met by entering into a referral agreement at any time prior to payment of the referral fee.

Commentary

[1] A lawyer who refers clients to other lawyers or paralegals, and a lawyer who receives referrals from other lawyers or paralegals each have fiduciary duties to the referred clients. Referral of a client must be in the client's best interests.

[2] The decision about who to retain is that of the client. The requirements in this rule are intended to ensure that the client has all of the relevant information to make this decision, including information about fees.

[3] In the normal course, a lawyer who is referring a client should recommend more than one lawyer or paralegal to the client. There may be circumstances however in which there is only one suitable referral, for reasons such as expertise or geographic location, and this must be noted in the referral agreement.

Division of Fees and Referrals from Non-Lawyers/NonParalegals

3.6-7 A lawyer shall not

(a) directly or indirectly share, split, or divide their fees with any person who is not a lawyer or paralegal, or

(b) give any financial or other reward to any person who is not a lawyer or paralegal for the referral of clients or client matters.

[*Amended - April 2008, October 2014*]

Commentary

[1] This rule prohibits licensees from entering into arrangements to compensate or reward non- licensees for the referral of clients. However, this rule does not prohibit a licensee from:

(a) making an arrangement respecting the purchase and sale of a law practice when the consideration payable includes a percentage of revenues generated from the practice sold;

(b) entering into a lease under which a landlord directly or indirectly shares in the fees or revenues generated by the law practice;

(c) paying an employee for services, other than for referring clients, based on the revenue of the licensee's firm or practice.

(d) [FLSC - not in use]

[*New - May 2001, Amended - October 2014*]

3.6-7.1 A lawyer shall not do indirectly what the lawyer is prohibited from doing directly under Rules 3.6-5 to 3.6-7.

Commentary

[1] This rule is intended to ensure that lawyers do not avoid or evade Rules 3.6-5 to 3.6-7.

[2] Where a lawyer does anything that has the effect of obtaining or giving financial or other reward for the referral of legal work, this rule is breached unless the lawyer may reasonably be considered to have done so primarily for bona fide purposes other than for obtaining or giving such a reward.

[3] Examples of breaches of this rule could include entering into transactions at non-market prices between the licensee who makes a referral and the licensee who receives the referral. Specific examples could include non-market leases or cost-sharing arrangements. Similarly, this rule could be breached where a licensee enters into a counsel, consulting or other relationship with a licensee who has received a referral for consideration that does not fairly reflect the work done as such.

Exception for Multi-discipline Practices and Interprovincial and International Law Firms

3.6-8 Rule 3.6-7 does not apply to

(a) multi-discipline practices of licensee and non-licensee partners where the partnership agreement provides for the sharing of fees, cash flows or profits among members of the firm; and

(b) sharing of fees, cash flows or profits by licensees who are

(i) members of an interprovincial law firm, or

(ii) members of a law partnership of Ontario and non-Canadian licensees who otherwise comply with the rules in Section 3.6.

[*Amended - June 2009*]

Commentary

[1] An affiliation is different from a multi-discipline practice established in accordance with the by-laws under the *Law Society Act*, an interprovincial law partnership or a partnership between Ontario licensees and foreign licensees. An affiliation is subject to rule 3.6-7. In particular, an affiliated entity is not permitted to share in the licensee's revenues, cash flows or profits, either directly or indirectly through excessive inter-firm charges, for example, by charging inter-firm expenses above their fair market value.

[*New - May 2001*]

Tab 4.2.3

REDLINE SHOWING PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT (AS DIRECTED BY CONVOCATION ON FEBRUARY 23, 2017)

Rules of Professional Conduct

Restrictions

4.1-2 In offering legal services, a lawyer shall not use means that

(a) are false or misleading;

(b) amount to coercion, duress, or harassment;

(c) take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover;

(d) are intended to influence a person who has retained another lawyer or paralegal for a particular matter to change ~~their~~ that ~~lawyer~~ representative for that matter, unless the change is initiated by the person or ~~the other~~that representative ~~lawyer~~; or

(e) otherwise bring the profession or the administration of justice into disrepute.

[*Amended - February 2017*]

Commentary

[1] A person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover may need the professional assistance of a lawyer, and this rule does not prevent a lawyer from offering their assistance to such a person. A lawyer is permitted to provide assistance to a person if a close relative or personal friend of the person contacts the lawyer for this purpose, and to offer assistance to a person with whom the lawyer has a close family or professional relationship. The rule prohibits the lawyer from using unconscionable or exploitive or other means that bring the profession or the administration of justice into disrepute.

[*Amended - October 2014*]

Tab 4.2.4

PROPOSED AMENDMENTS TO THE PARALEGAL RULES OF CONDUCT RE CAPPING AND REGULATING REFERRAL FEES

Rule 5 Fees and Retainers

5.01 FEES AND RETAINERS

Reasonable Fees and Disbursements

5.01 (1) A paralegal shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion.

(2) What is a fair and reasonable fee will depend upon such factors as,

(a) the time and effort required and spent;

(b) the difficulty of the matter and importance of the matter to the client;

(c) whether special skill or service was required and provided;

(d) the amount involved or the value of the subject matter;

(e) the results obtained;

(f) fees authorized by statute or regulation;

(g) special circumstances, such as the loss of other retainers, postponement of payment, uncertainty of reward, or urgency;

(h) the likelihood, if made known to the client, that acceptance of the retainer will result in the paralegal's inability to accept other employment;

(i) any relevant agreement between the paralegal and the client;

(j) the experience and ability of the paralegal;

(k) any estimate or range of fees given by the paralegal; and

(l) the client's prior consent to the fee.

(3) No fee, reward, costs, commission, interest, rebate, agency or forwarding allowance, or other compensation related to his or her employment may be taken by the paralegal from anyone other than the client, without full disclosure to, and the consent of, the client.

(4) In a statement of account delivered to the client, a paralegal shall clearly and separately detail amounts charged as fees and as disbursements.

(5) A paralegal shall not appropriate any funds of the client held in trust, or otherwise under the paralegal's control, for or on account of fees, except as permitted by the by-laws under the *Law Society Act*.

(6) If the amount of fees or disbursements charged by a paralegal is reduced by a Court Order, the paralegal must repay the monies to the client as soon as is practicable.

Contingency Fees

(7) Except in quasi-criminal or criminal matters, a paralegal may enter into a written agreement that provides that the paralegal's fee is contingent, in whole or in part, on the successful disposition or completion of the matter for which the paralegal's services are to be provided.

(8) In determining the appropriate percentage or other basis of a contingency fee under subrule (7), the paralegal shall advise the client on the factors that are being taken into account in determining the percentage or other basis, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery, who is to receive an award of costs and the amount of costs awarded.

(9) The percentage or other basis of a contingency fee agreed upon under subrule (7) shall be fair and reasonable, taking into consideration all of the circumstances and the factors listed in subrule (8).

Joint Retainers

(10) If a paralegal is acting for two or more clients in the same matter, the paralegal shall divide the fees and disbursements equitably between them, unless there is an agreement by the clients otherwise.

Division of Fees

(11) With the client's consent, f~~F~~ees for a matter may be divided between paralegals or paralegals and lawyers ~~licensees~~ who are not in the same firm, if ~~the client consents and~~ the fees are divided in proportion to the work done and the responsibilities assumed.

[*Amended - October 2014*]

Fee Splitting

(12) A paralegal shall not,

(a) directly or indirectly share, split, or divide his or her fees with any person who is not a paralegal or a lawyer ~~licensee~~, including an affiliated entity; or

(b) give any financial or other reward to any person who is not a paralegal or a lawyer ~~licensee~~, including an affiliated entity, for the referral of clients or client matters.

(13) Subrule (11) does not apply to multi-discipline practices of paralegal and non-licensee partners where the partnership agreement provides for the sharing of fees, cash flows or profits among members of the firm.

[*Amended - October 2014*]

Referral Fees

(14) In this rule and rule 5.01(15),

"referral" includes recommending another paralegal or lawyer to do legal work for anyone except where the work is done through the same paralegal firm in which the referring paralegal primarily practices;

"referral agreement" means a signed written agreement between the referring paralegal or lawyer, the paralegal or lawyer who receives the referral and the client, in the form provided by the Law Society from time to time, which includes:

(a) confirmation that the client has been advised and understands that the client has no obligation to accept the referral;
(b) confirmation that the client has been provided with information about the Law Society's requirements for payment and receipt of referral fees and a reasonable opportunity to review and consider that information;
(c) confirmation that the referring paralegal or lawyer ~~or paralegal~~ has recommended at least two paralegals or lawyers to the client~~,~~ and, if not, disclosure of the reason that it has not been reasonably possible to do so;~~,~~
(d) a provision that the client is free to retain a paralegal or lawyer other than the one who receives the referral;
(e) the reason(s) that the referring paralegal or lawyer has recommended the specific referee to the client;
(f) full and fair disclosure of the relationship between the referring paralegal or lawyer and the paralegal or lawyer who receives the referral;
(g) confirmation that no referral fee will be paid or payable unless and until the paralegal or lawyer who receives the referral i~~ha~~s paid his or her fee for legal services ~~rendered~~ for the matter; and
(h) full and fair disclosure of the referral fee including the circumstances in which the referral fee is payable and the basis upon which the amount of the referral fee is determined.

"referral fee" includes any financial or other reward for the referral of a matter whether the referral fee is direct or indirect and whether the referral fee is past, current, or future. However, a referral fee does not include a referral of other work by the licensee who received the referral.

5.01(15) A paralegal may accept and a paralegal may pay a fee for the referral of a matter provided that:

(a) the referral fee is fair and reasonable and does not increase the total amount of the fee payable by the client;

(b) a referral agreement has been entered into at the time of the referral or as soon as practicable after the referral;

(c) the paralegal or lawyer who receives the referral has the expertise and ability to handle the matter;

(d) the referral was not made because the referring paralegal or lawyer:

(i) has a conflict of interest;

(ii) was a lawyer or paralegal or lawyer whose license was suspended when the referral was made and who was accordingly not permitted to act on the matter.;

(e) the amount of the referral fee shall not exceed fifteen percent (15%) of the fees paid to the paralegal or lawyer who received the referral for the first fifty thousand dollars ($50,000) of such fees for the matter and five percent (5%) of any additional fees for the matter to a maximum referral fee of $25,000; and.

(16) The paralegal who received the referral for which a referral fee is payable shall note the referral fee on the account sent to the client at the time the referral fee is paid or payable and obtain the client's acknowledgement of the referral fee failing which acknowledgement the paralegal shall confirm in writing to the client that the client has been asked to so acknowledge but has declined to do so.

Transitional Requirements

5.01(17) The provisions of subrule 5.01(15) do not apply to the payment of a referral fee pursuant to an enforceable agreement to pay and receive referral fees that was entered into before or on April 27, 2017.

(18) In these circumstances, a paralegal who refers another matter to another paralegal or lawyer because of the expertise and ability of the other licensee to handle the matter and where the referral was not made because of a conflict of interest, the referring paralegal may accept and the a paralegal who receives a referral fee may pay a referral fee provided that

(i) the fee is reasonable and does not increase the total amount of the fee charged to the client; and

(ii) the client is informed and consents.;

(189) A paralegal who is entitled to receive a referral fees pursuant to an unwritten agreement that was entered into before or on April 27, 2017 shall confirm in writing the terms of thate agreement as soon as practicable to the other party to thate agreement and shall provide a copy of such confirmation to the client.

(1920) Where a referral was made before or on April 27, 2017 but there was no enforceable agreement for the payment of a referral fee as of that date, the requirement that the agreement has been entered into may be met by entering into a referral agreement at any time prior to payment of the referral fee.

Referral Fees

(14) A paralegal who refers a matter to another licensee because of the expertise and ability of the other licensee to handle the matter may accept, and the other licensee may pay, a referral fee if,

(a) the referral was not made because of a conflict of interest;

(b) the fee is reasonable and does not increase the total amount of the fee charged to the client; and

(c) the client is informed and consents.

[*Amended - October 2014*]

(20) A paralegal shall not do indirectly what the paralegal is prohibited from doing directly under Rules 5.01(11), (14) and (15).

Tab 4.2.5

"CLEAN" VERSION SHOWING PROPOSED AMENDMENTS TO THE PARALEGAL RULES OF CONDUCT RE CAPPING AND REGULATING REFERRAL FEES

Rule 5 Fees and Retainers

5.01 FEES AND RETAINERS

Reasonable Fees and Disbursements

5.01 (1) A paralegal shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion.

(2) What is a fair and reasonable fee will depend upon such factors as,

(a) the time and effort required and spent;

(b) the difficulty of the matter and importance of the matter to the client;

(c) whether special skill or service was required and provided;

(d) the amount involved or the value of the subject matter;

(e) the results obtained;

(f) fees authorized by statute or regulation;

(g) special circumstances, such as the loss of other retainers, postponement of payment, uncertainty of reward, or urgency;

(h) the likelihood, if made known to the client, that acceptance of the retainer will result in the paralegal's inability to accept other employment;

(i) any relevant agreement between the paralegal and the client;

(j) the experience and ability of the paralegal;

(k) any estimate or range of fees given by the paralegal; and

(l) the client's prior consent to the fee.

(3) No fee, reward, costs, commission, interest, rebate, agency or forwarding allowance, or other compensation related to his or her employment may be taken by the paralegal from anyone other than the client, without full disclosure to, and the consent of, the client.

(4) In a statement of account delivered to the client, a paralegal shall clearly and separately detail amounts charged as fees and as disbursements.

(5) A paralegal shall not appropriate any funds of the client held in trust, or otherwise under the paralegal's control, for or on account of fees, except as permitted by the by-laws under the *Law Society Act*.

(6) If the amount of fees or disbursements charged by a paralegal is reduced by a Court Order, the paralegal must repay the monies to the client as soon as is practicable.

Contingency Fees

(7) Except in quasi-criminal or criminal matters, a paralegal may enter into a written agreement that provides that the paralegal's fee is contingent, in whole or in part, on the successful disposition or completion of the matter for which the paralegal's services are to be provided.

(8) In determining the appropriate percentage or other basis of a contingency fee under subrule (7), the paralegal shall advise the client on the factors that are being taken into account in determining the percentage or other basis, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery, who is to receive an award of costs and the amount of costs awarded.

(9) The percentage or other basis of a contingency fee agreed upon under subrule (7) shall be fair and reasonable, taking into consideration all of the circumstances and the factors listed in subrule (8).

Joint Retainers

(10) If a paralegal is acting for two or more clients in the same matter, the paralegal shall divide the fees and disbursements equitably between them, unless there is an agreement by the clients otherwise.

Division of Fees

(11) With the client's consent, fees for a matter may be divided between paralegals or paralegals and lawyers who are not in the same firm, if the fees are divided in proportion to the work done and the responsibilities assumed.

[*Amended - October 2014*]

Fee Splitting

(12) A paralegal shall not,

(a) directly or indirectly share, split, or divide his or her fees with any person who is not a paralegal or a lawyer ~~licensee~~, including an affiliated entity; or

(b) give any financial or other reward to any person who is not a paralegal or a lawyer ~~licensee~~, including an affiliated entity, for the referral of clients or client matters.

(13) Subrule (11) does not apply to multi-discipline practices of paralegal and non-licensee partners where the partnership agreement provides for the sharing of fees, cash flows or profits among members of the firm.

