



January 15, 2019

**Law Society Tribunal
Public Consultation on New Rules of Practice**

Via email: tribunal@lso.ca

**RE: TLA'S SUBMISSIONS REGARDING AMENDMENTS TO LAW SOCIETY
TRIBUNAL RULES OF PRACTICE**

The Toronto Lawyers' Association ("TLA") is the voice of its 3,700 members who practise law in all disciplines across the Greater Toronto Area. The TLA is pleased to provide comments to the Law Society of Ontario ("LSO" or the "Law Society") regarding the proposed *Law Society Tribunal Rules of Practice* ("Rules").

On a preliminary note, the TLA commends the LSO for revisiting and revising the *Rules* to better reflect the values of fairness, transparency, and timeliness.

Most of the proposed changes relate to modernizing and simplifying various procedures, which will ultimately bring clarity and certainty to the *Rules* for those appearing at the Tribunal. The TLA is supportive of these amendments, including the following, as they will make Tribunal proceedings more effective and efficient:

- A values-based approach to guide the exercise of discretion by Tribunal members;
- More flexible case management powers and methods of hearing issues;
- Greater use of written hearings and technology.

Below, the TLA provides specific comments on the following:

- Requiring licensees to provide witness statements;
- Relaxing the rules regarding admission of evidence; and
- Dealing with licensees with mental health issues.

Requiring Licensees to Provide Witness Statements

Currently, licensees are only required to provide witness statements and documents they intend to rely on in select types of proceedings such as licensing, restoration, and reinstatement proceedings. The proposed new *Rules* expand this obligation on licensees by requiring them to prepare and provide documents they intend to rely on and witness statements in **all** Tribunal proceedings. The stated purpose of the proposed change is to allow for greater case management and ensure that parties are prepared for hearing. The proposed new Rule 10.5 reads:

KNOWLEDGE • ADVOCACY • COMMUNITY

Witness statements and document books

10.5 (1) Each party must provide to every other party:

- (a) a document book containing all anticipated documentary evidence;*
- (b) a list of witnesses that the party intends to call; and*
- (c) an affidavit, signed witness statement or summary of the anticipated oral evidence of each witness, as well as the witness's contact information or the contact information of a person through whom the witness may be contacted.*

A summary of the anticipated oral evidence, as defined in Rule 19.01(3) of the existing *Rules*, must be in writing and must contain:

- (a) the substance of the evidence of the witness;
- (b) a list of documents or things, if any, to which the witness will refer; and
- (c) the witness's name and address or, if the witness's address is not provided, the name and address of a person through whom the witness may be contacted.

The expanded disclosure requirement creates an added burden on licensees that does not necessarily improve the efficiency and effectiveness of Law Society Tribunal proceedings. In other words, there is not sufficient benefit that justifies the new burden imposed on licensees in a blanket fashion. The burden translates into costs for licensees, which, for all practical purposes, they cannot recover even if they are successful in the proceeding. It may make having proper legal representation cost-prohibitive for some licensees, if it is not already so seeing as many lawyers appearing before the Tribunal are self-represented.

In the TLA's view, improved case management and hearing preparation can be accomplished by requiring licensees to provide a list of witnesses and their contact information together with a brief summary of the anticipated evidence of the witnesses. It is not necessary that the summary list all the documents or things to which the witness will refer.

Rules regarding Admission of Evidence

It is proposed that the rules of evidence be relaxed to allow the Tribunal to admit any testimony or documents that are relevant unless privileged. The proposed new approach would have the Tribunal apply s. 15 of the *Statutory Powers Procedure Act* (SPPA) instead of the civil rules of evidence. Such a change would align the LSO with many other administrative tribunals and law societies that already apply the SPPA.

The notable downside to the proposed change is that it could lead to introduction of unnecessary evidence, thereby complicating and prolonging Tribunal proceedings, and/or unreliable forms of evidence like hearsay, which could compromise fairness and integrity.

The TLA is particularly concerned about the spectre of inappropriate reliance on hearsay. It could result in licensees being found guilty of professional misconduct, and having their

licences revoked, on the basis of evidence that is inherently unreliable, untested, and possibly prejudicial. The well-recognized dangers associated with hearsay are why it is presumptively excluded in courts and under the current *Rules* of the Tribunal.

The TLA is of the view that there should be an exception to the proposed change for hearsay evidence. Unless the parties to the proceeding consent, admission of hearsay should be guided by the civil rules of evidence, rather than the SPPA.

Licensees with Mental Health Issues

The TLA urges the LSO to consider the impact of its practice and procedure on licensees with mental health issues. It is arguably incumbent on the LSO to do so, in light of its responsibilities under human rights legislation.

At present, conduct proceedings against licensees, whether or not they have a mental health condition, are public. For licensees with a mental health disorder, their mental health challenges become public record for all to see and find.

In our view, when it comes to licensees with mental health issues, the goal of discipline proceedings should be restorative, rather than punitive. The privacy of the licensees should be protected to the greatest extent possible without jeopardizing the public interest. To this end, better use should be made of diversionary and confidential processes, including capacity proceedings held in the absence of the public, anonymization of identifying information in decisions respecting licensees with mental illnesses, and other protocols to support early diversion and treatment of mental illness and addiction issues. Indeed, diversion should be the norm rather than the exception where the alleged professional misconduct arose as a result of a mental or other disability, save for circumstances where fraud is alleged.

The Law Society should continually monitor initiatives by other professional regulators to address mental illness and addiction issues, and consider what might be adapted to the Law Society Tribunal context. It is also important that Tribunal adjudicators be provided with ongoing and comprehensive training on mental illness and addiction issues, as well as on accommodation requirements.

In closing, the TLA appreciates the opportunity to provide its input on the proposed changes to the *Rules*. We would be pleased to provide further feedback or address any questions the LSO may have.

Sincerely and on behalf of the Toronto Lawyers Association,



Dirk M. Derstine
President
Toronto Lawyers Association