



The Advocates' Society La Société des plaideurs

December 3, 2021

VIA EMAIL: twaley@lso.ca

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

Dear Mr. Troister:

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

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

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

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

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

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

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

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

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

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

6. Peer-Based Initiatives and Other Resources

1. Principles for an Effective Competence Regime

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

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

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

2. Definition of Competence

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

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

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

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

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

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

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

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

3. Practice Assessments

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

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

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

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

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

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

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

The Report notes that the Law Society is considering also “targeting” for Review practitioners who are “more senior” (see p. 23 of the Report). The apparent rationale for targeting a “more senior” age group is the higher percentage of complaints made to the Law Society against lawyers aged 50 to 64 as well as LawPRO’s trends showing that malpractice claims peak when lawyers are 10-20 years out from licensure (see p. 21 of the Report). If these two groups are now to be included as licensees to be targeted for “risk-based random review” along with the licensees in their first eight years from call who are currently targeted for such Reviews, the Law Society will essentially be targeting all licensees—a result that further puts into question the rationale of applying “risk indicia” to “target” licensees for assessments.

² The Final Report of the Law Society’s Challenges Faced by Racialized Licensees Working Group, entitled *Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions*, states that “Data gathered through the [Lawyer Annual Report] and [Paralegal Annual Report] show that 24% of racialized lawyers are in sole practice and 33% of racialized lawyers practice in legal workplaces of two to five” (p. 42). Risk-based random reviews of lawyers licensed in the past eight years are acknowledged by the Report to focus on sole practitioner and small firm lawyers (p. 16 of the Report). Re-entry reviews are by definition focused on sole practitioner and small firm lawyers. Audit cycles are more frequent for sole practitioners and small firms (p. 17 of the Report).

The Advocates' Society believes that using "risk indicia" to "randomly" or otherwise target licensees with particular profiles is fraught with the potential for unconscious bias, unfairness, controversy and questionable interpretation of data. As a result of this and the other concerns discussed above regarding the impact and effectiveness of Reviews and Audits, The Advocates' Society recommends that the Law Society consider adopting a more proactive, constructive and preventive approach (in lieu of some or all Reviews and Audits) that does not target individual licensees but instead targets *issues* that lead to or are tied to risk and regulatory outcomes. An approach that would direct resources away from random assessments to those licensees who need help and that would encourage those who might need help to self-identify and reach out to the Law Society is more likely to improve the practices of licensees on an overall basis. Such an approach could also improve practice management systems at a firm-wide level which, particularly for larger firms, are often outside the control of an individual lawyer.

The Advocates' Society understands that the Nova Scotia Barristers' Society has recently adopted such an approach, by i) requiring all licensees to conduct mandatory periodic self-assessments as against identified areas of risk and proactively reaching out to licensees and making valuable resources available to licensees that are specifically responsive to the risk issues/priority areas for development addressed in licensees' self-assessments, and ii) making an optional tool available to assist lawyers to engage more deeply in the self-assessment exercise and providing related practice tools and resources.³ The Advocates' Society believes that asking practitioners to assess their practice in the context of specific risk *issues* and regulatory outcomes in order to proactively determine if they would benefit from resources and assistance is potentially more helpful than "randomly" targeting specific lawyers to be subject to a Review or Audit. Having resources available to assist those licensees who need and seek assistance will be more helpful than assessing the practice of a licensee who is competent and does not need help at all. The Advocates' Society submits that optional support from the practice assessment lawyers on an ongoing or cyclical basis would offer guidance and resources to those who genuinely require same and may be a more efficient and effective allocation of resources. In this regard, the Advocates' Society takes favourable note of the following comment contained (without further elaboration) in the Report (at p. 23): "*(i) in addition, whether a practice review is conducted or not, licensees should be encouraged to reflect on their regulatory requirements on an annual basis and there should be self-assessment tools that facilitate this reflective process*", but suggests that the Competence Task Force's recognition of the valuable role of self-assessment, could perhaps go a step further—along the lines of the approach taken by the Nova Scotia Barristers' Society.

