



Memo

To: Benchers
From: Lawyer Education Advisory Committee
Date: February 7 2019
Subject: **Recommendation on CPD credit for pro bono work**

Purpose

1. This memo provides the Benchers with a recommendation from the Lawyer Education Advisory Committee not to approve the accreditation of pro bono work for continuing professional development credit (“CPD”), following a reconsideration of this issue over the past year.
2. In an effort to provide the Benchers with the range of debate on this issue within various Committees, the memo highlights arguments both in favour of, and opposing accreditation, with an emphasis on policy rationales that support the Lawyer Education Advisory Committee’s recommendation that pro bono work should remain ineligible for CPD credit in BC.

Background

3. During its review of the CPD program in 2016 and 2017, the Lawyer Education Advisory Committee examined the issue of providing credit for pro bono activities under the CPD program. This work included a consideration of hundreds of comments in relation to the 2016 CPD survey question seeking member feedback on whether pro bono activities should qualify for CPD credit, as well as a review of several academic articles¹ and numerous internal memos on the issue.

¹ Jason Wesoky and Christopher Bryan, “Receiving CLE Credit for *Pro Bono* Service” 41 *The Colorado Lawyer* 115 (August 2012), online at: http://www.garfieldhecht.com/wp-content/uploads/2012/08/Aug2012TCL_PointCounterpoint.pdf; Brian J. Murray “The Importance of Pro Bono Work in Professional Development” (2009) 23:3 *Verdict*, online at: <http://www.jonesday.com/files/Publication/adc22e68-c7f5-44d2-a043->

4. No Canadian province or territory with a CPD credit hour requirement grants CPD credit for pro bono activity. However, Alberta, which does not have a CPD credit hour requirement, recognizes pro bono activity as relevant to lawyer learning.²
5. In the USA, thirteen states have adopted rules permitting lawyers to earn a limited number of credits for pro bono work as part of their mandatory continuing legal education programs (“MCLE”). Although the specifics of accreditation rules vary, most commonly, a lawyer must complete five hours of pro bono service for each MCLE credit earned. The average amount of MCLE credits a lawyer is permitted to claim each year is capped at three hours [See **Appendix A**].³
6. Having considered the various policy arguments for and against providing CPD credit for pro bono work, in December 2017 the Lawyer Education Advisory Committee recommended against the accreditation of pro bono activities for CPD credit in its Final CPD Review Report. The rationale for not providing CPD credit was outlined as follows:

Pro bono and legal aid

92. During the 2011 CPD review, the Lawyer Education Advisory Committee determined that pro bono and legal aid work should not be recognized for CPD credit, on the basis that it is fundamentally the “practice of law,” not professional development.
93. The 2016 and 2017 Committees considered numerous arguments for and against accreditation,⁴ and came to a similar conclusion, ultimately recommending against the accreditation of pro bono and legal aid work.

Recommendation 10: The Law Society will not recognize pro bono and legal aid work as eligible for CPD credit.

94. Proponents of accreditation argue that pro bono activities provide unique learning opportunities not available to lawyers in the course of their paid work, both in relation to skill and knowledge

94709677480a/Presentation/PublicationAttachment/d2593229-ad83-428c-8023-a7afce3f3b62/Murray.pdf ; Esther Lardent, “Solving the Professional Development Puzzle” (2012) National Law Journal.

² Unlike BC, Alberta’s CPD system does not require the regulator to accredit activities and there are no minimum number of CPD hours lawyers must complete. Rather, any learning activity that is relevant to the professional needs of a lawyer, pertinent to long-term career interests of a lawyer, in the interests of the employer of a lawyer or related to the professional ethics and responsibilities of lawyers, qualifies for a CPD activity that can be included in a lawyer’s CPD plan. Pro bono work is listed as an example of one such activity. See the Law Society Alberta at: <https://www.lawsociety.ab.ca/lawyers-and-students/continuing-professional-development/cpd-activities/>

³ See the American Bar Association, online at:

http://www.americanbar.org/groups/probono_public_service/policy/cle_rules.html.

development and in gaining a deeper understanding of access to justice issues. Pro bono and legal aid work may also contribute to enhancing professional responsibility and ethics.

