The Law Society of British Columbia

Agenda

Act and Rules Committee

Date: Thursday, October 24, 2019
Time: **11:00 AM** [lunch provided]
Location: **Room 910 – note room**

1	September 26, 2019 meeting notes	pg. 3
2	Rule 3-99 and 3-107 – Client Identification and Verification	
	• Memo from Mr. Hoskins, Rules 3-99 and 3-107 – Client identification and verification", October 17, 2019	pg. 5
	• Draft – redlined	pg. 7
3	Rule 3-39 et al - Compulsory Prof. Liability Insurance	
	• Memo from Mr. Hoskins, "Rule amendments to implement *Legal Profession Act* amendments concerning insurance and indemnity provisions", October 16, 2019	pg. 8
	• *Attorney General Statutes Amendment Act*, 2018, Part 4, LPA Amendments	pg. 9
	• *Legal Profession Act*, Part 2 – with insurance indemnities 2018 – redlined	pg. 13
	• *Legal Profession Act*, Part 2 – with insurance indemnities 2018 – clean	pg. 18
	• Draft – redlined	pg. 23
	• Draft - clean	pg. 32
4	Rule 3-55 – Fiduciary Property	
	• Memo from Mr. Hoskins, "Rule 3-55 – Fiduciary property", October 17, 2019	pg. 41
	• Report from Executive Committee to Benchers, "Proposed Rule Amendments: Fiduciary Property (Rule 3-55), July 15, 2019	pg. 42
	• Draft – redlined	pg. 50
	• Draft - clean	pg. 51
5	Rule 3-3 et al.. – Reporting to Law Enforcement	
	• Memo from Mr. Hoskins, "Rule 3-3 et al. – Disclosure to law enforcement", October 17, 2019	pg. 52
	• Report from Executive Committee to Benchers, "Reporting to Law Enforcement: Proposal to Amend Rules", September 5, 2019	pg. 53
	• Draft – redlined	pg. 62
	• Draft - clean	pg. 64
6	Next scheduled meeting: Thursday, December 5 – room 910 [meeting at 11, year-end group lunch 1 PM]	

The Law Society of British Columbia

Memo

To: Act and Rules Committee
From: Jeffrey G. Hoskins, QC
Date: October 17, 2019
Subject: **Rules 3-99 and 3-107 — Client identification and verification**

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1. At the July meeting the Benchers approved the Act and Rules Committee's recommended amendments to rules intended to combat money laundering. Some of those changes, dealing with client identification and verification, were adopted effective January 1, 2020 to allow for preparation and transition both for the Law Society and for law firms.

2. One objective of those changes was to implement the substantive recommendations of the Federation of Canadian Law Societies, which were contained in changes to the Federation's model rules, in a way that would be compatible with the existing Law Society Rules in British Columbia.

3. It has been suggested that the amendments adopted could be improved by adopting two more changes, to be effective January 1, 2020. These would make the rules more consistent with the model rules. I attach a redlined version of the proposed minor changes.

Law firm fulfilling lawyer's responsibility

4. The current Rule 3-99(3) was not changed by the amendments adopted in July. That provision is this:

> (3) In this division, the responsibilities of a lawyer may be fulfilled by the lawyer's firm, including members or employees of the firm conducting business in another Canadian jurisdiction.

5. This restricts the members of the lawyer's firm who can assist in complying with the client identification and verification rules to those located in Canada. By contrast, the recently amended model rules say this:

(2) A lawyer's responsibilities under this Rule may be fulfilled by any member, associate or employee of the lawyer's firm, wherever located.

6. There does not seem to be any reason not to further amend the BC rules so that the client identification and verification responsibilities can be carried on by the firm outside Canada where appropriate.

Retention of documents involved in monitoring

7. Rule 3-107, as amended effective 2020, requires lawyers to retain the information and documents obtained in the client identification and verification process for a proscribed period. This is done by referring to specific rules that impose requirements to obtain certain information and documents.

8. However, the list of provisions referred to does not include the new Rule 3-110, which requires lawyers to monitor the accuracy of information obtained while acting for clients. Presumably, monitoring would involve obtaining information and documents that ought to be retained for audit and other purposes. The omission appears to be an oversight, which I suggest can be remedied by adding that provision to the list.

9. The Committee may want to recommend these changes to the Benchers at the December meeting so that they can take effect January 1, along with the changes adopted in July.

Attachments: drafts

JGH

The Law Society of British Columbia

Memo

To: Act and Rules Committee
From: Jeffrey G. Hoskins, QC
Date: October 17, 2019
Subject: **Rule 3-55—Fiduciary property**

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1. At the September meeting the Benchers considered a report from the Executive Committee recommending changes in the rule governing fiduciary property in lawyers' trust accounts. I attach a copy of the report for your reference.

2. These are the recommendations of the Executive Committee, which were approved by the Benchers in principle:

    a. rescission of Rule 3-55(6);

    b. consequential amendments to Rules 3-60(4) and 3-61(3).