Finally, The Advocates' Society submits that if "risk-based" "random" selection of licensees subject to Reviews is to continue, both the process for selection and the measures of competence that such Reviews seek to evaluate (including the evaluation criteria employed by the practice assessors) should be significantly more transparent. Furthermore, the Law Society should record and preserve data that allows it to track the impact of Reviews and Audits on equity-seeking groups, if it does not do so already.

4. Continuing Professional Development

Should the CPD requirement be changed to target the development and maintenance of certain competencies? [Q4(a)]

³ The Nova Scotia Barristers' Society collects the mandatory self-assessments completed by lawyers and uses them as a tool for engaging with lawyers and law firms. The Nova Scotia Barristers' Society tracks statistics on lawyers who reach out for support, and we understand that outreach from lawyers to the Nova Scotia Barristers' Society has been increasing from year to year.

Given the wide variability in lawyers' practices and areas of focus, The Advocates' Society is of the view that the adoption of detailed, specialized and prescriptive lists of "subject matter" CPD requirements by areas of legal practice is neither feasible nor appropriate. However, The Advocates' Society suggests that the CPD requirement could be enhanced without being prescriptive about CPD content. Lawyers may sometimes treat their CPD requirements simply as a "box to check" and choose to satisfy their requirements with programs that are not relevant to their area(s) of practice or their particular CPD needs. To avoid this, and to encourage lawyers to be more deliberate in their CPD choices, The Advocates' Society believes that the CPD requirement would be significantly enhanced if some broader-based criteria were imposed on lawyers designed to ensure that their CPD choices are specifically tied to their area(s) of practice and their needs.

The Advocates' Society suggests that such broader-based requirements might include:

- a) a requirement that a certain percentage of a lawyer's CPD hours relate to substantive law relevant to a lawyer's practice profile (as determined by the lawyer);
- b) for lawyers with certain practice profiles (or in earlier years of call—for example, the first ten years of call), a requirement that a certain percentage of their CPD hours relate to skills-based learning specifically relevant to their area(s) of practice (as determined by the lawyer); and
- c) a reminder to lawyers that in selecting CPD programming they should consider whether their particular needs warrant some CPD hours related to technological competence and cultural competence.

Regarding our recommendation that some component of CPD hours be skills-based programming relevant to a lawyer's area(s) of practice, the relevant skills would obviously depend on the lawyer's area(s) of practice (and the lawyer's own assessment of the skills-based learning relevant to their area(s) of practice). For example, in the case of lawyers who maintain an advocacy-based practice, the CPD program would be significantly enhanced if a certain number of CPD hours were devoted to litigation-based skills CPD programs (for example, examination and cross-examination skills, conducting an examination for discovery, arguing a motion, appellate advocacy). As a CPD provider with specific experience and significant expertise in the delivery of advocacy and litigation-based skills programs, The Advocates' Society has seen the positive impact of these types of programs on a lawyer's practice. Skills-based training is essential to ensuring competency (as well as excellence), particularly for lawyers in their first ten years of practice.

Cultural competency is an essential component of every lawyer's ability to discharge their duties to their clients and to the court. This has become particularly clear in the past several years, with issues of systemic racism in the justice system becoming more widely studied and acknowledged. The Advocates' Society recommends that lawyers be strongly encouraged to engage in broad cultural competency training to further a better understanding of their clients and the justice system generally.

In addition, The Advocates' Society recommends that in response to the Truth and Reconciliation Commission of Canada's Call to Action #27, the Law Society should consider developing in conjunction with the Indigenous community and making available a mandatory (and free) Indigenous cultural competency training program for all licensees to be completed within a specified number of years. The

Advocates' Society understands that both the Alberta Law Society⁴ and the British Columbia Law Society⁵ have recently taken such steps. The Advocates' Society believes that the Law Society must take meaningful and substantive action in response to the Call to Action #27 and that this is how it should do so. The Advocates' Society suggests that the [Guide for Lawyers Working with Indigenous Peoples](#), published by the Law Society of Ontario, The Advocates' Society and the Indigenous Bar Association in partnership, would form an excellent basis for programming on Indigenous cultural competency.

