

TAB 3
Report to Convocation
October 1, 2021

Professional Regulation Committee

Committee Members

Megan Shortreed (Chair)

Michelle Lomazzo (Vice-Chair)

Andrew Spurgeon (Vice-Chair)

Gerard Charette

Etienne Esquega

Julian Falconer

Jacqueline Horvat

C. Scott Marshall

Geneviève Painchaud

Jonathan Rosenthal

Quinn Ross

Nicholas Wright

Purpose of Report: Decision

Prepared by the Policy Division
Matthew Wylie (416-947-3953)

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Law Society
of Ontario

Barreau
de l'Ontario

Tab 3.1

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Updates to Form 9D

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Authored By:

Matthew Wylie
mwylie@lso.ca

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Motion

That Convocation approve the Motion at Tab 3.1.1, which amends Form 9D, Investment Authority, to update and correct an error.¹

Context

A. Form 9D

Lawyers who act for or receive money from a lender in a private mortgage transaction are required to have their client complete Form 9D, *Investment Authority*.

Form 9D requires that the client provide information about the transaction as a means of evidencing that they are making an informed investment decision. The Form was initially adopted by Convocation as one of a number of measures in response to an increase in claims to the Compensation Fund related to lawyer “mortgage brokering”, including transactions where the solicitor was alleged to have failed to disclose to their lender client the basic aspects of the transaction.

Form 9D is a prescribed form pursuant to subsection 24(9) of By-Law 9.

The current Form 9D includes a Disclosure statement, which states:

I (or we) acknowledge being advised by you as my (or our) lawyer that you do not have any direct or indirect interest in the borrower (or borrowers). (Specify yes or no and indicate the date on which the lawyer advised you that he or she has no direct or indirect interest in the borrower or borrowers.)

Below the disclosure, there is the additional statement (the “Statement”), which provides:

(If the lawyer has an interest in the borrower or borrowers, he or she is unable to act for you on this loan (Rule 3.4-31 of the Rules of Professional Conduct)).

The Statement has two issues:

1. It references a rule (3.4-31), which is no longer in use; and
2. Its conclusion, that a lawyer with an interest in the borrower or borrowers is unable to act on a loan, is incorrect.

Because Form 9D is part of By-Law 9, amending the form to correct this inconsistency requires approval by Convocation.

¹ A copy of Form 9D, Investment Authority, is [available on the Law Society's website](#).

The reference to Rule 3.4.31 appears to have arisen through an oversight when amendments to Rule 3.4 were approved by Convocation in May, 2016.

The Statement, that a lawyer cannot act for a lender client if the lawyer has an interest in the borrower(s), however, is incorrect. In fact, certain rules contemplate circumstances where a lawyer is able to act for a lender, despite having an interest in the borrower.

For instance, while a lawyer may not be able to directly borrow from an investor client, or create an entity by which to do so indirectly, a lawyer does appear to be able to act for an investor client to arrange a loan to a corporation, syndicate or partnership (a “corporation etc.”) in which the lawyer has an interest. For instance, Rule 3.4-29, paragraph (iv) contemplates a circumstance under which a lawyer or the lawyer’s spouse has a direct or indirect “substantial” interest in a corporation etc. and provides that the lawyer must require that a client lending to that corporation etc. receive independent legal representation.

By specifying that independent legal representation is needed where the lawyer or their spouse’s direct or indirect interest is “substantial”, the Rule allows that a lawyer or their spouse might have a “insubstantial interest” in a corporation etc., and the lawyer could still act for the lender client with out a requiring that they receive independent legal representation.

Similarly, under Rule 3.4-33.1, a lawyer may hold syndicated mortgages or loans for investor clients in circumstances where the lawyer owns less than five per cent of any class of shares in the borrower, or has a larger interest if the investor client is provided with certain disclosures.²

Recommendation

The Committee considered possible options to amend Form 9D to correct this issue. Ultimately, the Committee determined that the preferred approach was to remove the statement, and amend the disclosure to require that the client:

- be advised whether the lawyer has a direct or indirect interest in the borrower;
- be provided with details of the interest in writing, in circumstances where the lawyer has a direct or indirect interest in the borrower; and
- in those circumstances, be provided with an explanation by the lawyer about how their direct or indirect interest in the borrower is permitted under the *Rules of Professional Conduct*, including the Transactions with Clients rules.

² A completed reporting letter on the transaction, a trust declaration signed by the person in whose name the mortgage or any security instrument is registered, and a copy of the duplicate registered mortgage or security instrument.

This option was preferred as it requires that the lawyer provide a clear explanation, which will result in better communication between the client and their lawyer.

