LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

Constituted in early 2012, the formal mandate of the Professional Standards (Law Office Management) Committee as approved by Council of the Nova Scotia Barristers' Society is as follows:

The Law Office Management Standards Committee supports Council in the governance of the Society for its purpose of protecting the public interest and the practice of law by developing professional standards for the management of law offices in Nova Scotia.

These Standards and their featured resources are intended to be an articulation of the existing statutory and regulatory obligations for lawyers and to provide some guidance with respect to "how" a Standard might be met, taking into account the variances in practice around the province. Each proposed new Standard is first introduced to Council by the Professional Standards (Law Office Management) Committee and then communicated to the membership for review and consultation. After that process is complete, it is brought back to Council for approval and finally made fully available to lawyers through this website.

Complete Law Office Management Standards package (as a PDF) - current to July 26, 2016

#1 - RECORD RETENTION

#2 - CLIENT SERVICE

#3 - TIMEKEEPING

#4 - MAINTENANCE AND BACKUP OF ELECTRONIC DATA

#5 - RETENTION AND BILLING

#6 - CLOUD COMPUTING

#7 - LIMITED SCOPE RETAINERS

#8 - EQUITY AND DIVERSITY

LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

#1 - RECORD RETENTION

STANDARD

A lawyer must care for clients' property as a careful and prudent owner would when dealing with like property.[1]

A lawyer must draft or adopt an internal policy in writing for file closure, retention and destruction with regard to:

a. Legal and regulatory requirements;[2]
b. Clients needs and abilities;
c. The nature of the matter;[2]
d. Limitation periods.[3]

A lawyer must store client files and business records in a manner that is accessible and readable.[4]

A lawyer must store client files in a secure location with regard to:

a. Client confidentiality;
b. Preservation of records;
c. Accessibility.[4]

NOTES

[1] Nova Scotia Barristers' Society, *Code of Professional Conduct*, ch 3.5-2

[2] *Legal Profession Act* and Regulations, S.N.S. 2004, c. 28; *Canada Business Corporations Act*, RSC 1985. C. C-44; Canada Pension Plan, RSC 1985, c. C-8; *Employment Insurance Act*, SC 1996, c. 23; *Excise Tax Act*, RSC 1985, c. E-15; *Income Tax Act*, RSC 1985, c. 1 (5th Supp); *Nova Scotia Companies Act*, RS c. 81, s.1; *Sales Tax Act*, 1996 c. 31, s.1; *Electronic Commerce Act*, 2000 c. 26, s.1; *Land Registration Act*, 2001 c. 6; *Probate Act*, 2000 c.31; *Aggio v. Rosenberg*, 1981 Carswell ONT 407; *Spencer v. Crowe*, 1986 Carswell NS 251; *McInerney v MacDonald*, 1992 Carswell NB 63; *Nova Scotia (Attorney General) v. Royal & Sun Alliance Insurance Company of Canada*, 2005 Carswell NS

80; *Callinan Mines Ltd v Hudson Bay Mining & Smelting Co*, 2010 Carswell MAN 596; *Price v Lambrinos*, 2012 Carswell ONT 10559.
[3] *Limitations of Actions Act*, S.N.S. c. 258.
[4] Nova Scotia Barristers' Society, *Code of Professional Conduct*, ch 3.5; *Electronic Commerce Act*, 2000 c. 26, s.1

ADDITIONAL RESOURCES

- Record Retention, Lawyers' Insurance Association of Nova Scotia (2010)
- File Retention: Resources and Practice Aids, Lawyers' Insurance Association of Nova Scotia (2010)
- "Guide to Retention and Destruction of Closed Client Files", The Law Society of Upper Canada (March 2012)
- "Closed files: Retention and Disposition", The Law Society of British Columbia (2007)
- *Milbury v. Nova Scotia (Attorney General)*, 2007 Carswell NS 199.
- "Law firms need document retention policies too", Canadian Lawyer Magazine (October 2012)
- "The Retention and Destruction of Client Files and Business Records for Lawyers", Nova Scotia Barristers' Society, Professional Standards (Law Office Management) Committee (2013)
- Sample Record Retention Policies
- "Surviving a Disaster: A Lawyer's Guide to Disaster Planning", ABA Special Committee on Disaster Response and Preparedness (2011)

LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

#2 - CLIENT SERVICE

STANDARD

1. A lawyer must be competent to undertake the professional services they are offering.[1]

   a) A lawyer must know the general legal principles and procedures and the substantive law and procedure for their areas of practice.[2]

   b) A lawyer must obtain the facts, identify the issues, ascertain the client's objectives, consider possible options and develop and advise the client on appropriate courses of action except in those circumstances in which the lawyer's retention is for limited scope of professional services.[3]

   c) A lawyer must exercise the appropriate skills for any matter on which they are retained.[4]

2. A lawyer must communicate with their clients at all relevant stages of a matter in a timely and effective manner.[5]

3. A lawyer must perform their services conscientiously, diligently and in a timely and cost-effective manner.[6]

4. A lawyer must apply appropriate intellect, judgment, and deliberation to all of their professional services.[7]

5. A lawyer must comply with the letter and spirit with all rules of professional conduct.

6. A lawyer must recognize their own professional limitations and take appropriate measures to ensure that clients are effectively served.[8]

7. Lawyers must manage his/her practice in a manner which will maintain these standards.

8. A lawyer must continually pursue appropriate professional development to maintain and enhance their legal knowledge and skills.[9]

9. A lawyer must continually adapt to changing professional requirements, standards, techniques, and practices.[10]

10. A lawyer's services must be delivered promptly, courteously, and thoroughly.[11]

a) A lawyer must keep their clients reasonably informed.[12]

b) A lawyer must frankly and thoroughly answer their clients' reasonable requests for information.[13]

c) A lawyer must respond to their clients' telephone calls and other inquiries with reasonable promptness.[14]

d) A lawyer must keep their appointments with their clients or provide those clients with timely notice and explanation when appointments cannot be kept.

11. A lawyer must be honest and candid in providing information to their clients.[15]

12. When the lawyer's client is an organization, the lawyer's advice and services must align with the interests of the organization regardless of the identity of the instructing party (officer, director, shareholder, administrator or trustee).[16]

13. A lawyer must advise and encourage their clients to compromise and settle their dispute unless such advice would be unreasonable in the context.

14. A lawyer must discourage their clients from commencing or continuing legal proceedings which are not soundly based.[17]

NOTES

[1] See generally ch 3.1-2 of the Nova Scotia Barristers' Society, *Code of Professional Conduct*, ("the Code"). This chapter is to be read in conjunction with ch 3.2-1 of the Code addressing client service which is courteous, prompt and thorough.

[2] See commentaries 2 through 7 set out under ch 3.1-2 of the Code. For practical purposes, knowledge is generally regarded as including the ability to acquire the knowledge of law and procedure necessary to provide the legal services the client requires.

[3] Ch 3.2-1(a) of the Code permits lawyers to engage with clients for a limited scope of legal services. Attendance with a client on an initial court appearance for plea is but one example. In all such circumstances, the lawyer's arrangements with the client must be confirmed in writing. At the same time, lawyers acting for clients on limited scope retainers must be careful to ensure that they do not convey information to the client from which retention for broader legal services might be inferred. Lawyers acting on limited scope retainers must also be clear to the courts, tribunals and opposing lawyers that their services or appearances are in fact limited.

[4] Generally speaking, appropriate skill will include: an understanding of the subject matter for which the lawyer has been retained (or, in the alternative, the ability to acquire an understanding of that subject matter, legal research, analysis, application of the law to the relevant facts, writing and drafting,

negotiation, alternative dispute resolution, organized and persuasive advocacy (both written and oral) and problem solving.) In certain circumstances, a lawyer's ethical duty to her or his client will require the referral of the latter to alternative counsel or at least the retention (on the client's instructions) of the assistance of alternative counsel (see: Commentaries 5 through 7 set out under ch 3.1-2 (supra).

[5] See ch 3.1-1(d) of the Code.

[6] See ch 3.1-1(e) of the Code.

[7] See ch 3.1-2 of the Code and footnote 4 (supra). See also the extensive commentaries set out under ch 3.1-2 of the Code which assist in defining the scope and application of the Code's general competency requirements.

[8] By alternative or even specialized counsel or solicitors if necessary. See also Commentaries 3(e) and 6(b) set out under ch 3.1-2 of the Code.

[9] Regulation 8.3.2 permits the Council of the Nova Scotia Barristers' Society to from time-to-time prescribe mandatory and educational requirements. In each of the Society's fiscal years (July 1 – June 30), members are required to undertake a total of 12 hours of mandatory (or compulsory) professional development and education (CPD). The Society's approach to CPD has been very liberal and there are ample programs available to Members to ensure that their 12 hour requirement can be met. For additional information, see also the Professional Development drop-down menu under the heading Lawyers on the Society's website: http://nsbs.org/for_lawyers/professional_development.

[10] See Commentaries 2 set out under ch 3.1-2 of the Code. In analysing a lawyer's competence, the following factors, without limitation, will be considered: the complexity and specialized nature of the client's matter, the lawyer's general experience, the lawyer's training and experience in matters consistent with the complexity and specialized nature of the client's matter, the preparation and study the lawyer is able to give the client's matter and whether it is appropriate or feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

[11] See footnote 7 (supra).

[12] Frequent complaints made about lawyers relate to their alleged failures to respond to their clients' inquiries. In many cases, the degree to which a lawyer will keep her of his client informed is a "judgment call" of the type for which a lawyer's decisions may be afforded deference. The reason is that a client might fail to consider the necessity of their inquiries, their impact on their lawyer's time and other clients and matters and the extent to which unnecessary inquiry and engagement can serve to increase legal costs. By the same token, a lawyer must appreciate that many clients are engaged in the legal process only rarely and that their circumstances are often of grave concern to them. For a discussion on the subject, see: *McInnes Cooper v. Slaunwhite*, 2004 NSSM 32 (CanLII), commencing at paragraph 214.

[13] See Commentary 5 set out under ch 3.2-1 and Commentary 10 set out under ch 3.1-2 of the Code. The latter Commentary warns lawyers to be wary of bold and perhaps overconfident predictions on the outcome of any given matter.

[14] See Commentaries 3, 4 and 5 set out under ch 3.1-2 of the Code.

[15]

See ch 3.2-2 of the Code and in particular, Commentary 2 which states that “A lawyer should disclose to the client all the circumstances of the lawyer’s relations to the parties and interest in or connection with the matter, if any that might influence whether the client selects or continues to retain the lawyer.” Advice to a client must be “open and undisguised” and must clearly disclose what the lawyer honestly thinks about the merits and probable results of any possible course of action. A lawyer must be prepared to be firm with their clients, especially when they may disagree with the client’s perspective or objective and especially where the client indicates her or his own intention to proceed without candour. A lawyer’s advice to a client must be objective and capable of withstanding professional scrutiny even if it does not align with the client’s stated objectives.

[16] When a lawyer’s client is an organization, the lawyer’s duty is to the organization regardless of the interests of the person instructing the lawyer (officer, director, manager). See ch 3.2-3 of the Code and in particular, Commentaries 1 and 2.

[17] This requirement does not prohibit a lawyer from responding to a client’s instructions so long as those instructions do not oblige the lawyer to engage in services which are illegal or unethical or in professional bad taste.

ADDITIONAL RESOURCES

Memorandum to Council - Client Service Standard Gavin Giles, November 22, 2013

PRACTICE NOTES

Any client/lawyer relationship combines communication, accessibility, accountability, responsibility and respect with the seminal requirement for timely legal work of the highest quality. Clients take these professional imperatives seriously. A lawyer must also take them seriously. Without these professional imperatives, the basic lawyer/client relationship will fail.

Communication

A lawyer offers her or his greatest value through words. Not just the words which comprise legal documents but those by which a lawyer communicate our understanding of our clients’ affairs and their expectations relative to our services. A lawyer must listen to their clients carefully and respond to them fully.

In the so-called “information age”, a lawyer may wish to consider carrying a BlackBerry, iPhone, other mobile telephone or similar device to receive clients’ calls, text messages or email messages. Though there is no reasonable expectation that a lawyer should be available to respond to inquiries at all time and at all hours, efforts should be made to alert clients and potential clients to longer periods of absence and to means and methods by which legal information and services can be available through alternative means at such times.

Voice mail is an important technological tool which clients often see as a means of substantive communication with their lawyer. It is therefore important for a lawyer to use voice-mail appropriately. Ensuring it is updated regularly and responding to client voice messages in a timely manner is required.

Many law firms, knowing how reliant their practices are on voice-mail, have adopted a specific client service standard along the following lines:

We will frequently, if not daily, up-date our voice-mail greetings and automatic e-mail out of office announcements to advise our clients generally of where we are and when they might be able to hear back from us

When absent from our offices for any period longer than _____ hours, we will leave information available to our clients by which they can access any required legal services which cannot wait until we return

To the extent possible, we ensure that our clients have more than one contact or point for communication within _____ so that the legal services they might require at any given time can be accessed from more than one source

To the extent reasonably possible will endeavour to return our clients' calls and respond to their e-mail messages and correspondence on the same business day that they are received

Accessibility

Client service means, as an axiom, client accessibility. Lawyers are not the only members of our society who are facing time pressures. Many of our clients have numerous time pressures of their own. If we, as lawyers, add to those time pressures, they, as our clients, might well seek their legal services elsewhere. A lawyer's aim must therefore be her or his reasonable accessibility, not only during the working day but when matters arise in an emergency or simply "after hours".

Though it is not necessary to be available 24/7 – and no client service standards set out availability which is virtually 24/7 – there is no question that research shows that clients want to be in communication with their lawyers. Those lawyers who are attentive and respond to client communications outside of normal business hours have been demonstrated by the research to simply get more business.