3. I attach a draft of amendments to the relevant rules intended to implement the policy decision of the Benchers.

Drafting note

4. In the consequential amendments, I have added that funds other than trust funds must not be held in a trust account to make it clear that fiduciary property held in trust at the time of the change in the rule is subject to the rule and must be removed. If the change were not to include current deposits, there could be a long transition period, with resulting complication in audits. There has been much notice and wide consultation on the rule change.

Attachments: Executive Committee report

JGH

The Law Society of British Columbia

Proposed Rule Amendments: Fiduciary Property (Rule 3-55)

Date: July 15, 2019

Prepared for: Benchers

Prepared by: Executive Committee

Purpose: Discussion and Decision

Purpose

1. Having regard to decisions of Hearing Panels relating to how trust accounts were used and having regard to amendments to the Model Rules recommended by the Federation of Law Societies' Anti-Money Laundering Working Group, the Executive Committee has considered the rules relating to fiduciary property (and in particular Rule 3-55), which were created in 2015 and amended in 2016.

2. This Report reviews the issues and the consideration given by the Committee to those issues.

3. The Committee recommends amending Rule 3-55 by deleting Rule 3-55(6). This will result in a requirement that fiduciary property must be held outside of a trust account. Consequential amendments will be needed to Rules 3-60(4) and 3-61(3).

Background

4. In 2015, the Benchers amended the Law Society Rules by creating a rule regarding fiduciary property.

5. Up to that point in time, the definition of "trust funds" included funds and valuables for which a lawyer was responsible in a representative capacity where the lawyer's appointment was derived from a solicitor-client relationship.[1] Because those funds were deemed to be "trust funds," they had to be held in a trust account. Concerns had been raised within the profession (particularly by the Wills and Estates bar) that when a lawyer was acting in a fiduciary capacity rather than as a lawyer, the limitations on how funds could be held in a trust account created difficulties in discharging one's fiduciary obligations.

6. Consequently, the Benchers approved a rule that created a separate category of property called "fiduciary property," which was defined as "funds, other than trust funds, and valuables for which a lawyer is responsible in a representative capacity or as a trustee, if the lawyer's appointment is derived from a solicitor-client relationship" – essentially stripping out that portion of the then-definition of "trust funds." The policy rationale for this change in rules is described in a memorandum to the Benchers dated April 25, 2013, and was considered and approved in principle at the May 10, 2013 bencher meeting. After consultation with the profession and further work by the Act and Rules Committee, the new rules were approved at the March 6, 2015 Bencher meeting.

[1] For example, where a long-time client has come to trust his or her lawyer and decides to appoint the lawyer as Executor of the client's will, or as Power of Attorney for the client's affairs, or as Trustee of a trust created by the client. In these circumstances, the lawyer is acting qua fiduciary and not qua lawyer. The lawyer provides no legal services to the estate, or to the trust.

7. The fiduciary property rules were therefore created in order to permit lawyers, acting in a fiduciary capacity where the appointment was derived from a solicitor-client relationship but on which the lawyer was not acting as lawyer, to hold property outside a trust account, because the requirements for how funds must be held and dealt with in a trust account can be too limiting in the discharge of fiduciary responsibilities.[2] And, because "fiduciary property" was now defined as "funds *other than trust funds*," fiduciary property *could not be held* in a trust account.

8. The fiduciary property rules also provided that the lawyer must be able to produce certain records relating to fiduciary property for any period for which the lawyer was responsible for the fiduciary property, and that the records in question formed part of the books, records and accounts of a lawyer, which the lawyer must produce and permit to be copied as required under the rules. As a lawyer's mishandling of fiduciary property could be expected to amount to "conduct unbecoming the profession" the Law Society would need to access the records of the lawyer where an investigation is necessary. Further, there is a possibility that some limited activities of a lawyer in connection with fiduciary property could be covered by Part B Insurance, and it is therefore important to access lawyer's accounting records for such property if necessary to investigate such a claim.

9. Relatively soon after the new rules were implemented, the Law Society received some feedback from the profession to the effect that the prohibition on holding fiduciary property in a trust account was *too* limiting and that, from time to time, it was more convenient for lawyers acting in a fiduciary capacity to simply deposit funds held in a fiduciary capacity in their pooled trust account without having to open a separate fiduciary account – for example in situations where the funds would not be held for a long period of time, such as where they were being distributed to beneficiaries in an estate.

10. The Benchers therefore approved rule amendments in June 2016 that permitted fiduciary property to be held in a trust account provided that the lawyer complied with all the rules pertaining to trust funds with respect to the fiduciary property.

New Considerations

11. Subsequent to the amendment to the rules that permitted fiduciary property to be held in a trust account, the Law Society has become increasingly focused on clarifying the use of a lawyer's trust account to reduce the likelihood of such accounts being used for improper

[2] The policy considerations for this proposal were considered in detail and included a consideration of the public interest in ensuring that a client, who may have established a lengthy and trusted relationship with a lawyer over the years, could appoint a lawyer as a trustee (or executor or attorney) confident in the fact that the lawyer was a member of a regulated profession and in whom the client had already established confidence and trust, and that the lawyer could act fully as a trustee without being limited by the trust rules. If lawyers were unable to undertake this role on request, the client could be forced to utilise the services of a person or entity with whom they had no previous relationship and in whom they had not yet established trust.

purposes, including the possibility of money-laundering. Permitting non-trust funds such as fiduciary property to be held in a trust account complicates efforts to draw a clear line respecting the use of the trust account.