[*Amended - October 2014*]

Referral Fees

(14) In this rule and rule 5.01(15),

"referral" includes recommending another paralegal or lawyer to do legal work for anyone except where the work is done through the same paralegal firm in which the referring paralegal primarily practices;

"referral agreement" means a signed written agreement between the referring paralegal or lawyer, the paralegal or lawyer who receives the referral and the client, in the form provided by the Law Society from time to time, which includes:

(a) confirmation that the client has been advised and understands that the client has no obligation to accept the referral;
(b) confirmation that the client has been provided with information about the Law Society's requirements for payment and receipt of referral fees and a reasonable opportunity to review and consider that information;
(c) confirmation that the referring paralegal or lawyer has recommended at least two paralegals or lawyers to the client and, if not, disclosure of the reason that it has not been reasonably possible to do so;
(d) a provision that the client is free to retain a paralegal or lawyer other than the one who receives the referral;
(e) the reason(s) that the referring paralegal or lawyer has recommended the specific referee to the client;
(f) full and fair disclosure of the relationship between the referring paralegal or lawyer and the paralegal or lawyer who receives the referral;
(g) confirmation that no referral fee will be paid or payable unless and until the paralegal or lawyer who receives the referral is paid his or her fee for legal services for the matter; and
(h) full and fair disclosure of the referral fee including the circumstances in which the referral fee is payable and the basis upon which the amount of the referral fee is determined.

“referral fee” includes any financial or other reward for the referral of a matter whether the referral fee is direct or indirect and whether the referral fee is past, current or future. However, a referral fee does not include a referral of other work by the licensee who received the referral.

5.01(15) A paralegal may accept and a paralegal may pay a fee for the referral of a matter provided that:

(a) the referral fee is fair and reasonable and does not increase the total amount of the fee payable by the client;

(b) a referral agreement has been entered into at the time of the referral or as soon as practicable after the referral;

(c) the paralegal or lawyer who receives the referral has the expertise and ability to handle the matter;

(d) the referral was not made because the referring paralegal or lawyer:

(i) has a conflict of interest;

(ii) was a paralegal or lawyer whose license was suspended when the referral was made and who was accordingly not permitted to act on the matter.

(e) the amount of the referral fee shall not exceed fifteen percent (15%) of the fees paid to the paralegal or lawyer who received the referral for the first fifty thousand dollars ($50,000) of such fees for the matter and five percent (5%) of any additional fees for the matter to a maximum referral fee of $25,000; and

(16) The paralegal who received the referral for which a referral fee is payable shall note the referral fee on the account sent to the client at the time the referral fee is paid or payable and obtain the client’s acknowledgement of the referral fee failing which acknowledgement the paralegal shall confirm in writing to the client that the client has been asked to so acknowledge but has declined to do so.

Transitional Requirements

5.01(17) The provisions of subrule 5.01(15) do not apply to the payment of a referral fee pursuant to an enforceable agreement to pay and receive referral fees that was entered into before or on April 27, 2017.

In these circumstances, a paralegal who refers a matter to another paralegal or lawyer because of the expertise and ability of the other licensee to handle the matter and where the referral was not made because of a conflict of interest, the referring paralegal may accept and a paralegal who receives a referral may pay a referral fee provided that

(i) the fee is reasonable and does not increase the total amount of the fee charged to the client; and

(ii) the client is informed and consents.

(18) A paralegal who is entitled to receive referral fees pursuant to an unwritten agreement that was entered into before or on April 27, 2017 shall confirm in writing the terms of that agreement as soon as practicable to the other party to that agreement and shall provide a copy of such confirmation to the client.

(19) Where a referral was made before or on April 27, 2017 but there was no enforceable agreement for the payment of a referral fee as of that date, the requirement that the agreement has been entered into may be met by entering into a referral agreement at any time prior to payment of the referral fee.

(20) A paralegal shall not do indirectly what the paralegal is prohibited from doing directly under Rules 5.01(11), (14) and (15).

Tab 4.2.6

REDLINE SHOWING PROPOSED AMENDMENT TO THE PARALEGAL GUIDELINES (PLEASE SEE HEADING "FEE SPLITTING AND REFERRAL FEES")

GUIDELINE 13: FEES

Introduction

Rule Reference: Rule 5.01 (1)

1. Too often, misunderstandings about fees and disbursements result in disputes over legal bills and complaints from unhappy clients. Since these disputes reflect badly on the paralegal profession and the administration of justice, it is important that a paralegal discuss with his or her client(s) the amount of fees and disbursements that will likely be charged. It will be to the benefit of all concerned if the paralegal ensures that the client has a clear understanding not only of what legal services the paralegal will provide, but how much those services are likely to cost.

Fees and Disbursements

2. Generally, a ***fee*** refers to the paralegal's wage. Clients pay fees for the legal services provided by the paralegal. Fees may be billed in a variety of ways, including:
    - An *hourly rate*, charging for the actual time spent on the client matter,
    - A *block, fixed or flat fee*, charging a fixed amount for performing a particular task,
    - *Fees by stages*, charging for a matter which is broken down into stages, and an estimate is given as to the fee for each stage or step in the matter, or
    - *Contingency fees*, where part or all of the paralegal's fee depends on the successful completion of the matter, and the amount may be expressed as a percentage of the client's recovery in the matter.
3. The paralegal should consider which method best suits the circumstances and the client.
4. A ***disbursement*** refers to any expense that the paralegal pays on behalf of the client for which the paralegal is entitled to be reimbursed by the client. Common disbursements include charges for
    - research, such as Quicklaw charges or research conducted by third party professionals,
    - mileage,
    - postage, photocopying, faxing documents or sending documents by courier,
    - long-distance phone calls,

- expert reports,
- transcripts or certified documents, and/or
- tribunal or court filing fees related to the client matter.

5. A paralegal cannot charge more than the actual cost of the disbursement. A paralegal cannot make a profit from disbursements at the client's expense.

Discussing Fees and Disbursements

Rule Reference: Rule 5.01(1)

6. The following are steps that will assist a paralegal in meeting his or her obligations under Rule 5.01(1).

(a) A paralegal should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements, and interest as is reasonable and practical in the circumstances, including the basis on which fees will be determined;

(b) A paralegal should confirm with the client in writing the substance of all fee discussions that occur as a matter progresses. The paralegal may revise the initial estimate of fees and disbursements.

(c) A paralegal should openly disclose and discuss with clients all items that will be charged as disbursements and how those amounts will be calculated. If an administrative charge forms part of the amount charged as a disbursement, disclosure of such charge should be made to the client(s) in advance.

7. In discussing fees and disbursements with clients, it is appropriate for a paralegal to
   - provide a reasonable estimate of the total cost as opposed to an unreasonable estimate designed to garner the client's business, and
   - not manipulate fees and disbursements in a manner as to provide a lower fee estimate.
8. When something happens in the matter that the paralegal or client did not expect, resulting in costs that are higher than the paralegal's original estimate, the paralegal should immediately give the client a revised estimate of cost, and an explanation of why the original estimate has changed. The client can then instruct the paralegal based on the new information. The new understanding should be confirmed in writing.

Hidden Fees

Rule Reference: Rule 5.01(3)

9. The relationship between paralegal and client is based on trust. The client must be able to rely on the paralegal's honesty and ability to act in the client's best

interests. This means that the paralegal cannot hide from the client any financial dealings in his or her matter.

Payment and Appropriation of Funds

Rule Reference: Rule 5.01(5)

Rule 2.01(1)

10. The *Rules* are not intended to be an exhaustive statement of the considerations that apply to payment of a paralegal's account from trust. The handling of trust money is generally governed by the by-laws of the Law Society.
11. Refusing to reimburse any portion of advance fees for work that has not been carried out when the contract of professional services with the client has terminated is a breach of the obligation to act with integrity.

Fee Splitting and Referral Fees

Rule Reference: Rule 5.01(11), (12) & (13)

By-Law 7 (Multi-discipline Practices)

12. ***Fee splitting*** occurs when a paralegal shares or divides his or her fee with another person. Where a client consents, a paralegal and another paralegal or lawyer who are not at the same firm may divide between them the fees for a matter, so long as the fees are split relative to the work done and the responsibility assumed by each paralegal and/or lawyer. Multi-discipline practices are exempt from the prohibition against fee-splitting in certain circumstances.
13. A ***referral fee*** is defined in Rule 5.01(14) of the Paralegal Rules of Conduct and includes
    - a fee paid by a paralegal to another paralegal or lawyer for referring a client to the paralegal, or
    - a fee paid to the paralegal by another paralegal or lawyer for his or her referral of a ~~person~~ client to the ~~an~~other paralegal or lawyer.
14. The *Rules* do not prohibit a paralegal from:

(a) Making an arrangement respecting the purchase and sale of a professional business when the consideration payable includes a percentage of revenues generated from the business sold;

(b) Entering into a lease under which a landlord directly or indirectly shares in the fees or revenues generated by the provision of legal services;

(c) Paying an employee for services, other than for referring clients, based on the revenue of the paralegal's firm or professional business.

15. ~~15.~~ Rule 5.01(20) is intended to ensure that paralegals do not avoid or evade Rules 5.01(11), (14), and (15).

~~16.~~ Where a paralegal does anything that has the effect of obtaining or giving financial or other reward for the referral of legal work, Rule 5.01(20) is breached unless the paralegal may reasonably be considered to have done so primarily for *bona fide* purposes other than for obtaining or giving such a reward.

16. ~~(17)~~ Examples of breaches of ~~this rule~~Rule 5.01(20) could include entering into transactions at non-market prices between the paralegal or lawyer who makes ~~the~~a referral and the paralegal or lawyer who receives the referral. Specific examples could include non-market leases or cost-sharing arrangements. Similarly, Rule 5.01(20) could be breached where a paralegal or lawyer enters into a consulting or other relationship with a paralegal or lawyer who has received a referral for consideration that does not fairly reflect the work done as such.

17.

18. ~~185.~~ A paralegal who refers clients to other paralegals or lawyers, and a paralegal who receives referrals from other paralegals or lawyers each hav~~es~~ fiduciary duties to the referred clients. Referral of ~~the~~ a client ~~should~~ must be in the client's best interests.

19. ~~197.~~ The decision about who to retain is that of the client. The requirements in Rules 5.01(15) to (19) of the Paralegal Rules of Conduct are intended to ensure that the client has all of the relevant information to make this decision, including information about fees.

20. ~~[2018]~~ In the normal course, a paralegal who is referring a client should recommend~~ed~~ more than one paralegal or lawyer to the client. There may be circumstances however in which there is only one suitable referral, for reasons such as expertise or geographic location, and this ~~should~~ must be noted in the referral agreement.

The Statement of Account

Rule Reference: Rule 5.01(4)

~~1.~~ In addition to detailing fees and disbursements, the ***statement of account*** or bill delivered to the client by the paralegal should detail clearly and separately the amount the paralegal has charged for Harmonized Sales Tax (HST). The HST applies to fees and some disbursements, as outlined by the Canada Revenue Agency (CRA) guidelines. The paralegal should review and sign the statement of account before it is sent to the client.

21.

~~2.~~22. Should a dispute arise about the statement of account, the paralegal should discuss the matter openly and calmly with the client in an effort to resolve

the matter. Civility and professionalism must govern all discussions, including discussions relating to fee disputes with clients.

Contingency Fees

Rule Reference: Rule 5.01(6) – (8)

23. A ***contingency fee*** is a fee that is paid when and if a particular result is achieved in a client's matter.
24. Rule 5.01(7) outlines the factors to be considered in determining the appropriate percentage (or other basis) of the contingency fee agreement. Regardless of which factors are used to determine the fee and the other terms of the contingency fee agreement, the ultimate fee must still be fair and reasonable.
25. The contingency fee agreement should be clear about how the fee will be calculated.
26. It may be helpful for a paralegal to refer to *Regulation 195/04* to the *Solicitor's Act* (which applies to contingency fees for lawyers) for guidance as to what terms should be included in a paralegal contingency fee agreement.

Tab 4.2.7

"CLEAN" VERSION SHOWING PROPOSED AMENDMENT TO THE PARALEGAL GUIDELINES (PLEASE SEE HEADING "FEE SPLITTING AND REFERRAL FEES")

GUIDELINE 13: FEES

Introduction

Rule Reference: Rule 5.01 (1)

1. Too often, misunderstandings about fees and disbursements result in disputes over legal bills and complaints from unhappy clients. Since these disputes reflect badly on the paralegal profession and the administration of justice, it is important that a paralegal discuss with his or her client(s) the amount of fees and disbursements that will likely be charged. It will be to the benefit of all concerned if the paralegal ensures that the client has a clear understanding not only of what legal services the paralegal will provide, but how much those services are likely to cost.

Fees and Disbursements

2. Generally, a ***fee*** refers to the paralegal's wage. Clients pay fees for the legal services provided by the paralegal. Fees may be billed in a variety of ways, including:
    - An *hourly rate*, charging for the actual time spent on the client matter,
    - A *block, fixed or flat fee*, charging a fixed amount for performing a particular task,
    - *Fees by stages*, charging for a matter which is broken down into stages, and an estimate is given as to the fee for each stage or step in the matter, or
    - *Contingency fees*, where part or all of the paralegal's fee depends on the successful completion of the matter, and the amount may be expressed as a percentage of the client's recovery in the matter.
3. The paralegal should consider which method best suits the circumstances and the client.
4. A ***disbursement*** refers to any expense that the paralegal pays on behalf of the client for which the paralegal is entitled to be reimbursed by the client. Common disbursements include charges for
    - research, such as Quicklaw charges or research conducted by third party professionals,
    - mileage,
    - postage, photocopying, faxing documents or sending documents by courier,

- long-distance phone calls,
- expert reports,
- transcripts or certified documents, and/or
- tribunal or court filing fees related to the client matter.

5. A paralegal cannot charge more than the actual cost of the disbursement. A paralegal cannot make a profit from disbursements at the client's expense.

Discussing Fees and Disbursements

Rule Reference: Rule 5.01(1)

6. The following are steps that will assist a paralegal in meeting his or her obligations under Rule 5.01(1).

(a) A paralegal should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements, and interest as is reasonable and practical in the circumstances, including the basis on which fees will be determined;

(b) A paralegal should confirm with the client in writing the substance of all fee discussions that occur as a matter progresses. The paralegal may revise the initial estimate of fees and disbursements.

(c) A paralegal should openly disclose and discuss with clients all items that will be charged as disbursements and how those amounts will be calculated. If an administrative charge forms part of the amount charged as a disbursement, disclosure of such charge should be made to the client(s) in advance.

7. In discussing fees and disbursements with clients, it is appropriate for a paralegal to
   - provide a reasonable estimate of the total cost as opposed to an unreasonable estimate designed to garner the client's business, and
   - not manipulate fees and disbursements in a manner as to provide a lower fee estimate.
8. When something happens in the matter that the paralegal or client did not expect, resulting in costs that are higher than the paralegal's original estimate, the paralegal should immediately give the client a revised estimate of cost, and an explanation of why the original estimate has changed. The client can then instruct the paralegal based on the new information. The new understanding should be confirmed in writing.

Hidden Fees

Rule Reference: Rule 5.01(3)

9. The relationship between paralegal and client is based on trust. The client must be able to rely on the paralegal's honesty and ability to act in the client's best interests. This means that the paralegal cannot hide from the client any financial dealings in his or her matter.

Payment and Appropriation of Funds

Rule Reference: Rule 5.01(5)

Rule 2.01(1)

10. The *Rules* are not intended to be an exhaustive statement of the considerations that apply to payment of a paralegal's account from trust. The handling of trust money is generally governed by the by-laws of the Law Society.
11. Refusing to reimburse any portion of advance fees for work that has not been carried out when the contract of professional services with the client has terminated is a breach of the obligation to act with integrity.

Fee Splitting and Referral Fees

Rule Reference: Rule 5.01(11), (12) & (13)

By-Law 7 (Multi-discipline Practices)

12. ***Fee splitting*** occurs when a paralegal shares or divides his or her fee with another person. Where a client consents, a paralegal and another paralegal or lawyer who are not at the same firm may divide between them the fees for a matter, so long as the fees are split relative to the work done and the responsibility assumed by each paralegal and/or lawyer. Multi-discipline practices are exempt from the prohibition against fee-splitting in certain circumstances.
13. A ***referral fee*** is defined in Rule 5.01(14) of the Paralegal Rules of Conduct and includes
    - a fee paid by a paralegal to another paralegal or lawyer for referring a client to the paralegal, or
    - a fee paid to the paralegal by another paralegal or lawyer for his or her referral of a client to the other paralegal or lawyer.
14. The *Rules* do not prohibit a paralegal from:

(a) Making an arrangement respecting the purchase and sale of a professional business when the consideration payable includes a percentage of revenues generated from the business sold;

(b) Entering into a lease under which a landlord directly or indirectly shares in the fees or revenues generated by the provision of legal services;

(c) Paying an employee for services, other than for referring clients, based on the revenue of the paralegal's firm or professional business.

