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November 24, 2021

Law Society of Ontario  
130 Queen Street West  
Toronto, ON M5H 2N6

Dear Sidney Troister (Chair) and C. Scott Marshall (Vice-Chair), Competence Task Force,

Re: CCLA Response to the Law Society of Ontario's Report - Renewing the Law Society's Continuing Competence Framework

Thank you for engaging the public and the County of Carleton Law Association (“CCLA”) in consultations regarding the Law Society of Ontario’s (“LSO”) Competence Task Force. The CCLA is one of Ontario’s largest law associations, representing lawyers and paralegals in the Ottawa and Eastern Ontario legal community.

In preparing the following submissions, the CCLA solicited the opinions and views of its members in response to the LSO Report titled, “Renewing the Law Society’s Continuing Competency Framework” (“**Report**”). Our submissions follow the rubric of questions set out in the Report.

## **I. DEFINING COMPETENCE**

The CCLA’s membership does not agree with the proposed definition of “Competence”, which it found to be vague.

In our view, the LSO’s definition of “Competence” should be as rigorous as that imposed by the common law in Ontario, as defined by the Court of Appeal of Ontario. In *Ristimaki v.*

*Cooper*, 2006 CanLII 12415 at para 59 (Ont. C.A.), the Court of Appeal summarized the standard of care applicable to lawyers in Ontario:

- (a) A solicitor **must bring reasonable care, skill, and knowledge** to the professional service which he or she has undertaken; see *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.), at 208;
- (b) For a solicitor who holds himself or herself out as having particular **expertise in a given area of the law, a higher standard of care applies**; see *Confederation Life Insurance Co. v. Shepherd, McKenzie, Plaxton, Little & Jenkins* (1992), 29 R.P.R. (2d) 271 (Ont. Gen. Div. [Commercial List]), varied on other grounds (1996), 88 O.A.C. 398 (Ont. C.A.); and,
- (c) A lawyer who does not adequately or diligently **protect the client's interests** will be found negligent: see Stephen M. Grant and Linda R. Rothstein, *Lawyers' Professional Liability*, 2nd ed. (Markham: Butterworths, 1998) at 23. (Emphases added.)

The CCLA respectfully submits that it would be improper for the LSO to impose a lower and more subjective standard of lawyer competence than that imposed by the common law. In other words, the same conduct cannot be compliant with LSO regulation while concurrently being negligent at law.

The CCLA states that a unified standard of legal competence must exist in Ontario as between the common law and the LSO's competency regime. The CCLA states that this necessarily requires that the LSO's definition of lawyer competence mirror that of the common law as set out above.

The CCLA's membership also felt strongly that in addition to the foregoing, lawyers in Ontario should also have strong **ethical competence**. The standard of ethical competence is



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reflected in the Supreme Court of Canada's decisions of *R. v. Neil*, 2002 SCC 70 and *Strother v. 3464920 Canada Inc.*, 2007 SCC 24. Legal professionals are deemed by the common law to be aware of and comply with their fiduciary obligations. The ethical competency expected by the LSO should be no different.

## II. PRINCIPLES OF AN EFFECTIVE COMPETENCE REGIME

The CCLA agrees that competence requirements should be feasible, and that the LSO should make further significant strides to make its **CPD programs as cost-effective as possible**, not only for those who practise in solo or small firms, but for every practitioner (including those within government or at not-for-profit organizations) where annual CPD budgets are limited.

That being said, the CCLA strongly believes that an effective competence regime should have **inflexible obligations**. If this were not the case, there could be differential regional and subject matter standards not only of a lawyer's competence but ultimately of the law itself. By way of example, the CCLA believes that the LSO should not permit lawyers operating in rural locations to operate subject to a different standard than those operating in urban settings. Ontarians have the right to high quality legal service regardless of their place of residence within the province.

The CCLA agrees with the importance of considering **a client's perspective** of "*what constitutes the competent provision of legal services.*" This will often require a lawyer to balance diplomacy and candour, because clients do not always understand and accept what the law requires. However, the CCLA believes that this consideration should not and cannot trump the legal and regulatory standard of competency imposed in Ontario.



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### III. COMPONENTS OF A CONTINUING COMPETENCE FRAMEWORK

Our members are of the strong opinion that the **legal information and research supports** (Great Library and LiRN) should remain priority components of a rigorous competence framework. To remain useful, these resources must receive **ongoing, predictable, and robust funding** that keeps up with the cost of inflation.

