

December 3, 2021

Submitted Online Only

To: Members of the LSO Competence Task Force
From: The Roundtable of Legal Diversity Associations (RODA)

Re: Submissions for the Continuing Competence Framework

OVERVIEW

The Roundtable of Legal Diversity Associations (RODA) submits these comments in response to the *Call for Comment* on the continuing competence framework by the Law Society of Ontario's Competence Task Force ("Task Force"). The comments respond to the Competence Task Force's report, "*Renewing the Law Society's Continuing Competence Framework*" ("Report") dated June 23, 2021, and to the questions posed in that Report. It is RODA's understanding that the Task Force will be considering these submissions during the development phase of its work plan.

BACKGROUND

The Roundtable of Legal Diversity Associations (RODA) is an umbrella organization that brings together a coalition of 22 equity-deserving, Canadian legal associations.ⁱ Our members are lawyers who hail from a wide range of practice settings, from soles to national firms and institutions, work in all ranges of legal areas, and come from student to semi-retired levels of experience.

COMMENTARY & RECOMMENDATIONS

Principles for an effective competence regime

In general RODA agrees with the five principles as outlined in the Report **if** they are applied with a public interest lens. Lawyers have responsibilities to the administration of justice beyond their individual clients. We have an obligation to encourage public respect for and try to improve the administration of justice.ⁱⁱ **RODA reiterates the Federation of Asian Canadian Lawyers' (FACL) articulation of a broad, purposive approach to these principles, and adds that if that approach is not sufficiently robust, then the principles fail to guard the public interest aspect of a lawyer's competency.**ⁱⁱⁱ

Working Definition of Competence

RODA supports the Report's working definition of competence, including the value of context, but has concerns about having a standard that is "too contextually " driven - in other words, what is the minimum service that the public is entitled to receive no matter the working context of the lawyer. In that vein, **competence needs to be clearly anchored to the *Law Society Act*. In the interpretation of the standards of professional competence, a licensee fails if there are deficiencies in the licensee's knowledge, skill or judgment.**^{iv}

In modern times, knowledge, skill and judgment are informed by more than the law as it is written on a page. Competent lawyering requires engagement: engagement with the legal developments within one's practice areas, of course, but also in the legal developments that are occurring all around us. Lawyers must engage to understand the impacts of societal and technological change on the law and legal practice. This includes how we communicate and how different people receive our communications, changes to the administration of justice (including technical requirements and changes to rules), and how our clients interact with the law (including contextual analysis and their individual and group exposure to/experience with the law). These changes affect our legal analysis and, fundamentally, our ability to serve the public - as individual clients or as part of our justice system. It matters not whether you practice in a rural setting or an urban one: lawyers are still working with people, are still working with essentially the same laws, are still interacting with the same systems of justice, and have the same objectives: to provide competent legal service and support the administration of justice. For the purposes of this review, **engagement requires ongoing education and learning; it requires interaction with other legal professionals; and it requires reporting to/review by the legal regulator on a consistent and not infrequent basis.**

Continuing Professional Development Requirements

Given the current state of the bar, RODA **does not support the concept of self-assessment, beyond its current form**, because, in essence, one does not know what one does not know. This is especially true in matters of cultural or systemic privilege.^v RODA accepts that the LSO has struck a balance between mandatory CPD and individual self-assessment by requiring a certain number of hours within the designated categories of Substantive, Professional, and EDI. Individual licensees have an enormous range of choice that they use to tailor to their individual practice needs and particular contexts, but **the requirement to remain informed about the evolving understanding of how the law and its enforcement impacts society must be non-negotiable. This is essential to be able to give proper legal advice.**

