

Competence Task Force Submissions: Organizations

1. Aird Berlis LLP
2. Association des juristes d'expression française de l'Ontario
3. Bennett Jones LLP
4. Canadian Association for Legal Ethics
5. Canadian Defence Lawyers
6. Canadian Environmental Law Association
7. County Carleton Law Association
8. Federation of Asian Canadian Lawyers
9. Federation of Ontario Law Associations
10. Immigration Refugee Board of Canada
11. Indigenous Advisory Group
12. Equity Advisory Group
13. LawPRO
14. McCarthy Tétrault
15. McMillian LLP
16. Ontario Bar Association
17. Osgoode Professional Development
18. Roundtable of Diversity Associations
19. Ryerson Law Practice Program
20. South Asian Bar Association
21. The Advocates Society
22. Thunder Bay Law Association
23. Toronto Lawyers Association
24. Women's Law Association of Ontario

MEMORANDUM

TO: LSO Competence Task Force

FROM: Neil Guthrie
Director, Professional Development, Research & Knowledge Management

DATE: 15 November 2021

RE: Recommendations for lawyer competence

Aird & Berlis LLP makes the following recommendations for your consideration.

1. **More flexibility.** As an alternative to the current CPD requirement for continuing competence, we believe the Task Force should consider a more flexible approach by allowing licensees to identify their own learning needs and then create and execute their own unique professional development plans. Other jurisdictions (England and Wales, other Canadian provinces) have taken this approach.
2. **Mandated professionalism.** Even if the Law Society chooses to adopt a more flexible approach to CPD, we believe that licensees would continue to benefit from mandated Professionalism requirements including Ethics, Practice Management and EDI.
3. **Communication skills.** Given that the Law Society data indicate lawyer-client communication or miscommunication remain a key cause of complaints and malpractice claims, we believe that the Law Society should consider broadening the definition of Professionalism to include a wide range of communication and related lawyering skills similar to those outlined by the BC Law Society.
4. **Annual requirement.** The CPD requirement should remain an annual requirement.
5. **Caps.** In line with more flexibility, the 6-hour caps on viewing videos alone and on teaching should be permanently removed. These are both important and valuable ways in which many lawyers learn, and we see no good reason for those restrictions.

Le 30 novembre 2021

JUSTICE
EN FRANÇAIS
EN ONTARIO

Groupe d'étude sur la compétence

Barreau de l'Ontario
Osgoode Hall
130, rue Queen Ouest
Toronto (Ontario) M5H 2N6

Objet : Commentaires de l'AJEFO – Cadre de compétence du Barreau de l'Ontario

Madame, Monsieur,

Nous tenons à vous faire part de nos commentaires, de la part des membres de l'Association des juristes d'expression française de l'Ontario (AJEFO), dans le cadre de la consultation menée par le Barreau de l'Ontario à la suite du rapport du Groupe d'étude sur la compétence, intitulé *Renouveler le cadre de compétence continue du Barreau*. L'AJEFO est le plus grand regroupement de professionnels francophones de la justice en Ontario, avec plus de 1 100 membres à son actif.

L'AJEFO tient d'abord à souligner l'importance de la formation professionnelle continue obligatoire, y compris les heures de formation professionnelle portant sur la promotion de l'égalité, de la diversité et de l'inclusion, qui permettent d'aborder les obstacles auxquels font face les juristes racisé(e)s ou membres de groupes en quête d'équité. Il est également important que la formation professionnelle continue soit fondée sur des exigences de compétence qui tiennent compte des besoins, des objectifs et des points de vue des clients quant à ce qui constitue une prestation compétente des services juridiques. Dans cette optique, il est important de garder à l'esprit les différences de parcours, les différences culturelles et les différences sur le plan du revenu et des capacités qui peuvent avoir une incidence sur la communication avec les clients et sur la façon de fournir des conseils et des services juridiques compétents. Plus particulièrement, il est essentiel de reconnaître le rôle fondamental de la langue et de la culture pour les francophones en situation minoritaire de la province.

À titre de membre du Groupe consultatif en matière d'équité, l'AJEFO appuie les recommandations du groupe dans le cadre de cette consultation. Les recommandations sont les suivantes : (1) la mise

en place des compétences interculturelles autochtones conformément aux appels à l'action n° 27 de la Commission de vérité et réconciliation et (2) le maintien et l'amélioration des exigences de FPC pour les heures de l'égalité, de la diversité et de l'inclusion avec un accent particulier sur la lutte contre le racisme anti-noir. La lettre du Groupe consultatif en matière d'équité établit nombreux motifs en faveur des recommandations qui méritent d'être étudiés et considérés. L'AJEFO souhaite que ces formations soient disponibles **en français** et en anglais.

Nous voulons aussi insister sur l'importance de l'offre adéquate de services de perfectionnement professionnel en français qui soient disponibles sans délai (ex. Ligne d'aide à la gestion de la pratique, Réseau d'encadrement de la pratique et autres ressources de soutien à la pratique, y compris les services à la Grande bibliothèque et le Réseau de renseignements et de ressources juridiques). Certains de nos membres nous rapportent qu'ils préfèrent parfois demander le service de la Ligne d'aide à la gestion de la pratique en anglais, puisqu'ils auront un service plus rapide que s'ils le demandent en français. De plus, les services à la Grande bibliothèque ne sont pas activement offerts en français. Nous constatons d'ailleurs que la page « demandez à un bibliothécaire de droit » est disponible en anglais seulement. L'AJEFO demande donc au Barreau d'assurer l'embauche de plus d'employé(e)s bilingues (ou de bénévoles bilingues, selon le cas) pour répondre à la demande de services en français.

L'aptitude des juristes à offrir des services compétents en français est aussi une priorité de l'AJEFO. D'ailleurs, les juristes ont des obligations linguistiques en vertu des règles 3.3-2A et B du Code de déontologie. Les règles précisent que le juriste doit informer son client de ses droits linguistiques et de son droit à utiliser la langue officielle de son choix (s'il y a lieu). Les règles précisent aussi que le juriste ne peut représenter le client que s'il a la compétence de le faire et ce, dans la langue choisie par le client. Dans ce cadre, l'AJEFO fait deux recommandations : (1) accroître la formation professionnelle offerte en français et (2) exiger que tous les juristes participent à une formation professionnelle axée sur les droits linguistiques et les droits aux services en français. Cette dernière formation doit être offerte en français et **en anglais** afin que tous les juristes puissent informer un client le plus tôt que possible ou les référer selon le cas.

Dans ce même but, il serait souhaitable d'envisager la possibilité de créer une désignation de spécialiste agréé(e) pour garantir la compétence des avocats offrant des services en français. En effet, il est impossible pour l'instant de vérifier la compétence linguistique des membres du Barreau se déclarant capables d'offrir des services en français sur le Répertoire en ligne. L'AJEFO

souhaite contribuer à un meilleur encadrement des critères de compétence linguistique nécessaires à l'offre de services juridiques compétents en français.

Nous vous prions d'agréer, Madame, Monsieur, l'assurance de notre considération distinguée.

Sincères salutations,



M^e Marc Sauvé
Président de l'AJEFO

Competence Task Force

Law Society of Ontario
Osgoode Hall
130 Queen street West
Toronto (Ontario) M5H 2N6

Re: Comments from AJEFO – Competence Framework of the Law Society of Ontario

Dear Sir, Madam,

We would like to share comments on behalf of the members of the Association des juristes d'expression française de l'Ontario (AJEFO) on the consultation led by the Law Society of Ontario following the report of the Competence Task Force, entitled *Renewing the Law Society's Continuing Competence Framework*. The AJEFO is the largest group of francophone law professionals in Ontario, with over 1,100 members.

AJEFO would first like to emphasize the importance of mandatory continuing professional development, including professional development hours on promoting equality, diversity, and inclusion, which address the barriers faced by racialized lawyers or members of equity-seeking groups. It is also important that continuing professional development is based on competency requirements that consider the needs, objectives, and views of clients as to what constitutes competent delivery of legal services. In this regard, it is important to bear in mind the differences in background, culture, income, and ability that may affect communication with clients and the provision of competent legal advice and services. It is essential to recognize the fundamental role of language and culture for francophone minorities in the province.

As a member of the Equity Advisory Group, AJEFO supports the group's recommendations in this consultation. The recommendations are as follows: (1) the implementation of indigenous cross-cultural competencies in accordance with the Truth and Reconciliation Commission's Calls to Action #27 and (2) the maintenance and enhancement of CPD requirements for equality, diversity, and inclusion hours with a particular focus on combating anti-black racism. The Equity Advisory Group's letter provides many reasons for the recommendations that merit study and consideration. AJEFO would like to see this training available in **French** and English.

We also want to emphasize the importance of adequate provision of professional development services in French that are available without delay (e. g. Practice Management Helpline, Coach and Advisor Network and other practice support resources, including services at the Great Library and the Legal Information and Resource Network). Some of our members report that they sometimes prefer to request the Practice Management Helpline service in English, as they will receive faster service than if they request it in French. In addition, services at the Great Library are not actively offered in French. We note that the “Ask a Law Librarian” page is available in English only. AJEFO is therefore asking the Law Society to ensure that more bilingual employees (or bilingual volunteers, as the case may be) are hired to meet the demand for services in French.

The ability of lawyers to provide competent services in French is also a priority for AJEFO. Moreover, lawyers have linguistic obligations under Rules 3.3-2A and B of the Rules of Professional Conduct. The rules state that lawyers must inform their clients of their language rights and of their right to use the official language of their choice (if any). The rules also state that the lawyer may represent the client only if he or she is competent to do so, and in the language chosen by the client. In this context, AJEFO makes two recommendations: (1) to increase the amount of professional training offered in French and (2) to require that all lawyers participate in professional training focusing on language rights and rights to French-language services. The latter training must be offered in both French **and English** so that all lawyers can inform a client as soon as possible or refer them as appropriate.

For the same purpose, it would be desirable to consider the possibility of creating a certified specialist designation to guarantee the competence of lawyers offering services in French. It is currently impossible to verify the language skills of members of the Law Society who declare themselves capable of offering services in French on the online Directory. The AJEFO would like to contribute to a better framework for the language proficiency criteria necessary for the provision of competent legal services in French.

Regards.

Marc Sauvé
President of AJEFO

1400-85, rue Albert
Ottawa (Ontario) K1P
6A4T (613) 842-7462
F (613) 842-8389
bureau@ajefo.ca
www.ajefo.ca



Bennett Jones

MEMORANDUM

TO: LSO Competence Task Force
FROM: Bennett Jones LLP
DATE: November 12, 2021
RE: Call for Comments

Thank you for the opportunity to respond to the Law Society's Competence Task Force Report. Here are our comments. If you have any questions, please reach out to Christopher McKenna our Director of Junior Associate & Student Programs (Ontario) at mckennac@bennettjones.com or 416-777-5394.

1. **More Flexibility.** As an alternative to the current CPD requirement for continuing competence, we believe the Task Force should consider a more flexible approach by allowing licensees to identify their own learning needs and then create and execute their own unique professional development plan. Other jurisdictions (in England and Wales, and in Canada) have taken this approach.
2. **Mandated Professionalism.** Even if the Law Society chooses to adopt a more flexible approach to CPD, we believe that licensees would continue to benefit from mandated Professionalism requirements including Ethics, Practice Management and EDI.
3. **Communication Skills.** Given that the Law Society data indicate lawyer-client communication or miscommunication remain a key cause of complaints and malpractice claims, we believe that the Law Society should consider broadening the definition of Professionalism to include a wide range of communication and related lawyering skills similar to those outlined by the BC Law Society.
4. **Annual Requirement.** The CPD requirement should remain an annual requirement.
5. **Caps.** In line with more flexibility, the 6-hour caps on viewing videos alone and on teaching should be permanently removed. These are both important and valuable ways in which many lawyers learn and we see no good reason for these restrictions.

November 25, 2021

Competence Task Force
Law Society of Ontario
130 Queen Street West
Toronto, Ontario
M5H 2N5

Dear Task Force members,

The Canadian Association for Legal Ethics/Association canadienne pour l'éthique juridique (CALE/ACEJ) is a federal not-for-profit corporation whose members are academics, lawyers, and regulators interested in topics related to ethics and professionalism in the Canadian legal profession. CALE/ACEJ seeks to encourage and facilitate debate on issues of ethics and professionalism in Canada and to increase awareness about those issues in the public, the profession and the judiciary.

Your June 2021 report “Renewing the Law Society’s Continuing Competence Framework” invites comments on the wide range of questions it raises. The Board of CALE/ACEJ appreciates this opportunity to provide the following thoughts relating to continuing professional development (CPD) and technological competence.

A. CPD

Your report states that “The Law Society may wish to consider a reduced emphasis on mandatory CPD, or alternatively, more focussed requirements tied to licensee practice areas, experience levels, or identified areas of regulatory risk” (page 3). In our view, mandatory CPD remains of vital importance for the legal profession and it would be an unfortunate and retrograde step to eliminate mandatory CPD.

Requiring licensees to engage in continuing learning has several diverse objectives. These go well beyond reducing instances of professional malpractice and complaints against licensees. They include improving the quality of legal services, promoting public confidence in the legal profession and the administration of justice, building community among legal professionals and fostering important initiatives relating to equality, diversity, inclusion, access to justice and intercultural competence (including Indigenous intercultural competence). Critically, several of these objectives are notoriously difficult to measure with data and evidence. The benefits of any continuing learning requirement cannot be assessed in whole or in significant part by looking, for example, at changes to annual complaints per licensee or the volume of tribunal proceedings. Moreover, the reasons that malpractice claims or complaints against licensees may vary from year to year are complex. It is difficult to contemplate a study protocol that could meaningfully measure the degree to which CPD is a causal factor in any changes.

Université d'Ottawa
Faculté de droit
Section de common law

University of Ottawa
Faculty of Law
Common Law Section

613-562-5794
613-562-5124

57 Louis-Pasteur
Ottawa ON K1N 6N5
Canada

uOttawa.ca

Further, even if the relationship between CPD and complaints or claims could be isolated, this would be a highly imperfect measure of how CPD impacts the ethical and effective delivery of legal services. Claims and complaints tend to represent legal professionals who have fallen below a minimum standard of professional behaviour. But CPD has the possibility of making good legal professionals even better, with tangible benefits accruing to their clients and the public more broadly. The degree to which CPD can lead to these types of improvements is not captured by counting complaints and claims from year to year.

For the reasons set out in the above paragraphs, the lack of “hard evidence” (page 22) of benefits noted in your report is not a meaningful basis on which to reconsider the Law Society’s current approach to CPD.¹

We continue to agree with the statement in the February 25, 2010, committee report to Convocation wherein the introduction of the CPD requirement was recommended: “continuing professional development is a positive tool that benefits lawyers and paralegals and is an essential component of the commitment they make to the public to practice law or provide legal services competently and ethically.”²

We also note that the new *Ethical Principles for Judges* strongly encourages judges to engage in ongoing professional education. The reason why it is not mandated is because the *Ethical Principles for Judges* is not a binding code. In our opinion, it would be incongruous for the Law Society to backtrack on CPD at the very moment when it is being endorsed and embraced by the Canadian judiciary.

The specific content of any CPD requirement implemented by the Law Society is, of course, important. CALE/ACEJ has eight submissions on this point:

1. The Law Society should retain a mandatory (as opposed to a suggested or otherwise voluntary) CPD requirement. As the Supreme Court of Canada acknowledged in *Green v Law Society of Manitoba*, 2017 SCC 20, “as a practical matter, an unenforced educational standard is not a standard at all, but is merely aspirational” (para. 46). The objectives of continuing learning for licensees are too important to be operationalized or achieved through aspirational measures.

¹ We note that a similar argument was made by some at the time that the requirement was first being considered and the LSO Committees studying the matter concluded: “The Committees agree that there does not appear to be any empirical evidence of a *direct* link between a CPD requirement and reduced claims. They have considered whether this fact is fatal to introducing a requirement, but in the end they disagree that this resolves the issue. The impact of much of formal education on behaviours, abilities, and performance cannot truly be quantified and yet few dispute its importance.” (Professional Development & Competence Committee and Paralegal Standing Committee, *Joint Report to Convocation* (October 29, 2009) at para 30).

² Professional Development & Competence Committee and Paralegal Standing Committee, *Joint Paralegal Standing and Professional Development and Competence Committee Report* (February 25, 2010).

2. The Law Society should retain a minimum hours requirement. The current requirement for licensees to complete 12 CPD hours each year (including at least three professionalism hours) appears entirely reasonable and strikes an appropriate balance of requiring meaningful engagement and avoiding unduly onerous commitments of time or creating differential barriers. We note that 12 hours is consistent with comparators in Canada and the United States. Most other Canadian law societies have implemented a 12 hour requirement. In the United States, “on average, lawyers in mandatory CLE jurisdictions are required to certify completion of 12.2 hours per year.”³ The current requirement is not unduly onerous (especially given the highly flexible approach to eligible activities) and also meaningfully assists the valuable objectives of CPD, as discussed above. The “very high” compliance rate with the current Law Society CPD requirement, as noted in the Task Force’s report, reflects that licensees are overwhelmingly able to complete the allotted hours without facing undue barriers.
3. The Law Society should retain the specific requirement for three hours of Professionalism CPD, including one professionalism hour each year relating to equality, diversity, and inclusion topics. As stated in a 2009 report to Convocation about introducing a mandatory CPD requirement:

In most jurisdictions that require CPD there is a specific requirement that a portion of the hours be devoted to a basket of topics that include ethics, professionalism and/or practice management. This approach reflects a common understanding of the importance of these issues. Traditionally, CLE programming has not included these topics in substantive law courses and CLE attendees have not tended to sign up for programs focusing only on these issues.

Yet, there is evidence to suggest that lawyers and paralegals require additional exposure to learning in both ethics and professionalism and in practice management. For example, complaints and LawPRO statistics both regularly reveal that the primary areas of concern relate more to client and practice management than they do to weakness in knowledge of substantive law. Further, ethical issues are becoming increasingly complex and require continuous consideration both generally and in relation to the specific practice context within which lawyers and paralegals work.⁴

³ Rima Sirota, “Can Continuing Legal Education Pass the Test? Empirical Lessons From the Medical World” *Notre Dame JL Ethics & Pub Pol'y* (forthcoming 2022) at 6, available online: <https://scholarship.law.georgetown.edu/facpub/2386/>.

⁴ Professional Development & Competence Committee and Paralegal Standing Committee, *Joint Report to Convocation* (October 29, 2009) at paras 71-72.

We agree with the sentiments expressed in these paragraphs. All members of the CALE/ACEJ Board either currently teach professional responsibility to law students or have done so in the past. They have also, collectively, produced a significant and wide-ranging body of scholarship in the area of legal ethics and regularly participate in professionalism-related CPD events for lawyers and judges across Canada and internationally. From this position of expertise and experience, we cannot overstate the importance that the Law Society's CPD requirement continue to include a specific requirement for Professionalism hours.

The law governing lawyers is not stagnant. It is continually evolving as a result of developments in the common law (such as, for example, jurisprudence in the area of conflicts of interest or lawyer negligence) and changes to law society rules and regulations. The environment in which lawyers practice is also continually evolving and, in some cases, this also impacts lawyers' professionalism obligations. The increased use of technological tools in the practice of law is a prime example.

In order to do their jobs effectively and ethically, lawyers need to keep abreast of developments in the law governing lawyers and to their broader practice contexts. Mandating that lawyers complete a portion of their mandatory CPD hours in the area of professionalism is one means to help lawyers do this.

Further, it is essential to retain the requirement that one professionalism hour each year relate to equality, diversity, and inclusion (EDI) topics. The Law Society's public interest mandate is entirely consistent with, and indeed demands, attention to substantive equality in the legal profession and in the delivery of legal services. Individually, lawyers have an obligation to "encourage public respect for and try to improve the administration of justice" which is understood to include "a basic commitment to the concept of equal justice for all within an open, ordered, and impartial system" (r. 5.6-1 and Commentary [2] thereto). Lawyers are also recognized to have "a special responsibility to respect the requirements of human rights laws in force in Ontario" and are expected "to respect the dignity and worth of all persons and to treat all persons equally without discrimination" (r. 6.3.1-1 and Commentary [1] thereto). The area of EDI is one in which people often "don't know what they don't know" and is therefore not well suited to relying on individuals to self-identify gaps in their knowledge and to remediate them on their own. Requiring lawyers to complete one hour of EDI professionalism CPD each year is an important, pro-active step that the Law Society can take to help lawyers meet their professional obligations in relation to EDI. It also signals to the public that the Law Society is committed to the goals of substantive equality as part of its public interest mandate.

4. The Law Society should add a requirement that licensees complete Indigenous intercultural competence training. As the Law Society is aware, the Truth and Reconciliation Commission of Canada's Call to Action 27 addresses the need for law societies "to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations" and states that this will require that lawyers engage in "skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism."⁵

Following the June 2015 release of Truth and Reconciliation Commission of Canada's Executive Summary of Final Report, then-Treasurer of the Law Society, Janet Minor, stated that the Law Society was "committed to enhancing cultural competency within the legal professions and look[s] forward to further discussions about next steps, so that lawyers and paralegals have a greater understanding of Canada's history and the relationship between the Crown and the Canadian government and the First Nation, Métis and Inuit people."⁶

We question whether the Law Society has taken sufficient steps to realize this commitment. We do note and applaud the Law Society's partnership with The Advocates' Society and the Indigenous Bar Association that led to the publication of the impressive *Guide for Lawyers Working with Indigenous People* in 2018 as well as its other Indigenous initiatives, as described on its website.⁷ However, we also observe, as the Law Society is no doubt aware, that two other Canadian law societies have already instituted mandatory Indigenous intercultural competence training for lawyers but Ontario has not yet done so.⁸

⁵ Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), online: trc.ca/assets/pdf/Calls_to_Action_English2.pdf.

⁶ The Law Society of Upper Canada, *Law Society Public Statement on Truth and Reconciliation Commission of Canada's Executive Summary of Final Report* (2 June 2015), available online: <https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/r/rel/release-public-statement-trc.pdf>.

⁷ The Law Society of Ontario, "Indigenous Initiatives", online: <https://lso.ca/lawyers/practice-supports-and-resources/equity-supports-resources/indigenous-initiatives>.

⁸ The Law Society of British Columbia, "Law Society adopts Indigenous intercultural competency training" (6 December 2019), online: <https://www.lawsociety.bc.ca/about-us/news-and-publications/news/2019/law-society-adopts-indigenous-intercultural-compet/>; and the Law Society of Alberta, "President's Message: Introduction of Mandatory Indigenous Cultural Competency Training" (6 October 2020), online: <https://www.lawsociety.ab.ca/presidents-message-introduction-of-mandatory-indigenous-cultural-competency-training/>.

Although not directed to law societies specifically, Chief Justice Robert Bauman's recent statements at the Canadian Institute for the Administration of Justice conference on Indigenous peoples and the law are apposite, in our view, to the question of mandatory Indigenous intercultural competence training:

Now is time to do what we should have done when we arrived here, as uninvited guests, and demonstrate that we care enough to discover and learn and to act responsibly within the matrix of Indigenous customs, traditions, and protocols. Now is the time for humility.⁹

It is incumbent on the Law Society to demonstrate leadership in this area, including by introducing mandatory Indigenous intercultural competence training for Ontario licensees.

5. The Law Society should consider requiring licensees to prepare an annual professional development plan. This type of measure has already been adopted in other jurisdictions. For example, in Nova Scotia all lawyers are required to "prepare and implement a written plan for continuing professional development."¹⁰ The Law Society of Alberta has also implemented a requirement that lawyers "prepare and make a record of a plan for his or her continuing professional development."¹¹ As noted by Jordan Furlong in his report on lawyer competence prepared for the Law Society of Alberta, one limitation of a CPD approach focussed on the completion of a minimum amount of hours of learning "is that it is an input measure: It measures only what the lawyer did, not whether the lawyer received or achieved any result or outcome of value."¹² Furlong further notes that requiring lawyers to engage in self-reflection has the additional

⁹ Zena Olijnyk, "Recognition of Indigenous legal systems crucial to reconciliation, delegates to conference told" (18 November 2021), Canadian Lawyer, online: <https://www.canadianlawyermag.com/practice-areas/esg/recognition-of-indigenous-legal-systems-crucial-to-reconciliation-delegates-to-conference-told/361854>.

¹⁰ Nova Scotia Barristers' Society, Regulations Made pursuant to the *Legal Profession Act*, SNS 2004, c.28 at s 8.3.8.

¹¹ Law Society of Alberta, *The Rules of the Law Society of Alberta*, at r 67.2. Note that the Law Society of Alberta has suspended its mandatory Continuing Professional Development (CPD) filing requirement until 2023 to allow it to study and develop a new competency model, which will include a new CPD planning tool (Law Society of Alberta, "CPD Filing Requirement Suspended for Additional Year" (1 October 2021), online: <https://www.lawsociety.ab.ca/cpd-filing-requirement-suspended-for-additional-year/>).

¹² Jordan Furlong, *Lawyer Licensing and Competence in Alberta: Analysis and Recommendations* (November 2020) at 51, online: https://documents.lawsociety.ab.ca/wp-content/uploads/2020/12/08212906/LawyerLicensingandCompetenceinAlbertaReport_Designed.pdf.

advantage of “recogniz[ing] that the responsibility for professional development lies with each individual lawyer, who is in the best position to analyze their own learning needs and identify their required learning outcomes.”¹³ In their 2017 article for the Canadian Bar Review, Yanneck Ostaficzuk and Suzanne Gagnon similarly observe:

Taking inspiration from the changing standards governing the continuing development of professional competencies and promoted best practices, it is possible to suggest that the reflective approach has the advantage of making each professional’s mandatory continuing professional development meaningful, insofar as it is based more on the foundations of modern adult-learning theory.¹⁴

To be clear, CALE/ACEJ does not take the position that the Law Society’s current requirement for licensees to complete 12 CPD hours each year should be *replaced* with a requirement that licensees prepare an annual learning plan. The Law Society should consider the potential benefits of requiring licensees to develop a learning plan *in conjunction* with completing their required hours. On this point, CALE/ACEJ notes the observations about reflective learning approaches in a recent report prepared for Legal Services Board in England and Wales: “[w]hilst this kind of approach has a solid foundation in adult learning theory, concerns have been expressed in some quarters that without a mandatory hours requirement, lawyers will not engage in a meaningful way with self-reflection.”¹⁵ We also note that in Nova Scotia lawyers are expected to complete a minimum of 12 hours of CPD each year *in addition to* preparing and implementing a written CPD plan.

In considering this type of supplementary requirement, we recommend that the Law Society take note of Furlong’s recommendation that the Law Society of Alberta, as part of its continuing lawyer learning measures, “oversee the development of an online training program to help lawyers understand what ‘learning self-assessment’ is and how it works, why the law society is requiring self-assessment, and how a lawyer can assess their own

¹³ *Ibid* at 53.

¹⁴ Yanneck Ostaficzuk & Suzanne Gagnon, “Professional Excellence Through Competency Development” (2017) 95(2) Can Bar Rev 123 at 134.

¹⁵ Hook Tangaza, *International Approaches to Ongoing Competence: A report for the LSB* (March 2021), online: <https://legalservicesboard.org.uk/wp-content/uploads/2021/05/International-approaches-to-Ongoing-Competence.pdf>.

learning needs and choose learning outcomes related to those needs.”¹⁶ Developing a learning plan is not likely to be something with which most licensees are familiar and, as such, law society guidance would be an important part of introducing this supplementary requirement.

6. Beyond requiring licensees to prepare an annual professional development plan, the Law Society should consider how knowledge and techniques from adult learning experts could be better deployed in the context of its mandatory CPD requirement. One criticism that has been levelled against mandatory CPD is that it often involves “an expert speaker presenting material to a largely passive audience” (also known more colloquially as a “sage on the stage” approach).¹⁷ This format is not always conducive to optimal learning.

To be sure, the current flexibility of the eligibility requirements of the CPD requirements permits a broader range of activities beyond lectures to passive audience. There are also great ongoing examples of more interactive learning opportunities in Ontario for licensees.¹⁸ Moreover, we do not want to be misunderstood as taking the position that lecture-based learning is never effective or appropriate. However, there is more that could be done to ensure that optimal learning is taking place when licensees complete their required CPD hours. For example, the Law Society could study best practices in adult learning, consider how these might be integrated in the context of mandatory CPD and provide the resulting findings to those who wish to provide CPD to licensees. The Law Society could also potentially use such findings to improve their own CPD offerings. As noted in a recent article by Rima Sirota, “the imperative to study and improve CLE is plain.”¹⁹ Although Sirota was addressing an American context, this imperative holds true in Canada as well.

¹⁶ Jordan Furlong, *Lawyer Licensing and Competence in Alberta: Analysis and Recommendations* (November 2020) at 6, online: https://documents.lawsociety.ab.ca/wp-content/uploads/2020/12/08212906/LawyerLicensingandCompetenceinAlbertaReport_Designed.pdf.

¹⁷ Rima Sirota, “Can Continuing Legal Education Pass the Test? Empirical Lessons From the Medical World” *Notre Dame JL Ethics & Pub Pol'y* (forthcoming 2022) at 9, available online: <https://scholarship.law.georgetown.edu/facpub/2386/>. See also Deborah L. Rhode and Lucy Ricca, “Revisiting MCLE: Is Compulsory Passive Learning Building Better Lawyers?” (2014) 22(2) *Professional Lawyer* 2.

¹⁸ See eg Roz Bahrami, “Evidence-Based Simulated Client Initiative Just One Example of OPD’s Interactive, Skills-Based Offerings” (21 September 2021), online: <https://osgoodepd.ca/blog/evidence-based-simulated-client-initiative-just-one-example-of-opds-interactive-skills-based-offerings/>.

¹⁹ Rima Sirota, “Can Continuing Legal Education Pass the Test? Empirical Lessons From the Medical World” *Notre Dame JL Ethics & Pub Pol'y* (forthcoming 2022) at 4.

7. The Law Society should investigate whether its current CPD requirement creates burdens on certain sectors or populations in the legal profession and, if so, consider how it might remediate them. CPD opportunities are not equally accessible to all licensees in at least two respects. First, some courses and events that provide CPD opportunities are too expensive for some licensees to attend. Second, some but not all licensees have free and easy access to CPD opportunities that are directly provided by their workplace.

The impact of such limitations is addressed to a significant extent through the flexible approach that the Law Society takes to eligible activities and the significant provision of free CPD programming in Ontario, including that provided by the Law Society. That said, it is not clear that licensees, as a group, are sufficiently aware of free CPD opportunities and always find them easy to access. We have observed, for example, discussions in which licensees have expressed that they did not know that the Law Society provided free CPD resources. The Law Society should consider what additional efforts it might make to let licensees know about the free CPD resources it provides. The Law Society could also potentially play a useful role in helping to inform licensees about opportunities for free CPD that are offered by other providers. For example, the Law Society could maintain a “free CPD” webpage where events and opportunities could be posted.

Additionally, it is also not clear that all licensees can easily find free or low-cost resources that are relevant to their area of practice. It might be helpful for the Law Society to conduct a review of CPD offerings available to licensees and consider whether there are any gaps. If gaps are identified, the Law Society could develop its own programming to fill the void or reach out to other stakeholders and organizations to encourage them to develop that programming.

8. The Law Society should not institute differential CPD requirements for more experienced lawyers. One recommendation that Furlong submitted to the Law Society of Alberta is the development of “an optional alternative system of continuing learning for lawyers with more than 20 years’ experience in the profession.”²⁰ On this topic, Furlong’s report notes, among other things, that “the frequency of problems with and complaints about lawyers that require regulatory intervention decreases noticeably among lawyers with 20 years or more at the bar” and comments “traditional CLE programs are often of little interest to these lawyers and do little to help them maintain and improve their own competence.”²¹ In our view, in Ontario the current flexibility with respect to eligible activities already permits a sufficient range

²⁰ Jordan Furlong, *Lawyer Licensing and Competence in Alberta: Analysis and Recommendations* (November 2020) at 60, online: https://documents.lawsociety.ab.ca/wp-content/uploads/2020/12/08212906/LawyerLicensingandCompetenceinAlbertaReport_Designed.pdf.

²¹ *Ibid* at 59-60.

of learning opportunities that are relevant and appropriate to more experienced lawyers. We also reiterate our previous points that (1) the objectives of continuing learning requirements go well beyond reducing malpractice claims and law society complaints and (2) many areas of competence – such as those involving professional ethics and technology – are constantly evolving. For these reasons, we do not believe that more experienced lawyers should be subject to reduced or otherwise differentiated CPD requirements.

B. Technological Competence

Your June 2021 report raises the question of “whether technological competence should be encouraged or mandated” (page 24). CALE/ACEJ submits that the Law Society should immediately adopt the Federation of Law Societies of Canada’s Commentaries [4A] and [4B] to *Model Code of Professional Conduct* rule 3.1-2 addressing lawyer competence, which were added in October 2019.

These Commentaries require lawyers to “develop an understanding of, and ability to use, technology relevant to the nature and area of the lawyer’s practice and responsibilities” and specify that “the required level of technological competence will depend upon whether the use or understanding of technology is necessary to the nature and area of the lawyer’s practice and responsibilities and whether the relevant technology is reasonably available to the lawyer.” In large part, this new language simply makes explicit what is implied in existing rules. However, rendering licensees’ obligation of technological competence explicit is important: it ensures that the legal professions are clearly aware of their obligations and signals that the Law Society takes technological competence seriously. As I have noted previously about these Commentaries:

This is not a controversial change. The commentary is timely and modest. It is also not without precedent. In 2012, the American Bar Association amended its Model Rules of Professional Conduct to add similar commentary, and a duty of technological competence has now been adopted by 37 states. The sky hasn’t fallen there, and it won’t fall here, if law societies adopt the Model Code commentary. What adopting the commentary will do, however, is signal to lawyers (and dare I say the law schools that train them?) that understanding and using technology is a necessary part of modern legal practice. Lawyers don’t have to be coders or understand the complexities of artificial intelligence, but they can’t ignore the risks and benefits that technology can bring to their practice.²²

²² Amy Salyzyn, “It’s Finally (Sort Of) Here!: A Duty of Technological Competence for Canadian Lawyers”, *Slaw.ca* (26 November 2019), online: <http://www.slaw.ca/2019/11/26/its-finally-sort-of-here-a-duty-of-technological-competence-for-canadian-lawyers/>.

Since those observations at least five other Canadian law societies have adopted the new Model Code commentaries on technological competence. We note that, in November 2019, the Law Society's Technology Taskforce stated that the Law Society should consider "amending professional conduct rules and introducing a rule requiring technological competence (potentially including harmonizing standards with those of other jurisdictions)."²³ It has been over two years since that statement and over two years since the Model Code was amended. The Law Society should delay no longer and should join other Canadian law societies in adopting the new technological competence commentary.

Your report also observes that:

The Law Society offers some resources in [the area of technological competence], including Technology Practice Tips, a series of podcasts that provide a convenient way to learn about the latest technology issues, and a technology guideline that sets out professional responsibility considerations when using technology, but more attention should be paid to this area.

The above statement echoes comments made in the November 2019 Law Society Technology Taskforce Report wherein it was acknowledged that "licensees have made clear their interest in receiving more guidance about technology usage, and that the Law Society can be doing more to provide these resources."²⁴

We agree that the Law Society should pay more attention to helping licensees improve their technological competence. More specifically, we recommend that the Law Society consider implementing the following additional supports for licensees:

- **Checklists and guidelines:** To assist licensees in both assessing and using legal technology, the Law Society could publish additional, more detailed, checklists and guidelines. An example of how this could be done in a way that could be broadly applicable to licensees can be found in *Legal Ethics in a Digital Context*, a document Florian Martin-Bariteau and I prepared for the Canadian Bar Association.²⁵
- **Technology "ethics opinions":** Although ethics opinions are not generally issued by Canadian law societies, American state bars regularly use ethics

²³ Law Society of Ontario, Technology Taskforce, *Update Report* (29 November 2019) at 38.

²⁴ *Ibid.*

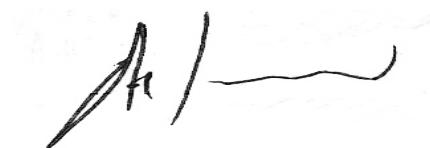
²⁵ Amy Salyzyn and Florian Martin-Bariteau, *Legal Ethics in a Digital Context* (prepared for the Canadian Bar Association Ethics and Professional Responsibility Sub-Committee), online: <https://www.cba.org/getattachment/Sections/Ethics-and-Professional-Responsibility-Committee/Resources/Resources/Legal-Ethics-in-a-Digital-Context/LegalEthicsInaDigitalContext.pdf>.

opinions as a means of providing detailed advice to lawyers about specific topics, including legal technology.²⁶ It would be very helpful for the Law Society to start publishing technology ethics opinions for licensees.

- **Increased technology CPD programming:** In recent years, Canadian law societies have increased their CPD programming in relation to legal technology generally. The Law Society should develop more programming, in conjunction with preparing a needs and gap analysis that identifies areas where licensees lack knowledge in relation to technology use.

We appreciate the opportunity to provide submissions to the Task Force on this issue and look forward to seeing the results of the consultation.

If CALE/ACEJ can provide any further information or answer any questions about the feedback provided in this letter, please do not hesitate to be in touch.



Amy Salyzyn
President, Canadian Association for Legal Ethics

²⁶ For further background, see Amy Salyzyn, “Time for Technology Ethics Opinions in Canada?” *Slaw.ca* (17 August 2017), online: <http://www.slaw.ca/2017/08/17/time-for-technology-ethics-opinions-in-canada/>. For an example of a specific legal technology opinion, see The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2015-193 (an opinion which details how “attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of electronically stored information [“ESI”]).

CANADIAN DEFENCE LAWYERS

November 17, 2021

LSO Competence Task Force

RE: LSO Competence Task Force Report :
Renewing the Law Society's Continuing Competency Framework
Response to Call for Comment – Canadian Defence Lawyers

Canadian Defence Lawyers (CDL) is grateful for the opportunity to respond to the Call for Comment issued by the Law Society of Ontario's Competency Task Force regarding the LSO's Competency Framework.

Founded in 1996, CDL is a national bar association with members from coast to coast. We are the voice of the Canadian civil defence bar, drawing from the experience of trial and appellate counsel appearing on behalf of insurers, insured defendants, corporations, and institutional litigants.

In preparation of this response, CDL canvassed its members through a nation-wide survey. The survey and follow-up communications obtained answers to specific questions raised by the Taskforce as well as general comments and recommendations from our broad base of members.

To assist the Taskforce, we have summarized the input received from our members under each specific question below. If you require expansion on any of the submissions and responses to specific questions please feel free to contact us.

Questions and Answers – CDL Competency Questionnaire

1. In what province(s) and/or territory(ies) do you practice?

- 88.9% of the respondents practice in Ontario
- 3.7% of the respondents practice in British Columbia
- 3.7% of the respondents practice in Manitoba
- 3.7% of the respondents practice in New Brunswick

2. Have you heard of the Law Society of Ontario Competency Task Force report "Renewing the Law Society's Continuing Competence Framework"?

- 42% of the respondents answered "Yes"
- 58% of the respondents answered "No"

3. Do you agree with the definition of “competency” as the “habitual and simultaneous application” of “knowledge, skills, abilities, behaviours, judgement and values”?

Do you agree with the working definition of competence?

63% of the respondents answered “Yes” (agreed)

37% of the respondents answered “No” (disagreed)

Examples of suggested changes to the definition are as follows:

- changes with respect to the specific words “habitual” and “simultaneous”
- use of terminology which is more “straight forward” and “plain” in its meaning
- create a definition which could be better understood by the public

4. Are you observing any competency issues among lawyers in practice? If so, what competency issues have you observed?

81% of the respondents answered “Yes”

19% of respondents answered “No”

Examples of the competency issues observed by our members are as follows:

- overworked lawyers cannot keep up with their file counts
- lack of understanding of basic practice and procedure of civil litigation, lack of understanding and knowledge of the Rules of Civil Procedure
- failure to understand and apply legal concepts – lawyers act on "autopilot" and basing their legal advice on conventional wisdom, rather than an actual understanding of the law
- lack of basic practice management issues - filing of correspondence, docketing activity on the file, using a calendaring system, etc.
- lack of proper mentoring for junior lawyers

5. Do you have any ideas (whether simple or complex, or in between) on how to improve the competency or practice skills of lawyers in practice?

63% of the respondents answered “Yes”

37% of the respondents answered “No”

Examples of the suggestions as to how to improve the competency and practice skills of lawyers are as follows:

- better focus on ground-level knowledge through better mentoring, training, and ongoing competencies
- reformat the articling system to focus more on substantive aspects of law
- greater emphasis on CLE of specific practice skills and civility in civil practice with more hands-on experience
- change the professionalism component to require education in specific issues depending on experience/year of call
- require lawyers to train and demonstrate competency in their specific practice area

6. How would you define a robust competency framework? Do you agree that a robust competency framework (1) addresses areas of risk, (2) accounts for flexibility in practice, (3) is cost effective and achievable, (4) accommodates fundamental future changes, and (5) is client centered?

89% of the respondents answered "Yes"

11% of the respondents answered "No"

Examples of potential suggested changes to the framework were as follows:

- rely on LawPro data to concentrate on historically high areas of solicitor negligence in the competency framework
- remove cost effectiveness as a requirement for the framework

7. Typical tools to improve competency include continued professional education requirements (i.e. CPD/CLE), practice management helpline, coach and advisor network, practice assessment programs such as audits, certified specialist programs, and legal information and research support. Do you find these tools beneficial to your practice?

78% of the respondents answered "Yes"

22% of the respondents answered "No"

Examples of comments as to the effectiveness of the tools are as follows:

- CPD requirements are extremely helpful tools to improve competency for all lawyers, regardless of practice area, level of experience, or size of firm
- audits are disruptive to practice and do not assist in improving competency
- the current tools are all essential and must remain mandatory
- the mandatory CPD requirements should include more flexibility
- voluntary organizations such as the OBA, CDL etc are enormously valuable for gaining and maintaining competency

8. Does your province or territory have competency tools, beyond those listed at Question 7 that you believe are effective at improving lawyer competency?

81% of the respondents answered "No"

19% of the respondents answered "Yes"

9. Does your Province or Territory have continuing education requirements. If so, should changes to continuing professional education requirements be a focus for the task force (for example, to further narrow or focus education to a given practice area or specialty)?

100% of the respondents answered "Yes"

Examples of the suggested focus of the task force are as follows:

- institute a national CLE on areas of competence in given practice areas which qualify uniformly for all provincial / territorial law societies (National Credits) while also encouraging CLE in local practice nuances which may be peculiar to a given province or region (Regional Credits)
- narrow CLE requirements to specific practice areas
- institute education and assistance on practice transitioning from senior to younger lawyers
- periodic testing in a lawyer's specific practice area

10. What is the ideal time to complete the continuing professional education requirements?

78% of the respondents answered "Annually"

11% of the respondents answered "Bi-Annually"

11% of the respondents answered "Other"

11. Do you believe continuing professional education requirements should be changed?

55.5% of the respondents answered "No"

44.5% of the respondents answered "Yes"

Examples of the types of changes suggested are as follows:

- focus CLE on a lawyer's identified area of practice
- increased focus on practice management
- include a requirement for hours dedicated to your practice area
- include requirements for technology

12. Should continuing professional education requirements include the improvement of technological competence?

88% of the respondents answered "Yes"

12% of the respondents answered "No"

13. Are there basic technological skills that all lawyers should be mandated by their law society to have?

63% of the respondents answered "Yes"

37% of the respondents answered "No"

Examples of the technology skills the respondents suggested should be mandatory are as follows:

- communication by email
- ability to work with PDF documents
- basic skills for remote hearings
- sufficient knowledge of government filing systems (criminal/civil/family litigation and corporate/real estate) to instruct staff in serving client needs
- use and management of platforms utilized by courts for hearings (i.e. Caselines)
- basic understanding of privacy obligations and cyber security practices to avoid privacy breaches

14. Do you believe the continuing professional education requirements to be beneficial to your practice or would you eliminate this mandate?

85% of the respondents answered “Yes”

15% of the respondents answered “No”

Of the respondents who answered “No”, the majority suggested some form of mentorship as a replacement.

15. As an alternative to continued professional education, would you prefer to conduct self-assessments identifying training needs to then create and execute your own professional development plan?

7% of the respondents answered “Yes”

93% of the respondents answered “No”

16. If you are a sole practitioner and/or small firm, is there any support or tools that may assist in enhancing competency that may not otherwise be available due to the restrictions of operating as a small firm. For example, substantive courses, law firm management, and/or financial record keeping. If so, please describe.

68% of the respondents answered “No”

32% of the respondents answered “Yes”

Examples of the enhanced support suggestions for solo or small practitioners were as follows:

- help line to answer procedural and technology questions
- reduced cost CLE
- sufficient resources are in place already such as the Coach and Advisor Network

17. Should lawyers be required to complete a training course related to a set of core competencies such as practice management or client communications? If so, should the course be mandatory for all lawyers, new lawyers, lawyers in sole or small firm practice, or lawyers transitioning to sole practice?