It is on that basis that many law firms have adopted a specific client service standard along the following lines:

We will provide our clients with our full co-ordinates on request – be they direct telephone, home telephone, cellular telephone or e-mail address. We will encourage our clients to access us through these means when their needs arise

We will be punctual for our meetings with our clients. If we are going to be late, we will advise as far advance as is reasonably possible

We will respect our clients' time and their other commitments. When we meet – other than in social settings – we will be prepared, succinct and to the point. When in meeting with clients our telephones, cellular telephones and Blackberries or similar devices will be "on hold" except where unavoidable

We will introduce our clients to other A lawyer and staff members within the firm who work or may be called upon to work on their matters or transactions. We will encourage our clients to access their

requirements for legal services through any of these other A lawyer and staff members as appropriate

Accountability

Legal services can be expensive. In certain circumstances, legal proceedings and transactions involving lawyers are stressful. A lawyer must thus always remain accountable to their clients. Informing a client up front about reasonable expectations and limitations is an important relationship-building technique.

This view is expressed in the following client service standard which has been adopted with some variation(s) by many firms:

We will respond quickly to our clients' requirements for legal services as soon as our conflicts checks and retainer agreements have been completed

We will assign only the lawyer(s) and staff member(s) necessary to the fulfillment of our clients' objectives

We will discuss with our clients, in advance, the possible creation of a service team should a client's requirements be such that they cannot be provided by a single lawyer

We will provide our clients with a clear understanding of how we will charge them for the legal services we provide

We will provide our clients, upon request, with a comprehensive and accurate estimate of the cost of the legal services they require

We will manage our clients' expectations through a clear understanding of their circumstances and a fulsome articulation of the laws, legal principles and procedures affecting those circumstances

We will provide periodic status updates on all matters and transactions[17]

Responsibility

As lawyers, we ought to be aware that our clients are responsible for the careful management of their businesses, organizations and personal affairs. They are required to meet production deadlines, deliver their own high standards, meet payrolls and other budgetary objectives and respond positively to myriad regulatory provisions. On the personal side, they must ensure that their property is secure, their rights are protected and that their affairs are structured so as to maximize personal return, eliminate or reduce risk or put effect to their wishes. They thus require lawyers who are just as responsible and will regard their clients' affairs as extensions of their own.

Reflecting that reality, many firms have adopted the following client service standards.

. *We will work to provide our clients with the highest standard of legal services*

We will keep our lines of communication with our clients open through whatever reasonable means there are

We will meet or exceed applicable deadlines or will advise our clients in advance with as much warning as possible that deadlines will be missed

We will refrain from discussing our clients' affairs in public or in any circumstance in which we might be overheard[17]

We will appear and dress appropriately when meeting with our clients or others with respect to our clients' affairs[17]

We will encourage our clients to report their complaints or concerns over our services to them directly to us or to our management and we will respond promptly to our clients' complaints or concerns about our delivery of their services and we will advise of clients of the remedial action(s) we have taken

We will seek to address, through appropriate channels, concerns expressed by our clients that we may have erred in providing our legal advice and services[17]

We will regularly seek our clients' input on how well we are serving them and how we might serve them better

We will continually self-assess our skills and our level of client service, seek to improve them and, if necessary to that end, attend for professional development

We will constantly monitor our lawyer and staff compliment to determine, as early as possible, if alternative client service relationships will have to be conceived and implemented for any client

We will work, in such circumstances, with affected clients to ensure the easy and seamless transition of their matters to another lawyer and staff members

We will consistently back-up all of our electronic data bases and electronic file storage in secure facilities

We will maintain an up-to-date disaster management plan which is designed to support the continuation of our services to our clients regardless of the prevailing circumstances

Respect

Many clients are interested in their lawyer's firm's dynamics, the extent to which their lawyers are involved in their communities and how their lawyers demonstrate community leadership as well as the legal services they require.

In particular, more and more clients are asking about their lawyers' diversity practices and policies, their lawyers' *pro bono* work and their lawyers' work within the community (church, the arts, the charities, and politics). It is for that reason that many firms are now publishing client service standards which are reflective of more than just legal services.

Consider, for example, the following:

The standards set out above apply, mutatis mutandis [with the necessary modifications], to the

relationships which each of have with our colleagues and co-workers

We are committed to a collegial workplace in which all individuals are accorded the same respect and dignity

We treat our colleagues and co-workers, regardless of their seniority or position, in the manner in which we, ourselves, wish to be treated

We respond to our colleagues' and co-workers' inquiries as if they were inquires from our clients or about our clients affairs

We seek to participate in the life of the communities around us in manners which reflect our clients' ideals and commitments

CLIA

NSBS

Disclaimer

Privacy

Terms of Use

LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

#3 - TIMEKEEPING

STANDARD

1. A lawyer's accounts must be fair, reasonable and lawful.[1]

a) The assessment and reasonableness of a lawyer's account will depend on many factors, one of which is the time and effort "required and spent".[2]

NOTES

1. When considering the fairness, reasonableness and legality of accounts for legal services, general resort should be had to s. 66 of the *Legal Profession Act*, S.N.S 2004, c. 28, s. 3.6-1 of the Nova Scotia Barristers' Society, *Code of Professional Conduct*, and Rule 77.13(1) of the Nova Scotia Civil Procedure Rules. These statutory and regulatory provisions express a constant theme but they do not do so in the same way and through the use of the same nomenclature. (see also: Chapter 11(a) of the Canadian Bar Association's *Code of Professional Conduct*)

2. Nova Scotia Barristers' Society, *Code of Professional Conduct*, ch 3.6-1 [1](a)

PRACTICE NOTES

An Introduction to Timekeeping

In many respects, everything a lawyer needs to know about timekeeping is set out in the Legal Profession Act, the Nova Scotia Barristers' Society, *Code of Professional Conduct*, ("the Code") adopted in 2012 (and in the commentaries thereto) and in the Nova Scotia Civil Procedure Rules. That is not to say that every lawyer, providing every form of legal service, and on every client file must keep time.[1]

Section 66 of the *Legal Profession Act* provides that: "[a] lawyer may sue to recover the lawyer's reasonable and lawful account." The implication, of course, is that a lawyer's account, to be recoverable, must be both "reasonable" and "lawful".

Neither the *Legal Profession Act*, nor the Regulations made thereunder, nor the related provisions of the Code, nor the applicable case law define what a lawyer's "lawful" account might be. The Code and the related case law do, however, require all lawyers' accounts to be "reasonable".[2]

The reasonableness of a lawyer's account is dependent on a variety of criteria. One of them is the amount of time taken by the lawyer to render the service which is the subject matter of the account.[3] The implication, thus, is that a "reasonable" account would also be "lawful". It is on that basis that time spent on the rendering of legal services can become an important issue.

Section 3.6-1 of the Code does not speak to legal fees which are "lawful" only to those that are "fair and reasonable" in that: "[a] lawyer must not charge or accept a fee or disbursement, including interest, unless it is fair and reasonable and has been disclosed in a
timely fashion."

Legal fees which are "fair and reasonable" have been further defined by the Code to be dependent on a number of factors, some interrelated and some not, such as: "the time and effort required and spent" on the matter for which the lawyer's account has been rendered.[4] It is on that basis also that time spent on the rendering of legal services can become an important issue.[5]

The Nova Scotia Civil Procedure Rules also speak to the matter in which a lawyer's entitlement to compensation is to be assessed. According to the Rules, a lawyer "is entitled to reasonable compensation for services performed, and recovery of disbursements necessarily and reasonably made, for a client who..." has been the recipient of legal services.[6] Once again, the Court's concept of reasonable compensation has been benchmarked, in part, against the lawyer's effort(s) on behalf of the client.[7]

Though the quantity of time within which a lawyer's services to her or his client have been performed is not referred to in the Rule, a lawyer's "effort", as an indication of her or his entitlement to fees in any give matter or transaction, would be a tangible thing. It would thus only make sense that it would have to be capable of measurement. Though effort in such circumstances might be measured through a variety of different means and analyses, the time over which such effort was expended would have to be one of them. Hence, the reason for the references to time set out above.[8]

"Time is money."[9] "Don't count every hour in the day but make every hour count."[10] "Time is actually more valuable than money. You can always get more money but you cannot get more time. Once it's used, it's gone. And it's gone forever."[11] "They who know how to employ opportunities will often find that they can create them; and what we achieve depends less on the amount of time we possess than on the use we make of our time."[12]

These quotations have helped professionals and others understand the necessity of time management from a value perspective. Although there is a move away from the billable hour by some lawyers the billable hour remains the principal basis upon which many if not most legal fee accounts are determined. In assessing the reasonableness of lump sum legal fee accounts, assessment and taxing officers, as well as the courts, will more often than not resort to an analysis of how much time was taken to perform the services in issue and how much time should have objectively been taken for them. It is on that basis that lawyers who do not keep time, fail to do so at their peril.[13]

Timekeeping Practices

The practice of timekeeping falls into two broad categories: the why and the how.

(a) Why Keep Time:

Apart from the general reasons set out above, there are several discrete reasons rooted in law practice and law office economics on why lawyers should keep time:

- Careful time records will permit a lawyer to analyze what she or he is or has been doing with respect to the professional service being offered The same records will permit a lawyer to analyze her or his efficiency with a view to refining the manner in which individual professional services are being offered
- Time records will also permit a lawyer to determine whether he or she is wasting time (in the sense that time in the office is not necessarily translating into revenue or non-revenue based professional services
- In many private practices, careful and accurate time records are the primary basis, if not the sole basis, for a lawyer's accounts to her or his clients
- Finally, timekeeping is now recognized as one of the primary methods by which a lawyer can communicate with her or his clients on how and in what manner(s) a matter is progressing[14]

(b) Timekeeping Nuts and Bolts

- Lawyers should be timely when recording the time spent on any professional service[15]
- Lawyers should be accurate in describing the professional service being performed and for how long
- Lawyers should not use abbreviations or acronyms for professional services known only to them
- Lawyers should review time records to ensure that they are free of misspellings and errors in the amounts of time recorded
- Lawyers should be complete in describing the purpose for the particular service rendered and recorded
- Lawyers should not record so little information regarding the particular professional service rendered that neither they nor anyone else can define or describe it objectively from the value to the client perspective

(c) Examples of Proper Timekeeping Entries or Dockets

- "Discussion with Mr. Smith regarding Date Assignment Conference and availability of Jury Trial dates in September and October, 2012"
- "Lengthy correspondence to Ms. Jones regarding draft Settlement Conference Brief and detailing the various settlement positions expected to be taken and to require detailed response"
- "E-mail message to Prothonotary Smith to confirm the Plaintiff's position that they do not approve of the Defendant's Notice of Discontinuance without costs"
- "Legal research and related opinion to Ms. Jones regarding availability in construction litigation in Canada of damages on the basis of the 'total cost method'"

- "Consideration and lengthy reasoned response/rebuttal to Mr. Smith's suggestion regarding vessel arrest"

(d) The Use of Standard Dockets

Standard, opening or minimum dockets have been used by lawyers and other professionals for many years. Many accounts for legal services contain standard time docket entries (ie .1 and .2 etc.). As a time management tool, lawyers should bear in mind that every interruption from a task at hand involves distinct components: disengaging from the task at hand, turning one's mind to the new matter, dealing with it, disengaging from that matter, and returning to the original task.

Though the concept of standard, opening or minimum dockets do not appear to have been considered in the available authorities, they would no doubt become an issue in proceedings examining a lawyer's account against the backdrop of the objectives set out in these standards. Thus, for lawyers who employ or who might wish to employ standard, opening or minimum dockets, the better course might be to raise and confirm them by written retainer agreement.[16]

FOOTNOTES

1. It is the intent of these standards to explicitly recognize that not all lawyers provide their services on the bases of hourly rates. This is particularly so with lawyers whose practices are restricted to certain types of real property transactions, certain types of wills and related estate planning instruments, certain corporate law services and commercial transactions and other forms of legal services which some have suggested have become more "commoditized" in nature. These standards also recognize that many lawyers are being increasingly asked by their clients and prospective clients to provide their services traditionally charged out by the hour on other than hourly rate bases. In that regard, various types of contingent fee arrangements, flat rate fees, reduced hourly rates in combination with bonus provisions or so-called "success fees" are becoming ever more common. It is obvious that in some such circumstances, timekeeping would not be required. Set out below, nevertheless, are some factors to be considered by individual lawyers, regardless of their practice mixes or types, in determining whether they will keep time. Chief amongst those considerations are the nature of the lawyer's retainer with his or her client, the likelihood of a challenge by a client to the lawyer's account and to the lawyer's internal practice management metrics from the analysis of efficiency or cost-effectiveness perspectives.

2. For a summary of some of the other legal provisions and authorities which underpin these concepts, see: Giles, Gavin and Giacomantonio, James, "Getting Paid a Reasonable Fee – A Thumbnail Sketch of the Art and Science of Solicitor-Client Taxation", a paper presented to the Canadian Bar Association Professional Development Day, January, 2010

3. See for example: McInnes Cooper v. Slaunwhite, [2004] N.S.J. No. 276, 241 N.S.R. (2d) 12 and Lindsay v. Stewart MacKeen & Covert (as that firm was then known), [1988] N.S.J. No. 9

4. supra, footnote 2

5. Cohen v. Kealey and Blaney, [1985] O.J. No. 160 10 O.A.C. 344 (Ont. C.A.) (at p. 350, wherein Robins J.A. articulated nine criteria to be applied on an assessment of the reasonableness of an account for legal services, the first of which was "[t]he time expended by the solicitor". (see also: McInnes

Cooper, supra, footnote 4, at para. 113 wherein it was held that: “When looking at the time dockets of a law firm, it is important to remember that the time dockets alone cannot be used to justify a solicitor/client account in totality. Instead, some ancillary evidence is required. That said, it is not incumbent upon me to review in detail every one of the time entries docketed. As was held by the Supreme Court of Nova Scotia in *Tannous v. Halifax (City) (1995)*, 145 N.S.R. (2d) 23 (Per Goodfellow, J.), I am entitled to take an overall view of the law firm's account in determining whether or not it is reasonable. In doing so, I have considered both the law firm's overall account and many, but not all, of the individual time entries it comprises.”

