

INTRODUCTION TO DRAFT PROFESSIONAL STANDARDS (FAMILY LAW)

As Chair of the Professional Standards (Family Law) Committee, I have been asked to prepare an Introduction to be circulated to the membership with these draft standards.

BACKGROUND

Our Committee (as presently constituted) has been in existence for three years. The predecessor committee (of the same name) was chaired by (now) Justice Elizabeth Jollimore. They produced an excellent book entitled "Resource Materials - Professional Standards (Family Law) Committee". It is clear that their focus was on a best practices approach rather than the development of Standards per se, which was the specific task assigned to our current Committee.

Our membership has remained relatively stable during the preceding three years. The present composition is set out in Appendix A.

We engaged in considerable discussion, as to our assigned task virtually from the beginning. An initial concern was whether we were being asked to create a template to be used in discipline. It is certainly conceivable that some of our Colleagues will share this concern.

We concluded that our focus should be to attempt to identify those standards to which family law practitioners are already expected to adhere. Our end product was therefore envisioned to be a tool to assist the membership by (1) identifying each extant Standard, and (2) providing adequate resources "at the member's fingertips" to insure that the Standard is met.

The Committee (in so doing) recognized that it has no power to "create" standards. Rather, clear authority is required if they are to be designated as such.

This led Council to approve the Committee Mandate, at our request, in early 2008. A copy of this Mandate appears as Appendix "B" to these draft Standards.

To maintain consistency, the "must", "should", and "may" system of terminology employed by the Professional Standards (Real Property) Committee report as approved by Council on November 22nd, 2002, was adopted. As the authors of that report clearly explain:

- a. "must" means that the lawyer is required to follow the standard. There is a legal (common law, statutory, or regulatory) requirement relating to the standard. When a standard uses "must" to require a lawyer to "determine", "consider", or "ensure" or carry out similar actions, the lawyer is called upon to exercise professional judgment in carrying out those actions.

- b. "should" means that the lawyer is required to follow the standard; however, if the lawyer determines, in the exercise of professional judgment, that compliance is not appropriate under the circumstances, that decision rests with the lawyer; and
- c. "may" means that it is an acceptable standard for the lawyer to follow, subject to the lawyer determining that compliance is an appropriate exercise of professional judgment.

While the draft standards that follow do flow from our Mandate, some issues do remain, and while many have been considered and discussed by our Committee, the most prominent are summarized below for ease of reference as the standards and the related materials are reviewed:

1. **Why single out family law as an area requiring practice standards in the first place?**

A significant percentage of all complaints received by the Society relate to some aspect of a family law practice. Possibly, the combination of the often highly emotional nature of the proceeding, the large number of subject areas in which a practitioner must be proficient, the difficulty that some lawyers experience in maintaining professional objectivity in the face of such a stressful combination, and the higher proportion of unrepresented parties encountered in these matters, has a lot to do with it.

It was therefore felt that these draft standards, together with the included reference materials, all of which may be accessed from a common website, will both assist Practitioners in identifying those standards to which they are already expected to adhere, and also to provide them with an adequate resource base, to assist themselves and their clients to ensure that they do not contravene them.

Indeed, the use of an interactive website providing access to the cases, other authorities, articles, relevant practice topics, checklists, precedents, and video taped material, all collected under one "roof" (so to speak) should be a useful tool, particularly for those who are relatively new to the field.

2. **Do we want to call them "Standards"?**

"Family law" is not an area of practice that exists in isolation to others. It has a significant civil litigation component. A practitioner is expected to deal with contracts, property issues, business issues, valuation issues, taxation issues, and many others. These are in addition to the more traditional "family law" topics involving the *Divorce Act*, *Matrimonial Property Act*, *Children and Family Services Act*, and so on. A search for standards that apply exclusively to the domain of family law is bound to be a fruitless one.

To cite but two examples, the Real Property standards also have sections devoted to conflicts of interest and documentation. The Ethics Handbook also speaks to some of these issues.

Must lawyers practicing in fields that overlap with family law (for example, civil litigation) adhere to standards of practice identified by this Committee, consisting (as it does) exclusively of family law practitioners?

