

CBA Ethical Practices Self-Evaluation Tool

The CBA Ethics and Professional Responsibility Committee has prepared this Ethical Practices Self-Evaluation Tool to assist Canadian law firms and lawyers to systematically examine the ethical infrastructure that supports their legal practices. The goal of the Self-Evaluation Tool is not to be prescriptive but rather to encourage exploration and discussion of firm practices. As such, the questions, practices and resources listed should be approached as suggestions rather than mandates. Lawyers are also encouraged to think creatively about what additional content could be appropriately and helpfully added to the Self-Evaluation Tool. Individual firms will have unique circumstances and needs to which lawyers should be attentive.

Given that the Canadian legal profession is regulated in each province and territory, lawyers using the Self-Evaluation Tool should be cognizant of the unique rules that may apply in their jurisdictions and bear this in mind when reviewing listed resources developed in other provinces and territories. The resources listed should also be evaluated for their currency – ethical obligations under which Canadian lawyers operate evolve and this evolution may result in some of the resources being out-of-date. The content listed under the heading “Examples of Resources Available” is a selection of material located on publically-accessible websites; additional resources exist and, in some cases, websites may have additional helpful content that is available to members only. The particular website on which content can be located is identified in each case, but there may be additional author information available on the linked documents themselves. If lawyers have any concern about the legal or regulatory applicability of a particular practice or resource, they should consult the relevant law society or seek independent legal advice. Nothing in the Self-Evaluation Tool should be interpreted as stating a standard of care.

I. RELATIONSHIP TO CLIENTS

1. Competence

Issues relating to competence give rise to significant risks for law firms. In Ontario, for example, LawPro reports that failures to know or apply the law accounted for approximately 2,703 claims and \$9.1 million in costs between 1997 and 2007.¹ In 2007, the Law Society of British Columbia reported that four or more lawyers miss a limitation period or deadline each week.² Beyond the available statistics, many additional issues of competence undoubtedly exist, resulting in poor client service although never resulting in a formal complaint to the relevant law society or a civil malpractice action.

Given the complex and dynamic nature of legal practice, continuing legal education is essential to ensure the competent delivery of legal services. In the area of ethics, the availability of informal opportunities for lawyers to discuss and deliberate on ethical issues is likely to be particularly important.³ Competence also goes beyond securing appropriate legal knowledge and skills, encompassing broader areas of concern, such as understanding of equity issues and the use of technology in practice.

¹ LawPro, “The Biggest Malpractice Risks” (online: <http://www.practicepro.ca/facts/malpracticerrisks.asp>).

² Law Society of British Columbia, “Stay tuned for more than 70 tips to prevent missed limitations and deadlines” (2007) *Bencher's Bulletin* (online: <http://www.lawsociety.bc.ca/page.cfm?cid=790&t=70-tips-to-prevent-missed-limitations-and-deadlines>).

³ See, for example, the discussion in Christine Parker et al, “The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour” (2008) 31(1) *UNSW Law Journal* 158.

Objective	Possible questions to ask in assessing compliance with this objective	Potential systems and practices to ensure objective is met	Examples of available resources
<p>Clients receive competent legal services</p>	<p>Do lawyers have appropriate and current knowledge of applicable substantive and procedural law in areas in which they practice?</p> <p>Do lawyers apply appropriate skills in delivering legal services?</p> <p>Does the law firm have appropriate resources for research to enable lawyers to access current knowledge?</p> <p>Do lawyers comply with applicable deadlines and limitation periods?</p> <p>Do lawyers and other members of the firm understand the technical and ethical aspects of using technology?</p> <p>Do lawyers and other members of the firm have adequate awareness, knowledge and training in order to ensure that clients with disabilities and other equality-seeking groups receive competent legal services?</p>	<p>Systems are in place to ensure lawyers receive regular feedback on work product (for example, regular performance reviews are conducted; peer review, where appropriate, is encouraged).</p> <p>Continuing education efforts are recorded and are considered in the context of performance reviews.</p> <p>Lawyers prepare professional development plans that are reviewed by senior colleagues and considered in the context of performance reviews.</p> <p>Checklists by matter type are used where appropriate.</p> <p>A system is in place for keeping lawyers up-to-date with changes in the law (for example, electronic updates are used or regular meetings are held).</p> <p>Guidelines for the correct steps in conducting legal research are available to lawyers.</p> <p>Dialogue on ethical questions is facilitated (for example, ethics “lunch and learn” seminars or “open door” policies with designated ethics counsel).</p> <p>All firm lawyers receive training on and use bring-forward systems to keep track of key dates (for example, limitation periods, court and tribunal appearances, filing deadlines, undertakings, closing dates).</p> <p>Technology training is made available and encouraged.</p> <p>Ethical issues pertaining to the use of technology are raised and discussed.</p> <p>All members of the firm receive training on the provision of services to persons with disabilities, language rights and cultural competence.</p> <p>An accessibility policy is in place.</p>	<p>Professional Management Practice Management Guideline (Law Society of Upper Canada)</p> <p>Practice Checklist Manual (Law Society of British Columbia)</p> <p>Checklists by fields of practice (Barreau du Québec)</p> <p>Legal Research Checklist (Law Society of Saskatchewan)</p> <p>Keeping Current (Nova Scotia Barristers' Society)</p> <p>Making Knowledge Management Work (CBA)</p> <p>Limitation period charts (LawPro)</p> <p>Time management/missed limitations (Lawyers' Insurance Association of Nova Scotia)</p> <p>Missed Limitations and Deadlines: Beat the Clock (Law Society of British Columbia)</p> <p>Saskatchewan Limitations Manual (Law Society of Saskatchewan)</p> <p>Technology Practice Management Guidelines (Law Society of Upper Canada)</p> <p>Guidelines for Practicing Ethically with New Information Technologies (CBA)</p> <p>Guide des TI - Gestion et sécurité des</p> <p>Technologies de l'information pour l'avocat et son équipe (Barreau du Québec)</p> <p>Respectful Language Guideline (Law Society of British Columbia)</p> <p>Accessible Customer Services (Law Society of Upper Canada)</p> <p>Providing Legal Services to People with Disabilities (ARCH Disability Law Centre)</p>

