



Law Society
of Scotland



International
Conference of
Legal Regulators

Workshop B2: Ethics, standards and navigating change

Moderator: Philip Yelland, Law Society of Scotland

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Workshop B2: Ethics, Standards and Navigating Change

ICLR, 6 September 2019

11:30 a.m. – 12:20 p.m.



Alternative Legal Service Providers in the U.S.A.

ABA House of
Delegates
Resolution 10A,
Adopted August
2019

- **ABA Best Practice Guidelines for Online Legal Document Providers, urges providers to follow recommendations regarding:**
 - **Utility of online legal documents and forms**
 - **Protection of customers**
 - **Recommendation of attorneys to assisting**
 - **Dispute resolution process**

Licensed
Technicians or
Paralegals

- **Washington State Bar Association:
Limited License Legal Technicians
(LLLTs)**
 - <http://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians>
- **Utah State Bar: Licensed Paralegal
Practitioner Program**
 - <https://www.utahbar.org/licensed-paralegal-practitioner/>

GET LEGAL HELP

We can guide you to resources to help you with your legal problem, including court forms, legal information, and referrals to free or low-cost legal aid lawyers. Or you can find legal self-help centers at courthouses and libraries across the state, where staff can help you use this site.

[Get legal help](#)[Find a legal self-help center](#)

NEED TO SOLVE A TOUGH LEGAL PROBLEM?

Try a new **toolbox**.

Already started?

- If you have an account, [log in now](#) and visit your dashboard.
- No account? If you have a return

Sample Alternative Legal Service Provider Focused on Access to Justice:
Illinois Legal Aid Online, www.illinoislegalaid.org

Referral Fees in the U.S.A.

ABA MRPC 5.4:
Professional
Independence of
a Lawyer

- **(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:...**

**ABA MRPC 7.2:
Communications
Concerning a
Lawyer's Services:
Specific Rules**

(b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services except that a lawyer may:

- (1) pay the reasonable costs of advertisements or communications permitted by this Rule;**
- (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service;**
- (3) pay for a law practice in accordance with Rule 1.17;**
- (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:
 - (i) the reciprocal referral agreement is not exclusive; and**
 - (ii) the client is informed of the existence and nature of the agreement; and****
- (5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.**

ABA MRPC 1.5: Fees

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;**
- (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and**
- (3) the total fee is reasonable.**

Competency Requirements in the U.S.A.

Technology, wellness, and more

ABA Model Rule
of Professional
Conduct 1.1 –
Competence

- **A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.**

Comment [8]

- **Maintaining Competence**
- [8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

ABA Model Rule
of Professional
Conduct 1.6 -
Confidentiality

- **(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.**

■ **MRPC 1.6, Comment [18]**

Acting Competently to Preserve Confidentiality

- [18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

ABA MRPC 1.6, Comment [19]

- [19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Continuing Legal Education (CLE) Trends

TECHNOLOGY COMPETENCE

- Florida and North Carolina require a CLE credit hour on technology competence

WELLNESS COMPETENCE

- Not part of ABA MRPC, but being discussed by some states
- Required CLE in some states

Trust Monies

LSO By-Law 9 – Trust Monies

7(1) Subject to section 8, every licensee who receives money in trust for a client shall immediately pay the money into an account at a chartered bank, provincial savings office, credit union or a league to which the Credit Unions and Caisses Populaires Act, 1994 applies or registered trust corporation, to be kept in the name of the [licensee or the licensee's firm] and designated as a trust account.

8. (1) A licensee is not required to pay into a trust account money which he or she receives in trust for a client if,

(a) the client requests the licensee in writing not to pay the money into a trust account;

(b) the licensee pays the money into an account to be kept in the name of the client, a person named by the client or an agent of the client; or

(c) the licensee pays the money immediately upon receiving it to the client or to a person on behalf of the client in accordance with ordinary business practices.

Law Society Act – mixed trust accounts

57 (1) Every licensee who holds money in trust for or on account of more than one client in one fund shall hold the money in an account at a bank listed in Schedule I or II to the *Bank Act (Canada)*, a credit union or league to which the *Credit Unions and Caisses Populaires Act, 1994* applies or a registered trust corporation, bearing interest at a rate approved by the trustees.

(2) The interest accruing on money held in an account referred to in subsection (1) shall be deemed to be held in trust for the Foundation.

55 (1) The objects of the Foundation are to establish and maintain a fund to be used for any or all of the following purposes:

1. Legal education and legal research.
2. Legal aid.
3. The establishment, maintenance and operation of law libraries.
4. The provision of costs assistance to parties to class proceedings and to proceedings commenced under the *Class Proceedings Act, 1992*.