15. Rule 5.01(20) is intended to ensure that paralegals do not avoid or evade Rules 5.01(11), (14), and (15).
16. Where a paralegal does anything that has the effect of obtaining or giving financial or other reward for the referral of legal work, Rule 5.01(20) is breached unless the paralegal may reasonably be considered to have done so primarily for *bona fide* purposes other than for obtaining or giving such a reward.
17. Examples of breaches of Rule 5.01(20) could include entering into transactions at non-market prices between the paralegal or lawyer who makes a referral and the paralegal or lawyer who receives the referral. Specific examples could include non-market leases or cost-sharing arrangements. Similarly, Rule 5.01(20) could be breached where a paralegal or lawyer enters into a consulting or other relationship with a paralegal or lawyer who has received a referral for consideration that does not fairly reflect the work done as such.
18. A paralegal who refers clients to other paralegals or lawyers, and a paralegal who receives referrals from other paralegals or lawyers each have fiduciary duties to the referred clients. Referral of a client must be in the client's best interests.
19. The decision about who to retain is that of the client. The requirements in Rules 5.01(15) to (19) of the Paralegal Rules of Conduct are intended to ensure that the client has all of the relevant information to make this decision, including information about fees.
20. In the normal course, a paralegal who is referring a client should recommend more than one paralegal or lawyer to the client. There may be circumstances however in which there is only one suitable referral, for reasons such as expertise or geographic location, and this must be noted in the referral agreement.

The Statement of Account

Rule Reference: Rule 5.01(4)

21. In addition to detailing fees and disbursements, the ***statement of account*** or bill delivered to the client by the paralegal should detail clearly and separately the amount the paralegal has charged for Harmonized Sales Tax (HST). The HST applies to fees and some disbursements, as outlined by the Canada Revenue Agency (CRA) guidelines. The paralegal should review and sign the statement of account before it is sent to the client.
22. Should a dispute arise about the statement of account, the paralegal should discuss the matter openly and calmly with the client in an effort to resolve the matter. Civility and professionalism must govern all discussions, including discussions relating to fee disputes with clients.

Contingency Fees

Rule Reference: Rule 5.01(6) – (8)

23. A ***contingency fee*** is a fee that is paid when and if a particular result is achieved in a client's matter.
24. Rule 5.01(7) outlines the factors to be considered in determining the appropriate percentage (or other basis) of the contingency fee agreement. Regardless of which factors are used to determine the fee and the other terms of the contingency fee agreement, the ultimate fee must still be fair and reasonable.
25. The contingency fee agreement should be clear about how the fee will be calculated.
26. It may be helpful for a paralegal to refer to *Regulation 195/04* to the *Solicitor's Act* (which applies to contingency fees for lawyers) for guidance as to what terms should be included in a paralegal contingency fee agreement.

THE LAW SOCIETY OF UPPER CANADA

BY-LAWS MADE UNDER
SUBSECTION 62 (0.1) AND (1) OF THE *LAW SOCIETY ACT*

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON APRIL 27, 2017

MOVED BY

SECONDED BY

THAT By-Law 9 [FINANCIAL TRANSACTIONS AND RECORDS], made by Convocation on May 1, 2007 and amended by Convocation on June 28, 2007, January 24, 2008, February 21, 2008, and April 28, 2011, be further amended as follows:

1. Subsection 19 (1) of the English version of the By-Law is amended by striking out "section 18" and substituting "sections 18 and 19.1".

2. Subsection 19 (1) of the French version of the By-Law is amended by striking out "de l'article 18" and substituting "des articles 18 et 19.1".

3. The English version of the By-Law is amended by adding the following section:

Record keeping requirements if referral fee paid or received

19.1 Every licensee who pays or receives a referral fee, in addition to maintaining the financial records required under section 18, shall maintain, in accordance with sections 21, 22, and 23 the following records:

1. A record showing all referral fees received and identifying the date on which each referral fee is received, the method by which each referral fee is received, the amount of each referral fee, the licensee from whom each referral fee is received and the client in connection to whom each referral fee is received.

2. A record showing all referral fees paid and identifying the date on which each referral fee is paid, the method by which each referral fee is paid, including the number or a similar identifier of any document used to pay the referral fee, the amount of each referral fee, the licensee to whom each referral fee is paid, and the client in connection to whom each referral fee is paid.

3. All documents related to each referral fee transaction, including any agreement the Society may require the licensee to enter into in relation to each referral fee transaction.

4. The French version of the By-Law is amended by adding the following section:

Obligations relatives à la tenue de registres si des frais de renvoi sont payés ou reçus.

19.1 Chaque titulaire de permis qui paie ou reçoit des frais de renvoi doit, en plus de tenir les registres financiers exigés en vertu de l'article 18, tenir les registres suivants en vertu des articles 21, 22 et 23 :

1. Un état de tous les frais de renvoi reçus et indiquant, pour chaque fois que des frais de renvoi sont reçus, la date de réception des frais de renvoi, la méthode de réception des frais de renvoi, le montant des frais de renvoi, le ou la titulaire de permis duquel ou de laquelle les frais de renvoi sont reçus et le (la) client(e) à l'égard duquel ou de laquelle les frais de renvoi sont reçus.

2. Un état de tous les frais de renvoi payés et indiquant, pour chaque fois que des frais de renvoi sont payés, la date de paiement des frais de renvoi, la méthode de paiement des frais de renvoi, y compris le numéro ou autre élément d'identification de tout document utilisé pour payer les frais de renvoi, le montant des frais de renvoi, le ou la titulaire de permis auquel ou à laquelle les frais de renvoi sont payés et le (la) client(e) à l'égard duquel ou de laquelle les frais de renvoi sont payés.

3. Tous les documents ayant trait à chaque opération de frais de renvoi, notamment toute entente que le Barreau pourrait exiger du titulaire de permis qu'il conclue concernant chaque opération de frais de renvoi.

5. Subsection 21 (1) of the English version of the By-Law is amended by adding ", 19.1" between "19" and "and 20".

6. Subsection 21 (1) of the French version of the By-Law is amended by adding ", 19.1" between "19" and "et 20".

7. Subsection 22 (1) of the English version of the By-Law is amended by adding ", 19.1" between "19" and "and 20".

8. Subsection 22 (1) of the French version of the By-Law is amended by adding ", 19.1" between "19" and "et 20".

9. The heading immediately preceding subsection 23 (1) of the English version of the By-Law is amended by striking out "and 19" and substituting ", 19 and 19.1".

10. The heading immediately preceding subsection 23 (1) of the French version of the By-Law is amended by striking out "et 19" and substituting ", 19 et 19.1".

11. Subsection 23 (1) of the English version of the By-Law is amended by striking out "and 19" and substituting ", 19 and 19.1".

12. Subsection 23 (1) of the French version of the By-Law is amended by striking out "et 19" and substituting ", 19 et 19.1".

BY-LAW 9

Made: May 1, 2007
Amended: June 28, 2007
January 24, 2008
February 21, 2008
March 20, 2009 (editorial changes)
September 29, 2009 (editorial changes)
April 28, 2011
May 3, 2011 (editorial changes)
October 19, 2015 (editorial changes)

FINANCIAL TRANSACTIONS AND RECORDS

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PART V

RECORD KEEPING REQUIREMENTS

REQUIREMENTS

Requirement to maintain financial records

18. Every licensee shall maintain financial records to record all money and other property received and disbursed in connection with the licensee's professional business, and, as a minimum requirement, every licensee shall maintain, in accordance with sections 21, 22 and 23, the following records:

1. A book of original entry identifying each date on which money is received in trust for a client, the method by which money is received, the person from whom money is received, the amount of money received, the purpose for which money is received and the client for whom money is received in trust.

2. A book of original entry showing all disbursements out of money held in trust for a client and identifying each date on which money is disbursed, the method by which money is disbursed, including the number or a similar identifier of any document used to disburse money, the person to whom money is disbursed, the amount of money which is disbursed, the purpose for which money is disbursed and the client on whose behalf money is disbursed.

3. A clients' trust ledger showing separately for each client for whom money is received in trust all money received and disbursed and any unexpended balance.

4. A record showing all transfers of money between clients' trust ledger accounts and explaining the purpose for which each transfer is made.

5. A book of original entry showing all money received, other than money received in trust for a client, and identifying each date on which money is received, the method by which money is received, the amount of money which is received and the person from whom money is received.

6. A book of original entry showing all disbursements of money, other than money held in trust for a client, and identifying each date on which money is disbursed, the method by which money is disbursed, including the number or a similar identifier of any document used to disburse money, the amount of money which is disbursed and the person to whom money is disbursed.

7. A fees book or a chronological file of copies of billings, showing all fees charged and other billings made to clients and the dates on which fees are charged and other billings are made to clients and identifying the clients charged and billed.

8. A record showing a comparison made monthly of the total of balances held in the trust account or accounts and the total of all unexpended balances of funds held in trust for clients as they appear from the financial records together with the reasons for any differences between the totals, and the following records to support the monthly comparisons:

   i. A detailed listing made monthly showing the amount of money held in trust for each client and identifying each client for whom money is held in trust.

   ii. A detailed reconciliation made monthly of each trust bank account.

9. A record showing all property, other than money, held in trust for clients, and describing each property and identifying the date on which the licensee took possession of each property, the person who had possession of each property immediately before the licensee took possession of the property, the value of each property, the client for whom each property is held in trust, the date on which possession of each property is given away and the person to whom possession of each property is given.

10. Bank statements or pass books, cashed cheques and detailed duplicate deposit slips for all trust and general accounts.

11. Signed electronic trust transfer requisitions and signed printed confirmations of electronic transfers of trust funds.

12. Signed authorizations of withdrawals by Teranet and signed paper copies of confirmations of withdrawals by Teranet.

Record keeping requirements if cash received

19 (1) Every licensee who receives cash shall maintain financial records in addition to those required under ~~section 18~~sections 18 and 19.1 and, as a minimum additional requirement, shall maintain, in accordance with sections 21, 22 and 23, a book of duplicate receipts, with each receipt identifying the date on which cash is received, the person from whom cash is received, the amount of cash received, the client for whom cash is received and any file number in respect of which cash is received and containing the signature of the licensee or the person authorized by the licensee to receive cash and of the person from whom cash is received.

No breach

(2) A licensee does not breach subsection (1) if a receipt does not contain the signature of the person from whom cash is received provided that the licensee has made reasonable efforts to obtain the signature of the person from whom cash is received.

Record keeping requirements if referral fee paid or received

19.1 Every licensee who pays or receives a referral fee, in addition to maintaining the financial records required under section 18, shall maintain, in accordance with sections 21, 22, and 23 the following records:

1. A record showing all referral fees received and identifying the date on which each referral fee is received, the method by which each referral fee is received, the amount of each referral fee, the licensee from whom each referral fee is received and the client in connection to whom each referral fee is received.

2. A record showing all referral fees paid and identifying the date on which each referral fee is paid, the method by which each referral fee is paid, including the number or a similar identifier of any document used to pay the referral fee, the amount of each referral fee, the licensee to whom each referral fee is paid, and the client in connection to whom each referral fee is paid.

3. All documents related to each referral fee transaction, including any agreement the Society may require the licensee to enter into in relation to each referral fee transaction.

Record keeping requirements if mortgages and other charges held in trust for clients

20. Every licensee who holds in trust mortgages or other charges on real property, either directly or indirectly through a related person or corporation, shall maintain financial records in addition to those required under section 18 and, as a minimum additional requirement, shall maintain, in accordance with sections 21, 22 and 23, the following records:

1. A mortgage asset ledger showing separately for each mortgage or charge,

   i. all funds received and disbursed on account of the mortgage or charge,

   ii. the balance of the principal amount outstanding for each mortgage or charge,

   iii. an abbreviated legal description or the municipal address of the real property, and

   iv. the particulars of registration of the mortgage or charge.

2. A mortgage liability ledger showing separately for each person on whose behalf a mortgage or charge is held in trust,

   i. all funds received and disbursed on account of each mortgage or charge held in trust for the person,

   ii. the balance of the principal amount invested in each mortgage or charge,

iii. an abbreviated legal description or the municipal address for each mortgaged or charged real property, and

iv. the particulars of registration of each mortgage or charge.

3. A record showing a comparison made monthly of the total of the principal balances outstanding on the mortgages or charges held in trust and the total of all principal balances held on behalf of the investors as they appear from the financial records together with the reasons for any differences between the totals, and the following records to support the monthly comparison:

i. A detailed listing made monthly identifying each mortgage or charge and showing for each the balance of the principal amount outstanding.

ii. A detailed listing made monthly identifying each investor and showing the balance of the principal invested in each mortgage or charge.

Financial records to be permanent

21. (1) The financial records required to be maintained under sections 18, 19, 19.1 and 20 may be entered and posted by hand or by mechanical or electronic means, but if the records are entered and posted by hand, they shall be entered and posted in ink.

Paper copies of financial records

(2) If a financial record is entered and posted by mechanical or electronic means, a licensee shall ensure that a paper copy of the record may be produced promptly on the Society's request.

Financial records to be current

22. (1) Subject to subsection (2), the financial records required to be maintained under sections 18, 19, 19.1 and 20 shall be entered and posted so as to be current at all times.

Exceptions

(2) The record required under paragraph 8 of section 18 and the record required under paragraph 3 of section 20 shall be created within twenty-five days after the last day of the month in respect of which the record is being created.

Preservation of financial records required under ss. 18, 19 and 19.1 ~~and 19~~

23. (1) Subject to subsection (2), a licensee shall keep the financial records required to be maintained under sections 18, 19 and 19.1 ~~and 19~~ for at least the six year period immediately preceding the licensee's most recent fiscal year end.

Same

(2) A licensee shall keep the financial records required to be maintained under paragraphs 1, 2, 3, 8, 9, 10 and 11 of section 18 for at least the ten year period immediately preceding the licensee's most recent fiscal year end.

Preservation of financial records required under s. 20

(3) A licensee shall keep the financial records required to be maintained under section 20 for at least the ten year period immediately preceding the licensee's most recent fiscal year end.

Record keeping requirements when acting for lender

24. (1) Every licensee who acts for or receives money from a lender shall, in addition to maintaining the financial records required under sections 18 and 20, maintain a file for each charge, containing,

(a) a completed investment authority, signed by each lender before the first advance of money to or on behalf of the borrower;

(b) a copy of a completed report on the investment;

(c) if the charge is not held in the name of all the lenders, an original declaration of trust;

(d) a copy of the registered charge; and

(e) any supporting documents supplied by the lender.

Exceptions

(2) Clauses (1) (a) and (b) do not apply with respect to a lender if,

(a) the lender,

(i) is a bank listed in Schedule I or II to the *Bank Act* (Canada), a licensed insurer, a registered loan or trust corporation, a subsidiary of any of them, a pension fund, or any other entity that lends money in the ordinary course of its business,

(ii) has entered a loan agreement with the borrower and has signed a written commitment setting out the terms of the prospective charge, and

(iii) has given the licensee a copy of the written commitment before the advance of money to or on behalf of the borrower;

(b) the lender and borrower are not at arm's length;

(c) the borrower is an employee of the lender or of a corporate entity related to the lender;

(d) the lender has executed the Investor/Lender Disclosure Statement for Brokered Transactions, approved by the Superintendent under subsection 54 (1) of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, and has given the licensee written instructions, relating to the particular transaction, to accept the executed disclosure statement as proof of the loan agreement;

(e) the total amount advanced by the lender does not exceed $6,000; or

(f) the lender is selling real property to the borrower and the charge represents part of the purchase price.