RODA believes that the current CPD offerings and requirements could be improved. The comments made by the Federation of Ontario Law Associations (FOLA) noting the default focus of CPD programming to be on knowledge - over skill and judgment - is important.^{vi} This is likely one factor for the high number of LAWPro complaints that fall into that category of client services claims and, in particular, communication deficiencies.^{vii} How do we maintain high levels of skill and judgment throughout our legal careers? It will certainly not be by ignoring the need to revisit those competency attributes. At Convocation on November 26, 2021, the LSO focused its debate on how to improve the experiential learning stage of becoming a lawyer. There is widespread acceptance that experiential training and early mentoring is key to learning the profession of law. The LSO may wish to investigate how experiential training could be incorporated into a licensee's career on a cyclical basis and not only at the beginning of a lawyer's career. To this end, FOLA's comments around the "how" and "who" to provide support for renewing our standards of practice are well-taken. **If the LSO intends to revisit the actual hourly requirements for CPD or the formats in which CPD is transmitted (including ways to better engage learners), then this needs to be done with proper consultation amongst legal educators and consumers of the programming.**

RODA is aware of the criticisms around the efficacy of whether mandatory CPD - in any format - is meeting its stated goals. While there may be room for improvement in the current model of CPD, given the general consensus amongst most professionally regulated entities around the world and, indeed most educational institutions,^{viii} ongoing education is an essential component of being a competent professional.^{ix} **RODA believes the requirement of continuing professional development is fundamental and, if the LSO finds it necessary to visit that basic premise, it should reach a conclusion only after serious and formal investigation and analysis.** As FACL has articulated in their submissions, "this would include in-depth study that incorporates consultation with qualified subject-matter experts, community-based organizations (including those with racialized and Indigenous membership), members of the profession, and the public." RODA would add to that list: pedagogical experts and LawPro. In addition, if a more in-depth review of the current CPD system or requirements is to be done, the reporting requirements should not be suspended in the interim, as has been done in at least one other jurisdiction.^x

Finally, RODA is aware of the criticisms around the annual requirement of one-hour of Equity, Diversity, and Inclusion (EDI) training. Again, while there may be room for format improvement, **until our legal community is at a place where our systems function more inclusively, and our profession is more literate about the effects of our inequitable legal and justice system, this training must be mandatory.** As a society, we know much more about the people around us than we did two decades ago when many of these basic requirements were developed,^{xi} and we know that many facets of exclusion or inequity are not visible at the outset of a relationship, solicitor-client or otherwise, nor are they necessarily visible on the face of a law. Furthermore, lawyers are prohibited from sexually harassing and have a special responsibility to respect the requirements of Ontario human rights laws and, specifically, to honour the obligation not to discriminate on enumerated grounds.^{xii} What that means is constantly evolving and lawyers

need to stay abreast of what this obligation entails. No matter the practice setting, lawyers must be conscious and pro-active in their approach to relationships, and this requires constant vigilance and education. The LSO cannot continue to debate whether the legal profession has a problem with inclusivity or with servicing diverse populations. **It must, instead, focus on solutions. Furthermore, RODA supports the specific recommendations as articulated in the submissions made by the LSO's Equity Advisory Group (EAG) regarding the specific need for required programming for Indigenous intercultural competency and anti-Black racism.**

Interacting with Other Legal Professionals

Several of the LSO's programs in its current continuing competence framework support the need to interact with other lawyers, which is of particular importance to those that work in sole or small firms. In general, **RODA is supportive of the Practice Management Helpline and Practice Management Resources, as well as the Coach and Advisor Network, and would encourage the LSO to broaden its publicity of these resources on a wider, more varied, and more regular basis.** Particularly for the Coach and Advisor Network, which is only four years old, lawyers may not be aware of what the programs actually offer. This is not only true for new lawyers, who are often inundated with information, but also for more seasoned lawyers who believe that these services are not meant for them.

RODA also encourages **the LSO to publicize and explain the existence and purpose of the Discrimination and Harassment Counsel ("DHC").** While the DHC has not been included as part of the competency review, the impact of discrimination and harassment on a lawyer's ability to function effectively is well-known. The DHC is part of the solution to keep a lawyer, who has been the victim of discrimination or harassment, competent.^{xiii} Conversely, a lawyer's discriminatory and harassing behaviour may well be a sign of incompetence. The LSO may wish to consider expanding the role of the DHC to provide support and guidance to lawyers who may want advice on how to avoid discriminatory or harassing behavior.