6. Rule 77.13(1)

7. See: Rule 77.13(2): “The reasonableness of counsel's compensation must be assessed in light of all the relevant circumstances, and the following are examples of subjects and circumstances that may be relevant on the assessment... (a) counsel's efforts to secure speed and avoid expense for the client;...”

8. supra, footnote 5

9. Benjamin Franklin

10. Albert Einstein

11. “The Effective Executive”, Professor Peter F. Drucker

12. John Stuart Mill

13. See for example: *Mor-Town Developments Ltd. v. MacDonald*, 2012 NSCA 35 (at para 49). To be noted is that Mor-Town related to a commercial property transaction in which the client complained about the legal fees charged by the lawyer only after the legal fees had been paid. Amongst other things, the lawyer argued that the client had no right to an assessment or a taxation of those fees once they had been paid. The Court of Appeal disagreed. The Court of Appeal also held in all circumstances wherein a lawyer’s account is being challenged, the lawyer bears the onus of demonstrating that the account is reasonable. One such message is in reference to the time it took for the subject legal services to have been performed.

14. “A detailed docket will help the client understand the nature and the complexity of the legal services which have been rendered and will thus help justify the time docketed and the related legal fee which has been charged.” – Stanley P. Jaskot, Harper Jaskot LLP (see also: Pietrafesa, Gianfranco, “Communication with Clients Through Invoices”: “The more descriptive the time charges on an invoice, the more likely a client will understand the work being done, the more likely a client will appreciate the effort being made on his behalf, and the more likely payment will be made. A lengthy description is not necessary.”)

15. Experts who have studied professional timekeeping practices have reported that their research has indicated that the most complete and accurate form of time recording is that which is undertaken as each discrete professional service to which it relates is completed. These experts have further reported that those professionals who attempt to reconstruct accurate time records from memory at the end of a day, routinely under-record their time by as much as 20%. The ratio of under-recorded time rises to 25% for reconstructions attempted at the commencement of the following day, to 35-40% for reconstructions

attempted at the conclusion of the week and to a staggering 60% for reconstructions attempted at conclusions of the month. (see also: Mor-Town, supra, footnote 14, at para. 56)

16. An example is as follows: “My current hourly rate is $____. This rate is subject to change without notice. It is likely to change while this mater in proceeding. You will be advised in advance if and when it does. Disbursements and applicable taxes are additional to fees. My clients must pay HST of ___% on our fees and on most (but not all) of our disbursements. Consistent with my normal billing practices, services to you on this matter will be docketed in tenths of hours. Though there are services which can be accomplished within two-tenths (and even one-tenth) of an hour, those services are very few. I tend not to docket in increments of less than three-tenths of an hour. Docketed time and hourly rates are the predominant basis for my fee accounts to my clients. That said, there are circumstances which can arise in the course of my services on any matter which can serve to reduce or increase fees which otherwise would be calculated from the application of normal dockets and hourly rates. In circumstances where individual services seem to have taken too much time or to have been of too little value, fees on the basis of normal dockets and hourly rates will be reduced. Conversely, for services which are provided on an urgent basis, or within compressed time periods, or which are particularly complex, or which result in particularly good value, fees can be increased from those resulting from normal dockets and hourly rates. In both instances (up and down), deviation from fees calculated on the basis of normal dockets and hourly rates is rare.”

LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

#4 - MAINTENANCE AND BACKUP OF ELECTRONIC DATA

Lawyers must ensure there is a system in place for the maintenance, backup, and access of all electronic data. This includes electronic records and information relating to clients and their files as well as the financial records of the lawyer and/or law firm.[1]

NOTES

1. Nova Scotia Barristers' Society, *Code of Professional Conduct*, ch 3.5

ADDITIONAL RESOURCES

- Record Retention Standard
- **International Legal Technical Standards Organization**, 2011 Guidelines for Legal Professionals
- **Cloud Computing**, Law Society of British Columbia
- **CBA Guidelines for Practicing Ethically with New Information Technologies**, September 2008
- **CBA White Paper**, Edward Poll
- **Association of Legal Administrators**
- **Technology Practice Management Guideline**, Law Society of Upper Canada
- **Cloud Ethics Opinion**, Alabama Opinion 2010-02
- **Cloud Ethics Opinion**, Arizona Opinion 09-04
- **Cloud Ethics Opinion**, California Opinion 2010-179
- **Cloud Ethics Opinion**, Connecticut Informal Opinion 2013-07
- **Cloud Ethics Opinion**, Florida Opinion 12-3
- **Cloud Ethics Opinion**, Iowa Opinion 11-01
- **Cloud Ethics Opinion**, Maine Opinion 194
- **Cloud Ethics Opinion**, Massachusetts Opinion 12-03
- **Cloud Ethics Opinion**, New Hampshire Opinion #2012-13/4
-

Cloud Ethics Opinion, New Jersey Opinion 701
- **Cloud Ethics Opinion**, New York Opinion 842
- **Cloud Ethics Opinion**, Nevada Opinion 33
- **Cloud Ethics Opinion**, North Carolina Formal Ethics Opinion 6
- **Cloud Ethics Opinion**, Ohio Informal Advisory Opinion 2013-03
- **Cloud Ethics Opinion**, Oregon Opinion 2011-188
- **Cloud Ethics Opinion**, Pennsylvania Opinion 2011-200
- **Cloud Ethics Opinion**, Vermont Opinion 2010-6
- **Cloud Ethics Opinion**, Virginia Legal Ethics Opinion 1872
- **Cloud Ethics Opinion**, Washington Advisory Opinion 2215
- **Data Security Policy**, Lawyers Mutual
- **Disaster and Risk Management**, Florida State Bar
- **Technology**, Florida State Bar
- **Disaster Planning**, Missouri State Bar
- **Technology**, South Carolina Bar
- **Disaster Recovery**, Tennessee Bar Association
- **Technology Resources**, Washington State Bar Association
- **The Lexcel v4.1 Standard**, The Law Society of England and Wales
- **Information Technology,** Australian Legal Practice Management Association
- **Challenges for Corporate Counsel in the Land of E-Discovery: Lessons from a Case Study** (p39) Pelc and Redgrave
- ***Zubulake v. UBS Warburg LLC, UBC Warburg and UBS ARG*** 02 Civ. 1243 (SAS)
- "Surviving a Disaster: A Lawyer's Guide to Disaster Planning", ABA Special Committee on Disaster Response and Preparedness, 2011
- "Preparing for a Disaster: Data Backup and Beyond"; Law Practice Today, April 2013
- "Cyber Security for Attorneys: Understanding the Ethical Obligations", Law Practice Today, March 2012

ADDITIONAL COMMENTARY

As part of a lawyer's obligation to care for a client's property, lawyers are expected not only to maintain client records, but to maintain them in a manner that allows for them to be practically accessible. This not only allows a lawyer to complete his / her ethical obligations, it makes good business sense. There has been no shortage of disasters in the last few years, from flooding to theft to fires. Such a disaster can drive lawyers out of their offices, prevent access to client files, disrupt communications and put time-sensitive matters at risk.

Type of Backup

It is one thing to backup electronic data onto some type of disk or other removable storage media but lawyers need to be aware that with the rapidly changing technology in our world today things become

obsolete quickly. One need only look at floppy disks from ten years ago to know that the modern computer cannot read them. There is no point in having a format so obsolete it is difficult or impossible to find a new computer to read it. Lawyers also need to be aware that things stored on disks can degrade over time, especially if they are not stored properly. Lawyers need to ensure that any electronic data is accessible quickly in the event of a disaster. Clients cannot be asked to wait a number of weeks or months while the lawyer sends obsolete disks somewhere to be converted or needs to wait for a special order computer to come in before being able to access the data. A lawyer should ensure that he or she reviews the technology of their backup on a regular basis.

There are a variety of methods to backup electronic data. Lawyers will need to determine the method best suited to their individual / firm needs. For some lawyers, this may mean backing up data to an external hard drive which is then stored in a separate location (such as your home); for other lawyers, this may mean using a cloud based service provider; for firms, this may mean using a separate server in a secure location.

This Standard should be read in conjunction with the Record Retention Standard and the Standard relating to Third Party Data Storage Providers.

Location of Backup

For a lawyer or law firm which operates from multiple locations the location of the electronic data backup is relatively simple. One location backs up the other location and vice versa. For lawyers who operate from one location that is not an option. In determining where their electronic data should be backed up there are a number of options.

There are companies which operate a backup service where they will automatically backup the electronic data onto servers located off site, either within the same city or somewhere around the world. If a lawyer chooses to use a commercial backup service they must do due diligence in order to ensure they are able to meet their ethical obligation with respect to client confidentiality as well as all of the other issues surrounding electronic data, including access and technology. Whether a lawyer chooses to use a commercial backup service is their decision.

Another option is to have the data backed up onto a removable format, such as a disk or hard drive, which is then stored offsite. Again for any lawyer, he or she must ensure this meets all of the other criteria as well as the overriding principal of client confidentiality. A further option for lawyers is to purchase their own backup server and locate it offsite. It would also be open to consider partnering with another law firm or professional services firm to backup each other’s electronic data, again subject to all of the issues including client confidentiality. If a lawyer chooses to store their electronic data with someone else, be it a commercial service or other law firm/professional services firm they must ensure they can access it all times without issue.

Frequency of Backup

How frequent a lawyer backs up their electronic data depends on the nature of their practice and the amount of work they produce. Each lawyer has an obligation to ensure they have a policy that their electronic data is backed up in a timely fashion and at a frequency that is appropriate to ensuring all client information is available should there be aproblem. For most lawyers this would be at least daily and depending on the nature of the lawyer’s work it could be even more frequently. A lawyer simply

needs to ensure that as much electronic data as possible is backed up in the event of a disaster.

Testing

Simply putting a process in place to backup electronic data and then assuming it works and continues to work is not sufficient. Regular testing should be done to ensure that the backup is working and remains accessible. Each lawyer should have in place a policy to test their electronic backup system on a regular basis.

The overriding goal of any backup system is to ensure that in the event of an emergency business can continue without any interruption. Clients can continue to access their file material as necessary and lawyers are able to access their files to continue work with as little impact on productivity as possible. If a lawyer keeps that in mind as well as the overriding issues with respect to client confidentiality then it is possible to adopt and develop a policy with respect to the backup and storage of electronic data.

LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

#5 - RETENTION AND BILLING

"A lawyer must not charge or accept a fee or disbursement, including interest, unless it is fair and reasonable and has been disclosed in a timely fashion."[1]

FOOTNOTES

1. Chapter 3.6-1 of the Nova Scotia Barristers' Society, *Code of Professional Conduct*, ("the Code") adopted in 2012 (and related commentaries) and Rule 77.13(1) of the Nova Scotia Civil Procedure Rules. (See Also: Chapter 11(a) of the Canadian Bar Association's *Code of Professional Conduct*)

PRACTICE NOTES

Preamble

This standard reflects and is to be read in conjunction with the standard which has specifically addressed timekeeping.

The establishment of legal fees which are "fair and reasonable" and which have been "disclosed in a timely fashion" is not something which lends itself to a formulaic definition. Though the standard set out above may appear to be a simple one, it is far more difficult to put it into actual practice.

To be recalled is that retention and billing are far more than a commercial reality of the operation of any private legal practice. Retention and billing instead require aspects of certainty and predictability in order to meet statutory, regulatory and ethical requirements. This is an important aspect of private practice law office management.

The mandate of the Law Office Management Committee (LOMC) of the Nova Scotia Barristers' Society is not to regulate lawyers' specific approaches to their clients' individual fee accounts nor lawyers' specific advice and general legal services provided to their clients. Its mandate is to raise and discuss the statutory, regulatory and ethical imperatives which lawyers' face in their retention and billing practices as well as to provide some advice with respect to suggested best practices in these areas. The anticipated result is to equip lawyers with the templates and tools necessary to ensure not only the

certainty and predictability of their accounts but the defensibility of those accounts when and if they are challenged through taxation of other form of assessment.

Introduction

There are certain truths about retention and billing which lawyers cannot ignore. Regular, comprehensive and accurate time-keeping should form the basis of most structured approaches to retention and billing. Exceptions are recognized. They include, but are not limited to, fixed fees (either those specifically set for any particular transaction or matter or those which are routinely quoted for certain types of commoditized legal services). In such circumstances, lawyers should be careful to use retainer agreements which reflect the possibility for changing circumstances and the related possible requirement to deviate from fixed or quoted fees. See below for further information on this topic.

Lawyers understand the necessity of time management and recording from a value perspective. That is not to suggest that the predominant method or even the method most understood and favoured by clients for determining professional fees is the billable hour. We know that for many types of legal services that is simply not the case. Rather, many types of legal services have attracted and will continue to attract standard flat rate fees which have been established by market forces, are routinely accepted by clients and are entirely appropriate. That having been said, we also know that as a gauge to efficiency, profitability, risk management and billing justification, there are few if any law office management standards which are superior to the proper and effective docketing of professional time.