95. Others have suggested that pro bono work is comparable to mentoring or teaching the general public in that it is “service learning” that integrates meaningful community service with skill development. Similar arguments can be made to support the accreditation of legal aid work.
96. The Committee is, however, troubled by the prospect of accrediting pro bono and legal aid work for a number of reasons. Importantly, file specific legal work is not eligible for CPD credit. In the Committee’s view, no exception should be made for free, but nevertheless file specific legal work.
97. The Committee also observes that although some American jurisdictions recognize pro bono work for a limited amount of MCLE credit, no Canadian law society currently grants CPD credit for pro bono activities.
98. Further, half of the respondents to the 2016 Survey were not in favour of including pro bono work in the CPD scheme and 64% were against providing credit for legal aid work. Examples of the comments provided include the following:

“This conflates the differing objectives of CPD. If mandatory CPD training is necessary in order to ensure ongoing substantive competency then it should be used for that. If you allow CPD for pro- bono - why not allow it [for] file work? How is the learning different if the work is done for free vs. being paid?”

“If the purpose of the CPD is professional development and given that lawyers are expected to provide the same level of service and skill to paying and pro bono clients giving credit for work on pro bono files suggests that a lower level of skill is required when a person takes on these files and that pro bono files are a chance to learn about areas of the law that the lawyer is not skilled in. In my view this would violate the ethical obligations lawyers have to provide competent service.”

99. Notwithstanding the recommendation against accreditation, the Committee views this type of work as a professional duty and expresses support for initiatives that encourage lawyers to take on pro bono and legal aid files as part of ongoing efforts to improve access to justice.
7. After considerable discussion by the Benchers, the recommendation was sent back for consideration by the “appropriate Committees.”
 8. Having already considered the merits of providing CPD credit for pro bono work and deciding against accreditation, the Lawyer Education Advisory Committee determined it should refer the matter to the Access to Legal Services Advisory Committee (the “Access Committee”). Specifically, the following questions were referred:
 - a. Whether pro bono work should be granted CPD credit and if so, how this meets the goals of the CPD program and/or improves access to justice.

- b. If the answer to the first question is “yes,” what type and amount of pro bono work should be eligible for credit and how such work might be verified.
9. The Access Committee was of the view that the question of whether pro bono work should be eligible for CPD credit must turn on whether it advances the objectives of the CPD program, as articulated in the Final CPD Review Report:

The purpose of the mandatory CPD program is to uphold and protect the public interest in the administration of justice by actively supporting the Law Society’s members in achieving and maintaining high standards of competency, professionalism and learning in the practice of law.

10. The Access Committee agreed that if pro bono work does not advance lawyer competency, professionalism or learning, it should not be eligible for credit notwithstanding that it may advance the goal of promoting access to justice.⁵
11. Members of the Access Committee had conflicting views as to whether pro bono work satisfies the objectives of the CPD program. These views were articulated in a memo provided to the Lawyer Education Advisory Committee in May 2018, in which the Access Committee concluded that due to a diversity of opinions among its members, it was not possible to reach a consensus that would support a unanimous recommendation to the Lawyer Education Advisory Committee. As a result, rather than providing a recommendation, the Access Committee outlined arguments both for and against granting CPD credit for pro bono services.
12. These arguments, which were similar to those previously considered by the Lawyer Education Advisory Committee during its analysis of the pro bono issue in 2016 and 2017, were again reviewed by the Lawyer Education Advisory Committee at its September 2018 meeting.
13. As discussed in further detail below, those discussions informed the Lawyer Education Advisory Committee’s final recommendation to the Benchers that pro bono work should not be eligible for CPD credit in BC.

⁵ Based on this view, the Access Committee felt it unnecessary to resolve the question of whether adoption of a policy that would permit CPD credit for pro bono work would encourage lawyers to provide pro bono services or otherwise promote access to legal services.

Discussion

14. The Lawyer Education Advisory Committee supports the Access Committee's view that pro bono work should only be eligible for CPD credit if it meets the objectives of the CPD program, namely: supporting lawyers to achieve and maintain high standards of competency, professionalism and learning in the practice of law.
15. For the reasons identified below, the Committee is of the unanimous view that pro bono work does not sufficiently meet these objectives, and therefore should not be accredited.