Finally, the recent discussions around the purpose and functions of **the Great Library, the LIRN and the County and District Law Libraries** have highlighted the critical role that these services play in addressing professional development and competence. Access to the legal resource collections and the provision of legal research expertise are crucial to the competent provision of legal services. Furthermore, **these hubs also function as places where lawyers interact and connect with peers for mentoring, coaching, and communicating.**

RODA supports the LSO's encouragement for lawyers to engage in mentorship relationships, however, it does not believe any benefits of a mandatory mentorship program would outweigh concerns around the appropriateness or effectiveness of any such program. RODA does not support the launch of a peer-assessment project because the support, training, and monitoring that the LSO would need to give for such a program to be successful, on its face, well outweighs the benefit of such a program.

Reporting and Reviews with the LSO

The Report's identification of the dynamism of law is accurate and **anything less than an annual CPD requirement or an annual reporting of one's professional state of affairs is inadequate. RODA supports the Practice Reviews and Spot Audit practice assessment programs and would recommend the expansion of both programs along the lines suggested by the County of Carleton Law Association (CCLA) in their submissions.** RODA agrees that initial increase in costs for these programs will be offset by savings in disciplinary investigations and proceedings, and very possibly, legal insurance premiums. It will also offer value in less tangible ways: assisting lawyers to provide competent legal services at early and other critical points in their careers, and assisting lawyers to stay in practice, both of which increase the likelihood that the public will have access to the competent legal services and will enhance the public's trust in the justice system.

RODA supports the Certified Specialist Program's goals but recommends a review as to why this program has had so little uptake within the profession and whether it is serving the public need to select an appropriate lawyer.

RODA supports a mandatory technological competence requirement. This should form part of the requirements to enter the profession and therefore be developed in collaboration with law schools and the experiential learning phase of licensing. Ongoing technological competence requirements should be clearly articulated by the LSO annually and reported through our Annual Report filing process. The development of the criteria should be done through consultation with stakeholders, including the licensees, the Attorney General, and the Courts.

RODA agrees with the LSO's acknowledgement that no single program or requirement can ensure the competence of lawyers, which is both an ongoing, individual professional responsibility, and a significant regulatory endeavour. That said, there is much worth maintaining and developing further in the LSO's current continuing competency framework.

RODA agrees with the Taskforce's objective: to develop an **effective, proportionate, and balanced regulatory framework** addressing careerlong competence in a manner that protects the public interest and is responsive to the public's legal needs.

CONCLUSION

As a self-governing profession, we ignore the needs of the public we serve at our peril. We must be competent and be seen to be competent. To that end, RODA supports and reiterates the comments made in FACL's submissions:

*At base, FACL submits that any competence regime must include a robust educational component devoted to the societal and cultural context in which legal services are delivered in the modern era. The public we serve is diverse in identities, beliefs, backgrounds, and needs. **The credibility and relevance of the legal profession and of the administration of justice rises and falls on our ability to evolve in parallel with that diversity.*** [emphasis added]

RODA looks forward to continuing the dialogue during the next phase of the Taskforce's review of the continuing competence framework. Thank you for the opportunity to comment on this Report and we welcome any questions that the Taskforce may have in regard to these submissions.

ⁱ The **Roundtable of Legal Diversity Associations (RODA)** is an umbrella organization that brings together a coalition of 22 equity-deserving, Canadian legal associations. RODA was founded in 2011 with the goal of fostering dialogue and promoting initiatives relating to the advancement of inclusion, diversity, equity, and accessibility (IDEA) in the legal profession, the judiciary, and within the broader legal community. As part of our mandate, we monitor and provide input on policy developments within the profession and legal systems.

Member Organizations:

Arab Canadian Lawyers' Association (ACLA)
Association des juristes d'expression française de l'Ontario (AJEFO)
Association of Chinese Canadian Lawyers of Ontario (ACCLO)
Canadian Association of Black Lawyers (CABL)
Canadian Association of Muslim Women in Law (CAMWL)
Canadian Association of Somali Lawyers (CASL)
Canadian Association of South Asian Lawyers (CASAL)
Canadian Hispanic Bar Association (CHBA)
Canadian Italian Advocates Organization (CIAO)
Canadian Muslim Lawyers Association (CMLA)
Federation of Asian Canadian Lawyers (FACL)
Filipino Canadian Lawyers Network (FCLN)
Hellenic Canadian Lawyers Association (HCLA)
Indigenous Bar Association (IBA)
Iranian Canadian Legal Professionals (ICLP)
Korean Canadian Lawyers Association (KCLA)
Macedonian Canadian Lawyers Association (MCLA)
OBA Sexual Orientation and Gender Identity Law Section (SOGIC)
OBA Equality Committee
South Asian Bar Association (SABA)
Toronto Lawyers Association (TLA)
Women's Law Association of Ontario (WLAO)

ⁱⁱ *Rules of Professional Conduct*, 5.6-1. A lawyer shall encourage public respect for and try to improve the administration of justice.