12. Trust accounts, including pooled trust accounts, must be designated on the records of the savings institution and the lawyer as a "trust account" thereby leading outside parties presume that the funds in the account are "trust funds" relating to legal services to be performed or disbursements to be made on behalf of a client.

13. Where a lawyer is acting in a fiduciary capacity, he or she is not providing any legal advice or otherwise engaging in the practice of law. There is no solicitor-client privilege in that relationship. While trust account records are not all necessarily privileged, they *may*, depending on the facts, be privileged. Consequently, depositing funds that are "fiduciary property" and therefore not subject to privilege into a trust account where there *is* a possibility of a claim of solicitor-client privilege being made can make investigation by outside organizations, such as the police, difficult to conduct should it be necessary to do so.

14. Given that there is no possibility of solicitor-client privilege attaching to dealings with fiduciary property, the rationale for being able to deposit the money in a trust account where solicitor-client privilege may be claimed (and in some cases may be presumed) is difficult to sustain.

15. "Fiduciary property" was contemplated as a recognition of a service some lawyers may undertake from time to time by accepting fiduciary obligations in common circumstances such as acting as an executor or personal representative under a will, or as a trustee for minor children, or as an attorney appointed under a power of attorney where, in each case, the relationship is documented and the purpose is clear. Lawyers in their fiduciary role would be managing assets, not simply holding them.

16. However, the Investigations and Trust Assurance Departments have reported that some audits have disclosed that lawyers have held money in a trust account that is not related to the delivery of legal services for a client where the relationship is not documented. When questioned, the lawyer has stated that he or she is holding it "as a fiduciary" and therefore it is "fiduciary property." This opens the possibility that a client could, with reference to the fiduciary property rule, tell a lawyer to hold *any* funds in a trust account in trust for the client, even where no legal services are performed or where the lawyer is not being asked to manage the assets as a fiduciary. Nevertheless, because the lawyer would be holding the funds in a fiduciary capacity derived from a solicitor-client relationship, the lawyer could argue that the funds are fiduciary property and that holding them in a trust account is permitted. This would be contrary to the intent of the rules, but could be difficult to refute.

Federation of Law Societies Model Trust Accounting Rule and new Law Society Rule 3-58.1

17. An additional new development subsequent to the implementation of an amendment to the fiduciary property rules is the creation of a Model Trust Accounting Rule by the Federation of Law Societies, which was approved by Federation Council in October 2018. The Model Rule was unanimously approved by the Federation of Law Societies in December 2018. The Benchers approved a new Law Society Rule (Rule 3-58.1) based on the Federation Model Rule in July, 2019. It states:

> **3-58.1** (1) Except as permitted by the Act or these rules or otherwise required by law, a lawyer or law firm must not permit funds to be paid into or withdrawn from a trust account unless the funds are directly related to legal services provided by the lawyer or law firm.

18. The intent of the Model Rule, and thus also the Law Society Rule, is to restrict the use of lawyers' trust accounts to purposes directly connected to the provision of legal services. The Federation opined that allowing lawyers to use their trust accounts for purposes unrelated to the provision of legal services unnecessarily increases the risk of money laundering or other illegal activity even when the funds in question are not "cash."

19. Consequently, a rule such as Rule 3-55(6) that currently permits the deposit of non-trust funds (fiduciary property) into a "trust account" would be contrary to the intent of the Model Rule, and Law Society Rule 3-58.1.

Consultations

20. A Consultation Notice regarding amending the fiduciary property rule was posted on the Law Society's website in February 2019. The Notice explained the history of the rule and outlined the new considerations that caused the Law Society to consider whether to remove the ability to place fiduciary property funds into a lawyer's trust account. Consultation was open for approximately one month.

21. The Notice was also communicated to the Chairs of the Wills and Estates Sections of the Canadian Bar Association (BC Branch), as the Wills and Estates Bar had been the proponent of the initial fiduciary property rule and had been the only groups to participate in the consultations that were undertaken when the rule was initially being debated.

22. One specific submission to the consultation was received, and two other enquiries were received.

23. The focus of the submission received was on the situation where a lawyer acts both as the Executor and as solicitor for the Estate (or where the lawyer's firm is acting as solicitor for the Estate).

24. The submission noted that the orderly administration of estates is facilitated, where a lawyer is also acting as executor, by using the trust account as a holding account for the estate, because all necessary information for the preparation of estate executor accounts is on hand and readily available and capable of reconciliation. Where the lawyer/executor acts in a dual capacity and collects of assets and funds for distribution, legal work is being provided, particular where there is a necessity to dispose of assets to accumulate funds for distribution.

25. As noted above, Rule 3-58.1 now states that a lawyer or law firm must not permit funds to be paid into or withdrawn from a trust account unless the funds are *directly related* to legal services provided by the lawyer or law firm. (emphasis added).

26. Where the lawyer/executor either individually or through his or her firm also acts in a legal capacity for the Estate, the funds collected with respect to the estate would likely be categorized as being "directly related" to legal services provided by the lawyer or the law firm. This would not be the case if the lawyer acts only as executor, because the lawyer would not be acting in any legal capacity.