Answer choices:	Yes – mandatory for all lawyers	48%
	Yes – mandatory for new lawyers only	41%
	Yes – mandatory for solo or small firm practice	4%
	No	7%

18. Should your law society require lawyers to enter into mentoring relationships?

48% of the respondents answered “Yes”

52% of the respondents answered “No”

19. Would you find peer assessments a useful tool for improving competency?

42% of the respondents answered "Yes"

58% of the respondents answered "No"

Examples of suggested responses as to how peer assessments could be completed:

- anonymously
- within a firm (if employed within a firm)
- if a sole practitioner based on year of call through mentorship program
- randomly, periodically and infrequently (once in a career absent an identified problem)

20. If you practice in Ontario, have you heard of the LSO Coach and Advisor Network?

52% of the respondents answered "Yes"

41% of the respondents answered "No"

7% of the respondents practice outside of Ontario

21. Have you been the subject of a practice assessment by the law society (e.g. practice reviews and/or audits)? If so, was it useful in improving competency?

19% of the respondents answered "Yes"

81% of the respondents answered "No"

Of those who answered yes, the following comments were provided as to the usefulness in improving competency:

- audits serve a purpose in identifying potential "blind spots"
- audits only address potential procedural issues and not substantive
- audits are helpful and instructive to improve and tweak our processes

22. If you practice in Ontario, do you find the frequency of practice assessments reasonable? If not, how should this change?

68% of the respondents answered "Yes"

24% of the respondents answered "No"

8% of the respondents practice outside of Ontario

Of note, the majority of respondents who answered "No" had no knowledge of the existence of practice assessments.

23. Does your province or territory provide a certified specialist program?

89% of the respondents answered "Yes"

11% of the respondents answered "No"

24. If you practice is in Ontario, should the certified specialist program remain as is or be modified? If modified, please explain.

67% of the respondents answered "It should remain as is"

26% of the respondents answered "It should be modified"

7% of the respondents practice outside of Ontario

Examples of how the respondents identified potential modification to the program are as follows:

- the areas of practice for which a specialty can and should be recognized should be expanded
- the program should be eliminated or made substantially more difficult/meaningful to achieve

25. Should a law society incentivize licensees to strive for excellence?

59% of the respondents answered "Yes"

41% of the respondents answered "No"

Examples of how the law society could incentive licensees are as follows:

- a national level core competency program contributed to by senior members from the various law societies and required by members of all law societies
- premium reductions in professional liability insurance based on maintaining competency in fields of practice
- offer incentives for lawyers who focus on and practice in one area, which should increase their knowledge and accordingly their competency level in that area of law

26. Are there any other ways to improve lawyer competencies or do you have any other comments on the issue of competency in the legal profession?

Examples of responses provided are as follows:

- strategies to improve competency should not be aimed towards only those in small or sole practice they should be implemented across the board to all lawyers
- the judiciary should confidentially be consulted and requested to report concerns on counsel competency
- the Law Society (Societies) need to focus on core competencies, and should be slow and careful when broadening the requirements put on individual lawyers and paralegals

Conclusions

The review undertaken by the Law Society's Competence Task Force will assist the LSO in providing a clear path for the enhancement of the post-licensure competence of lawyers and paralegals.

CDL as an organization supports the efforts of the LSO in its comprehensive review of the regulatory means required to ensure core competencies of the members of the LSO. CDL is committed to its ongoing role as a key stakeholder and provider of competency tools, including practice specific CLE and support to its members.

If you require any further information or clarification on the information contained within this response please do not hesitate to contact us.



Talaal Bond
President, Canadian Defence Lawyers



David Festeryga
Chair, CDL Public Policy Secretariat

Please enter your first and last name	Krystal-Anne Roussel
Email Address	krystal-anne@cela.ca
Please make a selection below	I am a lawyer
Are you representing an organization or association through your participation?	Yes
If you indicated 'Yes', please tell us which organization or association you are representing:	Canadian Environmental Law Association
What is the location of your workplace? If submitting on your own behalf, where do you reside?	Ontario

Working definition of competence

1. Do you agree with the working definition of competence? Are there any aspects of the definition that you would change?

Overall, we agree with the working definition of competence. However, we think it is critical that cultural competency also be included in this definition. The Truth and Reconciliation Commission's call to actions 27 and 28 focus on the importance of cultural competency training for lawyers and law students, and it is incumbent on the LSO to ensure this is built into the Continuing Competence Framework. Cultural competence is an essential skill in an increasingly diverse world. As a legal aid clinic, for example, CELA's lawyers work with clients from various backgrounds and cultures, and it is essential that we have the ability to relate to others comfortably, respectfully and productively.

Principles for an effective competence regime

2. Do you agree with the five principles for an effective competence regime set out below? Are there principles that should be included or omitted?

- a) Risk-based - Regulatory activities should ideally be designed to focus on addressing areas of greatest risk to the public based on known outcomes.
 - b) Flexible - Obligations should reflect the diverse array of practice areas, practice settings, geographies, practice stages, and other contextual factors that impact the professional circumstances of lawyers and paralegals.
 - c) Feasible - Competence requirements should be cost effective and achievable by the regulator and licensees alike and should not impose unreasonable burdens.
 - d) Forward-looking - The competence framework should be future-oriented in order to accommodate the fundamental changes taking place in the market for legal services.
 - e) Client-centred - Competence requirements should consider the client's needs, goals, and perspective on what constitutes the competent provision of legal services. This would include an awareness of differences in backgrounds, income levels, abilities and cultures that may impact communications with clients and the way in which legal advice and services are provided.
- Yes, we agree with the five principles for an effective competence regime.

Components of continuing competence framework

3. Do the components of the Law Society's current continuing competence framework listed below adhere to the five principles for an effective competence regime set out in question 2 (i.e., risk-based, flexible, feasible, forward-looking, client-centred)? If not, why not?

- a) CPD requirement and programs
- b) The Practice Management Helpline
- c) Coach and Advisor Network
- d) Practice assessment programs (practice reviews, spot audits, and practice audits)
- e) Certified Specialist Program
- f) Legal information and research supports (Great Library and LIRN)

Yes, the components of the Law Society's current continuing competence framework adhere to the five principles for an effective competence regime.

Renewing the Law Society's continuing competence framework

4.1. Should any, some or all of the key components of the competence regime set out in question 3 be modified, restructured or terminated? If so, how? Some examples are:

CPD

- a) Should the CPD requirement be changed to target the development and maintenance of certain competencies?**
 - b) Should the CPD requirement be tied to the licensee's practice area(s), experience level, or identified areas of risk?**
 - c) Should licensees complete their CPD requirement over the course of two calendar years rather than annually?**
 - d) Should CPD programs be more stringent or interactive to help ensure that licensees are engaged and learning?**
 - e) Should the CPD requirement remain as is, be enhanced, or be eliminated altogether?**
- f) As an alternative to the CPD requirement, should licensees be required to conduct a self-assessment to identify their learning and training needs and then create and execute their own unique professional development plan?**
- a) No, the CPD requirement should not be changed to target the development and maintenance of certain competencies. Often, these across-the-board requirements do not have relevance to the licensee's practice area and are not helpful in developing necessary competencies.
 - b) No, the CPD requirement should not be tied to the licensee's practice area(s), experience level, or identified areas of risk. It is more beneficial to retain flexibility so that people can choose things that are relevant to their substantive practice areas.
 - c) CELA would support the switch to allowing licensees to complete their CPD requirement over the course of two calendar years rather than annually.
 - d) No, CPD programs should not be more stringent or interactive. In particular, the flexibility to engage in pre-recorded CPD programs at times that work for individual licensees contributes to more positive mental health and increased ability to maintain proper work-life balance.
 - e) The CPD requirement should remain as is or be reduced.
- f) No, licensees should not be required to conduct a self-assessment to identify their learning and training needs and then create and execute their own unique professional development plan. This would be very time-consuming and would likely not be helpful in terms of professional development.**

4.2. Should any, some or all of the key components of the competence regime set out in question 3 be modified, restructured or terminated? If so, how? Some examples are:

Enhanced practice support and training

- g) Should the Law Society provide enhanced support for sole practitioners and small firms, such as courses on the business of law, law firm management and financial record-keeping?**
 - h) Should licensees be required to complete a training course related to a set of core competencies, such as practice management or client communications? If so, should the course be mandatory for:**
 - i. all licensees,
 - ii. new licensees,
 - iii. licensees in sole or small firm practice,
 - iv. licensees transitioning to sole practice,
- g) Only if these courses are optional, cost-effective or free. Otherwise, they will only further burden sole practitioners/small firms and inappropriately target equity-seeking groups with more mandatory requirements.
- h) No, the professionalism requirement is adequate and allows licensees the flexibility to choose additional CPD programs that relate most directly to their work. Additional core competencies, such as practice management and client communications, are adequately addressed in the bar admission exams.

4.3. Should any, some or all of the key components of the competence regime set out in question 3 be modified, restructured or terminated? If so, how? Some examples are:

Peer-based initiatives

- i) Should the Law Society require or encourage licensees to enter into a mentoring relationship, either as a mentor or mentee?**
 - j) Should the Law Society introduce peer assessments as a mechanism for improving competence? If so, how should they be structured?**
 - k) Are you aware of the Coach and Advisor Network? Have you participated in it and if so, did you find it helpful?**
- I) Should the Coach and Advisor Network remain as is, be enhanced, or be eliminated altogether?**
- i) The Law Society should encourage and allow licensees to enter into a mentoring relationship if they would like to. This should not be required of all licensees.
 - j) No, peer assessments are very time intensive and document heavy. There are already significant challenges to maintaining work-life balance in the legal profession and additional requirements will not help.
 - k) We are not aware of the Coach and Advisory Network.
 - l) We are not aware of the Coach and Advisory Network.

4.4. Should any, some or all of the key components of the competence regime set out in question 3 be modified, restructured or terminated? If so, how? Some examples are:

Practice assessments

m) Are you aware of practice assessments (i.e., practice reviews, spot audits, and practice audits)? Have you ever received one and if so, did you find it helpful?

n) Should the Law Society increase the number of practice assessments that it performs? If so, who should these additional practice assessments target?

o) Should the practice assessment program remain as is, be enhanced, or be eliminated altogether?

As a legal aid clinic, we have had quality assurance assessments and audits. In the Legal Aid context, we feel that these practices should remain as is. In particular, spot audits and practice audits are very helpful in terms of maintaining public trust and promoting high quality record keeping.

4.5. Should any, some or all of the key components of the competence regime set out in question 3 be modified, restructured or terminated? If so, how? Some examples are:

Certified Specialist Program

p) Are you aware of the Certified Specialist Program? Have you participated in it and if so, did you find it useful?

q) Should the Certified Specialist Program remain as is, be modified, or be eliminated altogether?

Yes, we have two certified specialists in the program, and they find it useful.

We feel that the program should remain but that it should be modified to reflect the variety of types of practice people maintain within the specialties. Currently, qualification for the specialist program focuses on hearing/court days and legal opinions. It would be helpful to include consideration of other activities such as law reform work and testifying in front of parliamentary committees.

4.6 Should any, some or all of the key components of the competence regime set out in question 3 be modified, restructured or terminated? If so, how? Some examples are:

Technological competence

r) Are there basic technological skills that the Law Society should require all licensees to have? If so, what are the skills and how should the Law Society verify or ensure that licensees have them?

s) In order to prepare licensees for the rapidly changing future, should the Law Society require or encourage licensees to take courses to enhance their technological competence?

No, we do not feel that there should be any more mandatory requirements. The LSO should maintain flexibility so that licensees can choose courses that are most well-suited to their individual needs and practice areas.

4.7. Should any, some or all of the key components of the competence regime set out in question 3 be modified, restructured or terminated? If so, how? Some examples are:

Encouraging excellence

t) Should the Law Society incentivize licensees to strive for excellence? If so, how?

We feel that continued awards programs are a good way to incentivize licensees to strive for excellence. When we've done work in the past to incentivize excellence in environmental protections, financial incentives and mandatory requirements have not been nearly as effective as the prestige of awards programs.

Additional aspects of competence regime

5. Is there anything else that should be included in the competence framework or that you would like to comment on with respect to continuing licensee competence?

We feel it is important to avoid overly onerous requirements that will disproportionately affect small firms and sole practitioners.



Ottawa Courthouse, Law Library | Palais de justice d'Ottawa, Bibliothèque de droit
2004 - 161 Elgin Street / Ottawa, Ontario K2P 2K1 | 2004 - 161, rue Elgin / Ottawa (Ontario) K2P 2K1

November 24, 2021

Law Society of Ontario
130 Queen Street West
Toronto, ON M5H 2N6

Dear Sidney Troister (Chair) and C. Scott Marshall (Vice-Chair), Competence Task Force,

Re: CCLA Response to the Law Society of Ontario's Report - Renewing the Law Society's Continuing Competence Framework

Thank you for engaging the public and the County of Carleton Law Association (“CCLA”) in consultations regarding the Law Society of Ontario’s (“LSO”) Competence Task Force. The CCLA is one of Ontario’s largest law associations, representing lawyers and paralegals in the Ottawa and Eastern Ontario legal community.

In preparing the following submissions, the CCLA solicited the opinions and views of its members in response to the LSO Report titled, “Renewing the Law Society’s Continuing Competency Framework” (“Report”). Our submissions follow the rubric of questions set out in the Report.

I. DEFINING COMPETENCE

The CCLA’s membership does not agree with the proposed definition of “Competence”, which it found to be vague.

In our view, the LSO’s definition of “Competence” should be as rigorous as that imposed by the common law in Ontario, as defined by the Court of Appeal of Ontario. In *Ristimaki v.*



Ottawa Courthouse, Law Library | Palais de justice d'Ottawa, Bibliothèque de droit
2004 - 161 Elgin Street / Ottawa, Ontario K2P 2K1 | 2004 - 161, rue Elgin / Ottawa (Ontario) K2P 2K1

Cooper, 2006 CanLII 12415 at para 59 (Ont. C.A.), the Court of Appeal summarized the standard of care applicable to lawyers in Ontario:

- (a) A solicitor **must bring reasonable care, skill, and knowledge** to the professional service which he or she has undertaken; see *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.), at 208;
- (b) For a solicitor who holds himself or herself out as having particular **expertise in a given area of the law, a higher standard of care applies**; see *Confederation Life Insurance Co. v. Shepherd, McKenzie, Plaxton, Little & Jenkins* (1992), 29 R.P.R. (2d) 271 (Ont. Gen. Div. [Commercial List]), varied on other grounds (1996), 88 O.A.C. 398 (Ont. C.A.); and,
- (c) A lawyer who does not adequately or diligently **protect the client's interests** will be found negligent: see Stephen M. Grant and Linda R. Rothstein, *Lawyers' Professional Liability*, 2nd ed. (Markham: Butterworths, 1998) at 23. (Emphases added.)

The CCLA respectfully submits that it would be improper for the LSO to impose a lower and more subjective standard of lawyer competence than that imposed by the common law. In other words, the same conduct cannot be compliant with LSO regulation while concurrently being negligent at law.

The CCLA states that a unified standard of legal competence must exist in Ontario as between the common law and the LSO's competency regime. The CCLA states that this necessarily requires that the LSO's definition of lawyer competence mirror that of the common law as set out above.

The CCLA's membership also felt strongly that in addition to the foregoing, lawyers in Ontario should also have strong **ethical competence**. The standard of ethical competence is



Ottawa Courthouse, Law Library | Palais de justice d'Ottawa, Bibliothèque de droit
2004 - 161 Elgin Street / Ottawa, Ontario K2P 2K1 | 2004 - 161, rue Elgin / Ottawa (Ontario) K2P 2K1

reflected in the Supreme Court of Canada's decisions of *R. v. Neil*, 2002 SCC 70 and *Strother v. 3464920 Canada Inc.*, 2007 SCC 24. Legal professionals are deemed by the common law to be aware of and comply with their fiduciary obligations. The ethical competency expected by the LSO should be no different.

II. PRINCIPLES OF AN EFFECTIVE COMPETENCE REGIME

The CCLA agrees that competence requirements should be feasible, and that the LSO should make further significant strides to make its **CPD programs as cost-effective as possible**, not only for those who practise in solo or small firms, but for every practitioner (including those within government or at not-for-profit organizations) where annual CPD budgets are limited.

That being said, the CCLA strongly believes that an effective competence regime should have **inflexible obligations**. If this were not the case, there could be differential regional and subject matter standards not only of a lawyer's competence but ultimately of the law itself. By way of example, the CCLA believes that the LSO should not permit lawyers operating in rural locations to operate subject to a different standard than those operating in urban settings. Ontarians have the right to high quality legal service regardless of their place of residence within the province.

The CCLA agrees with the importance of considering **a client's perspective** of "*what constitutes the competent provision of legal services.*" This will often require a lawyer to balance diplomacy and candour, because clients do not always understand and accept what the law requires. However, the CCLA believes that this consideration should not and cannot trump the legal and regulatory standard of competency imposed in Ontario.



Ottawa Courthouse, Law Library | Palais de justice d'Ottawa, Bibliothèque de droit
2004 - 161 Elgin Street / Ottawa, Ontario K2P 2K1 | 2004 - 161, rue Elgin / Ottawa (Ontario) K2P 2K1

III. COMPONENTS OF A CONTINUING COMPETENCE FRAMEWORK

Our members are of the strong opinion that the **legal information and research supports** (Great Library and LiRN) should remain priority components of a rigorous competence framework. To remain useful, these resources must receive **ongoing, predictable, and robust funding** that keeps up with the cost of inflation.

As we recently noted in the CCLA's Statement on "*Law Libraries: Ensuring Competency in the Profession and Access to Justice*":

The common law demands that lawyers and self-represented litigants understand the law as it has been decided previously. This is the premise on which the entire legal system rests. It is essential that lawyers, paralegals, and the public have access to legal research materials in order to adequately inform the Court of the development of the common law when arguing their case. We cannot forget that this obligation is an ethical and professional requirement of legal professionals as Officers of the Court.

Meanwhile, legal texts and databases are very expensive and their proper navigation is critical to ensuring the identification of relevant law. The public, sole practitioners, and professionals from smaller and medium sized law firms often do not have the resources to support this required bank of knowledge. And this is even true for the judiciary. We have been advised that members of the judiciary consult the material in the law library that is not otherwise available to them in their offices or judicial library, including rare books that are only otherwise available at the Great Library in Toronto. This is where our law libraries step in, especially libraries like the CCLA where our physical facilities enable public access. Our Ontario county and district law librarians have been providing both the resources and the expertise in their use to the full range of justice system participants for over 140 years...

When LSO members refer to their law libraries as "essential," "absolutely necessary," and "critical to [their] practice," we trust that the LSO listens given its obligation to ensure competency in the profession. Simply put, not everyone practicing law in this province can afford an adequate legal resource collection in their office. The public cannot. Well stocked, staffed, and funded courthouse libraries enable all legal professionals to carry out the research required of them for their clients and under their obligations per the Rules of Professional Conduct.



Ottawa Courthouse, Law Library | Palais de justice d'Ottawa, Bibliothèque de droit
2004 - 161 Elgin Street / Ottawa, Ontario K2P 2K1 | 2004 - 161, rue Elgin / Ottawa (Ontario) K2P 2K1

IV. CPD REQUIREMENTS

Our membership felt strongly that lawyers and paralegals should be required to take **CPD programs in their practice areas**, and, as the CCLA has stated earlier, that **CPD programs should be offered for as little money as possible** to improve the accessibility of these programs to the LSO membership.

Our membership did not agree that the CPD requirement should be completed over two years given that **many practice areas evolve significantly within one year**, let alone two. A two-year timeframe to complete their CPD requirement increases the risk that a lawyer or paralegal will fall behind the latest developments in their practice area(s) as dictated by legislative and common law change.

Our membership supports any initiative that will improve the potential for ongoing learning; in this vein, **we support increasingly stringent competency requirements** and interactive CPD programs.

Our membership **does not support a self-assessment** model of competency. In our view, this would essentially abdicate the LSO's legal obligations as a regulator.

V. ENHANCING PRACTICE SUPPORT AND TRAINING

As we have previously indicated, our membership endorses enhanced supports for sole practitioners and small firms. On this issue:

1. There should be a pragmatic **guide on trust accounting**;
2. There should be a pragmatic **guide on interviewing clients and speaking with opposing counsel**;



Ottawa Courthouse, Law Library | Palais de justice d'Ottawa, Bibliothèque de droit
2004 - 161 Elgin Street / Ottawa, Ontario K2P 2K1 | 2004 - 161, rue Elgin / Ottawa (Ontario) K2P 2K1

3. The LSO's **guides to running a legal business should be updated, made available for free, and be posted online** in a prominent, accessible location; and
4. A **list of the LSO's free legal resources** should be updated and listed prominently on the LSO's website.

VI. PEER-BASED INITIATIVES

The Law Society should not require licensees to enter into a mentoring relationship, but these relationships should be strongly encouraged. Our membership regards the **Coach and Advisor Network highly as an optional activity**.

Our membership did not approve of the idea of peer assessments given that these could be highly biased or discriminatory and make existing unequitable relationships more prone to abuse. We believe that the LSO's Complaints mechanism is an acceptable, existing manner for peers to report competency concerns.

VII. PRACTICE ASSESSMENTS

Our membership approves of spot audits, which motivates firms and legal professionals to follow the rules. Spot audits should not be limited to financial audits but should also include practice and/or competency reviews. In the context of barristers specifically, the CCLA also received the suggestion, a suggestion which the CCLA supports, that the LSO spot auditor observe the legal professional's performance in court.

In our view, **the number of spot audits should be the following: (1) increased for all licensees, (2) mandatory during the first few years of practice, (3) and required within the first twelve (12) months of a firm's opening**. While this may create an initial cost for the LSO, it will be offset by the savings from a reduction in disciplinary investigations and proceedings.



Ottawa Courthouse, Law Library | Palais de justice d'Ottawa, Bibliothèque de droit
2004 - 161 Elgin Street / Ottawa, Ontario K2P 2K1 | 2004 - 161, rue Elgin / Ottawa (Ontario) K2P 2K1

VIII. CONCLUSION

We thank the lawyers and paralegals of the CCLA who provided the above-noted policy feedback. We also thank CCLA External Relations Committee Member, Emily Crocco, for her substantive drafting of these.

Thank you for the opportunity to provide the LSO with our input. The CCLA requests the opportunity to make submissions before the Competency Task Force and/or Professional Development and Competence Committee. Should you have any questions or concerns, please do not hesitate to contact us at your earliest convenience. All of which is respectfully submitted.

C. Katie Black

Chair, CCLA External Relations Committee

cc: Teresa Donnelly, Treasurer, Law Society of Ontario

Barbara Murchie, Chair, Professional Development and Competence Committee

Jean-Jacques Desgranges, Bencher, East Region

Cheryl Lean, Bencher, East Region

Cecil Lyon, Bencher, East Region

Katie Robinette, Executive Director, Federation of Ontario Law Associations

Nathan Baker, Chair, Federation of Ontario Law Associations

Elizabeth Hall, Executive Director, Ontario Bar Association

SUBMITTED ONLINE

November 30, 2021

Law Society of Ontario
Competence Task Force
130 Queen Street West
Toronto, ON M5H 2N6

Re: Competence Framework – Call for Comment

The Federation of Asian Canadian Lawyers (Ontario) (“FACL”) provides the following response to the Competence Task Force’s Report to Convocation, *Renewing the Law Society’s Continuing Competence Framework*.¹

Overview

FACL is a non-profit corporation comprised of legal professionals from the pan-Asian Canadian community. Its diverse membership includes law students, solo and small firm practitioners, lawyers at large firms, corporate counsel, lawyers serving all levels of government and in the broader public sector, foreign-trained lawyers and non-practising lawyers, located all across Ontario. FACL promotes equity, justice, and opportunity for Asian-Canadian legal professionals and the wider community by advocating to government on policy decisions and legislative issues, fostering community involvement, promoting legal scholarship and education, and raising awareness of equity, diversity and inclusion issues facing the legal profession and the administration of justice.

Responses

At base, FACL submits that any competence regime must include a robust educational component devoted to the societal and cultural context in which legal services are delivered in the modern era. The public we serve is diverse in identities, beliefs, backgrounds, and needs. The credibility and relevance of the legal profession

¹ Law Society of Ontario, Competence Task Force’s Report to Convocation, *Renewing the Law Society’s Continuing Competence Framework*, online:
<https://lawsocietyontario.azureedge.net/media/lso/media/about/convocation/2021/convocation-june-2021-competence-taskforce-report.pdf> [“Report”].

and of the administration of justice rises and falls on our ability to evolve in parallel with that diversity.

FACL makes three points in support of this submission.

First, the Competence Task Force should apply a public interest lens to the principles that guide the development and design phases of its work. The Report sets out five guiding principles for an effective competence regime: risk-based, flexible, feasible, forward-looking, and client-centered.² FACL generally agrees that these principles are apposite – with the caveat that the principles must be given a broad, purposive application in order to fulfill their role in advancing the public interest. A “risk-based” approach to competence requirements should pro-actively address potential harm beyond what can be quantified in pecuniary terms or by litigation outcomes (e.g. unfair treatment, unethical behaviour, damage to public confidence in the legal system).³ A “flexible” approach should maintain the core competencies that apply across the profession (e.g. technological literacy, social and cultural literacy). “Forward-looking” and “client-centred” approaches to competency should consider the perspectives of impacted persons other than those with whom the lawyer seeks or forms a solicitor-client relationship (e.g. witnesses and other justice system participants).⁴

Second, the Task Force should apply its working definition of competence in a way that does not equate the ‘consumer’ with the ‘client’. The Report sets out a bullet-point list of factors as its working definition of competence.⁵ FACL generally agrees with the content of the definition – but it emphasizes, as above, that any

² Report, *supra* note 1 at p. 25.

³ See, for example, the discussion in A. Dodek and E. Alderson, “Risk Regulation for the Legal Profession” (2018), 55-3 Alberta Law Review 621, online: <<https://canlii.ca/t/7b9>> (positing that once regulatory objectives are set, risk should be measured in terms of not meeting those objectives; ongoing and thorough data collection, from a variety of sources, is necessary to ensure proper risk identification).

⁴ This is not to suggest any derogation from the duty of loyalty, but simply to recognize that the provision of legal advice and services does not take place in isolation from societal and cultural context. Indeed, narrowly defined, a “client-centered” approach would not fit comfortably with provincial and federal Crown prosecutors in the criminal law arena. Criminal law prosecutors advise the Attorney General/Minister of Justice or the police from time-to-time, but they will not ordinarily have a “client” in the traditional sense.

⁵ Report, *supra* note 1 at pp. 8-9.

“consumer perspective” that informs the “notion of competence” should consider the perspectives of impacted persons beyond a particular client.⁶

Third, the Task Force should recognize CPD requirements as an indispensable mechanism for promoting competence in all facets of the profession, at the heart of which lies the societal and cultural context in which we practice.

FACL is aware of a contrary view, espoused by some members, that education about societal and cultural context (including systemic racism and unconscious bias) is somehow harmful to the profession. That argument proceeds by incorrectly conflating the general concept of equity, diversity and inclusion (“EDI”) programming with a specific implicit association test developed in the U.S., and then attacking the latter by citing journal articles as ostensible support. Professional competence is too important a question to be resolved through amateur social science. If the utility of EDI programming is under scrutiny, this Task Force should reach a conclusion only after in-depth study that incorporates consultation with qualified subject-matter experts, community-based organizations (including those with racialized and Indigenous membership), and members of the profession and the public.

But one need not look very far for proof that social and cultural literacy plays an important role in professional competence. The jurisprudential guidance in Canada could not be clearer. For example, every level of court in this country has recognized that social and cultural context has a complex and important relationship with the proper adjudication of criminal and constitutional matters,⁷ ranging from policing,⁸ to criminal

⁶ Report, *supra* note 1 at p. 9.

⁷ *R. v. Morris*, 2021 ONCA 680 at para. 1 (“It is beyond doubt that anti-Black racism, including both overt and systemic anti-Black racism, has been, and continues to be, a reality in Canadian society, and in particular the Greater Toronto Area. That reality is reflected in many social institutions, most notably the criminal justice system. It is equally clear that anti-Black racism can have a profound and insidious impact on those who must endure it on a daily basis”), citing Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service* (Toronto: Government of Ontario, 2018), at p. 19; Ontario Association of Children’s Aid Societies, *One Vision One Voice: Changing the Child Welfare System for African Canadians* (Toronto: Ontario Association of Children’s Aid Societies, 2016), at p. 29.

⁸ *R. v. Grant*, 2009 SCC 32 at para. 154 per Binnie J. (concurring); *R. v. Theriault*, 2020 ONSC 3317 at paras. 11 (“I am mindful of the need to carefully consider the racialized context in which this case arises...this case, and others like it, raise significant issues involving race and policing that should be further examined”), aff’d 2021 ONCA 517 at para. 212, leave to appeal to S.C.C. requested, 39768 (materials submitted and under consideration by the Court as of November

liability,⁹ to credibility assessment,¹⁰ to sentencing.¹¹ Social and cultural literacy is only one step in the path towards better serving the consumers of the justice system, who reflect myriad features of diversity, whether in gender and sexual identity, in political and religious beliefs, in socio-economic and educational background, in mental health and physical ability, etc. The profession's approach to service delivery and the LSO's approach to professional competence must adapt accordingly if they are to maintain credibility, relevance and public trust.

²², 2021); **R. v. Le**, 2019 SCC 34 at paras. 89-97; **R. v. Parks** (1993), 15 O.R. (3d) 324 (C.A.) at p. 342, leave to appeal refused, [1993] S.C.C.A. No. 481.

⁹ **R. v. Humaid** (2006), 81 O.R. (3d) 456 (C.A.) at para. 94 (“Some academic commentary suggests that religious and cultural beliefs like those relied on by the appellant cannot be part of the ‘ordinary person’ inquiry [for the defence of provocation]...The resolution of this difficult issue awaits a case in which it must be resolved”).

¹⁰ **R. v. Santosh**, 2016 ONCA 731 at paras. 22-55 (“It is an error of law to consider evidence of a witness’ religious beliefs in assessing his or her credibility”).

¹¹ **R. v. Morris**, *supra* note 7 at para. 97 (no causal requirement, but there must be “some connection between the overt and systemic racism identified in the community and the circumstances or events that are said to explain or mitigate the criminal conduct in issue”); **R. v. Hamilton** (2004), 72 O.R. (3d) 1 (C.A.) at paras. 140-141 (existence and impact of systemic racism is relevant, but the “criminal law rejects a determinist theory of crime”); **R. v. Borde** (2003), 63 O.R. (3d) 417 (C.A.); **R. v. Reid**, 2016 ONSC 8210 at para. 27 (“While this court is not in a position to remedy the societal issues, it can and should take the societal context into account in fashioning an appropriate sentence for an individual offender”); **R. v. Golden**, [2001] 3 S.C.R. 689 at para. 83 (“African Canadians and Aboriginal people are overrepresented in the criminal justice system”); **R. v. Nur**, 2011 ONSC 4874 at para. 79, rev’d 2013 ONCA 677, 2015 SCC 15 without reference to this point (“it is not difficult to establish that anti-black discrimination undoubtedly contributes to many of these underlying societal causes”); **R. v. Jackson**, 2018 ONSC 2527 at para. 82 (taking judicial notice of “the history of colonialism...policies and practices of segregation, intergenerational trauma, and racism both overt and systemic as they relate to African Canadians and how that has translated into socio-economic ills and higher levels of incarceration”); **R. v. Gladue**, [1999] 1 S.C.R. 688 at para. 57 (“overincarceration [of Indigenous people] is a long-standing problem”); **R. v. Ipeelee**, 2012 SCC 13 at para. 67 (“judges can ensure that systemic factors do not lead inadvertently to discrimination in sentencing...Sentencing judges, as front-line workers in the criminal justice system, are in the best position to re-evaluate these criteria to ensure that they are not contributing to ongoing systemic racism”); **R. v. Williams**, 2018 ONSC 5409 at para. 45 (describing “the insidiously stealthy, subtle and general incalculable impact of racial discrimination” against Indigenous people); **R. v. Anderson**, 2014 SCC 41 at paras. 21-24; **R. v. F.H.L.**, 2018 ONCA 83 at paras. 31-32; **R. v. Brown**, 2020 ONCA 657 at paras. 50-51. See also, **R. v. X**, 2014 NSPC 95 at paras. 163, 176 (expert evidence about race and cultural factors relating to a young offender); **R. v. Gabriel**, 2017 NSSC 90; **R. v. Rage**, 2018 ONCA 211 at paras. 13-14.

Recommendation

The LSO should maintain and enhance its CPD requirements with respect to the social and cultural context in which legal services are delivered, whether under the separate rubric of Equity, Diversity and Inclusion (“EDI”) hours or otherwise incorporated into the competence regime. The pedagogical structure and substantive content of educational programming in this area should be determined in consultation with qualified subject-matter experts.

Conclusion

Equality, diversity and inclusion are foundational values in our constitutional democracy. Justice does not exist without equality. Equality does not exist without diversity and inclusion. A more equitable, diverse and inclusive profession is one that better serves the public. An important step towards that objective is to strengthen the LSO’s competency regime, including its continuing educational programming, by ensuring that it addresses the social and cultural context in which modern legal practice takes place and the diversity of its consumers.

FACL Ontario thanks the Task Force for the opportunity to provide input on the Report and looks forward to engaging in further dialogue on these critical issues.

Sincerely,

Advocacy and Policy Committee
Federation of Asian Canadian Lawyers (Ontario)



2021-2023
EXECUTIVE

Nathan Baker, Chair

Douglas Judson, Vice
Chair

William Woodward, Past
Chair

Jane Robertson,
Treasurer

Corey Wall, Central East
Region Representative

Allen Wynperle, Central
South Representative

Sam Misheal, Central
West Representative,
Family Law Chair

Craig O'Brien, East
Region Representative

Gordon Prisco,
Northeast Region
Representative,

Karen Seeley, Northwest
Region Representative

Jennifer S. Rooke,
Southwest Region
Representative

Anna Wong, Toronto
Lawyers Association
Representative

Eldon Horner, Real
Estate Co-Chair

Mark Giavedoni, Real
Estate Co-Chair

Terry Brandon
Legal Aid Chair

Katie Robinette,
Executive Director

FOLA RESPONSE TO THE LAW SOCIETY OF ONTARIO'S COMPETENCE TASK FORCE

Submitted to: Law Society of Ontario's Competence Task Force

Submitted on: November 30th, 2021

Submitted by: Michael Winward, FOLA Past Chair
winward@mackesysmye.com

Douglas Judson, FOLA Vice Chair
dwjudson@gmail.com

Allen Wynperle, FOLA Central South Representative
allen@wynperlelaw.ca

Mark Giavedoni, FOLA Real Estate Chair
Mark.Giavedoni@gowlingwlg.com



A. Introduction

The Federation of Ontario Law Associations (FOLA) is the voice of the practicing lawyer, representing the members of Ontario's 46 county and district law associations. We are pleased to provide the following submission in response to the interim report of the Competence Task Force.

B. Background

Earlier this year, the Civil Rules Committee struck a subcommittee to investigate the problem of late service of expert reports. The subcommittee is chaired by Justice Lauwers of the Court of Appeal. The subcommittee consisted of two judges of the Superior Court of Ontario, and seven senior counsel.¹

In June 2021, the subcommittee released an interim report. That report concluded with the following statement:

The Need for Education and Training

"We believe that the problems these proposals address can be partly attributed to the fact that the civil bar is vast and includes many untrained and inexperienced lawyers. The bar must be better educated about the Rules of Civil Procedure and trained in their use."

There are two noteworthy points to come from the subcommittee's comments:

- First, the subcommittee said, or came very close to saying, that many members of the civil bar do not meet standards of professional competence as defined as section 41 of the *Law Society Act*.
- Second, the subcommittee did not address its comments only to new or recent calls. The subcommittee referenced the entirety of the civil bar.

C. Context for the Interim Report

FOLA represents practicing members of the bar across the province, and based on the feedback from our members, we believe that the conclusions of the Competence Task Force need to be situated in context.

1. Competence and the Changing Landscape of the Profession

The subcommittee's comments are consistent with anecdotal comments that have been made to us by judges of every level of court, including the Court of Appeal. Although the comments are often addressed towards new or more recent calls, these concerns are widespread. Due to the fact that so many civil actions result in settlement, even licensees who were called 10 to 15 years ago can have limited trial experience. On the criminal side, comments received from the judiciary do tend to be addressed towards newer calls.

¹ Justice Mark Edwards, Justice Darla Wilson, Ranjan Das, Brian Bangay, Todd McCarthy, Stephen Wojciechowski, Jim Vigmond, Tom Curry, and Barbara Legate



There has also been a trend in licensees transitioning between practices through various stages of their professional career. Whether it arises from a self-recognition that their current practice area is too stressful, unfulfilling, too demanding or that the licensee is not well suited to that practice; or an identified need to change after coming back from a leave of absence; or even the toll of the pandemic, these licensees, who tend to be litigators turning to solicitor work, rarely have identified appropriate supports (outside of friends who can mentor them) in learning a new practice area to the standard of a competent practitioner. The result is a pool of licensees who are practicing in complicated areas of solicitor work without the experience or training to do so, post-licensure accreditation. As the old adage says: you don't know what you don't know.

The legal profession is growing. The number of licensees between 2000 and 2020 has nearly doubled. Looking at the Law Society's Annual Reports from 2014 to 2020, the number of lawyer licensees is growing at the rate of about 3% per year.

Although we do not have the data on the number of articling opportunities since the onset of the COVID-19 pandemic, comments received from our members suggest that over the past year and a half, fewer firms are offering fewer articling positions. Fewer articling positions translates into fewer hire-backs upon the completion of articles. When you add to that the fact that many students have been working from home since last March, they have fewer opportunities for networking and reduced employment options if they are not hired back by their firms.

2. Pandemic-Related Change

On the other hand, the pandemic has also ushered in significant change to the practice of law and the administration of justice. Many courts are now sitting online, using videoconference technology. New investments in technology and long overdue changes to rules have enabled the execution, commissioning, filing, and service of documents of materials online. Testamentary instruments can be effected and executed remotely in guarded situations, being a material alteration to centuries of practice. Many of these changes have been embraced by newer calls, while some senior counsel have struggled to adapt their skills to this new reality.

There are competence challenges in the profession. This is not something new; it has been brewing for some time. If unaddressed, the changes we have seen during the COVID-19 months is only going to make these problems worse. Some of the adaptations we have seen during the pandemic are also going to protract these challenges. For example:

- It is unlikely that courts will go back to holding strictly in-person attendances and paper filing systems, yet we have seen no significant effort from the Law Society to enact explicit technological competency or professional development requirements.
- Counsel are increasingly practicing in multiple counties and districts across the province, which has raised new questions about the myriad (and often inconsistent) practice directions put in place by the courts. With respect to the Competence Task Force, we question whether a lack of fluency with practice directions is being conflated with a lack of fluency with the Rules of Civil Procedure.

3. Support for New Calls and Junior Counsel

The fact that newly licensed lawyers and paralegals have a lower risk of complaint claims than other groups does not necessarily mean that their legal work is perfect. It may well mean that they have lower



complaints in claims because they have fewer clients or that they are taking on less complex legal matters. The existing efforts of the Law Society to provide early practice management audits to new calls in sole practice is helpful, and we encourage the Law Society to continue to develop this service from a lens of development and support, rather than sanction and fault-finding. The Law Society needs to enhance those reviews and audits by directing those to additional supports, courses or guidance.

Based on what we have heard from all levels of the judiciary and various other sources, newly licensed lawyers, and particularly those in a sole practice or with a small firm are in need of support in the early years of their practice. On October 25, 2021, the Court of Appeal called for senior counsel to do more to share advocacy opportunities with their juniors.² But this type of learning opportunity can only exist where there is a relationship between junior and senior counsel, whether as part of the same firm or otherwise. The Task Force's finding that, on average, 12% of newly licensed lawyers and 20% of newly licensed paralegals enter into sole practice within three years of being licensed is concerning if these new licensees are not provided with meaningful mentorship relationships or opportunities for guidance. These mentoring relationships can last a professional career and result in 'paying it forward' for mentees to later become mentors.

4. Information Needed About Complaints About Senior Lawyers

Identifying why there are more complaints against more seasoned lawyers needs to be further explored and common problems identified.

Why are so many complaints related to failure to communicate, failure to account, failure to serve one's client? The problems could be multifactorial, including time management, technological, or arising from challenges with practicing law with school aged children at home, elder parent care, financial concerns, burnout, etc. All of these stressors and challenges can lead to health problems, both physical and mental. For lawyers in a small or sole practice, the pressures may become overwhelming. Law has become a fast-paced, technologically challenging, competitive, and high-stress profession. There are struggling 'soles and smalls' who need to feel supported. However, support cannot be extended without first identifying the reasons behind service-related issues.

Reviewing additional data on complaints and claims against licensees will help the Law Society to identify patterns or badges of complaint-driven incompetence. Who are making these complaints? Against whom? At what stage in their career? What are the facts and context in making the claim? While it is truly helpful to look at complaints to try and identify areas of concern, responding to complaint generated data is not enough because it is reactive. Comments from the judiciary, such as the Rules subcommittee, have to be taken seriously and further inquiries made. In our experience, many judges of all levels in Ontario are quite willing to help address the competence problem.³

Solicitors do not readily have access to an objective standard to meaningfully address competency standards, like the judiciary to litigation counsel. Solicitors do not routinely appear before boards, commissions, arbitrators or adjudicators who can provide constructive comment on competency. Concerns about solicitors' competency, therefore, tend to flow from comments by other solicitors who

² <https://www.ontariocourts.ca/coa/how-to-proceed-court/statement-regarding-submissions-from-counsel/>

³ In 2019, Justice Brown of the Court of Appeal approached FOLA to help facilitate his travel to various regions in the province to discuss best practices in conducting a civil appeal, due to his concern over the standards of civil appellant advocacy.



are on the other side of the transaction or clients who have suffered a loss at the hands of an incompetent licensee. Although the instances of complaints to the Law Society or claims to LawPRO are representatively low, the assessment of these complaints or claims will outline additional data on incompetency that can be measured and regulated by the Law Society.

We agree that the policing model regulating competence is not enough and that more emphasis ought to be placed on the coaching model to actively promote competence. To that end, we believe that more can be done on the coaching side, but we believe that the Law Society alone cannot provide that model. Rather, it will take consultation and cooperation from key justice stakeholders and, perhaps most importantly, will require consultation with all levels of court in both the criminal and civil fields.

D. The Questions Asked

Questions 1 and 2: We have no disagreement with either the working definition of competence or the five principles for an effective competence regime.

Questions 3 and 4: Components of Continuing Competence Framework and Renewing the Law Society's Continuing Confidence Framework

For these two question areas, we see two issues: (a) how to best identify competence problems and (b) how to best address those problems.

1. Identifying the Problems

We see two ways to identify competence problems. The first is the risk-based approach that is already in use – referring to data generated from complaints to focus on the problem areas and the licensee demographic most subject to those complaints (see section 8 of the Committee's report). It would seem that service issues are particularly problematic and risk of complaints increase with years of licensure and age.

But focusing entirely on complaints for diagnostics is not enough. It can take a lot for a member of the public to go to the trouble of making a complaint. Further, just because the public does not complain does not mean that lawyers and paralegals are practicing to the standard of competence referenced in section 41 of the *Law Society Act*.

The report from the Rules subcommittee identifies a different sort of problem. Judges and senior counsel have identified that "the civil bar is vast and includes many untrained and inexperienced lawyers". This observation is not helpful without further context or detail. What are they seeing in or outside of courtrooms that leads them to this conclusion? What of other practitioners who experience incompetent licensees? This leads to a second means through which to identify competence concerns: through a consultative process.

In our view, the consultative process can start with the judiciary and the leaders of the primary practice area associations, including The Advocates' Society, the Criminal Lawyers Association, the Family Lawyers Association, and the Ontario Trial Lawyers Association (OTLA). This can be expanded to the Ontario Bar Association and Federation of Ontario Law Associations who have various committees, sections and task forces for solicitors who generally do not have practice-focused advocacy organizations. Specifically, what is going on in the practice world that is problematic and needs



addressing? In our experience, many members of the judiciary and these associations/organizations would welcome the opportunity to be consulted and take part in addressing the solutions.

Likewise, as much of the Task Force report references newer lawyers, we strongly encourage further consultation with stakeholders reflecting junior or aspiring members of the bar (which is also a resource to licensees transitioning from one practice area to another mid-career), including the Ontario Bar Association's Young Lawyers' Division, the Law Students' Society of Ontario, and the Law Society's Equity Advisory Group.