Requirement to provide documents to lender

(3) Forthwith after the first advance of money to or on behalf of the borrower, the licensee shall deliver to each lender,

(a) if clause (1) (b) applies, an original of the report referred to therein; and

(b) if clause (1) (c) applies, a copy of the declaration of trust.

Requirement to add to file maintained under subs. (1)

(4) Each time the licensee or any licensee of the same firm of licensees does an act described in subsection (5), the licensee shall add to the file maintained for the charge the investment authority referred to in clause (1) (a), completed anew and signed by each lender before the act is done, and a copy of the report on the investment referred to in clause (1) (b), also completed anew.

Application of subs. (4)

(5) Subsection (4) applies in respect of the following acts:

1. Making a change in the priority of the charge that results in a reduction of the amount of security available to it.

2. Making a change to another charge of higher priority that results in a reduction of the amount of security available to the lender's charge.

3. Releasing collateral or other security held for the loan.

4. Releasing a person who is liable under a covenant with respect to an obligation in connection with the loan.

New requirement to provide documents to lender

(6) Forthwith after completing anew the report on the investment under subsection (4), the licensee shall deliver an original of it to each lender.

Requirement to add to file maintained under subs. (1): substitution

(7) Each time the licensee or any other licensee of the same firm of licensees substitutes for the charge another security or a financial instrument that is an acknowledgment of indebtedness, the licensee shall add to the file maintained for the charge the lender's written consent to the substitution, obtained before the substitution is made.

Exceptions

(8) The licensee need not comply with subsection (4) or (7) with respect to a lender if clause (2) (a), (b), (c), (e) or (f) applied to the lender in the original loan transaction.

Investment authority: Form 9D

(9) The investment authority required under clause (1) (a) shall be in Form 9D.

Report on investment: Form 9E

(10) Subject to subsection (11), the report on the investment required under clause (1) (b) shall be in Form 9E.

Report on investment: alternative to Form 9E

(11) The report on the investment required under clause (1) (b) may be contained in a reporting letter addressed to the lender or lenders which answers every question on Form 9E.

RÈGLEMENT ADMINISTRATIF N^{O} 9

OPÉRATIONS FINANCIÈRES ET REGISTRES

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PARTIE V

OBLIGATION DE TENIR DES REGISTRES

OBLIGATIONS

Obligation de tenir des registres financiers

18. Les titulaires de permis tiennent des registres financiers dans lesquels sont inscrits les fonds et les autres biens qu'ils reçoivent, déboursent ou dont ils se départissent dans leurs activités professionnelles; à cette fin, les titulaires de permis tiennent au moins les registres suivants, conformément aux articles 21, 22 et 23 :

1. Un livre-journal où sont inscrits la date de réception des fonds en fiducie pour une cliente ou un client, la méthode de réception des fonds, l'identité de la personne dont ils proviennent, le montant des fonds reçus, l'usage de ces fonds et l'identité de la cliente ou du client pour lequel les titulaires de permis les reçoivent en fiducie.

2. Un livre-journal où sont inscrits tous les décaissements de fonds détenus en fiducie pour une cliente ou un client ainsi que la date de chaque décaissement, le mode de décaissement, y compris le numéro ou autre élément d'identification de tout document utilisé pour le décaissement, l'identité du bénéficiaire du décaissement, le montant du décaissement, l'usage du décaissement et l'identité de la cliente ou du client au nom de qui il a été effectué.

3. Un grand livre des clients où sont inscrits séparément pour chaque cliente ou client dont proviennent des fonds reçus en fiducie tous les fonds reçus et déboursés, ainsi que le solde.

4. Un état de tous les virements de fonds entre les comptes du grand livre des clients, avec notes explicatives pour chaque virement.

5. Un livre-journal où sont inscrits tous les fonds reçus autrement qu'en fiducie pour une cliente ou un client, la date de réception des fonds, la méthode de réception des fonds, le montant des fonds reçus et la personne dont ils proviennent.

6. Un livre-journal où sont inscrits tous les décaissements de fonds qui ne sont pas des fonds détenus en fiducie pour une cliente ou un client, ainsi que la date de chaque décaissement, le mode de décaissement, y compris le numéro ou autre élément d'identification de tout document utilisé pour le décaissement, le montant du décaissement et l'identité de son bénéficiaire.

7. Un livre des honoraires ou un dossier chronologique des factures indiquant tous les honoraires et autres frais facturés à une cliente ou à un client, les dates de facturation et l'identité des clients.

8. Un état comparatif mensuel du total des soldes des comptes en fiducie et du total des soldes des fonds détenus en fiducie pour les clients et clientes, tels qu'ils figurent dans les registres financiers, ainsi que les raisons de tout écart, appuyé par :

   i. Une liste mensuelle détaillée faisant état des fonds détenus en fiducie pour chaque cliente ou client et de son identité.

   ii. Un rapprochement (conciliation) mensuel détaillé pour chaque compte bancaire en fiducie.

9. Un état de tous les biens, fonds exclus, détenus en fiducie pour des clientes et clients et, pour chaque bien, une description du bien et la date à laquelle le titulaire de permis en a pris possession, la personne qui en avait la possession immédiatement avant, la valeur du bien, l'identité de la cliente ou du client pour lequel il est détenu en fiducie, la date à laquelle le titulaire de permis en remet la possession et le nom de la personne à qui il la remet.

10. Les relevés bancaires ou livrets de banque, les chèques encaissés et les doubles des bordereaux de dépôt de tous les comptes en fiducie et comptes généraux.

11. Les demandes de télévirement de fonds en fiducie signées et les confirmations de télévirement de fonds en fiducie imprimées et signées.

12. Les autorisations de retrait par Teranet signées et les confirmations de retrait par Teranet imprimées et signées.

Obligations relatives à la tenue de registres si les espèces sont reçues

19. (1) Chaque titulaire de permis qui reçoit des espèces maintient des registres financiers en plus de ceux qui sont requis en vertu ~~de l'article 18~~ des articles 18 et 19.1 et, comme obligation additionnelle

minimale, maintient, selon les articles 21, 22 et 23, un livre de duplicata de reçus, et chaque reçu indique la date à laquelle les espèces sont reçues, de qui les espèces proviennent, le montant des espèces reçues, le client ou la cliente pour qui les espèces sont reçues et tout numéro de dossier pour lequel les espèces sont reçues et portant la signature du titulaire de permis ou de la personne autorisée par le titulaire de permis à recevoir des espèces et de la personne de qui les espèces sont reçues.

Pas de violation

(2) Un titulaire de permis n'enfreint pas le paragraphe (1) si un reçu ne porte pas la signature de la personne pour qui les espèces sont reçues si le titulaire de permis a fait des efforts raisonnables pour obtenir la signature de cette personne.

Obligations relatives à la tenue de registres si des frais de renvoi sont payés ou reçus.

19.1 Chaque titulaire de permis qui paie ou reçoit des frais de renvoi doit, en plus de tenir les registres financiers exigés en vertu de l'article 18, tenir les registres suivants en vertu des articles 21, 22 et 23 :

1. Un état de tous les frais de renvoi reçus et indiquant, pour chaque fois que des frais de renvoi sont reçus, la date de réception des frais de renvoi, la méthode de réception des frais de renvoi, le montant des frais de renvoi, le ou la titulaire de permis duquel ou de laquelle les frais de renvoi sont reçus et le (la) client(e) à l'égard duquel ou de laquelle les frais de renvoi sont reçus.

2. Un état de tous les frais de renvoi payés et indiquant, pour chaque fois que des frais de renvoi sont payés, la date de paiement des frais de renvoi, la méthode de paiement des frais de renvoi, y compris le numéro ou autre élément d'identification de tout document utilisé pour payer les frais de renvoi, le montant des frais de renvoi, le ou la titulaire de permis auquel ou à laquelle les frais de renvoi sont payés et le (la) client(e) à l'égard duquel ou de laquelle les frais de renvoi sont payés.

3. Tous les documents ayant trait à chaque opération de frais de renvoi, notamment toute entente que le Barreau pourrait exiger du titulaire de permis qu'il conclue concernant chaque opération de frais de renvoi.

Obligations relatives aux hypothèques ou autres charges en fiducie

20. Les titulaires de permis qui détiennent en fiducie, directement ou par l'intermédiaire d'une personne liée, physique ou morale, des hypothèques ou d'autres charges grevant un immeuble, tiennent au moins, en plus des registres financiers prescrits par l'article 18 les registres suivants, conformément aux articles 21, 22 et 23 :

1. Un grand livre des créances hypothécaires où sont inscrits séparément, pour chaque hypothèque ou charge :

   i. tous les fonds reçus et déboursés au titre de l'hypothèque ou de la charge,

   ii. le solde du capital à rembourser pour chaque hypothèque ou charge,

   iii. une courte description légale ou l'adresse municipale de l'immeuble grevé,

   iv. les renseignements concernant l'enregistrement de l'hypothèque ou de la charge.

2. Un grand livre des dettes hypothécaires où sont inscrits séparément, pour chaque personne au nom de laquelle une hypothèque ou une charge est détenue en fiducie :

   i. tous les fonds reçus et déboursés au titre de l'hypothèque ou de la charge détenue en fiducie pour chaque personne,

   ii. le solde du capital investi dans chaque hypothèque ou charge,

   iii. une courte description légale ou l'adresse municipale de l'immeuble grevé,

   iv. les renseignements concernant l'enregistrement de l'hypothèque ou de la charge.

3. un état comparatif mensuel du total des soldes du capital à rembourser pour les hypothèques ou les charges détenues en fiducie et du total des soldes du capital détenu au nom des investisseuses ou investisseurs, tels qu'ils figurent dans les registres financiers, ainsi que les raisons de tout écart, appuyé par :

   i. une liste mensuelle où est inscrite séparément chaque hypothèque ou charge et où figure, pour chacune, le solde du capital à rembourser,

   ii. une liste mensuelle détaillée où est inscrit séparément chaque investisseuse ou investisseur et où figure le solde du capital investi dans chaque hypothèque ou charge.

Permanence des registres financiers

21. (1) Les données des registres financiers prescrits par les articles 18, 19, 19.1 et 20 peuvent être inscrites et reportées manuellement, mécaniquement ou électroniquement; les données manuscrites sont inscrites et reportées à l'encre.

Copies sur papier des registres financiers

(2) Les titulaires de permis qui inscrivent et reportent mécaniquement ou électroniquement les données d'un registre financier sont en mesure de produire promptement, à la demande du Barreau, une copie du registre sur papier.

Registres financiers à jour

22. (1) Sous réserve du paragraphe (2), les données des registres financiers prescrits par les articles 18, 19, 19.1 et 20 sont inscrites et reportées de façon à être continuellement à jour.

Exceptions

(2) Les registres prescrits par la disposition 8 de l'article 18 et la disposition 3 de l'article sont établis dans les vingt-cinq jours suivant le dernier jour du mois visé.

Conservation des registres financiers prescrits par les articles 18, 19 et 19.1 ~~et 19~~

23. (1) Sous réserve du paragraphe (2), les titulaires de permis conservent les registres financiers prescrits par l'article 18, 19 et 19.1 ~~et 19~~ qui couvrent au moins les six années précédant la date à laquelle s'est terminé leur dernier exercice.

Idem

(2) Les titulaires de permis conservent les registres financiers prescrits par les dispositions 1, 2, 3, 8, 9, 10 et 11 de l'article 18 qui couvrent au moins les dix années précédant la date à laquelle s'est terminé leur dernier exercice.

Conservation des registres financiers prescrits par l'article 20

(3) Les titulaires de permis conservent les registres financiers prescrits par l'article 20 qui couvrent au moins les dix années précédant la date à laquelle s'est terminé leur dernier exercice.

Obligations des titulaires de permis qui agissent au nom d'un prêteur

24. (1) Les titulaires de permis qui reçoivent des fonds d'une prêteuse ou d'un prêteur ou qui agissent en son nom tiennent, en plus des registres financiers prescrits par les articles 18 et 20, un dossier relatif à chaque charge contenant :

a) un formulaire d'autorisation de placement rempli, signé par chaque prêteuse ou prêteur avant la première avance de fonds à l'emprunteuse ou à l'emprunteur ou en son nom;

b) une copie du rapport de placement dûment rempli;

c) si la charge n'est pas détenue au nom de tous les prêteurs, l'original de la déclaration de fiducie;

d) une copie de la charge enregistrée;

e) tout document justificatif fourni par la prêteuse ou le prêteur.

Exceptions

(2) Les alinéas (1) a) et b) ne s'appliquent pas à la prêteuse ou au prêteur dans les cas suivants :

a) la prêteuse ou le prêteur remplit les conditions suivantes :

(i) il est une banque mentionnée à l'annexe I ou II de la *Loi sur les banques* (Canada), un assureur titulaire d'un permis, une société de prêt ou de fiducie inscrite, une de leurs filiales, une caisse de retraite ou toute autre entité qui prête des fonds dans le cours normal de ses affaires;

(ii) il a conclu un contrat de prêt avec l'emprunteuse ou l'emprunteur et il a signé un engagement écrit énonçant les stipulations de la charge éventuelle;

(iii) il a remis au titulaire de permis une copie de l'engagement écrit avant la première avance de fonds à l'emprunteuse, à l'emprunteur ou en son nom;

b) la prêteuse ou le prêteur et l'emprunteuse ou l'emprunteur ont un lien de dépendance;

c) l'emprunteuse ou l'emprunteur est un employé de la prêteuse ou du prêteur ou d'une

personne morale liée à la prêteuse ou au prêteur;

d) la prêteuse ou le prêteur a signé le Document d'information pour l'investisseur ou le prêteur concernant les opérations effectuées par des courtiers, approuvé par le surintendant en vertu du paragraphe 54 (1) de la *Loi de 2006 sur les maisons de courtage d'hypothèques, les prêteurs hypothécaires et les administrateurs d'hypothèque*, et il a donné au titulaire de permis des instructions écrites, relatives à l'opération en cause, pour qu'il accepte le document déclaratoire signé comme preuve du contrat de prêt;

e) la somme totale avancée par la prêteuse ou le prêteur ne dépasse pas 6 000 $;

f) la prêteuse ou le prêteur vend un bien immeuble à l'emprunteuse ou à l'emprunteur et la charge correspond à une partie du prix d'achat.

Obligation de fournir des documents au prêteur

(3) Immédiatement après la première avance de fonds à l'emprunteuse ou à l'emprunteur ou en son nom, le titulaire de permis remet à chaque prêteuse ou prêteur :

a) un original du rapport visé à l'alinéa (1) b), le cas échéant;

b) si l'alinéa (1) c) s'applique, une copie de la déclaration de fiducie.

Pièces jointes prescrites par le paragraphe (1)

(4) Chaque fois qu'un titulaire de permis ou un titulaire de permis de son cabinet accomplit un acte mentionné au paragraphe (5), il joint au dossier relatif à la charge, un nouveau formulaire d'autorisation de placement visé à l'alinéa (1) a), rempli et signé par chaque prêteuse ou prêteur avant que l'acte ne soit accompli, ainsi qu'une copie du nouveau rapport de placement visé à l'alinéa (1) b), dûment rempli.

Application du paragraphe (4)

(5) Le paragraphe (4) s'applique aux actes suivants :

1. La modification du rang de la charge qui entraîne une réduction du montant de la sûreté y afférente.

2. La modification d'une autre charge de rang supérieur qui entraîne une réduction du montant de la sûreté de la prêteuse ou du prêteur.

3. La mainlevée d'une garantie accessoire ou autre, détenue relativement au prêt.

4. La décharge d'une personne qui est responsable, au terme d'un engagement, de l'exécution d'une obligation relative au prêt.