2. Client Communication

Breakdowns in communication are a major source of complaints against lawyers. Client service issues, which include failures to communicate, amounted to 56% of the complaints received by the Law Society of Upper Canada in 2012.⁴ As reported by the Lawyers' Insurance Association of Nova Scotia: "[t]he most common source of miscommunication is a simple one: lawyers routinely fail to realize how little they are actually saying - the "I'm Sure it was Obvious" effect.... Nothing is ever obvious unless you made it obvious by spelling it out (preferably in writing)."⁵

Objective	Possible questions to ask in assessing compliance with this objective	Potential systems and practices to ensure objective is met	Examples of available resources
<p>Communication with clients is clear, continuous and courteous</p>	<p>Do clients and lawyers share the same understanding of terms and scope of the retainer?</p> <p>Do lawyers keep clients adequately informed of the status of their representation?</p> <p>Is client feedback actively solicited?</p> <p>Are client complaints adequately dealt with internally?</p>	<p>Engagement letters and termination of engagement letters are used.</p> <p>Policies are in place that ensure systematic recording of conversations with clients (for example, policies relating to archiving email and creating notes of client meetings and phone calls).</p> <p>Client instructions are confirmed in writing.</p> <p>Clients are provided with regular progress and costs updates with a frequency and in a form that suits their needs.</p> <p>Clients are copied on important correspondence sent and received.</p> <p>Client surveys are conducted to determine satisfaction with service.</p> <p>Policies and procedures are in place for addressing client complaints.</p>	<p>Retainer Precedents (LawPro)</p> <p>Communication Toolkit (Law Society of British Columbia)</p> <p>Client Service and Communication Practice Management Guidelines (Law Society of Upper Canada)</p> <p>Documenting/Effective Communication (Lawyers' Insurance Association of Nova Scotia)</p> <p>Model Client Survey (Law Society of British Columbia)</p> <p>Post-matter client service survey precedent (LawPro)</p> <p>What Do You Do With Client Feedback? (CBA)</p>

⁴ Law Society of Upper Canada, 2012 Annual Report – Performance Highlights, p. 19 (online: <http://www.lsuc.on.ca/annual-report>).

⁵ Lawyers' Insurance Association of Nova Scotia, "Documenting/Effective Communication" (online: http://www.lians.ca/rpm/risk_management/documenting_effective_communication).

3. Confidentiality

Lawyers do not always take the care required to meet their duty of confidentiality to their clients. The Law Society of British Columbia, for example, advises in its practice management materials that it “receives a number of errors and omissions claims relating to lost or missing documents” and warns “there is always a danger of sensitive documents coming into the wrong hands.”⁶

As technology becomes more and more integrated into lawyers’ practices, ensuring the confidentiality of client information has become increasingly complex. Metadata—which can be understood as “data about data” or “information describing the history, tracking or management of an electronic document”⁷—has, in particular, given rise to new ethical issues and poses unique challenges to maintaining the confidentiality of client information.