2. How to Address the Problem Areas Once Identified

While recognizing that this is an interim report and there is likely more work to be done, FOLA sees 3 ways the professional community can address the competence problems discussed by the Task Force: improved continuing professional development (CPD), better coaching and mentoring for all stages of practice, and by respecting the critical role of county and district law libraries.

i. CPD

CPD programs are a relatively straight forward way to address competence issues. Section 41 of the *Law Society Act* references a licensee's knowledge, skill, or judgment. Most often, CPD programs address matters of knowledge but not so much matters of skill or judgment. How do we address skill and judgment deficiencies? As our practices incorporate more technology and our courts embrace more online tools, the need for availability and recognition of skills-based CPD is rising.

To be sure, there is no shortage of CPD. Rarely does a week go by when there is not some CPD program offered to licensees. But we question how much of that programming is directed to matters of skill or judgment or even best practices. We question how much of this programming is directed toward matters of "how to" – for example, how to prepare a client for examination for discovery, how to cross examine a police officer on the contents of their notebook, how to make an objection in court, the "dos" and "don'ts" of examination in chief, how to conduct an asset sale or a real estate purchase, etc. CPD programming directed towards issues of practice could be interactive, demonstrative, or a combination of both.

Relative to the practice challenges experienced by licensees with 10 years or more experience, there must be an understanding as to why these members of the bar are facing the complaints they do, particularly, complaints related to service. It is only through an understanding of the "why" that CPD programming can be tailored to address the identified problems.

We agree that the Law Society should provide enhanced support to sole practitioners and small firms with courses that include the business of law, law firm management, and financial record-keeping. However, it is essential to understand what is behind the complaints that are laid against soles and smalls in order to formulate CPD programming that will address the problems. Such programs may need to be directed toward matters such as time management, better use of technology, stress management, etc.

CPD could be categorized much like they are now between substantive and professional CPD, but in a way that can also focus or credentialize skills-based CPD. This may be a much larger discussion point, but we can harken back to the professional, substantive and skills-based approach of the former Bar Admission Course and the equivalent goals of articling and the Law Practice Program as meeting a



professional and regulatory standard of competence in the ‘know how’ of practice. The availability of courses, not just prior to licensure, at a ‘beginner, intermediary and advanced’ level would enable continuation of standards and exposure to best practices throughout one’s career and could also be remedial after a finding of incompetence by the regulator or the courts. It may be prudent to consider who could make these available, such as law schools (outside of the JD/LLB programs, akin to a certification course) or the Law Practice Program itself. This is an area worthy of additional consultation.

ii. Coaching and Mentorship

The other way to address identified problem areas is through an enhanced coach and mentorship program. Respectfully, we do not believe that the LSO’s Coach and Advisor Network (CAN) addresses the degree of mentorship that is required, particularly for newer calls. It is axiomatic that no licensee can reach his or her potential in this profession without help. Have you ever attended a judicial swearing in or an awards ceremony where the appointee/recipient has not thanked all those who provided valued mentorship?

With the growth in the profession and the number of licensees who are in the early stages of their careers or going it alone or in small firms, mentorship is becoming critical. Likewise, with the rapid change in the profession and the practice of law owing to technology, senior lawyers can also benefit from skills-based coaching on some elements of practice.

We do not believe that any one entity, whether it be the Law Society, the Advocates’ Society, the Criminal Lawyers Association or any local law association can adequately, on its own, address the mentorship challenge. Rather, we believe that a truly effective mentorship program can only be achieved through a collaborative process that includes the regulator, key stakeholders and the judiciary.

In our experience, many within the judiciary do not want to simply shine a light on a competence problem. Rather, many within the judiciary are prepared to be part of the solution. We do not profess to have the blueprint for the perfect mentorship program. What we do believe, is that a starting point for litigation mentorship should involve open minded and frank discussions to identify the competence concerns and then try to come up with a collaborative approach as to how to best address those concerns. These consultations would involve, at a minimum, the Law Society of Ontario, the Chief Justices of the Court of Appeal, the Superior Court, the Family Court, the Ontario Court of Justice, a senior Associate Judge (former Master) and the leaders within the primary practice associations including the Advocates’ Society, the Criminal Lawyers Association, the Family Lawyers Association, Ontario Bar Association, FOLA and OTLA. We also strongly encourage consultation with organizations and bodies that represent newer calls and equity-seeking groups. We believe that it is only through this collaborative and cooperative approach that a truly effective mentorship program will emerge.

Therefore, to summarize, we believe that the current competence framework could be improved upon in the following ways:

1. Continue to utilize Law Society and LawPRO data to identify areas of competence concerns through the complaints or claims process;



2. Hold a meeting(s) between the LSO, the judiciary and representatives of the primary practice associations to:
 - (a) Identify areas of competence concern, and
 - (b) Formulate the best way to address those concerns, whether it be done through CPD, coaching/mentorship or a combination of both.

iii. County and District Law Libraries

Finally, we would be remiss without mentioning the critical role Ontario's network of county and district law libraries play in addressing professional development and competence, including hubs to co-locate and collaborate for mentoring, coaching and communicating.

Competency requires access to high-quality library and legal information services. The link between law libraries and competency was recently affirmed by the LSO's Professional Development & Competence Committee:

High-quality library and legal information services are components of the Law Society's supports to licensees, and are an element of the Law Society's competence platform. Competence has been identified as a priority for the 2019-2023 bencher term.

Yet, as FOLA's white paper titled "County and District Law Libraries: Ensuring Competency in the Profession and Access to Justice"⁴ points out, legal texts and databases are very expensive and their proper navigation is critical to ensuring the identification of relevant law. Sole practitioners and professionals from smaller and medium sized law firms often do not have the resources to support this required bank of knowledge.

By way of example, a Westlaw subscription can cost \$400 a month. The same service can be accessed through one's local law library for the cost of the licensee library fee which was \$182 in 2020 (since reduced to \$159 for 2021). The economies of scale cannot be overstated. Not only are the County Law Libraries a vital legal and regional research hub for lawyers, paralegals, and licensing candidates, they are also an invaluable partner for the Courts when distributing practice information, and ensuring that our judiciary has access to legal resources. We have been advised that members of the judiciary consult the material in many of the County Law Libraries that is not otherwise available to them in their offices or judicial library, including rare books that are only otherwise available at the Great Library in Toronto.

Ongoing, sustainable funding for Ontario's county and district law libraries must continue to be recognized as a fundamental priority for the Law Society to ensure there is equal and equitable access to resources for lawyers.

E. Conclusion

We thank the LSO for inviting FOLA to participate in this very important subject area and would welcome any opportunity to discuss these matters further.

⁴ <https://img1.wsimg.com/blobby/go/63f6349d-d85d-4511-bc5f-4314d54b45d0/downloads/Federation%20of%20Ontario%20Law%20Associations%20White%20P.pdf?ver=1626444624877>

Immigration and Refugee Board of Canada Submission on the Law Society of Ontario's Competence Task Force Call for Comment

General Submission

The *Immigration and Refugee Board* (IRB) is Canada's largest quasi-judicial administrative tribunal. It conducts tens of thousands of proceedings every year, a significant proportion of which take place in the province of Ontario. In many of these proceedings the participants are represented by counsel – either provincially regulated lawyers, or paralegals.

Serious rights and interests are at stake in IRB proceedings, including claims for refugee protection, and hearings related to immigration detention, public safety matters, and family sponsorship.

The IRB has a duty to ensure the integrity of its proceedings, as it relates to:

- i) the protection of the participants to its proceedings, who present with a range of vulnerabilities; and
- ii) the preservation of the integrity of Canada's immigration system.¹

The IRB's duty in this respect extends to counsel conduct and competence concerns, where such concerns may have an impact on the integrity of its proceedings.²

The majority of counsel who appear before the IRB are sole practitioners or work in small practices. The Law Society of Ontario (LSO) has identified these counsel profiles as being at higher risk for complaints, which is consistent with the IRB's experience.

In a recent draft report, researchers from the University of Toronto and York University investigated the question of access to justice in proceedings before the IRB. Central to their report was the following:

Our most important finding is that quality of representation is currently a more urgent issue with more significant impacts on efficiency, outcomes, and access to justice than the inability of claimants to secure counsel.³

The IRB shares the concerns set out in this report, namely that basic competency concerns arise in legal representation in a significant percentage of IRB proceedings.

Participants who come before the IRB are particularly vulnerable. It is not sufficient to rely solely upon a reactive complaints process to ensure competent representation; this population may not have permission to remain in Canada to pursue a complaint, and/or may face cultural, linguistic, and personal barriers to challenging authority figures.

¹ *Domantay v Canada (MCI)*, 2008 FC 755.

² *Rezaei v. Canada (Minister of Citizenship and Immigration)*, [2003] 3 FC 421 (TD), see also IRB Reasons and Decision – Mumtaz Khan: https://irb-cisr.gc.ca/en/decisions/Pages/mumtaz-khan.aspx?_=undefined&wbdisable=true.

³ Craig Damian Smith, Sean Rehaag and Trevor Farrow, *Access to Justice for Refugees: How Legal Aid and Quality of Counsel Impact Fairness and Efficiency in Canada's Asylum System*, Pre-release not yet available for circulation.

The IRB is of the view that the LSO does not currently have an adequate regulatory mechanism in place to monitor and address concerns over counsel competency. The IRB has invested significant resources to track, document, and report competency concerns, which could be more appropriately undertaken by professional regulatory bodies. Breaches of the duty of competence can have severe consequences for clients, and are costly to the operation of the tribunal, causing delays, cancellations, and administrative burden, as well as additional adjudicative time to ensure justice is served.

Accordingly, the IRB applauds the work of the LSO's Competence Task Force, and its efforts to renew its *Competence Framework*. The following comments, in italics below, are provided in response to a Call for Comments received by the Task Force.

Specific Responses to LSO Competence Task Force Call for Comment

1. Working definition of competence

Do you agree with the working definition of competence? Are there any aspects of the definition that you would change?

- *The IRB is concerned that the working definition of competence contains no clear statement of minimally acceptable standards for practice or competence. At the very least, the framework should set out that competence generally implies:*
 - *Meeting all deadlines associated with respect to a court or tribunal's rules of practice, or submitting requests for extensions of time in compliance with the governing rules;*
 - *Complying with the court or tribunal's rules, for example (but not limited to):*
 - *Requirements with respect to the form and content of legal submissions;*
 - *Evidentiary requirements;*
 - *Requirements with respect to the filing of forms;*
 - *Requirements with respect to motions, applications and other interlocutory matters.*
 - *Acting with integrity and respect both in relation to clients and the courts and tribunals before whom they appear;*
 - *Ensuring adequate preparation prior to proceedings;*
 - *Establishing and maintaining a sufficient level of legal knowledge in areas of practice;*
 - *An understanding of the legal regime – statutes, regulations, soft-law, forms and jurisprudence – that applies to a licensee's area of practice;*
 - *The ability to communicate effectively, both orally and in writing, in the official language of the licensee's practice; and*
 - *The ability to provide pleadings and oral representations to a court or tribunal that are broadly responsive to the evidence and issues raised in the proceeding.*
- *The IRB acknowledges that competence is dynamic throughout an advocate's career. There is a minimum standard of knowledge, however, that is associated with basic principles of competent practice – clearly defining those standards, or at least an approach to defining them, is not apparent in the LSO's framework. The law applicable to proceedings at the IRB is complex, and the rights at stake are paramount. The IRB urges the taskforce to create meaningful opportunities for review of and mentoring for*

minimum legal knowledge requirements. The IRB supports the development of substantive Practice Guidelines as a component of this framework.

- *The IRB also urges the LSO to take a holistic view of competence. The duty of competence may be breached by lower level, but frequent practice-shortcomings that cumulatively deviate from acceptable standards. For example, a one-time failure to comply with a tribunal's rules of practice may not, on its own, indicate any counsel competency concerns. However, repeated failures to comply with these same rules, over many cases, may indicate systematic practice management concerns which call into question whether counsel meets basic indicia of competence. This may be particularly the case in high volume, low margin practice areas.*

2. Principles for an effective competence regime

Do you agree with the five principles for an effective competence regime set out below? Are there principles that should be included or omitted?

- a) *Risk-based* - Regulatory activities should ideally be designed to focus on addressing areas of greatest risk to the public based on known outcomes.
 - b) *Flexible* - Obligations should reflect the diverse array of practice areas, practice settings, geographies, practice stages, and other contextual factors that impact the professional circumstances of lawyers and paralegals.
 - c) *Feasible* - Competence requirements should be cost effective and achievable by the regulator and licensees alike and should not impose unreasonable burdens.
 - d) *Forward-looking* - The competence framework should be future-oriented in order to accommodate the fundamental changes taking place in the market for legal services.
 - e) *Client-centred* - Competence requirements should consider the client's needs, goals, and perspective on what constitutes the competent provision of legal services. This would include an awareness of differences in backgrounds, income levels, abilities and cultures that may impact communications with clients and the way in which legal advice and services are provided.
- *While these are important pillars in a competence regime, the IRB would propose the addition of the two other pillars:*
 - *Proactive – Regulatory activities should be proactive in the monitoring of licensee competence, particularly in those areas of practice identified as high risk. An equitable and anti-racist competence regime should ensure that its framework is particularly focused on ensuring competent representation to vulnerable and/or racialized groups who may be unable to file complaints or litigate allegations of incompetence.*
 - *Remedial – Regulatory activities must identify practical, enforceable and client-centred remedies where competency concerns are identified.*

3. Components of continuing competence framework

Do the components of the Law Society's current continuing competence framework listed below adhere to the five principles for an effective competence regime set out in question 2 (i.e., risk-based, flexible, feasible, forward-looking, client-centred)? If not, why not?

- a) CPD requirement and programs
 - b) The Practice Management Helpline
 - c) Coach and Advisor Network
 - d) Practice assessment programs (practice reviews, spot audits, and practice audits)
 - e) Certified Specialist Program
 - f) Legal information and research supports (Great Library and LIRN)
- *Subject to the below comments, the IRB does not have comments on this question.*

4. Renewing the Law Society's continuing competence framework

Should any, some or all of the key components of the competence regime set out in question 3 be modified, restructured or terminated? If so, how?

Some examples are:

CPD

- a) Should the CPD requirement be changed to target the development and maintenance of certain competencies?
- b) Should the CPD requirement be tied to the licensee's practice area(s), experience level, or identified areas of risk?
 - *The IRB supports CPD requirements that are tailored as described. Requirements could include mandated time on substantive law, practice management, technology, and ethics.*
- c) Should licensees complete their CPD requirement over the course of two calendar years rather than annually?
 - *If requirements are refined, as suggested above, it may be necessary to allow for longer periods to fulfill the various categories.*
- d) Should CPD programs be more stringent or interactive to help ensure that licensees are engaged and learning?
- e) Should the CPD requirement remain as is, be enhanced, or be eliminated altogether?
- f) As an alternative to the CPD requirement, should licensees be required to conduct a self-assessment to identify their learning and training needs and then create and execute their own unique professional development plan?

- *If this approach is pursued, a strong review framework is required to ensure self-assessments are accurate and learning plans are appropriate and relevant. The IRB prefers CPD requirements that engage across various areas of competency.*

Enhanced practice support and training

g) Should the Law Society provide enhanced support for sole practitioners and small firms, such as courses on the business of law, law firm management and financial record-keeping?

h) Should licensees be required to complete a training course related to a set of core competencies, such as practice management or client communications? If so, should the course be mandatory for:

- i. all licensees,
- ii. new licensees,
- iii. licensees in sole or small firm practice,
- iv. licensees transitioning to sole practice?

Peer-based initiatives

i) Should the Law Society require or encourage licensees to enter into a mentoring relationship, either as a mentor or mentee?

j) Should the Law Society introduce peer assessments as a mechanism for improving competence? If so, how should they be structured?

k) Are you aware of the Coach and Advisor Network? Have you participated in it and if so, did you find it helpful?

l) Should the Coach and Advisor Network remain as is, be enhanced, or be eliminated altogether?

Practice assessments

m) Are you aware of practice assessments (i.e., practice reviews, spot audits, and practice audits)? Have you ever received one and if so, did you find it helpful?

n) Should the Law Society increase the number of practice assessments that it performs? If so, who should these additional practice assessments target?

- *The IRB is of the view that the Law Society should increase the number of practice assessments it performs, and the substantive robustness of these assessments. Additional practice assessments should be focused on areas of practice identified as high risk.*

o) Should the practice assessment program remain as is, be enhanced, or be eliminated altogether?

- *As above, the IRB is of the view that the Law Society practice assessments could be enhanced. In the IRB's experience, practice assessments are an important monitoring*

tool, but the current approach has not proven sufficient to address systemic competency concerns.

- **Crucially**, any competence and practice assessment regime must include channels for communicating concerns with respect to licensee competence. For example, tribunals such as the IRB are often uniquely situated, through their own direct experience, to communicate serious shortcomings in licensee competence. While the IRB already communicates its concerns with respect to serious counsel conduct issues, this approach has not proven effective in addressing broader competency concerns.

Certified Specialist Program

- p) Are you aware of the Certified Specialist Program? Have you participated in it and if so, did you find it useful?
- q) Should the Certified Specialist Program remain as is, be modified, or be eliminated altogether?

Technological competence

r) Are there basic technological skills that the Law Society should require all licensees to have? If so, what are the skills and how should the Law Society verify or ensure that licensees have them?

- *As tribunals undergo rapid transformation to digital filing and hearing requirements, the IRB agrees that basic technological skills should be a baseline competency indicator.*
- s) In order to prepare licensees for the rapidly changing future, should the Law Society require or encourage licensees to take courses to enhance their technological competence?
- *Consistent with the above, the IRB agrees that the Law Society should support and require licensees to obtain basic technological competencies.*

Encouraging excellence

t) Should the Law Society incentivize licensees to strive for excellence? If so, how?

5. Additional aspects of competence regime

Is there anything else that should be included in the competence framework or that you would like to comment on with respect to continuing licensee competence?

INDIGENOUS ADVISORY GROUP

November 30, 2021

Law Society of Ontario
Osgoode Hall
130 Queen St West
Toronto, ON
M5H 2N6

Attention:

RE: Call for Comment on the Competence Task Force Report

*"[L]awmakers, judges and lawyers are the gatekeepers to the justice system.
Until they understand the truth of our history and their role in making change,
our country will not be able to move forward."¹*

Senator Murray Sinclair

On behalf of the Indigenous Advisory Group (IAG), we welcome the opportunity to provide comments on the Competence Task Force Report.

The IAG was formally established by the Law Society of Ontario on June 23, 2016, to provide advice on Indigenous issues and guidance to the Law Society and the broader legal community in order to better understand the unique issues faced by Indigenous peoples in Ontario. The IAG consists of Indigenous legal professionals in Ontario who volunteer their time and serve on a *pro bono* basis and Elders. The IAG's members include and are representative of many different First Nations, Inuit, and Métis communities, and it endeavors to be reflective of the populations served by the legal profession throughout the province.

The IAG works to support and provide insight to the Law Society of Ontario with Indigenous initiatives, programming and it also supports the work of the Equity and Indigenous Affairs Committee. The IAG promotes the implementation, recommendations, calls to action, and calls to justice from the many reports and inquiries stemming from and generated regarding Indigenous peoples and Canada's legal system, more specifically the implementation of the Calls to Action from the Truth and Reconciliation Commission of Canada's final report². The Calls To Action are directed at and call upon governments, institutions, and organizations across the country, including

¹ www.theglobeandmail.com/business/commentary/article-the-legal-industry-needs-to-understand-the-truth-of-canadas/ (Globe and Mail, November 14, 2019).

² Truth and Reconciliation Commission of Canada, Truth and Reconciliation Commission of Canada: Calls to Action (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), online: trc.ca/assets/pdf/Calls_to_Action_English2.pdf.

law societies, law schools, and the justice sector more broadly, to build relationships with, and improve access to justice for, Indigenous peoples.

Specifically, Call to Action 27 addresses the competency of legal professionals in serving Indigenous peoples:

27. We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights and anti-racism.³

The release of the Truth and Reconciliation Commission's Executive Summary and 94 Calls to Action were announced at its closing event held in Ottawa from May 31 to June 3, 2015. On June 2, 2015, the Law Society of Ontario released a public statement on the Truth and Reconciliation Commission's Executive Summary of Final Report and Call to Action 27. Janet Minor, then Law Society Treasurer stated,

"In particular, we are committed to enhancing cultural competency within the legal professions and look forward to further discussions about next steps, so that lawyers and paralegals have a greater understanding of Canada's history and the relationship between the Crown and the Canadian government and the First Nation, Métis and Inuit people."⁴ [emphasis added]

The Federation of Law Societies of Canada (FLSC), meanwhile, released a formal statement of commitment to reconciliation in December 2020 and has adopted Guiding Principles to ensure Indigenous perspectives inform its progress.⁵ In its Report of the Truth and Reconciliation Calls to Action Advisory Committee, released in 2020, the FLSC acknowledged the generational gap that may exist relating to knowledge and awareness of issues facing Indigenous peoples and how this can be addressed through mandatory Indigenous cultural competency training. The FLSC encourages members from all jurisdictions to undertake training that will enhance their knowledge of Indigenous history and legal orders.

The Law Society of Ontario was aware of the need to develop and implement Indigenous strategies for many years prior to the Truth and Reconciliation Commission.⁶ The year following its public statement committing to reconciliation, the Law Society of Ontario established the Indigenous Advisory Group and created a Certified Specialist Program in Indigenous Legal Issues. Further, the LSO introduced 1) an Indigenous Framework developed in accordance with priorities

³ Supra.

⁴ The Law Society of Upper Canada, Law Society Public Statement on Truth and Reconciliation Commission of Canada's Executive Summary of Final Report (2 June 2015), available online:

<https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/r/rel/release-public-statement-trc.pdf>.

⁵ <https://flsc.ca/national-initiatives/truth-and-reconciliation/>

⁶ Introduction of the Aboriginal Working Group, Rotiio>taties, standing committee of Convocation, now known as Equity and Indigenous Affairs Committee as examples.

identified in three key Law Society documents (2017)⁷; 2) A Guide for Lawyers Working with Indigenous People (2018)⁸; and 3) conducted a review of how the disciplinary tribunal addresses complaints involving Indigenous persons in 2018.⁹

Despite these initiatives, the Law Society of Ontario has yet to introduce mandatory Indigenous cultural awareness/competency and anti-racism training. It has been over six years since the Law Society's public statement of commitment to reconciliation. When one considers the sheer number of licensees that the Law Society of Ontario regulates, over 60,000 legal professionals¹⁰, it is disappointing that programming has yet to be developed and/or designed for delivery to its members.

The Indigenous Advisory Group recommends that the Law Society of Ontario develop a training program focused on developing cross-cultural competency and educating legal professionals about Indigenous lived experiences in Ontario and Canada in consultation with Elders, Indigenous communities, and organizations.

Currently, two other Canadian law societies have introduced mandatory Indigenous intercultural competence training for lawyers. In December 2019, the Law Society of British Columbia introduced mandatory training for all British Columbia lawyers, regardless of their year of call or whether they were part time or full-time practitioners.¹¹ Lawyers are required to complete the six-hour course within a two-year timeframe. This course exists outside of mandatory CPD programming, however, the time spent on the course can be counted toward CPD "ethics" requirements. Flexibility was introduced to permit lawyers to carry-over six CPD credits from one year to the next and the timeframe of two years to complete the training provided additional flexibility.

The Law Society of Alberta followed suit passing a resolution in February 2020 to create a new CPD program.¹² The mandatory educational requirement was approved at the October 1, 2020, Bencher meeting and was introduced on April 21, 2021. All lawyers in Alberta must complete the programming within 18 months. This mandatory Indigenous Cultural Competency Education called The Path (Law Society of Alberta) – Your Journey Through Indigenous Canada has five modules and takes approximately five hours to complete.

Recognizing the vast number of different communities throughout Ontario, and persons from different nations in the larger urban settings, a "one-size fits all" approach may not be feasible or desirable. The Ontario government introduced two separate educational training modules for its employees. San'yas Anti-Racism Indigenous Cultural Safety Training Program is approximately eight hours in length and delivered online. Bimickaway delivered to employees of the Ministry of

⁷ Convocation's 2015-2019 Strategic Plan; Treasurer's Memorandum to the Equity and Aboriginal issues Committee (September 22, 2016); and Approaches for the Law Society of Upper Canada's Responses to the Truth and Reconciliation Commission of Canada (TRC) Final Report (Sept. 2, 2016).

⁸ Created in partnership with The Advocates' Society and the Indigenous Bar Association.

⁹ Review Panel on Regulatory and Hearing Processes Affecting Indigenous Peoples ("Keshen Review").

¹⁰ Over 53,000 lawyers and over 9,000 paralegals.

¹¹ <https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/TRC-LawyerEd-2019.pdf>

¹² <https://www.lawsociety.ab.ca/lawyers-and-students/continuing-professional-development/indigenous-cultural-competency-education/>

the Attorney General of Ontario is a five module course delivered in person to groups up to a maximum of 25. The creation of these programs ensured that Indigenous people were included in the development and implementation, which has been instrumental in their success.

As a self-regulated profession, it is imperative to have and maintain a minimum standard of CPD hours per year. CPD hours improve the quality of legal services, promote important initiatives relating to access to justice, equity, diversity, and inclusion, and can promote public confidence in self-regulated professions, including the legal profession. The IAG supports the current mandatory requirement of 12 hours annually and strongly recommends that it remain in place. The Law Society of Ontario should also maintain professionalism hour requirements included within the existing CPD requirement to ensure members are completing courses and/or taking part in educational events that address issues relating to ethics, equity, diversity, and inclusion. The IAG supports the submissions made by the Equity Advisory Group in this consultation process.

We would caution, however, that Indigenous cross-cultural competency training should not, and cannot, be grouped within existing equity, diversity, inclusion, and professionalism CPD requirements. The Calls to Action are clear that the nature of the professions' relationships to Indigenous peoples and communities are *sui generis* in nature. The Indigenous Advisory Group believes that it is an ethical imperative for all legal professionals to rise to the Calls to Action, both individually and collectively. Anything less represents an abdication of our responsibilities as professionals.

It is imperative that members of the Law Society of Ontario examine and understand professional competence through an Indigenous lens. Mandatory Indigenous cultural awareness/competency training will ensure a minimum base level awareness and understanding of systemic discrimination and unconscious bias faced by Indigenous peoples, racism experienced by Indigenous persons, differences in Indigenous communities, history of colonization, residential schools, 60's scoop, and other factors that have impacted, and continue to impact, Indigenous peoples and their communities. Providing general knowledge and understanding of colonialism and historical and ongoing systems-based anti-Indigenous racism and discrimination will bring a minimum level of awareness when working with Indigenous peoples and/or communities. It is imperative that training programs and/or methods of delivery be revisited and updated regularly to be responsive and remain current.

Therefore, the Indigenous Advisory Group makes the following recommendations:

1. That the Law Society of Ontario develop a mandatory Indigenous Cultural Competency Program, including training on Anti-Indigenous Racism, in consultation with Indigenous communities and persons within Ontario;
2. That the Indigenous Cultural Competency Program training be offered by Indigenous persons;
3. That the Indigenous Cultural Competency Program training be offered to all licensees free of charge;

4. That the Law Society of Ontario commit to review and update Indigenous Cultural Competency Program resources on a regular basis, at least once every five years;
5. That the Law Society of Ontario maintain the current minimum standard of 12 general CPD hours per year; and,
6. That the Law Society of Ontario maintain the requirement that at least one professionalism hour per year relate to equality, diversity and inclusion topics.

Respectfully submitted on behalf of the Indigenous Advisory Group of the Law Society of Ontario.



Catherine Rhinelander
Co-Chair, IAG



Danielle Lussier, Ph.D.
Co-Chair, IAG

To: Members of the LSO Competence Task Force
From: Members of the LSO Equity Advisory Group (EAG)
Date: November 30, 2021

Re: Submissions for the Continuing Competence Framework

Overview

1. Members of the Law Society of Ontario's Equity Advisory Group (EAG) have considered the Competence Task Force's report *Renewing the Law Society's Continuing Competence Framework* dated June 23, 2021.¹
2. Pursuant to the five identified principles for an effective continuing competence regime (risk-based, flexible, feasible, forward-looking and client-centered), EAG recommends:
 - (1) the implementation of Indigenous intercultural competency in accordance with the Truth and Reconciliation Commission's Calls to Action #27; and
 - (2) the maintenance and enhancement of the CPD requirements for Equity Diversity and Inclusion (EDI) hours with a particular focus in addressing anti-Black racism.
3. The implementation of both recommendations requires further consultation.

Background

4. EAG's mandate is to assist the Equity and Indigenous Affairs Committee/Comité sur l'équité et les affaires autochtones (EIAC) in the development of policy options for the promotion of equity and diversity in the legal professions. Additionally, EAG has responded to several previous consultations from the LSO on a variety of topics including the Challenges Faced by Racialized Licensees, Alternative Business Structures, the Dialogue on Licensing, the Governance Task Force, the Tribunal Rules changes, the Access to Justice Call for Comments and the Family Legal Services Provider (FLSP) licence consultation.

¹ <https://lawsocietyontario.azureedge.net/media/lso/media/about/convocation/2021/convocation-june-2021-competence-taskforce-report.pdf>

5. EAG's membership consists of individual and organizational members:

- The individual members are Nima Hojjati, Jacqueline Beckles, Krishna Badrinarayan, Prasanna Balasundaram, Fatema Dada, Kyle Elliott, Kate Forget, Romona Gananathan, Sasha Hart, Michelle Liu, Njeri Damali Sojourner-Campbell, Djawid Taheri; and
 - The organizational members are L'Association des juristes d'expression française de l'Ontario (AJEFO), Arab Canadian Lawyers' Association, ARCH Disability Law Centre, Canadian Association of Black Lawyers, Canadian Association of Nigerian Lawyers, Canadian Hispanic Bar Association, Federation of Asian Canadian Lawyers (Ontario), Law Students' Society of Ontario, Ontario Association of Black Paralegals, Roundtable of Legal Diversity Associations (RODA), South Asian Bar Association and Women's Law Association of Ontario.
6. It should be noted that both individual and organizational members of EAG may make their own submissions regarding the competence framework. AJEFO, RODA, the Federation of Asian Canadian Lawyers (Ontario) and the Women's Law Association of Ontario will be providing additional submissions.

Recommendation 1: Indigenous Intercultural Competency as Lawyer Competence

7. EAG recommends the implementation of Indigenous intercultural competency as a necessary part of lawyer competence. Reconciliation will not become a reality without a commitment to understanding the truth of Canada's dark history and the legacy of colonialism that Indigenous people continue to experience. Legal professionals must be well informed and equipped to contribute to the process.
8. The Truth and Reconciliation Commission's Call to Action #27 called on law societies to ensure that lawyers are trained in cultural competency:
27. We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will

require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.²

9. On June 2, 2015, the LSO released a public statement on the TRC's executive summary and stated a commitment to acting upon the TRC's Calls to Action for reconciliation wherever possible.³ In the statement, Treasurer Janet E. Minor noted:

In particular, we are committed to enhancing cultural competency within the legal professions and look forward to further discussions about next steps, so that lawyers and paralegals have a greater understanding of Canada's history and the relationship between the Crown and the Canadian government and the First Nation, Métis and Inuit people.⁴

10. In *R. v. Barton*, 2019 SCC 33, the Supreme Court noted that it has acknowledged on several occasions the detrimental effects of widespread racism against Indigenous people within the criminal justice system and “when it comes to truth and reconciliation from a criminal justice system perspective, much-needed work remains to be done”.⁵
11. The Law Society of British Columbia (LSBC) has recognised that Canada's policies as they relate to Indigenous people sought to eliminate the rights, governments, culture, resources, lands, languages and institutions of Indigenous people and laws were used to make this happen.⁶ The TRC report highlights how Canadian lawyers played an active role in forcing Indigenous children into residential schools and the intergenerational impacts of residential schools continue to impact Indigenous people today.⁷
12. The LSBC requires lawyers to take an Indigenous course which provides “knowledge on the history of Aboriginal-Crown relations, the history and legacy of residential schools and how legislation regarding Indigenous peoples created the issues that reconciliation seeks to address”.⁸ The course takes six hours to be completed over two years and lawyers can claim CPD credit for the time taking the course.

² <https://nctr.ca/records/reports/#trc-reports>

³ <https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/r/rel/release-public-statement-trc.pdf>

⁴ *Ibid.*

⁵ *R. v. Barton*, 2019 SCC 33, <https://canlii.ca/t/j0fqi>, at para 199.

⁶ <https://www.lawsociety.bc.ca/our-initiatives/truth-and-reconciliation/>

⁷ *Ibid.*

⁸ *Ibid.*

13. In addressing Calls to Action #27, the Law Society of Alberta requires active lawyers to complete a five-hour Indigenous cultural competency course called The Path.⁹ The course was vetted by Indigenous organizations and people and their Lawyer Competence Committee and must be completed within an 18-month time frame.¹⁰
14. Indigenous intercultural competency at the LSO could take the form of a course (similar to BC and Alberta) or mandatory CPD requirement similar to EDI hours. Any program should be created in consultation with Indigenous communities and organizations.

Recommendation 2: EDI CPD Hours and Addressing anti-Black Racism

15. EAG recommends that the LSO maintain and enhance the CPD requirement for EDI hours with a particular focus on addressing anti-Black racism.
16. The Rules of Professional Conduct speak to the responsibility of lawyers to recognise the diversity of communities within Ontario.¹¹ Rule 2.1-1 states that “a lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity”.¹² A similar duty of integrity is stated at Rule 2.01 of the Paralegal Rules of Conduct.¹³ Commentary to the integrity rule adds:

[4.1] A lawyer has special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and democratic society and in the administration of justice, including a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in force in Ontario.¹⁴ [emphasis added]

⁹ <https://www.lawsociety.ab.ca/lawyers-and-students/continuing-professional-development/indigenous-cultural-competency-education/>

¹⁰ *Ibid.*

¹¹ *Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions – Challenges Faced by Racialized Licensees Working Group Final Report:* <https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/w/working-together-for-change-strategies-to-address-issues-of-systemic-racism-in-the-legal-professions-final-report.pdf> [Challenges Report] at page 40, para 93.

¹² <https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct>, Rule 2.1-1.

¹³ <https://lso.ca/about-lso/legislation-rules/paralegal-rules-of-conduct/complete-paralegal-rules-of-conduct>, Rule 2.01.

¹⁴ *Ibid*, Rules 2.1-1 [4.1].

Equality and inclusion training assists licensees in understanding their obligations under the Rules.¹⁵

17. In *R. v. Morris*, 2021 ONCA 680, the Court of Appeal noted:

It is beyond doubt that anti-Black racism, including both overt and systemic anti-Black racism, has been, and continues to be, a reality in Canadian society, and in particular in the Greater Toronto Area. That reality is reflected in many social institutions, most notably the criminal justice system. It is equally clear that anti-Black racism can have a profound and insidious impact on those who must endure it on a daily basis [...] Anti-Black racism must be acknowledged, confronted, mitigated and, ultimately, erased.¹⁶

18. In *R. v. Le*, 2019 SCC 34, the Supreme Court noted that “members of racial minorities have disproportionate levels of contact with the police and the criminal justice system in Canada”.¹⁷

19. In *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33, the Supreme Court noted that “access to justice is facilitated where clients seeking legal services are able to access a legal profession that is reflective of a diverse population and responsive to its diverse needs”.¹⁸

History of EDI CPD Requirement at the LSO

20. In 1991, Convocation adopted a Statement of Policy with 14 principles, including:

(i) The Law Society of Upper Canada is responsible for governing the legal profession in the public interest. Matters which relate to the professional careers of lawyers and their personal well-being inevitably affect the public interest: they are matters which have a direct impact upon the quality of legal services in Ontario. The Law Society has a responsibility to undertake research and to provide leadership in these areas.

(v) Where there is evidence of significant dissatisfaction with the practice of law among members of the profession, the Law Society has a responsibility, both to the public and to its members, to study the issue and to propose solutions.

(vi) The Law Society has a responsibility to work towards the amelioration of conditions within the profession which lead to dissatisfaction with the practice of law.

(xi) the Law Society endorses the principles of the *Human Rights Code*, 1981, and accordingly affirms that every member of the Society has a right to equal treatment with

¹⁵ Challenges Report at page 40, para 93.

¹⁶ *R. v. Morris*, 2021 ONCA 680, <https://canlii.ca/t/jjhd9>, at para 1.

¹⁷ *R. v. Le*, 2019 SCC 34, <https://canlii.ca/t/j0nvf>, at para 90.

¹⁸ *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33, <http://canlii.ca/t/hsjpt>, at para 23.

respect to conditions of employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.

(xii) The Law Society acknowledges that there are members of the profession, particularly women, who perceive themselves or their colleagues to be subject to discrimination. The findings of the [Transitions Report] lead the Law Society to conclude that discrimination (whether it be individual or systemic, intentional or unintentional) continues to exist within the profession.

(xiii) Lawyers have a responsibility to take a lead in eliminating discrimination. The Law Society will intensify its efforts to eradicate discrimination in the profession.¹⁹ [emphasis added]

21. In 1995, Convocation adopted the following **Statement of Values**:

The Law Society of Upper Canada declares that the legal profession in Ontario is enormously enriched by, and values deeply, the full participation of men and women in our profession regardless of age, disability, race, religion, marital or family status or sexual orientation.²⁰

22. In 1996, Convocation adopted three recommendations from the Equity Committee (with respect to the Report of the Commission on Systemic Discrimination in the Ontario Criminal Justice System). The first recommendation was:

To approve in principle the Law Society's commitment to combatting racism and systemic discrimination.²¹

23. In 2012, the LSO created the Challenges Faced by Racialized Licensees Working Group (the Challenges Working Group) to identify challenges faced by racialized licensees and design preventative, remedial, enforcement, regulatory and/or support strategies for consideration by EIAC and other committees to address these challenges.²²

24. In 2014, Convocation approved the Challenges Working Group's Consultation paper and between January and March 2015, the Working Group consulted with over 1,000 lawyers,

¹⁹ *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession*, 1997:
<https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/b/bicentennial.pdf> [Bicentennial Report] at page 14, para 26.

²⁰ Bicentennial Report at page 16, para 27.

²¹ Bicentennial Report at page 16, para 28.

²² Challenges Report at page 12.

paralegals, law students, articling students, and members of the public.²³ The Challenges Working Group also received written submissions from 45 individuals and organisations.²⁴

25. As a result of its consultations, the Challenges Working Group identified three objectives:

1. Inclusive legal workplaces in Ontario;
2. Reduction of barriers created by racism, unconscious bias and discrimination; and
3. Better representation of racialized licensees, in proportion to the representation in the Ontario population, in the professions, in all legal workplaces and at all levels of seniority.²⁵

26. The Challenges Working Group promoted 13 Recommendations in order to meet these objectives.²⁶ Recommendation 9 states:

Recommendation 9 – Continuing Professional Development (CPD) Programs on Topics of Equality and Inclusion in the Professions

The Law Society will:

- 1) launch a three hour accredited program focused on advancing equality and inclusion in the professions;
- 2) develop resources to assist legal workplaces in designing and delivering their own three hour program focused on advancing equality and inclusion in the professions, to be accredited by the Law Society; and
- 3) require each licensee to complete three hours of an accredited program focused on equality and inclusion within the first three years following the adoption of these recommendations and one hour per year every year thereafter, which will count towards the licensee's professionalism hours for that year.²⁷

27. The EDI CPD requirement remains in its infancy but it must be nurtured and properly evaluated.

28. EDI CPDs are largely accessible to legal professionals for no costs. They are a feasible program that is available regardless of a licensees' CPD budgetary constraints.

²³ Challenges Report at page 12.

²⁴ Challenges Report at page 12.

²⁵ Challenges Report at page 25, para 23.

²⁶ Challenges Report at page 25, para 24.

²⁷ Challenges Report at pages 39-40, paras 87-93.

Summary

29. In advancing the LSO's commitments to equality and inclusion in the professions, EDI CPD hours must be maintained and enhanced with a particular focus on addressing anti-Black racism.
30. Further consultation with stakeholders is required.



SUBMISSION TO THE LSO COMPETENCE TASK FORCE

March 4, 2022

Contents

Executive Summary.....	1
Introduction: The importance of a competency framework designed to reduce claims and maintain reasonable insurance premiums.....	2
About LAWPRO	2
The importance of professional liability coverage.....	3
Competency to reduce claims and maintain reasonable insurance premiums	3
LAWPRO's Responses to the Task Force's Questions	3
LAWPRO supports the Task Force's definition of competency (Question 1)	4
LAWPRO supports the proposed principles for an effective competency regime (Question 2)	5
Competency framework focus: A risk-based competency regime should address negligence risks	5
Competency framework focus: Reduce the biggest claims risks, which relate to basic client service/communications and practice management issues, and occur across the legal professions.....	6
Competency framework focus on insurance education	9
The continuing competence framework: Elements of the framework and renewal (Questions 3 and 4)...	9
A. CPD.....	9
(i) CPD increases competence and reduces malpractice claims	9
(ii) Renewing CPD efforts	10
B. The Practice Management Helpline: Effective triage of potential LAWPRO claims	11
C. Coach and Advisor Network, Mentoring and Peer-Based Initiatives.....	12
(i) LAWPRO supports CAN and mentoring	12
(ii) Promote mentoring, but do not make it a requirement	13
(iii) Peer assessments: More information required	13
D. Practice Assessment Programs: Addressing practice and claims risks early	13
E. Enhanced practice support and training: The clear need for more assistance	13
F. Technological Competence: An opportunity to enhance client service while reducing risks	14
G. Encouraging Excellence: LAWPRO's Risk Management Credit Initiative	17
Conclusion.....	18

LAWPRO's Submission to the LSO Competence Task Force

Executive Summary

Lawyers' Professional Indemnity Company (LAWPRO) is pleased to provide submissions to the Law Society's Competence Task Force, which can be summarized as follows.

LAWPRO welcomes the Task Force's review of the Law Society's competency framework. LAWPRO generally supports both the Task Force's working definition of competency and its principles to inform a modern competency framework.

LAWPRO is pleased to see that the Task Force is recommending a risk-based and client-centered approach. LAWPRO believes a risk-based approach should focus on both regulatory risks and negligence claims risks. Claims prevention competency initiatives have helped avoid claims from occurring. In addition to preventing Law Society complaints, competency efforts with a claims prevention focus benefit members of the public and the bar by reducing malpractice claims and lower insurance premiums.

A claims prevention approach also helps identify competency areas of focus that will foster effective risk prevention strategies. Using this approach suggests that the competency framework should focus on key risk-based themes, including understanding negligence risks, where and why claims happen, and the steps that can be taken to avoid them. Poor client service and communication along with lapses in basic practice management are the biggest drivers of malpractice claims – not failures to know or apply substantive law. Other key competency areas, from a professional liability lens include educating licensees about insurance requirements and claims reporting, technology, cyber dangers and fraud prevention. Focusing on these areas would follow a client-centred approach to professional competency, as mastery of these areas would enhance client service while reducing risks.

LAWPRO comments on particular elements of the framework and its renewal:

- **CPD:** LAWPRO supports mandatory CPD as our experience indicates it helps reduce claims. For example, a lawyer and firm staff member attended a LAWPRO organized CPD on avoiding wire frauds in early December 2021, and just a week later avoided a \$488,000 wire redirection fraud because they recognized the red flags of such a fraud from attending the program. LAWPRO recommends that the LSO enhance and expand CPD dedicated to claims prevention and risk management supplemented by lawyer and law firm self-assessments or other interactive online learning modules. LAWPRO would be pleased to assist in the development of such resources and tools and it does not see them as a replacement to minimum CPD / training requirements.
- **Mentoring:** LAWPRO is a long-time supporter of mentoring programs through its insurance offerings and outreach efforts, and actively promotes the LSO's Coach and Advisor Network. However, LAWPRO cautions against making mentoring mandatory, as this may create new risks and harms. In addition, without more information, LAWPRO cannot comment about the

possible strengths or risks presented by a peer assessment program but does not see an urgent need for such an addition to the LSO's competency programs.

- **LSO Practice Management and Practice Assessment Services:** LAWPRO appreciates the valuable contributions of the LSO's Practice Management Hotline and practice assessment initiatives and the working relationships between our claims prevention efforts and these programs.
- **Technology competency:** LAWPRO encourages the LSO to embrace opportunities to foster ongoing technological competency. This has the potential to enhance client service while reducing risks.
- **Encouraging excellence:** LAWPRO does not have a view as to whether or how the LSO should encourage excellence. LAWPRO notes that its own Risk Management Credit program offers one example of how the profession has been incentivized to learn about claims prevention and risk management.

LAWPRO would welcome the opportunity to discuss these issues further with the Task Force in 2022 and believes there are opportunities to work together to attain outcomes that are beneficial to both organizations

Introduction: The importance of a competency framework designed to reduce claims and maintain reasonable insurance premiums

LAWPRO welcomes the opportunity to share its expertise in malpractice insurance and claims prevention to assist the Law Society of Ontario's Competence Task Force in its important and timely review of the Law Society's competency framework. LAWPRO consents to having this submission shared publicly.