Nouvelle obligation face au prêteur

(6) Immédiatement après avoir rempli un nouveau rapport de placement en vertu du paragraphe (4), le titulaire de permis en remet un original à chaque prêteuse ou prêteur.

Pièces jointes prescrites par le paragraphe (1) : substitution

(7) Chaque fois qu'un titulaire de permis ou un titulaire de permis de son cabinet substitue à la charge une autre garantie ou un instrument financier qui constitue une reconnaissance de dette, il joint au dossier relatif à la charge le consentement de la prêteuse ou du prêteur à la substitution, donné par écrit avant la substitution.

Exceptions

(8) Le titulaire de permis n'est pas tenu de se conformer au paragraphe (4) ou (7) à l'égard d'une prêteuse ou d'un prêteur auquel s'appliquaient les alinéas (2) a), b), c), e) ou f) lors de l'opération de prêt initiale.

Autorisation de placement : Formulaire 9D

(9) L'autorisation de placement prévue à l'alinéa (1) a) est rédigée selon le Formulaire 9D.

Rapport de placement : Formulaire 9E

(10) Sous réserve du paragraphe (11), le rapport de placement visé à l'alinéa (1) b) est rédigé selon le Formulaire 9E.

Rapport de placement : solution de rechange au Formulaire 9E

(11) Le rapport de placement prescrit par l'alinéa (1) b) peut être fait sous forme de lettre de rapport adressée à la prêteuse ou au prêteur, à condition qu'elle réponde à toutes les questions figurant dans le Formulaire 9E.

Tab 4.2.9

This **Referral Agreement** confirms the referral by [Referrer Name] of [Client Name] to [Referree Name] and the related referral fee payment terms.

Referral Recommendation:

- [Client Name] wishes to obtain legal services with respect to [briefly describe the legal matter].

- [Referrer Name] has recommended [Referree Name] to Client because [reasons for referral].

  ADD IF there is a relationship between the Referrer and the Referree:

  [Referrer Name] has disclosed to Client that [Referrer Name] and [Referree Name] have the following relationship: [describe any legal, financial or other relationship between Referrer and Referree].

- [Referrer Name] also recommended the following two [lawyers and/or paralegals] to [Client Name]: [names]. OR It has not been reasonably possible for [Referrer Name] to recommend any other [lawyer(s) or paralegal(s)] to [Client Name] because [reasons for not providing other names].

Explanation of Referral Fees and Client Rights:

- [Client Name] has been provided with the **Law Society's Requirements for Referral Fees** (attached). [Client Name] has had the opportunity to review and consider the requirements.

- [Client Name] has been advised and understands that there is **no obligation to retain** [Referree Name] or any of the other lawyers [or paralegals] referred by [Referrer Name]. [Client Name] is free to retain another lawyer [or paralegal] of his/her choice.

- After signing this Referral Agreement, [Client Name] understands that [Client Name] has the **right to terminate the retainer with [Referree Name]** at any time and for any reason.

- [Client Name] has no obligation either to [Referrer Name] or [Referrer Name] as a result of this Referral Agreement.

Acceptance of Referral and Referral Fee Payment Terms:

- [Client Name] has accepted the referral to [Referree Name].

DRAFT

- For this referral, [Referree Name] agrees to pay [Referrer Name] a referral fee:
    - in the amount of [insert set dollar value]; OR
    - in an amount equal to •% of the fees paid by [Client Name] to [Referree Name] for the legal matter referred; OR
    - [such other basis as may be agreed]

  In any event, the referral fee will not exceed the amount permitted by the *Rules of Professional Conduct* or the *Paralegal Rules of Conduct*. A sample calculation is set out in the Law Society's Requirements for Referral Fees.

- This referral fee will not be paid or payable until [Referree Name] is paid his or her fees in the matter.
- The referral fee will be noted on the account sent to [Client Name] at the time the referral fee is paid.
- This referral fee is the responsibility of [Referree Name] and not [Client Name]. The referral fee will not increase the total amount of the fee charged to [Client Name].

By signing below, [Client Name], [Referrer Name], and [Referee Name] confirm that they understand and agree to the terms outlined above.

Date:

_____ _____

[Referrer Name] **[Referree Name]**

_____

[Client Name]

Tab 4.2.10

Law Society requirements for Referral Fees – What Clients need to Know

What is a referral fee?

A referral fee is a sum of money or other reward paid directly or indirectly for the referral of your file, with your knowledge and consent, in accordance with a referral agreement. The lawyer or paralegal receiving the referral pays the referral fee. The lawyer or paralegal making the referral is paid the referral fee.

Does it increase the legal fees I pay?

It should not. The lawyer or paralegal receiving the referral fee is not permitted to increase the amount of the legal fees charged to you because a referral fee is paid. The referral fee must be fair and reasonable.

What is a referral agreement?

The Law Society has prepared a referral agreement which covers the requirements set out in the Rules of Professional Conduct/Paralegal Rules of Conduct and which can be found at *website*. The agreement must be signed, as soon as practicable and before a referral fee can be paid or accepted, by you, the lawyer or paralegal making the referral, and the lawyer or paralegal receiving the referral.

By signing a referral agreement, you confirm that you have sufficient information to accept the referral and you consent to the payment of the referral fee on the terms agreed.

What are the Law Society requirements for a referral agreement?

To ensure transparency and to protect the public, the Law Society requires that the referral agreement document that you have been advised of the following:

- A referral is being recommended and the reasons why
- The nature of any relationship between the lawyer or paralegal making the referral and the lawyer or paralegal receiving the referral
- The names of at least two alternate lawyers or paralegals or why your options for a referral are limited
- You are under no obligation to accept the referral
- You are free to retain another lawyer or paralegal or your choice
- You are free to later terminate the retainer if you no longer wish to work with the lawyer or paralegal receiving the referral
- The referral fee arrangement does not create any obligation on your part

- How much the referral fee is or how it will be calculated
- When the referral fee will be paid by the lawyer or paralegal receiving the referral

Why would a lawyer or paralegal recommend a referral of my file?

Referrals are made for many reasons. However, for a referral fee to apply, the lawyer or paralegal receiving the referral must have the expertise and ability to handle your matter.

When would a lawyer or paralegal not be allowed to accept a referral fee?

A lawyer or paralegal is not allowed to accept a referral fee if he or she has a conflict of interest and not permitted to act on the matter, or is suspended and not permitted to act on the matter.

What if I do not want to retain the recommended lawyer or paralegal?

A lawyer or paralegal can *recommend* a referral, but only you can decide to retain a lawyer or a paralegal. You are under no obligation to accept a referral.

Must there be a referral fee for me to get legal representation?

No. You are entitled to retain who you want to retain whether or not you are referred to someone or whether or not a referral fee is paid.

Can I obtain a referral without there being a payment of a referral fee?

Yes. You can access the Law Society Referral Service (LSRS) by visiting www.findlegalhelp.ca. If you are in crisis, you can call the LSRS directly at 1-855-947-5255 Monday to Friday, between 9 am – 5pm. Many lawyers and paralegals are prepared to make referrals without requiring a referral fee.

How is a referral fee calculated?

The referral agreement will either set out the amount of the referral fee or, in the case of matters accepted on contingency, the basis on which the referral fee will be calculated.

Where a matter is proceeding on a contingency fee basis, referral fees are calculated as a percentage of the fees payable in accordance with the contingency fee agreement or as approved by a court.

There is a maximum referral fee that is permitted. The maximum payable is made up of 15% of the fee paid for the first $50,000.00 recovered, plus 5% of any additional fees recovered, up to a maximum of $25,000.00.

Example: If $100,000 in legal fees were paid, the maximum permitted referral fee is

15% of the first 50,000.00 = 7,500.00

5% of the balance	=	2,500.00
Maximum Referral Fee	=	10,000.00

What is the most a lawyer or paralegal can receive as a referral fee?

A referral fee cannot exceed $25,000.00.

When will the referral fee be paid?

A referral fee can only be paid after the lawyer or paralegal doing the client work has received payment for their fees.

What if I decide later that I do not want to work with the lawyer or paralegal who accepted the referral?

The referral fee arrangement does not affect your decision to continue with your lawyer or paralegal or to terminate your retainer with them.

However, you should be aware that some retainer agreements, in particular contingency fee agreements, have clauses that come into effect on termination. You may owe your lawyer or paralegal money for services rendered and expenses incurred. These can be significant sums of money. If the lawyer or paralegal receives payment of his or her fee, then he or she may have an obligation to pay the referral fee in accordance with the referral agreement.

How will I know the referral fee will be paid?

The referral fee will be noted on your statement of account. You will be asked to acknowledge the referral fee at that time.

Tab 4.3

FOR INFORMATION

ANNUAL REPORT OF THE COMPLAINTS RESOLUTION COMMISSIONER

67. Part I of By-Law 11, which governs the office of the Complaints Resolution Commissioner, requires that the Complaints Review Commissioner ("the Commissioner") submit an annual report to the Committee. The Committee must then provide the report to Convocation. The relevant section of the By-Law reads:

> **Annual report**
> 3. Not later than March 31 in each year, the Commissioner shall submit to the Professional Regulation Committee a report upon the affairs of the office of the Commissioner during the immediately preceding year, and the Committee shall lay the report before Convocation not later than at its regular meeting in June.

68. The report of the Commissioner, Bernard Morrow, is attached as **Tab 4.3.1.** The report was provided to the Committee in its February 9 meeting materials. Due to time constraints, discussion of the report was deferred to the April 6 meeting.

69. Mr. Morrow and two members of his staff attended the Committee's April 6 meeting to discuss the report. Members of the Paralegal Standing Committee also participated in this discussion at the Committee's meeting.

Annual Report of the Complaints Resolution Commissioner

January 1, 2016 – December 31, 2016

Submitted by Bernard Morrow,
Complaints Resolution Commissioner

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A. Introduction

I began a two-year appointment as Complaints Resolution Commissioner (hereinafter referred to as the "Commissioner") on April 1, 2014. My appointment was renewed for an additional two-year term commencing April 1, 2016. I have found the past year to be challenging, productive and rewarding. This Annual Report (hereinafter referred to as the "Report") covers the activities of the office of the Complaints Resolution Commissioner (hereinafter referred to as the "CRC") for the 2016 calendar year.

B. Law Society Act and By-Law 11

The Commissioner is appointed by Convocation pursuant to Section 49.14 of the *Law Society Act*, R.S.O. 1990, ch. L.8 (hereinafter referred to as the "*Act"*). The role and responsibilities of the Commissioner are set out in Sections 49.14 to 49.19 of the *Act* and are attached to this Report as Appendix 1. The *Act* also outlines the administrative responsibilities of the CRC.

Part 1 of By-Law 11[1] (hereinafter referred to as "By-Law 11"), made pursuant to section 62 of the *Act*, a copy of which is attached to this Report as Appendix 2, elaborates on the role and functions of the Commissioner.

Pursuant to section 3 of By-Law 11, the Commissioner is required to submit to the Professional Regulation Committee of the Law Society of Upper Canada (hereinafter referred to as the "Law Society") an Annual Report "upon the affairs of the office of the Commissioner during the immediately preceding year."

C. Complaints Resolution Commissioner's Functions

By-Law 11 provides the Commissioner with two distinct functions: complaints resolution and complaints review.

Complaints Resolution Function

The complaints resolution function provides the Commissioner with the statutory authority to perform a formal resolution role. It allows the Law Society, with the consent of the complainant and licensee, to refer a matter to the Commissioner for resolution.

The Commissioner has broad discretion to determine the process for the resolution function. While the resolution function has been available for implementation since the establishment of the CRC in 2007, to date, the Commissioner has only been called upon to perform the review function.

[1] By-Law 11 was made May 1, 2007, and was most recently amended June 26, 2014.

Complaints Review Function

By-Law 11 provides the Commissioner with the statutory authority to review a complaint if a complainant requests that the Law Society refer a reviewable complaint to the Commissioner for review.

Subsection 4 (1) of By-Law 11 establishes four criteria for the review of complaints by the Commissioner. A complaint may be reviewed if,

(a) the merits of the complaint have been considered by the Law Society;
(b) the complaint has not been disposed of by the Proceedings Authorization Committee, Hearing Panel or Appeal Panel;
(c) the complaint has not been previously reviewed by the Commissioner; and
(d) the Law Society has notified the complainant that it will be taking no further action in respect of the complaint.

Subsection 4 (2) of By-Law 11 provides that a complaint may not be reviewed by the Commissioner if, in the opinion of the Commissioner, it concerns only the quantum of fees or disbursements charged by a licensee, a licensee's filing requirements, the handling of money and other property, or the negligence of a licensee.

Subsection 5 (3) of By-Law 11 requires the complainant to request a review within 60 days of being notified of the Law Society's decision to close the complaint file.

Standard of Review

Subsection 7 (2) of By-Law 11 requires the Commissioner to apply a standard of reasonableness in reviewing the Law Society's investigation of a complaint. In applying this standard, the Commissioner must determine whether the Law Society's consideration of a complaint and its resulting decision to take no further action with respect to the complaint was reasonable. The Commissioner's role is similar to that of an ombudsman where a degree of deference is given to the body over which the ombudsman has oversight.

If the Commissioner is satisfied that the Law Society's consideration of a complaint and its decision to close a file was reasonable, no further action is recommended. However, if the Commissioner is not satisfied that the Law Society's consideration of a complaint and its decision was reasonable, the complaint will be referred back to the Law Society with a recommendation for further action.

Section 49.19 of the *Act* states: "A decision of the Commissioner is final and is not subject to appeal."

D. Complaints Review Process

Notice to the Complainant

Upon being notified by Law Society staff of either the Complaints Resolution Department or the Investigations Department that a complaint file is being closed without a referral to the Proceedings Authorization Committee for further action, including disciplinary action, the complainant is advised of the right to seek a review by the Commissioner.

Processing Requests for Review

Upon receipt of a request for review, the CRC sends the complainant a letter of confirmation and notifies the investigating department of the request for review.

The applicable investigating department of the Law Society is responsible for preparing the materials for the review. A bound copy of all pertinent materials, referred to as the document book, is prepared for use at the review meeting. The document book usually includes the Law Society's closing letter or report, copies of all relevant materials submitted by the complainant and either the licensee's written response to the complaint or a synopsis of it. Once the document book is completed, it is reviewed by the office of the Executive Director of Professional Regulation (hereinafter referred to as the "office of the Executive Director"), and then delivered to the CRC's Senior Coordinator. Upon receipt of the bound materials, the Senior Coordinator schedules the review meeting. The CRC sends a letter to the complainant, setting out the scheduled date, time and manner in which the meeting will proceed and, if in person, the place where the meeting will be held. A copy of the document book, for the complainant's use during the meeting, is enclosed with the letter. A copy of the document book is also provided to the Commissioner and to Counsel to the Commissioner, for review, in advance of the meeting.

Documents that fall within the confidentiality provisions of subsection 49.12 (1)[2] of the *Act* are also provided to the Commissioner and Counsel to the Commissioner. The type of information considered confidential includes the following:

(a) Law Society record of information relating to the licensee;
(b) evidence from third parties which is protected by confidentiality and/or solicitor-client privilege;
(c) solicitor-client information, when the complainant is not the client or the information is in respect of other clients of the licensee.

While the applicable investigating department of the Law Society notifies the licensee of the request for review, pursuant to subsection 8 (4) of By-Law 11, the licensee is not entitled to participate in the review process. Once the review is concluded, the investigating department notifies the licensee of the Commissioner's decision.

[2] 49.12 (1) A bencher, officer, employee, agent or representative of the Society shall not disclose any information that comes to his or her knowledge as a result of an audit, investigation, review, search, seizure or proceeding under this Part.

Format of the Review Meeting

Subsection 8 (1) of By-Law 11 provides that the procedures applicable to the review of a complaint referred to the Commissioner shall be determined by the Commissioner.