Objective	Possible questions to ask in assessing compliance with this objective	Potential systems and practices to ensure objective is met	Examples of available resources
Client documents and communications are kept confidential in a manner consistent with lawyers’ legal and ethical obligations	<p>Do lawyers and staff understand the importance of confidentiality and applicable duties of confidentiality as provided for by rules of professional conduct and case law?</p> <p>Are lawyers aware of situations where disclosure of confidential information is either permissible or mandated by law?</p> <p>Are lawyers familiar with the requirements of privacy legislation?</p> <p>Is there adequate office security to ensure that confidential information—including electronic data—is secure?</p> <p>Are lawyers and staff aware of confidentiality issues that may arise from technologies in use at the firm?</p>	<p>A written confidentiality policy is in place and signed by all lawyers and staff.</p> <p>Lawyers and staff receive ongoing training on their duties of confidentiality.</p> <p>Procedures are in place for dealing with situations where exceptions to duties of confidentiality may apply.</p> <p>Appropriate security systems are in place with respect to physical and electronic data.</p> <p>Measures are taken to ensure the confidentiality of electronic communications with or about a client (for example, encryption software where appropriate, and password-protection on firm computers and lawyers’ smartphones).</p> <p>Technology training, including training on issues of confidentiality and privacy, is made available and is encouraged.</p>	<p>Sample confidentiality agreement (Lawyers’ Insurance Association of Nova Scotia)</p> <p>FAQs about solicitor-client privilege and confidentiality (CBA)</p> <p>Guidelines for Practising Ethically with New Information Technologies (CBA)</p> <p>Cloud computing due diligence guidelines (Law Society of British Columbia)</p> <p>“Practice Tip: Be Careful with MetaData” The Advisory, p.8 (Law Society of Alberta)</p> <p>Data security (Lawyers’ Insurance Association of Nova Scotia)</p>

⁶ The Law Society of British Columbia, Practice Material: Practice Management (February 2013) at p. 24 (online: <http://www.lawsociety.bc.ca/page.cfm?cid=300>).

⁷ Dave Bilinsky, Practice Management Advisor, Law Society of British Columbia, “Practice Tips: Metadata” (2008) *Bencher’s Bulletin* (online: <http://www.lawsociety.bc.ca/page.cfm?cid=461&t=Practice-Tips:-Metadata>).

4. Conflicts

The issue of conflicts of interest has become increasingly important over the last several decades as Canadian lawyers have become more mobile, business entities have become more complex and the courts have provided more guidance on when impermissible conflicts arise. As noted in the CBA Conflicts of Interest Toolkit, “the consequences of a conflict of interest for the lawyer can be severe and costly” and can include:

- disqualification from representation of one or more clients;
- forfeiture of fees charged and the inability to charge for work in progress and other time invested;
- a damage claim which may include punitive damages;
- embarrassment and cost in time and money of defending a malpractice claim or investigation.⁸

In addition to monitoring for potential or actual conflicts between clients, lawyers need to also guard against conflicts between lawyers’ personal interests (financial or otherwise) and client interests.

Objective	Possible questions to ask in assessing compliance with this objective	Potential systems and practices to ensure objective is met	Examples of available resources
<p>Impermissible conflicts of interest are avoided and, where not avoided, resolved/managed in a timely fashion</p>	<p>Are appropriate systems in place to identify potential and actual conflicts of interest?</p> <p>Do lawyers and staff understand what steps to take when a potential or actual conflict is identified?</p>	<p>Policies and procedures are in place with respect to checking for and evaluating conflicts of interest:</p> <ul style="list-style-type: none"> • Prior to accepting a new retainer; • When a new party becomes involved in a matter; • Upon employment of new individuals at a firm; • When a lawyer is acting for multiple parties and the interest of the parties diverge; • When a lawyer is considering accepting a directorship position or engaging in a business venture with a client; and • When a lawyer’s interpersonal relationship (such as marriage) create possible conflicts. <p>Systems to facilitate conflicts checks are in place (for example, appropriate databases are maintained that contain all relevant information with respect to each file).</p> <p>Where appropriate, a senior lawyer or committee at the firm is delegated responsibility for evaluating and addressing conflict of interest questions or situations.</p> <p>Lawyers and staff have been provided appropriate training regarding conflicts. Lawyers are encouraged to regularly review professional rules and case law regarding conflicts of interest.</p> <p>Policies are in place with respect to lawyers acting as directors for public or private companies, not-for-profit corporations or other entities.</p>	<p>Model conflicts of interest checklist (Law Society of British Columbia)</p> <p>Checking for conflicts of interest (Law Society of Upper Canada)</p> <p>Conflicts of Interest – Toolkit (CBA)</p> <p>Conflicts of Interest Checklist (Lawyers’ Insurance Association of Nova Scotia)</p> <p>Conflict of Interest – Lawyers’ Personal Interests (Law Society of Saskatchewan)</p> <p>Lawyers on boards (LawPro)</p> <p>Sitting on a non-profit board: A risk management checklist (LawPro)</p>

⁸ Canadian Bar Association Conflicts of Interest – Toolkit (available online: www.cba.org/cba/groups/conflicts/toolkit.aspx)

5. Preservation of Client Property/Trust Accounting/File Transfers

It is imperative that law firms implement appropriate financial management systems and, in particular, that firms ensure that client money received in trust is properly handled. Fraudulent activity, both at the hands of firm members and outsider fraudsters, is an area of significant risk for law firms.⁹ Care must also be taken to ensure that both active and closed files are properly transferred when required.