About LAWPRO

LAWPRO is an Ontario-regulated insurance company that provides more than 78,450 Ontario lawyers and a small number of paralegals¹ with cost-effective professional liability insurance, expert claims administration, and proactive risk and practice management initiatives to help prevent claims.

LAWPRO's mission is to be an innovative provider of insurance products and services that enhance the viability and competitive position of the legal profession. Through its Excess Insurance Program, LAWPRO provides optional coverage over and above the Law Society's mandatory program², primarily to sole practitioners and small firms who would otherwise find it difficult or impossible to obtain this coverage elsewhere. Through its practicePRO® initiative, LAWPRO educates lawyers on where and why

¹ At January 1, 2022, LAWPRO insured 48 paralegals who participate in partnerships or professional corporations with lawyers. Having all partners in a law firm under the same E&O policy helps avoid gaps in coverage and makes handling a claim simpler and more efficient. Ontario paralegals that are not co-owner partners of Ontario lawyers get their malpractice insurance from commercial carriers.

² LAWPRO's excess program can provide excess limits that can go as high as \$9 million per claim/in the aggregate above the \$1 million per claim/\$2 million in the aggregate limits provided under the primary program. LAWPRO's excess insurance program competes with the excess offerings of other commercial insurers in the Ontario market.

malpractice claims occur and provides tools and resources to reduce their claims exposure. Through its TitlePLUS® operation, LAWPRO provides comprehensive title insurance and legal services coverage for residential purchase and mortgage-only/refinance transactions handled by lawyers across Canada and Quebec notaries.

The Lawyer's Professional Indemnity Company (LPIC) was incorporated in 1990 by the Law Society of Upper Canada (as it was then known) for the purpose of obtaining reinsurance. As a result of the so called "insurance crisis" which saw the Law Society facing more than \$200 million in unfunded claims liabilities, and further to the recommendations of the LSO's 1994 *Insurance Task Force Report*, Convocation gave LPIC the mandate to operate an insurance company that:

- Operates independently from the Law Society with its own management and Board of Directors;
- Operates in a commercially reasonable manner (i.e., revenues must cover expenses);
- Offers premiums that generally reflect risk (i.e., those with greater risk pay higher premiums); and
- Settles claims fairly and quickly, though not on a "no-fault basis".

LPIC (now known as LAWPRO) was created in 1995 and has operated independently of the Law Society since then. Currently LAWPRO handles 3,000 newly reported claims on an annual basis and has just over 4,000 open claims files.

The importance of professional liability coverage

The Law Society's mandatory professional liability insurance requirement is integral to its public protection mandate. Ontario lawyers and paralegals in private practice must carry professional liability insurance coverage of at least \$1 million per claim and \$2 million in the aggregate on an annual basis. Professional "malpractice" insurance protects the public if they suffer a compensable loss due to an error by their legal services provider. It also indirectly protects lawyers against the financial consequences of claims that might otherwise threaten their solvency, and their ability to practice. On an annual basis, approximately 275 LAWPRO claims cost more than \$100,000, and 5-15 claims hit the \$1 million per claim LAWPRO policy limit.

As the insurer of all Ontario lawyers, LAWPRO is a key part of the Law Society's public protection mandate. It stands behind the over 30,450 lawyers currently in private practice and, through the run-off coverage it offers, it stands behind over 38,000 additional lawyers formally in private practice who have retired or moved into other sectors.

Competency to reduce claims and maintain reasonable insurance premiums

As we must insure every lawyer licensed to practice law in Ontario, lawyer competence is a matter of great interest to LAWPRO. Trying to inculcate good risk management practices in lawyers at all stages of their practices is not only beneficial to lawyers themselves but is also important for the practicing bar as a whole if insurance premiums are to be maintained at reasonable levels.

LAWPRO's Responses to the Task Force's Questions

LAWPRO has been managing lawyer errors and omissions claims and proactively addressing claims prevention issues facing lawyers and law firms for over 27 years. This expertise in claims prevention and risk management informs our comments for the Task Force's consideration.

LAWPRO supports the Task Force's definition of competency (Question 1)

LAWPRO supports the Task Force's working definition of competence. We agree with both the Task Force's findings that competence is generally "composed of knowledge, skills, abilities, behaviours, judgment and values".³

In addition, LAWPRO supports the express recognition of the importance of "the habitual [...] application of attributes" as part of the definition of competence, i.e., the importance of habit formation.⁴ A significant part of LAWPRO's claims prevention and risk management efforts focus on educating lawyers and law firm staff about where and why malpractice claims happen, and how they can pro-actively take steps to reduce their claims risks.

LAWPRO emphatically agrees with the Task Force's view that the client experience is a "critical dimension of competence".⁵ Just as client complaints regarding client service are a top driver of complaints to the LSO, in almost all areas of practice the leading cause of claims to LAWPRO relate to client service (e.g., client communication and relationship issues) and basic practice management issues (e.g., missing deadlines and procrastination). This is the case for almost all areas of law, regardless firm size or length of time in practice. Competent client service and basic practice management are key to managing complaints to the regulator and claims to LAWPRO and can reduce potential harms to clients and the public.

LAWPRO agrees that competence is developmental, and there are a wide range of means to acquire competency. As described in more detail below, LAWPRO promotes professional competency, with a focus on risk recognition and claims prevention through different methods of acquisition, including:

1. **Education:** LAWPRO regularly presents at programs offered by the main-stream CPD providers, provides CPD programs directly to lawyers and law firm staff itself, and offers a Risk Management Credit to incentivize insureds to learn about claims risks and claims prevention. LAWPRO supplements these efforts by providing online and print materials to lawyers and firm staff, including practical "how to" resources that help lawyers reduce their risk of claims, better manage their practices and safely use technology (e.g., articles, checklists and precedents).
2. **Training and practical experience:** LAWPRO assists in lawyer training by participating in skills programs offered by CPD providers, and by regularly presenting to LPP/PPD students as part of their training and experiential programs on topics such as the most common claims risks and how to avoid them, and the benefits and risks of using legal technology (e.g., wire fraud and cyber dangers). For greater relevance and impact, many of LAWPRO's presentations, materials and resources are created with content specific to a particular area of practice.
3. **Mentoring and coaching:** As described further below, LAWPRO has long supported mentoring initiatives through its insurance policy rules designed to encourage lawyers to serve as mentors, by promoting mentoring best practices, and by promoting the Coach and Advisor Network and other Ontario mentoring programs.

³ Competence Task Force Report, June 23, 2021, at page 8.

⁴ Competence Task Force Report, June 23, 2021, at page 8.

⁵ Competence Task Force Report, June 23, 2021, at page 9.

In addition, LAWPRO shares the Task Force's view that competence requires self-awareness, self-reflection, and a growth mindset. LAWPRO seeks to instill these elements of competence, working with the LSO to advance these goals where possible. See for example, our recent practicePRO article, [Cultivate Your Innovation Mindsets to Build Your Future Practice Today](#) and the Jan 2022 LSO CPD chaired by Juda Strawczynski, Director of practicePRO, [Reflecting on Your Practice: Goal Setting for Success in 2022 \(and Beyond\)](#).

LAWPRO's claims statistics confirm that competence must be instilled, not only at the start of one's career, but continuously improved throughout one's career. Real and alleged malpractice errors are made by lawyers at all levels of experience and at all career stages.

LAWPRO agrees that competence is dynamic, adaptive and context-dependent, and that as such a competence framework should include context-specific risk management and claims prevention efforts, but LAWPRO believes it is critical to note that by proportion, the types of errors leading to malpractice claims are very similar across firms of all sizes and for all areas of practice – people make errors and systems breakdown in the same way across all practice settings (see the pie chart on page zz).

LAWPRO supports the proposed principles for an effective competency regime (Question 2)

LAWPRO embraces the Task Force's five principles for an effective competence regime. We agree that a competency framework should be flexible, feasible, and forward looking. Most important from LAWPRO's claims prevention and risk-prevention perspective, the Task Force has correctly noted that the regime should be risk-based. LAWPRO agrees with the Task Force's recommendation that "Regulatory activities should ideally be designed to focus on addressing areas of greatest risk to the public based on known outcomes".⁶

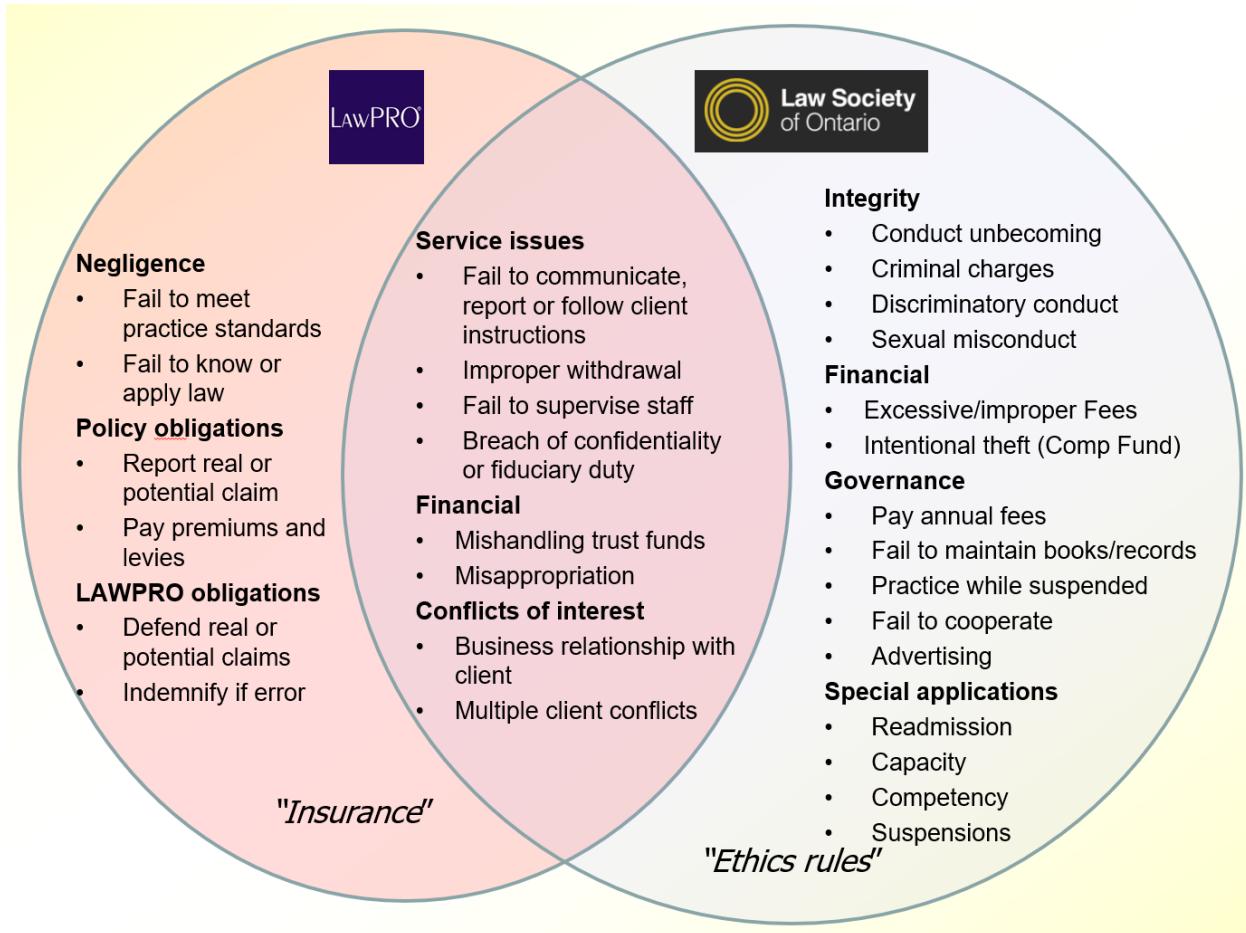
As we describe further below, **the greatest risks to the public relate to cases of lawyer negligence typically arising from basic client service/communications and practice management issues rather than due to the misapplication of the law**. As the greatest risks to the public often relate to client service and the client experience, LAWPRO supports the Task Force's recommendation that the competency regime also be based on a client-centered approach.

Competency framework focus: A risk-based competency regime should address negligence risks

In LAWPRO's experience, and consistent with the Law Society's approaches to competency, competence includes the ability to apply competency attributes to address lawyer and law firm professional liability (negligence) risks. Professional liability risk management should be a significant aspect of a future LSO competency regime, as real or perceived professional negligence has significant impacts for the public, and on lawyers when they have to deal with a malpractice claim, even if it is without merit.

⁶ Competence Task Force Report, June 23, 2021, at page 9.

Risk management relates in part to professional liability risks. As the diagram below shows, professional negligence risks (also called “professional liability risks” and “claims risks”) overlap with, but are at times separate from the regulatory and ethical risks addressed by the LSO, which are governed by Rules of Professional Conduct.



Claims risks include potential, perceived and actual errors and omissions, which require the defense of the licensee, and indemnification if there was an error. Although professional liability risks are at times separate from Law Society regulatory risk matters, they raise significant competency issues, and can affect the licensee, the licensee's client, and the administration of justice.

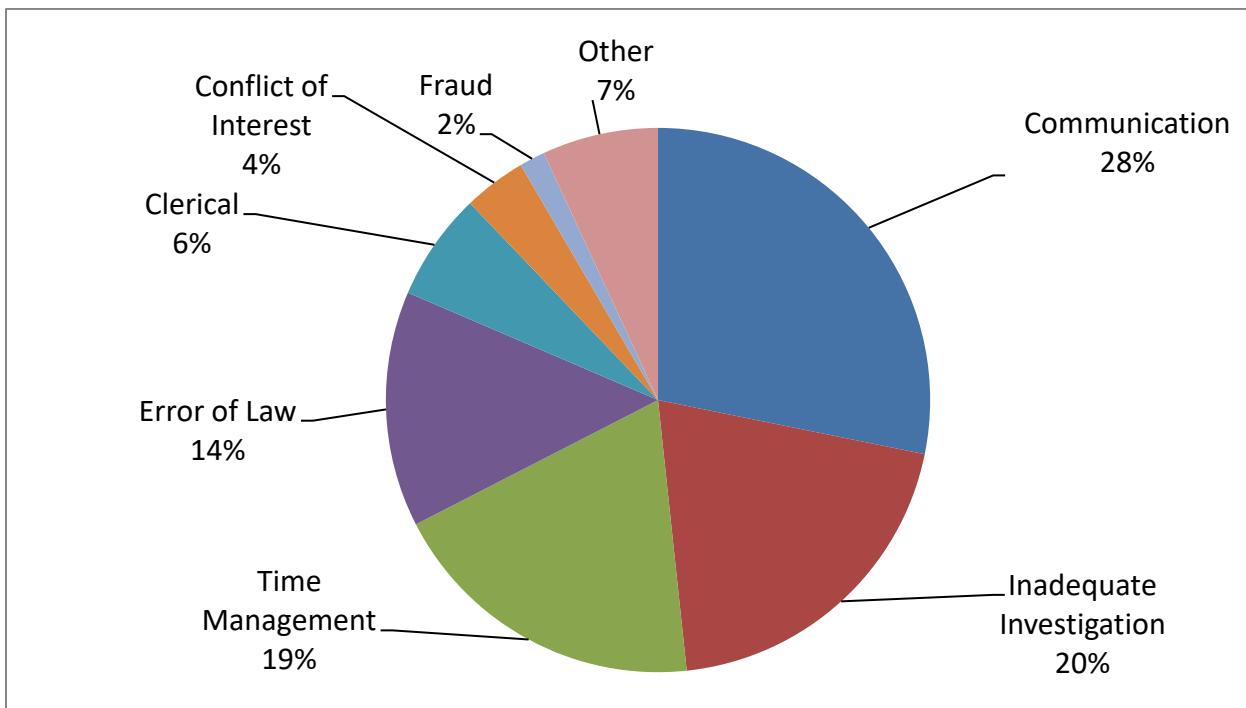
Competency framework focus: Reduce the biggest claims risks, which relate to basic client service/communications and practice management issues, and occur across the legal professions

As the malpractice insurance carrier that provides the mandatory insurance program to all lawyers in private practice in Ontario, LAWPRO has broad insights into where and why malpractice claims occur.

Perhaps most surprising to many is that failures to know or apply substantive law account for a relatively small portion of LAWPRO claims. As the following pie chart illustrates, the most common claims risks, constituting more than two-thirds of LAWPRO's claims, relate to basic client service/communication and

practice management related issues. LAWPRO's claims costs by type of error are roughly in the same proportion as this chart, although conflicts of interest and fraud tend to be proportionally more costly, and clerical errors are proportionally less costly as they can often be repaired.

Proportion of LAWPRO Claims by Type of Error (2010-2020)



They involve:

1. **Lawyer/client communication and relationship issues (28% of LAWPRO claims by count):**
These claims occur when important aspects of a matter are not handled properly due to miscommunication, poor communication or no communication. These claims occur because there is not enough time or effort spent on setting and controlling client expectations on the scope of the retainer; explaining how the matter will proceed and how long it will take; outlining what strategies or options exist, describing what the potential outcomes of the matter will be, and being clear on what final recoveries and legal fees will be.
2. **Inadequate investigation errors (20% of LAWPRO claims by count):**
These errors arise when lawyers miss details or don't ask clients all the questions they should. Examples include not investigating the details or impact of an injury in a manner sufficient to work-up a damages claim on a personal injury matter; not investigating the circumstances of an accident sufficiently to identify limitations periods; not understanding the nature and purpose of a transaction and the intended outcomes; or not fully determining the extent of assets or liabilities for an estate planning or family matter. Over the last decade this type of error has increased in most major practice areas and is a symptom of circumstances where a lawyer gives summary advice because the client wants a quick answer with minimal legal fees.
3. **Time/deadline management or procrastination issues (19% of LAWPRO claims by count):**

While this is the most common cause of litigation claims, it is the third biggest issue in most other practice areas. Deadline errors involve not knowing a limitation period, missing a limitation period because it was not entered in a tickler system, or a failure to respond to a deadline in a tickler system. Procrastination claims occur because a lawyer does not do work as promised or on a timely basis. Lack of follow-up claims occur when draft documents such as a will or a lease are sent to a client and there is no follow-up.

4. **Failures to know or apply substantive law:** This is the fourth most common error in most areas of practice. Lawyers are far more likely to make a substantive law error when they “dabble” outside their usual area of expertise. This often occurs when lawyers with the best of intentions try to help family or friends as a favour. Substantive law errors are also more likely to occur on matters that involve tax issues or when there are multiple intersecting areas of law, such as in family law, where law-related errors are the second most common type of malpractice error.

As was noted above, client service/communication errors make up the majority of claims in most areas of practice and are the leading cause of malpractice claims across firms of all sizes from sole practitioners to the largest firms.

While new calls in their first 5 years of practice tend to have fewer claims (and pay lower LAWPRO premiums as a result), we tend to see more claims in the 6-24 years of practice window when lawyers are most active. That being said, lawyers in the final years of practice continue to have significant numbers of claims, from both claims count and claims costs points of view.

On average malpractice claims are reported to LAWPRO 2½-3 years after the error occurred. Missed limitation periods are often reported shortly after they are missed, whereas as problems on real estate deals and wills can take decades to be discovered.

Roughly 15% of the 3,000 claims reported to LAWPRO on an annual basis involve an indemnity payment (i.e., a finding that a client suffered a compensable loss because of negligence in the services of their lawyer). But as they can be equally distressing for clients and lawyers alike, and can also be costly for LAWPRO to defend, reducing the 85% of LAWPRO claims where there is no negligence should also be a focus of any effort to increase competency. These types of claims frequently arise when a client is unhappy with the outcome or the legal fees. These claims can also arise when there is no negligence, but basic levels of client service and practice management are not met.

From its regular collaboration with the other Canadian law society insurance programs and bar-affiliated insurance programs in the U.S., it is clear that the nature and causes of malpractice claims are consistent, regardless of jurisdiction. LAWPRO also shares an observation made by several other Canadian insurance programs that problematic lawyers will typically become known to law societies due to multiple complaints well before they become known to the malpractice insurer as a result of claims.

In this submission, LAWPRO has highlighted the more important universal observations about where and why claims occur, and how they can be prevented. To better appreciate the nuances that occur in specific areas of practice, we recommend a review of our [Claims Fact Sheets](#). They contain common claims scenarios and risk management advice for ten different major areas of practice.

Competency framework focus on insurance education

As it is misunderstood by many lawyers and overlooked in many CPD programs, the LAWPRO insurance policy and the obligation to report claims warrants mention. The *Rules of Professional Conduct* and the LAWPRO policy oblige lawyers to report when there is a claim or circumstance that could lead to a claim. The discovery of an actual or potential error or a client alleging an error was made, even where there was none, trigger an obligation to report. We frequently see lawyers unsure as to what to do when there is a real or potential malpractice claim and, not infrequently, we see lawyers attempt self-repairs without reporting. Early reporting is in the best interest of the public and members of the profession as LAWPRO can assist with a response, including making a repair (i.e., taking steps to reduce or even eliminate damages to the client). When lawyers fail to report promptly or at all, it can have significant repercussions for both the client (e.g., who can suffer exacerbated harm) and the lawyer (e.g., coverage can be denied).

The continuing competence framework: Elements of the framework and renewal (Questions 3 and 4)

LAWPRO generally supports a multipronged approach to building and continuously enhancing lawyer and paralegal competencies. In this section, LAWPRO provides its comments regarding various elements of the Task Force's proposed LSO continuing competence framework and its renewal.

A. CPD

(i) CPD increases competence and reduces malpractice claims

LAWPRO has always supported and continues to champion CPD, which in LAWPRO's experiences, form a key part of shaping lawyer competency, and should accordingly be a vital element of any competency framework. We supported CPD before it was made mandatory, supported the LSO decision to introduce mandatory CPD, and continue to support mandatory CPD for all licensees. For LAWPRO, the issue is simply that in our experience CPD helps lawyers – and LAWPRO – avoid malpractice claims.

LAWPRO is of the view, based on its over 27 years of claims handling and claims prevention efforts, that CPD has helped to reduce claims. Several times a year we get direct evidence from comments by insureds that the information or resources we provided lawyers at a CPD helped them recognize they were in circumstances that exposed them to a claim or to navigate a difficult situation to avoid what otherwise would have become a claim. We also regularly receive "hot calls" where lawyers, having recalled LAWPRO's risk management advice, reach out to us for direction when they feel they are in circumstances that could lead to a claim. For example, a lawyer and his staff member recently acknowledged that they recognized the red flags of a wire fraud a week after attending our online CPD on wire fraud just this last December, and thereby were able to avoid a fraudulent wire transfer redirection fraud in the amount of \$488,000.

LAWPRO takes these repeated acknowledgements as direct evidence that information provided to lawyers in CPDs and via print or electronic resources can help them recognize risky situations and avoid claims.

Ideally there would be statistical evidence establishing that attendance at CPD programs directly leads to a reduction of malpractice claims or ethics complaints. Anecdotal evidence aside, it is always more difficult to prove a negative (i.e., a claim didn't happen) than a positive (i.e., a claim occurred). Further, there are many complex and unrelated factors that influence what a lawyer knows or learns and how they might handle a circumstance that could lead to a claim. The content of CPD programs varies widely (e.g., substantive law, procedural rules, practice management, advocacy skills, legal technology education, etc.), and based on LAWPRO's experience from reviewing hundreds of programs over many years for approval for the LAWPRO Risk Management Credit, not all CPD programs include content specifically focused on claims prevention. Lawyers attend varying amounts of CPD programming and the programs they do attend may have varying degrees of relevance to their practice. The circumstances giving rise to a claim may arise within weeks after the CPD or many years later. Thus, it is very difficult to provide a direct statistical link between continuing legal education and reduced claims.

On three occasions, LAWPRO investigated whether lawyers that claimed the LAWPRO Risk Management Credit had a lower claims rate. One of the investigations found a lower claims rate, and the results on the other two show less correlation. Note that two of these investigations were completed prior to the implementation of mandatory CPD, and one just after, and as such we're looking to determine if lawyers that evidenced a more proactive attitude towards CPD by virtue of the fact they were claiming the LAWPRO Risk Management Credit would have a lower claims risk.

Despite the limitations on the quantification of the importance of CPD in relation to the prevention of malpractice claims, based on actual comments from our insureds over many years, LAWPRO is convinced that CPD helps prevent mistakes from happening, and in cases where mistakes have happened, at times can help minimize the severity of harm to clients. Without CPD LAWPRO believes lawyer competency would decline over time, leading to an increase in malpractice claims, and ultimately increased LAWPRO premiums.

(ii) Renewing CPD efforts

LAWPRO makes the following recommendations regarding the Task Force's CPD renewal efforts:

- **Maintain or expand CPD dedicated to claims prevention and risk management**

LAWPRO was pleased to see the introduction of professionalism criteria when mandatory CPD was introduced as we felt it helped ensure claims prevention and practice management skills were included in lawyer competency objectives. Most of the professionalism criteria help strengthen claims prevention and risk management abilities, and are therefore topics LAWPRO requires included for CPD programs to qualify for the LAWPRO Risk Management Credit. LAWPRO frequently provides presenters and materials related to LSO professionalism criteria at CPD programs.

Given the prevalence of LSO complaints and LAWPRO claims that arise out of professionalism issues such as client service/communications and practice management, LAWPRO recommends that, at a minimum, the LSO maintain its current levels of professionalism requirements.

If changes to CPD criteria are to be made to target certain competencies, then we would support proactive risk recognition and claims prevention being one of the key competencies. This means CPD should help lawyers appreciate where claims are happening, why they are happening, and the steps that can be taken to reduce the likelihood of a claim occurring. CPD attendees should also be provided with materials and resources (e.g., papers or articles, checklists and precedents) to help make this happen. This would be in the public interest, as risk prevention could enhance client satisfaction, reduce regulator complaints and malpractice claims.

- **Embrace interactive online learning modules for claims prevention and risk management**

Most available CPD offerings are based on a presenter or presenters providing legal education by way of lecture. However, adult education best practices recommend more interactive educational modalities and skills-based applied learning. The LSO has developed interactive CPD modules based on adult learning principles (available from <https://store.lso.ca/e-courses>). We encourage the LSO to develop further modules including ones that focus on claims prevention and risk management in areas such as client service, calendaring and time management and fraud prevention. We would welcome the opportunity to discuss how LAWPRO could assist in the development of such CPDs.

- **Licensee and law firm self-assessments around claims prevention and practice management would be helpful tools but should not replace minimum CPD requirements.**

LAWPRO believes that self-assessment tools are an important part of developing and enhancing competencies. Self-assessment tools can help describe key competencies that should be met by lawyers, paralegals and law firms. They can help lawyers and others consider their skills and competencies and identify areas for improvement. However, individual and firm self-assessments should not replace CPD requirements; rather, these can be resources that can enhance pre-CPD and post-CPD efforts by lawyers and law firms to build towards key competencies. LAWPRO would be pleased to work with the LSO to develop claims prevention and risk management competency self-assessments to assist licensees consider their training and other needs to enhance key competencies.

If the LSO shifts from a mandatory CPD requirement to a self-assessment and licensee-driven professional development plan, the PD plan should have a self-assessment of risk-management competencies and pathways to help licensees enhance competencies. The mandatory risk-management component should address both areas of risk identified by the LSO and LAWPRO so it reduces negligence claims to LAWPRO and LSO complaints. If the LSO moves in this direction, we welcome the opportunity to work with it to develop risk-management professional development self-assessments and model plans regarding claims prevention issues.

B. The Practice Management Helpline: Effective triage of potential LAWPRO claims

The Law Society Practice Management Helpline (PMH) is an example of proactive regulation that seeks to assist licensees and reduce risks for those in practice. When PMH receives calls from lawyers and LAWPRO-insured paralegals where there may be a negligence issue, the caller is advised to call LAWPRO

before matters escalate. This serves licensees, clients and the public interest as it helps reduce claims risks.

PMH primarily addresses ethical and rules-based issues, and LAWPRO's practicePRO team addresses claims prevention and insurance issues. While our areas of concern overlap, thanks to strong relationships between LSO and LAWPRO staff, we ensure there is no wrong door to seeking practice assistance, with the result and that lawyers and paralegals are referred to the appropriate resource. LAWPRO regularly refers matters related to PMH, and vice versa. On overlapping issues, which are not uncommon, we can each assist licensees and work proactively to assist licensees with their practice issues.

We look forward to continuing to work with our PMH colleagues. In 2022, this will include keeping dialogue open about general trends, resource needs within the profession, presenting together at various CPDs and continuing to refer calls to and from our respective practice management and claims prevention lines.

C. Coach and Advisor Network, Mentoring and Peer-Based Initiatives

(i) LAWPRO supports CAN and mentoring

LAWPRO is supportive of the Coach and Advisory Network (CAN) and mentoring.

To address the widespread perceived concerns that acting as a mentor exposes a lawyer to a greater risk of a malpractice claim, in 2002 LAWPRO instituted special rules to encourage mentoring relationships. LAWPRO will waive any deductible or claims levy surcharge on any claim made against a lawyer mentor arising out of a mentoring relationship, provided that:

- The mentor and mentee agree to enter a written mentoring relationship, (which can range from being formal signed mentoring agreement, to a simple email acknowledging the relationship);
- The mentor will have no contact with a mentee's client that would create a solicitor/client relationship; and
- The mentee understands that they are responsible for individually satisfying themselves of the soundness of any suggestions, recommendations or advice-like comments made by the mentor.

LAWPRO also encourages lawyers exempt from the payment of premiums (such as certain in-house lawyers and retired lawyers) to be mentors in CAN and other mentoring programs. Exempt lawyers can maintain their exempt status while having coverage for mentoring through CAN. They can have their deductible (and claims levy surcharge if they return to practice) waived on any claim against them arising out of a mentoring relationship, provided they maintained the above mentor-mentee protocol.

LAWPRO has historically promoted mentoring within the profession and continues to do so. LAWPRO released its [Managing a Mentoring Relationship](#) booklet in 2002, before many of today's formal mentoring and coaching programs were developed. In 2021 LAWPRO released its [Ontario Mentoring Programs](#) table (that includes CAN) to help lawyers navigate the programs and find suitable mentoring and coaching programs. In our outreach efforts we regularly encourage lawyers to explore CAN.

Informal mentoring is widespread across the profession, and we see a continued need for programs such as CAN, as we continue to receive inquiries that could be addressed by a professional colleague.

We would welcome further discussions as to how we can provide further supports to CAN to ensure that coaches and advisors know LAWPRO insurance, claims risks and they can assist licensees to reduce their exposure to claims.

(ii) Promote mentoring, but do not make it a requirement

LAWPRO supports mentoring, including CAN, and supports the LSO encouraging lawyers to become mentors and mentees, but cautions against requiring them to do so. Not all lawyers are suitable to serve as mentors. Not all lawyer mentors can help instill professional competencies in mentees. There may be certain cases where the match would be ill-suited. Sometimes a mandatory mentoring match may do more harm than good.

If the Task Forces decides to further explore mandatory mentoring relationships, we would welcome the opportunity to discuss the risks and potential consequences on lawyer liability insurance further before any recommendations are made.

(iii) Peer assessments: More information required

We have not heard of a need for peer assessment as a specific tool to develop lawyer competencies. As with mandatory mentoring, a mandatory peer assessment program might raise new risks. However, without knowing the objectives, scope and competency outcomes of a peer assessment program, LAWPRO cannot consider what implications such a program may have on our errors and omissions insurance program. If further to this consultation the Task Force is interested in pursuing peer assessment options, we would welcome the opportunity to comment based on more detailed information.

D. Practice Assessment Programs: Addressing practice and claims risks early

LSO's practice assessment programs (practice reviews, spot audits, and practice audits) proactively address practice management issues and steer lawyers and paralegals towards best practices. These programs presumably help prevent correct issues before they may lead to a complaint to the LSO, a claim to LAWPRO, or both.

LAWPRO does not share information about individual lawyer claims with the Law Society; however, our strong working relationships with program staff ensure that we know regulatory trends, and that LSO staff know claims trends. This helps to make sure that both LAWPRO and LSO practice initiatives can focus on issues as they emerge and that practice supports and resources can be considered as new risks arise.

If the LSO increases practice assessments, they should continue to be on a risk management basis informed by errors and risk trends. These decisions should continue to be made in part on LAWPRO data for claims issues for lawyers.

E. Enhanced practice support and training: The clear need for more assistance

We encourage the LSO to continue to explore potential additional support, in particular, for sole practitioners and small firms, and the possibility of training courses addressing key claims prevention and practice management competencies.

There appears to be need in this area. LAWPRO is frequently invited to present on the business of law, business basics and law firm management. A review of LAWPRO's [most popular resources](#) clearly indicates the lawyers are looking for "how to" resources that give them practical information and direction on law practice management and legal technologies. Among our top 20 articles or resources for 2020 are our retainer precedents and resources ([Limited Scope Retainer Resources](#) were the #1 resource; [General Retainer Letter](#) was the #2 resource), [Business Plan Outline](#), several of our Managing Series publications ([Managing the Lawyer/Client Relationship](#); [Managing Conflicts of Interest](#); [Managing the Finances of Your Practice](#)), and our CPD on [Managing your practice through COVID-19](#).

However, LAWPRO is not suited to teach / train lawyers about financial record-keeping or all aspects of Law Society regulatory compliance. The business of law, law firm management, and financial record-keeping are key foundational skills to practice at the solo or small firm level. We would welcome the opportunity to assist in skills development programming should the Law Society mandate or develop such courses.

From a risk-management perspective, it would be beneficial to *require* CPD related to claims prevention, including practice management, client communication, fraud prevention and other key risk areas. It may be possible to develop certain resources through a mix of new and existing resources, as done with the LSO's excellent Bridge to Practice Program, which could reduce program development costs and/or maintain program affordability.

If the LSO determines that it would like to further develop new mandatory courses for all licensees, new licensees, licensees in solo or small practice settings, or licensees returning to practice, we would be pleased to assist in identifying key claims areas and practice tips.

F. Technological Competence: An opportunity to enhance client service while reducing risks

In countless ways technology has become an integral part of the provision of legal services today. Technology advances over the last two or three decades illustrate how technological competence is a perfect example of how licensee competencies must evolve over time, and why licensee competency must be based on life-long learning. But despite the fact it has been long recognized that technological competency is an essential part of the legal professional's competency skills set, technology competency rules struggle to define technological competence and lag behind the pace of technological change.

Like most of the current legal service regulatory structures and mechanisms, technology competence has focused on directing the conduct of individual lawyers. The notion that all lawyers could be competent in the use of available technologies was perhaps an attainable outcome in the earlier days of legal technology as the several dozen legal technology tools in play at that time could be understood by one person. Most of these tools were task specific (e.g., word processors like the widely used WordPerfect) and had fairly simple functionality. In the early days of technology it was typically one or two lawyers in a firm advocating for and implementing new technologies.

As time went on, legal technology tools advanced and became more specialized. They evolved to support back-office functions like billing and accounting. Fax machines became widely used, replacing mail and couriers for many types of correspondence. Software tools that handled file or matter management like Amicus Attorney also became available and were used by many lawyers.

And at the same time, new technologies from the mainstream were widely adopted by lawyers. Despite the alleged inherent dangers raised by many naysayers, email became the preferred manner of lawyer/client communication. Laptops and iPhones allowed some of us to be mobile and provide legal services from locations far beyond the traditional law office setting.

Over the last two decades we have also seen the emergence of specialized document or form creation tools for almost every area of practice, as well as research and analysis tools, many of which are now cloud-based. Technology is now a part of almost every stage of litigation process, from electronic document discovery and analysis, document management and production tools, pleading drafting tools and technologies that support advocacy at hearings.

In February of 2020 most law firms largely operated from a traditional office setting. By April of 2020 almost every law firm was functioning successfully, for the most part, with most staff working entirely from home. Necessity drove a huge transformation for many late and slow adopters of technology. Remote work, laptops and virtual meetings became an accepted part of running a practice in a manner that many would have said simply wasn't possible just a few months earlier. And these changes are here to stay. LAWPRO prepared a [variety of resources to help lawyers make the transition to and operate safely in a remote practice setting](#).

Today there are thousands of legal and non-legal technology products and services that a lawyer can consider for use in their practice or at their firm. With all these options comes far greater complexity and the notion that any individual lawyer can be competent in all technologies is not practical or even possible. A consideration of how technology has evolved at smaller versus larger firms serves to highlight this point.

The early “DIY” adopters of technology used the same task-specific tools, regardless of firm size. While lawyers at all sizes of firms continue to use the modern equivalents of many of the traditional tools (e.g., word processing, time tracking, billing and accounting, etc.), bigger firms now have a wide range of products and services that support the more institutional and systematized infrastructure they must have in place (e.g., conflicts checking, document management, HR and staff management tools). And while firms of all sizes should put some thought and effort into business continuity and disaster planning, large law firms must have business continuity plans that are far more sophisticated than what a smaller firm or sole practitioner would have for their technology footprint.

The challenge of law firm information security warrants a separate mention. At the present time every device owned by an individual or business is a target for hackers. Personal and law firm owned devices used by lawyers and law firm staff are even more of a target as law firms have sensitive and valuable client information and sometimes large balances in client trust accounts. Frauds of various types (e.g., real estate mortgage frauds or wire redirection frauds) are costly for LAWPRO and the Law Society’s Compensation Fund. Keeping law firm data and funds secure is a task that is Sisyphean in nature and requires constant and ongoing attention. Most law firms require the knowledge and advice of outside experts to help them properly secure firm data and information.

It is important to define the technology competence that an individual lawyer should have. CPD programs, resource materials and talking to colleagues can help lawyers understand the technology options available to them.

It is equally important to recognize that technology implementation often occurs on a firm-wide basis. From solo practices with support staff, to larger law firms, technology infrastructure is a matter for an entire organization, with lawyers ultimately responsible for the competent delivery of legal services and for cyber security. From this point of view, something more akin to standards or guidance for the processes, systems and technology infrastructure at a firm level would be more relevant from operational and risk mitigation points of view.

CPD programs, resource materials and talking to colleagues can help lawyers understand the technology options available to them. There is further good news as cloud-based services offer lawyers at law firms of all sizes access to sophisticated tools at a fraction of cost that firms would incur for traditional self-built or self-hosted solutions, with the additional benefit of having the vendor maintain the technology infrastructure and provide (hopefully) best practices for cyber security. Outside experts can provide helpful advice and direction, but they can be hard to find. Many firms fail to reap the full rewards of the technologies they implement as they do not provide staff with sufficient training.

In the early years many lawyers rode the coattails of early technology adopters, and a good number ignored technology and continued to practice in a traditional manner. Today's early adopters are using technology to deliver legal services in new and non-traditional ways. Discussing the technology competence of a typical lawyer is necessary, but it is important to note that legal technology has gone far beyond specialized document production and back-office operations – some websites and apps can now directly provide legal services to clients (e.g., online legal advice and “smart” forms). This raises the question of whether technology alone is competent to provide legal services. We will leave that discussion for another time.⁷

At some point we crossed a tipping point where legal technology is not just a tool that can be used to support the work a lawyer does as part of their practice to provide legal services to a client. Today technology competence is now interwoven into just about everything that happens within the firm and in many ways has become as much a part of providing legal services as basic legal competence is. And technology is now opening the door for the provision legal services in new non-traditional ways, some of which could make legal services more accessible to individuals and entities that can't today access the legal advice and services they need.

As technology is so integral to the provision of traditional and emerging legal services, LAWPRO encourages the Law Society to consider how technology competence can be interwoven in the competence framework that the Law Society develops for lawyers and paralegals, and their firms.

The more widespread use of new technologies and the changes how aspects of legal matters and transactions are handled will also create the need the Law Society to consider standards or guidelines

⁷⁷ While it has the potential to improve access to justice by allowing new or cheaper kinds of legal services, the provision of legal advice purely by technology raises some interesting and challenging questions. Is it possible for clients using an online site for legal services get the incorrect advice because they were confused by the interface or provided incorrect factual information? Can the algorithms or artificial intelligence (AI) behind an online site give accurate legal advice or correctly create formal legal documents? Can algorithms or AI give incorrect legal advice? Can there be bias in algorithms? The answer to all these questions is of course, yes. The failure points for legal advice created purely by technology are not all that different from the failure points of human-created legal advice.

for technology-related issues like client identification and verification, e-signatures, and funds transfer mechanisms.

Improving technology competency through CPD and other training can enhance the delivery of legal services while reducing risk. Many of the most common malpractice claim risks can be reduced with the proper use of technology (e.g., practice or matter management software can help with managing a file, communicating with clients, and keeping track of deadlines and tasks). Helping lawyers reduce their exposure to fraud and cyber dangers is also a critical part of technology competence. And in LAWPRO's experience, many lawyers are hungry for help and direction on how they can use technology in their practices. The practical "how to" technology articles, checklists and other resources that LAWPRO has created over the last two decades under the practicePRO banner have proven to be our most popular downloads. Our December 2, 2021 CPD: Avoiding the wire fraud nightmare – what you need to know to protect yourself and your clients had 1,100 attendees and continues to be accessed as replay along with the program materials which include wire fraud prevention resources and our popular cyber tips sheets and resources.

LAWPRO would welcome the opportunity to collaborate with the Law Society in its efforts to improve the technology competence of members of the profession.

G. Encouraging Excellence: LAWPRO's Risk Management Credit Initiative

LAWPRO takes no position as to whether or how the LSO should incentivize licensees to strive for excellence. There are no shortage of regulatory tools that could be used to encourage enhanced competency or even excellence. One tool that LAWPRO employs and is planning to continue to operate to incentivize our insureds to engage in continuing competency development related to claims prevention and risk management is our Risk Management Credit (RMC) program.

The precursor to the RMC was developed long before there was a mandatory CPD requirement. To encourage lawyers to learn about risk management and claims prevention issues, LAWPRO offered a credit against the LAWPRO premium for attending CPD programs addressing these issues. The logic at the time was that education and training in these areas would help lawyers better recognize scenarios that could lead to a claim, which would reduce their claims risk, thus justifying offering them a lower premium. LAWPRO continues to believe in the RMC as we hear from lawyers that lessons learned at CPDs focusing on claims prevention have helped them navigate safely away from risks.

Under the RMC, LAWPRO offers a \$50 premium credit (to a maximum of \$100) for each qualifying program completed by mid-September. The credit is then applied to the next year's insurance premium. Qualifying programs must, among other criteria, provide at least 1 hour of education, include written materials, and provide information that will help lawyers:

- appreciate the nature, cause and frequency of malpractice claims;
- understand and assess what can go wrong;
- determine which risks demand the most attention; and
- implement strategies to deal with and eliminate those risks.

To learn more about the RMC, we invite you to visit: <https://www.LAWPRO.ca/risk-management-credit/>.

Conclusion

LAWPRO believes proactive claims prevention efforts can help reduce exposure to malpractice claims. LAWPRO therefore encourages the Law Society to include claims awareness and risk mitigation strategies as an integral part of a risk-based competence regime going forward. Such an approach would adapt to risks as they arise, with a focus on client service and communication along with basic practice management, fraud and cyber dangers and technology competencies. To further minimize risk, LAWPRO encourages the Law Society to include a strong focus on how insureds should deal with a malpractice claim, obligations for reporting a claim and how to deal with real and potential claims. These claims prevention efforts can help address issues before they arise. This is good for lawyers, their clients and the public interest.

We hope that our comments and the underlying claims analysis on which they are based provide useful insights for the discussions on future of the LSO's competency framework. LAWPRO would welcome the opportunity to further collaborate as the Task Force considers its next steps.

McCarthy Tétrault LLP
PO Box 48, Suite 5300
Toronto-Dominion Bank Tower
Toronto ON M5K 1E6
Canada
Tel: 416-362-1812
Fax: 416-868-0673

McCarthy Tétrault LLP



Memorandum

November 30, 2021

To: LSO Competence Task Force
From: McCarthy Tétrault LLP
Re: Call for Comment

Many thanks for the opportunity to respond to the Law Society's Competence Task Force Report. Director Laura Millman together with Senior Directors Gina Rogakos and Katy Honsberger, all members of our Professional Resources group with responsibility for professional development, provide comments below on behalf of McCarthy Tétrault LLP. Should you have any questions, please get in touch with Laura Millman at lmillman@mccarthy.ca.

1. More Flexibility

As an alternative to the current CPD requirement for continuing competence, we are of the view that the Task Force should consider a more flexible approach by allowing licensees to identify their own learning needs and then to create and execute their own unique professional development plan. Other jurisdictions (in England and Wales, and in Canada) have taken this approach

2. Mandated Professionalism

Even if the Law Society chooses to adopt a more flexible approach to CPD, we are of the view that licensees would continue to benefit from mandated Professionalism requirements including Ethics, Practice Management and EDI.

3. Communication Skills

Given that the Law Society data indicate lawyer-client communication or miscommunication remain a key cause of complaints and malpractice claims, we believe that the Law Society should consider broadening the definition of Professionalism to include a wide range of communication and related lawyering skills similar to those outlined by the BC Law Society.

4. Annual Requirement

The CPD requirement should remain an annual requirement.