27. Consequently, the concern raised by the submission is likely already addressed in Rule 3-58.1

28. If it is thought advisable, this could be specifically clarified through guidelines created by the Law Society.

Discussion

29. Money laundering, terrorist financing and other criminal activities pose serious threats. Lawyers must always recognize that their role is not to facilitate criminal activity, but lawyers also need to guard against becoming unwitting accessories to such activity. The current rules permitting the use of a trust account for the deposit of "fiduciary property," which is broadly defined, can increase the risk that lawyers may unwittingly be used to facilitate illegal activities.

30. There is a risk that criminals may attempt to assert the privilege that can be argued to attach to a lawyer's trust account to hide beneficial ownership of funds from authorities and to facilitate the movement of funds without detection. The creation of a trust by a former client that imposes fiduciary duties on a lawyer permitting the resulting funds to be deposited into a trust account that gives rise to the possibility of a claim of solicitor-client privilege would be a tempting proposition by which criminals could be able to

obscure beneficial ownership while maintaining control over the illicit funds and making it more difficult for law enforcement authorities to trace the funds. The Executive Committee, after discussion, concluded that the best way to reduce this risk was to prevent fiduciary property from being deposited to a trust account, because it has no connection to legal services.

31. While it is obviously hoped that lawyers acting as fiduciaries would not be involved in suspicious transactions or criminal activity, the fact is that where they are not acting as a lawyer, the reporting obligations of all involved in a matter under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* must be applied. If the funds are in a trust account, that possibility can be frustrated as there is an exemption on lawyers having to report under the Act, and where funds are in a trust account there may be a presumption that lawyers are providing related legal services. While perhaps the lawyer could be required to advise the savings institution that the fiduciary property funds are not "trust funds," the result is that some funds in a pooled trust account would have to be segregated and that would cause confusion, and also open up possibilities for mistakes to be made.

32. Because trust accounts are only to be used for funds directly related to the provision of legal services, the deposit of fiduciary property to a trust account would constitute an anomaly. If such deposits were to continue to be permitted, outside parties might presume that legal services are being provided with respect to the funds and that therefore a solicitor-client relationship exists, which can give rise to a claim of privilege. The ability to investigate those funds, should it be necessary, by outside agencies is thereby complicated when there is no real reason to do so. This is not a message that either the Law Society or the legal profession should want to send.

33. While the "fiduciary property" rules were created to preserve lawyers being able to deal with funds in a fiduciary capacity outside a solicitor-client retainer, and to preserve the public's ability to use respected and regulated individuals as fiduciaries for matters of importance to clients, the Committee concluded that it is time to recognize the need to ensure a complete separation (as was originally proposed) of fiduciary property from a trust account.

34. The Committee was mindful that it may be more convenient for lawyers to utilize the trust account from time to time for the deposit of funds that are fiduciary property, particularly where it was on a short term basis to a pooled trust account. However, aside from the concerns identified above, questions may also arise about the attribution of interest as the funds in question are not "trust funds." In any event, the Committee concluded that "convenience to a lawyer" ought not to be the primary determinative of the policy decision at issue. If the public interest can be better protected by demonstrating a clear delineation on the use of a trust account, then the fact the resulting rule may be less convenient for lawyers may be a necessary consequence.

35. The Committee concluded that Rule 3-58.1 is intended to clarify, unambiguously, that trust accounts are only for funds directly related to the provision of legal services. Currently, Rule 3-55(6) is an exception to that end, and the Committee concluded that it should be removed.

Other Provinces

36. The law societies in each of Manitoba and Nova Scotia are giving consideration to revising their rules to prohibit the deposit to a trust account of money handled by a lawyer in a fiduciary or representative capacity not related to the provision of legal services, having regard to Federation's Model Trust Account Rule. The Law Society of Alberta passed rules preventing such deposits in April, 2019.

Recommendation

37. In light of the Law Society's effort to draw a "bright line" so that the use of the trust account is for purposes only where legal services are provided, the Committee recommends that Rule 3-55(6) be deleted. This will mean that funds that are fiduciary property cannot be deposited to a trust account. The Committee recognizes that in some limited circumstances, where a lawyer is acting in a dual role (such as executor and lawyer to an estate), the funds in question may be directly related to the provision of related legal services and may thereby be deposited in a trust account, but these circumstances are expected to be limited.

38. Consequential amendments will be needed to Rules 3-60(4) and 3-61 (3).

39. In effect, this recommendation will reverse the amendment approved in 2016. It will nevertheless permit individuals who are lawyers to act as fiduciaries, thereby preserving the original policy decision from 2013. It will, as was initially contemplated, prevent fiduciary property from being deposited to a trust account.

40. The Committee recommends as well that staff develop guidelines to assist the bar in the discharge of its responsibilities in handling fiduciary property.

MDL/al

LAW SOCIETY RULES

PART 3 – PROTECTION OF THE PUBLIC

Division 7 – Trust Accounts and Other Client Property

Fiduciary property

3-55 (6) [rescinded]

Pooled trust account

3-60 (4) Subject to subrule (5) and Rule 3-74 *[Trust shortage]*, a lawyer must not deposit or hold in a pooled trust account any funds other than trust funds.