Alternatively, if the answer to that question is "no", are family law practitioners to be held to a standard that those practicing in overlapping subject areas need not follow? Is this problem avoided if we do not refer to this body of work as "Family Law Standards", but rather, something else?

Finally, if we do refer to these as something other than "Standards", are we doing a disservice to practitioners? After all, the authorities do recognize the following to be "Standards" in the sense that they either apply exclusively to, or acquire special prominence, in the practice of Family law. Knowing that authority holds practitioners to the level of conduct noted herein, can we do other than refer to the product as "Family Standards"?

3. Consultation with Membership

Council has approved the circulation of these draft standards for review and input from the membership at large. While your attention has been specifically drawn to the issues identified in numbers 1 and 2 above, the feedback sought is not to be so restricted.

We would be grateful for comments/suggestions/criticism pertaining to the standards, materials, authorities, or anything else that has been included herewith.

As previously noted, the intent is to provide a user friendly tool for the benefit of Family Law Practitioners. To that end, extensive scrutiny and input can only improve the end value of the product.

You are being presented with "draft standards" deliberately. It is intended that this website will be up and running and open to the consideration of all members of the Nova Scotia Barristers Society. Obviously, what follows is not in its final form.

The deadline for response is November 30th 2010, so as to provide sufficient time for the Committee to consider, review, and to take full advantage of the input we expect to receive from our Colleagues. Our goal is to prepare and deliver a final report and recommendations to Council no later than May, 2011.

Even the word "final" is used advisedly. It will be apparent that the Standards themselves can never be "complete". They are more appropriately thought of as the base or root of a plant that can grow over time as practice in this field (and the law) continues to develop and evolve.

Feedback may be provided to Terry Bartlett-Visser, who staffs our Committee, at tvisser@lians.ca

CONCLUSION

While this has not been an easy task for our Committee, the work was both interesting and stimulating. In addition to the tremendous contributions made by virtually all of our past and present Committee members, we also owe a debt of gratitude to Deborah Rozee, who staffed the Committee until her departure in 2008, the Nova Scotia Barristers Society library staff, whose work in proof reading and checking citations was cheerfully and tirelessly supplied, and also to Terry Bartlett-Visser, upon whose shoulders the task of organizing and editing the materials and website fell after Deborah's departure. For this, and for the assistance and encouragement with which we had been provided by Council, and our colleagues, we are grateful.

Respectfully submitted,

Timothy Gabriel, Q.C.

APPENDIX "A"

Tim Gabriel, Q.C. - Chair
Bob Chipman
Tim Daley
Jean Beeler, Q.C.
Janice Beaton, Q.C.
Julia Cornish, Q.C.
Jill Perry
Terry Sheppard
Terry Bartlett-Visser - Staff

* Her Honour, Judge Jean DeWolfe was also a member of the Committee until she was appointed to the Bench late last year.

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Mandate

Pursuant to regulation 2.9.1 of the *Legal Profession Act* the Professional Standards - Family Law Committee is appointed to develop professional standards for the area of family law and to make recommendations to Council in these areas.

The Professional Standards - Family Law Committee will make recommendations to Council with respect to identification of:

1. existing applicable professional standards of family law practice and emerging family law issues which may require the development of professional standards, and
2. changes in professional standards of family law practice and emerging family law issues which require amendments to existing NSBS Professional Standards - Family Law.

The Committee will annually review the NSBS Professional Standards - Family Law (including footnotes and references) and advise Council with respect to any amendments which may be required. If amendments are recommended, the Committee will provide Council with a draft of the proposed amendments to the NSBS Professional Standards - Family Law.

The Committee will identify resources and tools to assist members to practice in accordance with the Standards.

The Committee will act as a resource on issues of professional standards for family law as may be requested by Council.

The development of new professional standards and the amendment of the NSBS Professional Standards - *Family Law* require approval of Council. Amendments to the footnotes and references of the NSBS Professional Standards - *Family Law* may be made on notice to Council.

Approved by Professional Standards - Family Law Committee - May 2, 2008

Approved by the Executive Committee

Approved by Council May 30, 2008