Commentary [select]

[1] The obligation set out in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet for the same reason, a lawyer should not hesitate to speak out against an injustice.

[2] The admission to and continuance in the practice of law implies on the part of a lawyer a basic commitment to the concept of equal justice for all within an open, ordered, and impartial system. However, judicial institutions will not function effectively unless they command the respect of the public, and because of changes in human affairs and imperfections in human institutions, constant efforts must be made to improve the administration of justice and thereby maintain public respect for it.

ⁱⁱⁱ *FACL submissions: A "risk-based" approach to competence requirements should pro-actively address potential harm beyond what can be quantified in pecuniary terms or by litigation outcomes (e.g. unfair treatment, unethical behaviour, damage to public confidence in the legal system).*[3] *A "flexible" approach should maintain the core competencies that apply across the profession (e.g. technological literacy, social and cultural literacy). "Forward-looking" and "client-centred" approaches to competency should consider the perspectives of impacted persons other than those with whom the lawyer seeks or forms a solicitor-client relationship (e.g. witnesses and other justice system participants).*[4]

[3] See, for example, the discussion in A. Dodek and E. Alderson, "Risk Regulation for the Legal Profession" (2018), 55-3 *Alberta Law Review* 621, online: <<https://canlii.ca/t/7b9>> (positing that once regulatory objectives are set, risk should be measured in terms of not meeting those objectives; ongoing and thorough data collection, from a variety of sources, is necessary to ensure proper risk identification).

[4] This is not to suggest any derogation from the duty of loyalty, but simply to recognize that the provision of legal advice and services does not take place in isolation from societal and cultural context. Indeed, narrowly defined, a "client-centered" approach would not fit comfortably with provincial and federal Crown prosecutors in the criminal law arena. Criminal law prosecutors advise the Attorney General/Minister of Justice or the police from time-to-time, but they will not ordinarily have a "client" in the traditional sense.

^{iv} *Law Society Act*, R.S.O. 1990, c. L.8, (41 (a)(i)).

^v See for example: *Power, Privilege and Inequities in the Legal Profession*, January 2018, <https://ccdi.ca/media/2020/20180125-report-power-privilege-and-inequities-in-the-legal-profession.pdf>; and *Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions*. <http://lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/w/working-together-for-change-strategies-to-address-issues-of-systemic-racism-in-the-legal-professions-final-report.pdf>.

^{vi} FOLA submissions.

^{vii} *Renewing the Law Society's Continuing Competence Framework*, dated June 23, 2021.

^{viii} See, for example: <https://meridian.allenpress.com/jmr/article/103/2/22/80878/Quality-Assurance-and-Maintenance-of-Competence>

^{ix} Examples of the belief that ongoing education is important abound locally: for example, our own professional insurer, LawPro's emphasis on and provision for ongoing legal education, like PracticePRO, and their consistent involvement in legal presentations. And, federally, the *College of Immigration and Citizenship Consultants Act*, S.C. 2019, c. 29, s. 292, came into force in December 2020 with the specific

purpose of "continuing education requirements for licensees," and in November 2021, the resulting College of Immigration and Citizenship Consultants was launched.

^x Law Society of Alberta: <https://www.lawsociety.ab.ca/cpd-filing-requirement-suspended-for-additional-year/>

^{xi} The LSO modern approach to competency began in 2001.

^{xii} *Rules of Professional Conduct*, 6.3-3 and 6.3.1-1.

^{xiii} Discrimination and Harassment Council: <https://lso.ca/protecting-the-public/information-for-licensees/discrimination-and-harassment-counsel>.