Separate trust account

3-61 (3) Subject to Rule 3-74 *[Trust shortage]*, a lawyer must not deposit or hold in a separate trust account any funds other than trust funds.

The Law Society of British Columbia

Memo

To: Act and Rules Committee
From: Jeffrey G. Hoskins, QC
Date: October 17, 2019
Subject: **Rule 3-3 et al.—Disclosure to law enforcement**

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1. At the September meeting the Benchers considered a memorandum from the Executive Committee recommending changes in the rules governing disclosure of possible evidence of criminal activity obtained in Law Society investigations and other activity to law enforcement authorities.

2. These are the recommendations of the Executive Committee, which were approved by the Benchers in principle:

    - the Law Society Rules be amended so that the Executive Director may disclose information or documents that may disclose an offence to law enforcement agencies that have been gathered in the course of a complaint investigation, a practice standards investigation an application for admission, enrolment or re-instatement, or a claim made under trust protection insurance, with the consent of one committee, rather than one of the three existing committees;

    - the single committee be the Discipline Committee;

3. I attach a draft of amendments to the relevant rules intended to implement the policy decision of the Benchers.

Drafting note

4. In the current rules, various committees are charged with consenting to the disclosure of information. Where the committee is not currently the Discipline Committee, I have substituted that committee. I have also tried to make the language of the various provisions more consistent and simpler.

Attachments: Executive Committee report

JGH

The Law Society of British Columbia

Reporting to Law Enforcement: Proposal to Amend Rules

Executive Committee

September 5, 2019

Prepared for: The Benchers

Purpose: Decision

I. Issue

1. The current rules permit the Executive Director with the consent of the relevant committee of Discipline, Credentials or Practice Standards, to deliver to a law enforcement agency information or documents in the Law Society's possession that reasonably may be evidence of an offence.

2. The Executive Committee, in its Regulatory Policy role, considered whether to recommend to the Benchers that the rules be amended:

   (a) to permit the Executive Director to provide the information on his or her own discretion without the involvement of a Committee,

   (b) to leave the manner in which the discretion is exercised largely unchanged but to centralize the process to involve only one Committee, or

   (c) to remove the discretionary aspect and simply *require* the Law Society to provide such information to law enforcement agencies.

3. This report outlines the Committee's consideration of the issues, explains why it accepted or rejected the matters under consideration and makes a recommendation for a rule change.

II. The Current Process

4. In the course of Law Society regulatory activity, the Law Society occasionally comes into possession of documents or information that may be evidence of an offence. While the Law Society's regulatory function is not to investigate criminal wrongdoing or to make findings of guilt, it may be in the broader public interest to provide information or documents that may be evidence of an offence, gathered in the course of the Society's regulatory activities, to relevant law enforcement authorities.

5. The Law Society Rules provide generally for the confidentiality of Law Society processes and proscribe the general sharing of information. However, the Law Society Rules contain several provisions that give the Executive Director discretion to deliver to law enforcement agencies information or documents obtained through Law Society investigative processes, be they through credential applications, discipline or practice standards investigations or insurance (Part B) matters.[1]

6. In each case, before the Executive Director delivers information to a law enforcement agency, the relevant committee amongst Discipline, Practice Standards and Credentials must give its consent and must "reasonably believe" the documents or information in

[1] See Rules 2-53(4), 3-3(4), 3-23(3), 3-46(5)(c) and 4-8(5)

question "may be evidence of an offence." These rules permitting disclosure are permitted under each of ss. 33.1(1)(c) and 33.1(2) of the *Freedom of Information and Protection of Privacy Act*.

III. Past Consideration by the Benchers

7. The Benchers first considered this issue in 1985 when a motion was debated *"that whenever a matter involving criminal activity on the part of a lawyer came to the attention of the Law Society, it was to be reported to the police provided it was lawful to do so."* Concerns were expressed by the Benchers about the ambit of the proposed requirement and in determining what conduct would fall within the proposal. Eventually, the Benchers resolved that, whenever any matter involving criminal activity on the part of a lawyer came to the attention of the Law Society, it was to be referred to the Discipline Committee, who was to decide whether it should be reported to the police.

8. The issue was next considered in the context of the work of the Disclosure and Privacy Task Force in 2003. That Task Force, comprised mostly of Benchers, recommended to the Benchers that the Rules *"be amended to allow the Executive Director, in his discretion but subject to the Legal Profession Act, to release information or documents to a law enforcement agency which he reasonably believes may be evidence of an offence."* The Task Force noted that giving the Executive Director clear authority to make such disclosure would permit it to be done in a timely manner and would permit agreements with law enforcement agencies concerning how the information could be provided.

9. However, when the matter came before the Benchers, concerns were expressed about leaving the matter in the hands of the Executive Director. The matter was referred back to the Task Force for further consideration, and it was returned to the Benchers with a recommendation that was ultimately approved that resulted in the current Rules.

IV. Key comparisons: Rules and Practices

10. Information disclosure varies across law societies, as does the practice for disclosure. Not all law societies have rules permitting the disclosure of information to law enforcement authorities, and of those that do, the issue is addressed in fairly different ways.