In fact, even if assessing the reasonableness of lump sum legal fee accounts, even in the legal services areas of practice wherein they are common, assessment and taxing officers, as well as the courts, will more often than not resort to an analysis of how much time was taken to perform the services in issue and how much time should have objectively been taken for them. It is on that basis that the LOMC submits that lawyers, who fail to keep time, fail at their peril.[2]

In making that statement, the LOMC fully appreciates and accepts that some lawyers, in particular types of legal practice, use the form of fixed fee model referred to above instead of keeping time; particularly in types of matters wherein the market has established a general fee range or where in those circumstances wherein it is generally possible to predict what a particular matter will entail in terms of time and expertise. Those lawyers should remain free to structure their related fee accounts on that basis; bearing in mind the overall regulatory and ethical framework that goes with any fee (including the above standard) and bearing in mind that contemporaneous time records will be a highly relevant factor in assessing the reasonableness of any contested fee account.

To be defensible (and therefore potentially recoverable), lawyers accounts must also be fair, reasonable and lawful.[3] The reasonableness of a lawyer's account is dependent on a variety of criteria. Only one of them is the amount of time taken by the lawyer to render the service which is the subject matter of the account.[4] The implication, thus, is that a "reasonable" account would also be "lawful".

Though the concept of "fair and reasonable" would stand to be affected by many criteria, including complexity, the results achieved and even, on the applicable jurisprudence, the clients' abilities to pay, the concept of "disclosed in a timely fashion" undoubtedly relates to retention and to the disclosure of the expense consequences of the retention prior to the related services being commenced.

The Nova Scotia Civil Procedure Rules also speak to the matter in which lawyers' entitlements to

compensation are to be assessed. According to the Rules, lawyers are “entitled to reasonable compensation for services performed, and recovery of disbursements necessarily and reasonably made, for a client who...” has been the recipient of legal services.[5] Once again, the Court’s concept of reasonable compensation has been benchmarked against a variety of criteria; some of which are all but totally incapable of any fine definition.[6]

General Billing Principles

McInnes Cooper v. Slaunwhite[7], ("McInnes Cooper"), heard in early 2004, has set out and discussed some important retention and billing principles.

The areas of law covered by McInnes Cooper are made all the more complex in that lawyers and their clients rarely carefully define – if they define at all – the terms of the engagements in which they are involved. McInnes Cooper highlights this requirement.

Facts Underpinning McInnes Cooper

McInnes Cooper involved considerable sums. Senior lawyers had been engaged by a plaintiff severely injured in a car accident.
Given principles of vicarious liability applicable to the defendant driver’s employer, there were effectively no limits on the damages potentially available to the plaintiff.

There were also numerous factors which potentially cut in favour of the defendant driver. These included the Plaintiff’s alleged significant pre-existing conditions and diseases and the allegation that the plaintiff’s medical and physical conditions had been potentially compromised as a result of negligent post-injury medical care and treatment.

Not long before the plaintiff’s claims were scheduled to proceed to mediation, he retained new counsel. He sought and received McInnes Cooper’s assistance in readying his extensive file for transfer to his new counsel. In the end, McInnes Cooper’s comprehensive mediation brief formed the bulwark of the plaintiff’s appreciable mediated settlement.

McInnes Cooper had been acting for the plaintiff on a standard form Contingency Fee Agreement. The agreement contained the standard provision which permitted McInnes Cooper to recover on the basis of its docketed hours – and its normal hourly rates – in circumstances in which the firm was released from its retainer prior to the conclusion of its engagement. Although McInnes Cooper agreed to “hold” its account pending the outcome of the plaintiff’s claims while they were being mediated by his new counsel, it eventually claimed fees – calculated on the basis of its docketed hours and applicable hourly rates – of approximately $350,000. When the plaintiff refused to pay, the firm proceeded to taxation.

The Jurisprudence

Cohen v. Kealey and Blaney[8] was referred to in McInnes Cooper as underscoring the importance of following certain billing principles which have arisen from a variety of procedural, ethical and common law standards set out over many years. Though not exhaustive, these principles usually include some iteration of the following:

1. The time expended.

2. The legal complexity of the matter(s).
3. The degree of responsibility assumed.
4. The monetary value of the matter(s).
5. The importance of the matter(s).
6. The degree of skill and competence demonstrated.
7. The result.
8. The ability of the client to pay.
9. The expectation of the client as to the amount of the fee.

As held in McInnes Cooper:

When looking at the time dockets of a law firm, it is important to remember that the time dockets alone cannot be used to justify a solicitor/client account in totality. Instead, some ancillary evidence is required. That said, it is not incumbent upon me to review in detail every one of the time entries docketed. As was held by the Supreme Court of Nova Scotia in Tannous v. Halifax (City) (1995), 145 N.S.R. (2d) 23 (Per Goodfellow, J.), I am entitled to take an overall view of the law firm's account in determining whether or not it is reasonable. In doing so, I have considered both the law firm's overall account and many, but not all, of the individual time entries it comprises.

Reasonableness, the Overarching Principle

McInnes Cooper also highlighted the seminal test which has emerged in Nova Scotia jurisprudence regarding lawyers' accounts: "reasonableness".

In *Blackburn English v. Ezuricke*[9] the Supreme Court considered a taxation decision taken on appeal from the Small Claims Court. The Supreme Court allowed the appeal and held that while the time spent by a counsel on a divorce proceeding was appropriate the counsel's hourly charge-out rate was not. The Supreme Court found that the lawyer in Blackburn had worked hard on the matter and had been very effective in his representation of the client's interests. There was thus no articulated concern over the lawyer's docketed hours. Nevertheless, the Court reduced the lawyer's rate from $250 to $175. There was no expressed reason for doing so and no indication from the Court's reasons that it had analysed what the lawyer's hourly rate should have been. Such is the risk from both the taxation process generally and from the failure to properly regulate the solicitor-client relationship through carefully drawn retainer agreements. And even then, there is no assurance that the Courts or the Taxing Officers will not so what was done in Blackburn.

The fact that the lawyer was senior (more than 30 years of experience) member of the Bar and a Queen's Counsel does not appear to have played a role in the Court's analysis. Instead, the Court appeared to have concentrated more on the "means of client". Apparently ignored was that the hourly rate of $175 allowed was well below what would have ordinarily be charged by a similar lawyer. In short, the overall finding was not leastways consistent with the Court's following observation:

The Adjudicator, as I said, looked at the reasonableness of the services provided and, based on what I can see on the record and from what I have heard today, it is apparent to me that Mr. Ezuricke got effective and competent legal representation from Blackburn English and in particular from ...

The seminal authority in Nova Scotia on the reasonableness of a lawyer's account is *Lindsay v. Stewart, McKeen and Covert*[10]. Lindsay underscored the notion that the taxation of a lawyer's account is a fluid

exercise. It is not dependent specifically on any one feature. It is not a science which is to be practiced empirically. Instead it is an exercise which attempts to bring facets of order to an amalgam of circumstances which are not easily reconcilable with each other.

Very often, the taxation of a lawyer's account dissolves into an exercise in which attempts are made to reconcile individual time charges while each individual service is assessed retrospectively from the perspective of whether or not it was necessary or unnecessary. It is an approach which can lack fairness to clients and counsel alike.

Though this form of dissective approach remains inviting, especially to clients against whom claims are being made by their former lawyers, the more accepted role is to gauge a lawyer's account in dispute against the broad backdrop of what appeared reasonable – all things considered – at the time the lawyer was undertaking the services provided. It is against this benchmark that lawyers must continually challenge themselves to adopt billing standards which will produce altogether reasonable results.

The Retainer

An important factor which almost always arises in the circumstances of a challenge to a lawyer's bill is the question of whether the client was fully informed of the potential costs of the legal services provided. A mistake which lawyers routinely make is the failure to raise these costs issues in advance or the failure to properly note their clients' agreements on these costs issues in writing. Carefully drafted retainer agreements are one solution. Good law office management standards should thus include template agreements to cover most of the legal services which are being offered.

Lawyers must remember that they bear the burden of proof in all cases of challenges to their bills. In other words, the client need not establish that a disputed bill is unreasonable; a lawyer must establish that it is reasonable. If there is no written agreement setting out the parameters of the retainer, particularly in the case of an unsophisticated client, the lawyer involved is setting up a difficult burden for himself or herself to meet.

The corollary, of course, is also true: if the terms of the lawyer's engagement are clearly set out in a retainer letter or agreement, and the billing is consistent with the terms, the prospects of a lawyer's successful defence against a disputed bill are far higher.

Better retainer agreements set out the lawyer's expectations on all fees issues; including lump sums or hourly rates, the periodic changes to the latter, if anticipated, the method by which time will actually be docketed (and the application, if any, of minimum dockets), the use of colleagues and their applicable hourly rates, the billing frequency, expected payment terms, the application of specific interest on overdue accounts and the lawyer's right to withdraw if unpaid over a specific period. Potential costs recovery from (or payment to) an opponent is also an important factor. More and more often, retainer agreements also set out litigation budgets or what each aspect of the matter is likely to cost the client. Finally, retainer agreements should look at related matters prospectively and should set out, as accurately as possible, how costs, including hourly rates, might change in the future. An example of a retainer agreement can be found in the Practice Notes to the Time Keeping Standards at Note 18.

It is also important to note that a lawyer should not be too concerned about a retainer agreement which becomes redundant as the matter to which it applies becomes more complex as it proceeds. It is often the case that what at first appeared to be a simple matter is one that will take more time and increased

resources. The key in such circumstances is for the lawyer to document the complicating factor(s) in follow-up retainer agreements and to receive the client's expressed authority to proceed with the matter and the costs associated with the further work to be done on the matter.

What About Contingency Fee Agreements

McInnes Cooper also considered that the relationship between the lawyer and client was predicated on a Contingency Fee Agreement. In such circumstances, the client can often see the relationship with the lawyer as a "no-lose" proposition. The client receives relatively unrestricted access to the lawyer and pays nothing for it unless successful. When there is then a change of counsel and the former lawyer is required (or entitled) to bill the client on a time basis, the establishment or assessment of a reasonable fee can become very difficult. It is therefore recommended that Contingency Fee Agreements be drafted with consideration to the possibility that the lawyer/client relationship will terminate with the result that applicable fees will have to be assessed on the basis of the factors set our above. Law firms working on contingent fee arrangements are encouraged to engage in proper timekeeping.

One of the keys to a lawyer's ability to maintain a claim for fees subsequent to a terminated contingency fee arrangement is careful and complete time dockets setting out professional time and effort expended to the date of termination. Without that evidence, fees are still recoverable; though more on a quantum meruit basis and at the risk of a reduction.[11]

Also to be considered is that in a solicitor and client Taxation, a Contingency Fee Agreement will only comprise a part of the evidence which the Taxing Officer or Court will consider. Though the stated percentage may establish the client's prima facie fee, Taxing Officers and Courts routinely inquire into the true nature of the contingency, the real risk of the lawyer not recovering a fee at all and the reasonableness of the contingent fee charged given the precise legal services which were rendered – more often than not measured by way of available time records. The frequent result of such exercises is the reduction of the lawyer's fee notwithstanding the terms of the Contingency Fee Agreement.

The decision of the Supreme Court of Nova Scotia (per: LeBlanc, J.) in *Elwin v. Nova Scotia Home for Coloured Children*[12] is instructive. Relying largely on the decision of the Federal Court of Canada (per: Barnes, J.) in *Manuge v. Canada*[13] 2013 FC 341, LeBlanc, J. held as follows with respect to time records:

> *As will be clear from the comments above, the time actually spent by counsel is a matter of some concern to the court in this case. There can be no question that the class proceeding (as well as the predecessor individual proceedings) involved a great deal of effort by multiple lawyers over an extended time. I am reluctant to place as much reliance on the records as [counsel] initially suggested I should, but I am prepared to accept that thousands of hours were spent by [counsel] and others in his firm in the course of the class proceeding and the predecessor individual proceedings. I would add that such material was not originally sought by the court. Class counsel provided specific time estimates for individual lawyers with the first set of submissions. It was these estimates that raised concerns, which were exacerbated by the affidavits provided later.*[14]

Though the Commitee underscores the general desirability of the incorporation of retention and billing standards so as to perhaps ameliorate the possibility of findings such as those in Home For Coloured Children and in the other references authorities, it also appreciates that there are many lawyers who conduct highly sophisticated and highly client accessible practices based largely of not exclusively on

contingent fee agreements and on the basis that they will simply accept the risk of an adverse taxing finding should they fail, for example, to keep time.

Multiplicity of Legal Personnel

While it was at one time common for lawyers to assign multiple lawyers and other staff members to their matters, such multiple personnel assignments are becoming much less common. In fact, many general counsel and insurance claims examiners are reluctant to authorize their lawyers to engage with multiple personnel. There are exceptions; but they relate normally to highly complex matters or matters in which there will be many witnesses, voluminous documents or both.

An issue which arose in McInnes Cooper was the client's assertion that the lawyer had engaged too many colleagues and that there what had resulted was an overlap in the legal services which each provided. Though the lawyer successfully rebutted the allegation, the general concept rings true. Care should be taken to guard against it.

In *Canada Trustco Mortgage Company v. Homburg*[15], our Supreme Court was critical of the apparently haphazard approach by which the lawyer went about assigning other lawyers to the prosecution of a complex foreclosure. A total of nine lawyers had provided services on the file from time-to-time. It was found by the Supreme Court that there had been considerable overlap. As lawyers left the firm, they were replaced by others; each of whom effectively had to re-learn the file – or, as it was held, “re-invent the wheel”. The lawyer’s fees were substantially reduced.