Objective	Questions to ask in assessing compliance with this objective	Systems and practices to ensure objective is met	Examples of available resources
<p>Client property is carefully and prudently safeguarded in a manner consistent with applicable laws and regulations</p>	<p>Is client property appropriately labeled and identified upon receipt?</p> <p>Are appropriate records kept with respect to client property?</p> <p>Are monies received in general accounts and trust accounts being handled properly?</p> <p>Is the law firm sufficiently protected from trust account misuse/fraud?</p> <p>Are both active and closed files transferred in a manner consistent with ethical duties?</p>	<p>Records are kept of client property received.</p> <p>An appropriate accounting system is used to track trust account funds and other monies received.</p> <p>Accounting records are up-to-date and accurate.</p> <p>Adequate internal controls are in place to minimize risk of fraud committed by firm members.</p> <p>Training is provided to assist law firm members in spotting possible fraudulent activity.</p> <p>Policies and procedures are in place regarding the transfer of active files and closed files.</p>	<p>Trust account requirements and information (various law societies)¹⁰</p> <p>Concerning File Closure, Retention and Destruction (The Law Society of Newfoundland and Labrador)</p> <p>Photocopying a client's file (Law Society of the Northwest Territories)</p> <p>Transfer of Open Files to New Lawyer (Practice Direction) (Law Society of Manitoba)</p> <p>File Transfer on Termination of Retainer (Webinar) (Law Society of Saskatchewan)</p> <p>File Transfer (Law Society of Upper Canada)</p> <p>Closed files: Retention and Disposition (Law Society of British Columbia)</p>

⁹ Luis Millan, "The Profession's Dirty Little Secret" (March 2013) *Canadian Lawyer* (online: www.canadianlawyermag.com/4551/the-professions-dirty-little-secret.html?print=1&tmpl=component), Yamri Taddese, "Law firm's trust account hacked, 'large six figure' taken" (January 7, 2013) *Law Times* (online: www.lawtimesnews.com/201301079535/Headline-News/Law-firms-trust-account-hacked-large-six-figure-taken).

¹⁰ [Trust Assurance \(The Law Society of British Columbia\)](#), [Trust Accounting & Safety \(Law Society of Alberta\)](#), [Trust Account Forms \(Law Society of Saskatchewan\)](#), [Articles relating to trust accounts and financial responsibility \(Law Society of Manitoba\)](#), [Trust accounts \(Law Society of Upper Canada\)](#), [Trust accounts \(Lawyers' Insurance Association of Nova Scotia\)](#), [Trust accounts \(Law Society of Prince Edward Island\)](#).

6. Fees and disbursements

Dissatisfaction with fees is a major source of complaints against Canadian lawyers. Clear communication about fees and disbursements at the beginning of an engagement and throughout the duration of the engagement assists clients in making informed decisions and alleviates frustration that can occur when clients are faced with unexpected final bills. When complaints about fees do arise, firms may benefit from an internal process to help resolve disputes informally: commencing a civil action to recover fees should be undertaken with caution as the result may be a lengthy and costly counterclaim alleging negligence.¹¹ Empirical studies conducted in other jurisdictions suggest that there is lack of awareness among many lawyers as to what constitutes ethical billing practices¹² and have found that the existence of firm policies to ensure ethical billing is linked to lower instances of observed unethical billing.¹³ Authors of these studies strongly recommend that firms offer clear guidance on appropriate billing practices.