Competency and learning

16. The CPD program has a well-established set of "learning modes" which are eligible for CPD credit, including online interactive programs, local bar and CBA section meetings, study groups, teaching, writing, and mentoring. The Lawyer Education Advisory Committee's review of these learning modes in 2017 confirmed the historical view that learning and competency are predominantly enhanced by educational activities that help lawyers keep up with legislation, cases and trends in different practice areas and the development of lawyering skills. As such, the Committee felt the continued accreditation of these types of activities was warranted.
17. However, the Committee determined then, as it reaffirms now, that these learning and competency goals are not adequately advanced through the provision of pro bono work, particularly if lawyers simply perform their regular services, but without pay.
18. Rather, the primary rationale for providing CPD credit for pro bono work is to improve access to justice. This is reflected by the American Bar Association's view that most states permitting pro bono work for CLE do so to encourage the recruitment and retention of pro bono volunteers.⁶ As both the Lawyer Education Advisory Committee and the Access Committee agree, improving access to justice is not a sufficient reason to permit the accreditation of pro bono work.
19. Moreover, the Lawyer Education Advisory Committee is concerned that accrediting pro bono services creates a risk that pro bono work will displace CPD hours that lawyers would otherwise earn through existing learning modes.⁷

⁶ *Supra* note 3.

⁷ Notably, all US regulators that recognize pro bono work for MCLE credit have implemented a cap on the number of MCLE hours than can be earned through pro bono activities. See Appendix A at the end of this memo.

20. An opposing view was presented by some members of the Access Committee, who advocated that pro bono work does contribute to improved competency and learning.
21. For example, pro bono work can provide lawyers — particularly newer lawyers in larger firms — with opportunities to develop skills and knowledge through experiences that may not be available in the course of paid work, including taking responsibility for the full conduct of a case, increased access to courtroom experiences and a substantial amount of client contact and communications. Additionally, pro bono work provides lawyers with greater insight into the relationship between law and society, including the opportunity to learn about the systemic barriers and issues of access to justice and how to represent marginalized persons.
22. Notwithstanding the laudable benefits of taking on pro bono work, the Lawyer Education Advisory Committee is of the view that a lack of payment does not fundamentally change the nature of what is essentially “file specific” work. The current CPD Guidelines are explicit that all file specific work, including file specific mentoring, file specific teaching and file specific group study activities are not eligible for credit.⁸
23. One example of how providing credit for pro bono work could result in accrediting file specific work is demonstrated in the context of legal aid files. Legal aid lawyers often provide a portion of their services for free, given that the tariff is typically insufficient to cover all costs associated with a file. Accreditation of pro bono work could lead to a problematic scenario whereby unpaid work associated with a legal aid file is eligible for CPD credit because it is regarded as an educational experience that fosters lawyer competency and learning, while the paid portion does not qualify, despite the nature of the work being virtually identical.
24. The Lawyer Education Advisory Committee is also troubled by the notion of accrediting pro bono work on the basis that it provides an opportunity for lawyers to improve their competence. Importantly, lawyers should *already* have attained high standards of competency before agreeing to provide legal services to a client, regardless of who those clients are.
25. Characterizing pro bono as a learning opportunity for lawyers might send the message that pro bono clients’ matters are somehow inferior to paid legal work, in that accepting pro bono files to develop competence is acceptable, whereas lawyers are expected to

⁸ See <https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/continuing-professional-development/eligible-activities/>

develop their competence both within and beyond the CPD sphere before taking on paid work.

Professionalism

26. The *BC Code of Professional Conduct* establishes that lawyers have a duty to assist the advancement of the goals of the legal profession. The associated Commentary encourages lawyers to enhance the profession through activities that include providing legal services on a pro bono basis:

2.2-2 A lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions.

Commentary

[1] Collectively, lawyers are encouraged to enhance the profession through activities such as: [...]

(b) participating in legal aid and community legal services programs or providing legal services on a pro bono basis;

27. Accordingly, some members of the Access Committee have suggested that providing CPD credit for pro bono work is consistent with achieving and maintaining standards of professionalism in the practice of law – one of the objectives of the CPD program.⁹
28. The Lawyer Education Advisory Committee supports the view that the provision of free legal services to assist the less fortunate is a foundational ethical principle of lawyering. However, this principle is eroded by creating an incentive, or self-interested reason for lawyers to do pro bono work. Providing CPD credits for pro bono is a form of non-monetized payment for something that should be provided without compensation. Lawyers should not need the benefit of CPD credits to do what should be done as a matter of course.

⁹ The Access Committee proposed that to be eligible for CPD credit on the basis of professionalism, pro bono services must be provided to persons of limited means such that the recipients of the services would not otherwise be able to retain a lawyer, and that pro bono services should not be work provided as part of the lawyer's regular employment duties.