5. Caps

In line with more flexibility, the 6-hour caps on teaching and viewing videos alone should be permanently removed. These are both important and valuable ways in which many of our lawyers learn and we see no good reason for these restrictions.

MEMORANDUM

To: LSO Competence Task Force
From: McMillan LLP
Date: November 12, 2021
Re: Call for Comment

Thank you for the opportunity to respond to the Law Society's Competence Task Force Report. Here are our comments. If you have any questions, please reach out to Marlene Kane our Director of Professional Development at marlene.kane@mcmillan.ca or 416-865-7245.

1. **More Flexibility.** As an alternative to the current CPD requirement for continuing competence, we believe the Task Force should consider a more flexible approach by allowing licensees to identify their own learning needs and then create and execute their own unique professional development plan. Other jurisdictions (in England and Wales, and in Canada) have taken this approach.
2. **Mandated Professionalism.** Even if the Law Society chooses to adopt a more flexible approach to CPD, we believe that licensees would continue to benefit from mandated Professionalism requirements including Ethics, Practice Management and EDI.
3. **Communication Skills.** Given that the Law Society data indicate lawyer-client communication or miscommunication remain a key cause of complaints and malpractice claims, we believe that the Law Society should consider broadening the definition of Professionalism to include a wide range of communication and related lawyering skills similar to those outlined by the BC Law Society.
4. **Annual Requirement.** The CPD requirement should remain an annual requirement.
5. **Caps.** In line with more flexibility, the 6-hour caps on viewing videos alone and on teaching should be permanently removed. These are both important and valuable ways in which many lawyers learn and we see no good reason for these restrictions.



The Voice of the Legal Profession

Submission on Renewing the LSO Continuing Competency Framework

Submitted to: The Law Society of Ontario

Submitted by: Ontario Bar Association

Date: January 21, 2022



ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

L'ASSOCIATION DU
BARREAU DE L'ONTARIO
Une division de l'Association
du Barreau canadien

Table of Contents

Introduction.....	3
The Ontario Bar Association.....	3
Overview.....	3
Comments.....	4
Mandatory Continuing Professional Development Requirement	4
Tying CPD Requirement to Practice Area(s), Experience Level or Identified Areas of Risk	5
Technological Competence	6
Indigenous Cultural Competency	6
Certified Specialist Program	7
Legal Information and Research Supports.....	7
Conclusion.....	7



Introduction

The Ontario Bar Association (OBA) appreciates the opportunity to provide this submission in response to the Law Society of Ontario's (LSO) Report from the Competence Task Force on Renewing the LSO's Continuing Competence Framework (the "Consultation Paper").

The Ontario Bar Association

Established in 1907, the OBA is Ontario's largest voluntary legal advocacy organization, representing lawyers, judges, law professors and students from across the province, on the frontlines of our justice system. Through the work of our 40 practice sections, the OBA routinely provides expert advice to the Law Society on matters that affect the administration of justice in Ontario in the interest of the public and the profession.

In preparing this submission, the OBA has sought input from a critical cross-section of the bar, including senior and junior lawyers, from managing partners to new calls and students, who practise across Ontario as solicitors and barristers in a variety of practice settings.

Overview

The stated objective of the Task Force is to recommend an effective, proportionate, and balanced regulatory framework addressing career-long competence in a manner that protects the public interest and is responsive to the public's legal needs.¹ Access to lawyer services is critical to protecting and responding to the public's needs. To achieve these objectives, it is crucial for the LSO to ensure that the regulatory framework does not unnecessarily jeopardize lawyer practice feasibility. To an extent, this is reflected in the principles of flexibility and feasibility that the Task Force has identified to guide its work, and they are included in the comments from our members that follow.

¹ Consultation Paper at p. 2



Comments

Mandatory Continuing Professional Development Requirement

The OBA previously provided feedback supporting the requirement of 12 mandatory CPD hours, as a reasonable and not overly burdensome requirement for the bar². Since the inception of this requirement, we have not heard calls for reform. No compelling reason has been put forward to disrupt the current CPD requirement, nor has any persuasive alternative been proposed that is able to achieve the balance of flexibility and public confidence more effectively. The CPD requirement, as it currently stands, provides a measure of confidence for the public, while being balanced with the flexibility lawyers need to ensure they are able to select the CPD activities required to suit their particular practice. We understand the requirement for one EDI hour is explicitly exclude from the consultation. We assume that is because the need for, and value of, such education is patently evident.

The Consultation Paper notes that “compliance with the CPD requirements has been very high since inception of the program” with “approximately 99% of practicing lawyers … fulfill[ing] the requirement on an annual basis”. The CPD requirement continues to have strong support from the bar at large, with a recognition that the requirement provides important protection for the public and aligns the profession with other respected professions.

The experience of our members, as creators, participants (i.e. speakers) and consumers of CPD, shows us that there are also many ancillary benefits of the OBA’s CPD offerings, including:

- Hearing voices from different firms, regions, perspectives and/or practice areas for a diverse and well-rounded educational experience;
- Establishing and building business development, networking and mentorship relationships with fellow attendees and speakers; and
- Raising profile for speakers.

² OBA Submission, [Mandatory Continuing Professional Development – Two-Year Review](#), April 2, 2013



The OBA is dedicated to providing CPD programs that are accessible, timely and relevant regardless of where lawyers are located across the province. While the Consultation Paper notes that the “majority of licensees participate in CPD programs to fulfill their annual requirements”, the other eligible learning activities under the current CPD requirement are valuable in providing even further accessibility and flexibility for members of the bar to meet the requirement.

Tying CPD Requirement to Practice Area(s), Experience Level or Identified Areas of Risk

The LSO has asked broad questions about whether to further tailor the CPD requirement based on a number of factors, such as practice area, experience level or identified areas of risk. The LSO would need to set out a compelling reason to add such additional regulatory requirements and no such reason has been clearly identified.

Lawyers could be encouraged to give meaningful thought to selecting their CPD activities to provide for a richer learning experience. This could include self-assessment, developing a plan to target identified goals or needs, and self-reflection. That said, we do not have any cause to believe that lawyers are not targeting their CPD selections to their particular practice needs. In fact, it is hard to fathom why a lawyer would take the time (and often incur the expense) of CPD activities that are not tied to or beneficial for their practice. If the LSO has information that suggests such a disparity, it should be clearly provided.

Additionally, practice-focused requirements are likely to have the most significant impact on general practitioners. General practice is a critical structure for lawyers to be able to deliver services on “Main Street”, which is itself an access to justice consideration in many smaller centres across the province. Imposing additional CPD requirements tied to specific practice areas may be unduly burdensome and restrictive for lawyers with a more general practice, many of whom are often serving smaller communities.

The flexibility to align CPD activities with the services a lawyer provides is an important part of the current regime. It is not evident that lawyers, in particular general practitioners, are failing to stay on top of areas in which they practice in a way that jeopardizes competence. Additionally, even if the data does support such a conclusion, it is not clear that amending the CPD regime is the appropriate fix. If the LSO’s data supports the conclusion that general practitioners, or lawyers generally, are not



targeting their CPD activities to meet the needs of their practices, that information should be provided so that both specialist and generalist lawyers can comment on what response best addresses such an issue without jeopardizing practice feasibility.

Technological Competence

Technological competence is critical to the practice of law today. The truth of this statement has only become clearer through the course of the COVID-19 pandemic. With the courts, tribunals and government agencies transitioning to electronic systems, lawyers need to keep pace and the LSO should encourage this.

Technological competence is appropriately captured in the current professionalism content criteria. Many OBA CPD events provide technological training, either as standalone events such as our CaseLines Hands-On Training or incorporated into other substantive and professionalism events.

Given the fundamental importance of technological competence, it is worth considering a specific technology-focused requirements within the current CPD regime.

Indigenous Cultural Competency

The Truth and Reconciliation Commission of Canada (TRC)'s Call to Action 27 calls upon law societies to ensure that lawyers receive appropriate cultural competency training. The Federation of Law Societies of Canada subsequently urged law societies to consider mandatory Indigenous cultural competency training. The panel report commissioned by the LSO in 2018, called upon legal professionals to radically improve their competence in dealing with Indigenous clients and called for cultural competency training for lawyers.

The Canadian Bar Association, the OBA's national organization, endorsed this Call to Action at its annual meeting in 2016, passing a Resolution that outlined the CBA's commitment to further advancing the TRC Calls to Action³. The CBA and the OBA have since worked to provide CPD

³ Canadian Bar Association, [Resolution 16-12-A – Responding to the Truth and Reconciliation Call to Action](#), August 11, 2016.

programming targeted at enhancing lawyers' cultural competency⁴, demonstrating the significance of the role and ability of the legal profession to advance the TRC Calls to action.

The TRC Calls for Action make clear that justice sector reform is a critical element of the path to reconciliation. The OBA supports the addition of Indigenous cultural competency training requirements and opportunities for lawyers

Certified Specialist Program

Certified Specialist Designations are an important indicator to both the public and the legal profession that those who hold them are recognized as having achieved a high standard of expertise in a particular field. This both allows lawyers to promote their expertise, and assists the public (as well as other practitioners) in identifying a lawyer who is best placed to address specific legal issues.

The OBA has advocated for the expansion of the Certified Specialist program to additional practice areas in recent years, including into the area of Taxation Law (which was added to the program) and Privacy Law (which is currently under consideration), and supports its continuation.

Legal Information and Research Supports

Local law libraries have long served as a centre of activity and support for local lawyers. It is critical that they receive the necessary funding to continue to carry out that role, and the supports to make requisite improvements to ensure continued relevance and maximum efficiencies, such as taking advantage of technological innovation.

Conclusion

The OBA appreciates the opportunity to comment on the important issues presented in the Consultation Paper and looks forward to further engagement on this topic as the Task Force moves forward with its work. We would be happy to provide further feedback on the existing LSO programs.

⁴ See for example: [The Path – Your Journey Through Indigenous Canada](#); [We Are All Treaty People – Why We Need to be Allies](#); [After the TRC and the National Inquiry: The Gladue Principles and the Ongoing Call for Justice](#); [The Future of the United Nations Declaration on the Rights of Indigenous People in Ontario](#).



ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

L'ASSOCIATION DU
BARREAU DE L'ONTARIO
Une division de l'Association
du Barreau canadien

To provide effective additional feedback, additional information would be helpful and we would welcome a meeting to discuss further.

1 DUNDAS STREET WEST
26th FLOOR, PO BOX 42
TORONTO, ON
CANADA M5G 1Z3
T 416 597 9724
F 416 597 9736
www.osgoodepd.ca

Competence Task Force
Law Society of Ontario
130 Queen St West
Toronto, Ontario
M5H 2N5

Dear Task Force members,

A number of us at Osgoode Professional Development (OsgoodePD) wish to respond as a group to the June 2021 Report entitled *Renewing the Law Society's Continuing Competence Framework*. The Report sets out a number of questions upon which the Competence Task Force would like to consult, and we have chosen to respond to a sub-set of these questions below.

OsgoodePD has provided professional legal education since 1996. We are known globally for our commitment to ongoing innovation in educational technology and pedagogy. We were the first law program in Canada to offer distance learning and have worked to continuously improve quality, accessibility and flexibility. Our vision is to be at the centre of innovative design and delivery of professional legal education, enabling understanding, connection and transformation.

In the following comments we focus upon Questions 2, 4 and 5.

Question 2: Principles for an effective competence regime

Competence frameworks are not a new concept: the medical profession in particular has been developing competence frameworks for at least the last 20 years. This means that there is plenty of experience and evaluation to draw on when developing a new competence framework. For example:

- Competence Frameworks are not well received when they are overly cumbersome and prescriptive. Too much detail tends to make frameworks unwieldy and reduce assessment to a tick-box exercise which oversimplifies complex competences and therefore fails in its objective to assess higher-level professional competence.
- Engagement from all stakeholders is essential. Stakeholders need to be able to understand the rationales behind the Competence Framework and be able to buy into the outcomes.
- The link between point of licensure and ongoing competence. With a few exceptions, the knowledge and skills which are required to be taught and/or assessed prior to qualification, should reflect the knowledge and skills needed for practice. Not only does it make the pre-qualification training more realistic and relevant, it also helps to reconnect the profession with pre-qualification training and engender a sense of life-long learning in practitioners. There are structural models, such as the [Delta Model](#) in the US, which are specifically designed to be flexible reflecting practitioners' level of seniority, practice area and role within a firm or as in-house counsel.
- Competences need to be accompanied by a description of the level at which it is expected to be practised over the life cycle of a legal career, eg. "competent", "proficient", "mastery".

- There is usually a tension between stakeholders about what is or isn't a core competence, depending on their own specialist area(s). Given the overriding objective of transparency behind the development of a competence framework, this issue needs to be negotiated and resolved, commonly through mediation between stakeholders, or the development of specialist outcomes at appropriate stages of professional development.
- A further controversial factor is whether the Competence framework should extend to personal attributes (e.g. empathy, respect, resilience), or whether it should be confined to the knowledge and skills that can be assessed outside the workplace. The research suggests that considering how competences will be assessed and when is an important factor to consider from the outset.

From the work of the UK's LETR team and others, we have identified three main types of Competence Framework which we refer to further below:¹

- **Type A** - Regulatory frameworks – this includes most professions and is based around a statement of baseline competence, but which often links with ongoing expectations of professional competence (see the UK's General Medical Council's [Good Medical Practice](#))
- **Type B** - Internal employer frameworks – this drives progression/career milestones/workforce planning and is tailored to a firm or organisation
- **Type C** - Industry-wide frameworks – this would generally include frameworks developed, for example, for the engineering sector, or the National Health Service in the UK, to anticipate strategic workforce planning issues and skills shortages. The [Delta Model](#) could also be seen as an example of this, as well as the [IAALS study](#).

Any review of competence framework needs to take into account the flexibility of the frameworks put in place. If the framework is not capable of being put into practice by stakeholders in a broad range of workplaces, it will have only limited impact and value. The LSO clearly envisage Type A; but we would argue that a framework that can be easily adapted to Type B would be very useful to the profession. For this reason we urge the LSO to create a competence framework that in content and presentation can be used as a multi-purpose professional tool for learning and assessment across the legal sectors.

Finally, under Q.2, the definition of professionalism (cited on p.7) is perhaps too narrow in scope. We would like to see it broadened to include other issues, as in the following threshold definition:

1. Lawyers who meet the threshold will evidence that they are committed to the rule of law and administration of justice, and the interests of justice and democracy, both in Canada and in the global context.
2. As newly qualified lawyers they will correctly apply the most commonly-used principles of good conduct, identify the limits to their knowledge and experience, and escalate appropriately.
3. They will have an accurate knowledge of the foundational concepts of legal knowledge and skills and will rarely make mistakes in their delivery of straightforward matters.
4. At the point of qualification, they should be able to deliver effective and competent legal services at a level which is unlikely to cause regulatory concerns for their employer or regulator.
5. They will understand their personal responsibility to maintain and develop their knowledge and skills throughout their career through continuing professional education and personal development.
6. They will demonstrate an understanding of diversity and cultural issues, respect the needs and cultural wishes of others and be proactive in addressing the needs of people from all backgrounds.
7. A lawyer who meets the threshold will conduct themselves (both orally and in writing) in a manner which instils confidence in their work and advice. At all times they will act with honesty and integrity and with respect for colleagues, clients, third parties and the courts.

¹ Webb, J., Ching, J., Maharg, P., Sherr, A. (2013). *Setting Standards. The Future of Legal Services Education and Training Regulation in England and Wales* (London, SRA, BSB, IPS). Available at: <http://letr.org.uk>

Question 4: Renewing the Law Society's Continuing Competence Framework

In response to Q. 4 (d), we would state that OsgoodePD is supportive of increasing interaction and engagement in CPD programs. This approach promotes deeper learning, better retention, and increased ability to transfer or use new knowledge in different situations. OsgoodePD's commitment to interactive learning is evident in our interactive skills-based courses, such as our long-running Intensive Trial Advocacy Workshop, Certificate in Online Dispute Resolution, and in our use of simulated clients in programs such as the Certificate in Family Law Skills & Practice and in the Advanced Certificate in Workplace Investigations. In addition to these programs, OsgoodePD has made a commitment to continually improve our CPD offerings, with an emphasis on interactive, multi-day offerings that align with adult learning principles. A recent paper by Rima Sirota² challenges all CPD providers to create meaningful programs that change the practices of participants and improve the experiences of clients. This would be a worthy goal for the LSO's continuing competence framework.

- (e) Should the CPD requirement remain as is, be enhanced, or be eliminated altogether?

In response to Q. 4(e), it is OsgoodePD's position that the CPD requirement should remain an annual requirement and include mandated professionalism and EDI hours.

The LSO should, however, contemplate permanently removing the 6-hour cap on viewing archived/recorded CPD programs without a colleague. Asynchronous learning is a valuable way to learn. It gives the adult learner more control over their learning, offers greater flexibility and is more accessible. It also provides more opportunity for the learner to review the content as needed to improve comprehension and retention.

Question 5: Additional Considerations

The LSO Competence Task Force was established to "examine regulatory approaches aimed at ensuring and enhancing the post-licensure competence of lawyers and paralegals."³ To ensure this mandate is fulfilled, the LSO should ensure lawyers and paralegals have access to learning that best suits their professional development needs. To do so, the LSO must ensure licensees have a method to easily search and identify *all* available learning opportunities that can be claimed towards their annual CPD requirements.

As the regulator who is also a revenue-generating CPD provider, the LSO has multiple advantages over others who provide CPD. Mandatory CPD reporting and annual member reports completed by all licensees, gives the LSO access and direct insight into the future program needs of licensees, the competitive landscape (based on the programs their licensees have taken) and data on how licensees prefer to learn. Further, the LSO has access to licensee information and can promote (at little or no cost) their CPD programs directly to the licensees. Whether via email, mail, the Ontario Reports or other communication methods, this information is available to the LSO, but not shared with other providers. The impact? Other CPD providers must devote a considerable amount of time and resources conducting market research with licensees on what content they need to know, and marketing tactics to promote their offerings, including list rentals and publications. Providers are left with no choice but to pass these costs on to the public in the form of higher program fees.

In other jurisdictions (eg. British Columbia), regulatory bodies have shared licensee information with other providers in that jurisdiction or provided a website/portal access for all providers to promote their programs alongside the regulator's offerings. This practice ensures their licensees have access to the full array of available CPD options and helps reduce competitive barriers for other providers, including legal associations and non-profits. Although the LSO has a portal for LSO accredited programs, accredited providers are not afforded the opportunity to contribute and post in this.

² Sirota, Rima, "Can Continuing Legal Education Pass the Test? Empirical Lessons From the Medical World." (2021). *Georgetown Law Faculty Publications and Other Works*. 2386. Available at: <https://scholarship.law.georgetown.edu/facpub/2386>.

³ Law Society of Ontario, Competence Task Force Report: "Renewing the Law Society's Continuing Competence Framework" p. 2, par. 1.

The LSO should assess current practices, support providers, and ensure licensees are able to easily search all programs that can be claimed towards their annual CPD requirement – not just those produced by the LSO. This will ensure lawyers and paralegals can access and choose the learning that best suits their professional development needs, thereby enhancing their competence and the mandate of this Task Force.

Yours truly,

Heather Gore Liddell, Director, CLE Programs
Audrey Fried, Director, Faculty and Curriculum Development
Professor Paul Maharg
Victoria Watkins, Executive Director & Assistant Dean

December 3, 2021
(re-submitted December 6, 2021 with clarifications)

Submitted Online Only

To: Members of the LSO Competence Task Force
From: The Roundtable of Legal Diversity Associations (RODA)

Re: Submissions for the Continuing Competence Framework

OVERVIEW

The Roundtable of Legal Diversity Associations (RODA) submits these comments in response to the *Call for Comment* on the continuing competence framework by the Law Society of Ontario's Competence Task Force ("Task Force"). The comments respond to the Competence Task Force's report, "*Renewing the Law Society's Continuing Competence Framework*" ("Report") dated June 23, 2021, and to the questions posed in that Report. It is RODA's understanding that the Task Force will be considering these submissions during the development phase of its work plan.

BACKGROUND

The Roundtable of Legal Diversity Associations (RODA) is an umbrella organization that brings together a coalition of 22 equity-deserving, Canadian legal associations.ⁱ Our members are lawyers who hail from a wide range of practice settings, from soles to national firms and institutions, work in all ranges of legal areas, and come from student to semi-retired levels of experience.

COMMENTARY & RECOMMENDATIONS

Principles for an effective competence regime

In general RODA agrees with the five principles as outlined in the Report **if** they are applied with a public interest lens. Lawyers have responsibilities to the administration of justice beyond their individual clients. We have an obligation to encourage public respect for and try to improve the administration of justice.ⁱⁱ **RODA reiterates the Federation of Asian Canadian Lawyers' (FACL) articulation of a broad, purposive approach to these principles, and adds that if that approach is not sufficiently robust, then the principles fail to guard the public interest aspect of a lawyer's competency.**ⁱⁱⁱ

Working Definition of Competence

RODA supports the Report's working definition of competence, including the value of context, but has concerns about having a standard that is "too contextually" driven - in other words, what is the minimum service that the public is entitled to receive no matter the working context of the lawyer. In that vein, **competence needs to be clearly anchored to the Law Society Act. In the interpretation of the standards of professional competence, a licensee fails if there are deficiencies in the licensee's knowledge, skill or judgment.**^{iv}

In modern times, knowledge, skill and judgment are informed by more than the law as it is written on a page. Competent lawyering requires engagement: engagement with the legal developments within one's practice areas, of course, but also in the legal developments that are occurring all around us. Lawyers must engage to understand the impacts of societal and technological change on the law and legal practice. This includes how we communicate and how different people receive our communications, changes to the administration of justice (including technical requirements and changes to rules), and how our clients interact with the law (including contextual analysis and their individual and group exposure to/experience with the law). These changes affect our legal analysis and, fundamentally, our ability to serve the public - as individual clients or as part of our justice system. It matters not whether you practice in a rural setting or an urban one: lawyers are still working with people, are still working with essentially the same laws, are still interacting with the same systems of justice, and have the same objectives: to provide competent legal service and support the administration of justice. For the purposes of this review, **engagement requires ongoing education and learning; it requires interaction with other legal professionals; and it requires reporting to/review by the legal regulator on a consistent and not infrequent basis.**

Continuing Professional Development Requirements

Given the current state of the bar, RODA **does not support the concept of self-assessment, beyond its current form**, because, in essence, one does not know what one does not know. This is especially true in matters of cultural or systemic privilege.^v RODA accepts that the LSO has struck a balance between mandatory CPD and individual self-assessment by requiring a certain number of hours within the designated categories of Substantive, Professional, and EDI. Individual licensees have an enormous range of choice that they use to tailor to their individual practice needs and particular contexts, but **the requirement to remain informed about the evolving understanding of how the law and its enforcement impacts society must be non-negotiable. This is essential to be able to give proper legal advice.**

RODA believes that the current CPD offerings and requirements could be improved. The comments made by the Federation of Ontario Law Associations (FOLA) noting the default focus of CPD programming to be on knowledge - over skill and judgment - is important.^{vi} This is likely one factor for the high number of LAWPro complaints that fall into that category of client services claims and, in particular, communication deficiencies.^{vii} How do we maintain high levels of skill and judgment throughout our legal careers? It will certainly not be by ignoring the need to revisit those competency attributes. At Convocation on November 26, 2021, the LSO focused its debate on how to improve the experiential learning stage of becoming a lawyer. There is widespread acceptance that experiential training and early mentoring is key to learning the profession of law. The LSO may wish to investigate how experiential training could be incorporated into a licensee's career on a cyclical basis and not only at the beginning of a lawyer's career. To this end, FOLA's comments around the "how" and "who" to provide support for renewing our standards of practice are well-taken. **If the LSO intends to revisit the actual hourly requirements for CPD or the formats in which CPD is transmitted (including ways to better engage learners), then this needs to be done with proper consultation amongst legal educators and consumers of the programming.**

RODA is aware of the criticisms around the efficacy of whether mandatory CPD - in any format - is meeting its stated goals. While there may be room for improvement in the current model of CPD, given the general consensus amongst most professionally regulated entities around the world and, indeed most educational institutions,^{viii} ongoing education is an essential component of being a competent professional.^{ix} **RODA believes the requirement of continuing professional development is fundamental and, if the LSO finds it necessary to visit that basic premise, it should reach a conclusion only after serious and formal investigation and analysis.** As FACL has articulated in their submissions, "this would include in-depth study that incorporates consultation with qualified subject-matter experts, community-based organizations (including those with racialized and Indigenous membership), members of the profession, and the public." RODA would add to that list: pedagogical experts and LawPro. In addition, if a more in-depth review of the current CPD system or requirements is to be done, the reporting requirements should not be suspended in the interim, as has been done in at least one other jurisdiction.^x

Finally, RODA is aware of the criticisms around the annual requirement of one-hour of Equity, Diversity, and Inclusion (EDI) training. Again, while there may be room for format improvement, **until our legal community is at a place where our systems function more inclusively, and our profession is more literate about the effects of our inequitable legal and justice system, this training must be mandatory.** As a society, we know much more about the people around us than we did two decades ago when many of these basic requirements were developed,^{xi} and we know that many facets of exclusion or inequity are not visible at the outset of a relationship, solicitor-client or otherwise, nor are they necessarily visible on the face of a law. Furthermore, lawyers are prohibited from sexually harassing and have a special responsibility to respect the requirements of Ontario human rights laws and, specifically, to honour the obligation not to discriminate on enumerated grounds.^{xii} What that means is constantly evolving and lawyers

need to stay abreast of what this obligation entails. No matter the practice setting, lawyers must be conscious and pro-active in their approach to relationships, and this requires constant vigilance and education. The LSO cannot continue to debate whether the legal profession has a problem with inclusivity or with servicing diverse populations. **It must, instead, focus on solutions. Furthermore, RODA supports the specific recommendations as articulated in the submissions made by the LSO's Equity Advisory Group (EAG) regarding the specific need for required programming for Indigenous intercultural competency and anti-Black racism.**

Interacting with Other Legal Professionals

Several of the LSO's programs in its current continuing competence framework support the need to interact with other lawyers, which is of particular importance to those that work in sole or small firms. In general, **RODA is supportive of the Practice Management Helpline and Practice Management Resources, as well as the Coach and Advisor Network, and would encourage the LSO to broaden its publicity of these resources on a wider, more varied, and more regular basis.** Particularly for the Coach and Advisor Network, which is only four years old, lawyers may not be aware of what the programs actually offer. This is not only true for new lawyers, who are often inundated with information, but also for more seasoned lawyers who believe that these services are not meant for them.

RODA also encourages **the LSO to publicize and explain the existence and purpose of the Discrimination and Harassment Counsel ("DHC").** While the DHC has not been included as part of the competency review, the impact of discrimination and harassment on a lawyer's ability to function effectively is well-known. The DHC is part of the solution to keep a lawyer, who has been the victim of discrimination or harassment, competent.^{xiii} Conversely, a lawyer's discriminatory and harassing behaviour may well be a sign of incompetence. The LSO may wish to consider expanding the role of the DHC to provide support and guidance to lawyers who may want advice on how to avoid discriminatory or harassing behavior.

Finally, the recent discussions around the purpose and functions of **the Great Library, the LIRN and the County and District Law Libraries** have highlighted the critical role that these services play in addressing professional development and competence. Access to the legal resource collections and the provision of legal research expertise are crucial to the competent provision of legal services. Furthermore, **these hubs also function as places where lawyers interact and connect with peers for mentoring, coaching, and communicating.**

RODA supports the LSO's encouragement for lawyers to engage in mentorship relationships, however, it does not believe any benefits of a mandatory mentorship program would outweigh concerns around the appropriateness or effectiveness of any such program. RODA does not support the launch of a peer-assessment project because the support, training, and monitoring that the LSO would need to give for such a program to be successful, on its face, well outweighs the benefit of such a program.

Reporting and Reviews with the LSO

The Report's identification of the dynamism of law is accurate and **anything less than an annual CPD requirement or an annual reporting of one's professional state of affairs is inadequate.** RODA* supports the Practice Reviews and Spot Audit practice assessment programs and would recommend the expansion of both programs along the lines suggested by the County of Carleton Law Association (CCLA) in their submissions. RODA agrees that initial increase in costs for these programs will be offset by savings in disciplinary investigations and proceedings, and very possibly, legal insurance premiums. It will also offer value in less tangible ways: assisting lawyers to provide competent legal services at early and other critical points in their careers, and assisting lawyers to stay in practice, both of which increase the likelihood that the public will have access to the competent legal services and will enhance the public's trust in the justice system.

RODA supports the Certified Specialist Program's goals but recommends a review as to why this program has had so little uptake within the profession and whether it is serving the public need to select an appropriate lawyer.

RODA supports a mandatory technological competence requirement. This should form part of the requirements to enter the profession and therefore be developed in collaboration with law schools and the experiential learning phase of licensing. Ongoing technological competence requirements should be clearly articulated by the LSO annually and reported through our Annual Report filing process. The development of the criteria should be done through consultation with stakeholders, including the licensees, the Attorney General, and the Courts.

RODA agrees with the LSO's acknowledgement that no single program or requirement can ensure the competence of lawyers, which is both an ongoing, individual professional responsibility, and a significant regulatory endeavour. That said, there is much worth maintaining and developing further in the LSO's current continuing competency framework.

RODA agrees with the Taskforce's objective: to develop an **effective, proportionate, and balanced regulatory framework** addressing careerlong competence in a manner that protects the public interest and is responsive to the public's legal needs.

CONCLUSION

As a self-governing profession, we ignore the needs of the public we serve at our peril. We must be competent and be seen to be competent. To that end, RODA supports and reiterates the comments made in FACL's submissions:

*At base, FACL submits that any competence regime must include a robust educational component devoted to the societal and cultural context in which legal services are delivered in the modern era. The public we serve is diverse in identities, beliefs, backgrounds, and needs. **The credibility and relevance of the legal profession and of the administration of justice rises and falls on our ability to evolve in parallel with that diversity.** [emphasis added]*

RODA looks forward to continuing the dialogue during the next phase of the Taskforce's review of the continuing competence framework. Thank you for the opportunity to comment on this Report and we welcome any questions that the Taskforce may have in regard to these submissions.

*The Women's Lawyers Association of Ontario (WLAO) recommends a different approach to supporting lawyers and law firms. The LSO may wish to detail some options to licensees and request specific feedback as to what they would find most helpful. This may differ depending on the context of one's practice.

ⁱ The **Roundtable of Legal Diversity Associations (RODA)** is an umbrella organization that brings together a coalition of 22 equity-deserving, Canadian legal associations. RODA was founded in 2011 with the goal of fostering dialogue and promoting initiatives relating to the advancement of inclusion, diversity, equity, and accessibility (IDEA) in the legal profession, the judiciary, and within the broader legal community. As part of our mandate, we monitor and provide input on policy developments within the profession and legal systems.

Member Organizations:

- Arab Canadian Lawyers' Association (ACLA)
- Association des juristes d'expression française de l'Ontario (AJEFO)
- Association of Chinese Canadian Lawyers of Ontario (ACCLO)
- Canadian Association of Black Lawyers (CABL)
- Canadian Association of Muslim Women in Law (CAMWL)
- Canadian Association of Somali Lawyers (CASL)
- Canadian Association of South Asian Lawyers (CASAL)
- Canadian Hispanic Bar Association (CHBA)
- Canadian Italian Advocates Organization (CIAO)
- Canadian Muslim Lawyers Association (CMLA)
- Federation of Asian Canadian Lawyers (FACL)
- Filipino Canadian Lawyers Network (FCLN)
- Hellenic Canadian Lawyers Association (HCLA)
- Indigenous Bar Association (IBA)
- Iranian Canadian Legal Professionals (ICLP)
- Korean Canadian Lawyers Association (KCLA)
- Macedonian Canadian Lawyers Association (MCLA)

OBA Sexual Orientation and Gender Identity Law Section (SOGIC)

OBA Equality Committee

South Asian Bar Association (SABA)

Toronto Lawyers Association (TLA)^{**}Unable to confirm support within the timeframe.

Women's Law Association of Ontario (WLAO)

ⁱⁱ *Rules of Professional Conduct*, 5.6-1. A lawyer shall encourage public respect for and try to improve the administration of justice.

Commentary [select]

[1] The obligation set out in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet for the same reason, a lawyer should not hesitate to speak out against an injustice.

[2] The admission to and continuance in the practice of law implies on the part of a lawyer a basic commitment to the concept of equal justice for all within an open, ordered, and impartial system. However, judicial institutions will not function effectively unless they command the respect of the public, and because of changes in human affairs and imperfections in human institutions, constant efforts must be made to improve the administration of justice and thereby maintain public respect for it.

ⁱⁱⁱ FACL submissions: A “risk-based” approach to competence requirements should pro-actively address potential harm beyond what can be quantified in pecuniary terms or by litigation outcomes (e.g. unfair treatment, unethical behaviour, damage to public confidence in the legal system).[3] A “flexible” approach should maintain the core competencies that apply across the profession (e.g. technological literacy, social and cultural literacy). “Forward-looking” and “client-centred” approaches to competency should consider the perspectives of impacted persons other than those with whom the lawyer seeks or forms a solicitor-client relationship (e.g. witnesses and other justice system participants).[4]

[3] See, for example, the discussion in A. Dodek and E. Alderson, “Risk Regulation for the Legal Profession” (2018), 55-3 Alberta Law Review 621, online: <<https://canlii.ca/t/7b9>> (positing that once regulatory objectives are set, risk should be measured in terms of not meeting those objectives; ongoing and thorough data collection, from a variety of sources, is necessary to ensure proper risk identification).

[4] This is not to suggest any derogation from the duty of loyalty, but simply to recognize that the provision of legal advice and services does not take place in isolation from societal and cultural context. Indeed, narrowly defined, a “client-centered” approach would not fit comfortably with provincial and federal Crown prosecutors in the criminal law arena. Criminal law prosecutors advise the Attorney General/Minister of Justice or the police from time-to-time, but they will not ordinarily have a “client” in the traditional sense.

^{iv} *Law Society Act*, R.S.O. 1990, c. L.8, (41 (a)(i)).

^v See for example: *Power, Privilege and Inequities in the Legal Profession*, January 2018, <https://ccdi.ca/media/2020/20180125-report-power-privilege-and-inequities-in-the-legal-profession.pdf>; and *Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions*. <http://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/w/working-together-for-change-strategies-to-address-issues-of-systemic-racism-in-the-legal-professions-final-report.pdf>.

^{vi} FOLA submissions.

^{vii} *Renewing the Law Society's Continuing Competence Framework*, dated June 23, 2021.

^{viii} See, for example: <https://meridian.allenpress.com/jmr/article/103/2/22/80878/Quality-Assurance-and-Maintenance-of-Competence>

^{ix} Examples of the belief that ongoing education is important abound locally: for example, our own professional insurer, LawPro's emphasis on and provision for ongoing legal education, like PracticePRO, and their consistent involvement in legal presentations. And, federally, the *College of Immigration and Citizenship Consultants Act*, S.C. 2019, c. 29, s. 292, came into force in December 2020 with the specific purpose of "continuing education requirements for licensees," and in November 2021, the resulting College of Immigration and Citizenship Consultants was launched.

^x Law Society of Alberta: <https://www.lawsociety.ab.ca/cpd-filing-requirement-suspended-for-additional-year/>

^{xi} The LSO modern approach to competency began in 2001.

^{xii} *Rules of Professional Conduct*, 6.3-3 and 6.3.1-1.

^{xiii} Discrimination and Harassment Council: <https://lso.ca/protecting-the-public/information-for-licensees/discrimination-and-harassment-counsel>.

November 30, 2021

**LSO Competence Task Force: Renewing the Law Society's Continuing Competence Framework
Submitted Via LSO Competence Task Force Portal**

**Law Practice Program (LPP) at Ryerson Submission:
Developing a Continuing Competence Framework for the Future**

Introduction

The Law Practice Program (LPP) at Ryerson is an approved route to licensing for lawyers in Ontario. It was established by contract with the Law Society of Ontario with two goals: first, to help address the persistent shortfall in articling placements, and second, to standardize the approach to skills development and training that are at the heart of the licencing process.

By the end of this, our 8th year, almost 2000 licensing Candidates will be LPP Alumni. They will all have successfully completed 4 months of interactive skills development and training, followed by 4 months of work experience where the skills development continues under the supervision of a practicing lawyer. Throughout the previous 7 years, and we hope this year as well, every Candidate who successfully completed the first 4 months of skills development and training obtained a work placement.

The LPP is not an academic program. Thousands of lawyers and other professionals have participated in the program as mentors, advisors, assessors, subject matter experts, training deliverers and employers. The LPP is a purpose-built, standardized, assessed, future-looking, consumer-centric skills development and training program.

Our experience in developing and delivering a skills training program might be of assistance to your work on the Continuing Competence Framework. We will also offer some observations and ideas on the approach you might take. We hope that the result of your work will be a forward-looking Framework that will support a vibrant, strong and prosperous profession, encourage excellence, and result in an enhanced individual and collective ability to serve the public. It will be a Continuing Competence Framework for the Future.

This work is styled as a renewal, and it is time for that. It has been years since the original Framework was developed, and there have been many alterations to it since then. We see both a need, and an opportunity, to be ambitious. Why? The world has changed.

Pandemic

The pandemic became real for most Canadians in mid-March 2020. Justice providers were seriously challenged. For weeks our formal system of justice was almost at a standstill. Lawyers in all settings and all types of practices were forced to adapt to a new reality.

Over the weeks and months that followed a lot changed. Zoom became a household word. Technology and different approaches to the practice of law that had been ignored, dismissed or

even ridiculed just months before were adopted relatively quickly. So many of the practices and procedures that lawyers had been told would not, could not or should not be changed for various ethical, professional, or other reasons were suddenly changed out of necessity, and the results have proven to be overwhelmingly positive.

The pandemic may have forced change on many practices in the justice sector, but rapidly accelerating change has been happening in the world around us for many years. The technology and business approaches that might be seen as new developments in law have been part of the broader community for years. Many of them are neither new, nor particularly sophisticated. Our rules, structures and expectations have not kept pace with the times. This review is an opportunity to build for the future.

The pandemic's effects should further encourage us to pursue an evidence-based approach to regulation. Evidence matters. We are a traditional profession, and it is important to acknowledge and understand those traditions. However, we need to prepare the lawyers for the future. Just because we have done something in a certain way, or feel comfortable doing it that way, does not mean that it is the only way to do it. We should be governed by the evidence. When we are told that a new or innovative approach cannot be tried, we should ask why not? We should also remember how many times in the past we have been told 'no' for reasons the pandemic made clear just aren't so.

Opportunity

This discussion provides an opportunity to advance both a social benefit to society and an economic benefit to lawyers. Lawyers have a monopoly over all legal services in Ontario, but we serve less than 20% of those needs. The people and businesses we do not serve have consistently said that our approach to justice is too complex, too slow and too expensive.

A Continuing Competence Framework should recognize and support the opportunity to be found in serving the unserved. The Framework should be consumer-focussed, not simply client-focussed, by including those we could but do not yet serve. There is a very significant economic opportunity for the legal profession in this, but it will not be realized if we only follow the path of the past.

The LPP has, from the start, seen the opportunity in this, and has introduced our Candidates to different business and other approaches that either are being or could be used to serve legal needs.

Confidence

The approach to building the Framework should reflect confidence in our colleagues. The Framework should allow them to use their talent and ability to the greatest extent possible. It should inspire them to reach for more, not limit or restrict them. Rules that are unduly prescriptive or restrictive will hold them back from realizing their full potential, and make them lose the promise of their future. Such an approach will soon lose the confidence of the led.

We should recognize that all lawyers and licensees are so much more than the sum of the law they know. They each bring a unique background, strengths, and perspectives that can enrich, broaden, and strengthen the legal services they deliver. The faster we develop a continuing competency framework that recognizes, supports and encourages this, the better.

Skills Matter

Skills matter. They enable lawyers to leverage their legal and procedural knowledge and deliver the services the client and circumstances require.

The LPP has used the LSO skills framework, which is a more expansive version of the National Standards framework, to develop and deliver the core skills that are required for licensing. We have done this by engaging thousands of members of the profession over the years as mentors, assessors, subject experts, advisors and program developers. They have worked together with other experts with different expertise to design, develop and deliver the program.

Legal skills are important, but they are not enough. Teamwork, emotional intelligence, business skills, technology and creativity, to name just a few, are all important. The T-shaped lawyer, or variations of it, is the standard. We have incorporated these additional skills, in different ways, into the LPP. From the teamwork required to work in a ‘law firm’, to the technology that supports it (e.g. Clio), from the modules on emotional intelligence and design thinking, to the preparation of a business plan, the LPP is constantly enhancing the skills base of the program.

Skills are what enable lawyers to do their work. Our knowledge and skills are what should differentiate us from those who would provide services that we could provide. They are at the very core of what it means to be a lawyer. They are a key part of the brand, and constitute a core justification for self-regulation. A framework which supports their continuous development is essential.

We apply a “**coaching**” approach to training, rather than a policing approach. We use adult learning concepts to support the development of our Candidates: learn about something; try it out (in our case in a simulated environment first); receive feedback by someone with experience; reflect on the feedback; and apply the feedback on subsequent improved attempts. Every year, our Candidates tell us that this approach has increased their confidence and competence in the various areas of development.

The opportunity to practice or experience “true to life/the profession” opportunities in a safe, **simulated environment** before they enter a workplace has also greatly benefitted our Candidate development. If they make a mistake, nobody goes to jail, loses money, loses their right or gets reported!

The Report mentions several areas of concern, including **communications, client relationship management and practice management**. We address these issues in the LPP using the virtual firm simulations. For example, included are the following annual “deliverables” (ie work products within their virtual firm simulations):

- Receiving, reviewing, applying regular daily simulated emails and phone messages from which work must be determined and completed
- Initial and follow-up meetings with our “actor” clients, and work that flows from those meetings, in the different substantive files. Ethical and professionalism issues often arise.
- A “file audit”, developed from the LSO’s concept of Practice Reviews – where a practising lawyer reviews their files and suggests improvements.

The Foundation Matters

A Continuing Competence Framework needs a reference point. Licensing, which is entirely within the control of the LSO, is that point. The licensing process purports to require that every lawyer has certain core skills. Without a verifiable reference point, a solid skills foundation, any subsequent framework to improve those skills has no foundation on which to stand.

What Gets Measured Gets Managed

It is not possible to assume a skill has been learned or developed from mere attendance at an event, or from the passage of time. If you do not assess whether the skill has been obtained, you do not know whether it has been. The failure to measure, to test, to examine what has been learned and what has not means you simply don’t know.

Assessing skills is not easy. It is time-consuming and requires resources. It serves to demonstrate where the individual is on the continuum of development, and clarifies and can assist with what improvement is required. It also helps focus the mind of the Candidate on the importance of the skill.

The LPP assesses the skills that are at the core of the licensing requirements. It is not a “gotcha” process, where those who do not meet the standard are failed. Instead, we use the assessment process to encourage skills training and development. We use a combination of means, at various stages, with specific criteria and with different experts, to assess the skills development of the Candidates. Our approach is to take them from where they are and help them get to where they need to be.

Technology

The LPP has used technology in many ways from the beginning. Most of our first 4 months of interactive skills training was online during the first 6 years, and all of it is now. We have used cloud-based technology for our Candidates to manage their ‘practices’ during these 4 months (e.g. Clio and Google suite of products). Beyond that, though, we have incorporated technology

and new business approaches into every year of our training. We do it for two reasons: first, to understand the possibilities in traditional practices, and second, to recognize the opportunities if you consider serving consumers differently.

The challenge with an imposed technology requirement is that we are so far behind, and the debate over it will inevitably be so long, that it will be obsolete before it is imposed. Many of the current formulations focus on existing practice models. They do not contemplate a rethinking of service delivery, and do not take into account other business models. They concentrate on technology, and don't seem to contemplate that technology is often leveraged by new business approaches or models.

This is an area where information, resources and encouragement would go further than direction. We would be better off to speak of what is happening beyond Ontario's borders, what the opportunities are for all lawyers if they use technology and different business approaches, and what the risk of inaction or too little action is.

Conclusion

The world is changing. The pace of change is accelerating. Consumers, globalization and technology are combining to drive and accelerate change. Legal needs are engaged throughout the changes that are occurring. Unfortunately, the legal profession is serving a small percentage of those needs. The structures that support the legal profession must be able to help lawyers adapt to change, and maybe more importantly take advantage of it. The successful adapt to change. Leaders take advantage of change.

Our continuing competence framework must be fit for both the present, and for the future we wish to see. It must have a solid foundation, but be adaptable to rapidly changing events. It must inspire and not simply police. Leadership that entices with the opportunity for better will drive change faster than that which only seeks to enforce minimum standards. We should aspire to the highest standards. There is a future in excellence, not so much in mediocrity.

