



NOVA SCOTIA
BARRISTERS' SOCIETY

Ethical Obligations – During a Pandemic

RELANS October 2020 Webinar Series

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Overview

- Review – timeline
- Guidelines for meeting ethical obligations during a pandemic:
 - Client ID/Verification
 - Wills, POA, Personal Directives
- NSBS role – “administration of justice”



Health Protection Act - Orders

Time Line:

- March 13, 2020 – First Order
 - *All persons in NS must maintain distance of 2 metres or more*
 - *Business may remain open, but must maintain distance of 2 metres or more*
 - *Limit customers/clients to no more than 5*
 - ***Except in exceptional circumstances**, long term care facilities – closed to visitors and resident movement restricted to the grounds of the facility*
- April 13, 2020 – Revised Long Term Care Guidelines added as an Appendix to the Health Protection Order
 - “Essential visitors” = those visiting very ill or palliative residents (compassionate exception) or those who are performing essential support care services for the resident

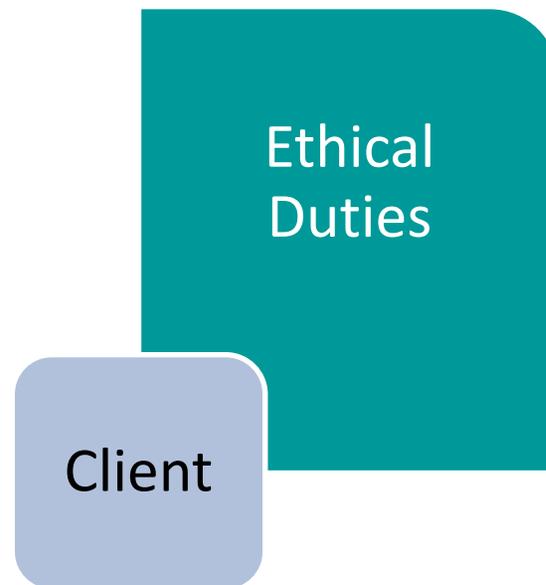


Impact = Risk Assessment





Professional and Ethical Duties





Client Identification & Verification

- Verification normally face to face
 - Can you do face to face – if not why not?
 - Can you use an agent – if not why not?
 - *Ask questions, consider the plausibility of the answers, ask more questions*
 - Has there been previous verification by a lawyer acting in own capacity or as agent under agreement with a legal professional?



Client Identification & Verification

- Verification by video conference may be necessary due to competing obligations:
 - Public health order/directives
 - Health and safety of yourself, client, and employees
 - Other
- Document decision as to how and why arrived at necessity



Client Identification & Verification

- Last Resort:
 - Be reasonably satisfied that the government issued identification is valid and current
 - Ability to compare the image in the government issued identification with the client to be reasonably satisfied that it is the same person
 - Record, with the applicable date, the method by which you verified the client's identification
 - Treat the transaction as a **high risk** transaction and continues to monitor the business relationship as a **high risk** transaction



Client Identification & Verification

- **Manage Risk:**
 - Are there red flags associated with fraud or money laundering?
 - Ensure that you are not assisting in or being reckless in respect of any illegal activity.
 - Stay alert to fraudsters using pandemic as an opportunity
 - Document any red flags, what measures you have taken to mitigate that risk, and your decision on how you proceeded, not proceed, or discontinue retainer.



Client Identification & Verification

- Additional Resources:
 - Federation Guidelines re COVID-19: <https://nsbs.org/wp-content/uploads/2020/03/Anti-Money-Laundering-Requirements-COVID19.pdf>
 - Guidance on Monitoring Obligations: <https://flsc.ca/wp-content/uploads/2020/07/Guidance-on-Monitoring-Obligations.pdf>
 - Risk Assessment Case Studies
 - <https://flsc.ca/wp-content/uploads/2020/02/CasestudiesENv5.pdf>
 - Risk Factors <https://flsc.ca/wp-content/uploads/2020/01/RiskAdvisory6EN.pdf>



Wills, POA, and Directives

Code of Conduct

Competence

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



Wills, POA, and Directives

Code of Conduct

Rule 3.2-9 Clients with Diminished Capacity

Commentary:

“when a client is, or comes to be, under a disability that impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.”



Wills, POA, and Directives

Code of Conduct

Making Legal Services Available

4.1-1 A lawyer must make legal services available to the public *efficiently and conveniently* and, subject to rule 4.1-2, may offer legal services to a prospective client by any means.



Wills, POA, and Directives

Guidance from NSBS FAQ's

- Last Resort – continuous assessment of risks
- Assess capacity
- Assess and be aware of risk of undue influence and duress
- Confirm understanding of the document
- Adequate opportunity to ask questions
- Advice regarding validity/potential invalidity
- Re-execution in person
- Document



Administration of Justice

Legal Profession Act

Purpose of Society

4 (1) The purpose of the Society is to uphold and **protect the public interest in the practice of law.**

(2) In pursuing its purpose, the Society shall



Administration of Justice

(d) **seek to improve the administration of justice** in the Province by

(i) regularly consulting with organizations and communities in the Province having an interest in the Society's purpose, including, but not limited to, organizations and communities reflecting the economic, ethnic, racial, sexual and linguistic diversity of the Province, and

(ii) engaging in such other relevant activities as approved by the Council



Administration of Justice

The administration of justice is not confined to the courts; it encompasses officers of the law and others whose duties are necessary to ensure that the courts function effectively. The concern of the administration of justice is the **fair, just and impartial upholding of rights, and punishment of wrongs, according to the rule of law**

R. v. Samson (No. 7), 37 O.R. (2d) 237 (1982)



Administration of Justice

It is not easy to define justice. According to [Kelsen \(2000\)](#) "no other question has been the object of so much intensive thinking by the most illustrious thinkers from Plato to Kant; and yet, this question is today as unanswered as it ever was". The act of doing justice implies making decisions on the freedom, and often on the life, of human beings. Therefore, at the broader societal level, administering justice involves maintaining the social structure in harmonious operation. As [Rawls \(1999, p. 3\)](#) expressed it, "Justice is the first virtue of social institutions [...] the **basic structure of society, the way in which the major social institutions distribute fundamental rights and duties**".

Administration of justice: an emerging research field

<https://www.emerald.com/insight/content/doi/10.1108/RAUSP-04-2018-010/full/html>



Administration of Justice

Not just “Access to Justice” and “Access to Legal Services”

- NSBS Role in seeking legislative solution:
 - Impact on Nova Scotians
 - Fair and just that persons be able to create a legally binding Will, POA and Directives
 - Fair and just that persons be able to administer estates through the Probate Court
 - Courts and the Legislature have an obligation to ensure fairness and justice.



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QUESTIONS?