Subsection 8 (2) of By-Law 11 provides:

> The Commissioner shall, where practicable, meet with each complainant, whose complaint has been referred to the Commissioner for review, and the Commissioner may meet with each complainant by such telephone, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other simultaneously and instantaneously.

Until the end of December 2011, all meetings were scheduled as in-person meetings. However, if the complainant was unable or unwilling to attend an in-person meeting, the complainant was provided with the opportunity to participate in a teleconference meeting or, alternatively, to request a review based on the written materials.

In December 2011, in order to meet the growing demand for reviews, a form entitled the "Request for Review by the Complaints Resolution Commissioner" (the "form") was introduced. The form provides the complainant with three format options for the review meeting: in-person, by teleconference or in-writing (based on the written material contained in the Law Society's file). When the written option is selected the complainant often submits detailed written material with the form. Attached to the Report, and marked as Appendix 3, is a copy of the form. Also attached, and marked as Appendix 4, is a copy of the CRC's Information Sheet (the "information sheet"), which explains the review process to the complainant. The Law Society includes copies of both the form and information sheet with its closing letter to the complainant.

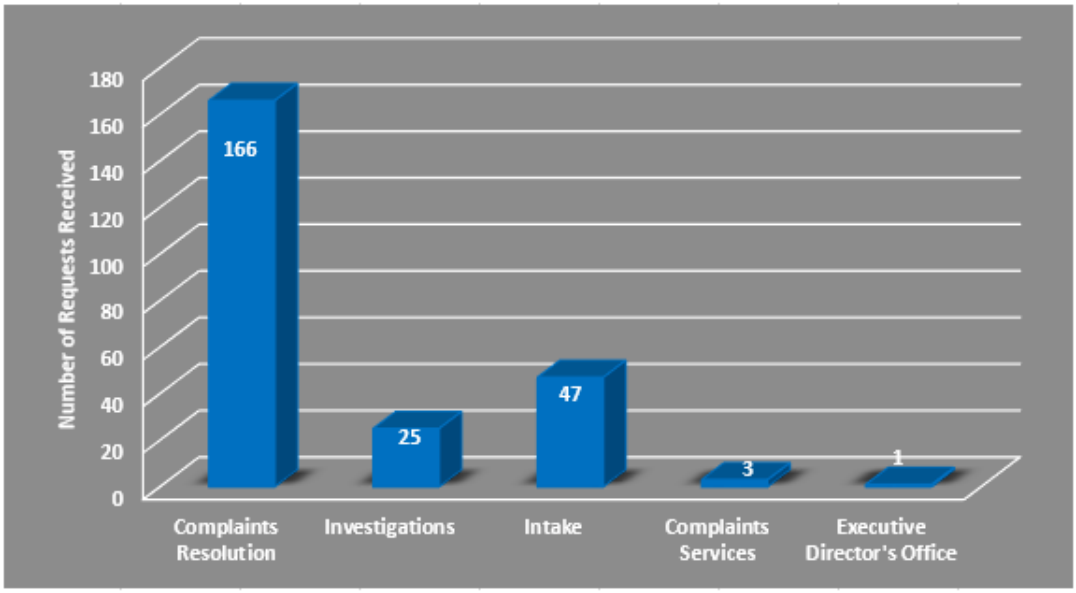
During 2016, meetings were scheduled two days per week, bi-weekly. On average six meetings were scheduled bi-weekly. However, some complainants requested reviews of multiple licensees resulting in more than six files being reviewed in every two-week period.

E. Statistical Information

What follows is relevant statistical information on the affairs of the CRC for the current year and for the two previous years, for comparison purposes.

Number of Requests for Review

Table 1 – CRC Requests Received by Department in 2016



In 2016, the CRC received 242 requests for review. Table 1, above, provides a breakdown of the departments from which these requests for review were received.

As indicated earlier in this Report, subsection 4 (1) of By-Law 11 provides that a review is only available when the merits of a complaint have been considered by the Law Society. This subsection of By-Law 11 has been interpreted to mean that the Commissioner can only review those files that have been investigated under the authority set out in section 49.3 of the *Act.*

As reflected in Table 1, above, the CRC received a total of 50 requests for review from the Law Society's Complaints Services and Intake departments. In accordance with subsection 4 (1) of By-Law 11, these requests were found to be outside the Commissioner's jurisdiction, as they were not considered on their merits, as the licensee was neither notified of the complaint nor given an opportunity to respond to it. Where the CRC receives a request for review, which is beyond the Commissioner's jurisdiction, the complainant is advised of the Commissioner's lack of jurisdiction and referred back to the department that closed the file for a further response. The department manager then reviews the file and if the manager believes that the file should remain closed, the complainant is so notified.

In 2016, the CRC also received 12 requests for review that were beyond the Commissioner's jurisdiction for other reasons, including the expiry of the 60 day time period for requesting a review and, in one instance, the subject of the complaint no longer being a licensed member of the Law Society. In each of these cases, the complainant was notified in writing of the reason for the Commissioner's lack of jurisdiction to review the matter. Of these 12 files, 11 were investigated by the Complaints Resolution Department and one was investigated by the Investigations Department.

Therefore, in total, 62 requests for review were found to be ineligible for review by the Commissioner. After eliminating these 62 files, 180 requests for review were found to be eligible for review.

By comparison, in 2015 there were 261 requests for review received, and after eliminating those files beyond the Commissioner's jurisdiction, 195 were found to be eligible for review by the Commissioner. In 2014, 281 requests for review were received, and after eliminating those beyond the Commissioner's jurisdiction, 219 were found to be eligible for review.

Table 2 - Comparison of Requests Received in 2016, 2015 and 2014 by Department

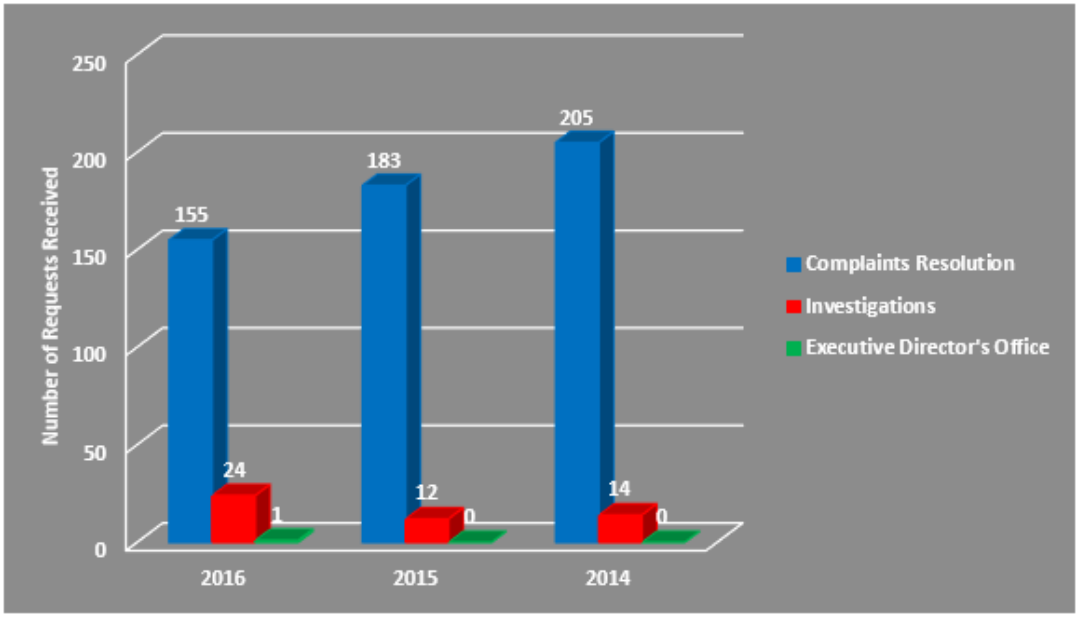


Table 2, above, provides a comparison of requests for review received by department from 2014 through 2016. It does not include those files in which the request was beyond the Commissioner's jurisdiction.

Number of Reviews Conducted

Between January 1, 2016 and December 31, 2016, the Commissioner[3] reviewed 151 files. Of those 151 files, 16 involved requests for review received in 2016, 127 related to requests received in 2015, seven related to requests received in 2014 and one request was received in 2013.[4]

In 2015, 160 files were reviewed. In 2014, 197 files were reviewed.

Format of Review Meetings Conducted

Table 3 – Comparison of Format of Review Meetings Held in 2016, 2015 and 2014

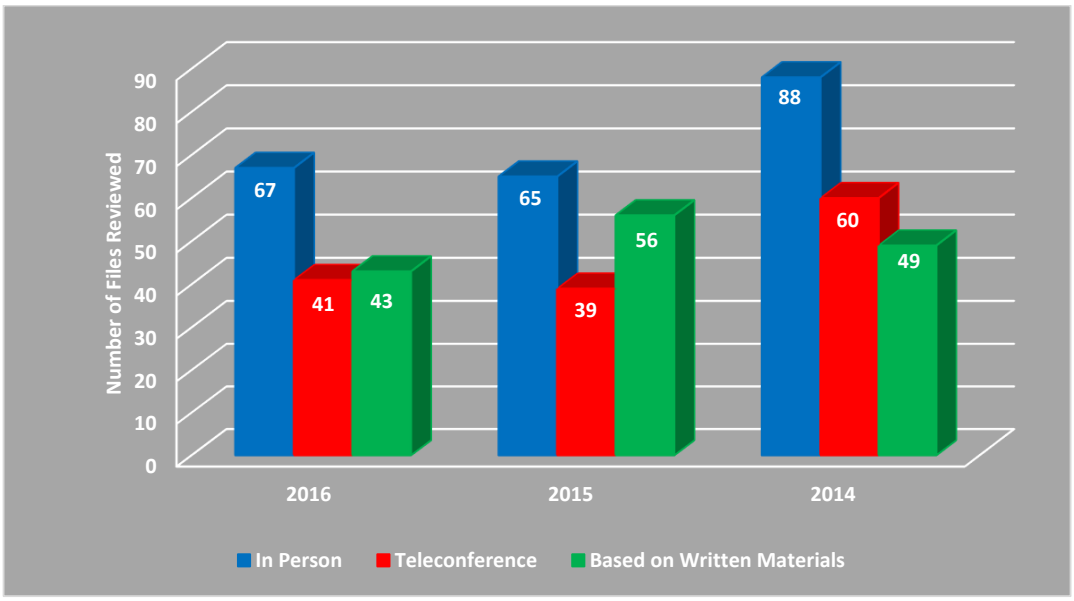


Table 3, above, indicates that during 2016, of the 151 files reviewed, 67 (44%) were reviewed by way of in-person meeting, 41 (27%) were conducted by teleconference and 43 (29%) proceeded based on the written material.

By comparison, between January 1, 2015 and December 31, 2015, of the 160 files reviewed, 65 (41%) were reviewed by way of in-person meeting, 39 (24%) were conducted by teleconference and 56 (35%) proceeded based on the written material.

[3] The Commissioner has the authority to appoint a delegate when a conflict arises. Due to identified conflicts, the Commissioner's delegate reviewed five files in 2016. The 151 files reviewed by the Commissioner in 2016 include those files reviewed by his delegate.

[4] The one request received in 2013 was placed in abeyance as the complainant had several outstanding requests for review for which CRC had not yet received the document books.

In 2014, of the 197 files reviewed, 88 (45%) proceeded by way of in-person meeting, 60 (30%) were conducted by teleconference and 49 (25%) proceeded based on the written material.

All in-person review meetings conducted in 2016 were held in Toronto. In the past, in an effort to provide greater accessibility to the process for those complainants who reside outside of the Toronto area, in-person meetings were conducted in Ottawa and London, where the demand justified the scheduling of review meetings in these cities.

However, in 2016, while a limited number of complainants residing in or around Ottawa and London expressed a desire in their request form for an in-person meeting, they were content to participate by teleconference or to have the review conducted in writing. Accordingly, trips to Ottawa and London were not scheduled.

Department that Conducted the Investigation

Table 4 – CRC Reviews Conducted in 2016 by Department

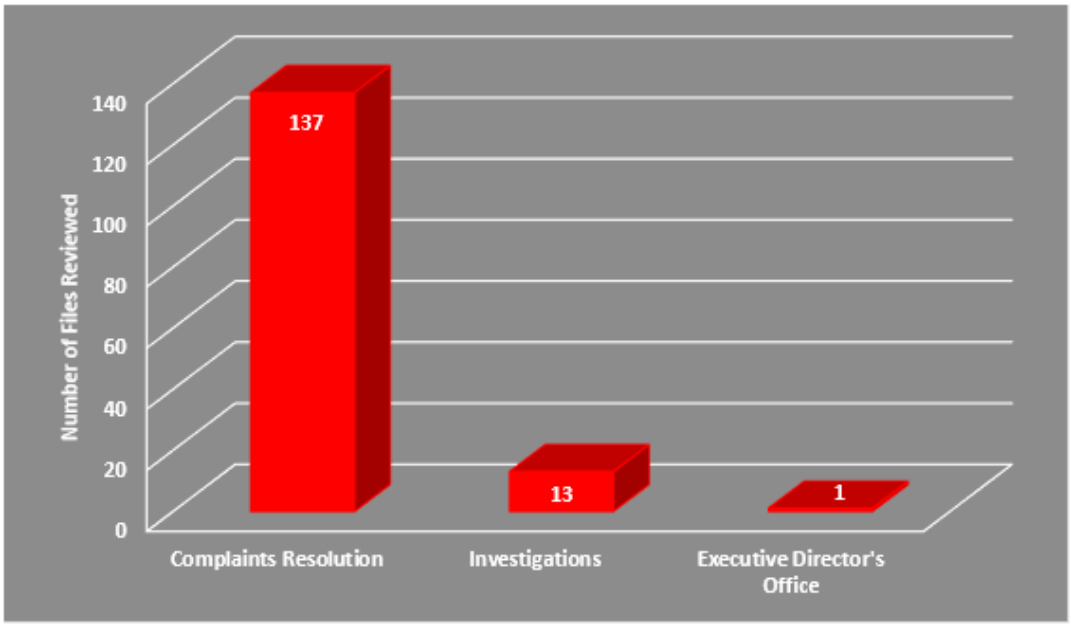


Table 4, above, identifies the Law Society department that conducted the investigation of those files reviewed in 2016.

As Table 4 demonstrates, of the 151 files reviewed in 2016, 137 were investigated by the Complaints Resolution Department, 13 were investigated by the Investigations Department and one file was investigated by the office of the Executive Director.

