



NOVA SCOTIA  
BARRISTERS' SOCIETY

## MEMORANDUM TO COUNCIL

**From:** Lawrence Rubin and the Professional Standards (Real Estate) Committee

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**Date:** March 26, 2021

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**Subject:** Professional Standards (Real Estate) 1.5 Documentation of Advice and Instruction

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**For:**      **Approval**       **Introduction**       **Information**

DATE	Council	Introduction
March 26, 2021		
	Council	Approval

### **Recommendation/Motion:**

This is the introduction to Council of revised standard 1.5 – Documentation of Advice and Instruction – by the Professional Standards (Real Estate) Committee. Following introduction, the standard will be circulated to the membership for review and consultation. The Committee will review any comments received and then present the final form, amended if necessary, to Council for approval. An equity lens was applied while revising this standard.

### **Executive Summary:**

The Committee determined that it would be prudent to update the Documentation of Advice and Instruction Standard to better align with current practice, case law and legislation. The Revised Standard is intended to provide guidance and assistance to lawyers with respect to practices concerning documentation of client instructions and advice.

### **Exhibit:**

Revised Standard 1.5 Documentation of Advice and Instruction with rationale for the revisions.

Existing Standard	Proposed Standard	Rationale
<p><b>STANDARD</b></p> <p>A lawyer should document in writing</p> <p>(a) advice to the client, including explanations and confirmation of the explanations, the lawyer’s advice with respect to restrictions, if any, on the client’s quiet use and enjoyment of the property and qualifications to the opinion on title<sup>1</sup>; and</p> <p>(b) instructions received from the client, including instructions limiting the lawyer’s retainer and instructions arising out of the lawyer’s advice described in clause (a).</p> <p>A lawyer should also document in writing the lawyer’s advice to an unrepresented party pursuant to <a href="#">Standard 1.4 - Conflict of Interest</a>.</p> <p>When a lawyer explains to the client the effect of a document signed by the client, the lawyer may consider the client’s signature evidence of the client’s instructions. The lawyer should meet personally and explain the effect of the document to the client.<sup>2</sup></p>	<p><b>STANDARD</b></p> <p>A lawyer should document in writing:</p> <p>(a) advice to the client, including explanations and confirmation of the explanations, the lawyer’s advice with respect to restrictions, if any, on the client’s quiet use and enjoyment of the property and qualifications to the opinion on title<sup>1</sup>; and</p> <p>(b) instructions received from the client, including instructions limiting the lawyer’s retainer and instructions arising out of the lawyer’s advice described in clause (a).</p> <p>It is advisable for a lawyer to document the disclosure of and client consent to conflicts of interest and joint retainers.<sup>2</sup></p> <p>It is advisable for a lawyer to document in writing the lawyer’s communications with an unrepresented party, particularly those communications pursuant to <a href="#">Standard 1.4 - Conflict of Interest</a>.<sup>3</sup></p> <p>When a lawyer explains to the client the effect of a document signed by the client, the lawyer may consider the client’s signature evidence of the client’s instructions. It is advisable for the lawyer to communicate personally with clients in order to explain the effect of the document. A lawyer should be aware of the limits with respect to delegation to a non-lawyer as it relates to providing advice and obtaining instructions from a client.<sup>4</sup></p>	<p>The Committee determined that it would be prudent to update the Documentation of Advice and Instruction Standard to better align with current practice, case law and legislation. The Revised Standard is intended to provide guidance and assistance to lawyers with respect to practices concerning documentation of client instructions and advice.</p>

## FOOTNOTES

1. *Ravina and A & R Properties Ltd. v. Stern* (1987), 1987 Carswell NS 348, 77 N.S.R. (2d) 406 (sub nom. *Ravina v. Stern*) 191 A.P.R. 406 (C.A.)
2. Supervision of employees: *Legal Ethics and Professional Conduct Handbook* (See Commentaries 19.4 (ensuring work done by qualified lawyer), 19.6 (work by legal assistant) and 19.7 (supervision and education of legal assistant))
3. *Yamada v. Mock*, 1996 CanLII 8024 (ON SC). Supervision of employees: *Legal Ethics and Professional Conduct Handbook* (See Commentaries 19.4 (ensuring work done by qualified lawyer), 19.6 (work by legal assistant), 19.7 (supervision and education of legal assistant))

## ADDITIONAL RESOURCES

- Duty to explain risks, obtain written instructions: *Edmond & Associates v. Angelatos* (1997), 120 Man.R. (2d) 70 (Q.B.), *Credit Foncier v. Grayson, Rushford* (1987), 54 Sask.R. 203 (Q.B.)

## FOOTNOTES

<sup>1</sup> *Ravina and A & R Properties Ltd. v. Stern* (1987), 1987 Carswell NS 348, 77 N.S.R. (2d) 406 (sub nom. *Ravina v. Stern*) 191 A.P.R. 406 (C.A.). See also *Rice v. Condran*, 2012 NSSC 95 (CanLII).