A continuing competence framework for the future will be uncompromising in ensuring that there are core skills, competencies and standards of conduct that must be demonstrated by licensees whenever they serve their clients. It will be ambitious in supporting those who seek to serve the many not now served. It will be future-looking, recognizing that law and legal services are part of the world around us, not separate from it. It will be based on confidence in the members it supports, both for who they are and what they can bring to the future. It will help to release and leverage the talent and ability of all.

The LPP is looking forward to the future.

Chris Bentley, Managing Director

Gina Alexandris, Senior Program Director

Fariya Walji, Assistant Director, Professional Development & Work Experience

South Asian Bar Association of Toronto
300-20 Toronto Street
Toronto, ON M5C 2B8
sabatoronto@gmail.com

To: Members of the LSO Competence Task Force (CTF)

Date: November 25, 2021

Re: Response to the Call for Comment on the Continuing Competence Framework

In response to the Call for Comment regarding the Law Society of Ontario's Competence Framework, the South Asian Bar Association of Toronto (SABA) advances the following points:

- 1) Continuing Professional Development (CPD) is a necessary condition for growth in the legal profession.
- 2) CPD requirements focused on equality, diversity, and inclusion (EDI) help promote diversity and equity within the legal profession.

Each item will be addressed below. It is SABA's position that CPD requirements focused on EDI should be a key component of the LSO's Competence Framework, as these will support career-long competence in a manner that protects the public interest and is responsive to the public's legal needs.

(1) Continuing Professional Development (CPD) is a necessary condition for growth in the legal profession

CPD underpins the career-long learning process that is intrinsic to the legal profession. As outlined in the CTF's report,¹ CPD ensures that lawyers and paralegals continue to enhance their skill set and knowledge in line with changing societal needs, circumstances, and priorities. This allows LSO members to be well-equipped to provide high-quality service to the public. In addition to benefitting individual licensees, CPD requirements ensure that we as a profession take the steps necessary to maintain our professional competence.

LSO members can have profound societal impact through the provision of their services. The LSO, as the regulatory body which oversees licensing, must have an effective mechanism in place to support continuing competence to provide those services. Having a formal, centralized structure to CPD helps maintain consistency of learning objectives and outcomes. Furthermore, learning from the experiences of our colleagues, whether it be challenges or successes, helps build camaraderie and mentorship within the

¹ Law Society of Ontario, Competence Task Force, online: [Renewing the Law Society's Continuing Competence Framework \[CTF Report\]](#).

profession,² both of which have been highlighted by the CTF as valuable to building competence.³ Therefore, it is SABA’s position that the renewed competency framework should retain a clear-cut CPD requirement that is regularly evaluated and modified as required.

(2) CPD requirements focused on equality, diversity, and inclusion (EDI) help promote diversity and equity within the legal profession

In response to the Final Report of the Challenges Faced by Racialized Licensees Working Group,⁴ the current Competence Framework now includes the requirement that “between January 1, 2018 and December 31, 2020, lawyers and paralegals must complete a total of three Professionalism Hours that focus on advancing equality, diversity and inclusion in the lawyer and paralegal professions”⁵ and that each year thereafter, at least one CPD professionalism hour must relate to EDI topics. It is SABA’s position that these requirements should be retained in the renewed framework.

CPD requirements focused on EDI topics will help mold the ethos of the profession into one that prioritizes the creation and maintenance of a diverse and inclusive space. Ensuring that all members are aware of the systemic barriers present in the legal system, profession, and society at large, including how members’ conduct can influence the impact of these barriers, advances the overall profession. Moreover, members of all backgrounds can practice more effectively when their colleagues are well-informed and when the institution that represents their profession acknowledges and celebrates the diversity of its members. In short, EDI programming assists in the education of all lawyers and the profession as a whole.

EDI requirements also advance diversity within the profession. Incorporating EDI as a key pillar of continuing competence communicates to the broader community that the LSO and the legal profession strive to build welcoming and inclusive spaces and expect members to help fulfill this mandate. This will consequently encourage those from diverse backgrounds to enter the legal profession and, equally as important, stay in the profession. As the Supreme Court explained, “access to justice is facilitated where clients seeking legal services are able to access a legal profession that is reflective of a diverse population and responsive to its diverse needs”.⁶

Overall, retaining EDI as an important element of CPD and the overall Competence Framework will ultimately equip lawyers and paralegals to appropriately connect with and acknowledge those with diverse backgrounds, experiences and perspectives, allowing them to better serve the public and respond to the public’s legal needs.

We thank the Law Society of Ontario for inviting SABA Toronto to participate in this important initiative and look forward to opportunities for further discussion.

² Andrew L. Friedman, *Continuing Professional Development: Lifelong Learning of Millions* (New York: Routledge, 2012).

³ CTF Report, *supra* at pp. 21-22.

⁴ Challenges Faced by Racialized Licensees Working Group, December 2, 2016 Report to Convocation, online: Working Together for Change: [*Strategies to Address Issues of Systemic Racism in the Legal Professions*](#).

⁵ <https://lso.ca/lawyers/enhancing-competence/continuing-professional-development-requirement>.

⁶ *Trinity Western University v. Law Society of Upper Canada*, [2018 SCC 33](#) at para. 23.



About SABA Toronto

The South Asian Bar Association of Toronto is Canada's largest equity-seeking bar organization, dedicated to promoting the objectives of South Asian members of the legal profession. SABA represents South Asian legal professionals and ensures that their interests are recognized, respected, and voiced with the Law Society of Ontario and various levels of provincial and federal government. SABA aims to unite its over 800 members, deliver programming for professional growth and advancement, promote access to justice, and give back to South Asian communities. Its membership includes legal professionals from large and small law firms, sole practitioners, government agencies and departments, nonprofit organizations, and corporations. Members of the judiciary, academics, and law students also form an integral part of SABA.



The Advocates' Society

La Société des plaideurs

December 3, 2021

VIA EMAIL: twaley@lso.ca

Sidney Troister, Chair
Law Society of Ontario Competence Task Force
Law Society of Ontario
130 Queen Street West
Toronto, ON M5H 2N5

Dear Mr. Troister:

RE: Response to *Renewing the Law Society's Continuing Competence Framework*

The Advocates' Society, established in 1963, is a not-for-profit association that represents approximately 5,500 members throughout Canada, including approximately 4,500 in Ontario.

The Advocates' Society's mandate includes, among other things, making submissions to governments, regulators and others on initiatives or legislation that affect access to justice, the administration of justice, and the practice of law by advocates. The Advocates' Society is also the premier provider of advocacy skills training to lawyers across Canada, including programs on ethics and professional responsibility, and facilitates access to mentoring for members, especially young advocates. We are committed to enhancing inclusivity within our organization and understand the value of hearing perspectives from lawyers from diverse communities, and who practise in diverse geographic regions, practice areas and practice settings.

At the heart of the work of The Advocates' Society is a bar whose lawyers excel in the practice of law and feel supported by their mentors and peers. The Advocates' Society has reviewed with interest the report of the Competence Task Force entitled "Renewing the Law Society's Continuing Competence Framework" (the "Report"). This submission has been contributed to and closely reviewed by advocates in different geographic areas across Ontario, working in different practice settings and at varying stages of practice; and specifically by The Advocates' Society's specialized sub-committees on education, advocacy and practice, diversity and inclusion and mentorship.

The Advocates' Society has identified the following general important elements of lawyer competence, which emerge as key themes from the more detailed submissions in this letter:

- The working definition of "competence" in the Report poses concerns. There is no explanation for the Report's focus on this new working definition, rather than the current definition of "competent lawyer" in Rule 3.1-1 of the *Rules of Professional Conduct*. The current definition in Rule 3.1-1 is a much more appropriate starting point for any considerations of competency although it could benefit significantly from the inclusion of references to both technological and cultural competence. The Report's working definition of competence is extremely vague and also

raises concerns by incorporating an emphasis on a “consumer perspective” and on unspecified “values”.

- Any significant decisions about the practice assessment program (whether it should be maintained as-is, eliminated or altered) would benefit from a more focused and robust look at the relevant data in tandem with a qualitative consideration of the nature and significance of the deficiencies identified through the various streams of the practice assessment program. Feedback suggests that the effectiveness and value of practice reviews and spot audits is questionable. There are also concerns that practice reviews and spot audits have the potential to disproportionately impact equity-seeking groups and there is a perception that this is indeed the case. The use of “risk indicia” to “randomly” or otherwise target licensees with particular profiles for assessment is fraught with the potential for unconscious bias, unfairness, controversy and questionable interpretation of data. The Law Society should consider adopting a more proactive, constructive and preventive approach (in lieu of some or all practice reviews and spot audits) that does not target individual licensees but instead targets *issues* that lead to or are tied to risk and makes resources and information available to licensees as needed in relation to such issues.
- The requirement for lawyers to complete CPD should not be eliminated or reduced. CPD is essential to a lawyer’s competence. If anything, the CPD requirement could be enhanced by requiring lawyers to select CPD opportunities in areas they determine to be complementary to their area(s) of practice, to engage in skills-focused learning in earlier years of practice and to consider CPD opportunities aimed at improving their cultural and technological competence, both of which areas often evolve as quickly as the substantive law.
- Self-reflection and self-assessment should be a mandatory element of competence. Lawyers and law firms should regularly and proactively reflect on their own practice and self-reflect upon:
 - their regulatory requirements and their focus/responsiveness to identified risk issues;
 - their skills;
 - their strengths and areas for improvement; and
 - their plan for meaningful and practice- or skills-focused continuous learning opportunities over the year to come to help them to continually improve their legal skills and knowledge in areas that are complementary to their area(s) of practice.
- Lawyers should be strongly encouraged to engage in broad cultural competency training to further a better understanding of their clients’ needs and the impact of systemic racism within the justice system. In response to the Truth and Reconciliation Commission of Canada’s Call to Action #27, the Law Society should consider making available a mandatory (and free) cultural competency training program focused on Indigenous issues for all licensees.

We have reviewed the questions set out at pages 25-28 of the Report. We have responded to those questions which are most pertinent to our membership, and have grouped our responses under the following categories:

1. Principles for an Effective Competence Regime
2. Definition of Competence
3. Practice Assessments
4. Continuing Professional Development
5. Technological Competence

6. Peer-Based Initiatives and Other Resources

1. Principles for an Effective Competence Regime

Do you agree with the five principles for an effective competence regime set out below? [i.e. risk-based, flexible, feasible, forward-looking, and client-centred] Are there principles that should be included or omitted? [Q2]

The Advocates' Society is concerned with the Report's articulation of "client-centred" as a principle for an effective competence regime. Certainly, we agree that understanding and considering a "*client's needs, goals and perspectives*", including having an "*awareness of differences..including in backgrounds, education, income levels, abilities and cultures..that may impact communications with clients and the way in which legal services are provided*" is an important part of competence. In addition, there are basic elements of client service – timeliness of communications, for example¹ – which are essential parts of a lawyer's competence. To the extent that the Report's reference to a "client-centred" principle is focused on these concepts (as it appears to be at pp. 3 and 25, for example), The Advocates' Society is supportive.

However, to the extent that it is the Report's intention to expand the "client-centred" principle beyond such understanding, considerations and awareness of different perspectives and differences, The Advocates' Society has some concerns. In particular, the Report's focus in places on a "consumer perspective" (see p. 9, for example) and its apparent conflation of a "client-centred" principle with concepts of client or "consumer" satisfaction raises some concerns. The Advocates' Society cautions that a "consumer perspective" should not be used to assess competence. In our view, an assessment of competence based upon a "consumer perspective" is not consistent with the Law Society's obligation to regulate the legal profession in the public interest. While client satisfaction is an important objective, it is not necessarily indicative of competency. For example, clients who lose their court cases are generally unhappy with the result, but that does not mean that their lawyers were incompetent. Similarly, lawyers have a duty to give objective advice to the client, even if the client does not like the advice. An effective regulatory system cannot be unduly focused on the subjective views of the ultimate "consumer" of legal services. Even the use of the term "consumer" is, in our view, an oversimplification of what is ultimately a much more complex relationship, that is, a solicitor-client relationship with all of its attendant obligations, including fiduciary obligations.

2. Definition of Competence

Do you agree with the working definition of competence? Are there any aspects of the definition that you would change? [Q1]

The definition of competence must contain objective, specific criteria. In The Advocates' Society's view, Rule 3.1-1 of the *Rules of Professional Conduct*, which provides a definition of a "competent lawyer" that details specific aspects of competence, should be the starting point for any competency considerations, including any modifications to the concept of competence. However, the working definition of competence set out in the Report is very different from the definition in Rule 3.1-1 and the Report inexplicably does not make any reference to the Rule 3.1-1 definition. It is not clear whether the working

¹ The requirement to "communicat[e] at all relevant stages of a matter in a timely and effective manner" is, appropriately, already part of a lawyer's obligations under the *Rules of Professional Conduct* – see Rule 3.1-1(d).

definition of competence in the Report is intended to replace the definition in Rule 3.1-1 and there is no suggestion in the Report that the Rule 3.1-1 definition is not serving the public interest.

Moreover, The Advocates' Society has concerns with the working definition of competence set out in the Report, namely:

- The working definition is extremely vague and fails to provide meaningful guidance on what is required of a competent *lawyer*. Indeed, the working definition is so broad that it could be applied to any professional.
- As outlined in Section 1 above, we have concerns about a “consumer perspective” being used to assess competence. As we indicate above, we believe this is inconsistent with the Law Society’s obligation to regulate in the public interest and risks creating a regulatory system that is too consumer-based. The profession should be regulated through an objective “standard of practice” lens and not through a subjective “consumer perspective” lens. To the extent that the Task Force’s “client-centred” approach is intended to refer to an understanding of a client’s needs, requiring cultural competence as necessary depending on the client’s circumstances, this should be articulated more expressly and less obliquely by the Task Force and the Law Society—particularly given the fact that the importance of understanding and considering a “*client’s needs, goals and perspectives*”, including having an “*awareness of differences..including in backgrounds, education, income levels, abilities and cultures..that may impact communications with clients and the way in which legal services are provided*” although discussed at certain points in the Report is not expressly incorporated into the Task Force’s working definition of competence (at pp. 8-9 of the Report).
- We disagree with the inclusion of unspecified “values” as part of the Report’s working definition of competence. We believe a reference to unspecified “values” is too vague to provide any meaningful guidance to lawyers in this context. Moreover, such a reference could also alienate lawyers from equity-seeking groups who may already feel excluded from the dominant culture in the profession.

While we believe that the existing definition of a “competent lawyer” contained in Rule 3.1-1 could benefit from some additions, we believe this existing definition is more functional and consistent with regulating in the public interest and should be the starting point for any considerations by the Competence Task Force. We believe that the current definition of a “competent lawyer” in Rule 3.1-1 could benefit from changes that address the following:

- Cultural competence (or inter-cultural competence) (including some of the concepts apparently intended to be captured by the Report’s articulation of “client-centred” principles as discussed above in Section 1) should be included in the existing definition.
- We note that cultural competence includes, but is not limited to, cultural competence with respect to Indigenous peoples in Canada. The Truth and Reconciliation Commission of Canada’s Call to Action #27 calls upon law societies to ensure that lawyers receive appropriate cultural competency training. The Law Society must respond to the Commission’s Call to Action in a meaningful, substantive manner and some suggestions in this regard are discussed in Section 4 below.
- Technological competence should be included in the definition. As we discuss in Section 5 below, technological competence has reached a heightened level of importance to a lawyer’s ability to competently carry out their duties.

3. Practice Assessments

Are you aware of practice assessments (i.e., practice reviews, spot audits, and practice audits)? Have you ever received one and if so, did you find it helpful? [Q4(m)] and Should the Law Society increase the number of practice assessments that it performs? If so, who should these additional practice assessments target? [Q4(n)] and Should the practice assessment program remain as is, be enhanced, or be eliminated altogether? [Q4(o)]

The Advocates' Society is aware of the various forms of practice assessments, including practice reviews ("Reviews"), spot audits ("Audits") and practice audits. Members have been the recipients or have practised alongside the recipients of Reviews and Audits and those with whom The Advocates' Society consulted did not find Reviews and Audits to be particularly helpful for improving their law practices. To the contrary (and also directly contrary to the "consistently positive" feedback reported by the Competence Task Force in the Report at p. 16), those members have observed that Reviews and Audits take a significant amount of time, create a diversion from one's typical workload, and cause additional stress. The Advocates' Society also received comments that those conducting Reviews are i) frequently retired licensees who practised in a different area of law and/or in a different sized firm and are not sufficiently familiar or experienced with the particular type of practice of the individuals for whom they are conducting Reviews, ii) often focused on matters that are outside of the particular reviewee's control (e.g. law firm systems issues) and sometimes have a tenuous connection to the licensee's practice management skills and routines, and iii) sometimes perceived by reviewees to be inappropriately insensitive or judgmental and not appropriately informed regarding the nature of the reviewees' practice, with the objectives of the Review not being made sufficiently transparent to reviewees.

The Advocates' Society acknowledges based upon the data included in the Report that in some cases, Reviews and Audits serve the public interest by revealing serious deficiencies that may not otherwise have surfaced and that appear to necessitate remediation. However, given the Report's acknowledgment (at p.16) that the "vast majority" of Reviews and Audits reveal only minor deficiencies and "only a small percentage" disclose serious deficiencies requiring escalation, and given the feedback on assessments we have received from our members and the other concerns about Reviews and Audits that are noted below, The Advocates' Society questions whether some of the resources necessary to operate the Reviews and Audits programs would not be better deployed differently or elsewhere, as discussed below. For the same reasons, The Advocates' Society also questions the Competence Task Force's view (as set out at p. 23 of the Report) that the Law Society should consider increasing the number of Reviews that it performs.

The Report discloses only very high level statistical data about the results of Reviews and Audits and does not disclose details about the qualitative nature or seriousness of the "deficiencies" or matters "requiring a follow-up" review that are identified through assessments. Without knowing the nature or significance of the "deficiencies" or "matters requiring a follow-up" or the extent of resources committed, The Advocates' Society cannot assess whether the remediated deficiencies identified through Reviews and Audits is both proportionate to the resources expended by the Law Society and reviewers and the impacts of Reviews and Audits on reviewees. Additionally, the data is not sufficiently detailed to permit any consideration of the relative merits (and individual merits) of the three main streams of Reviews (i.e., focused reviews due to "cause", risk-based random reviews of lawyers licensed in the past eight years, and re-entry reviews of lawyers re-entering private practice as a sole practitioner or in a small firm after five years), given that data is not split out for the results of these three main streams. The Advocates' Society suggests that any significant decisions about the practice assessment program (whether it should be maintained as is, eliminated or altered) would benefit from a more focused and robust look at the

relevant data as well as the nature of the deficiencies that are identified. For example, and by way of hypothetical illustration only, whereas the data might potentially reveal a strong (or stronger) case for maintaining the current focused reviews due to “cause”, there might be less of a case for maintaining one or both of the other main streams of Reviews, especially given the acknowledgment in the Report (at p. 20) that lawyers in their first five years of private practice are proportionately less likely to be the subject of complaints.

The Advocates’ Society also has additional concerns about the potential for Reviews and Audits to disproportionately impact equity-seeking groups, given that sole practitioners and small firms are much more likely to be the subjects of both Reviews and Audits and those settings employ a disproportionate number of racialized lawyers.² The data relevant to whether lawyers from equity-seeking groups are more frequently the subject of Reviews and Audits resides with the Law Society and has not been made available as part of the Report. That said, The Advocates’ Society notes that in its consultations it did receive comments from multiple sources that there is a perception held by a number of licensees that Law Society assessments have the effect of disproportionately impacting equity-seeking groups.

The Advocates’ Society also has concerns about the Law Society’s use of “complaints” as a metric for risk and as a basis for launching “for cause” Reviews. Certain practice areas (e.g. family law) may be the subject of more frequent client complaints. Additionally, client concerns may more frequently progress to a complaint to the Law Society in circumstances of a sole practice or a small firm where there might not be a managing partner to address and resolve any client concerns directly before they escalate to a complaint. In other words, the mere fact that licensees in small firm and sole practitioner settings are the subject of complaints at a higher proportion than licensees in other contexts (as noted at p. 21 of the Report) is not necessarily determinative of such licensees being a source of greater risk warranting a targeted “for cause” Review. The Advocates’ Society does not have visibility into what the Law Society assesses to be “risk” for purposes of its assessments, but notes that choices about both what such “risk” entails and how it is measured is itself fraught with issues. (For example—is “risk” to be equated with complaints made to the Law Society, or LawPRO claims made, or disciplinary actions, or something else?)

The Report notes that the Law Society is considering also “targeting” for Review practitioners who are “more senior” (see p. 23 of the Report). The apparent rationale for targeting a “more senior” age group is the higher percentage of complaints made to the Law Society against lawyers aged 50 to 64 as well as LawPRO’s trends showing that malpractice claims peak when lawyers are 10-20 years out from licensure (see p. 21 of the Report). If these two groups are now to be included as licensees to be targeted for “risk-based random review” along with the licensees in their first eight years from call who are currently targeted for such Reviews, the Law Society will essentially be targeting all licensees—a result that further puts into question the rationale of applying “risk indicia” to “target” licensees for assessments.

² The Final Report of the Law Society’s Challenges Faced by Racialized Licensees Working Group, entitled *Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions*, states that “Data gathered through the [Lawyer Annual Report] and [Paralegal Annual Report] show that 24% of racialized lawyers are in sole practice and 33% of racialized lawyers practice in legal workplaces of two to five” (p. 42). Risk-based random reviews of lawyers licensed in the past eight years are acknowledged by the Report to focus on sole practitioner and small firm lawyers (p. 16 of the Report). Re-entry reviews are by definition focused on sole practitioner and small firm lawyers. Audit cycles are more frequent for sole practitioners and small firms (p. 17 of the Report).

The Advocates' Society believes that using "risk indicia" to "randomly" or otherwise target licensees with particular profiles is fraught with the potential for unconscious bias, unfairness, controversy and questionable interpretation of data. As a result of this and the other concerns discussed above regarding the impact and effectiveness of Reviews and Audits, The Advocates' Society recommends that the Law Society consider adopting a more proactive, constructive and preventive approach (in lieu of some or all Reviews and Audits) that does not target individual licensees but instead targets *issues* that lead to or are tied to risk and regulatory outcomes. An approach that would direct resources away from random assessments to those licensees who need help and that would encourage those who might need help to self-identify and reach out to the Law Society is more likely to improve the practices of licensees on an overall basis. Such an approach could also improve practice management systems at a firm-wide level which, particularly for larger firms, are often outside the control of an individual lawyer.

The Advocates' Society understands that the Nova Scotia Barristers' Society has recently adopted such an approach, by i) requiring all licensees to conduct mandatory periodic self-assessments as against identified areas of risk and proactively reaching out to licensees and making valuable resources available to licensees that are specifically responsive to the risk issues/priority areas for development addressed in licensees' self-assessments, and ii) making an optional tool available to assist lawyers to engage more deeply in the self-assessment exercise and providing related practice tools and resources.³ The Advocates' Society believes that asking practitioners to assess their practice in the context of specific risk *issues* and regulatory outcomes in order to proactively determine if they would benefit from resources and assistance is potentially more helpful than "randomly" targeting specific lawyers to be subject to a Review or Audit. Having resources available to assist those licensees who need and seek assistance will be more helpful than assessing the practice of a licensee who is competent and does not need help at all. The Advocates' Society submits that optional support from the practice assessment lawyers on an ongoing or cyclical basis would offer guidance and resources to those who genuinely require same and may be a more efficient and effective allocation of resources. In this regard, the Advocates' Society takes favourable note of the following comment contained (without further elaboration) in the Report (at p. 23): "*(i)n addition, whether a practice review is conducted or not, licensees should be encouraged to reflect on their regulatory requirements on an annual basis and there should be self-assessment tools that facilitate this reflective process*", but suggests that the Competence Task Force's recognition of the valuable role of self-assessment, could perhaps go a step further—along the lines of the approach taken by the Nova Scotia Barristers' Society.

Finally, The Advocates' Society submits that if "risk-based" "random" selection of licensees subject to Reviews is to continue, both the process for selection and the measures of competence that such Reviews seek to evaluate (including the evaluation criteria employed by the practice assessors) should be significantly more transparent. Furthermore, the Law Society should record and preserve data that allows it to track the impact of Reviews and Audits on equity-seeking groups, if it does not do so already.

4. Continuing Professional Development

Should the CPD requirement be changed to target the development and maintenance of certain competencies? [Q4(a)]

³ The Nova Scotia Barristers' Society collects the mandatory self-assessments completed by lawyers and uses them as a tool for engaging with lawyers and law firms. The Nova Scotia Barristers' Society tracks statistics on lawyers who reach out for support, and we understand that outreach from lawyers to the Nova Scotia Barristers' Society has been increasing from year to year.

Given the wide variability in lawyers' practices and areas of focus, The Advocates' Society is of the view that the adoption of detailed, specialized and prescriptive lists of "subject matter" CPD requirements by areas of legal practice is neither feasible nor appropriate. However, The Advocates' Society suggests that the CPD requirement could be enhanced without being prescriptive about CPD content. Lawyers may sometimes treat their CPD requirements simply as a "box to check" and choose to satisfy their requirements with programs that are not relevant to their area(s) of practice or their particular CPD needs. To avoid this, and to encourage lawyers to be more deliberate in their CPD choices, The Advocates' Society believes that the CPD requirement would be significantly enhanced if some broader-based criteria were imposed on lawyers designed to ensure that their CPD choices are specifically tied to their area(s) of practice and their needs.

The Advocates' Society suggests that such broader-based requirements might include:

- a) a requirement that a certain percentage of a lawyer's CPD hours relate to substantive law relevant to a lawyer's practice profile (as determined by the lawyer);
- b) for lawyers with certain practice profiles (or in earlier years of call—for example, the first ten years of call), a requirement that a certain percentage of their CPD hours relate to skills-based learning specifically relevant to their area(s) of practice (as determined by the lawyer); and
- c) a reminder to lawyers that in selecting CPD programming they should consider whether their particular needs warrant some CPD hours related to technological competence and cultural competence.

Regarding our recommendation that some component of CPD hours be skills-based programming relevant to a lawyer's area(s) of practice, the relevant skills would obviously depend on the lawyer's area(s) of practice (and the lawyer's own assessment of the skills-based learning relevant to their area(s) of practice). For example, in the case of lawyers who maintain an advocacy-based practice, the CPD program would be significantly enhanced if a certain number of CPD hours were devoted to litigation-based skills CPD programs (for example, examination and cross-examination skills, conducting an examination for discovery, arguing a motion, appellate advocacy). As a CPD provider with specific experience and significant expertise in the delivery of advocacy and litigation-based skills programs, The Advocates' Society has seen the positive impact of these types of programs on a lawyer's practice. Skills-based training is essential to ensuring competency (as well as excellence), particularly for lawyers in their first ten years of practice.

Cultural competency is an essential component of every lawyer's ability to discharge their duties to their clients and to the court. This has become particularly clear in the past several years, with issues of systemic racism in the justice system becoming more widely studied and acknowledged. The Advocates' Society recommends that lawyers be strongly encouraged to engage in broad cultural competency training to further a better understanding of their clients and the justice system generally.

In addition, The Advocates' Society recommends that in response to the Truth and Reconciliation Commission of Canada's Call to Action #27, the Law Society should consider developing in conjunction with the Indigenous community and making available a mandatory (and free) Indigenous cultural competency training program for all licensees to be completed within a specified number of years. The

Advocates' Society understands that both the Alberta Law Society⁴ and the British Columbia Law Society⁵ have recently taken such steps. The Advocates' Society believes that the Law Society must take meaningful and substantive action in response to the Call to Action #27 and that this is how it should do so. The Advocates' Society suggests that the [Guide for Lawyers Working with Indigenous Peoples](#), published by the Law Society of Ontario, The Advocates' Society and the Indigenous Bar Association in partnership, would form an excellent basis for programming on Indigenous cultural competency.

Should the CPD requirement be tied to the licensee's practice area(s), experience level, or identified areas of risk? [Q4(b)]

As noted above, The Advocates' Society believes that the CPD requirement should be tied to the licensee's particular practice area(s), as assessed and determined by each particular licensee. Also as noted above, The Advocates' Society believes that a skills-based CPD requirement specific to practice area(s) could reasonably be tied to licensees' experience level/years of call.

The Advocates' Society does not believe that stratifying CPD requirements or imposing greater CPD requirements on particular lawyers on the basis of "areas of risk" is feasible (and as we note above, we question whether relevant and sufficient data exists to identify which licensees are more susceptible to certain "risks" and we note that such an approach could easily result in imposing burdens on certain licensees in an unfair manner).

Should licensees complete their CPD requirement over the course of two calendar years rather than annually? [Q4(c)]

The Advocates' Society is of the view that for many reasons it is preferable that the CPD requirement be completed annually. This ensures that every lawyer has actively taken steps each year to keep their knowledge current and enhance and improve their skills and it ensures that CPD is a regular and consistent priority. The Advocates' Society understands that the Law Society permits lawyers to request an exemption from the mandatory CPD requirement when they are on leave from practice (for maternity or parental leave or for other extended leave), and believes that this reflects a suitable accommodation.

Should CPD programs be more stringent or interactive to help ensure that licensees are engaged and learning? [Q4(d)]

Non-interactive, recorded or virtual (rather than in-person) CPD programming may potentially result in less engagement and learning in circumstances where a lawyer is simply looking to "check the box" to satisfy the Law Society's CPD requirements. That said, based on our experience, many of the lawyers who register for The Advocates' Society's CPD programming are generally genuinely engaged and take the programming seriously. In the circumstances, we think that it would not be appropriate for the Law Society to mandate an in-person or interactive programming requirement and that the Law Society must recognize and make allowances for the fact that in-person and interactive programming is not always feasible for lawyers, depending on where and when the programming is offered. Furthermore, the limitation of a maximum of six CPD hours for viewing or listening to archived or recorded CPD programs

⁴ See: <https://www.lawsociety.ab.ca/lawyers-and-students/continuing-professional-development/indigenous-cultural-competency-education/>.

⁵ See: <https://www.lawsociety.bc.ca/our-initiatives/truth-and-reconciliation/>.

without at least one colleague in attendance likely goes a long way toward addressing this potential concern.

Should the CPD requirement remain as is, be enhanced, or be eliminated altogether? [Q4(e)]

The Advocates' Society is strongly of the view that the CPD requirement should be enhanced (along the lines noted above in answer to Q4(a) and Q4(b)) or, at the very least, remain as it is and that it should not be eliminated or reduced. To be clear, in recommending the enhancements in answer to Q4(a) and Q4(b), The Advocates' Society is not suggesting that the current existing categories of CPD (or their corresponding hours requirements should be altered in any way). The Advocates' Society supports maintaining the current requirements for EDI, Professionalism and Substantive hours.

The Advocates' Society believes that continuing learning is an effective tool to proactively address issues related to lawyer competence (including enhancing access to justice and focusing on positive client outcomes). We note that the Report states at p. 22: “[a study across 91 regulatory bodies] noted that notwithstanding the widespread adoption of a continuous learning requirement across professions and geographic regions, there is little hard evidence to support the practice or a correlation to positive, practice-related outcomes.” In contrast, The Advocates' Society's experience and the experience of its members is overwhelmingly that litigation and advocacy-related programming (including substantive and skills-based content as well as professionalism and EDI content) is of significant assistance to building our members' competencies, skills, experience and confidence. This is particularly the case for lawyers at mid-to large-sized firms who may not have the opportunity to “get on their feet” in court in their earlier years of practice and also for lawyers at smaller firms who may not have the benefit of receiving training from more senior or experienced lawyers. In this regard, we have attached at **Schedule “A”** to this submission the list of CPD programs that The Advocates' Society delivered between June 2020 and June 2021, and **Schedule “B”** to this submission a sample of the feedback that The Advocates' Society has received from CPD program participants over the past few years. This feedback speaks to the value and impact of quality CPD programming that is directly relevant to a lawyer's area(s) of practice. It also speaks to lawyers' level of engagement and interest in such programming. The Advocates' Society expects that other providers of CPD programming in Ontario, including the Law Society, have likely received similar positive feedback supporting the importance of CPD. If there is any serious consideration by the Law Society to eliminating or reducing the existing CPD requirements, The Advocates' Society suggests that before the Law Society do so, it should canvass lawyers on their views about the value and merit of the CPD requirements.

As an alternative to the CPD requirement, should licensees be required to conduct a self-assessment to identify their learning and training needs and then create and execute their own unique professional development plan? [Q4(f)]

The Advocates' Society believes that self-assessment is a worthy and effective tool, but that it should supplement and not replace the mandatory CPD requirement. Annual self-assessment, perhaps timed in conjunction with and prompted by the Lawyer Annual Report process, as a supplement to the mandatory CPD requirement would encourage lawyers to identify their learning and training needs and select CPD programs that correspond to those needs – essentially, this would encourage lawyers to see the CPD requirement as a useful tool to address gaps in their knowledge, skills or competencies rather than as a box that needs to be checked. Self-assessment as a supplement to the mandatory CPD requirement would hopefully function to make lawyers' decisions about how they will satisfy their annual CPD requirements more deliberate and thoughtful and in line with an enhanced CPD requirement that CPD programming be relevant to a lawyer's particular area(s) of practice. In fact, The Advocates' Society submits that an

opportunity for annual self-reflection and planning may help to address the principles for an effective competence regime set out in the Report.

If self-assessments related to CPD are formally adopted, these should not be accompanied by any additional filings or detailed submissions to the Law Society. Rather, the CPD self-assessments should merely be tools designed to encourage lawyers to self-reflect and consider what areas of focus would most benefit their particular practice.

5. Technological Competence

Are there basic technological skills that the Law Society should require all licensees to have? If so, what are the skills and how should the Law Society verify or ensure that licensees have them? In order to prepare licensees for the rapidly changing future, should the Law Society require or encourage licensees to take courses to enhance their technological competence? [Q4(r) & (s)]

As Justice Myers of the Ontario Superior Court of Justice recently noted, “Counsel and the court alike have a duty of technological competency in my respectful view.” ([Worsoff v. MTCC 1168](#), 2021 ONSC 6493 at para. 32) The Advocates’ Society agrees that legal professionals must be competent in their use of technology. Lawyers should know the types of technology available to serve clients in an effective, efficient way. As we note above, The Advocates’ Society would support a reference to technological competence as part of the definition of “competent lawyer” under Rule 3.1-1 in order for the standard to continue to evolve as technology evolves.

More specifically, the “Technology” section of the Law Society’s *Practice Management Guidelines* should be updated regularly to remain current with contemporary technological requirements. Many of the suggestions in the “Technology” section of the *Guidelines* should be reframed as minimum standards of competence, including the use of information technology, online research tools and electronic document management systems. As technology is evolving rapidly and technological competence requires that legal professionals update their knowledge and skills on an ongoing basis, the Law Society should continue to provide resources to lawyers in the form of training on the various new technologies that are deployed by the court system.

The Advocates’ Society notes that lawyers across Ontario will have differing levels of facility with technology and different technological needs, based on various factors including their experience and the nature of their practice. As the “Technology” section of the *Guidelines* notes, lawyers should be aware of and consider technologies to support client service expectations and practice management systems as well as concerns respecting security, disaster management, and technological obsolescence. With this in mind, technological competence may be enhanced by an individual lawyer acknowledging his or her own limitations and taking the requisite steps to associate with or retain persons with the requisite knowledge and expertise.

As noted above in response to Q4(a), The Advocates’ Society suggests that it would be worthwhile for the Law Society to remind lawyers that in selecting CPD programming they should consider whether their particular needs warrant some CPD hours related to technological competence.

While The Advocates’ Society considered whether competence should include the ability to work and service clients remotely, it acknowledges that access to broadband internet is not equally accessible across the province and as such does not recommend that all legal professionals should be able to work

remotely in order to be considered competent. That said, legal professionals should have a remote work plan in place to continue to be able to serve their clients' needs.

The Advocates' Society also believes that the Law Society should take a larger role in providing resources to lawyers to help them adapt to important technological advancements that involve the mandatory requirement to use a novel platform or software. For example, the recent rollout of CaseLines in courts across Ontario has created an additional court-mandated obligation on litigators to educate themselves quickly on the inner workings of this platform. The Law Society should assist lawyers in getting up to speed in this essential mandated skill set by developing and distributing relevant resources to the bar.

6. Enhanced Practice Support and Training, Peer-Based Initiatives and Other Resources

Generally speaking, The Advocates' Society strongly supports proactive resource allocation for programming that assists those licensees who need and seek support, whether logistical support, substantive support, ethical support, and/or practice-specific guidance and mentorship.

Should the Law Society provide enhanced support for sole practitioners and small firms, such as courses on the business of law, law firm management and financial record-keeping? [Q4(g)]

The Advocates' Society agrees that this type of enhanced support is particularly important for practitioners who practise solo or in small firms.

Further, the allocation of resources to those opening any new practice (regardless of size) may also be an effective means of providing timely support to licensees and an efficient means of ensuring and supporting competence. A voluntary program that deals with practice management and accounting/trust account issues, along with other practice management principles (conflict-checking, tickler systems, etc.) should be made available as a resource for new firms. The availability of such a program for new law practices with specialized assistance available to teach and mentor may genuinely assist licensees to put appropriate systems in place from the outset and foster the desirable level of competence.

Should licensees be required to complete a training course related to a set of core competencies, such as practice management or client communications? If so, should the course be mandatory for: i) all licensees; ii) new licensees; iii) licensees in sole or small firm practice, iv) licensees transitioning to sole practice? [Q4(h)]

A central component of the Law Society's mandate is to ensure that all licensees called to the Bar in Ontario have received the necessary training to satisfy all core competencies of the profession. To the extent that practice management, client communication or other related practice management skills are part of those core competencies, it is essential that the Law Society provide the necessary training and skills assessment to all licensees as part of the qualification / licensing process. It is in the public interest to offer licensees a variety of training opportunities to support individual practice needs as they evolve and mature, but the Law Society should avoid a mandatory, prescribed approach given the vast array of practice needs. Whether, and to what extent, a licensee may wish to pursue post-call training in these areas are questions best left to licensees based on self-assessment and reflection.

Should the Law Society require or encourage licensees to enter into a mentoring relationship, either as a mentor or mentee? [Q4(i)]

The Advocates' Society agrees that mentorship is helpful for lawyers' development. The Advocates' Society supports the Law Society's mentorship program, and supports the Law Society encouraging less experienced lawyers to find mentor(s) and more experienced lawyers to offer mentorship.

The Advocates' Society has reservations about the suggestion that mentorship should be mandatory. For mentorship to be meaningful, The Advocates' Society submits that it should be voluntary and consensual. If the Law Society were to make mentorship mandatory — whether being a mentor or being mentored — The Advocates' Society is concerned that:

- mentorship will be reduced to a “box to check”;
- the authenticity and value of mentorship will be undermined; and
- licensees will be burdened with additional responsibilities that they may not be able to shoulder.

The Advocates' Society believes that, optimally, mentorship is an organic process. The Advocates' Society recognizes, however, that this may be more difficult for some licensees, including racialized licensees and sole practitioners. For this reason, it is imperative that the Law Society continue to maintain its mentorship program. The Advocates' Society further suggests that information about the mentorship program should be shared more broadly so as to attract both more mentors and more mentees. As one example, the Annual Report could invite licensees to volunteer as mentors or request a mentorship pairing.

The Law Society may also want to consider encouraging retired licensees to volunteer as mentors as a way of keeping “one toe in the game” while enhancing the ongoing development of the Bar with wisdom and experience.

The Advocates' Society is cognizant that issues may arise through the formal mentorship program, including quality control concerns (standards for volunteer mentors, or assurances that volunteer mentors meet the standards of competence that the Law Society seeks to maintain) and potential conflict concerns (for example, if a mentee wishes to discuss specific cases with their mentor). Consideration should be given to these issues.

Should the Law Society introduce peer assessments as a mechanism for improving competence? If so, how should they be structured? [Q4(j)]

The Report is not entirely clear about how the contemplated “peer assessments” would function. The Advocates' Society has questions and concerns about the concept of peer assessments, including:

- In what context would a peer assessment arise? How would the Law Society identify a licensee to be assessed by a peer?
 - The Advocates' Society submits that a peer assessment should never be mandatory. It is possible that a peer assessment may make sense in the narrow circumstance where there has been a finding of misconduct and the licensee may benefit from peer mentoring. Even in that situation, consideration should be given to the additional concerns listed below.
 - The Advocates' Society also has concerns that certain categories of licensees may be disproportionately targeted by such a program, including racialized lawyers, sole and small firm practitioners, new licensees, and licensees from areas of law with a disproportionate number of complaints like family law.
- How would the Law Society identify a peer assessor? How would the Law Society monitor this program and ensure quality?

- The Advocates' Society submits that a non-practising lawyer (including a lawyer employed by the Law Society for this purpose), or a lawyer practising in another area of law (or even in another demographic) is not a "peer" assessor. We question how an appropriate peer would be identified and deemed qualified, and how a peer assessment process would handle different practice styles and approaches (which could again disproportionately impact licensees from marginalized communities or different areas of practice).
- What would be the impact of peer assessments on issues of privilege and conflict?
 - Even if an appropriate peer could be identified, if such a person observed or reviewed aspects of another licensee's practice, there would be serious concerns about solicitor-client privilege as well as risk of current or future conflicts of interest. It is imperative that the Law Society address these concerns if it pursues this type of program.

Are you aware of the Coach and Advisor Network? Have you participated in it and if so, did you find it helpful? [Q4(k)]

The Advocates' Society's Task Force was not aware of the Coach and Advisor Network until we learned about it through the Report. No member of The Advocates' Society's Task Force is aware of anyone who has participated in it.

Should the Coach and Advisor Network remain as is, be enhanced, or be eliminated altogether? [Q4(l)]

The Advocates' Society supports the Coach and Advisor Network as another voluntary and proactive support to licensees, which may enhance competence. The Advocates' Society suggests that, as with the mentoring program, the Coach and Advisor Network would benefit from more widespread marketing to increase awareness, volunteerism and uptake. Retired licensees may be an untapped resource here as well.

As with the mentorship program, The Advocates' Society is mindful that concerns relating to "quality control", privilege and conflicts should be considered and addressed. Any such program should, again, be voluntary only.

A word on the Legal Information and Research Network

With regard to the Legal Information and Research Network ("LiRN"), which supports 48 regional, area, and local libraries across the province of Ontario, The Advocates' Society was very pleased to see Convocation's approval of an operating budget of \$8,542,130 for the LiRN for 2022, in addition to a one-time transitional budget of up to \$900,000 for the LiRN to expand the electronic resources available across its network and invest in associated staff training and IT infrastructure. As we noted in our February 17, 2021 letter to the Treasurer of the Law Society (attached here for your reference), law libraries are critical to ensuring that lawyers meet their professional obligations without incurring exorbitant, and potentially prohibitive, costs. In our letter, we emphasized the importance of ensuring that the LiRN continue to be well-funded and expressed our concern with the 2021 funding cuts to the LiRN. The Advocates' Society is grateful for Convocation's recognition of the importance of continually investing in these resources.

Thank you for undertaking this important public consultation with stakeholders and for providing The Advocates' Society with the opportunity to make these submissions. We would be pleased to discuss our comments with you further.