Objective	Possible questions to ask in assessing compliance with this objective	Potential systems and practices to ensure objective is met	Examples of available resources
<p>Clients are charged fees and disbursements which are fair and reasonable and which are disclosed in a timely fashion</p>	<p>Are clients being charged fees that are fair and reasonable?</p> <p>Do lawyers have a clear understanding of what constitutes unethical billing practices?</p> <p>Do clients and lawyers share the same expectations regarding fees and disbursements?</p> <p>Is there ongoing communication with clients about fees charged and disbursements incurred?</p>	<p>Written policies regarding billing practices and procedures are in place.</p> <p>Educative measures are in place to ensure that lawyers are aware of firm policies regarding billing practices and to encourage discussion of what constitutes unethical billing practices.</p> <p>At the beginning of the engagement, billing procedures and fees are discussed with clients and addressed in a written engagement letter.</p> <p>Where practicable, an estimate of anticipated fees and disbursements is provided and, where an estimate is given, clients are regularly updated.</p> <p>Firm managers periodically conduct random audits of bills.</p> <p>Clients are billed on a regular, interim basis.</p> <p>Policies and procedures are in place for internally addressing client complaints with respect to fees and disbursements.</p>	<p>Litigation Cost Estimate Template (Law Society of Upper Canada)</p> <p>“Practice Watch - Fees, Disbursements and Interest” <i>Bencher’s Bulletin</i> (Law Society of British Columbia)</p> <p>Appropriate Billing Practices (Practice Direction (Law Society of Manitoba))</p> <p>Financial Management (Lawyers’ Insurance Association of Nova Scotia)</p> <p>Resolutions to avoid fee disputes (and to make more money) (LawPro)</p> <p>Model Work Guidelines for Young Lawyers (Legal Profession Assistance Conference of the CBA)</p>

¹¹ Tim Lemieux, LawPro, “Resolutions to Avoid Fee Disputes (And Make More Money) (online: <http://avoidclaim.com/2013/resolutions-to-avoid-fee-disputes-and-make-more-money>).

¹² Susan Saab Fortney, “Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture and the Effects of Billable Hour Requirements” (2000) 69 *UMKC Law Review* 239; Christine Parker and David Ruschena, “The Pressures of Billable Hours: Lessons from a Survey of Billing Practices Inside Law Firms” (2011) 9 *University of St. Thomas Law Journal* 619.

¹³ See, Parker and Ruschena, *supra* note 28 at 654, noting that their empirical study of billing practices of lawyers in Queensland, Australia revealed “a statistical relationship between firm policies to ensure ethical billing and lawyers reporting both fewer observed instances of bill padding and a lower level of ethical concern about the billing practices of other lawyers within their firms.”

II. RELATIONSHIP TO STUDENTS, EMPLOYEES AND OTHERS

7. Hiring

Although at risk of being overlooked, hiring practices are an important part of a law firm’s ethical infrastructure. Not only are lawyers “[t]he greatest asset to any law firm,”¹⁴ they are also a major source of risk. Lateral hires can be particularly risky: as noted in a leading American law firm risk management text, “[t]here are multiple instances of awards and settlements in the millions of dollars because of lateral hiring decisions that turn out to have introduced ‘Trojan horses’ into law firms.”¹⁵ Similar examples are likely to be found in Canada.

Hiring practices also implicate lawyers’ duty to promote the public interest. There is good reason for lawyers across Canada to share in the Law Society of British Columbia’s belief that “the public is best served by a more representative and inclusive legal profession that reflects the diversity of [society].”¹⁶ Unfortunately, there remains a chronic underrepresentation of individuals from equality-seeking groups in the Canadian legal profession.¹⁷ The adoption of fair and equitable hiring practices by law firms is one measure that can be taken in an attempt to address this situation.

Objective	Possible questions to ask in assessing compliance with this objective	Potential systems and practices to ensure objective is met	Examples of available resources
<p>The firm engages in careful, fair and equitable hiring practices</p>	<p>Does the firm conduct appropriate due diligence in hiring new staff and lawyers? Does the firm engage in fair and equitable hiring practices?</p>	<p>Adequate due diligence is conducted on candidates before a final hiring decision is made (for example, as permitted by applicable laws, review of disciplinary records and reference and credential checks are conducted). Interviewers and lawyers who make hiring decisions receive training on gender and racial stereotypes as well the potential role of unconscious bias in hiring decisions. Written interviewing guidelines are used. An employment equity and diversity hiring policy is in place. Diversity performance within the firm is measured regularly.</p>	<p>Screening and Hiring Employees (Law Society of Upper Canada) Finders & Keepers: Recruiting and retaining top talent (LawPro) CBA Equity and Diversity Guide Resource Manual Guidelines – Recruiting, Interviewing and Hiring Practices (Law Society of British Columbia) Guidelines for Equality in Employment Interviews (Law Society of Alberta) Best Practices for Employment Interviews (Law Society of Manitoba) Summary of Fair Hiring Practices Guidelines (Law Society of Upper Canada) CBA Measuring Diversity Guide</p>

¹⁴ Tim Lemieux, “In the practicePRO Lending Library: Recruiting Lawyers – How to Hire the Best Talent” (March 25, 2013), online: <http://avoidclaim.com/2013/in-the-practicepro-lending-library-recruiting-lawyers-how-to-hire-the-best-talent/>

¹⁵ Anthony E. Davis and Peter R. Jarvis, *Risk Management: Survival Tools for Law Firms* (American Bar Association, 2007) at p. 135.