Should the CPD requirement be tied to the licensee's practice area(s), experience level, or identified areas of risk? [Q4(b)]

As noted above, The Advocates' Society believes that the CPD requirement should be tied to the licensee's particular practice area(s), as assessed and determined by each particular licensee. Also as noted above, The Advocates' Society believes that a skills-based CPD requirement specific to practice area(s) could reasonably be tied to licensees' experience level/years of call.

The Advocates' Society does not believe that stratifying CPD requirements or imposing greater CPD requirements on particular lawyers on the basis of "areas of risk" is feasible (and as we note above, we question whether relevant and sufficient data exists to identify which licensees are more susceptible to certain "risks" and we note that such an approach could easily result in imposing burdens on certain licensees in an unfair manner).

Should licensees complete their CPD requirement over the course of two calendar years rather than annually? [Q4(c)]

The Advocates' Society is of the view that for many reasons it is preferable that the CPD requirement be completed annually. This ensures that every lawyer has actively taken steps each year to keep their knowledge current and enhance and improve their skills and it ensures that CPD is a regular and consistent priority. The Advocates' Society understands that the Law Society permits lawyers to request an exemption from the mandatory CPD requirement when they are on leave from practice (for maternity or parental leave or for other extended leave), and believes that this reflects a suitable accommodation.

Should CPD programs be more stringent or interactive to help ensure that licensees are engaged and learning? [Q4(d)]

Non-interactive, recorded or virtual (rather than in-person) CPD programming may potentially result in less engagement and learning in circumstances where a lawyer is simply looking to "check the box" to satisfy the Law Society's CPD requirements. That said, based on our experience, many of the lawyers who register for The Advocates' Society's CPD programming are generally genuinely engaged and take the programming seriously. In the circumstances, we think that it would not be appropriate for the Law Society to mandate an in-person or interactive programming requirement and that the Law Society must recognize and make allowances for the fact that in-person and interactive programming is not always feasible for lawyers, depending on where and when the programming is offered. Furthermore, the limitation of a maximum of six CPD hours for viewing or listening to archived or recorded CPD programs

⁴ See: <https://www.lawsociety.ab.ca/lawyers-and-students/continuing-professional-development/indigenous-cultural-competency-education/>.

⁵ See: <https://www.lawsociety.bc.ca/our-initiatives/truth-and-reconciliation/>.

without at least one colleague in attendance likely goes a long way toward addressing this potential concern.

Should the CPD requirement remain as is, be enhanced, or be eliminated altogether? [Q4(e)]

The Advocates' Society is strongly of the view that the CPD requirement should be enhanced (along the lines noted above in answer to Q4(a) and Q4(b)) or, at the very least, remain as it is and that it should not be eliminated or reduced. To be clear, in recommending the enhancements in answer to Q4(a) and Q4(b), The Advocates' Society is not suggesting that the current existing categories of CPD (or their corresponding hours requirements should be altered in any way). The Advocates' Society supports maintaining the current requirements for EDI, Professionalism and Substantive hours.

The Advocates' Society believes that continuing learning is an effective tool to proactively address issues related to lawyer competence (including enhancing access to justice and focusing on positive client outcomes). We note that the Report states at p. 22: “[a study across 91 regulatory bodies] noted that notwithstanding the widespread adoption of a continuous learning requirement across professions and geographic regions, there is little hard evidence to support the practice or a correlation to positive, practice-related outcomes.” In contrast, The Advocates' Society's experience and the experience of its members is overwhelmingly that litigation and advocacy-related programming (including substantive and skills-based content as well as professionalism and EDI content) is of significant assistance to building our members' competencies, skills, experience and confidence. This is particularly the case for lawyers at mid-to large-sized firms who may not have the opportunity to “get on their feet” in court in their earlier years of practice and also for lawyers at smaller firms who may not have the benefit of receiving training from more senior or experienced lawyers. In this regard, we have attached at **Schedule “A”** to this submission the list of CPD programs that The Advocates' Society delivered between June 2020 and June 2021, and **Schedule “B”** to this submission a sample of the feedback that The Advocates' Society has received from CPD program participants over the past few years. This feedback speaks to the value and impact of quality CPD programming that is directly relevant to a lawyer's area(s) of practice. It also speaks to lawyers' level of engagement and interest in such programming. The Advocates' Society expects that other providers of CPD programming in Ontario, including the Law Society, have likely received similar positive feedback supporting the importance of CPD. If there is any serious consideration by the Law Society to eliminating or reducing the existing CPD requirements, The Advocates' Society suggests that before the Law Society do so, it should canvass lawyers on their views about the value and merit of the CPD requirements.