Use of Junior Lawyers, Paraprofessionals and Assistants

Tied closely to the issue of multiple lawyers being assigned to a single matter is the issue of the valuation of the time docketed to any given matter by so-called “juniors”. Adjudicator W. Augustus (“Gus”) Richardson, Q.C. of the Small Claims Court of Nova Scotia has considered this issue and has provided some guidance in *Burchell Hayman Parish v. Sirena Canada Inc.*[16]:

> *The relative inexperience of a junior lawyer does not in and of itself warrant discounting its [sic] value. It does, however, raise the possibility that the lawyer might spend more time than necessary (that is, more than would be reasonable for a reasonably experienced lawyer in the field) performing the work in question. In my opinion on a taxation the standard to be applied in evaluating the reasonableness of a lawyers account includes an assessment of the amount of time it would take a reasonably competent lawyer with several years experience to perform the services at issue.*
>
> *…*
>
> *This of course poses a problem to the client. A client is entitled to expect good work (which it received in this case). But is should not be required to pay for the learning experience of a junior: Goodman v. Tempermendrum Limited*[17]

Adjudicator Richardson’s comments have been routinely endorsed and applied by other Adjudicators. As such, the standard approach is to consider the amount of time any reasonably competent lawyer would spend on any given task. If the time sought to be recovered by way of a fee account is disproportionate, it should be adjusted or disallowed. The only exception is where the junior lawyer whose time is being assessed carried an hourly rate much lower than that which would be charged on average by the reasonably competent lawyer carrying out the task in question. In the end, the analysis should always be about value received. If there is value received for the work of a junior lawyer, then his or her time

should be allowed in full.

Value to the Client Test

In *Roebuck, Garbig v. Albert*[18] the court articulated three important principles when looking at the value a client received from legal services rendered on their behalf:

1. The ability of the client to pay;
2. The results achieved; and,
3. The reasonable expectation of the client as to fees.

The summation of the above principles leads to a single thrust of the lawyer's billing process: the value to the client. Though trite, the work that a lawyer does for a client must have value in order for the client to be billed. The value is measured against the ability of the client to pay, the reasonable expectation of fees and (to a lesser degree) the results achieved.

It is the duty of the lawyer to fully inform the client of the reasonable prospects of success and the potential cost of pursuing different legal options. The informed consent is best captured in a retainer agreement to ensure that both parties possess an understanding of the relationship going forward. Finally, the lawyer's bill must be reasonable against the above mentioned principles.

In Conclusion

Mark M. Orkin, Q.C. points out in "The Law of Costs" (2nd Ed.) that:

A solicitor's bill of fees, charges or disbursements is sufficient in form if it contains a reasonable statement or description of the services rendered with a lump charge therefore, together with a detailed statement of disbursements. The object of a bill of costs is

"... to secure a mode by which the items of which the total sum are made up, should be clearly and distinctly shewn, so as to give the client an opportunity of exercising his judgment as to whether the bill was reasonable or not ... ".

A bill for professional fees is, therefore, sufficient if it sets out an account of the services rendered itemized so that the reasonableness of the charges may be ascertained by the client. The contents of the bill must, however, show sufficient information to enable the assessment officer to determine whether or not the charge is reasonable. It is not necessary in the first instance to give details or charges or items, such as the time occupied in consultations, folios contained in a conveyance, or detailed statements as to attendances or searches; but the solicitor is under a duty to render a bill containing such a general statement of the services as would enable another solicitor to advise the client as to the propriety or reasonableness of the bill. In any action upon or assessment of a bill, further details of the services rendered may be ordered. If the bill as delivered does not comply with the statute because it lacks a reasonable statement of the services for which the fee is demanded, leave may be given to deliver a further bill in extended form which will comply.[19]

It can be reasonably expected that the determination of that to which a lawyer is entitled by way of payment for the services rendered will continue to be a difficult exercise. As such, the best likely perspective on what the lawyer's bill should be remains the value to the client concept.

Value to the client is an amorphous concept. It must be assessed objectively. The test is what the services should have cost. Though the lawyer has considerable flexibility in determining what to charge, the flexibility is not limitless and must be based on the few standard precepts which have been set out above.

Getting paid is, and will remain, a challenging part of what the legal profession does. The best approach, therefore, is to define in advance as many variables to the solicitor-client relationship as are possible. The more which is set out in advance, the more certain the billing process will likely be.

END NOTES

[2] See for example: *Mor-Town Developments Ltd. v. MacDonald*, 2012 NSCA 35 (at para 49). To be noted is that Mor-Town related to a commercial property transaction in which the client complained about the legal fees charged by the lawyer only after the legal fees had been paid. Amongst other things, the lawyer argued that the client had no right to an assessment or a taxation of those fees once they had been paid. The Court of Appeal disagreed. The Court of Appeal also held in all circumstances wherein a lawyer's account is being challenged, the lawyer bears the onus of demonstrating that the account is reasonable. One such message is in reference to the time it took for the subject legal services to have been performed.

[3] When considering the fairness, reasonableness and legality of accounts for legal services, general resort should be had to s. 66 of the *Legal Profession Act*, S.N.S 2004, c. 28; ch 3.6-1 of the Nova Scotia Barristers' Society's *Code of Professional Conduct*, and Rule 77.13(1) of the *Nova Scotia Civil Procedure Rules*. These statutory and regulatory provisions express a constant theme but they do not do so in the same way and through the use of the same nomenclature. (see also: Chapter 11(a) of the Canadian Bar Association's *Code of Professional Conduct*)

[4] See for example: *McInnes Cooper v. Slaunwhite*, (infra at end note 10) and *Lindsay v. Stewart MacKeen & Covert* (as that firm was then known), [1988] N.S.J. No. 9

[5] Rule 77.13(1)

[6] See: Rule 77.13(2): "The reasonableness of counsel's compensation must be assessed in light of all the relevant circumstances, and the following are examples of subjects and circumstances that may be relevant on the assessment... (a) counsel's efforts to secure speed and avoid expense for the client; (b) the nature, importance, and urgency of the case; (c) the circumstances of the person who is to pay counsel, ...; (d) the general conduct and expense of the proceeding; (e) the skill, labour, and responsibility involved; [and] counsel's terms of retention, including an authorized contingency agreement, terms for payment by hourly rate, and terms for value billing."

[7] [2004] N.S.J. No. 276, 241 N.S.R. (2d) 12

[8] [1985] O.J. No. 160 10 O.A.C. 344 (Ont. C.A.)

[9] (2007), 2008 Carswell N.S. 232

[10] [1988] N.S.J. No. 9, 47 D.L.R. (4th)

[11] At least to be considered by lawyers engaging in retainers based on Contingency fee Agreements is that the Courts generally take a very conservative approach to the determination a lawyer's entitlement to fees. The Decision by the Supreme Court of Nova Scotia (Per: Smith, ACJ) in *Wade v. Burrell*, 2011 NSSC 60 (CanLII) is one such example. There, Smith, ACJ was tasked to consider a lawyer's fee account which was sought on the basis of a Contingency Fee Agreement. Though the Decision by Smith, ACJ is difficult to parse, a few factors arising from it can safely be summarized here. First, careful time records were kept by the lawyer. They commenced with his work on the matter the day following his retention. Second, the hourly rates initially stipulated by the lawyer were held to have been reasonable, as were the annual increments by which the lawyer increased those hourly rates. Third, at normal hourly rates, the lawyer's fee account would have been approximately $197,000 less than that which the lawyer sought to charge by way of his Contingency Fee Agreement ($195,000 as opposed to $392,000). Fourth, the matter overall was complex and the lawyer was held by the Smith, ACJ to have demonstrated an admirable degree of persistence which resulted in significant recovery for the Plaintiff beyond the available policy limits in issue. Fifth, the lawyer was not required to shoulder considerable risk – though the matter was indeed complex, liability for the Plaintiff's injuries was not in issue. Sixth, the lawyer has himself sought a fee discounted from that to which he was entitled on the strict wording of the relevant Contingency Fee Agreement. Seventh, the Plaintiff was an infant who had sustained catastrophic injuries and whose costs of future care may outstrip his recovery, net of his litigation expenses. Eighth, the lawyer "carried" the matter for a decade (unit the Plaintiff's injuries had plateaued to the point that his prognosis and cost of future care could be considered. On the basis of all of these factors, and applying the "fair and reasonable" test to the settling of all legal fee accounts, Smith, ACJ awarded/approved a fee account of $280,000. And this was on the basis of several overarching factors which clearly favoured the lawyer's fee on the basis of his Contingency Fee Agreement alone. See end note 14 for additional relevant commentary. And see also the decision of the Small Claims Court of Nova Scotia (Per: Slone, Adj.) in .*Rhodenizer v. M.W.*, 2014 NSSM 30 (CanLII). At issue in Rhodenizer was a disputed legal account which the client alleged was too large given what was contended as a "fixed price retainer" and what was contended as unnecessary or wasteful effort. After considerable analysis by Adjudicator Slone, the client's allegations were dismissed and the lawyer's account was held to be payable in full.

[12] 2014 NSSC 375

[13] 2013 FC 341

[14] At para. 45. Home For Coloured Children is acknowledged for the purposes of these standards as a class action proceeding and not a straight Contingent Fee Agreement proceeding. That said, many of the principles which apply to the calculation and approval of fees in class proceedings also apply, mutatis mutandis, to the calculation and approval of more standard forms of contingent fees. But see also the Decision of the British Columbia Court of Appeal (Per: Newbury, J.A.) in *Mide-Wilson v. Hungerford Tomyn Lawrenson and Nichols*, 2013 BCCA 559 (CanLII). There, Newbury, J.A. was required to consider the application of a Contingency Fee Agreement which would have resulted in fees which were several times greater than those which would have been produced by way of a retainer/fee agreement based on the lawyers' normal hourly rates. Also at issue was the sophistication of the client, her significant wealth (which made it entirely possible for her to pay for the legal services she required on the basis of normal hourly rates) and her specific request of the lawyers that they undertake her representation on contingency. And once again, the Decision in Mide-Wilson is difficult to parse; except

perhaps for some overarching findings which include the integrity and fidelity of the legal profession as a trump on the freedom and sanctity of private contract, the fact that Contingency Fee Agreements are not lottery tickets and cannot be used in the justification of lawyers' fee accounts which are out of proportion with their efforts and the risks they have undertaken and that lawyers' fees must always be capable of fair and reasonable justification. It was on that basis that Newbury, J.A. agreed to the "roll back" to $5Million a fee account which if calculated on the basis of the applicable Contingency Fee Agreement would have been approximately $17Million.

[15] (2000), 180 N.S.R. (2d) 258

[16] [2006] Carswell NS 520, (at paras. 17 and 21)

[17] (1991), 25 A.C.W.S. (3d) 169 (Ont. Assess.O.). See also *Canada Trustco Mortgage Co. v. Homburg*, [1999] N.S.J. No. 382 (N.S.S.C.) and *Miller v. Johnson* (2006), 247 N.S.R. (2d) 297 wherein it was held that: "As a rule, a client should not be expected to pay for the training of young lawyers or students. There is no doubt that such work does give value to the client (and for that the client should expect to pay), but there is equally no doubt that in [the] ordinary course some of the time spent performing the work is composed of false starts, or looking at precedents that will later be known by heart."

[18] [1992] O.J. No. 1113 (Ont. Assess. O)

[19] Section 302.2

LAWYERS' INSURANCE ASSOCIATION OF NOVA SCOTIA

#6 - CLOUD COMPUTING

A lawyer who uses Cloud Computing services for storing, processing, and retrieving client data must provide that reasonable care is taken to ensure that the data is at all times secure and accessible. The service provider and the technology used must support the lawyer's professional obligations, including compliance with the Nova Scotia Barristers' Society's regulatory processes.[1]

NOTES

[1] Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012: rule 3.3-1 "Confidential Information"; rule 3.5-1 "Preservation of Client's Property"; and section 7.1 "Responsibility to the Society and the Profession Generally".

PRACTICE NOTES

Introduction

Cloud Computing, or Software as a Service ("SaaS") has become an integral part of commerce throughout the world, and lawyers stand to gain from these opportunities as much as anyone. On the one hand, the outsourcing of data storage and software management can unburden the practitioner from many of the difficulties of traditional technology solutions by reducing upfront costs, reducing the need to engage in-house expertise and allowing greater ease of use. At the same time, the new technologies raise significant questions about confidentiality and security of client data stored outside of the traditional brick and mortar law firm.

It is fair to say that the question is no longer whether Cloud Computing should be permitted, but what limitations and safeguards are appropriate for lawyers in Nova Scotia.

Development of a Standard

Reference needs to be made to the work done by the Law Society of British Columbia in their Report of the Cloud Computing Working Group. This report is an exhaustive work, particularly on the analysis of the issues facing a Law Society, and while the report may be criticized for being

overly demanding in its recommendations, a summary of the analysis of that work serves as a guide for the type of considerations which lawyers must make in taking reasonable care in the use of Cloud Computing. The following is an example of a succinct statement of responsibility which is typical of what has been accepted, in this case by the Vermont Bar:

Vermont attorneys may use SaaS systems for storing, processing, and retrieving client property, as long as they take reasonable precautions to ensure the property is secure and accessible. The nature of the precautions depends on the circumstances. The ability to engage in Cloud Computing is not limited by the specific location of the remote server, although some of the factors noted above, including choice of law clauses, and concerns about access to data in the event of a service interruption or an emergency, may be implicated by the location of the storage server and the extent of backup service provided by the vendor.

The Law Society of BC report similarly provides for General Due Diligence Guidelines as follows:

Lawyers must ensure that the service provider and technology they use support the lawyer's professional obligations, including compliance with the Law Society's regulatory processes. This may include using contractual language to ensure the service provider will assist the lawyer in complying with Law Society investigations.