11. In some law societies, the Executive Director is, with the consent of a committee, permitted to *advise* the Minister of Justice that there are reasonable grounds that a lawyer has committed a criminal offence, and if so is directed to forward a copy of the hearing record and other specified information.[2]

[2] See s. 78(5),(6) and (8) *Legal Profession Act* (Alberta)

12. In others, certain law society officials have a *duty* to disclose to a law enforcement authority any information about possible criminal activity on the part of a member that is obtained during an investigation.[3]

13. In still others, there is a general prohibition on sharing information gathered during an investigation, subject to some general exceptions.[4]

14. Some address the question from an analysis of the release of *personal information* and permit it to be given without consent to a body responsible by law for the prevention, detection or repression of crime or statutory offences, if the information is necessary to prosecute an offence against an Act applicable in the province.[5]

15. Most law societies appear to involve a committee in the determination about whether to release information to a law enforcement agency. Saskatchewan and Ontario permit the decision to be made at the staff level.[6]

16. It is worth noting, too, that Standard 18 of the Federation of Law Societies' National Discipline Standards is:

> There is an ability to report to police about criminal activity in a manner that protects solicitor-client privilege.

V. Options

17. Three main options were considered:

- Amend the Rules to permit the Executive Director to exercise the discretion to provide information that may disclose an offence to law enforcement authorities without the consent of a committee. Guidelines for the exercise of discretion would be created;

- Amend the Rules to centralize the process for obtaining consent from one of three committees to that of a single committee. Guidelines for the exercise of discretion would be created;

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[3] Section 69(2)(d) of *Legal Profession Act* (Manitoba). In practice, we are told that disclosure is not made until the conclusion of a prosecution, and permission would be sought from clients before confidential information is shared.
[4] See s. 49.12 *Law Society Act* (Ontario). We are told that the Law Society of Ontario interprets this section to permit it to disclose information to the police during the investigation stage, subject to the protection of privilege and confidentiality. Disclosure is made on the approval of the Executive Director, Professional Regulation.
[5] Section 59(3), Act respecting Access to Documents held by Public Bodies and the Protection of Personal Information (c. A-2.1) (Québec)
[6] See s. 54, *Legal Profession Act* (Saskatchewan) and Rule 405(3). For Ontario, see footnote 4, above.

- Amend the Rules to create a *requirement* (and not leave it to the discretion of any group on a case-by–case basis) that the Law Society has a duty to provide information that is not the subject of solicitor-client privilege that may disclose an offence to law enforcement authorities.

VI. Discussion

18. The Executive Committee considered each of the options and noted the following points:

Disclosure of Information and the Public Interest

19. There is a considerable premium in demonstrating that the Law Society is not seen as an organization that protects lawyers, particularly where there is information that may suggest that a lawyer has committed an offence. Indeed, other self-regulatory bodies – notably those dealing with teachers and realtors - have suffered considerably where their actions have been perceived as weighted towards their members' interests rather than the broader public interest. The perception of the professions themselves has been negatively affected through these failures. The legal profession is not immune from this criticism. In 2013, the then-Law Society of Upper Canada was heavily criticized in the Toronto *Star* for not disclosing information in the possession of that law society concerning alleged criminal activity of lawyers to police. The *Star* noted that most law societies *do* report criminal activity to police.

20. Disclosure of information to law enforcement to ensure the ability to properly investigate an alleged offence is in the public interest. As a principle, public confidence in the administration of justice would also expect that, where law societies have information that may disclose an offence, law societies have the ability to share it with the authorities and do so where it was not otherwise precluded (such as where the information was privileged). Failing to do so might be viewed by the general public as obstructionist in a moral, although not legal, sense. While it is not the Law Society's role to prosecute crime, it is also not consistent with the Law Society's role to protect lawyers by not disclosing information in its possession that may disclose an offence involving a lawyer.

21. On the other hand, the public interest also requires prosecutions by law enforcement agencies to be done effectively, fairly, and not to be tainted by information that prosecutors should not have. This includes other considerations that have to be addressed in making a decision to provide information, such as:

    - The extent to which the disclosure is prohibited due to the Law Society's statutory obligations to maintain solicitor-client privilege and confidentiality;

- The extent to which disclosure may undermine or prejudice the Law Society's ability to carry out its mandate in the credentials, Part B insurance claims, complaint investigation and discipline processes, as the case may be, in the context of the particular case at hand or generally;

- Whether disclosure will undermine the Law Society's ability to either obtain, or tender at a hearing, reliable and credible evidence;

- The extent to which law enforcement requires or does not require the disclosure (for example, because Law Society information can be compelled from a lawyer in circumstances where the prosecution could not compel such information, disclosing such information to the prosecution could complicate the prosecution's investigation);

- The extent to which the disclosure will trigger the Law Society's obligations pursuant to the *Freedom of Information and Protection of Privacy Act* and any steps necessary to ensure compliance with that Act.

22. The Committee concluded that it was therefore obviously necessary to ensure that the Law Society Rules provided an avenue to permit the disclosure of information to law enforcement authorities that had been gathered during Law Society investigative processes.