Yours sincerely,



Deborah E. Palter
President

CC: Vicki White, Chief Executive Officer, The Advocates' Society
Priya Bhatia, Executive Director, Professional Development & Competence, Law Society of Ontario
Tasmin Waley, Strategic Policy Counsel, Policy Division, Law Society of Ontario

Members of The Advocates' Society Task Force:

Andrea L. Burke (Chair), *Davies Ward Phillips & Vineberg LLP*, Toronto
Hilary Book, *Book Law*, Toronto
Alice Colquhoun, *Petrone & Partners*, Thunder Bay
David D. Conklin, *Goodmans LLP*, Toronto
Martha A. Cook, *Martha Cook Professional Corporation*, Stratford
Sheila Gibb, *Epstein, Cole LLP*, Toronto
Ewa Krajewska, *Borden Ladner Gervais LLP*, Toronto
Sandy Lockhart, *Polley Faith LLP*, Toronto
Craig T. Lockwood, *Osler, Hoskin & Harcourt LLP*, Toronto
Maureen Whelton, *Stevenson Whelton LLP*, Toronto
Suzanne Amiel, Policy Lawyer, The Advocates' Society
Angela Greenberg, Manager of Professional Development, The Advocates' Society
Dave Mollica, Director of Policy & Professional Development, The Advocates' Society

Schedule “A”: The Advocates’ Society CPD programs delivered between June 2020 and June 2021

1. Objections (June 23, 2020)
2. Business Development for Litigators (Part 2) (June 26, 2020)
3. Top Cases in Atlantic Canada (June 26, 2020)
4. Remote Skills Workshop: Discoveries (June 30, 2020)
5. Introduction to Thomson Reuters – CaseLines (Aug. 13, 2020)
6. Influence: The Art & Science of Changing Minds (Aug. 18, 2020)
7. Remote Skills Workshop: Motions (Aug. 27, 2020)
8. On Oral Advocacy (Sept. 23, 2020)
9. Arbitration Advocacy (Sept. 24, 2020)
10. Legal Drafting for Litigators (BC) (Sept. 29, 2020)
11. Gain the Edge: Advanced Negotiation With Marty Latz (Sept. 30, 2020)
12. Civil Trial Advocacy (AB) (Oct. 1-2, 2020)
13. Atlantic Advocacy Symposium (Oct. 2, 2020)
14. Pozner on Cross: Advanced Techniques Using the Chapter Method (Oct. 5&6, 2020)
15. Equality, Diversity & Inclusion (Oct. 8, 2020)
16. Examinations for Discovery [plenary + skills workshop] (Oct. 14 & 28, 2020)
17. Business Development for Litigators (Part 3) (Oct. 19, 2020)
18. Fall Forum: New Frontiers (Oct. 23, 2020)
19. L’art de la plaidoirie en appel (QC) (Oct. 27, 2020)
20. Examining and Cross-examining Experts (Nov. 3, 2020)
21. Written Advocacy (joint with OPD) (Nov. 9, 11, 17 & 19, 2020)
22. Credibility for Litigators [plenary + skills workshop] (Nov. 10 & 16, 2020)
23. Virtual Discoveries (BC) (Nov. 17, 2020)
24. Alberta Advocacy Symposium (Nov. 18, 19, 25 & 26, 2020)
25. Evidence for Litigators (Nov. 24, 2020)
26. E-Discovery (joint with OBA & LSO) (Nov. 25, 2020)
27. Dîner pour les femmes en litige (QC) (Nov. 25, 2020)
28. The Bench Speaks (Nov. 27, 2020)
29. Leading Your Case [plenary + skills workshop] (Dec. 8 & 10, 2020)
30. Case Preparation for Litigators (Dec. 9, 2020)
31. Civility in a Post-Pandemic Era (Dec. 15, 2020)
32. Conduct of the Estates Motion [plenary + skills workshop] (Jan. 20 & 21, 2021)
33. Virtual Advocacy Series: The Art of Virtual Persuasion (Jan. 22, 2021)
34. Defamation: What Litigators Need to Know (Jan. 25, 2021)
35. Tricks of the Trade (Jan. 29, 2021)
36. On Oral Advocacy – Part 2 (Feb. 11, 2021)
37. Legal Drafting for Litigators [plenary + skills workshop] (Feb. 19 & 23, 2021)
38. The Art of Settlement (Feb. 22, 2021)
39. Virtual Advocacy Series: Technology Gone Wrong – Cautionary Tales from the Remote Courtroom (Feb. 26, 2021)
40. Motions Advocacy [plenary + skills workshop] (Mar. 4 & 9, 2021)
41. The Latest on Applications in Court (Nova Scotia) (Mar. 5, 2021)
42. Digital Evidence for Litigators (Mar. 10, 2021)
43. Cross-Examination: Strategies for Success [plenary + skills workshop] (Mar. 30 & 31, 2021)
44. Commercial List Advocacy (Apr. 9, 2021)
45. Modern Criminal Advocacy in a Virtual World (Apr. 10, 2021)

46. Preparation Series: Examination-in-Chief (Apr. 13, 2021)
47. The Fearless Advocate: Litigating Polarizing Legal Issues (Apr. 16, 2021)
48. LAT Advocacy (Apr. 19, 2021)
49. Spring Symposium: The Effective Advocate & The Advocate Making a Difference (Apr. 21 & 28, 2021)
50. Virtual Advocacy Series: Virtual Roadmap – Help Judges Help You (Apr. 23, 2021)
51. Discovery Dos and Don'ts (Atlantic Canada) (Apr. 26, 2021)
52. Maîtrisez l'interrogatoire préalable (Apr. 27, 2021)
53. Administrative Tribunal Advocacy [plenary + skills workshop] (Apr. 29 & 30, 2021)
54. Examining and Cross-Examining Experts [plenary + skills workshop] (May 4 & 5, 2021)
55. Virtual Advocacy Series: Virtual Client Management (May 7, 2021)
56. Virtual Body Language for Litigators (May 11, 2021)
57. Women in Litigation Symposium: Western Canada Edition (May 20, 2021)
58. Supreme Court of Canada Advocacy (May 27, 2021)
59. Preparation Series: Cross-Examination (June 1, 2021)
60. Privilege: A Litigator's Guide (June 3, 2021)
61. Colloque sur les techniques de plaidoirie (QC) (June 7 & 8, 2021)
62. Summer Trial Advocacy College (June 10 & 11, 2021)
63. Atlantic Trial Advocacy College (June 10 & 11, 2021)
64. Dealing with Difficult People Series: Opposing Counsel (June 15, 2021)
65. Tech Hacks for Litigators (June 17, 2021)
66. An Advocate's Guide To the Calgary Indigenous Court (June 21, 2021)
67. Litigating Contract Disputes [plenary + skills workshop] (June 22 & 23, 2021)

Schedule “B”: Selected Feedback from Attendees at The Advocates’ Society’s CPD Programs

The Advocates’ Society generally delivers around 70 CPD programs per term (a term runs from mid-June to mid-June of the following year). These programs vary in length and are focused on legal advocacy skills and issues of direct relevance to litigators. Programs may be focused on general litigation, or on litigation or advocacy in specialized areas of practice. In a typical term, The Advocates’ Society will see between 4,500 and 5,000 registrants at our CPD programs⁶.

The Advocates’ Society provides an optional feedback form at the conclusion of CPD programs. The following comments are excerpts from the feedback provided across a wide range of our programs.

“The personalized feedback and the opportunity to practise time and time again with attentive, experienced and kind lawyers was incredible. I have never learned more in one day. I could also see the improvement in performance, so to speak, throughout the day in my small group. I come from an athletic background where good coaching and great training mates make the difference. I wish I had the opportunity to have this type of coaching/mentorship more frequently. The instructors went above and beyond my expectations and made the experience both challenging and judgement free so that we were able to step out of our comfort zones. I am very thankful that I had the opportunity to participate.”

“This was a very enlightening program! I walked away feeling a lot more confident about my cross examination skills. I would highly recommend this program, especially the workshop.”

“A practical and immediately useful program. I took away a better approach to examining expert witnesses.”

“This was an excellent seminar. I will be applying what I’ve learned to my practice and will be a much better lawyer for it!”

“Great program. Very relevant. I have a far better understanding of privilege as a standalone evidentiary concept.”

“This was a great learning experience and I am excited to begin preparing for trials with all of the tips and tools provided from this much needed program! Thank you to all who put the excitement back into trial advocacy and chipped away at the fear of conducting one.”

“The instructors’ insights and feedback prepared me for Court better than law school or articling.”

“Incredible experience and great opportunity to network and learn from experienced litigators. I have confidence that each student walked away as a better and more strategic litigator than they were prior to their participation.”

“This has been the most useful CLE I’ve taken in 10 years, hands down. I learned new approaches that I will implement right away.”

⁶ This figure represents the sum of registrants at each CPD program and is not corrected to account for individuals who register for more than one CPD program in a term.

“I received important insights from the Bench on what works and what to avoid when drafting legal documents.”

“This presentation made me want to hurry back to my office and revise some of my written materials in progress. Very helpful and informative. I learned a lot!”

“The workshop was fantastic. I really appreciated the opportunity to get on my feet! The instructors gave me very practical tips and had very helpful constructive comments.”

“I enjoyed the variety of topics and the diversity of experience. I have a deeper appreciation for the procedural and strategic nuances of arbitration.”

“Getting to practise advocacy skills in a congenial low-risk environment is great for growth as a junior lawyer. This was a very rewarding learning experience.”

“The entire program was well-presented with great content from top to bottom. Faculty provided a lot of great tips about handling digital evidence that will help me on my files.”

“This was immensely helpful! Hearing from judges and senior counsel with experience in managing complex commercial litigation was so valuable.”

THE HAMILTON LAW ASSOCIATION

The Hamilton Law Association exists to enable its members to become successful, respected and fulfilled in their profession.
45 Main Street East, Suite 500
Hamilton, Ontario L8N 2B7
Telephone (905) 522-1563
Fax (905) 572-1188
Website: <http://www.hamiltonlaw.on.ca>



The Law Society of Ontario
130 Queen Street West
Toronto, Ontario M5H 2N6

November 30th, 2021

Attention: Competence Task Force

Re: Competence Task Force Call for Comment

Dear Sir or Madam:

The Hamilton Law Association (HLA) welcomes the opportunity to participate in the Law Society of Ontario's call for consultation to the report of the Competence Task Force. The HLA represents the interests of its approximately 1000 members in the City of Hamilton and we trust that the Law Society of Ontario and its Benchers will give our submissions due consideration.

Background

Our law library and association staff have provided a nucleus of organizational and informational support to our bar and its 1,037 members. With the oversight of our Board, the library is a community hub where legal research is conducted by members and staff alike to assist lawyers in competently performing their vital societal function. It is submitted that, with the essential funding assistance, county libraries and associations provide support to lawyers serving all Ontarians.

The HLA Library frequently assists lawyers serving members of the public seeking legal assistance with family law, criminal law, real estate law, estate planning needs, and those with small businesses. Our library assists members in providing competent services.

THE HAMILTON LAW ASSOCIATION

The Hamilton Law Association exists to enable its members to become successful, respected and fulfilled in their profession.
45 Main Street East, Suite 500
Hamilton, Ontario L8N 2B7
Telephone (905) 522-1563
Fax (905) 572-1188
Website: <http://www.hamiltonlaw.on.ca>



In addition to being a hub for legal information, the HLA and Anthony Pepe Memorial Library, through its 13 committees and approximately 25 annual educational events, generate a web of relationships that enable its membership to seek and offer advice and mentorship. This provides lawyers with collegial and education support against errors in judgement

Call for Comment

Upon review of the Competence Task Force Report, we identified three key issues that our association can and should provide comment and they all revolve around the importance of local law libraries and the involvement of our association regarding CPD requirements. Those include the importance of local libraries, CPD programming, and mentorship.

The importance of local libraries

In preparing a response to the call for consultation to the report of the Competence Task Force, the HLA conducted a survey of our members. Respondents overwhelmingly agreed that the association library is a critical component in the competency framework for our members (82.98% of survey respondents agreed that access to legal information through the local association library is an important resource to assist the member in maintaining competence).

The library facilitates access to information, provides a hub for mentoring (formally fostered by the HLA and informally on a member-to-member basis) and creates a collaborative environment which is key in developing and maintaining competency for our members.

The HLA law library provides information support to our members, including availability of legal research conducted by members and staff alike to assist lawyers in providing competent services. The library also enables access to practice software for members.

We echo the comments of the Federation of Ontario Law Association in their response to this call for comment about the importance of association libraries as part of the overall competency picture.

THE HAMILTON LAW ASSOCIATION

The Hamilton Law Association exists to enable its members to become successful, respected and fulfilled in their profession.
45 Main Street East, Suite 500
Hamilton, Ontario L8N 2B7
Telephone (905) 522-1563
Fax (905) 572-1188
Website: <http://www.hamiltonlaw.on.ca>



CPD

The HLA and the law library enable our organization to provide 25 annual educational events for our members across all areas of practice. Attendance at the events, and in the common library space create relationships and enable our membership to seek and offer advice and mentorship.

With respect to CPD, our members agreed that there should be continuing obligations to participate in substantive and professional programming on an annual basis. It was noted that it would be appropriate to consider tailoring professional development based on the member's area of practice and level of experience.

We encourage the Task Force to consider the development of resources for lawyers. The resources would include Practice Manuals, which could include expectations of best practices, precedents and other critical information in a variety of practice areas. These resources would assist all members, but could be particularly beneficial to sole and small firm practitioners, new practitioners, practitioners transitioning from one area of practice to another or experienced practitioners who wish to review current standards of practice.

Mentorship

The HLA through its New Lawyers' Subcommittee offers a vital and well attended mentoring program which is available to articling students and new lawyers practising in the Hamilton area, as well as students enrolled in their second or third year of law school. Their focus is to connect these individuals with other articling students and lawyers practising in the Hamilton area.

Mentorship is critical for any new lawyer, sole practitioner or lawyer in a small firm. As highlighted by FOLA in their response, we agree that to be effective a mentorship program must be a collaborative process that includes the LSO, stakeholders and the judiciary. We echo the recommendation of FOLA in how best to implement a truly effective mentorship program.

THE HAMILTON LAW ASSOCIATION

The Hamilton Law Association exists to enable its members to become successful, respected and fulfilled in their profession.
45 Main Street East, Suite 500
Hamilton, Ontario L8N 2B7
Telephone (905) 522-1563
Fax (905) 572-1188
Website: <http://www.hamiltonlaw.on.ca>



Conclusion

We conclude by reiterating the importance of local law libraries as a critical piece of the foundation of competency for our members and the Ontario bar as a whole. As set out in the FOLA submission, ongoing sustainable funding for Ontario's county and district law libraries must continue to be a fundamental priority for the Law Society to ensure equality and equitable access for lawyers across the province and in particular, outside of jurisdictions where there is a law school or Great Library.

On behalf of the Board of the Hamilton Law Association, we thank you for your attention to this important issue. We would be happy to discuss this matter further if clarification is required.

Yours truly,

A black and white photograph of a handwritten signature, likely belonging to Laura Dickson.

Laura Dickson
Professional Matters Chair,
The Hamilton Law Association

A black and white photograph of a handwritten signature, likely belonging to Kathleen Bingham.

Kathleen Bingham
Family Law Committee Chair,
The Hamilton Law Association



125 Brodie Street North

Thunder Bay, ON P7C 0A3

Telephone: (807) 344-3481

Fax: (807) 345-9091

Email: library@tbla.ca

Web: <https://www.tbla.ca>

November 30, 2021

Law Society of Ontario
Osgoode Hall
130 Queen Street West
Toronto, ON M5H 2N6

Re: Competence Task Force Report

The Thunder Bay Law Association has reviewed and considered the Competence Task Force's report in relation to the Renewing the Law Society's Continuing Competence Framework and provides the following comments and submissions.

1. Do you agree with the working definition of competence? Are there any aspects of the definition that you would change?

- The current definition of competence is sufficient subject to the inclusion of references to both technological and cultural competence.
- The proposed working definition of competence is too vague and does not provide clear enough guidance on what is required of a competent lawyer.
- The proposed definition places too much emphasis on client satisfaction. A lawyer can provide competent services and still have a client that is unhappy with the outcome of their case. This cannot and should not be the focus of a competency assessment.

2. Should changes be made to the current CPD requirements for lawyers?

- The adoption of detailed or specialized CPD requirements by practice area is not feasible. Many lawyers, especially those in small communities practice in

a wide variety of areas and therefore, such a requirement would be too burdensome.

- It is preferable that CPD requirements be completed annually, not every two years. This ensures that lawyers have taken active steps each year to improve their skills and knowledge and remain abreast of changes in the law.
- We do not think that the CPD requirements should be reduced or eliminated. The status quo is not onerous. There is a concern that if the requirements are eliminated it will in fact be the lawyers that require it the most that will no longer attend CPD programming.

3. *Should the LSO provide enhanced support for sole practitioners and small firms, such as courses on the business of law, law firm management and financial record-keeping?*

- This requirement may be something to consider for new law firms that are opening or new lawyers that are going to be practicing as sole practitioners. However, it should be included within their required CPD hours and not in addition to as this could be onerous and costly to sole and small firms.

4. *Should the LSO require mentoring or peer assessments as a mechanism for improving competence?*

- Mentorship is helpful to a lawyer's development and the LSO should support lawyers in finding mentors. However, this should not be mandatory. For mentorship to work it has to be consensual. If people are forced to participate any benefit in same may be lost for many individuals who do not want to engage in the process.
- It is unclear from the report how peer assessments will work. We expect that it will be difficult to find qualified and appropriate assessors to assist with this process. There would also be concerns about solicitor client privilege and conflicts if the assessors were from the same region.

5. *Should the LSO increase the number of practice assessment that it performs? Should the practice assessment program remain as is, be enhanced or be eliminated altogether?*

- Our members have not found practice assessments or audits to be particularly helpful for improving their law practices. They take a lot of time and cause additional stress for lawyers.

- The report does not provide sufficient data to truly assess whether reviews and audits are valuable and therefore, perhaps a further analysis must be completed before changes are made to the current system.
- We also note that these reviews and audits can be particularly burdensome, costly and stressful for sole and small firms. The LSO may want to consider whether the resources used for assessments and audits can be better utilized to assist lawyers, especially sole and small firms.

6. Should the LSO require or encourage licencees to take courses to enhance their technological and cultural competence?

- We agree that lawyers must be competent in their use of technology and therefore, would support a specific reference to in the definition of competence referring to same.
- Furthermore, the LSO should consider making cultural competency training mandatory and free for all lawyers.

Overall, we are concerned with the focus on sole and small firms in the report and the suggested changes. We remain of the opinion that any changes should be directed to the profession as a whole. Simply because you work in a mid to large size firm does not make you a more competent lawyer.

Thank you for taking the time to consider our submissions.

Yours truly,

THUNDER BAY LAW ASSOCIATION



S. GEORGE JOSEPH

President



November 30, 2021

Sidney Troister, Chair
Competence Task Force
Law Society of Ontario
Osgoode Hall, 130 Queen Street West
Toronto, Ontario
M5H 2N6

Via: Upload to portal

Dear Mr. Troister,

**RE: RESPONSE TO LAW SOCIETY OF ONTARIO'S COMPETENCE TASK FORCE CALL FOR
COMMENT**

I am writing to you on behalf of the Toronto Lawyers Association ("TLA"). The TLA is the voice of its 3,700 members who practice law in all disciplines across the Greater Toronto Area.

We understand the Law Society of Ontario ("LSO") has appointed a Competence Task Force to examine the issue of continuing competence among lawyers licensed in Ontario. We have reviewed the Competence Task Force's June 23, 2021 Report entitled "Renewing the Law Society's Continuing Competence Framework", including the various questions posed by the Competence Task Force at pages 25 to 28 of its Report. In response to the Competence Task Force's request for commentary from various stakeholders, the TLA invited its members to complete an online survey in order to gather their views as they relate to the questions posed in the Competence Task Force's Report. Approximately 120 members responded to the TLA's survey, with many providing insightful comments that we believe will greatly assist the Competence Task Force in its efforts to renew the competence framework in Ontario.

The TLA Executive Committee also wishes to express its views in the matter of renewing the continuing competence framework in Ontario. The TLA strongly supports the LSO's requirement that licensees complete a minimum number of CPD hours per year. We believe that ongoing legal education is fundamental to licensee competence and, as such, we believe that the current CPD requirement should either be maintained or increased to ensure minimum levels of competence among practitioners. Similarly, the TLA strongly encourages the LSO to place

continued emphasis on the maintenance and funding of local law libraries as a means to provide ongoing education to licensees and to ensure minimum standards of client service.

We are pleased to provide below our members' responses to our online survey.

RESPONSES TO TLA MEMBERSHIP SURVEY

As indicated above, the TLA invited its members to complete an online survey in direct response to the questions posed by the Competence Task Force at pages 25 to 28 of its Report. The survey was available for completion between October 12, 2021, and October 28, 2021. A copy of the survey and our members' responses are attached to this correspondence as Appendix "A". Of particular significance is the fact that our survey questions mirror the specific questions posed by the Competence Task Force, thereby providing the Competence Task Force with insights and commentary in direct response to the issues in question.

The survey was completed by 122 respondents. Ninety-seven respondents provided information related to their year of call. Of those 97 lawyers, 12 have been practicing for less than five years, 11 have been practicing for six to nine years, 12 have been practicing for 10 to 14 years, 13 have been practicing for 15 to 19 years, 22 have been practicing for 20 to 29 years and 27 have been practicing for 30 or more years. Ninety-three lawyers provided information related to the number of lawyers in their firm/office. Of those 93 lawyers, 33 were sole practitioners, 26 work in a practice comprised of two to five lawyers, 13 work in practice comprised of six to 10 lawyers, 10 work in a practice comprised of 11 to 49 lawyers, one works in a practice comprised of 50 to 99 lawyers and 10 work in a practice comprised of 100 or more lawyers.

1. Working Definition of Competence

TLA members were asked whether they agreed with the Law Society's working definition of "competence". In particular, the TLA survey posed the following question:

The Law Society's Competence Task Force has developed a working definition of "competence". According to the Law Society, competence is composed of knowledge, skills, abilities, behaviours, judgement and values. Competent performance requires the habitual and simultaneous application of many of these attributes. Competence is also developmental in nature and it spans the entirety of a lawyer's career. It requires self-awareness, self-reflection and a growth mindset. It is dynamic and adaptive and is informed by a consumer perspective. It evolves with societal change.

Seventy-five percent of respondents agreed with the LSO's working definition of competence as set out above. Twenty-five percent disagreed with this working definition. Some indicated that competence should not be informed by consumer perspective. Others said the definition was too vague and open to interpretation. Some respondents also questioned whether the concept of "values" should be a part of the definition of competence.

2. Principles for an Effective Competence Regime

TLA members were asked whether the following five principles form part of an effective competence regime: risk-based; flexible; feasible; forward-looking; and client-centred. Of the 93 respondents who answered this question, 82% agreed that these principles form part of an effective competence regime.

Respondents were asked if any of these principles should be omitted or whether any other principles should be added. The following are among the general comments received:

- These principles are vague
- Honesty, civility and access to justice should be included as principles
- Risk-based and client-centred should not be included as principles

3. Components of Continuing Competence Framework

TLA members were asked about the six components that comprise the LSO's current competence framework. Members were asked whether the six components adhere to the five principles of an effective competence regime. Of the 94 respondents who answered this question, 73% agreed with that statement. Respondents who disagreed with this statement were asked to comment on why they disagreed with it. The following general comments were provided:

- CPD in its current form is “useless”
- The Certified Specialist Program does not speak to competency
- Funding cuts to libraries will hurt sole practitioners
- Practice assessments are “bad for everyone”
- None of these components are sufficiently client-centred
- Spot audits unfairly target sole practitioners and small firms

TLA members were asked if any of the six components should be modified, restructured or terminated. Thirty-four respondents provided commentary, which included the following general answers:

- The Certified Specialist Program should be eliminated
- The LSO should move away from a centralized resource system and instead establish a physical education presence in all regions of the province
- Eliminate practice assessments
- Provide additional supports/resources to newer licensees trained abroad
- Make the Coach and Advisor Network more robust

4. Renewing the Law Society's Continuing Competence Framework

TLA members were asked a variety of questions regarding the current state of the LSO's continuing competence framework and any changes that ought to be made to it. Sixty-three percent of survey respondents believe that the current CPD requirement should not be changed to target the development and maintenance of certain competencies. Of those respondents who believe it should be changed, the following general comments were provided:

- Junior lawyers should be required to complete CPD courses specific to their area of practice either at no cost or on a cost recovery basis
- If the CPD requirement is to remain, it should be more effective (i.e. licensees should be required to complete programming in their practice area)
- CPD should be more skills-based
- There should be a greater requirement for EDI hours
- Technological competence should be emphasized
- CPD should be more affordable
- There should be a greater focus on practice management
- "Unneccesary" CPD should be eliminated

When asked whether CPD should be tied to a licensee's area of practice, experience level or identified areas of risk, 56% of respondents agreed. Fifty-two percent of respondents are of the view that the CPD requirement should not be completed over the course of two years (as opposed to annually). Of the minority of respondents who indicated that CPD hours should be completed over the span of two years, there were mixed views on whether the number of CPD hours should be changed if lawyers were permitted to complete their CPD over two years. Some respondents indicated that the number of CPD hours should remain the same (i.e., the number of hours to be completed per year should be halved). Other respondents suggested that if licensees are to be given two years to complete the CPD requirement, the total number of hours to be completed should double.

Survey respondents were asked whether CPD programs should be more stringent or interactive to help ensure that licensees are engaged and learning. Seventy percent of respondents disagreed with this statement. The vast majority (79%) of respondents also do not believe that as an alternative to the CPD requirement, licensees should be required to conduct a self-assessment.

The majority of respondents favour keeping the CPD requirement as is or enhancing it. Fifty-seven percent of survey respondents are of the view that the CPD requirement should remain as is. Twenty-six percent believe it should be enhanced. Less than seventeen percent of respondents indicated that the CPD requirement should be eliminated altogether. Respondents were asked why they would make these changes. They commented as follows:

- Most CPD programs are too broad and should be more focused upon certain competencies
- Certain courses should be mandatory for more junior lawyers and the LSO should select a panel of lawyers to teach these courses
- CPD courses do not actually ensure competence and are “window dressing”
- It is currently easy to obtain CPD hours without necessarily gaining knowledge
- Licensees should not be able to take CPD courses unrelated to their area of practice
- CPD is simply a money-making exercise
- There is no oversight as it relates to whether licensees actually watch/listen courses they have logged on to
- Many licensees do not need a formal CPD system in order to remain competent
- CPD should be low-cost and easily accessible

Survey respondents were asked whether they had any other comments to provide with respect to the CPD requirement. Some suggested that competence should be addressed at the beginning of a lawyer’s career by ensuring appropriate legal education and conducting an assessment prior to permitting lawyers to be licensed in Ontario. CPD should not be used to address weaknesses in the original licensing program. Some respondents suggested that CPD should be available at no cost to licensees. Others suggested that CPD should be very targeted to younger lawyers. Multiple respondents commented that technological competence should be a focus of CPD programming. One respondent suggested that self-study should be permitted as the sole method of completing the CPD requirement.

Survey respondents were asked whether the LSO should provide enhanced supports for sole practitioners and small firms, such as courses on the business of law, law firm management and financial record-keeping. Seventy-seven percent of respondents agreed with this statement. When asked what types of supports should be provided, respondents’ answers included the following:

- Provide programming at cost recovery basis
- Provide record keeping support
- Provide free courses on the business of law, law firm management and record keeping as well as mentoring in these areas
- Develop best practices toolkits so that new lawyers don’t need to “reinvent the wheel”

Fifty-five percent of survey respondents believe that licensees should be required to complete a training course related to a core set of competencies, such as practice management or client communications. Of those, 27 respondents indicated that the course should be mandatory for all licensees, 37 indicated that it should be mandatory for new licensees, 13 indicated that it should be mandatory for sole practitioners or those in small practices, 15 indicated that it should be mandatory for licensees transitioning to a sole practice and 11 indicated that it should be

mandatory for licensees after a particular number of years of practice (responses ranged from five years to 25 years).

Survey respondents were asked whether licensees should be required to enter into a mentoring relationship, either as mentor or mentee. Seventy-nine percent of respondents said no. Many of those who disagreed with the idea of a mandatory mentoring relationship agreed, however, that the LSO should encourage mentoring relationships.

The vast majority of respondents (85%) disagreed that the LSO should introduce peer assessments as a mechanism for improving competence. Of the 15% of respondents who support the idea of introducing peer assessments, the following comments were provided with respect to how they should be structured:

- Using group meetings
- By selecting a mentor that the licensee is comfortable with and conducting monthly meetings
- Assessors should be selected by the LSO
- Peer assessment may be used for lawyers who are the subject of complaints to the LSO for competency-based reasons

Fifty-four percent of respondents were aware of the Coach and Advisor Network. Respondents who were mentees were asked how helpful they found CAN. On a scale of one to five (with one being not helpful at all and five being very helpful), the average rating was three. Of those respondents who were mentors, 61% found the experience to be rewarding. Respondents were asked whether CAN should remain as is, be enhanced or be eliminated altogether. Sixty four percent believe it should remain as is, 31% believe it should be enhanced and only 5% believe it should be eliminated. Respondents were asked what changes they would make to CAN and the following answers were provided:

- Provide more robust or hands-on support
- Introduce a category for those licensees transitioning between practice areas
- Publicize it more as some licensees are unaware of it
- Link it with local law associations to create more relationships
- Encourage licensees to join prior to their call to bar to ensure proper mentorship immediately upon admission to the profession, particularly where articling requirements are reduced

Ninety percent of respondents were aware of the Certified Specialist Program; however only 11% have participated in it. Just over half (55%) of respondents indicated that they did not find the program to be useful. Of the 45% who found it to be useful, the average rating of "usefulness" was three out of five. Half of survey respondents believe that the Certified Specialist Program should remain as is. Fifteen percent believe it should be enhanced and 35% believe it should be

eliminated altogether. Respondents were asked if they have any suggestions for changes to the program. Their comments included the following:

- The program should be focused on actual experience and skills
- It is currently little more than a marketing tool
- Expand the areas of specialization and create subspecialties
- Eliminate it because it provides the public with a false sense of confidence in a lawyer who has the C.S. designation

Survey respondents were asked whether there are basic technological skills that the LSO should require all licensees to have. Respondents were divided on this issue - of the 105 respondents who answered this survey question, 53 replied no and 52 replied yes. Respondents who agreed with this statement were asked which technological skills licensees should have and how the LSO should verify that licensees have them. The following comments were provided:

- LSO should provide support to lawyers who need help with programs like Zoom or e-filing programs
- Periodic courses on programs like CaseLines would be helpful
- Incorporate technology skills into articling
- Licensees should have basic technological skills related to accounting/bookkeeping, email and the maintenance of electronic client files
- Licensees should have sufficient technological capabilities in their offices/firms
- Licensees should have core skills in their area of practice (i.e., litigators should know how to file documents with the court electronically and how to appear in virtual court)
- Provide licensees with training related to IT security and how to respond to IT threats such as ransomware attacks
- LSO may consider creating a Technological Competence category to the annual CPD requirement
- Licensees should be required to have basic technological competence however the LSO should be mindful not to set the standard too high as it may disadvantage sole practitioners or those in smaller communities with fewer resources

Three quarters of respondents agree that in order to prepare licensees for the rapidly changing future, the LSO should require or encourage licensees to take courses to enhance their technological competence. Survey respondents were asked if they had any further comments to provide on the topic of technological competence. They provided the following comments:

- Some were of the view that it would be very difficult for the LSO to implement a province-wide requirement for technological competence and suggested that the LSO may want to impose a standard whereby lawyers are free to choose how to adhere to the standard while also minimizing risks related to IT security
- Technological competence should be encouraged but not compelled

- Requiring technological competence from all licensees may result in some licensees being inadvertently excluded from the bar
- Technology is mostly a staff concern and licensees should be focused on practicing law
- Create a resource for licensees to use when they require live support to do things such as file documents with the court electronically
- Technological competence training should be included as part of the professionalism CPD requirement

Survey respondents were asked whether the LSO should incentivize licensees to strive for excellence. Of the 100 respondents who answered this question, 51 answered yes and 49 answered no. Respondents were asked what excellence means to them and how licensees should strive for it. The following comments were provided:

- Excellence means competent work, reasonable fees and good service
- Excellence is competence, dedication, public service, skillful representation, effective advocacy, participation in legal organizations and an overall contribution to legal knowledge
- Excellence is keeping up to date on the law, assisting young lawyers through mentoring and cooperating with colleagues by exchanging useful information
- The LSO could encourage competence by distributing local awards to deserving licensees
- Licensees should strive for excellence by keeping in mind who they serve and by remembering their legal, moral and ethical obligations to clients and the community at large
- Reinstate the Q.C. program for lawyers who have maintained a high standard of professionalism for 20+ years
- Excellence is best practices within an area of specialization
- Excellence is serving clients in the way they deserve to be served – that is, with attention and care and with the requisite expertise
- Excellence means going beyond basic competence

5. Additional Aspects of Competence Regime

In addition to the survey answers above, respondents were asked whether there is anything else that should be included in the competence framework or that they would like to comment on with respect to continuing licensee competence. Comments included the following:

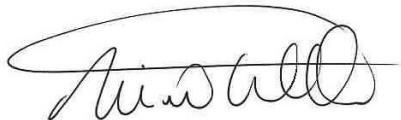
- There should be an ongoing commitment by licensees to access to justice initiatives
- The assessment of client satisfaction should be part of the framework
- Increase the annual EDI training requirement
- Provide licensees with access to precedents on the LSO website
- Introduce an annual fee for CPD courses and permit licensees to enroll in as many courses as they would like to take (i.e., over and above the minimum requirement)

- Implement penalties for lawyers who claim to have completed virtual CPD but in fact have not attended
- Licensees should be required to complete an anti-fraud CPD course each year
- Implement mandatory unconscious bias training
- Expand the Coach and Advisor Network and publicize it more broadly

As is evident from the survey responses above, TLA members hold widely varying opinions on the LSO's current competence framework and any changes that might be made to it. As noted above, the TLA strongly supports the LSO's requirement for licensees to complete an annual CPD component. It also strongly supports the maintenance and robust funding of local law libraries as a means of ensuring licensee competence throughout the province.

Thank you for considering these comments. Our Advocacy Committee would be pleased to discuss these comments at your convenience, should you find additional consultation beneficial.

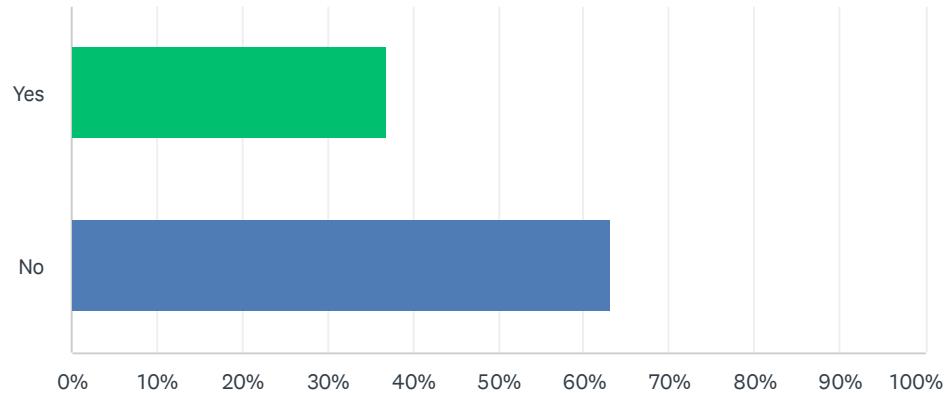
Yours very truly,

A handwritten signature in black ink, appearing to read "Michael J. White".

Michael J. White
President
Toronto Lawyers Association

Q1 Should the CPD requirement be changed to target the development and maintenance of certain competencies?

Answered: 119 Skipped: 3



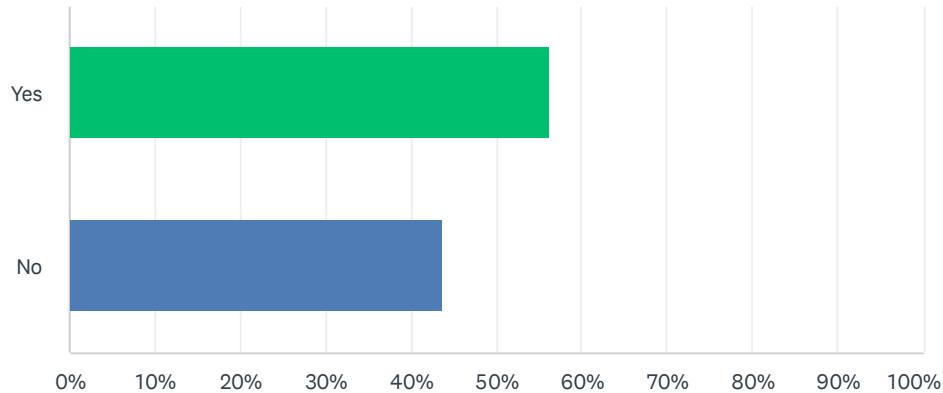
ANSWER CHOICES	RESPONSES	
Yes	36.97%	44
No	63.03%	75
TOTAL		119

Q2 If yes, how should it be changed?

Answered: 40 Skipped: 82

Q3 Should the CPD requirement be tied to the licensee's practice area(s), experience level or identified areas of risk?

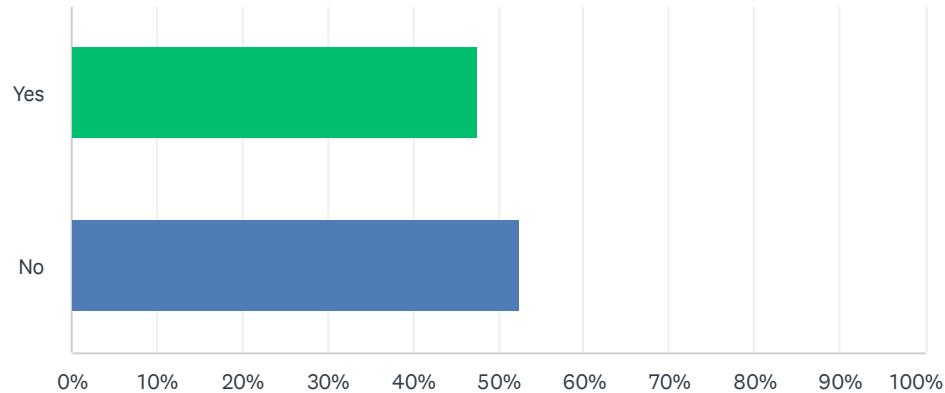
Answered: 121 Skipped: 1



ANSWER CHOICES	RESPONSES	
Yes	56.20%	68
No	43.80%	53
TOTAL		121

Q4 Should licensees complete their CPD requirement over the course of two calendar years as opposed to annually?

Answered: 122 Skipped: 0



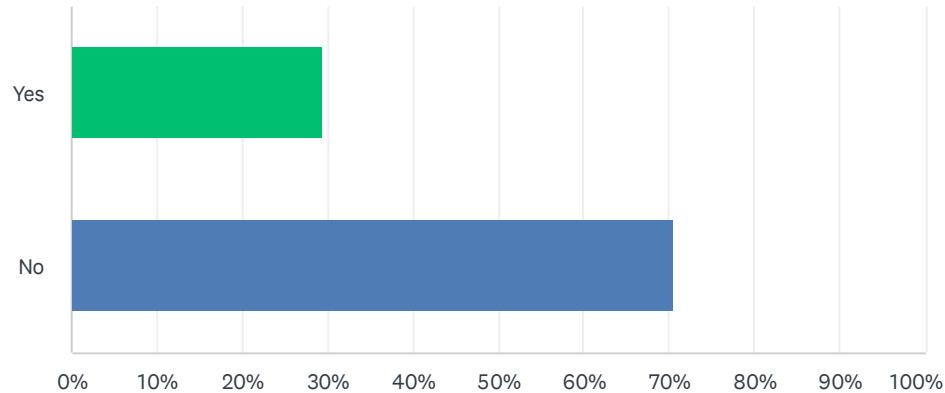
ANSWER CHOICES	RESPONSES	
Yes	47.54%	58
No	52.46%	64
TOTAL		122

Q5 If yes, should the number of hours remain the same or increase?

Answered: 63 Skipped: 59

Q6 Should CPD programs be more stringent or interactive to help ensure that licensees are engaged and learning?

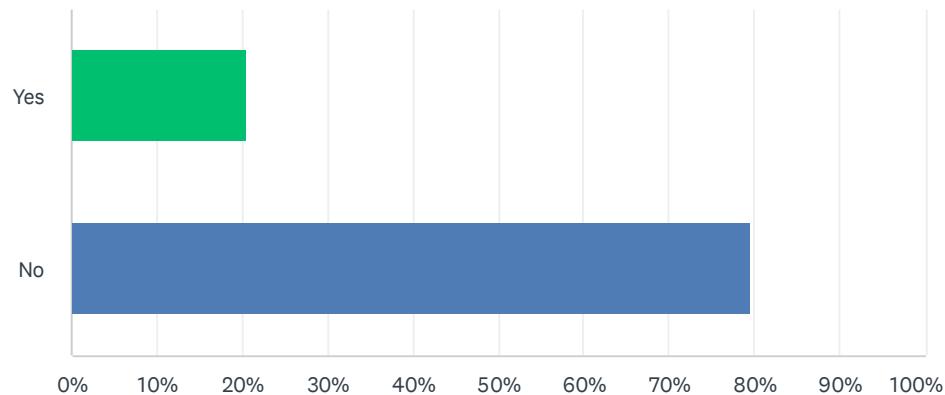
Answered: 122 Skipped: 0



ANSWER CHOICES	RESPONSES	
Yes	29.51%	36
No	70.49%	86
TOTAL		122

Q7 As an alternative to the CPD requirement, should licensees be required to conduct a self-assessment to identify their learning and training needs and then create and execute their own unique professional development plan?

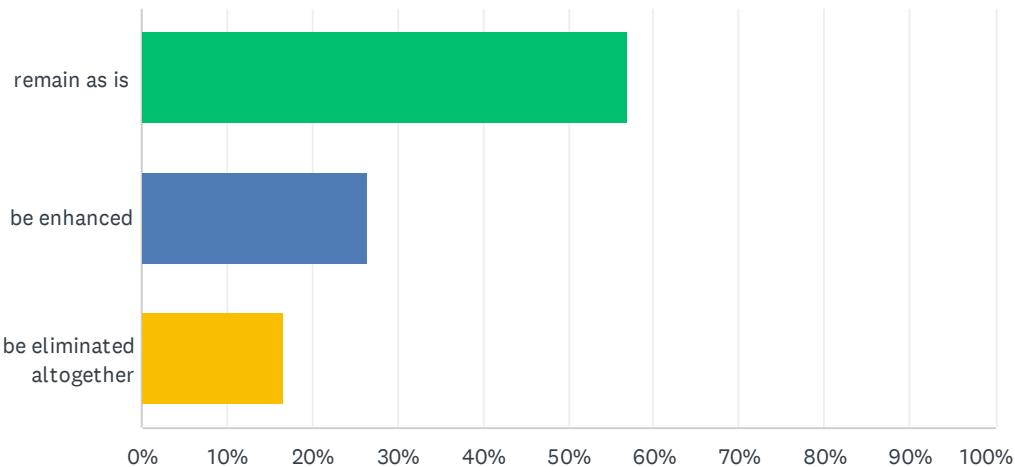
Answered: 122 Skipped: 0



ANSWER CHOICES	RESPONSES	
Yes	20.49%	25
No	79.51%	97
TOTAL		122

Q8 Should the CPD requirement (Pick one)

Answered: 121 Skipped: 1



ANSWER CHOICES	RESPONSES
remain as is	57.02%
be enhanced	26.45%
be eliminated altogether	16.53%
TOTAL	121

Q9 Why would you make these changes and how would you go about making them?

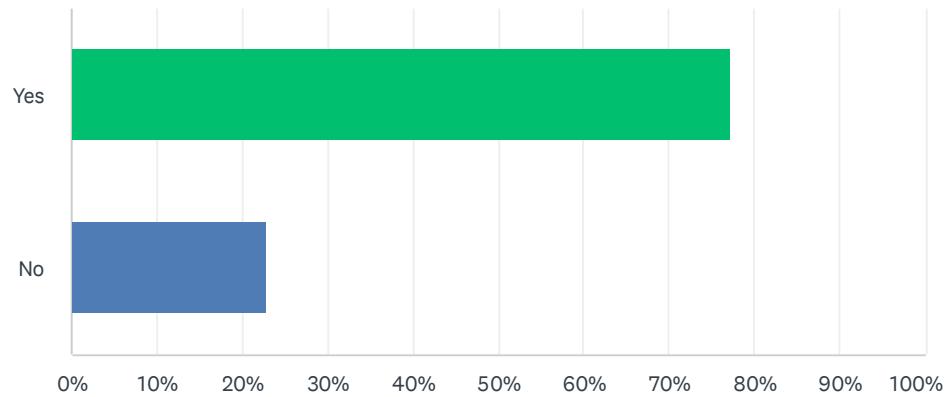
Answered: 52 Skipped: 70

Q10 Any other comments about CPD requirements?

Answered: 44 Skipped: 78

Q11 Should the Law Society provide enhanced support for sole practitioners and small firms, such as courses on the business of law, law firm management and financial record-keeping?

Answered: 110 Skipped: 12



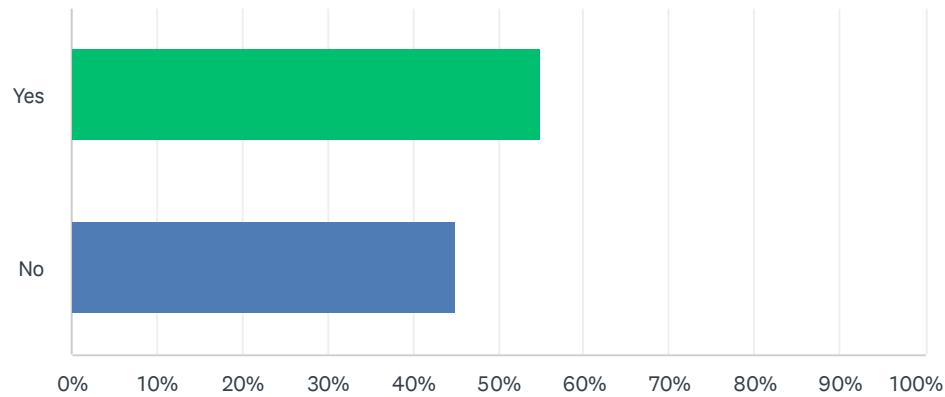
ANSWER CHOICES	RESPONSES	
Yes	77.27%	85
No	22.73%	25
TOTAL		110

Q12 If yes, what types of supports?