Issues

The benefits to be derived from cloud computing are fairly straightforward and it can be assumed that members of the NSBS are using, or will be using such services. If reasonable care or reasonable precaution is the standard to which members should be held in doing so, a clear statement of the main issues is essential.

Jurisdiction

Cloud services by definition involve data storage which is outside of the de facto control of the lawyer responsible for the data. That server could easily be located in a jurisdiction other than the province of Nova Scotia (and likely will be). This brings an inherent risk that the data may not have the same level of legal protection that it would in our jurisdiction. In fact, the data might very well be backed up on servers all over the world, making the task of due diligence regarding security and confidentiality onerous.

The other side of the jurisdictional problem is that foreign governments may have legislative power of search and seizure that will affect the risk of breach of confidentiality. The USA Patriot Act is an example.

The third issue arising in this context is the Law Society's ability to enforce an order for the disclosure of a lawyer's records when those records are stored in another jurisdiction.

Security

When a lawyer entrusts storage of data to a service provider, he or she entrusts the security of that data to that service provider. This delegation of responsibility to a service provider raises questions of both the adequacy of data security at the time of initial storage and whether the level of security is maintained and updated as technology changes.

Records Retention and Management

What happens if the service provider goes bankrupt? Will some form of escrow agreement be sufficient to allow the lawyer to get the records back from a trustee in bankruptcy? And even if the data is retrievable, will it be usable without the software now belonging to the trustee? Will it be retrievable within the time frame required by the Bar Society?

Due Diligence Guidelines

With the cloud computing issues in mind and with a practice standard requiring reasonable care, guidelines such as the following (which have been adapted from the Law Society of BC report of the Cloud Computing Working Group) must be considered:

1. Lawyers are strongly encouraged to read the service provider's terms of service, service level agreement, privacy policy and security policy. Lawyers must ensure the contract of service adequately addresses concerns regarding protecting clients' rights, allows the lawyer to fulfill professional obligations, and provides meaningful remedies. At a minimum consideration should be given to the following:

a) Lawyers must take steps to ensure the confidentiality and privilege of their clients' information is protected. Clear contractual language should be used to accomplish this objective.
b) Lawyers should try to ascertain where the data is stored / hosted. Consider the political and legal risks associated with data storage in foreign jurisdictions. The lawyer must consider whether he or she can comply with Nova Scotia and Federal laws, such as laws governing the collection of personal information, when using third-party service providers.
c) Does the lawyer have the right to approve in advance any transfer of data to another province or country?
d) Who owns the data? Confidentiality and privilege are rights that lie with the client. Lawyers must ensure ownership of their clients' information does not pass to the service provider or a third party.
e) Who at the service provider will have access to the data and will there be different levels of access? Does the service provider screen its employees?
f) What happens if the service provider goes out of business or has their servers seized or destroyed?
g) If there is a data breach, will the lawyer be notified? How are costs for remedying the breach allocated?
h) On what terms can the service provider cut off the lawyer's access to the records? What rights do you have in the event of a billing or similar dispute the provider? Do you have the option of having your data held in escrow by a third party, so that it is fully accessible in the event of a dispute? Alternatively can you backup your data locally so that it is accessible to you should you need it?
i) Will the lawyer have continuous access to the source code and software to retrieve records in a comprehensible form? Consider whether there is a source code escrow agreement to facilitate this.
j) How easily can the lawyer migrate data to another provider, or back to desktop applications?
k) What procedural and substantive laws govern the services? What are the implications of this?
l) Does the service provider archive data for the retention lifecycle the lawyer requires?
m) Are there mechanisms to ensure data that is to be destroyed has been destroyed?

n) What are the lawyer's remedies for the service provider's noncompliance with the terms of service, service level agreement, privacy policy or security policy?
o) Ensure that the service provider supports electronic discovery and forensic investigation. A lawyer may need to comply with regulatory investigations, and the litigation disclosure, in a timely manner. It is essential that the services allow a lawyer to meet these obligations.

2. What is the service provider's reputation? This essentially requires the lawyer to assess the business risk of entrusting records to the service provider. Lawyers should seek out top-quality service providers.
3. What is the service provider's business structure? Lawyers must understand what sort of entity they are contracting with as this affects risk.
4. Does the service provider sell its customer information or otherwise try and commoditize the data stored on its own servers?
5. Lawyers should strive to keep abreast of changes in technology that might affect the initial assessment of whether a service is acceptable. Services, and service providers, may become more or less acceptable in light of technological and business changes.
6. What security measures does the service provider use to protect data, and is there a means to audit the effectiveness of these measures? How good are the provider's backup policies and procedures?
7. A lawyer should compare the cloud services with existing and alternative services to best determine whether the services are appropriate.
8. If using a service provider puts the lawyer offside a legal obligation, the lawyer should not use the service. For example, there may be legislative requirements for how certain information is stored/secured.
9. Lawyers should establish a record management system, and document their decisions with respect to choosing a cloud provider. Documenting due diligence decisions may provide important evidence if something goes wrong down the road.
10. Consider the potential benefits of a private cloud for mission critical and sensitive data, along with information that may need to be stored within the jurisdiction.

This is an extensive list of steps to be taken in considering the retention of a service provider and, if one is shopping, the due diligence is multiplied by the number of potential suppliers being considered. Any such list can only serve as a guide as additional questions may be appropriate given the facts of a particular situation. Finally, reasonable care with respect to the use of technology will be subject to change at a rate linked to the change in the technology itself.

ADDITIONAL RESOURCES

Cloud Computing resources - LIANS
Record Retention Standard - LIANS
Maintenance and Back up of Electronic Data Standard - LIANS
Cloud Computing Checklist, Law Society of British Columbia
Cloud Computing Due Diligence Guidelines, Law Society of British Columbia
Report of the Cloud Computing Working Group, Law Society of British Columbia, January 27, 2012
Technology Practice Management Guideline, Law Society of Upper Canada

LSBC, Sample internet and email use policy
PracticePro, Managing the security and privacy of electronic data in a law office
PracticePro, Backup best practices and strategies
Government of Canada, Get Cyber Safe (resources) – including Get Cyber Safe Guide for Small and Medium Businesses (see Appendix A: Cyber Security Status Self-Assessment)
LIANS, Data protection
Law Society of Alberta, Computer/Network Security Checklist
Data Security Policy, Lawyers Mutual

Approved by Council on June 13, 2015

LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

#7 - LIMITED SCOPE RETAINERS

STANDARD

A lawyer who enters into a limited scope retainer with a client must confirm the nature, extent, and scope of the retainer with the client in writing, including the proposed fee.[1]

NOTE

1. Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax; Nova Scotia Barristers' Society, 2012, ch 3-7.1A. (Note: this Standard is not intended to apply to short-term summary legal services, as defined in ch. 3-4.2A)

ADDITIONAL COMMENTARY

A limited scope retainer means the provision of legal services for part, but not all, of a client's legal matter by agreement with the client.[1] This is also sometimes known as de-bundling of legal services.

In considering whether, and how, to render services under a limited scope retainer, the lawyer should consider the factors relevant to the retainer, which may include such things as:

(a) The nature and urgency of the legal work sought by the client;
(b) The nature of the decision maker (such as a Court, Tribunal, Arbitrator or Mediator)
(c) The status and particulars of any adverse or related party, including whether there is other Counsel involved
(d) The nature and importance of the problem at issue;
(e) The availability of alternate resources to the client;
(f) The scope of what a normal full-service retainer would involve, and the extent to

which the client seeks to "de-bundle" the engagement from that full-service retainer;
(g) Whether, and to what extent, other counsel or professionals are involved in rendering other services to the client;
(h) The lawyer's ability to engage in the limited scope retainer without negatively affecting the client's legal rights or overall position in the matter or transaction;
(i) The expectations, sophistication and means of the client, and any disability of the client;
(j) Any pertinent orders or directions by competent authorities, such as Courts and tribunals;
(k) The stage of development of the matter under consideration;
(l) Real or potential conflicts of interest;
(m) The competence of the lawyer to handle the scope of the matter under consideration;
(n) Relevant substantive law, including the Code of Professional Conduct, applicable professional standards, duties to the Court and other counsel, and whether there are matters out of which the lawyer and client cannot contract.[2]

PRACTICE NOTES

Introduction

Limited Scope Retainers ("LSRs") have existed for many years. Lawyers have acted as local agents for other counsel, or have been seconded for specialty work or specific projects, without difficulty, for decades. It is only in recent years, however, that the formal "de-bundling" of legal services has become an issue for lawyers and clients alike. This commentary sets forth some best practices as well as pitfalls to avoid when considering LSRs.

The NSBS' *Code of Professional Conduct* defines an LSR as "the provision of legal services for part, but not all, of a client's legal matter by agreement with the client".[3] There are many variations, but can broadly be broken down into consultation, document preparation, and limited representation. Some examples may include:

- The litigator who is retained to draft, or review, a brief, pleadings or documents but not be on the record ("ghostwriting"[4]);
- An engagement to examine a witness either in chief or on cross examination[5], or to appear on an application, arraignment, bail hearing, sentencing, or other discrete step in a proceeding, but not otherwise be on the record
- Advice on a specialized aspect of a transaction, such as tax implications or regulatory implications
- Advice on the desirability of a proposed settlement or transaction, including independent legal advice on an agreement
- An engagement to draft a Deed or convey a property but not otherwise be engaged in

the handling of funds or to advise on the advisability or impact of the transaction[6]
Attestation or witnessing (particularly, to notarize or attest the execution as a barrister/commissioner) a document but without advice on its nature or effect
Initial or limited consultation on a matter, such as to determine one's legal rights or merits of a position, or on a technical issue or step in a matter
Providing technical or logistical assistance to a self-represented party, such as document assembly, electronic discovery, and the like

While the nature and scope of LSRs will vary enormously by client and subject matter, they may broadly be categorized into four types:

1. Those which are both permitted and are desirable both from the perspective of the specific engagement at hand, and from the broader objectives of access to justice and achieving the desired client outcome;
2. Those which are permitted and while perfectly in order as between lawyer and client, require a careful and prudent understanding of the scope of the engagement and on what payment terms;
3. Those which, while permitted, should be reviewed with circumspection and, if entered into, must be carefully qualified in detail and in writing; and
4. Those which, while perhaps sought and desired by the client, must be refused on legal and ethical grounds.

The Ethical Framework

As with any engagement, the *Code of Professional Conduct* is the ultimate guide to the governing principles. It is important to remember that the fact a proposed retainer is for "less than full" services does not relieve the lawyer from all of the same ethical obligations as with any other engagement, including

Competence
Candour
Compliance with all relevant directions such as Court orders
Compliance with mandatory professional standards enacted by the Society (such as those applicable to Real Estate or Family Lawyers)
Confidentiality
Conflicts of interest
Clarity on the scope and nature of the retainer.

The *Code* also sets out, in some detail, additional rules pertaining to LSRs. After defining an LSR in 1.1-1(i) as " the provision of legal services for part, but not all, of a client's legal

matter by agreement with the client", the *Code* sets out specific rules in sections 3.1-2, 3.1-2A, 7.1., and 7.2-6A.

Why LSRs?

Although this Standard and commentary attempts to point out limitations and pitfalls to LSRs, both conventional and otherwise, they have a significant role in appropriate cases particularly, but not limited to, the litigation context. The advent of the internet, the explosion of self-represented litigants, the increased use of alternate-dispute resolution mechanisms, and the heavy call upon Court and other resources have increased the number and scope of situations in which LSRs can be appropriate and ethical alternatives to full service lawyer client retainer agreements. In addition, society as a whole has an increased awareness of the problem with Access to Justice issues to many individuals and groups.[7] Experience has shown that "some representation is better than no representation."[8]

For the client of no or limited means, LSRs can ensure access to professional advice of the greatest "utility for the dollar," which in turn can alert them to theretofore unknown issues or pitfalls; turn them towards or away from a course of action; discourage frivolous or prolix activity; save Court time; and, as studies suggest, result in increased client satisfaction[9] and, for the lawyer, an increased rate of recovery on fees billed.[10]

In "Limited Scope Legal Services: Unbundling and the Self-Help Client",[11] the ABA identified varied reasons, not all of them economic, that the public may seek an LSR:

1. They like to control their legal matters and have DIY personalities.
2. They cannot afford to pay for full legal representation.
3. They want the flexibility and convenience that unbundling may give them.
4. They would benefit from alternative fee arrangements, such as the fixed fees and value billing that can accompany unbundled services.
5. They are less intimidated with limited interaction with lawyers than they would be in traditional, full-service law firms or they may be more comfortable with online DIY services using the Internet to communicate and accomplish their business needs rather than making appointments at traditional law offices.
6. They live in remote areas or for other reasons do not have the means to travel to larger cities to visit physical law offices multiple times as often is required in full-service representation.[12]

The Scope and Billing of the LSR

(A) The Retainer

It is important in any engagement to define the scope of the retainer, including events of termination or deemed termination, in writing. This "best practice" becomes critical, and in

fact mandatory, in an LSR.