Trust funds and the implications of EFT

- *EasyFund* lets you manage the payouts of your real estate transaction quickly and effortlessly without leaving the office.
- In every residential real estate transaction, clients count on you for fast, secure and accurate closings. FCT understands the importance of efficiency, building customer relationships, operational effectiveness and trust. With those values in mind, we responded to a need brought forward from the legal community to provide greater efficiencies in the archaic practice of paper cheques delivered between offices during a real estate funding process.
- *EasyFund* is a secure electronic portal that puts the lawyer in control of the funding every step of the way. It allows lawyers to transfer closing funds to one another without leaving their desks and is designed to reduce and eliminate the most frustrating tasks that add to the stress of closing on time.

Permitted Business Structures

Permitted Business Structures and the Fee Sharing Rule

- The Law Society of Ontario regulates 53,000 lawyers and 9,000 paralegals. Generally, only licensees are permitted to provide “legal services” as broadly defined

For the purposes of this Act, a person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person.

- Rule 3.6-7(a) of the *Rules of Professional Conduct*:
A lawyer shall not ... directly or indirectly share, split, or divide their fees with any person who is not a lawyer or paralegal
- The following are the permitted business structures:
 - *Professional Corporations and LLP* owned by licensees
 - *Multi-Discipline Practices and Partnerships*
 - *Affiliations*
 - *Civil Society Organizations*

Permitted Business Structures

- *Multi-Discipline Practices and Partnerships*
 - Licensees may form a Multi-Discipline Practice with professionals who practise a profession, trade or occupation that supports or supplements their practice of law or provision of legal service (e.g., accountants, tax consultants, trademark and patent agents, etc.).
 - Licensees are responsible for the actions of professional partners and must maintain professional liability insurance for all professional partners.
 - Practically, “non-licensees” who are service providers may partner with “licensees” but “non-licensees” who simply provide capital may not. This is different in New Brunswick and Quebec
- *Affiliations*
 - Licensees may join with an affiliated entity in the delivery or promotion and delivery of the services of the licensee and the services of the affiliated entity.

Permitted Business Structures

- *Civil Society Organizations*
 - To make lawyer and paralegal services more accessible, the Law Society has approved a registration system that enables lawyers and paralegals to provide their professional services to the public as employees of charities and not-for-profit corporations.

Referral Fees

Referral Fees

- A significant issue with the emergence of mass advertising by a law firm for personal injury work
- The concern was that the mass advertising was thought not to be for the purpose of attracting legal work but rather for the purpose of earning referral fees

- Rule **3.6-7**

A lawyer shall not

(a) directly or indirectly share, split, or divide their fees with any person who is not a lawyer or paralegal, or

(b) give any financial or other reward to any person who is not a lawyer or paralegal for the referral of clients or client matters.

Referral Fees – 2017 revisions

3.6-6.1 (1) A lawyer may accept and a lawyer may pay a fee for the referral of a matter provided that:

- (a) the referral fee is fair and reasonable and does not increase the total amount of the fee payable by the client;
- (b) a **referral agreement** has been entered into at the time of the referral or as soon as practicable after the referral;
- (c) the lawyer or paralegal who receives the referral has the expertise and ability to handle the matter;
- (d) the referral was not made because the referring lawyer or paralegal:
 - (i) has a conflict of interest;
 - (ii) was a lawyer or paralegal whose license was suspended when the referral was made and who was accordingly not permitted to act on the matter.
- (e) **the amount of the referral fee shall not exceed fifteen percent (15%) of the fees paid to the lawyer or paralegal who received the referral for the first fifty thousand dollars (\$50,000) of such fees for the matter and five percent (5%) of any additional fees for the matter to a maximum referral fee of \$25,000**

Referral Fees – 2017 revisions

“referral agreement” means a signed written agreement between the referring lawyer or paralegal, the lawyer or paralegal who receives the referral and the client, in the form provided by the Law Society from time to time, which includes:

- (a) confirmation that the client has been advised and understands that the client has no obligation to accept the referral;
- (b) confirmation that the client has been provided with information about the Law Society’s requirements for payment and receipt of referral fees and a reasonable opportunity to review and consider that information;
- (c) confirmation that the referring lawyer or paralegal has recommended at least two lawyers or paralegals to the client and, if not, disclosure of the reason that it has not been reasonably possible to do so;
- (d) a provision that the client is free to retain a lawyer or paralegal other than the one who receives the referral;

Referral Fees – 2017 revisions

“referral agreement” means a signed written agreement between the referring lawyer or paralegal, the lawyer or paralegal who receives the referral and the client, in the form provided by the Law Society from time to time, which includes:

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- (d) a provision that the client is free to retain a lawyer or paralegal other than the one who receives the referral;

Technology and Competence

Technology

- *Federation of Law Societies of Canada 2017 Model Code Consultation Report*

3.1-2 A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.

Commentary

...

[5A] To maintain the required level of competence, a lawyer should develop and maintain a facility with technology relevant to the nature and area of the lawyer's practice and responsibilities. A lawyer should understand the benefits and risks associated with relevant technology, recognizing the lawyer's duty to protect confidential information set out in section 3.3.