As an alternative to the CPD requirement, should licensees be required to conduct a self-assessment to identify their learning and training needs and then create and execute their own unique professional development plan? [Q4(f)]

The Advocates' Society believes that self-assessment is a worthy and effective tool, but that it should supplement and not replace the mandatory CPD requirement. Annual self-assessment, perhaps timed in conjunction with and prompted by the Lawyer Annual Report process, as a supplement to the mandatory CPD requirement would encourage lawyers to identify their learning and training needs and select CPD programs that correspond to those needs – essentially, this would encourage lawyers to see the CPD requirement as a useful tool to address gaps in their knowledge, skills or competencies rather than as a box that needs to be checked. Self-assessment as a supplement to the mandatory CPD requirement would hopefully function to make lawyers' decisions about how they will satisfy their annual CPD requirements more deliberate and thoughtful and in line with an enhanced CPD requirement that CPD programming be relevant to a lawyer's particular area(s) of practice. In fact, The Advocates' Society submits that an

opportunity for annual self-reflection and planning may help to address the principles for an effective competence regime set out in the Report.

If self-assessments related to CPD are formally adopted, these should not be accompanied by any additional filings or detailed submissions to the Law Society. Rather, the CPD self-assessments should merely be tools designed to encourage lawyers to self-reflect and consider what areas of focus would most benefit their particular practice.

5. Technological Competence

Are there basic technological skills that the Law Society should require all licensees to have? If so, what are the skills and how should the Law Society verify or ensure that licensees have them? In order to prepare licensees for the rapidly changing future, should the Law Society require or encourage licensees to take courses to enhance their technological competence? [Q4(r) & (s)]

As Justice Myers of the Ontario Superior Court of Justice recently noted, “Counsel and the court alike have a duty of technological competency in my respectful view.” ([Worsoff v. MTCC 1168](#), 2021 ONSC 6493 at para. 32) The Advocates’ Society agrees that legal professionals must be competent in their use of technology. Lawyers should know the types of technology available to serve clients in an effective, efficient way. As we note above, The Advocates’ Society would support a reference to technological competence as part of the definition of “competent lawyer” under Rule 3.1-1 in order for the standard to continue to evolve as technology evolves.

More specifically, the “Technology” section of the Law Society’s *Practice Management Guidelines* should be updated regularly to remain current with contemporary technological requirements. Many of the suggestions in the “Technology” section of the *Guidelines* should be reframed as minimum standards of competence, including the use of information technology, online research tools and electronic document management systems. As technology is evolving rapidly and technological competence requires that legal professionals update their knowledge and skills on an ongoing basis, the Law Society should continue to provide resources to lawyers in the form of training on the various new technologies that are deployed by the court system.

The Advocates’ Society notes that lawyers across Ontario will have differing levels of facility with technology and different technological needs, based on various factors including their experience and the nature of their practice. As the “Technology” section of the *Guidelines* notes, lawyers should be aware of and consider technologies to support client service expectations and practice management systems as well as concerns respecting security, disaster management, and technological obsolescence. With this in mind, technological competence may be enhanced by an individual lawyer acknowledging his or her own limitations and taking the requisite steps to associate with or retain persons with the requisite knowledge and expertise.

As noted above in response to Q4(a), The Advocates’ Society suggests that it would be worthwhile for the Law Society to remind lawyers that in selecting CPD programming they should consider whether their particular needs warrant some CPD hours related to technological competence.

While The Advocates’ Society considered whether competence should include the ability to work and service clients remotely, it acknowledges that access to broadband internet is not equally accessible across the province and as such does not recommend that all legal professionals should be able to work

remotely in order to be considered competent. That said, legal professionals should have a remote work plan in place to continue to be able to serve their clients' needs.