While the exact nature of the engagement will depend on the specific topic and the particular solicitor-client relationship, an LSR retainer agreement, signed by all parties, should at a minimum include:

(a) A statement that it is an LSR and that the lawyer is not engaging in nor advising upon matters beyond the scope of the LSR;
(b) A detailed description of exactly what the lawyer is retained to do;
(c) The fact that there are other issues upon which the client can, and should, obtain independent legal advice or representation, as the case may be;
(d) Who is in charge of filing documents, if applicable, and how disbursements are treated;
(e) Any applicable limitation period, or that advice is not being given on them;
(f) The circumstances in which the engagement is completed, or terminated, or in which the lawyer is entitled to withdraw or is deemed to have been discharged.[13] This may, for example include situations in which the lawyer is engaged for what is expected to be a default or uncontested proceeding though it is in fact opposed.[14] It can and should also contain provisions that the lawyer is discharged or entitled to withdraw where the client does not accept the lawyer's advice.[15]
(g) How fees are to be calculated, and when they are to be paid;[16]
(h) Any disclosure required given the fiduciary nature of the solicitor-client relationship;
(i) Subject to any rules or practice of Court, when the lawyer is to appear on the Record, a direction to disclose to the Court the scope and limit of that engagement;
(j) Provisions for expansion, if such is to be the case, of the LSR.[17]

Lawyers, both from a business and liability perspective, should beware of potential "retainer creep".[18] The lawyer who is asked to "answer a quick question" about a matter outside the scope of the agreed-upon retainer not only risks expanding the business scope of the representation (either with or without compensation) but runs the substantial risk of actionable negligence in the event of an incomplete or inaccurate answer.[19] Preserving the "four corners" of the LSR also engenders respect for the solicitor-client relationship and the value of the legal services engaged and agreed to be paid for.[20]

The lawyer who does not take care in the retainer clearly to specify what is and is not within the scope of the engagement will likely have any ambiguity construed against the lawyer.[21]

The lawyer should also be especially careful to document what information and documents are provided by the client, particularly if the subject of the LSR is either "midstream" or conclusive to the matter at hand. For example, the lawyer who is called upon to give a recommendation on a proposed settlement and who is provided with only part of the file is not in a position to provide a competent evaluation on the merits.

The LIANS website, as well as resource materials referred to in the bibliography, contain several useful checklists; in particular, the "who does what" treatment of steps in a

transaction or proceeding is useful in removing ambiguity or later disagreement.[22]

(B) Fees and Billing the LSR Client

The general law applicable to solicitor-client fees apply to LSRs.[23]

It is perhaps more common to engage in fixed-fee, paid-in-advance fee arrangements with LSRs than in other engagements on similar topics, in which the time spent or skills called upon are less predictable.[24] This can not only provide certainty to the client who is seeking justice at a predicable cost, but marketing opportunities for the firm.

(C) Non-Waivable Aspects of the LSRs

As noted above, a lawyer cannot contract out of the *Code* or applicable Professional Standards.

Not every fact situation will lend itself to an LSR, despite perhaps the wishes of the potential client. Serious or complicated matters may require full and traditional legal services, or be of such a nature that the mandatory scope of the representation makes an LSR either inadvisable or downright impracticable.[25]

In the case of a client under disability, it may not be possible to limit, or obtain informed consent to limit, the scope of the representation.[26]

Marketing LSRs

The growing market for LSRs provides both opportunities and pitfalls in marketing those potential services.[27]

As always, the substantive law, including the Code, applies to marketing legal services. Specifically, lawyers should pay particular attention to advertising fees (they bind the lawyer and the firm) and the prohibition upon modifiers such as “simple,” “and up,” and the like.[28]

If using a website or interactive online presence, the lawyer should distinguish between information and advice; in the event of the latter, the same substantive law applies as in face-to-face situations.[29]

ENDNOTES

[1] NSBS *Code of Professional Conduct*, 1.1-1(i)

[2] The Office of the Syndic of the Barreau du Quebec puts it succinctly: “The [office] also wishes to underline that a lawyer cannot contractually limit the scope of his/her ethical obligations, either toward the client or anyone else.” Barreau de Montreal, "A Lawyer’s

Guide to Limited Scope Representation" (p.2)

[3] *Code*, 1.1-1(i)

[4] As set out throughout this commentary, the LSR does not change the substantive law applicable to the solicitor-client relationship or the lawyer's ethical obligations. While much has been written in other jurisdictions about the ethics of ghostwriting and the level of disclosure required, there appears to be no specific Canadian prohibitions or restrictions on ghostwriting that would not apply to documents issued over the lawyer's own signature. In other words, if a lawyer shouldn't issue an instrument with their signature attached or take a course of action under their own name, they should not write it, or counsel a position or strategy for issuance under someone else's.

[5] For example, under s. 486.3 of the *Criminal Code*, there are situations in which a self-represented litigant cannot cross-examine a witness.

[6] As of writing, Real Estate Standards is working on, but has not yet issued, a specific standard on this point. That standard will prevail to the extent of any inconsistency.

[7] Nothing in this Standard or commentary precludes appropriate "pro bono" retainers, either on a full service or permitted LSR basis.

[8] See for example, "Limited Representation Committee of the California Commission on Access to Justice, Report on Limited Scope Legal Assistance with Initial Recommendations" (October 2001), pp. 10-11. As cited in American Bar Association, "Handbook on Limited Scope Legal Assistance" (2003, American Bar Association), p. 144 (hereinafter "ABA Report"): "[w]e agree with a number of judges who conclude that 'it is usually very clear' to a trial judge 'when a litigant has received some legal assistance,' and it is better that 'litigants receive some help, rather than none.'"

[9] See, for example, Macfarlane, Dr. Julie, "Getting the Public and the Profession on the Same Page About Unbundled Legal Services" in CBA Alberta's "The Limited Scope Retainer" report (p. 20 at 22).

[10] Howe, III, William J. "Unbundling Legal Services: A Part of the Oregon Task Force On Family Law Reform Package", OR. ST. BAR BULL., Jan. 1997, cited in ABA Report, p. 132

[11] Kimbro, Stephanie L., "Limited Scope Legal Services: Unbundling and the Self-Help Client" ABA 2013; hereinafter "Limited Scope Legal Services"

[12] Limited Scope Legal Services, supra, p. 10

[13] In certain circumstances, it may be appropriate to include this as a separate document, so as to enable its filing with a Court or applicable third parties without disclosing more information than necessary.

[14] In particular, see LIANS' Family Law Standard #11: Scope of Representation.

[15] As with general-representation situations, a distinction must be made between instructions which the lawyer cannot accept for substantive reasons, and those which, after informed consent (in writing), the client elects upon a course of conduct or instructions to counsel which is permissible but not recommended by the lawyer. As by definition a lawyer in an LSR is not handling all aspects of the matter, this is an area especially prone to error. You should also include a statement if you have recommended being retained for a particular aspect or service and the client has declined to do so.

[16] You may also wish to set out "how much of funds received relate to different kinds of work, in case the client may go bankrupt during work on the file." – see discussion of bankruptcy issues in LIANS' Family Law Standards #11: Scope of Representation

[17] For sample checklists and forms, see LIANS' Limited Scope Retainer Resources

[18] Although there is no concrete evidence that LSRs have given rise to increased claims or insurance payouts (see Macfarlane, "Listening to the Public", and indeed some evidence to the contrary (see ABA report, p. 75 et seq.), the very nature of the LSR calls for increased vigilance in ensuring that the lawyer and client are, at all times, on the same page in what the client believes the lawyer is responsible for, and what the lawyer in fact is undertaking to do. See also ABA Report, p. 56.

[19] In *Poulain v. Iannetti*, 2015 NSSC 181, a solicitor in a personal injury case was held liable for negligent advice pertaining to a Section B settlement. Although the Court found that the defendant lawyer was NOT retained to handle the Section B claim, he was nevertheless liable in negligence once he had undertaken to give advice pertaining to it.

In "Unbundled Legal Services: Pitfalls to Avoid" (2012: LawPro Magazine, 11:1, pp 7-8, Dan Pinnington lists the following as items to keep in mind in reducing exposure to claims in an LSR:

> Limited scope representation does not mean less competent or lower quality legal services
> Identify the discrete collection of tasks that can be undertaken on a competent basis
> Confirm the scope of the limited retainer in writing
> Clearly document work and communications
> Be careful with communications when opposing counsel is acting on an unbundled basis
> Recognize that unbundled legal services are not appropriate for all lawyers, all clients, or all legal problems
> Be careful providing further assistance to a client after a limited scope retainer is terminated

[20] Gallagher, Edward: "Limited Scope Retainers in a Small Practice", [CBA paper, hereinafter "CBA Report"], p. 29 at 31.

[21] *Trillium Motor World v. General Motors of Canada,* 2015 ONSC 3824, involved a multi-million dollar claim relating to advice giving to dealers whose GM franchises were being terminated. While currently (2015) on appeal, the decision focuses at para. 462 et seq. on the importance for the scope of the retainer to be defined clearly. At Para. 469-70, the Court stated:

[469] Where a retainer clearly limits the scope of legal services to be provided, a client generally cannot, at a later stage, criticize the lawyer for failing to perform services that fall outside the scope of the retainer.

[470] On the other hand, where a retainer has not been reduced to writing, a heavy onus is on the lawyer to show that its version of the scope of the retainer is correct: Griffiths v. Evans, [1953] 2 All E.R. 1364, [1953] 1 W.L.R. 1424 (C.A.); Rye and Partners v. 1041977 Ontario Inc., [2002] O.J. No. 4518 (S.C.). This is especially true in cases involving ambiguity as to the scope of the retainer. As Justice Hoilett stated in Coughlin v. Comery, [1996] O.J. No. 822 at para. 34 (Gen. Div.), aff'd [1998] O.J. No. 4066 (C.A.), leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 597:
…the onus is on the solicitor who seeks to limit the scope of his/her retainer and where there is ambiguity or doubt it will, generally, be resolved in favour of the client.

[22] Footnote 16, supra.

[23] See also Law Office Management Standard #5: Retainer and Billing

[24] See Limited Scope Legal Services, *supra*, Chapter 4.

[25] For a discussion of this in the Real Property context, see Winter, Cumming, et al "All I Want is A Deed" (RELANS conference, December 2, 2013), as well as articles in LIANSwers November 2012 and November 2013. A specific Real Estate Practice standard is in development on the topic. In a litigation context, a serious criminal charge may render "partial representation" nugatory and perhaps be open to challenge on the basis of inadequate or ineffective counsel.

[26] See *Code* 3.2-9: "When a client's ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as reasonably possible, maintain a normal lawyer and client relationship."

[27] See: Harvie, Robert: "Why Me, Why Now?" in CBA Report, p. 6; ABA Report, Chapter 8.

[28] Regulation 7.6.6 under the *Legal Profession Act*.

[29] Such as the client identification rules and rules on conflicts of interest.

ADDITIONAL RESOURCES

Lawyers' Insurance Association of Nova Scotia: Limited Scope Agreement Templates

Lawyers' Insurance Association of Nova Scotia, Family Law Professional Standard #11: Scope of Representation

Canadian Bar Association, Alberta Branch "The Limited Scope Retainer"

Pinnington, Dan: "Unbundled Legal Services: Pitfalls to Avoid" *LawPro Magazine*, 11:1 January 2012, p. 6

Barreau de Montreal "A Lawyer's Guide to Limited Scope Representation" (2011)

Eaton, J. Timothy and Holtermann, David: "Limited Scope Representation is Here" 2010 CBA Record 37

American Bar Association: "Handbook on Limited Scope Legal Assistance" 2003

Lawyer's Insurance Association of Nova Scotia, Real Property Standard 4.5: Limited Scope Retainers

LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

#8 - EQUITY AND DIVERSITY

STANDARD

A lawyer and law firm must treat all persons in a manner consistent with best practices in human rights law and the *Code of Professional Conduct*, and have a proportionate and principled written policy with regards to such practices.[1]

These best practices include management and conduct of the practice of the lawyer or law firm that respects equity and diversity.[2]

In considering policies selected for these best practices, in the context of the particular lawyer or law firm, the lawyer or law firm shall consider all relevant factors to that lawyer or law firm including:

(a) the development of fair and unbiased criteria in the recruitment, selection, and retention of clerks, lawyers,
and staff;

(b) management policies appropriate for the lawyer or law firm including anti-harassment, anti-discrimination,
parental leave, accommodations for persons with disabilities, cultural competence, and

(c) a meaningful process to enforce such policies.[3]

FOOTNOTES

[1] *Human Rights Act*, RSNS 1989, c 214, s. 3. *Employment Equity Act*, SC 1995, c 44. Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012, section 6.3 and 3.1; consider element #9 of the *Management System for Ethical Legal*

Practice.

[2] Nova Scotia Barristers' Society: Vision and Values

[3] *Shah v. George Brown College*, 2009 HRTO 920 (CanLII) [Ont. Human Rights Tribunal]

ADDITIONAL RESOURCES

Templates

Model Policy: Workplace Equality (July 2007) Law Society of British Columbia
Model Equity Policies for Law Firms, Law Society of Alberta
Guidelines for Drafting and Implementing a Diversity and Equality Policy in Legal Workplaces & Sample Diversity and Equality Policy, (February 2005) Law Society of Alberta
Guide to Developing a Policy Regarding Workplace Equity in Law Firms, (March 2003) Law Society of Upper Canada
Equity: Model Policies, Law Society of Manitoba
Equity Model Policies, Publications & Reports, Law Society of Upper Canada

Documents

Abella, Rosalie Silberman (October 1984) Report of the Commission on Equality in Employment

Babiuk, Buchert, Chiekwe & Hong (November 2014) "Cultural Competency and Diversity in the Nova Scotia Legal Profession: Final Summary Report"

Brown, Jennifer (September 20, 2013) "Survey of lawyers to examine experience of sexual minorities in profession", Legal Feeds

Dumke, Kathryn and Kevin Hong (July 2015) Equity and Diversity in Legal Practice.

Morse, Gail H. (July 2009) "Is It Time for a LGBT Call to Action?", Embracing Diversity: Tort Trial & Insurance Practice Section of the American Bar Association's Diversity Newsletter

Rouse, Hanna N. (18 November 2010) "Lawyers Discuss LGBT Barriers", The Harvard Crimson

Addressing Discriminatory Barriers Facing Aboriginal Law Students and Lawyers (April 2000) Aboriginal Law Graduates Working Group, Law Society of British Columbia.