- *Law Society of Ontario Technology Task Force*

Limited Liability Partnerships



- LLPs remain partnerships, not corporate structures – Partnership Act applies to the extent that it is not inconsistent with LSRA
- Must be either a registered solicitor firm with the Society or legal partnership with the Authority – no dual process currently available
- No change in tax treatment of partnership
- No disclosure of accounts
- Limited liability does not apply to any debts, obligations or liabilities incurred:
 - Prior to the date of authorisation
 - Tax arising under tax legislation
 - As a result of fraud or dishonesty
 - By a partner for a purpose not connected with the business of the LLP

Legal Partnerships



- A partnership of legal practitioners at least one of whom is a practising barrister
- Challenges of regulating solicitors and barristers
- Barristers must be briefed by a solicitor for contentious matters and cannot hold client moneys
- Only clients of solicitors will have access to the Society's Compensation Fund for dishonesty of solicitors
- Solicitor may brief internal LP barrister but client must be advised they can brief an external barrister

Multi-disciplinary practices



- Current focus is on LLPs, LPs and Part 6 of the LSRA Act
- 2 reports to the Minister for Justice and Equality but no indication of commencement schedule to date
- Both the Law Society and Bar Council provided submissions to the Authority opposing these structures
- Review of MDPs in other jurisdictions shows a low take up and small market share
- Challenge to regulate MDPs as the Authority's remit is limited to regulating legal practitioners

Solicitors and referral fees



- The Solicitors Acts prohibit solicitors from rewarding (or agreeing to reward) an unqualified person for legal business introduced by the person to a solicitor
- Any agreement in contravention of this restriction is void
- Solicitors (Professional Practice) Regulations reiterate that sharing profits with non-solicitors is prohibited
- However, the regulations do permit the sharing of professional fees with a 'duly qualified legal agent in another country'.



Solicitors & referral fees – examples of breach



Solicitors' Advertising & 'claims harvesting' websites

- Illegal 'claims harvesting' websites are operated by non-solicitors in contravention of the prohibition on solicitors paying non-solicitors referral fees
- Site visitors pursuing a personal injury claim provide information that is sold to an anonymous panel of solicitors, who then contact the claimants directly
- To date, 28 illegal 'claims harvesting' websites have been closed down as a result of the Society's intervention, with solicitors involved providing undertakings to the Society that they will not engage in any such activities in future



Receive expert advice
directly from a highly
experienced Irish
solicitor

Solicitors & referral fees – examples of breach



Practice Regulation and commencement of practice

- An independent solicitor firm commenced practice with two solicitors previously employed by a claims adjustment company
- The independent solicitor firm was located in the same building as the claims adjustment company
- Information received by the Society indicated that the independent solicitor firm was referring clients to the claims adjustment company was to the independent solicitor firm for work referrals
- The Society sought confirmation that no fees were being paid to the claims adjustment company for work referrals



General competence in practice



A Guide to Good Professional Conduct for Solicitors (3rd Ed)

- The Guide provides a statement of accepted principles of good conduct and practice for solicitors
- Using practical examples of issues that arise in practise, the Guide reflects the core values of the profession. Main areas of competency include:
 - **Honesty** – A solicitor must be honest in their practice as a solicitor in all their dealings with others
 - **Independence** – Solicitors must always retain their professional independence and their ability to advise their clients fearlessly and objectively
 - **Confidentiality** – Separate from legal privilege, solicitors have a professional duty of confidentiality to their client
 - **The avoidance of conflict of interest** – A solicitor should not act where there is a conflict of interest

General competence in practice - technology



Solicitors should be mindful of the strong emphasis on privacy and security required in client communications and data arising, in part, from implementation of the GDPR.

Particular consideration should be given to:

- Appropriate **access controls** to the firm's case management system
- **Protecting/encrypting** all sensitive and confidential documents
- Encrypting internal and external **emails**, depending on level of sensitivity
- Review of the appropriateness of **online file sharing**
- Implementation of a **security policy** for all of the firm's electronic devices in the event of loss or theft or unauthorised disclosure
- **Brexit** – solicitors should keep this under review, as guidance may change in the lead-up to Brexit and in the early months after Brexit

General competence in practice – cybercrime



Cybercrime is most commonly via a phishing attack and includes data, ransomware and denial of services.

financial fraud, theft of confidential

To avoid attack, solicitors should:

- **Secure** all computers with strong passwords
- **Backup** all data, preferably on a daily basis
- Keeping **up-to-date** with technological developments and potential threats
- Ensure the firm has an appropriate **risk management policy** and contingency plan in place, with adequate staff training
- **Encrypt** all electronic devices
- Never send or receive **bank account details** electronically and ensure all clients are aware of this policy from outset