The Advocates' Society also believes that the Law Society should take a larger role in providing resources to lawyers to help them adapt to important technological advancements that involve the mandatory requirement to use a novel platform or software. For example, the recent rollout of CaseLines in courts across Ontario has created an additional court-mandated obligation on litigators to educate themselves quickly on the inner workings of this platform. The Law Society should assist lawyers in getting up to speed in this essential mandated skill set by developing and distributing relevant resources to the bar.

6. Enhanced Practice Support and Training, Peer-Based Initiatives and Other Resources

Generally speaking, The Advocates' Society strongly supports proactive resource allocation for programming that assists those licensees who need and seek support, whether logistical support, substantive support, ethical support, and/or practice-specific guidance and mentorship.

Should the Law Society provide enhanced support for sole practitioners and small firms, such as courses on the business of law, law firm management and financial record-keeping? [Q4(g)]

The Advocates' Society agrees that this type of enhanced support is particularly important for practitioners who practise solo or in small firms.

Further, the allocation of resources to those opening any new practice (regardless of size) may also be an effective means of providing timely support to licensees and an efficient means of ensuring and supporting competence. A voluntary program that deals with practice management and accounting/trust account issues, along with other practice management principles (conflict-checking, tickler systems, etc.) should be made available as a resource for new firms. The availability of such a program for new law practices with specialized assistance available to teach and mentor may genuinely assist licensees to put appropriate systems in place from the outset and foster the desirable level of competence.

Should licensees be required to complete a training course related to a set of core competencies, such as practice management or client communications? If so, should the course be mandatory for: i) all licensees; ii) new licensees; iii) licensees in sole or small firm practice, iv) licensees transitioning to sole practice? [Q4(h)]

A central component of the Law Society's mandate is to ensure that all licensees called to the Bar in Ontario have received the necessary training to satisfy all core competencies of the profession. To the extent that practice management, client communication or other related practice management skills are part of those core competencies, it is essential that the Law Society provide the necessary training and skills assessment to all licensees as part of the qualification / licensing process. It is in the public interest to offer licensees a variety of training opportunities to support individual practice needs as they evolve and mature, but the Law Society should avoid a mandatory, prescribed approach given the vast array of practice needs. Whether, and to what extent, a licensee may wish to pursue post-call training in these areas are questions best left to licensees based on self-assessment and reflection.

Should the Law Society require or encourage licensees to enter into a mentoring relationship, either as a mentor or mentee? [Q4(i)]

The Advocates' Society agrees that mentorship is helpful for lawyers' development. The Advocates' Society supports the Law Society's mentorship program, and supports the Law Society encouraging less experienced lawyers to find mentor(s) and more experienced lawyers to offer mentorship.

The Advocates' Society has reservations about the suggestion that mentorship should be mandatory. For mentorship to be meaningful, The Advocates' Society submits that it should be voluntary and consensual. If the Law Society were to make mentorship mandatory — whether being a mentor or being mentored — The Advocates' Society is concerned that:

- mentorship will be reduced to a “box to check”;
- the authenticity and value of mentorship will be undermined; and
- licensees will be burdened with additional responsibilities that they may not be able to shoulder.

The Advocates' Society believes that, optimally, mentorship is an organic process. The Advocates' Society recognizes, however, that this may be more difficult for some licensees, including racialized licensees and sole practitioners. For this reason, it is imperative that the Law Society continue to maintain its mentorship program. The Advocates' Society further suggests that information about the mentorship program should be shared more broadly so as to attract both more mentors and more mentees. As one example, the Annual Report could invite licensees to volunteer as mentors or request a mentorship pairing.

The Law Society may also want to consider encouraging retired licensees to volunteer as mentors as a way of keeping “one toe in the game” while enhancing the ongoing development of the Bar with wisdom and experience.

The Advocates' Society is cognizant that issues may arise through the formal mentorship program, including quality control concerns (standards for volunteer mentors, or assurances that volunteer mentors meet the standards of competence that the Law Society seeks to maintain) and potential conflict concerns (for example, if a mentee wishes to discuss specific cases with their mentor). Consideration should be given to these issues.