BLAC Report on Education: Redressing Inequity - Empowering Black Learners (1994) Black Learners Advisory Committee (BLAC)

Challenges Facing Racialized Licensees: Final Report (March 11, 2014) Law Society of Upper Canada

Employment Equity in the Legal Profession in Nova Scotia (2012) Nova Scotia Barristers' Society

Employment Equity within the NSBS Membership (September 2014) R.A. Malatest & Associates Ltd.

Equality and Diversity (November 2014) Solicitors Regulation Authority

Equality and Diversity Requirements: SRA Handbook (July 2012) Solicitors Regulation Authority

Equality and Diversity Rules of the BSB Handbook (September 2012) Bar Standards Board

Equality in Employment: A Royal Commission Report. General Summary; Published in Canadian Woman Studies (1984) Vol. 6, no. 4, p 5-7.

Equity portal: Developing an equity strategy in your legal workplace, Nova Scotia Barristers' Society

Executive Summary: Retention of Women in Private Practice Working Group (May 2008) Law Society of Upper Canada

Final Report: Aboriginal Bar Consultation (January 29, 2009) Equity Initiatives Department, Law Society of Upper Canada

Fostering Employment Equity and Diversity in the Nova Scotia Legal Profession (August 2000) Employment Equity Guidelines Committee: Nova Scotia Barristers' Society

"Kirby says gay lawyers still face discrimination" (24 June 2010) Lawyers Weekly

Lawyers with Disabilities: Overcoming Barriers to Equality (2004) Disability Research Working Group, Law Society of British Columbia

Our Equality and Diversity Strategy 2014-2017, Law Society of Scotland

Practicing Law: Minority Groups: Final Report (June 2008) Race Relations Committee: Nova Scotia Barristers' Society

Reasonable Accomodation Checklist: Developing a Policy, Manitoba Human Rights Commission

Royal Commission on the Donald Marshall, Jr., Prosecution: digest of finding and recommendations Nova Scotia. Royal Commission on the Donald Marshall, Jr., Prosecution, December 1989

Touchstones for Change : Equality, Diversity and Accountability (1993) Task Force on Gender Equality in the Legal Profession: Canadian Bar Association

Case Law

Andrews v. Law Society of British Columbia, [1989] 1 SCR 143, 1989 CanLII 2 (SCC)

Cardinal v. Douglas College and another, 2013 BCHRT 64 (CanLII)

E.J. v. Catholic Children's Aid Society of Toronto, 2014 ONSC 3277 (CanLII)

Gichuru v. The Law Society of British Columbia (No. 9), 2011 BCHRT 185 (CanLII)

Johal v. Dhesi, 2012 BCSC 550 (CanLII)

Law Society of Upper Canada v. Terence John Robinson, 2013 ONLSAP 18 (CanLII)

Moore v. British Columbia (Education), [2012] 3 SCR 360, 2012 SCC 61 (CanLII)

R. v. Armitage, 2015 ONCJ 64 (CanLII)

R. v. Fraser, 2011 NSCA 70 (CanLII)

R. v. Gladue, [1999] 1 SCR 688, 1999 CanLII 679 (SCC)

R. v. Kapp, [2008] 2 SCR 483, 2008 SCC 41 (CanLII)

R. v. Kennedy, 2013 ONSC 6419 (CanLII)

R. v. S. (R.D.), [1997] 3 SCR 484, 1997 CanLII 324 (SCC)

R. v. Spence, [2005] 3 SCR 458, 2005 SCC 71 (CanLII)

R. v. Twoyoungmen, 1998 ABPC 135 (CanLII)

R. v. "X", 2014 NSPC 95 (CanLII)

LAWYERS' INSURANCE ASSOCIATION OF NOVA SCOTIA

#9 - SUCCESSION PLANNING

STANDARD

1. A lawyer must have a written and accessible plan to protect clients and client property[1] in the event of the cessation of the lawyer's practice.[2]
2. A law firm must have a written and accessible plan that includes the practices of all lawyers in the firm, and should contemplate the practices of all lawyers in the firm ceasing simultaneously.[3]
3. A lawyer or law firm must review annually its succession plan and update it as appropriate.[4]
4. A lawyer or law firm must include in their succession plan information and adequate arrangements to allow for the handling of clients and management of the practice[5] with minimal interruption[6].

NOTES

1. See generally Rule 3.5 (Preservation of Client's Property) of the Nova Scotia Barristers' Society, *Code of Professional Conduct,* Halifax: Nova Scotia Barristers' Society, 2012 ("the Code"). These duties are closely related to and should be read in conjunction with Rule 3.3 of the Code addressing confidential information.
2. Subregulations 4.6.1, 4.6.2, and 4.6.5 of the Regulations made pursuant to the *Legal Profession Act*, S.N.S 2004, c.28
3. Subregulations 4.6.4
4. Subregulation 4.6.4
5. Subregulation 4.6.6
6. Rule 3.7 of the Code outlines lawyer's duties relating to withdrawal from representation. While this Rule generally does not contemplate those circumstances where a succession plan might be effected – i.e. death, illness, disaster / unforeseen business interruption – the duties

outlined in Rule 3.7-8 (Manner of Withdrawal), speaking to minimizing client expense and avoiding prejudice, are relevant to both the practice successor and succeeding lawyer.

PRACTICE NOTES

Introduction

Clients can be seriously inconvenienced or prejudiced if a lawyer or firm fails to have an adequate succession plan in place that contemplates all possible scenarios in which a law practice may cease to operate (e.g. death, temporary and long term illness, unforeseen business interruption). In addition, there are significant costs to the Society when lawyers leave behind paper files and trust funds with no successor in place.

The Society is taking multi-pronged approach to encouraging and supporting all practices to have functional succession plans:

- Succession plans are now required under the Regulations (pursuant to the *Legal Profession Act*).
- The Society's Legal Services Support (LSS) team delivers succession planning workshops and works with members, including meeting with individual firms.
- LSS has developed supportive materials (see 'Additional Resources') including a Guide, a template succession plan, a template file retention/destruction plan, and a succession checklist.
- Firms will reflect on succession planning when they complete their triannual self-assessment of their Management System for Ethical Legal Practice ("MSELP").
- When new firms register with the Society, they discuss succession planning with the LSS team.
- The Society has identified a number of possible ways to make succession easier and continues looking for and working on solutions.
- The Society's Trust Assurance team works with firms that report old balances to offer advice and encourage resolution.
- The Trust Account Working Group is exploring how lawyers can best transfer responsibility for their trust accounts at the time succession is needed.

Development of Practice Standard

The Standard reflects the minimum requirements laid out in Regulation 4.6 (pursuant to the *Legal Profession Act*). It goes further, in providing guidance on particular issues for consideration when developing succession plans and presenting practice resources and support to assist in the process.

The Standard recognizes that each lawyer's and firm's succession plan should reflect their unique practice circumstances.

Issues for Consideration

Circumstances and Outcomes of Practice Cessation

Cessation of a lawyer's practice can follow from a number of circumstances including:

temporary disability or incapacity;
long term disability or incapacity;
death;
unforeseen disaster (ie hurricane, flood).

Each of these scenarios should be contemplated by lawyers and firms when developing their succession plans.

The NSBS-LSS Succession Planning Guide suggests considering, too, the three basic outcomes for your practice at retirement, disability or death:

1. Practice wind-up
2. Practice transfer
3. Practice stays 'intact' and the existing firm takes responsibility.

In addition to the requirement for each lawyer to have a succession plan, law firms are also required to have a plan that includes the practices of all lawyers in the firm. In many firms, other lawyers in the firm act as natural practice successors for one another. This might not be the cases where, for example, practice expertise varies among the lawyers in a firm.

For firms of all sizes, it is important to cover succession planning in partnership agreements. Firms should include a plan for what happens in the event of a dissolution, particularly the process to follow for dealing with open client files and trust monies.

In the case of smaller practices, the firm's succession plan must contemplate the unlikely scenario of the practices of all lawyers in the firm ceasing simultaneously.

In the case of a disaster or unforeseen circumstances that prevent entry to a physical workspace, having the firm's files stored online and accessible – together with accessible office systems (telephones, email, etc.) means you can continue practising with minimal interruption.

Note that retirement preparation and succession planning for an emergency are closely linked. The regulatory requirements for succession planning are similar to those for a lawyer changing their practicing membership category to retired, or for resigning ones membership from the Society. (See Application for change of category from non-practising to retired and Application for change of category from practising to resigned)

Succession Models

When planning your practice succession, a good place to start is considering the various models:

1. Internal: A traditional model for succession in small and sole practices is to recruit a new lawyer or clerk to take over. Increasingly, lawyers find it is difficult to attract someone who will stay long term. Firms of more than one lawyer often rely on other lawyers in the practice, especially where practice expertise aligns.
2. Sale: Another traditional approach is to arrange the sale of your practice in advance of retiring. This works best if you have unique goodwill that is transferrable and if your practice is 'clean,' including having paper and trust accounts in good order.
3. Merger: Increasingly, sole practitioners and small firms join another firm before getting to the point where a successor is needed. Some continue to operate out of their existing offices as a satellite of the merged firm. This can be a way to reduce management responsibilities and allow you to approach retirement gradually.
4. Successorship: Here, a lawyer-successor comes in at the point you are unable to practice, attends to your responsibilities and either keeps or distributes your files. Sometimes, a sale of all or part of the practice is possible, best arranged in advance.
5. Stewardship: where the responsibilities are simple enough, some lawyers prefer to use a non-lawyer (e.g. spouse, office manager…) to do most of the work to wind up their practice and then to look after file retention/destruction. A lawyer is still needed to supervise in these circumstances.

Costs and Proceeds of Succession

There are different ways to cover costs and obtain payment for you or your estate (in the event of sale):

1. Insurance is recommended if it is an option for you, even if you expect money to come in from your practice over time. If you plan to cover the costs at death or disability with insurance, you can look after your succession costs, debt and perhaps have a surplus for your estate. For example, a life insurance policy payable to your successor or firm plus an agreement to pay the balance to a beneficiary can give you peace of mind.
2. Sale: you worked out a price or valuation formula for your practice, including any transferable goodwill. You have a contract, which could be a partnership agreement or otherwise.
3. Balance after succession accomplished: your practice at succession may have receivables, WIP that can be billed, owned equipment that can be sold and surplus cash in your general account. In some instances, all or part of the practice *might* be saleable, but that's hard to do if you are not around to help with the transition. You may also have obligations: payables, accounting costs especially if you have a trust account, staff obligations, taxes etc.
4. Negative payment: you plan for your estate to pay for succession.

'Adequate Arrangements' and Assigning Responsibilities

When considering adequate arrangements to allow for the handling of clients and management of the practice, subregulation 4.6.6 points to the following specific considerations:

(a) open and closed files;

(b) wills and wills indices;

(c) foundation documents and other important records;

(d) other valuable property;

(e) passwords and the means to access computers, email, accounting and other electronic records;

(f) trust accounts and trust funds;

(g) other accounts related to the member's practice; and

(h) any other arrangements necessary to carry on or wind up the lawyer's unique practice.

Not all of these might be relevant to a particular lawyer's practice. Equally, 'any other arrangements necessary' falls to the professional judgment and discretion of the lawyer in fulfilling their obligations.

Equally important is identifying the key players in your succession (ie Executor/Trustee/POA, lawyer successor or supervisor) and ensuring that each is aware of what they are agreeing to. You should be confident they will be of sufficient capacity to do the job when the time might come. If circumstances change and this is not the case, new arrangements should be made.

Each of these considerations is discussed in more detail in the NSBS-LSS Succession Planning Guide.

Preparing for Succession – File Retention and Old Trust Balances

The biggest consideration – regardless of whether you want to sell, retire, or simply prepare for contingencies – is how to make your practice more appealing to others. This means considering how you retain files (ie electronic versus paper storage) and addressing lingering obligations like open files, foundation documents, and old trust balances.

With the advent of privacy laws and changes in attitude toward paper, lawyers have to rethink their file retention/destruction practices. The reason we keep closed files is to defend against liability claims or professional responsibility complaints. Beyond that, lawyers are not archivists. Storage for other reasons, or for longer than reasonably necessary, is problematic, whether your files are paper or electronic.

See Law Office Management Practice Standard #1 – Record Retention, for details on lawyers' file retention and destruction obligations.

The Society has additional resources to help and LSS team can offer guidance. See the NSBS-LSS Succession Planning Guide, File Retention/Destruction Plan Template, and Targeted Paper Reduction Guide, in particular.

Another way to prepare is to clean up old trust account balances by working through them systematically. To start, eliminate 3+ yr old balances. Then tackle your 2+ yr old balances; then your 1+ yr old balances.

If necessary, take advantage of the periodic applications the Society makes respecting undistributed trust funds.

You can contact the Society's Trust Assurance team at 902 422 1491 or at trustaccounts@nsbs.org if you would like support, or simply have questions, about trust account issues including old balances.

ADDITIONAL RESOURCES

NSBS-LSS: Succession Planning Guide

NSBS-LSS: File Retention/Destruction Plan Template

NSBS-LSS: Succession Plan Sample

NSBS-LSS: Succession Checklist

NSBS-LSS: Sample Succession Plan for Simple Situations

NSBS-LSS: Targeted Paper Reduction Plan Guide

LIANS has useful links and precedents on succession-related issues.

The Law Society of BC, Law Society of Alberta, and Law Society of Ontario all have sections on their websites devoted to succession, including precedents you might choose to adapt. Beware that the law and practice can be different: Ontario, for example, allows testators to have two wills.

Connect with NSBS' Legal Services Support team at 902-422-1491 or LSS@nsbs.org to discuss your succession planning.