Other considerations

29. The Lawyer Education Advisory Committee has undertaken limited analysis of how accreditation might operate if pro bono work were eligible for CPD credit on the basis that the Benchers must first decide the threshold issue of whether, in principle, *any* pro bono work should qualify for CPD credit.
30. However, even a preliminary consideration of how to establish criteria regarding which types of free legal services would be eligible for CPD credit, and which types would be ineligible, reveals significant operational challenges.
31. For example, some members of the Access Committee proposed that pro bono work should not be accredited if it falls within the lawyer's primary area of practice. The Lawyer Education Advisory Committee is of the view, however, that imposing this type of limitation raises the risk that lawyers will pursue pro bono work in new and unfamiliar areas, potentially to the detriment of their pro bono clients.
32. Additionally, given that the Law Society has moved away from a CPD model that requires confirmation and corroboration of learning activities, and now generally trusts members to truthfully and accurately report their CPD hours, implementing a system of approved pro bono providers and associated verification procedures —design elements of many of the American programs that recognize pro bono work for MCLE credit — would be both challenging and out-of-step with the general shift away from the Law Society providing extensive regulatory oversight of the CPD program.
33. These additional considerations all auger against the approval of pro bono activities for CPD credit in BC.

Conclusion

34. Over the past two and a half years, the issue of whether pro bono work should be eligible for CPD credit has resulted in a great deal of discussion and debate at both the Committee level and around the Bencher table.
35. The Benchers are now asked to make a final decision as to whether pro bono work should, in principle, be eligible for accreditation.

36. The Lawyer Education Committee has presented a recommendation to the Benchers twice on this issue, first, in December 2017, as part of the review of the CPD program, and now, as a stand-alone issue.
37. Analysis of this issue has been both substantial and comprehensive, including research into the approaches taken by other jurisdictions, a review of academic articles and numerous memos prepared by the Law Society's policy and legal services staff and consideration of hundreds of comments from lawyers that responded to the 2016 CPD survey question asking whether pro bono activities should qualify for CPD credit.
38. More recently, this work has benefitted from the insights of the Access Committee, which agreed that *if* pro bono work does not advance lawyer competency, professionalism or learning, it should not be eligible for credit notwithstanding that it may advance the goal of promoting access to justice.
39. This detailed and lengthy review has resulted in consensus amongst the Lawyer Education Advisory Committee that CPD credit should not be provided for pro bono work in BC on the basis that it does not adequately meet the objectives of the CPD program, namely: supporting lawyers to achieve and maintain high standards of competency, professionalism and learning in the practice of law. Accordingly, the Lawyer Education Advisory Committee seeks Bencher approval of the recommendation that pro bono work remain ineligible for CPD credit in BC.
40. The Committee strongly supports the Law Society identifying and implementing methods, other than offering CPD credit, by which lawyers are encouraged to engage in pro bono legal activities. The adoption of the resolutions at the Law Society's 2018 AGM calling for the Benchers to continue to advocate for legal aid funding and encourage lawyers to undertake legal aid and pro bono cases within their field of expertise reflects the profession's strong commitment to improving access to justice. As discussed in this memo and elsewhere, access to legal services is improved by lawyers offering their services for no fee.
41. However, the Committee is of the view that granting CPD credit is not the right mechanism to encourage lawyers to engage in pro bono activities given that this type of work is not sufficiently aligned with the objectives of the CPD program.

APPENDIX A: MCLE CREDIT FOR PRO BONO WORK IN THE UNITED STATES

State	# of pro bono hours required to earn 1 hour of CLE credit	Cap on number of CLE credits for pro bono work
Wisconsin	5	6 CLE credits every 2 years
Arizona	5	5 CLE credits per year
Ohio	6	6 CLE credits every 2 years
Colorado	5	9 CLE credits every 3 years
Wyoming	5	3 CLE credits per year
Delaware	6	6 CLE credits every 2 years
Louisiana	5	3 CLE credits per year
Minnesota	6	6 CLE credits every 3 years
New York	2	10 CLE credits every 2 years
North Dakota	6	3 CLE credits every year
Tennessee	5	3 CLE credits per year
Oregon	2	6 CLE credits every 2 years
Washington	1* (this is the only state that has a 1:1 ratio)	24 CLE credits every 3 years

NOTE: In the majority of states, pro bono work is not eligible for MCLE credit.