Should the Law Society introduce peer assessments as a mechanism for improving competence? If so, how should they be structured? [Q4(j)]

The Report is not entirely clear about how the contemplated “peer assessments” would function. The Advocates' Society has questions and concerns about the concept of peer assessments, including:

- In what context would a peer assessment arise? How would the Law Society identify a licensee to be assessed by a peer?
 - The Advocates' Society submits that a peer assessment should never be mandatory. It is possible that a peer assessment may make sense in the narrow circumstance where there has been a finding of misconduct and the licensee may benefit from peer mentoring. Even in that situation, consideration should be given to the additional concerns listed below.
 - The Advocates' Society also has concerns that certain categories of licensees may be disproportionately targeted by such a program, including racialized lawyers, sole and small firm practitioners, new licensees, and licensees from areas of law with a disproportionate number of complaints like family law.
- How would the Law Society identify a peer assessor? How would the Law Society monitor this program and ensure quality?

- The Advocates’ Society submits that a non-practising lawyer (including a lawyer employed by the Law Society for this purpose), or a lawyer practising in another area of law (or even in another demographic) is not a “peer” assessor. We question how an appropriate peer would be identified and deemed qualified, and how a peer assessment process would handle different practice styles and approaches (which could again disproportionately impact licensees from marginalized communities or different areas of practice).
- What would be the impact of peer assessments on issues of privilege and conflict?
 - Even if an appropriate peer could be identified, if such a person observed or reviewed aspects of another licensee's practice, there would be serious concerns about solicitor-client privilege as well as risk of current or future conflicts of interest. It is imperative that the Law Society address these concerns if it pursues this type of program.

Are you aware of the Coach and Advisor Network? Have you participated in it and if so, did you find it helpful? [Q4(k)]

The Advocates’ Society’s Task Force was not aware of the Coach and Advisor Network until we learned about it through the Report. No member of The Advocates’ Society’s Task Force is aware of anyone who has participated in it.

Should the Coach and Advisor Network remain as is, be enhanced, or be eliminated altogether? [Q4(l)]

The Advocates’ Society supports the Coach and Advisor Network as another voluntary and proactive support to licensees, which may enhance competence. The Advocates’ Society suggests that, as with the mentoring program, the Coach and Advisor Network would benefit from more widespread marketing to increase awareness, volunteerism and uptake. Retired licensees may be an untapped resource here as well.

As with the mentorship program, The Advocates’ Society is mindful that concerns relating to “quality control”, privilege and conflicts should be considered and addressed. Any such program should, again, be voluntary only.

A word on the Legal Information and Research Network

With regard to the Legal Information and Research Network (“LiRN”), which supports 48 regional, area, and local libraries across the province of Ontario, The Advocates’ Society was very pleased to see Convocation’s approval of an operating budget of \$8,542,130 for the LiRN for 2022, in addition to a one-time transitional budget of up to \$900,000 for the LiRN to expand the electronic resources available across its network and invest in associated staff training and IT infrastructure. As we noted in our February 17, 2021 letter to the Treasurer of the Law Society (attached here for your reference), law libraries are critical to ensuring that lawyers meet their professional obligations without incurring exorbitant, and potentially prohibitive, costs. In our letter, we emphasized the importance of ensuring that the LiRN continue to be well-funded and expressed our concern with the 2021 funding cuts to the LiRN. The Advocates’ Society is grateful for Convocation’s recognition of the importance of continually investing in these resources.

Thank you for undertaking this important public consultation with stakeholders and for providing The Advocates’ Society with the opportunity to make these submissions. We would be pleased to discuss our comments with you further.