As we recently noted in the CCLA's Statement on "Law Libraries: Ensuring Competency in the Profession and Access to Justice":

*The common law demands that lawyers and self-represented litigants understand the law as it has been decided previously. This is the premise on which the entire legal system rests. It is essential that lawyers, paralegals, and the public have access to legal research materials in order to adequately inform the Court of the development of the common law when arguing their case. We cannot forget that this obligation is an ethical and professional requirement of legal professionals as Officers of the Court.*

*Meanwhile, legal texts and databases are very expensive and their proper navigation is critical to ensuring the identification of relevant law. The public, sole practitioners, and professionals from smaller and medium sized law firms often do not have the resources to support this required bank of knowledge. And this is even true for the judiciary. We have been advised that members of the judiciary consult the material in the law library that is not otherwise available to them in their offices or judicial library, including rare books that are only otherwise available at the Great Library in Toronto. This is where our law libraries step in, especially libraries like the CCLA where our physical facilities enable public access. Our Ontario county and district law librarians have been providing both the resources and the expertise in their use to the full range of justice system participants for over 140 years...*

*When LSO members refer to their law libraries as "essential," "absolutely necessary," and "critical to [their] practice," we trust that the LSO listens given its obligation to ensure competency in the profession. Simply put, not everyone practicing law in this province can afford an adequate legal resource collection in their office. The public cannot. Well stocked, staffed, and funded courthouse libraries enable all legal professionals to carry out the research required of them for their clients and under their obligations per the Rules of Professional Conduct.*



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#### IV. CPD REQUIREMENTS

Our membership felt strongly that lawyers and paralegals should be required to take **CPD programs in their practice areas**, and, as the CCLA has stated earlier, that **CPD programs should be offered for as little money as possible** to improve the accessibility of these programs to the LSO membership.

Our membership did not agree that the CPD requirement should be completed over two years given that **many practice areas evolve significantly within one year**, let alone two. A two-year timeframe to complete their CPD requirement increases the risk that a lawyer or paralegal will fall behind the latest developments in their practice area(s) as dictated by legislative and common law change.

Our membership supports any initiative that will improve the potential for ongoing learning; in this vein, **we support increasingly stringent competency requirements** and interactive CPD programs.

Our membership **does not support a self-assessment** model of competency. In our view, this would essentially abdicate the LSO's legal obligations as a regulator.

#### V. ENHANCING PRACTICE SUPPORT AND TRAINING

As we have previously indicated, our membership endorses enhanced supports for sole practitioners and small firms. On this issue:

1. There should be a pragmatic **guide on trust accounting**;
2. There should be a pragmatic **guide on interviewing clients and speaking with opposing counsel**;



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3. The LSO's **guides to running a legal business should be updated, made available for free, and be posted online** in a prominent, accessible location; and
4. A **list of the LSO's free legal resources** should be updated and listed prominently on the LSO's website.

## VI. PEER-BASED INITIATIVES

The Law Society should not require licensees to enter into a mentoring relationship, but these relationships should be strongly encouraged. Our membership regards the **Coach and Advisor Network highly as an optional activity**.

Our membership did not approve of the idea of peer assessments given that these could be highly biased or discriminatory and make existing unequitable relationships more prone to abuse. We believe that the LSO's Complaints mechanism is an acceptable, existing manner for peers to report competency concerns.

## VII. PRACTICE ASSESSMENTS

Our membership approves of spot audits, which motivates firms and legal professionals to follow the rules. Spot audits should not be limited to financial audits but should also include practice and/or competency reviews. In the context of barristers specifically, the CCLA also received the suggestion, a suggestion which the CCLA supports, that the LSO spot auditor observe the legal professional's performance in court.

In our view, **the number of spot audits should be the following: (1) increased for all licensees, (2) mandatory** during the first few years of practice, (3) and required within the first twelve (12) months of a firm's opening. While this may create an initial cost for the LSO, it will be offset by the savings from a reduction in disciplinary investigations and proceedings.



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## VIII. CONCLUSION

We thank the lawyers and paralegals of the CCLA who provided the above-noted policy feedback. We also thank CCLA External Relations Committee Member, Emily Crocco, for her substantive drafting of these.

Thank you for the opportunity to provide the LSO with our input. The CCLA requests the opportunity to make submissions before the Competency Task Force and/or Professional Development and Competence Committee. Should you have any questions or concerns, please do not hesitate to contact us at your earliest convenience. All of which is respectfully submitted.

C. Katie Black

Chair, CCLA External Relations Committee

cc: Teresa Donnelly, Treasurer, Law Society of Ontario  
Barbara Murchie, Chair, Professional Development and Competence Committee  
Jean-Jacques Desgranges, Bencher, East Region  
Cheryl Lean, Bencher, East Region  
Cecil Lyon, Bencher, East Region  
Katie Robinette, Executive Director, Federation of Ontario Law Associations  
Nathan Baker, Chair, Federation of Ontario Law Associations  
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