Table 5 – Comparison of Reviews Conducted in 2016, 2015 and 2014 by Department

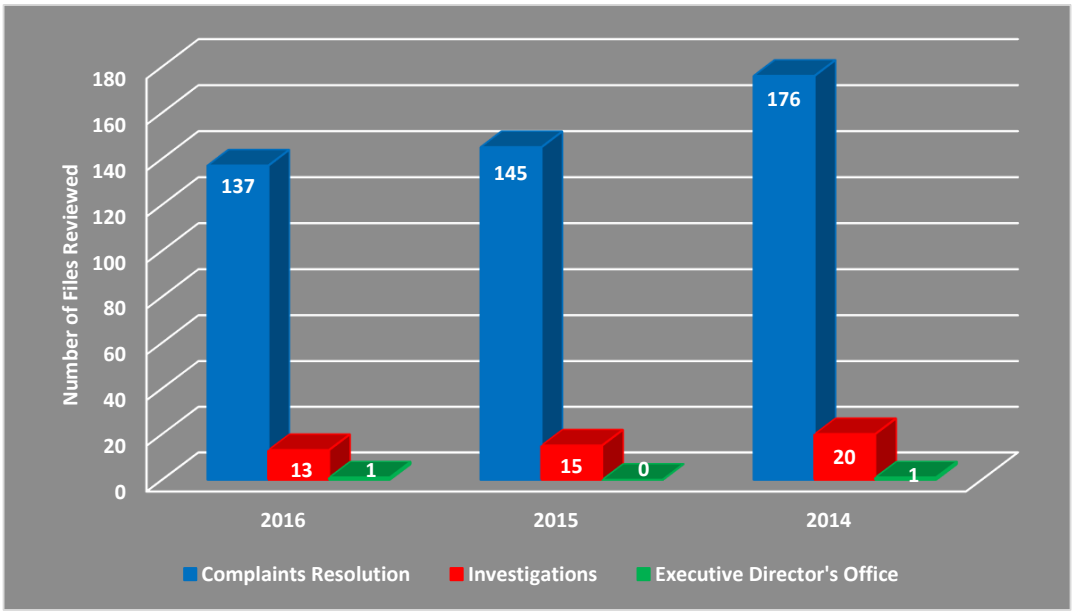


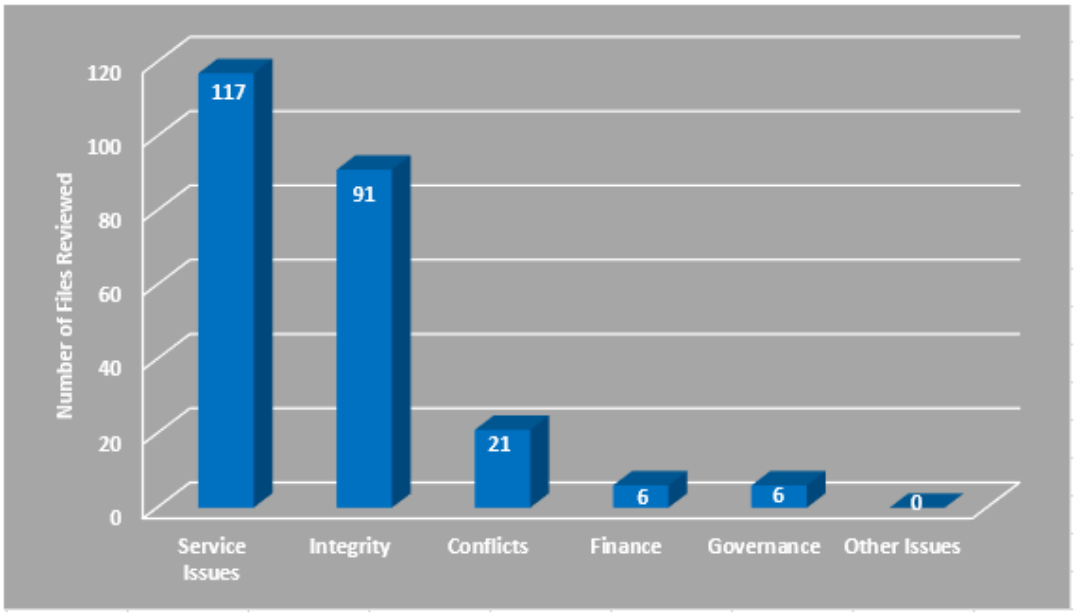
Table 5, above, provides a statistical comparison by department of the 151 files reviewed in 2016, with those reviewed in 2015 and 2014.

In 2015, of the 160 files reviewed by the Commissioner, 145 were investigated by the Complaints Resolution Department and 15 were investigated by the Investigations Department. There were no files received from the office of the Executive Director.

In 2014, of the 197 files reviewed, 176 were investigated by the Complaints Resolution Department, 20 were investigated by the Investigations Department and one file was investigated by the Executive Director's office.

Predominant Issues Identified in the Cases Reviewed

Table 6 - Predominant Issues Identified in Each of the 2016 Files Reviewed



The Law Society tracks the regulatory issues raised in each complaint file. Based on the Law Society's categorization, Table 6, above, identifies the six predominant issues raised in the 151 files reviewed in 2016. Since the current case management system may record more than one "predominant issue" in each file, the total number of issues identified exceeds the number of files reviewed.

Table 7 – Comparison of Predominant Issues Identified in Files Reviewed in 2016, 2015 and 2014

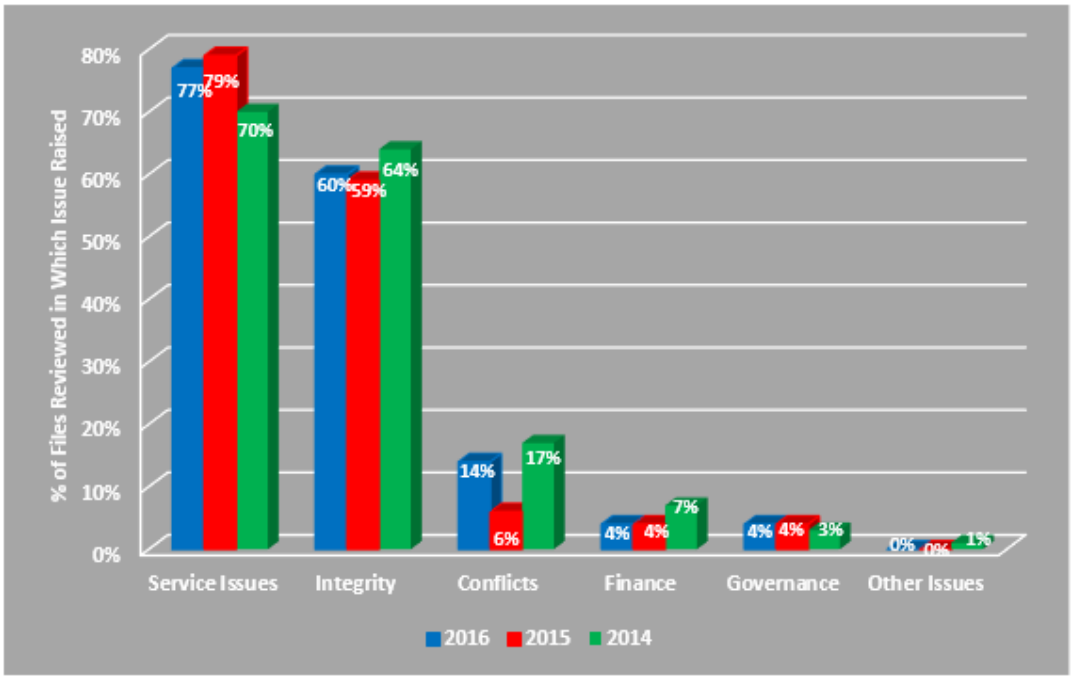
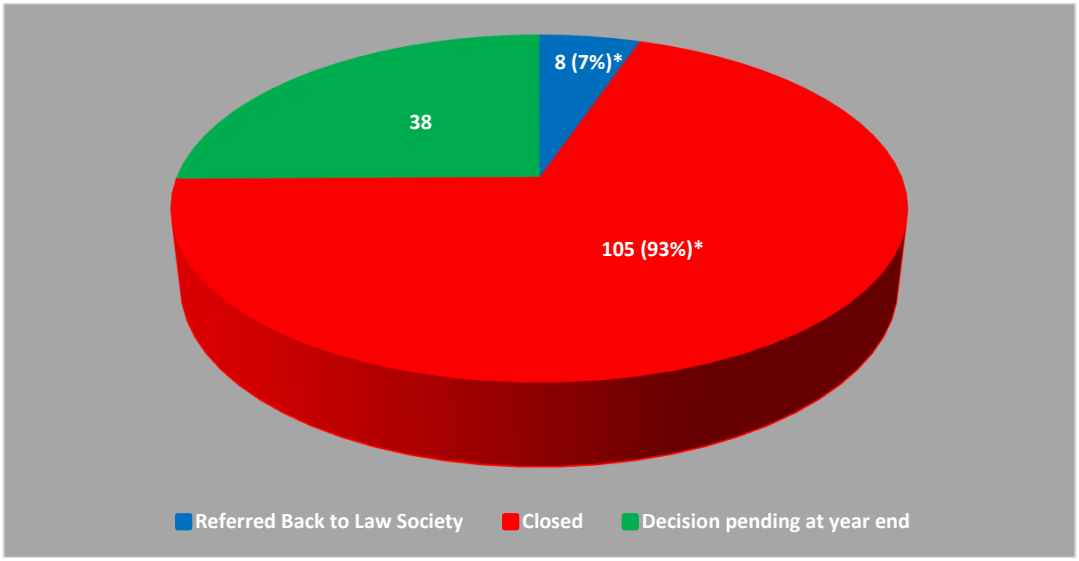


Table 7, above, provides a statistical comparison, by percentage, of the predominant issues raised in those files reviewed in 2016, 2015 and 2014. As table 7 indicates, service issues are the most predominant issues raised in reviewed files. Service issues were raised in 77% of the files reviewed in 2016. By comparison, in 2015, service issues were raised in 79% of the files reviewed while in 2014 service issues were raised in 70% of the files reviewed.

Results of Reviews Conducted in 2016

Figure 1 (1) - Review Results 2016



*percentage based on files reviewed and decisions rendered (total of 113)

Figure 1 (1), above, depicts the results of the 151 files reviewed by the Commissioner in 2016.

Of the 151 files reviewed in 2016, decisions were rendered in 113. Of those 113 decisions, eight (7%) were referred back to the Law Society.[5] In six of these files, the Commissioner was not satisfied that the decision to close the matter was reasonable and the Commissioner referred these files back, pursuant to subsection 7 (2) (b) of By-Law 11, with recommendations for further action. With respect to the remaining two files, while the Commissioner found the Law Society's decision to close those complaint files to be reasonable, based on the evidence available to the Law Society at the time of closing, the Commissioner referred the files back for a review of significant fresh evidence received, pursuant to Subsection 7 (1) of By-Law 11.

As in previous years, the Commissioner and his Counsel together with Counsel to the Executive Director have continued to work together to resolve issues prior to the review meetings, including discussing the circumstances in which information provided by the licensee to the Law Society may be shared with the complainant during the review meeting process.

[5] There was a ninth file reviewed in 2016. However, the decision referring the file back to the Law Society was not rendered to the Law Society until 2017 and is not captured in Figure 1 (1) above.

Results of Reviews Conducted in 2015

Figure 1 (2) - Review Results 2015

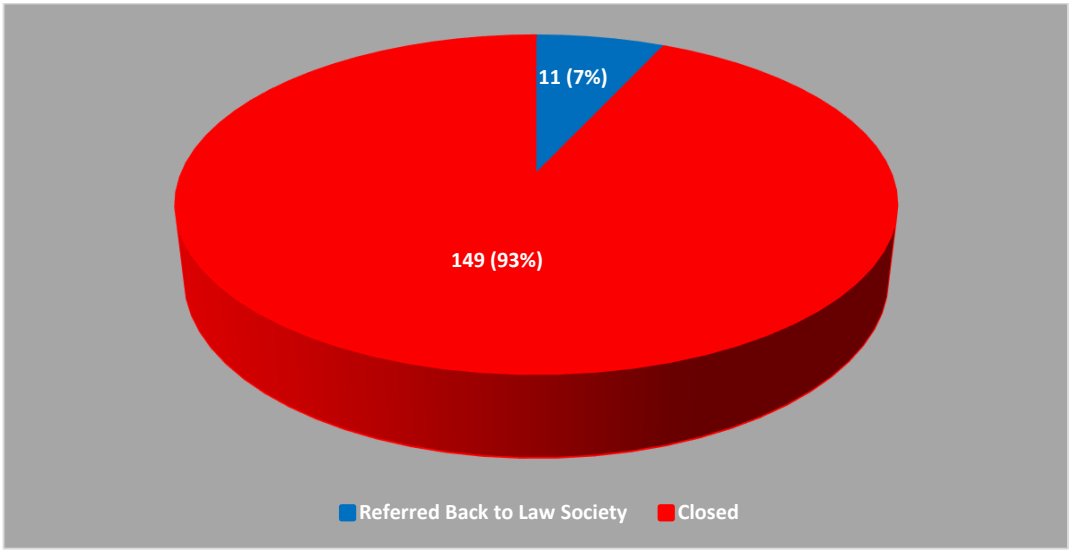


Figure 1 (2), above, reflects the results of the 160 decisions rendered by the Commissioner for the 2015 year.

Of the 160 files reviewed in 2015, 11 files (7%) were referred back to the Law Society. In each of these files, the Commissioner did not find the Law Society's decision to close the file to be reasonable and recommended further action pursuant to subsection 7 (2) (b) of By-Law 11. In three files, not depicted in Figure 1 (2), above, the Commissioner was satisfied that the decision to close was reasonable but sent the matter back after identifying Law Society practice and process issues.

Results of Reviews Conducted in 2014

Figure 1 (3) – Review Results 2014

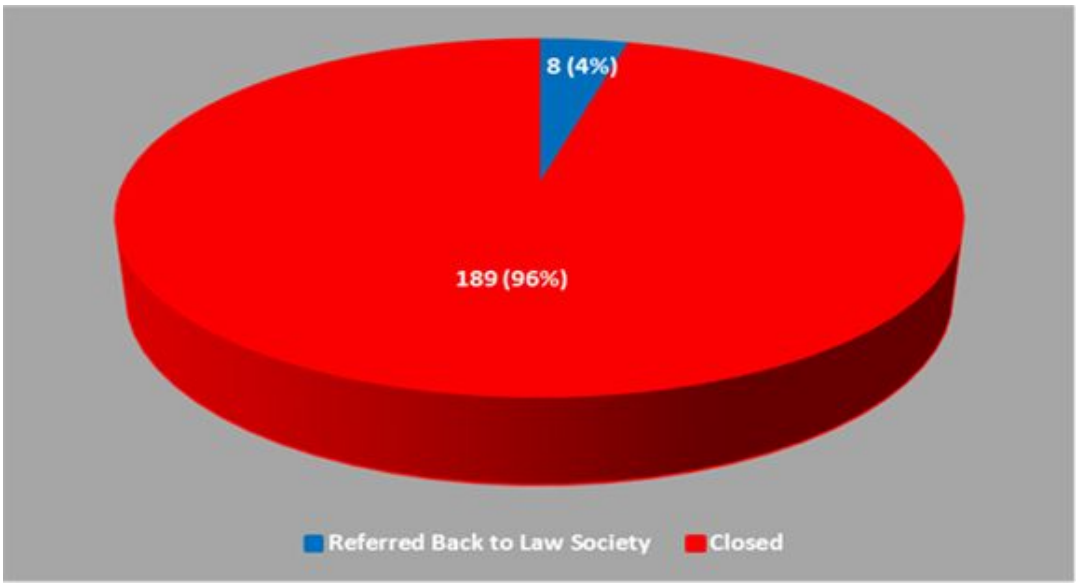
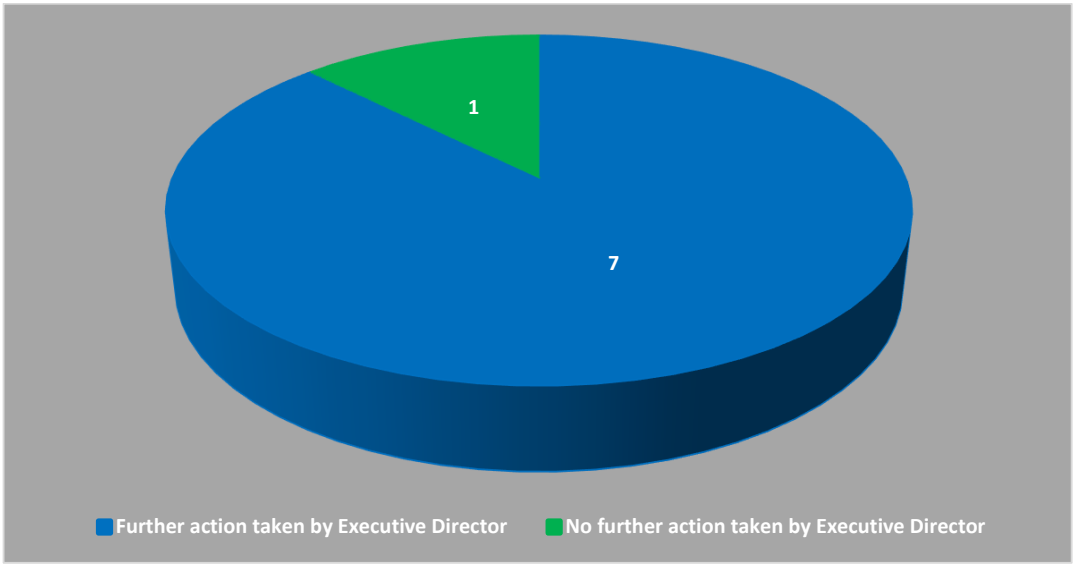


Figure 1 (3), above, reflects the results of the 197 decisions rendered by the Commissioner for the 2014 year.