Yours sincerely,



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President

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Schedule “A”: The Advocates’ Society CPD programs delivered between June 2020 and June 2021

1. Objections (June 23, 2020)
2. Business Development for Litigators (Part 2) (June 26, 2020)
3. Top Cases in Atlantic Canada (June 26, 2020)
4. Remote Skills Workshop: Discoveries (June 30, 2020)
5. Introduction to Thomson Reuters – CaseLines (Aug. 13, 2020)
6. Influence: The Art & Science of Changing Minds (Aug. 18, 2020)
7. Remote Skills Workshop: Motions (Aug. 27, 2020)
8. On Oral Advocacy (Sept. 23, 2020)
9. Arbitration Advocacy (Sept. 24, 2020)
10. Legal Drafting for Litigators (BC) (Sept. 29, 2020)
11. Gain the Edge: Advanced Negotiation With Marty Latz (Sept. 30, 2020)
12. Civil Trial Advocacy (AB) (Oct. 1-2, 2020)
13. Atlantic Advocacy Symposium (Oct. 2, 2020)
14. Pozner on Cross: Advanced Techniques Using the Chapter Method (Oct. 5&6, 2020)
15. Equality, Diversity & Inclusion (Oct. 8, 2020)
16. Examinations for Discovery [plenary + skills workshop] (Oct. 14 & 28, 2020)
17. Business Development for Litigators (Part 3) (Oct. 19, 2020)
18. Fall Forum: New Frontiers (Oct. 23, 2020)
19. L’art de la plaidoirie en appel (QC) (Oct. 27, 2020)
20. Examining and Cross-examining Experts (Nov. 3, 2020)
21. Written Advocacy (joint with OPD) (Nov. 9, 11, 17 & 19, 2020)
22. Credibility for Litigators [plenary + skills workshop] (Nov. 10 & 16, 2020)
23. Virtual Discoveries (BC) (Nov. 17, 2020)
24. Alberta Advocacy Symposium (Nov. 18, 19, 25 & 26, 2020)
25. Evidence for Litigators (Nov. 24, 2020)
26. E-Discovery (joint with OBA & LSO) (Nov. 25, 2020)
27. Dîner pour les femmes en litige (QC) (Nov. 25, 2020)
28. The Bench Speaks (Nov. 27, 2020)
29. Leading Your Case [plenary + skills workshop] (Dec. 8 & 10, 2020)
30. Case Preparation for Litigators (Dec. 9, 2020)
31. Civility in a Post-Pandemic Era (Dec. 15, 2020)
32. Conduct of the Estates Motion [plenary + skills workshop] (Jan. 20 & 21, 2021)
33. Virtual Advocacy Series: The Art of Virtual Persuasion (Jan. 22, 2021)
34. Defamation: What Litigators Need to Know (Jan. 25, 2021)
35. Tricks of the Trade (Jan. 29, 2021)
36. On Oral Advocacy – Part 2 (Feb. 11, 2021)
37. Legal Drafting for Litigators [plenary + skills workshop] (Feb. 19 & 23, 2021)
38. The Art of Settlement (Feb. 22, 2021)
39. Virtual Advocacy Series: Technology Gone Wrong – Cautionary Tales from the Remote Courtroom (Feb. 26, 2021)
40. Motions Advocacy [plenary + skills workshop] (Mar. 4 & 9, 2021)
41. The Latest on Applications in Court (Nova Scotia) (Mar. 5, 2021)
42. Digital Evidence for Litigators (Mar. 10, 2021)
43. Cross-Examination: Strategies for Success [plenary + skills workshop] (Mar. 30 & 31, 2021)
44. Commercial List Advocacy (Apr. 9, 2021)
45. Modern Criminal Advocacy in a Virtual World (Apr. 10, 2021)