Answered: 72 Skipped: 50

Q13 Should licensees be required to complete a training course related to a core set of competencies, such as practice management or client communications?

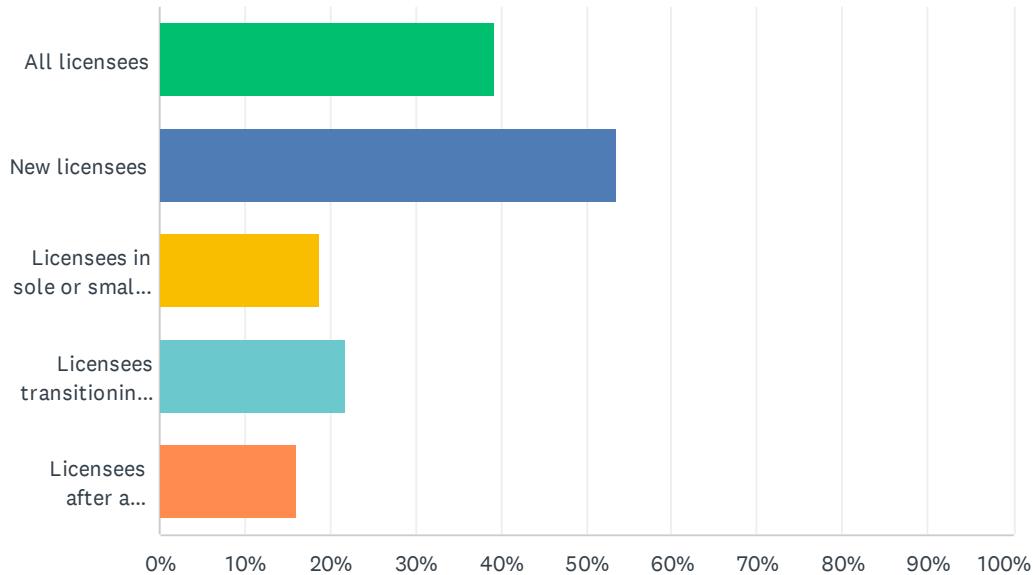
Answered: 111 Skipped: 11



ANSWER CHOICES	RESPONSES	
Yes	54.95%	61
No	45.05%	50
TOTAL		111

Q14 If yes, should the course be mandatory for: (Pick as many as applicable)

Answered: 69 Skipped: 53



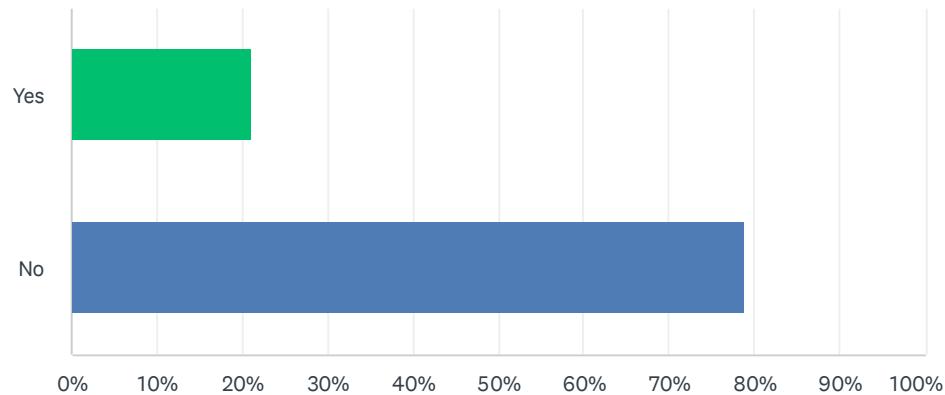
ANSWER CHOICES	RESPONSES	
All licensees	39.13%	27
New licensees	53.62%	37
Licensees in sole or small firm practice	18.84%	13
Licensees transitioning to sole practice	21.74%	15
Licensees after a particular number of years of practice (Indicate how many years below)	15.94%	11
Total Respondents: 69		

Q15 If you have indicated above that the course should be mandatory for licensees after a particular number of years of practice, please indicate below the number of years of practice after which the course should be required.

Answered: 17 Skipped: 105

Q16 Should the Law Society require licensees to enter into a mentoring relationship, either as mentor or mentee?

Answered: 109 Skipped: 13



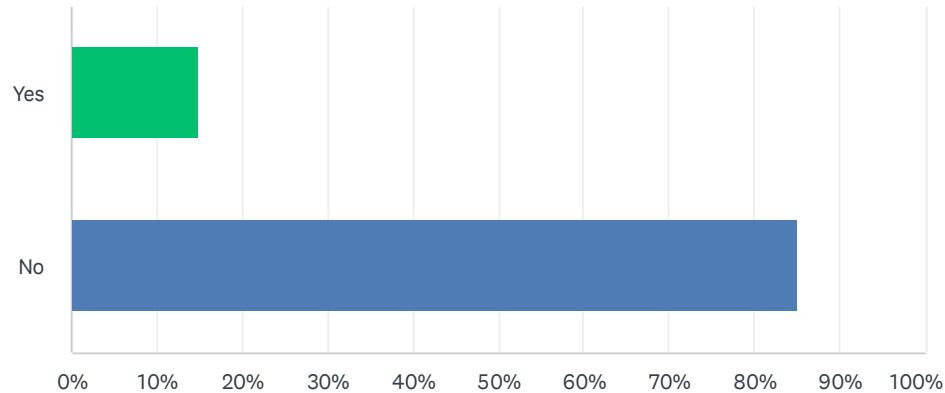
ANSWER CHOICES	RESPONSES	
Yes	21.10%	23
No	78.90%	86
TOTAL		109

Q17 If no, should the Law Society encourage licensees to enter into a mentoring relationship, either as mentor or mentee?

Answered: 76 Skipped: 46

Q18 Should the Law Society introduce peer assessments as a mechanism for improving competence?

Answered: 107 Skipped: 15



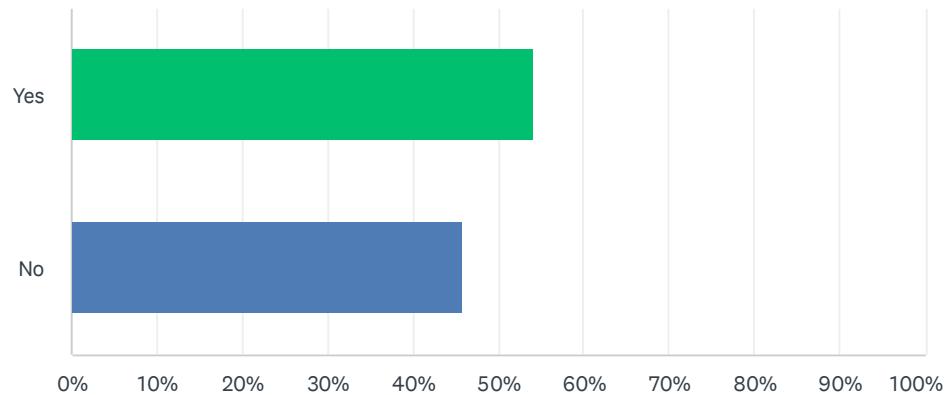
ANSWER CHOICES	RESPONSES	
Yes	14.95%	16
No	85.05%	91
TOTAL		107

Q19 If yes, how should they be structured?

Answered: 17 Skipped: 105

Q20 Are you aware of the Coach and Advisor Network?

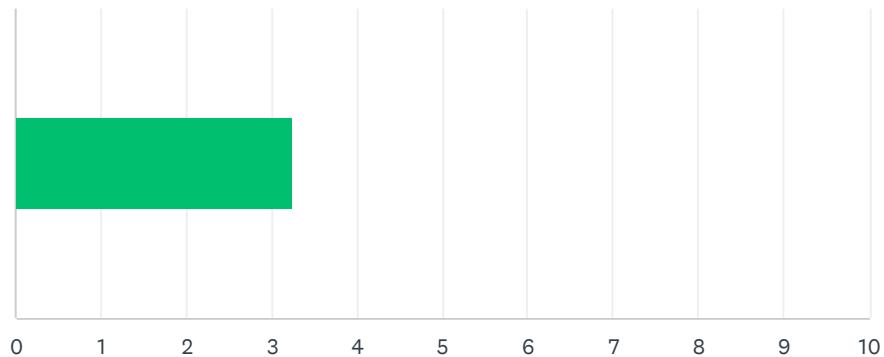
Answered: 107 Skipped: 15



ANSWER CHOICES	RESPONSES	
Yes	54.21%	58
No	45.79%	49
TOTAL		107

Q21 If you participated in the Coach and Advisor Network as a mentee, on a scale of 1-5, with 1 being not at all helpful and 5 being very helpful, how helpful did you find it?

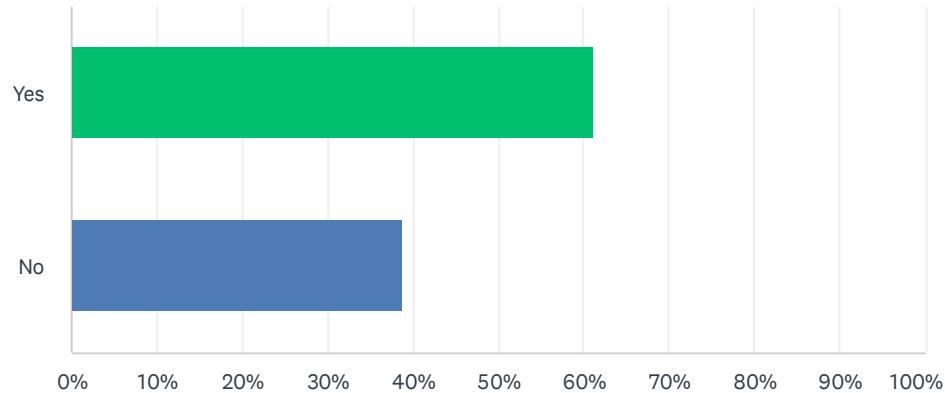
Answered: 12 Skipped: 110



ANSWER CHOICES	AVERAGE NUMBER	TOTAL NUMBER	RESPONSES
	3	39	12
Total Respondents: 12			

Q22 If you participated in the Coach and Advisor Network as a mentor, did you find it rewarding?

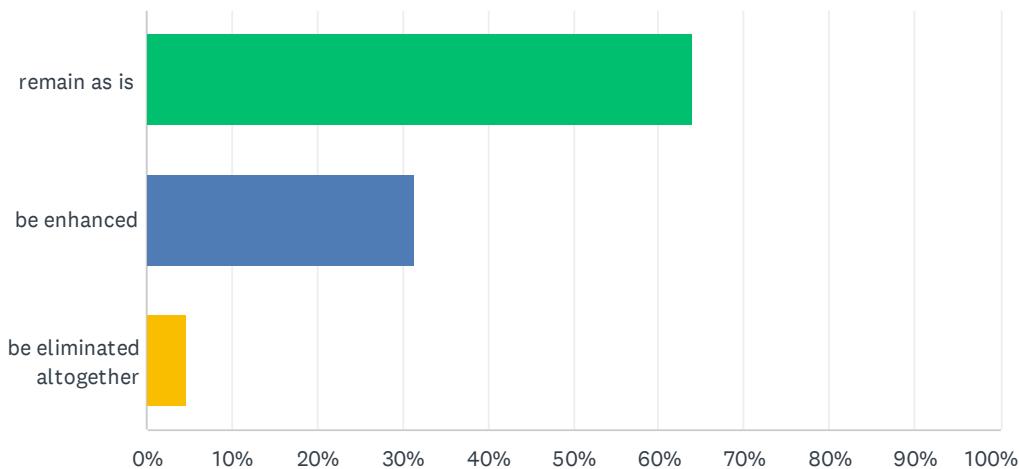
Answered: 18 Skipped: 104



ANSWER CHOICES	RESPONSES	
Yes	61.11%	11
No	38.89%	7
TOTAL		18

Q23 Should the Coach and Advisor Network (Pick one)

Answered: 64 Skipped: 58



ANSWER CHOICES	RESPONSES	
remain as is	64.06%	41
be enhanced	31.25%	20
be eliminated altogether	4.69%	3
TOTAL		64

Q24 If you would make changes: Why would you make these changes and how would you go about making them?

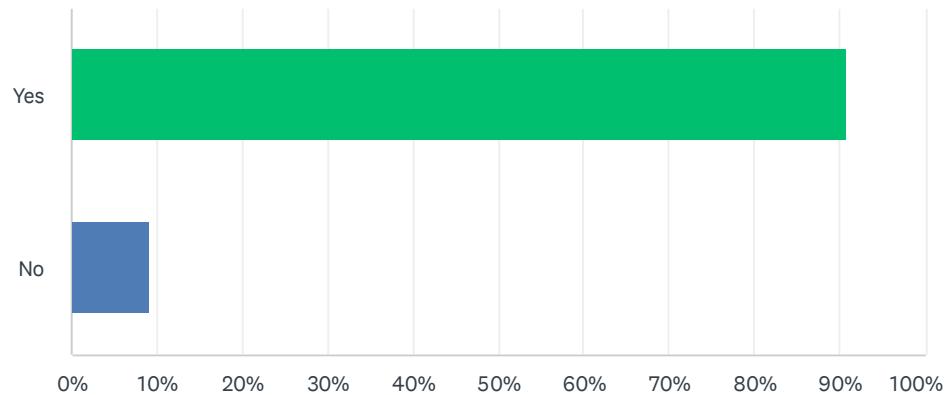
Answered: 17 Skipped: 105

Q25 Any other comments about peer-based initiatives?

Answered: 15 Skipped: 107

Q26 Are you aware of the Certified Specialist Program?

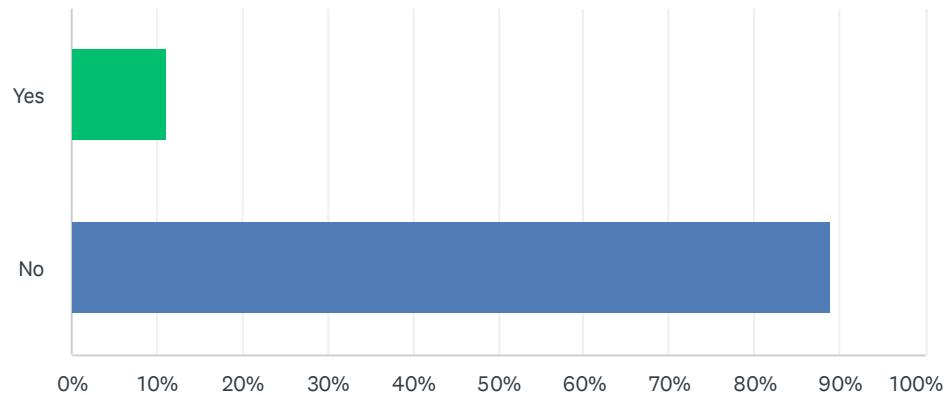
Answered: 108 Skipped: 14



ANSWER CHOICES	RESPONSES	
Yes	90.74%	98
No	9.26%	10
TOTAL		108

Q27 If yes, have you participated in it?

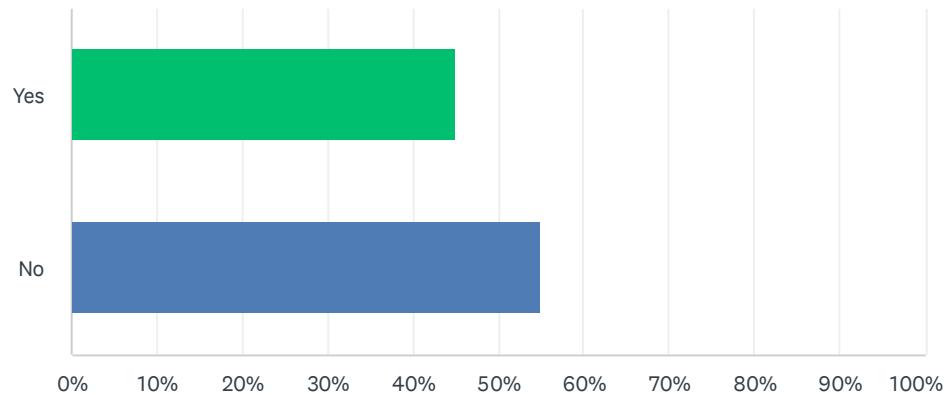
Answered: 100 Skipped: 22



ANSWER CHOICES	RESPONSES	
Yes	11.00%	11
No	89.00%	89
TOTAL		100

Q28 If so, did you find it useful?

Answered: 20 Skipped: 102



ANSWER CHOICES	RESPONSES	
Yes	45.00%	9
No	55.00%	11
TOTAL		20

Q29 If yes, on a scale of 1-5 how useful did you find it

Answered: 15 Skipped: 107



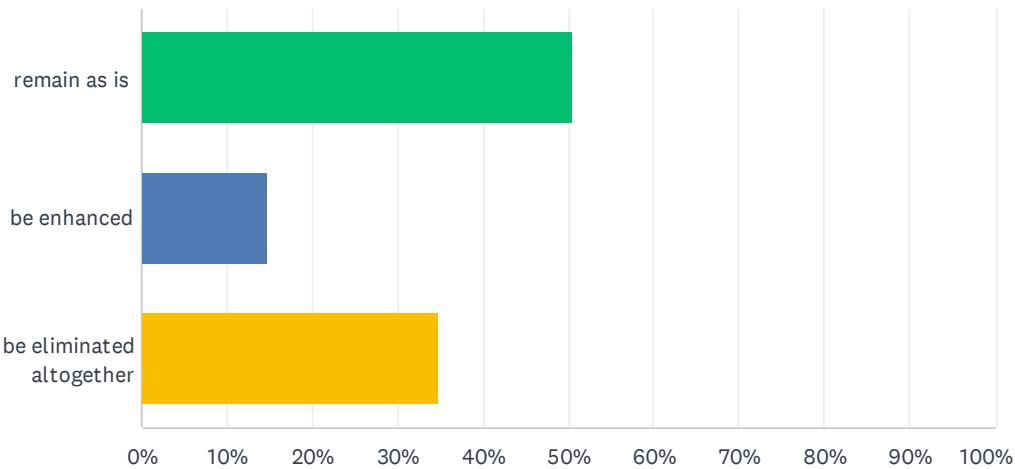
ANSWER CHOICES	AVERAGE NUMBER	TOTAL NUMBER	RESPONSES
	3	51	15
Total Respondents: 15			

Q30 If so, do you have suggestions for any changes to the Program?

Answered: 15 Skipped: 107

Q31 Should the Certified Specialist Program

Answered: 89 Skipped: 33



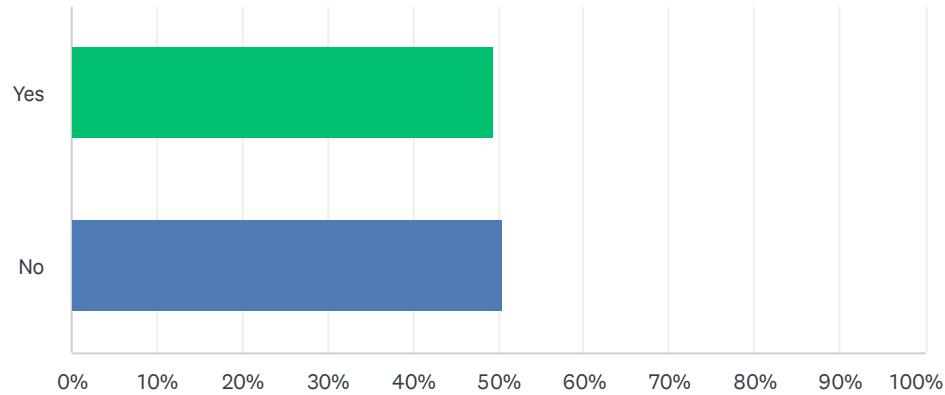
ANSWER CHOICES	RESPONSES	
remain as is	50.56%	45
be enhanced	14.61%	13
be eliminated altogether	34.83%	31
TOTAL		89

Q32 If you would make changes: Why would you make these changes and how would you go about making them?

Answered: 21 Skipped: 101

Q33 Are there basic technological skills that the Law Society should require all licensees to have?

Answered: 105 Skipped: 17



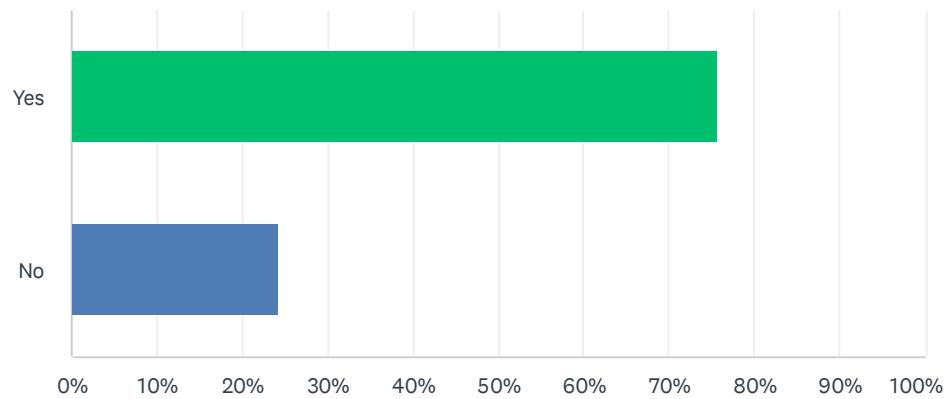
ANSWER CHOICES	RESPONSES	
Yes	49.52%	52
No	50.48%	53
TOTAL		105

Q34 If yes, what are those skills and how should the Law Society verify or ensure that licensees have them?

Answered: 48 Skipped: 74

Q35 In order to prepare licensees for the rapidly changing future, should the Law Society require or encourage licensees to take courses to enhance their technological competence?

Answered: 103 Skipped: 19



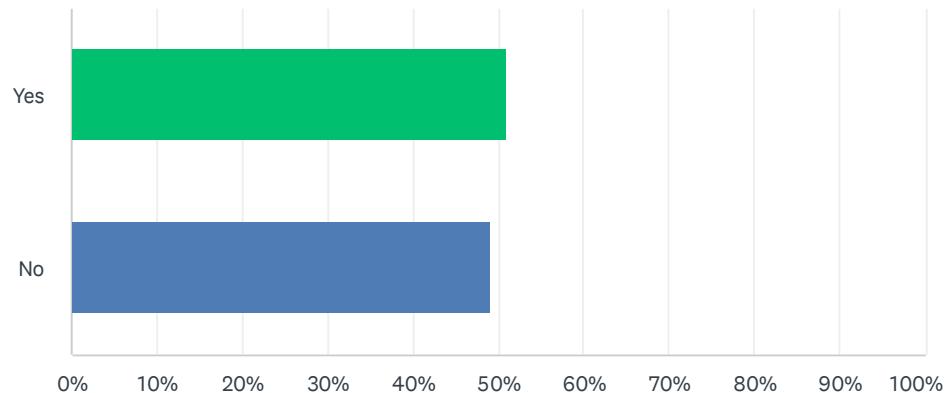
ANSWER CHOICES	RESPONSES	
Yes	75.73%	78
No	24.27%	25
TOTAL		103

Q36 Any other comments about technological competence?

Answered: 26 Skipped: 96

Q37 Should the Law Society incentivize licensees to strive for excellence?

Answered: 100 Skipped: 22



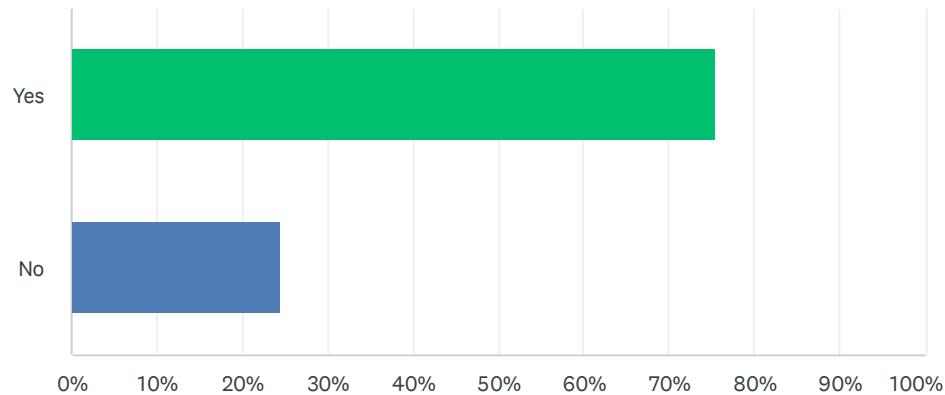
ANSWER CHOICES	RESPONSES	
Yes	51.00%	51
No	49.00%	49
TOTAL		100

Q38 If yes, what is excellence to you and how should licensees strive for excellence?

Answered: 36 Skipped: 86

Q39 Do you agree with the Law Society's working definition of competence as set out above?

Answered: 94 Skipped: 28



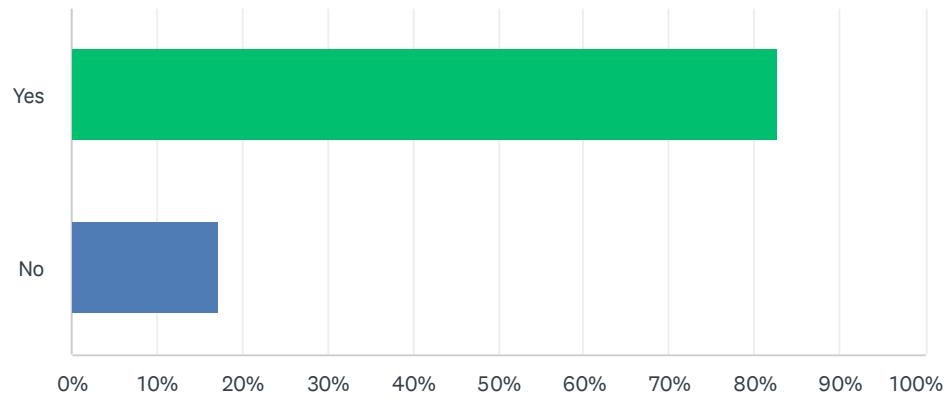
ANSWER CHOICES	RESPONSES	
Yes	75.53%	71
No	24.47%	23
TOTAL		94

Q40 If you disagree with any part of the definition, what do you disagree with and why?

Answered: 23 Skipped: 99

Q41 Do you agree that the following five principles form part of an effective competence regime? Risk-basedFlexibleFeasibleForward-lookingClient-centred

Answered: 93 Skipped: 29



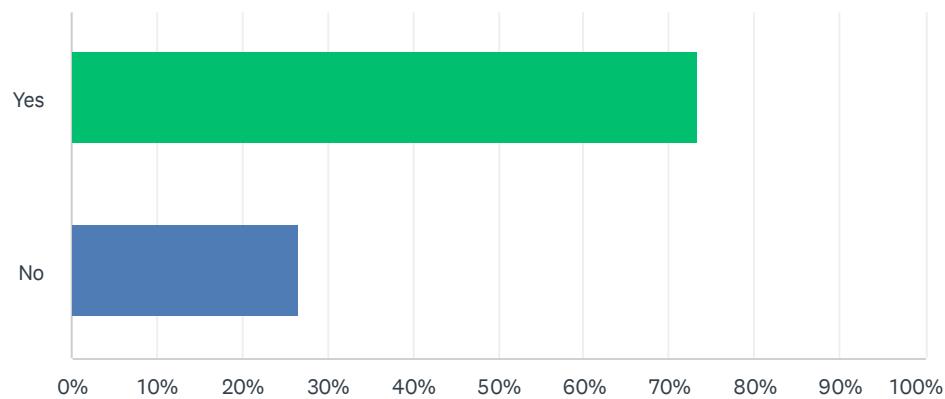
ANSWER CHOICES	RESPONSES	
Yes	82.80%	77
No	17.20%	16
TOTAL		93

Q42 Are there any principles that should be omitted or added?

Answered: 27 Skipped: 95

Q43 The LSO's current competence framework is comprised of the following six components. Do you agree that the six components adhere to the five principles for an effective competence regime (i.e. risk-based, flexible, feasible, forward-looking and client-centred)?
a. CPD requirement and programs
b. The Practice Management Helpline
c. Coach and Advisor Network
d. Practice assessment programs (i.e. practice reviews, spot audits, practice audits)
e. Certified Specialist Program
f. Legal information and research supports (Great Library and LiRN)

Answered: 94 Skipped: 28



ANSWER CHOICES	RESPONSES	
Yes	73.40%	69
No	26.60%	25
TOTAL		94

Q44 If not, why not?

Answered: 24 Skipped: 98

Q45 Should any of the six components of the competence regime (as listed above) be modified, restructured or terminated? If so, how?

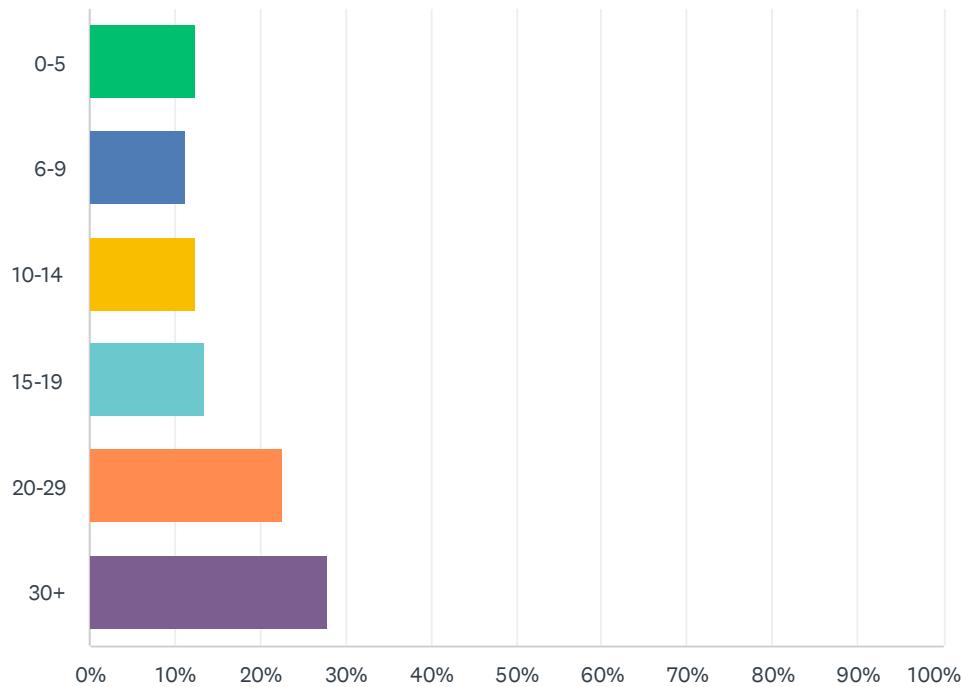
Answered: 34 Skipped: 88

Q46 Is there anything else that should be included in the competence framework or that you would like to comment on with respect to continuing licensee competence?

Answered: 18 Skipped: 104

Q47 How many years have you been licensed to practice law in Ontario?

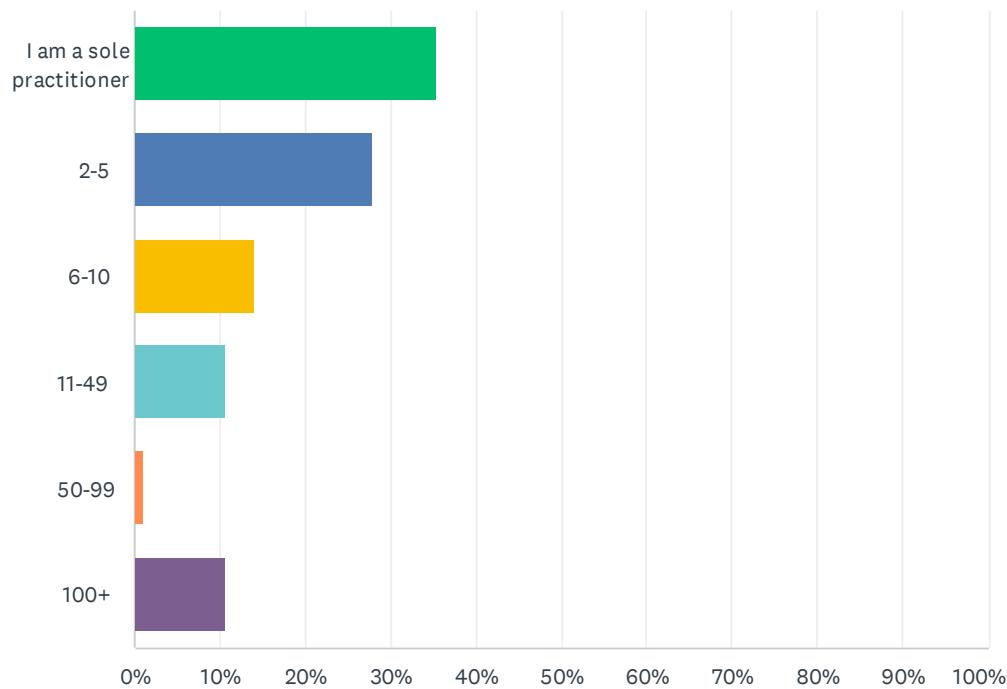
Answered: 97 Skipped: 25



ANSWER CHOICES	RESPONSES	
0-5	12.37%	12
6-9	11.34%	11
10-14	12.37%	12
15-19	13.40%	13
20-29	22.68%	22
30+	27.84%	27
TOTAL		97

Q48 How many lawyers are there in your firm/office?

Answered: 93 Skipped: 29



ANSWER CHOICES	RESPONSES
I am a sole practitioner	35.48%
2-5	27.96%
6-10	13.98%
11-49	10.75%
50-99	1.08%
100+	10.75%
TOTAL	93



SENT VIA ONLINE FORM

November 30, 2021

Law Society of Ontario
130 Queen Street West
Toronto, Ontario M5H 2N5

Dear Members of the Competence Task Force:

RE: Consultation on the Competence Task Force: Renewing the Law Society's Continuing Competence Framework

The Law Society of Ontario's Competence Task Force initiated a process to renew the Law Society's competence framework for lawyers and paralegals. The Women's Law Association of Ontario ("WLAO") welcomes the opportunity to provide input on this crucial issue from the perspective of women lawyers.

The WLAO, founded in 1919, stands as one of the oldest legal associations in Canada. The WLAO advances the interests of women in the legal profession and society through advocacy, mentorship, and professional development. The WLAO brings a practiced understanding of gender equality and intersectional discrimination to bear on the issue of the regulation of competency.

The WLAO is a member group of the Equity Advisory Group ("EAG"). The WLAO adopts the submissions made by EAG to this Task Force. We offer additional remarks below.

A. OVERVIEW COMMENTS ON THE APPROACH OF THE TASKFORCE

In its June 23, 2021 Report, the Task Force recommends a shift in the competence framework, proposing a reduction or modification of mandatory continuing professional development ("CPD") in favour of increased reliance on spot audits, practice reviews and practice audits. However, in doing so, the Task Force presents no evidence of improved effectiveness to support the shift.



Women's Law Association of Ontario
1 Toronto Street, Suite 900 • Toronto, ON • M5C 2V6
Office: 905-466-5971 • Email: wlao@cogeco.ca

The WLAO submits that the Task Force's suggested approach would not effectively promote competence. The knowledge and skills training offered by CPD more directly improves the quality of legal services delivered to the public than practice management skills.

CPD events serve to update legal knowledge and skills in an ever-changing legal landscape with minimal interference with the law firm's day-to-day operations. In contrast, spot audits, practice reviews and practice audits are more disruptive and demand numerous lawyer's hours.

Furthermore, the proposed shift from CPD to practice reviews and audits may exacerbate the problem of the retention of women in the profession.

Women face discrimination and pay equity disparities in the legal workplace. The reduction of CPD and, by extension, EDI removes a tool aimed at eradicating these problems.

Women lawyers carry the bulk of childcare and domestic responsibilities. Women licensees cite the time pressures caused by legal work and domestic demands as a reason for leaving the profession. Consequently, the Task Force should carefully consider the time requirements for responding to onerous regulatory procedures such as spot audits and practice reviews and audits where no deficiencies exist.

Racialized and Indigenous licensees have reported that they experience barriers in the workplace, underscoring the need to preserve EDI CPD. In addition, the shift to practice reviews and audits may impose greater burdens on racialized and Indigenous licensees.

Much of the Report addresses sole and small firm practitioners. Racialized and Indigenous lawyers practice in this area in disproportionate numbers. The proposed shift from CPD events that efficiently deliver knowledge and skills training to a more time-consuming and intrusive audit and review process will impose greater burdens on these groups.

Based on feedback, competency is a goal for all lawyers. In pursuing competency training, the WLAO asks the LSO to consider the time efficiencies and educational benefits in the CPD model over increased randomized spot audits, practice reviews and audits.

RECOMMENDATIONS: **The WLAO recommends that the LSO maintain CPD/EDI as its primary tool to advance competency and reserve practice reviews and audits as a preventative measure for new licensees and licensees with demonstrated deficiencies.**

The WLAO recommends that the LSO maintain and further develop practice management tools that licensees can access voluntarily.



The WLAO recommends that the LSO work with LawPro to create increased premium credits for voluntary participation in practice management skills training.

B. THE IMPORTANCE OF CPD

The Supreme Court of Canada in *Green v. Law Society of Manitoba* affirmed the importance of CPD:

A lawyer's professional education is a lifelong process. Legislation is amended, the common law evolves, and practice standards change as a result of technological advances and other developments. Lawyers must be vigilant in order to update their knowledge, strengthen their skills, and ensure that they adhere to accepted ethical and professional standards in their practices.

...

CPD programs serve this public interest and enhance confidence in the legal profession by requiring lawyers to participate, on an ongoing basis, in activities that enhance their skills, integrity and professionalism. CPD programs have in fact become an essential aspect of professional education in Canada. Most law societies across the country have implemented compulsory CPD programs.¹

In addition to the gains in knowledge and skills training, licensees derive intangible benefits by participating in CPD events. Based on feedback, the CPD events provide licensees with an opportunity to socialize and network with colleagues informally. Licensees have commented feeling reinvigorated about their work after participating in a CPD event.

Notwithstanding the clear value gained from CPD programs, some members report that the cost of CPD events can be burdensome, with Law Society programming running as high as \$250.00. As one licensee put it, "*I pay my fees. The speakers volunteer their time. The Law Society can put on these events for free*".

RECOMMENDATIONS: **The WLAO recommends that the LSO maintain mandatory CPD requirements especially given that the Task Force appears to predicate the reduction of the CPD hours with an increased resort to the number and scope of audit and practice reviews.**

¹ *Green v. Law Society of Manitoba*, [2017] 1 S.C.R. 360 at paras. 1 and 3



The WLAO recommends that the LSO significantly decrease the cost of CPD and increase the number of free CPD.

The WLAO recommends that links for free CPD events offered by third parties be included on the LSO webpage to facilitate access to the free CPD.

The WLAO recommends that the LSO provide specialized CPD for senior licensees such as roundtable or fireside chats with senior bar members or the judiciary- again at a no-cost or reduced fee basis.

C. Equality, Diversity and Inclusion Education (“EDI”)

The proposal to reduce CPD requirements necessarily calls into question the preservation of EDI, a program that the WLAO urges LSO to maintain.

The introduction of the EDI requirement followed extensive work and consultation with the profession. In 2015, the Challenges Faced by Racialized Licensees Working Group released a report that found racialized licensees face barriers to full inclusion.² Furthermore, the LSO’s Articling Survey found that approximately 21% of candidates experience racial and gender discrimination.³ The WLAO commends the LSO’s historical work on equality and discrimination, notwithstanding its recent retrenchment from these issues with its elimination of the Statement of Principles (“SOP”).

These reports, along with other data and jurisprudence, suggest that the EDI requirements play a vital role in promoting education and regulation of the profession.⁴

Currently, the LSO requires that licensees complete one hour of EDI per year. This represents a very modest demand on the licensees’ time. Based on feedback, licensees appreciate the substantive EDI programming and the fact that many EDI programs are offered at no cost.

RECOMMENDATION: WLAO recommends that the EDI CPD hours be maintained and enhanced to include Indigenous intercultural competency training. [Discussed in the next section]

² Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions: Challenges Faced by Racialized Licensees Working Group

<https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/w/working-together-for-change-strategies-to-address-issues-of-systemic-racism-in-the-legal-professions-final-report.pdf>

³ The Law Society of Upper Canada Summary of Articling Experience Survey Results:

<http://www.lawsocietygazette.ca/wp-content/uploads/2018/01/Summary-of-Articling-Experience-Survey-Results.pdf>

⁴ *R. v. Le*, [2019] 2 S.C.R. 692 at paras. 90 – 97; *R. v. Morris*, 2021 ONCA 680 at para. 1; *R. v. Barton*, [2019] 2 S.C.R. 579 at para. 199



D. INDIGENOUS INTERCULTURAL COMPETENCY AS LAWYER COMPETENCY

The WLAO adopts the detailed submissions of EAG in its recommendation that the LSO implement Indigenous intercultural competency training as a component of lawyer competency.

In support of EAG's submission, the WLAO stresses that the Truth and Reconciliation Commission ("TRC") issued direct calls to law societies to ensure that lawyers receive cultural training. The training should include the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal – Crown relations.⁵

The urgency of the TRC's calls has only intensified recently with the recent discovery of the mass unmarked graves of children held in the residential schools.

The LSO's valuable work in the 2008 Aboriginal Bar Consultation supports the need for EDI training focused on Indigenous intercultural competencies. In the consultation with the Aboriginal bar, the LSO found that 26 % of Indigenous lawyers felt that their Indigenous status factored negatively in their experience in the profession. Furthermore, the majority stated that they attributed their feelings to the racism and discrimination they experienced in their workplaces. The respondents identified a lack of awareness of aboriginal issues, a lack of content and misinformation about aboriginal issues as problems.⁶

RECOMMENDATION: **WLAO recommends that the EDI CPD hours be enhanced to include mandatory Indigenous intercultural competency training.**

E. RESPONSES TO SPECIFIC QUESTIONS PROPOSED BY THE TASK FORCE

Concerning the definition of competency offered by the Task Force, the WLAO raises two issues with the proposed "working definition of competence":

1) The Task Force suggests that the working definition of competence includes:

- remedial training prompted by the regulator or insurer

⁵ <https://nctr.ca/records/reports/#trc-reports>

⁶ https://lawsocietyontario.azureedge.net/media/lso/media/legacy/2009-final-report-of-the-indigenous-bar-consultation_1.pdf



This component of the definition does not disclose the factors that would trigger “remedial training.” The WLAO favours an interpretation where identified deficiencies initiate “remedial training.” However, this interpretation is not evident because the Task Force refers to increased *randomized* audits and reviews elsewhere in the Report.

2) The Task Force also suggests that the working definition of competence includes:

- peer observation and evaluation

This component of the definition does not define the scope of the peer observation and evaluation. However, the language, as it stands, suggests a broad power to intervene in daily firm operations.

RECOMMENDATION: **The WLAO recommends that the Task Force clarify the above-referenced components of the definition of competence**

F. INCREASED REGULATORY BURDEN OF SOLE AND SMALL FIRM PRACTITIONERS

Licensees who operate from sole and small firms play a central role in the provision of legal services in Ontario.

Indigenous and racialized licensees work in sole and small practices at a greater frequency. According to the Statistical Snapshot of Lawyers on Ontario Fact Sheet, “24 % of Indigenous lawyers are sole practitioners, compared to 18 % of White lawyers.” Furthermore, “compared to White lawyers, racialized lawyers are more likely to be sole practitioners.”⁷

The Task Force Report emphasizes that sole and small firms attract more complaints than large firms in proportionate terms. However, the Report does not acknowledge that the higher number of complaints against small firms likely results from the different focus between small and big firms. Small firms receive more complaints simply because they represent individuals rather than institutional clients.

Acknowledging the nuances in the data on complaints will ensure that racialized and Indigenous licensees do not experience undue regulatory action.

CONCLUSION

⁷ <https://lawsocietyontario.azureedge.net/media/lso/media/lawyers/practice-supports-resources/equity-supports-resources/snapshot-lawyerseng-pdf.pdf>



The WLAO submits that a model of competency founded on easily accessible, reduced cost CPD is preferable to one premised on practice reviews and audits for the reasons expressed above.

The WLAO agrees with the Task Force that firms should receive guidance on practice management; however, WLAO suggests that the LSO provide guidance by developing and sharing specific tools to assist lawyers. The LSO should reserve spot audits, practice reviews and audits for established licensees exhibiting deficiency and new licensees. However, all licensees should have an avenue to pursue management review on a voluntary basis.

The WLAO strongly urges this Task Force to expand and enhance CPD and EDI based on a no-cost structure.

Sincerely,



Jennifer Gold
President



Women's Law Association of Ontario
1 Toronto Street, Suite 900 • Toronto, ON • M5C 2V6
Office: 905-466-5971 • Email: wlao@cogeco.ca