¹⁶ The Law Society of British Columbia, *Towards a More Representative Legal Profession: Better practices, better workplaces, better results* (June 2012) (online: http://www.lawsociety.bc.ca/docs/publications/reports/Diversity_2012.pdf).

¹⁷ *Ibid*.

8. Supervision/Retention/Lawyer and Staff Wellbeing

The treatment of lawyers and staff is an important aspect of risk management and ethical compliance. In 2008, LawPro reported that clerical and delegation-related errors were the sixth most common type of error by number and cost.¹⁸ In the case of associate lawyers and partners, regular evaluations of performance and peer review processes can work to proactively address and remediate potential problems in lawyer competence and conduct.¹⁹

Regular feedback may also assist in retention, which has significant financial implications for law firms.²⁰ Retention is also a significant issue in relation to equality and diversity in the legal profession. This is particularly true for female lawyers. As a report by the Law Society of Upper Canada observed, “[w]omen have been entering the legal profession and private practice in record numbers for at least two decades...[but] have been leaving private practice in droves largely because the legal profession has not effectively adapted to this reality.”²¹

Ensuring that both formal and informal performance evaluation and work assignment processes are free of bias (both conscious and unconscious) is essential to alleviating systemic barriers faced by women and other members of equality-seeking groups in the legal profession.²² Eliminating bias may have broader implications for risk management as well: studies on ethical behaviour in organizations suggest that the perceived fairness of procedures within an organization (like those relating to, for example, compensation, promotion and work assignments) can play an important role in fostering a culture of ethical compliance.²³

Finally, the wellbeing of lawyers and staff in the firm is a critical area of law firm management. It is repeatedly observed that the practice of law can be extraordinarily stressful. The consequences of this stressful environment for individuals can be devastating: rates of burnout, depression and suicide are disproportionately high in the legal profession and drug and alcohol abuse is prevalent.²⁴ Mental, physical and emotional issues experienced by lawyers and staff can also give rise to behaviour that leads to malpractice claims.²⁵

Objective	Possible questions to ask in assessing compliance with this objective	Potential systems and practices to ensure objective is met	Examples of available resources
Issues of training, supervision, retention and	Does the firm provide initial and ongoing training for lawyers and staff?	Training opportunities are available to firm administrators, senior lawyers, and senior staff on how to train, supervise and give feedback to other lawyers and staff.	<u>Guide to Successful Associate Evaluations (CBA)</u>

¹⁸ The biggest malpractice risks by Dan Pinnington (LAWPRO Magazine Summer 2008) (online: http://www.practicepro.ca/LawPROmag/Pinnington_Biggest_Malpractice.pdf).

¹⁹ Susan Saab Fortney, “Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture” (1996) 10 *The Georgetown Journal of Legal Ethics* 271.

²⁰ The Law Society of British Columbia, *Towards a More Representative Legal Profession: Better practices, better workplaces, better results* (June 2012) (online: http://www.lawsociety.bc.ca/docs/publications/reports/Diversity_2012.pdf).

²¹ The Law Society of Upper Canada, *Executive Summary – The Retention of Women in Private Practice Working Group* (May 22, 2008) (online: <http://www.lsuc.on.ca/with.aspx?id=397>).

²² The Law Society of British Columbia, *Towards a More Representative Legal Profession: Better practices, better workplaces, better results* (June 2012), online: http://www.lawsociety.bc.ca/docs/publications/reports/Diversity_2012.pdf

²³ Milton C Regan, “Moral Intuitions and Organizational Culture” (2007) 51 *St. Louis U. L.J.* 941.

²⁴ Owen Kelly, CBA PracticeLink “Coping with Stress and Avoiding Burnout: Techniques for Lawyers” (online: <http://www.cba.org/cba/practicelink/bwl/stresscoping.aspx>).

²⁵ LawPro, “Wellness & Balance: Resources to Help you Find Your Footing” (online: http://www.practicepro.ca/LawPROmag/Wellness_Resources.pdf).