23. However, a rule *requiring* disclosure could be unworkable where privileged information is involved, and moreover would be troubling if the disclosure adversely affected either Law Society investigations or law enforcement investigations, such as where the law enforcement authority did not want the information because it was compelled testimony obtained by the Law Society.

24. The Committee therefore concluded that the rule should retain a discretion to disclose, and that it would be wise to prepare guidelines for consideration in the exercise of that discretion that took into account factors, including those in paragraph 19 above, that would be relevant when considering the issue.

Disclosure of the Existence *of Information or Documents as Opposed to Disclosure of the* Actual *Information or Documents themselves*

25. Because, as noted above, there will be instances where it is not clear that the information or documents are privileged, or because disclosure of actual documents or information could compromise the investigation being undertaken by the law enforcement agency, disclosure of the *existence* of information or documents that the Law Society possesses that it considers may be evidence of an offence rather than disclosure of the *actual* information or documents themselves would be advisable.

26. This would necessitate that any report to law enforcement officials would need to contain sufficient information to outline the basis of the belief that an offence has been committed.

27. There may be occasions where the information or documents are already in the public domain and it is clear that privilege does not, or can no longer, attach to them, in which case disclosure of the particulars of the information or the documents themselves may be considered.

Who Exercises the Discretion?

28. The decision to provide information from a Law Society investigation to law enforcement agencies is currently a discretionary one that currently lies with a committee, although it is the Executive Director who determines whether to bring the matter to the relevant committee for consideration. In practical terms, this gives the Executive Director the ability to determine whether *to not* disclose information. If that discretion now lies with the Executive Director, the Committee considered whether there was a substantial benefit to engaging the committees in exercising the discretion (by being required to seek their consent) *to* disclose the information or the existence of the information?

29. The Committee also recognized that vesting the discretion in the Executive Director could improve efficiencies in process, because decisions could be made more quickly. The Committee further understood that vesting the discretion in the Executive Director (or a delegate) could improve consistency in decision-making, because the discretion would be exercised, in reference perhaps to guidelines, by one person rather than by one of three Committees, the composition of which changes each year.

30. However, if the disclosure of documents, or the existence of documents, is to be considered, the Committee concluded that the act of balancing public interest rationales in favour of disclosure against other legal considerations that must be kept in mind that may militate against disclosure is something for which the benchers, or a group of them, should bear ultimate responsibility.

31. After consideration, the Executive Committee concluded that the involvement of a bencher committee was therefore warranted. Recognizing that a decision one way or another could be the subject of some criticism, the Committee concluded that it would be unfair to require staff, through the Executive Director, to bear responsibility for making a final decision on the exercise of discretion.

Which Committee?

32. The current rule requires the involvement of one of three committees in the exercise of the discretion to provide information. This permits the involvement of Benchers in the

consideration of the matter, which is valuable given the importance of the decision being made and the balance of the broad, general public interest relating to law enforcement versus the general right to the presumption of innocence of individuals (not all of whom will necessarily be lawyers).

33. However, given the way the rule is framed at present, the committee charged with having to consent before the Executive Director can disclose information varies depending on where the investigation was conducted within the Law Society.

34. Spreading the discretion amongst one of three different committees increases the risk that the discretion about whether or not to consent will vary depending on which committee is involved. The Executive Committee concluded that possibility was not ideal.

35. The Committee concluded it would be better to vest the exercise of discretion to a single committee. The Executive Committee considered that the logical choices were the Discipline Committee or the Executive Committee.

36. After consideration, the Committee concluded that the Discipline Committee would be the more logical choice. That Committee is the Committee most likely to be dealing with the underlying facts (although not always), and that Committee most usually has at least one criminal law lawyer appointed who will have some familiarity with the issues under consideration. Moreover, keeping the factual matrix for consideration within the Discipline Committee reduces the possibility of conflicting other benchers outside that committee, who may be needed to sit on a hearing of matter under investigation.

Hearing Decisions

37. Hearing decisions are public. The Executive Committee concluded there is therefore no need for a rule requiring disclosure to law enforcement officials of a hearing decision that may raise facts that may be evidence of an offence.

Guidelines

38. The Committee concluded it would be useful to have staff prepare guidelines that would outline the considerations to be addressed in exercising any discretion afforded in disclosing the existence of information or documents to law enforcement officials.

VII. Recommendation

39. After consideration, the Executive Committee recommends that:

- the Law Society Rules be amended so that the Executive Director may disclose information or documents that may disclose an offence to law enforcement

agencies that have been gathered in the course of a complaint investigation, a practice standards investigation an application for admission, enrolment or re-instatement, or a claim made under trust protection insurance, with the consent of one committee, rather than one of the three existing committees;

- the single committee be the Discipline Committee;
- that a set of guidelines be prepared by staff that outline considerations that should be taken into account by the committee when considering a request from the Executive Director to disclose information or documents to law enforcement agencies.

40. In the event the recommendation is accepted, the matter should be referred to the Act and Rules Committee to prepare the necessary rule amendments to be returned to the Benchers for approval.