The Motion also includes the following two additional amendments, which are intended to update the Form:

1. The “note to lawyer” at the beginning of the Form includes a statement that “this form may be entered on a word processor”.

It is recommended that this statement be removed as it is antiquated and no longer necessary.

2. The Form includes two warnings, one of which notes that any loss the client may suffer on the mortgage investment will not be insured under the lawyer’s professional liability policy if the lawyer has acted as a mortgage broker or has helped to arrange it. That statement is followed by a footnote, which references and quotes clause (g) of Part III of LAWPRO’s *Professional Liability Insurance Policy for Lawyers*.

The wording of clause (g) has changed. Therefore, it is recommended that this note be amended to use the current language in the policy.

Next Steps

If the Motion at Tab 3.1.1 is adopted by Convocation, Form 9D will be amended as set out.

LAW SOCIETY OF ONTARIO
BY-LAWS MADE UNDER
SUBSECTIONS 62 (0.1) AND (1) OF THE LAW SOCIETY ACT
BY-LAW 9
[FINANCIAL TRANSACTIONS AND RECORDS]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON OCTOBER 1, 2021

MOVED BY MEGAN SHORTREED

SECONDED BY MICHELLE LOMAZZO

THAT By-Law 9 [Financial Transactions and Records], in force immediately before this motion is moved, be amended as follows:

1. The “Note to lawyer” at the beginning of the English version of Form 9D is amended by deleting “This form may be entered on a word processor.”

2. Paragraph C. 1 of the English version of Form 9D is deleted and the following substituted:

1. You as my (*our*) lawyer has advised me (*us*) that:

(a) You do not have any direct or indirect interest in the borrower.

or

(b) You have or intend to have a direct or indirect interest in the borrower, details of which have been provided to me (*us*) in writing. You have explained to me (*us*) how your direct or indirect interest in the borrower is permitted under the *Rules of Professional Conduct*, including the Transactions with Clients rules.

(Specify (a) or (b). If (a) is selected, indicate the date on which the lawyer advised you that they have no direct or indirect interest in the borrower. If (b) is selected, append all relevant documents, including a certificate or waiver of independent legal advice where required, to this Form.)

3. The footnote (“*”) to paragraph 2 of the “Warning” that follows paragraph C. 1 of the English version of Form 9D is deleted and the following substituted:

**(Pursuant to clause (g) of Part III of the Professional Liability Insurance Policy for Lawyers, the policy does not apply “to any CLAIM in any way relating to or arising out of an INSURED acting as a MORTGAGE*

BROKER, or to any CLAIM in any way relating to or arising out of circumstances in which an INSURED provided before July 1, 2008, PROFESSIONAL SERVICES in conjunction therewith".)

4. The “Note à l’avocat/l’avocate” at the beginning of the French version of Form 9D is amended by deleting “Le formulaire peut être informatisé.”

5. Paragraph C. 1 of the French version of Form 9D is deleted and the following substituted:

1. Vous, en votre qualité d’avocat, m’avez/nous avez déclaré :

a) que vous n’avez aucun intérêt direct ou indirect dans les affaires de l’emprunteur/l’emprunteuse.

ou

b) que vous avez ou avez l’intention d’avoir un intérêt direct ou indirect dans les affaires de l’emprunteur/l’emprunteuse, dont vous m’avez/nous avez remis les détails par écrit. Vous m’avez/nous avez expliqué en quoi votre intérêt direct ou indirect dans les affaires de l’emprunteur/l’emprunteuse est permis en vertu du *Code de déontologie*, notamment des règles portant sur les opérations avec les clients.

(Préciser a) ou b). Si a) est sélectionné, indiquer la date à laquelle l’avocat/l’avocate vous a informé qu’il/elle n’avait aucun intérêt direct ou indirect dans les affaires de l’emprunteur/l’emprunteuse. Si b) est sélectionné, joindre au présent formulaire tous les documents pertinents, y compris un certificat ou une renonciation à des conseils juridiques indépendants le cas échéant.)

6. The footnote (“*”) to paragraph 2 of the “Mise en garde” that follows paragraph C. 1 of the French version of Form 9D is deleted and the following substituted:

**(Aux termes de l’alinéa g) de la partie III de la police d’assurance responsabilité civile professionnelle des avocats, est exclue « toute RÉCLAMATION se rapportant de quelque manière que ce soit aux activités d’un ASSURÉ à titre de COURTIER EN HYPOTHÈQUES, ou découlant de celles-ci, ou toute RÉCLAMATION se rapportant de quelque manière que ce soit aux circonstances dans lesquelles un ASSURÉ a fourni avant le 1^{er} juillet 2008 des SERVICES PROFESSIONNELS conjointement avec ce qui précède, ou découlant de ces circonstances.)*