46. Preparation Series: Examination-in-Chief (Apr. 13, 2021)
47. The Fearless Advocate: Litigating Polarizing Legal Issues (Apr. 16, 2021)
48. LAT Advocacy (Apr. 19, 2021)
49. Spring Symposium: The Effective Advocate & The Advocate Making a Difference (Apr. 21 & 28, 2021)
50. Virtual Advocacy Series: Virtual Roadmap – Help Judges Help You (Apr. 23, 2021)
51. Discovery Dos and Don'ts (Atlantic Canada) (Apr. 26, 2021)
52. Maîtrisez l'interrogatoire préalable (Apr. 27, 2021)
53. Administrative Tribunal Advocacy [plenary + skills workshop] (Apr. 29 & 30, 2021)
54. Examining and Cross-Examining Experts [plenary + skills workshop] (May 4 & 5, 2021)
55. Virtual Advocacy Series: Virtual Client Management (May 7, 2021)
56. Virtual Body Language for Litigators (May 11, 2021)
57. Women in Litigation Symposium: Western Canada Edition (May 20, 2021)
58. Supreme Court of Canada Advocacy (May 27, 2021)
59. Preparation Series: Cross-Examination (June 1, 2021)
60. Privilege: A Litigator's Guide (June 3, 2021)
61. Colloque sur les techniques de plaidoirie (QC) (June 7 & 8, 2021)
62. Summer Trial Advocacy College (June 10 & 11, 2021)
63. Atlantic Trial Advocacy College (June 10 & 11, 2021)
64. Dealing with Difficult People Series: Opposing Counsel (June 15, 2021)
65. Tech Hacks for Litigators (June 17, 2021)
66. An Advocate's Guide To the Calgary Indigenous Court (June 21, 2021)
67. Litigating Contract Disputes [plenary + skills workshop] (June 22 & 23, 2021)

Schedule “B”: Selected Feedback from Attendees at The Advocates’ Society’s CPD Programs

The Advocates’ Society generally delivers around 70 CPD programs per term (a term runs from mid-June to mid-June of the following year). These programs vary in length and are focused on legal advocacy skills and issues of direct relevance to litigators. Programs may be focused on general litigation, or on litigation or advocacy in specialized areas of practice. In a typical term, The Advocates’ Society will see between 4,500 and 5,000 registrants at our CPD programs⁶.

The Advocates’ Society provides an optional feedback form at the conclusion of CPD programs. The following comments are excerpts from the feedback provided across a wide range of our programs.

“The personalized feedback and the opportunity to practise time and time again with attentive, experienced and kind lawyers was incredible. I have never learned more in one day. I could also see the improvement in performance, so to speak, throughout the day in my small group. I come from an athletic background where good coaching and great training mates make the difference. I wish I had the opportunity to have this type of coaching/mentorship more frequently. The instructors went above and beyond my expectations and made the experience both challenging and judgement free so that we were able to step out of our comfort zones. I am very thankful that I had the opportunity to participate.”

“This was a very enlightening program! I walked away feeling a lot more confident about my cross examination skills. I would highly recommend this program, especially the workshop.”

“A practical and immediately useful program. I took away a better approach to examining expert witnesses.”

“This was an excellent seminar. I will be applying what I’ve learned to my practice and will be a much better lawyer for it!”

“Great program. Very relevant. I have a far better understanding of privilege as a standalone evidentiary concept.”

“This was a great learning experience and I am excited to begin preparing for trials with all of the tips and tools provided from this much needed program! Thank you to all who put the excitement back into trial advocacy and chipped away at the fear of conducting one.”

“The instructors’ insights and feedback prepared me for Court better than law school or articling.”

“Incredible experience and great opportunity to network and learn from experienced litigators. I have confidence that each student walked away as a better and more strategic litigator than they were prior to their participation.”

“This has been the most useful CLE I’ve taken in 10 years, hands down. I learned new approaches that I will implement right away.”

⁶ This figure represents the sum of registrants at each CPD program and is not corrected to account for individuals who register for more than one CPD program in a term.

“I received important insights from the Bench on what works and what to avoid when drafting legal documents.”

“This presentation made me want to hurry back to my office and revise some of my written materials in progress. Very helpful and informative. I learned a lot!”

“The workshop was fantastic. I really appreciated the opportunity to get on my feet! The instructors gave me very practical tips and had very helpful constructive comments.”

“I enjoyed the variety of topics and the diversity of experience. I have a deeper appreciation for the procedural and strategic nuances of arbitration.”

“Getting to practise advocacy skills in a congenial low-risk environment is great for growth as a junior lawyer. This was a very rewarding learning experience.”

“The entire program was well-presented with great content from top to bottom. Faculty provided a lot of great tips about handling digital evidence that will help me on my files.”

“This was immensely helpful! Hearing from judges and senior counsel with experience in managing complex commercial litigation was so valuable.”