During 2014, of the 197 decisions rendered, six files (3%) were referred back to the Law Society, pursuant to subsection 7 (2) (b) of By-Law 11, with a recommendation for further action. In two files (1%), while the Commissioner found the Law Society's decision to close to be reasonable, he referred the files back to the Law Society on the basis of significant fresh evidence received, pursuant to subsection 7 (1) of By-Law 11. In one file the Commissioner was satisfied that the decision to close was reasonable but sent the matter back due to concerns regarding the conduct of the law firm where the individual licensee who was the subject of the complaint practised.

Executive Director's Response to Files Referred Back to the Law Society in 2016

Figure 2 (1) – Executive Director's Response to Files Referred Back in 2016



In 2016, as depicted in figure 2 (1), above, eight files were referred back by the Commissioner to the Law Society pursuant to subsection 7 (2) (b) of By-Law 11, with recommendations for further action, or pursuant to subsection 7 (1) of By-Law 11, based on the receipt of significant fresh evidence. The Executive Director agreed to take action on the recommendations made by the Commissioner in seven of those files and declined to take further action on one file.

Executive Director's Response to Files Referred Back to the Law Society in 2015

Figure 2 (2) – Executive Director's Response to Files Referred Back in 2015

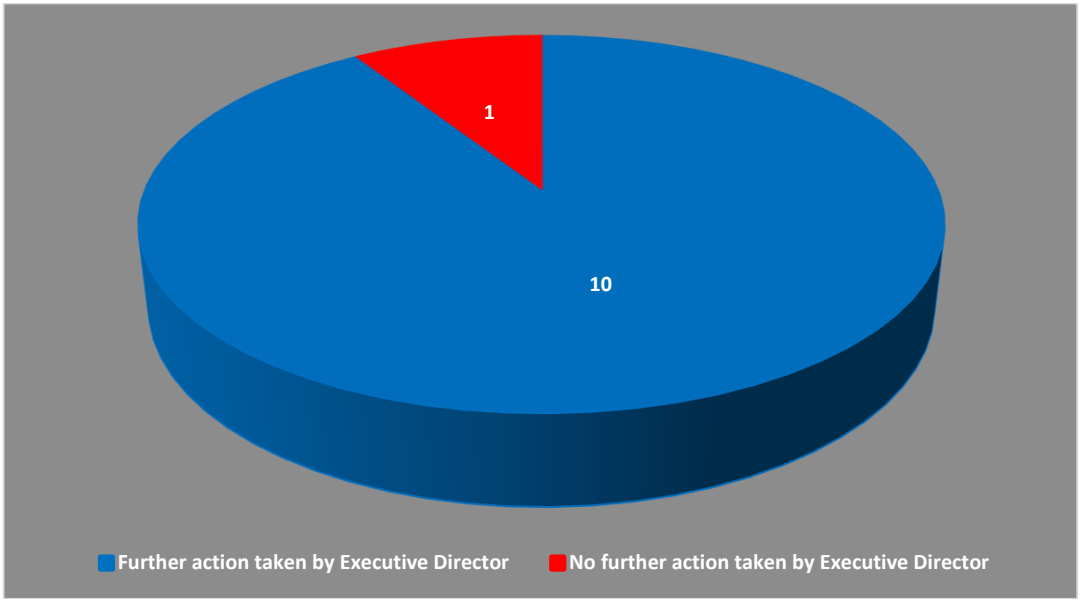


Figure 2 (2), above, reflects the Law Society's response to the 11 files that were referred back by the Commissioner in 2015. Each of these 11 files were referred back pursuant to subsection 7 (2) (b) of By-Law 11, with a recommendation for further action. The Executive Director agreed to take further action on 10 of these files and declined to take any further action on one file.

Executive Director's Response to Files Referred Back to the Law Society in 2014

Figure 2 (3) – Executive Director's Response to Files Referred Back in 2014

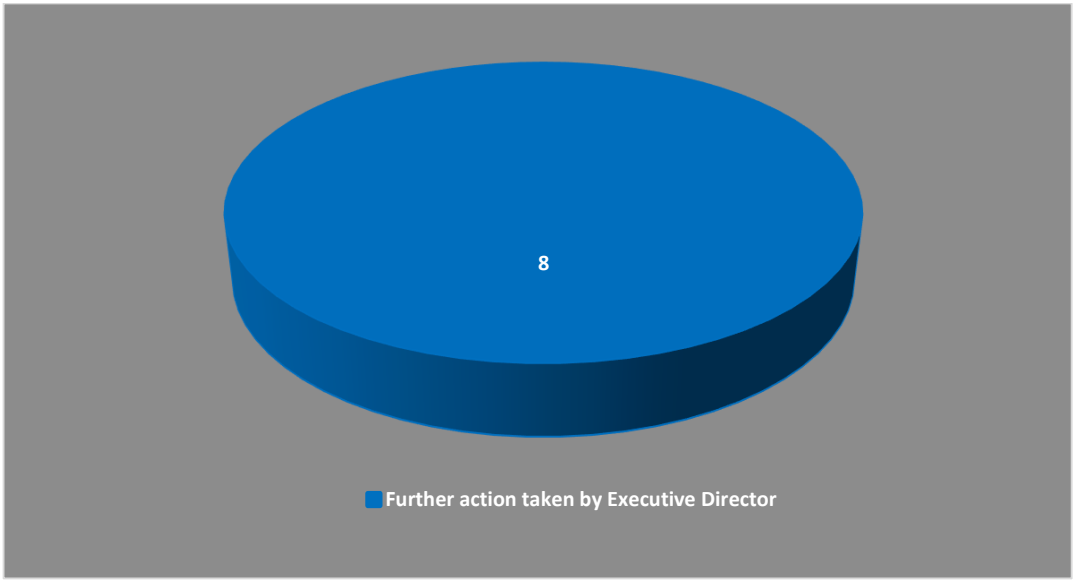


Figure 2 (3), above, reflects the Law Society's response to the eight files referred back by the Commissioner in 2014 with recommendations for further action, pursuant to subsection 7 (2) (b) of By-Law 11, or pursuant to subsection 7 (1) of By-Law 11, based on the receipt of fresh evidence. All eight recommendations of the Commissioner were accepted by the Executive Director.

F. <u>Age Tracking of Files Closed in 2016</u>

In this Report we have provided statistical data regarding the average time it takes to advance a file through the CRC process, in the 2016, 2015 and 2014 calendar years.

The tables below compare the aging of files from the date a request for review is received in the Commissioner's office to the date a file is closed. In-person and teleconference reviews are compared with in-writing reviews for each of 2016, 2015 and 2014.

In-Person and Teleconference Reviews

In 2016, 97 reviews were completed using either the in-person or teleconference meeting format. By comparison, in 2015, 102 reviews were completed through in-person meetings and teleconferences and, in 2014, 148 of the reviews were completed using the in-person or teleconference meeting format.

Average Age	2016 (days)	2015 (days)	2014 (days)
Average age from the receipt of the request to the date the Commissioner's decision was released	**374**	**319**	**230**
(a) Average age from the date the request for a review was received to the date the Professional Regulation Division (PRD) was notified of the request	6	3	5
(b) Average age from the date that PRD was notified of the request to the date the document books were received in the Office of the Commissioner	200	126	111
(c) Average age from the date the document books were received to the date the review meeting was first scheduled	12	23	11
(d) Average age from the date the review meeting was first scheduled to the date the review meeting was held	87	90	70
(e) Average age from the date the review meeting was held to the date the Commissioner 's decision was released	69	76	33

Median Age	2016 (days)	2015 (days)	2014 (days)
Median age from the receipt of the request to the date the Commissioner's decision was released	**366**	**303**	**224**
(a) Median age from the date the request for a review was received to the date PRD was notified of the request	1	2	1
(b) Median age from the date that PRD was notified of the request to the date the document books were received in the Office of the Commissioner	195	121	96
(c) Median age from the date the document books were received to the date the review meeting was first scheduled	1	7	2
(d) Median age from the date the review meeting was first scheduled to the date the review meeting was held	89	78	58
(e) Median age from the date the review meeting was held to the date the Commissioner's decision was released	71	72	34

In-Writing Reviews

In 2016, 46 reviews were completed based on the written materials. By comparison, 58 reviews were completed based on written materials in 2015 and 40 reviews were completed based on written material in 2014.

Average Age	2016 (days)	2015 (days)	2014 (days)
Average age from the receipt of the request to the date the Commissioner's decision was released	**410**	**327**	**213**
(a) Average age from the date the request for review was received to the date PRD was notified of the request	6	7	12
(b) Average age from the date that PRD was notified of the request to the date the document books were received in the Commissioner's office	202	128	99
(c) Average age from the date the document books were received to the date the Commissioner 's decision was released	202	194	101

Median Age	**2016 (days)**	**2015 (days)**	**2014 (days)**
Median age from the receipt of the request to the date the Commissioner's decision was released	**358**	**320**	**195**
(a) Median age from the date the request for review was received to the date PRD was notified of the request	1	3	1
(b) Median age from the date that PRD was notified of the request to the date the document books were received in the Commissioner's office	193	123	96
(c) Median age from the date the document books were received to the date the Commissioner's decision was released	154	193	94

No Jurisdiction Files

In 2016, 62 files were closed on the basis that the Commissioner did not have the jurisdiction to review the file. The average and median age from receipt of the request to review to the date the complainant was notified of the lack of jurisdiction was four days.

In 2015, 66 files were closed on the basis that the Commissioner did not have the jurisdiction to review the file. The average age from receipt of the request to review to the date the complainant was notified of the lack of jurisdiction was six days, and the median age was four days.

In 2014, 63 files were closed on the basis that the Commissioner did not have the jurisdiction to review the file. The average age from receipt of the request to review to the date the complainant was notified of the lack of jurisdiction was five days, and the median age was nine days.

Active Inventory as of December 31, 2016

There were 212 files in the CRC's active inventory as of December 31, 2016, with the following status:

- Review dates had been scheduled in 2017 for 83 files.
- The CRC was awaiting review materials in 82 files from the Law Society.
- Nine files were being held in abeyance.
- 38 decisions on files reviewed in 2016 were pending.

G. Observations and Recommendations

The work we perform at the CRC remains both challenging and rewarding.

While we have seen a decrease year over year in the number of requests for review, perhaps partially attributable to the work of the PRD in better managing the processing of complaints, the level of complexity of the files we receive for review has increased considerably. Anecdotally, we are seeing more files involving multiple issues and licensees, a greater number of complainants who are extremely disillusioned with the legal profession and the legal services they have received from licensees, and an increased level of frustration and confusion from complainants regarding the transparency of the PRD's complaints process.

We have met these challenges head-on and I am extremely proud of the dedication and professionalism exhibited by the staff of the CRC in performing our vital public service role.

An in-person or teleconference meeting with the Commissioner is often a complainant's first and only opportunity to express their concerns to a human being and many of the complainants with whom we meet often report how thankful they are to finally have a chance to be heard. A review conducted in-person or by teleconference enables the complainant to tell their story, vent and/or ask questions about the Law Society's process and the outcome of the investigation. These meeting formats also allow the Commissioner to discuss issues that the complainant may not fully understand, including the difference between issues of negligence and professional misconduct, the Law Society's limited jurisdiction to deal with fee issues and the nature of the fee assessment process.

Regardless of the format selected for review, I can say with confidence that each request is approached with an independent and impartial mindset and a genuine interest in ensuring that the complainant has been thoroughly heard and the Law Society's investigation carefully considered.

Outreach with Professional Regulation

My role as Commissioner has provided me with the opportunity to engage in a productive ongoing dialogue with the Executive Director regarding systemic concerns and suggestions for improving the Law Society's investigation process. Over the course of 2016, I have had the privilege of working with both Ms. Lesley Cameron and Ms. Karen Manarin. Both Ms. Cameron and Ms. Manarin have been receptive to my feedback, embraced my recommendations and welcomed discussion on finding ways to improve the Law Society's practices and procedures, particularly with regard to improving transparency.

Recommendations

- **Encourage greater transparency and communication regarding the investigation process**

In the 2015 Annual Report, I suggested that the Law Society could do more to keep complainants informed about important aspects of the investigation process and developments that take place during the course of an investigation. While I have seen some improvement, this area remains a big concern. Better and more regularized communication of investigation timelines (including investigation stages, completion targets and status updates) and processes and procedures (including evidence gathering techniques and internal file transfer protocols) would serve to increase transparency, build trust and credibility between complainants and the Law Society, and foster a more customer-centered experience.

- **Provide the public with more responsive information resources**

We often hear from complainants who are unclear about the Law Society's regulatory framework. Many are self-represented litigants who do not know where to turn when faced with a regulatory issue involving a licensee. While some information is available on the Law Society's website, many complainants are not adequately informed and some of the information sought is not easily conveyed in written format.

The Law Society should consider making available additional information resources to provide enhanced general information to the public about the complaint process, the Law Society's jurisdiction to investigate a complaint (including the difference between and possible intersection of professional misconduct and negligence), and the investigation process (including how the Law Society gathers evidence and the evidentiary burden on the complainant to establish an allegation of misconduct).

A more informed public may lead to a reduction in the number of complaints filed with the Law Society.

- **Consider the use of the Commissioner's complaints resolution function**

As discussed above, By-Law 11 provides the Commissioner with two distinct functions: the complaints resolution and complaints review functions. Section 9 (1) sets out parameters for the discretionary referral of a complaint by the Law Society for attempted resolution. However, to date, the Commissioner has only been called upon to perform the complaints review function. There are times when it is clear that a complainant is seeking a resolution to their complaint that would lend itself to a mediation process involving the licensee and complainant. I would recommend the early identification of files that may be suitable for mediation and the development of a clear process for referral.

Having so recommended, I am mindful that there are a number of outstanding issues that must first be addressed (including establishing a process to deal with potential conflicts) prior to utilizing the resolution function. In particular, if the resolution function is exercised but does not result in a resolution of the complainant's issues, and the file then proceeds to an investigation, is the complainant still entitled to have the matter reviewed by the Commissioner? And, if the complainant is entitled to request a review in those circumstances, who would act as the Commissioner during the review process?

Impact of PRD Reorganization

The Law Society's PRD is in the midst of a reorganization. To date, it is unclear how the reorganization of the PRD will impact the role of the CRC regarding the eligibility of files for review.

Traditionally, those files closed by the Intake Department have not been eligible for review by the Commissioner. As discussed earlier in this Report, in accordance with subsection 4 (1) of By-Law 11, files in which the regulatory issues have not been considered on their merits are viewed to be beyond the Commissioner's jurisdiction. However, the process to be used in the new "Intake and Resolution Department," particularly in the resolution stream, will include obtaining oral or written representations from the licensee. Arguably, all files closed in the Intake and Resolution Department and, in particular, those in which the licensee's representations have been obtained, may be eligible for review, on the basis that "the merits of the complaint have been considered" within the meaning of subsection 4 (1) of By-Law 11.

Based on this analysis, I would recommend that the implications of the reorganization described above on the requirements of By-Law 11 be explored.