<sup>2</sup> For example, Rule 3.4-15 of Nova Scotia's **Code of Professional Conduct** provides, "...When a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction..." Where the lender is a "lending client", a lawyer's obligations to document consent and to provide advice can be more limited: see Rule 3.4-5, 3.4-6, 3.4-7, 3.4-13, 3.4-14 and 3.4-16.

<sup>3</sup> A lawyer should be cognizant that, even in absence of a solicitor-client relationship, in some circumstances he or she may owe a duty of care to a non-client. See *Tracy v. Atkins* (1979), 1979 CanLII 760 (BC CA) and *Begusic v. Clark, Wilson & Co.* (1992), 1992 CanLII 447 (BC SC)

<sup>4</sup> This potentially gives rise to the supervision of employees and issues of delegation: See Code of Professional Conduct (See Rule 6).

## PRACTICE NOTES

Due to volume and repetition of common issues, a lawyer may develop and use precedents to document common advice and practice. Examples of documents wherein a lawyer's advice can be documented include: (1) retainer agreements/opening letters;

<ul style="list-style-type: none"> <li>• Absent documentation, client's recollection of scope of retainer preferred over lawyer's: <i>Bergman v. Williams</i> (1980), 22 B.C.L.R. 317 (S.C.), <i>ABN Amro Bank Canada v. Gowling, Strathy &amp; Henderson</i> (1994), 20 O.R. (3d) 779 (Gen.Div.). Failure to document advice, scope of retainer not conclusive: <i>669283 Ontario Ltd. v. Reilly</i> [1996] O.J. No. 273 (Gen. Div.), <i>Hants County Business Development Centre Ltd. v. Poole et al.</i> (1997), 165 N.S.R. (2d) 365 (S.C.), (1998), 172 N.S.R. (2d) 393 (N.S.C.A.)</li> <li>• Lawyer's notes as documentation: <i>Mazerolle v. Maynes</i>, [2000] N.B.R.(2d) (Supp.) No. 5 (T.D.)</li> <li>• Effective advice may require delivery to client in writing</li> <li>• C. Walker, Q.C., "<a href="#">Abstracts and the Land Registration System</a>" in <i>Land Registration Act Education Program, LRA Education Materials</i></li> </ul>	<p>(2) authorizations and directions; (3) closing\disengagement letters; (4) certificates of title.</p> <p>In documenting advice and instructions, a lawyer should consider the client's background including but not limited to:</p> <ul style="list-style-type: none"> <li>• The client's capacity;</li> <li>• The client's relationship with any other party involved in the transaction;</li> <li>• The client's level of sophistication with legal and/or business matters; and</li> <li>• The client's literacy level and potential language barriers.</li> </ul> <p>Where a client is acting against the lawyer's advice, in addition to documenting their advice, the lawyer should attempt to have the client execute a written acknowledgement of their instructions and prepare a memorandum to file.</p> <h3 style="text-align: center;">ADDITIONAL RESOURCES</h3> <ul style="list-style-type: none"> <li>• Duty to explain risks, obtain written instructions: <i>Edmond &amp; Associates v. Angelatos</i> (1997), 120 Man.R. (2d) 70 (Q.B.), <i>Credit Foncier v. Grayson, Rushford</i> (1987), 54 Sask.R. 203 (Q.B.)</li> <li>• Absent documentation, client's recollection of scope of retainer preferred over lawyer's: <i>Bergman v. Williams</i> (1980), 22 B.C.L.R. 317 (S.C.), <i>ABN Amro Bank Canada v. Gowling, Strathy &amp; Henderson</i> (1994), 20 O.R. (3d) 779 (Gen.Div.). Failure to document advice, scope of retainer not conclusive: <i>669283 Ontario Ltd. v. Reilly</i> [1996] O.J. No. 273 (Gen. Div.), <i>Hants County Business Development Centre Ltd. v. Poole et al.</i> (1997), 165 N.S.R. (2d) 365 (S.C.), (1998), 172 N.S.R. (2d) 393 (N.S.C.A.)</li> </ul>	
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	<ul style="list-style-type: none"><li>• Lawyer's notes as documentation: <i>Mazerolle v. Maynes</i>, [2000] N.B.R.(2d) (Supp.) No. 5 (T.D.); and also <i>Webb v Tomlinson</i>, 2006 CanLII 18192 (ON S.C.)</li><li>• Effective advice may require delivery to client in writing</li><li>• C. Walker, Q.C., "Abstracts and the Land Registration System" in Land Registration Act Education Program, LRA Education Materials</li><li>• D. Gillis, Q.C., "LIANS : giving independent legal advice" in The Society, 2010 Jul</li><li>• D. Gillis, Q.C., "Tips for Reducing Negligence Claims in Your Property Practice" RELANS Conference, April 12, 2010 (see p. 8 – Documenting Your File).</li></ul>	
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