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LAW SOCIETY RULES

PART 2 – MEMBERSHIP AND AUTHORITY TO PRACTISE LAW

Division 2 – Admission and Reinstatement

Application for enrolment, admission or reinstatement

Disclosure of information

2-53 (4) With the consent of the ~~Credentials~~ Discipline Committee, the Executive Director may deliver to a law enforcement agency any information or documents obtained under this division that ~~the Committee reasonably believes~~ may ~~disclose~~ be evidence of an offence.

PART 3 – PROTECTION OF THE PUBLIC

Division 1 – Complaints

Confidentiality of complaints

3-3 (1) No one is permitted to disclose any information or records that form part of the investigation of a complaint or the review of a complaint by the Complainants' Review Committee except for the purpose of complying with the objectives of the Act or with these rules.

(5) Despite subrule (1), with the consent of the Discipline Committee, the Executive Director may deliver to a law enforcement agency any information or documents obtained under this division that ~~the Committee reasonably believes~~ may be evidence of an offence.

Division 2 – Practice Standards

Confidentiality of Practice Standards Committee deliberations

3-23 (1) Subject to subrules (2) to (6) and Rule 3-24 *[Report to complainant]*, the following must be treated as confidential and must not be disclosed except for the purpose of complying with the objects of the Act:

(a) all of the information and documents that form part of the Practice Standards Committee's consideration of a complaint;

(b) any action taken or decision made by the Committee;

(c) any report prepared for or on behalf of the Committee.

(3) Despite subrule (1), ~~With~~ with the consent of the ~~Practice Standards~~Discipline Committee, the Executive Director may deliver to a law enforcement agency any information or documents obtained under this division that ~~the Committee reasonably believes~~ may be evidence of an offence.

Division 5 – Insurance

Confidentiality of insurance claims

3-46 (2) No one is permitted to disclose any information or records associated with a claim.

(5) In the case of a claim under Part B of the policy of professional liability insurance, despite subrule (2), the Executive Director may do any of the following:

(c) with the consent of the Discipline Committee, deliver to a law enforcement agency any information or documents obtained under this division that ~~the Committee reasonably believes~~ may be evidence of an offence.

PART 4 – DISCIPLINE

Confidentiality of Discipline Committee deliberations

4-8 (1) No one is permitted to disclose any of the following information except for the purpose of complying with the objects of the Act or with these rules:

(a) information and documents that form part of the consideration of a complaint under Rule 4-4 *[Action on complaints]* or 4-5 *[Consideration of complaints by chair]*;

(b) the result of a consideration under Rule 4-4.

(5) Despite subrule (1), with the consent of the Discipline Committee, the Executive Director may deliver to a law enforcement agency any information or documents obtained under this division that ~~the Committee reasonably believes~~ may be evidence of an offence.

LAW SOCIETY RULES

PART 2 – MEMBERSHIP AND AUTHORITY TO PRACTISE LAW

Division 2 – Admission and Reinstatement

Application for enrolment, admission or reinstatement

Disclosure of information

2-53 (4) With the consent of the Discipline Committee, the Executive Director may deliver to a law enforcement agency any information or documents obtained under this division that may be evidence of an offence.

PART 3 – PROTECTION OF THE PUBLIC

Division 1 – Complaints

Confidentiality of complaints

3-3 (1) No one is permitted to disclose any information or records that form part of the investigation of a complaint or the review of a complaint by the Complainants' Review Committee except for the purpose of complying with the objectives of the Act or with these rules.

(5) Despite subrule (1), with the consent of the Discipline Committee, the Executive Director may deliver to a law enforcement agency any information or documents obtained under this division that may be evidence of an offence.

Division 2 – Practice Standards

Confidentiality of Practice Standards Committee deliberations

3-23 (1) Subject to subrules (2) to (6) and Rule 3-24 *[Report to complainant]*, the following must be treated as confidential and must not be disclosed except for the purpose of complying with the objects of the Act:

(a) all of the information and documents that form part of the Practice Standards Committee's consideration of a complaint;

(b) any action taken or decision made by the Committee;

(c) any report prepared for or on behalf of the Committee.

(3) Despite subrule (1), with the consent of the Discipline Committee, the Executive Director may deliver to a law enforcement agency any information or documents obtained under this division that may be evidence of an offence.

Division 5 – Insurance

Confidentiality of insurance claims

3-46 (2) No one is permitted to disclose any information or records associated with a claim.

(5) In the case of a claim under Part B of the policy of professional liability insurance, despite subrule (2), the Executive Director may do any of the following:

(c) with the consent of the Discipline Committee, deliver to a law enforcement agency any information or documents obtained under this division that may be evidence of an offence.

PART 4 – DISCIPLINE

Confidentiality of Discipline Committee deliberations

4-8 (1) No one is permitted to disclose any of the following information except for the purpose of complying with the objects of the Act or with these rules:

(a) information and documents that form part of the consideration of a complaint under Rule 4-4 *[Action on complaints]* or 4-5 *[Consideration of complaints by chair]*;

(b) the result of a consideration under Rule 4-4.

(5) Despite subrule (1), with the consent of the Discipline Committee, the Executive Director may deliver to a law enforcement agency any information or documents obtained under this division that may be evidence of an offence.