<p>lawyer and staff wellbeing are treated thoughtfully and seriously within the firm</p>	<p>Are lawyers and staff adequately supervised?</p> <p>Do lawyers understand what work may be delegated to non-lawyers and what may not?</p> <p>Are steps being taken to ensure that all lawyers and staff experience a fair and safe working environment?</p> <p>Are processes for evaluation and assigning work free of bias?</p> <p>Does the firm take steps to monitor and encourage lawyer and staff wellbeing?</p>	<p>Systems are in place to ensure that lawyers and staff receive regular feedback on work product (for example, formal performance reviews and informal meetings about performance are regularly conducted; peer review, where appropriate, is encouraged).</p> <p>Appropriate internal controls are in place with respect to financial transactions.</p> <p>Policies and procedures are in place to address and understand accommodation, equality and harassment in the workplace.</p> <p>Written maternity and parental leave polices are in place.</p> <p>Processes in place for evaluating performance and for assigning work are reviewed for potential unconscious bias.</p> <p>Flexible work arrangements are available where appropriate.</p> <p>Lawyers are made aware of, and encouraged to use when needed or desired, personal assistance programs offered by and for the legal profession, and other mental health resources available in the community.</p> <p>Benefits are available to staff and lawyers to access good health management services (for example, exercise or courses on healthy eating, ergonomics, or stress release techniques).</p> <p>Opportunities are available to lawyers to engage in the legal community (for example, join legal associations, volunteer for boards and committees, and attend events).</p> <p>Senior lawyers in the firm model healthy work practices.</p>	<p>Employee Delegation and Supervision (Law Society of Upper Canada)</p> <p>Supervision of Employees – the Buck Stops with You (LawPro)</p> <p>Human Resources/Staff Management (Lawyers’ Insurance Association of Nova Scotia)</p> <p>Personal Management Practice Management Guideline (Law Society of Upper Canada)</p> <p>Model equality and diversity policies (various law societies)²⁶</p> <p>Guide to Accessibility Planning for Law Firms (CBA)</p> <p>Resource Guide for Lawyers with Disabilities and Employers (Law Society of British Columbia)</p> <p>Model policy: flexible work arrangements (Law Society of British Columbia)</p> <p>Alternative work arrangements – guidelines for law firms (Law Society of Saskatchewan)</p> <p>Model policy on alternative work schedules (Law Society of Manitoba)</p> <p>Lawyer assistance programs (various law societies)²⁷</p> <p>Laughter & Living: The Lawyer’s Personal Toolbox (The Law Society of British Columbia)</p> <p>Legal Profession Assistance Conference (LPAC) of the CBA</p>
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²⁶ [Model policies \(Law Society of British Columbia\)](#), [Model equity policies \(Law Society of Alberta\)](#), [Equity \(Law Society of Saskatchewan\)](#), [Equity \(Law Society of Manitoba\)](#), [Equity Model Policies \(Law Society of Upper Canada\)](#)

²⁷ [Personal assistance programs \(Law Society of British Columbia\)](#), [Assist Program \(Law Society of Alberta\)](#), [Lawyers At Risk \(Law Society of Manitoba\)](#), [Member Assistance Program \(Law Society of Upper Canada\)](#), [Nova Scotia Lawyers Assistance Program](#), [Yukon Lawyers Assistance Program](#), [Lawyers’ Assistance \(Law Society of the Northwest Territories\)](#)

III. RELATIONSHIP TO REGULATOR, THIRD-PARTIES AND THE PUBLIC GENERALLY

9. Rule of Law and the Administration of Justice

The administration of justice and regulation of the profession requires that lawyers are responsive to court orders and communications from law societies. Failures to respond to law society communications or cooperate in law society investigations result in a significant number of disciplinary actions against lawyers every year. Moreover, these failures damage the reputation of the profession for trust and integrity.

Prompt and diligent compliance with undertakings is also an important part of ethical legal practice. As observed by a lawyer disciplinary panel in British Columbia:

The trust and confidence vested in lawyer's undertakings will be eroded in circumstances where a cavalier approach to the fulfillment of undertaking obligations is permitted to endure. Reliance on undertakings is fundamental to the practice of law and it follows that serious and diligent efforts to meet all undertakings will be an essential ingredient in maintaining the public credibility and trust in lawyers.²⁸

Opinion letters prepared by firm lawyers and relied on by third parties is another area that implicates the rule of law and proper administration of justice, in addition to raising risk management concerns. As noted in a leading American law firm risk management text, "[k]ey to managing risk in this area is the existence and enforcement of policies and procedures ensuring independent review, within the firm, before lawyers with client or matter responsibility can issue opinion letters."²⁹

Objective	Questions to ask in assessing compliance with this objective	Systems and practices to ensure objective is met	Examples of available resources
Lawyers and law firms respect and foster the rule of law and the proper administration of justice	<p>Do lawyers understand their ethical duties in relation to giving undertakings and responding to law society communications?</p> <p>Are steps taken to ensure undertakings, court orders, and law society requests are properly and promptly fulfilled?</p> <p>Does the firm provide training with respect to ethical issues that engage administration of justice issues or concerns?</p> <p>Does the law firm have safeguards in place regarding opinion letters that will be relied on by third parties?</p>	<p>Undertakings are given in writing and the file updated when fulfilled. Where appropriate, verification is sought that an undertaking has been properly fulfilled.</p> <p>When given, undertakings are recorded; when fulfilled, verification is sought.</p> <p>Educational measures are in place to ensure that lawyers understand their ethical duties in relation to giving undertakings and responding to law society communications.</p> <p>Systems and policies are in place to ensure that lawyers have opportunities to discuss and understand their role in ensuring the proper administration of justice (for example, informal intra-firm education events are held and/or relevant external CPD activities are funded).</p> <p>Policies and procedures are in place with respect to third party opinions (for example, where appropriate, template opinion letters are used and/or peer-review processes are in place).</p>	<p>Undertakings (Law Society of Upper Canada)</p> <p>Undertakings (Lawyers' Insurance Association of Nova Scotia)</p> <p>Communications with the Law Society (Law Society of British Columbia)</p> <p>Solicitors' Legal Opinions Committee of British Columbia</p>

²⁸ As approvingly quoted by the British Columbia Court of Appeal in *The Law Society of British Columbia v. Heringa*, 2004 BCCA 97 (C.A.) at para. 10.

²⁹ Anthony E. Davis and Peter R. Jarvis, *Risk Management: Survival Tools for Law Firms* (American Bar Association, 2007) at p. 134.

10. Access to Justice

Lawyers have a duty to promote and protect the public interest. One of the most significant issues currently facing the Canadian public is meaningful access to justice. Canada ranked ninth among twelve European and North American countries in a 2011 World Justice Project analysis of access to civil justice.³⁰ Serious issues of access, such as lengthy delays, also exist in the criminal justice system. Improving access to justice in Canada requires leadership and change that reaches well beyond practices within law firms. This does not, however, preclude law firms from looking inward to what they might do themselves to better meet their obligations to promote and protect the public interest. Encouraging pro bono or other volunteer work, as well as exploring alternative fee arrangements and limited scope retainers (where appropriate and permitted under applicable laws and regulations), are examples of some tangible steps that firms can take.

Law firms should explore how their lawyers interact with self-represented parties.³¹ One aspect of the access to justice crisis in Canada is that legal services have become increasingly out of reach for many Canadians. This has resulted in a large number of self-represented parties. A recent comprehensive study on self-represented litigants in Alberta, British Columbia and Ontario revealed that a significant number of self-represented litigants had complaints about the opposing counsel they dealt with.³² On the other hand, a number of lawyers reported challenges in communicating or negotiating with self-represented litigants.³³ This suggests, at the very least, that lawyers need more information and training to assist them in dealing with self-represented litigants.

Objective	Questions to ask in assessing compliance with this objective	Systems and practices to ensure objective is met	Examples of available resources
<p>The law firm adopts practices that promote access to justice</p>	<p>Does the firm undertake practices and foster a culture in which access to justice is valued and promoted?</p> <p>Are lawyers trained to effectively interact with self-represented parties?</p>	<p>Pro bono and other volunteer activity in the community is encouraged by the law firm and taken into account in performance evaluations (for example, billable hour credits are provided or annual goals are set).</p> <p>A written pro bono policy is in place.</p> <p>Where appropriate and permitted under applicable laws and regulations, the law firm uses alternative fee arrangements and limited scope retainers (i.e. unbundled legal services).</p> <p>Training is provided to lawyers who are likely to encounter self-represented litigants.</p>	<p>The ABC's of Creating a Pro Bono Policy for Your Firm (CBA)</p> <p>Best Practices Guide (Pro Bono Law Ontario)</p> <p>"Creating Pro Bono Opportunities" The Advisory (Law Society of Alberta)</p> <p>Tips for Dealing with the Self-Represented Litigant (Ontario Bar Association)</p> <p>Self-represented Litigants: A Survival Guide (LawPro)</p> <p>"Unbundling" of Legal Services (Law Society of Upper Canada)</p>

³⁰ Mark Agrast, Juan Carlos Botero and Alejandro Ponce, WJP Rule of Law Index 2011 (Washington, D.C.: The World Justice Project, 2011) (online: <http://worldjusticeproject.org/publications>).

³¹ The terms "unrepresented" or "litigant in person" are also sometimes used to describe individuals who appear in court without a lawyer. The CBA Self-Evaluation Tool follows the recent comprehensive report authored by Julie MacFarlane in using the term "self-represented litigants" (Julie MacFarlane, The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants, Final Report (May 2013) at 16 (available online: http://www.representing-yourself.com/index.php?option=com_content&view=article&id=99&Itemid=97)).

³² *Ibid.* at 91.

³³ *Ibid.* at 92.

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