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**OBA Charity & Not-For-Profit Law  
Young Lawyers Division  
Toronto – April 5, 2019**

# **PRACTICE MANAGEMENT TOOLS**

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<p><b>Practice Management Tools</b></p> <p>By Terrance S. Carter, B.A., LL.B., TEP, Trade-mark Agent &amp; Ryan M. Prendergast, B.A., LL.B.</p> <p>rmp@carters.ca &amp; tcarter@carters.ca 1-877-942-0001</p> <p>© 2019 Carters Professional Corporation</p>	
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<p><b>OVERVIEW</b></p> <ul style="list-style-type: none"><li>• Analyzing the Client-Lawyer Relationship</li><li>• Considerations Specific to a <i>Pro Bono</i> Arrangement</li><li>• Conflicts of Interest for Lawyers in Advising a Charitable Client</li><li>• Best Practices When Advising a Charitable Client</li></ul>  <p>www.charitylaw.ca <span style="float: right;">www.carters.ca</span></p>	

## A. ANALYZING THE CLIENT-LAWYER RELATIONSHIP

### 1) The Nature of the Charitable Client

- Motivated by a sense of the greater good, but subject to greater disappointment and misunderstandings
- Inherent lack of continuity in board of charity, *i.e.* frequent change in directors and executive staff
- Varied extent of commitment by volunteers
- Frequently internal differences of opinion in how to structure and operate the charity



- General lack of understanding of legal requirements by directors and executive staff
- Tendency to focus on programs and fundraising over compliance with legal requirements
- General lack of understanding of the exposure of directors and officers to personal liability
- Sense of being thwarted by legal process and the need to comply with the law at the expense of charitable purpose



## 2) Unrealistic Expectations of the Charitable Client

- Frequently there is an unrealistic expectation of the lawyer by the charitable client
- Lawyers may be expected to provide complicated legal services *pro bono* or at significantly reduced rates
- Lawyer's involvement in even small matters is often seen as the legal seal of approval on everything that a charity does
- Lawyers may be susceptible to accountability in not having warned the client of potential risks



## 3) Difficulties that the Lawyer May Encounter When Advising the Charitable Client

- Charities often do not know what questions to ask, let alone the answers
- Lawyers must fully explain the legal process to charity
- Lawyer must warn of applicable risks and advise of better alternatives, if available
- If the lawyer becomes aware of risks or legal problems outside of the scope of retainer, the lawyer may need to warn of these issues, notwithstanding the limited nature of retainer



## B. CONSIDERATIONS SPECIFIC TO A *PRO BONO* ARRANGEMENT

### 1) What is *pro bono* work?

- Lawyers provide *pro bono* services when they:
  - “voluntarily contribute part of their time without charge or at substantially reduced rates, to establish or preserve the rights of disadvantaged individuals; and to provide legal services to assist organizations who represent the interests of, or who work on behalf of, members of the community of limited means or other public interest organizations, or for the improvement of laws or the legal system”  
(CBA Resolution 98-01-A)

### 2) Rules of Professional Conduct

- Reduced fees or *pro bono* service does not justify incomplete legal advice
- Lawyer should review Rules of Professional Conduct:
  - Competence (R. 3.1-2)  
“A lawyer shall perform any legal services undertaken on a client’s behalf to the standard of a competent lawyer.”
  - Quality of conduct (R. 3.2-1)  
“A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.”



- Limited scope retainers (if applicable)
  - (R. 3.2-1A) “Before providing legal services under a limited scope retainer, a lawyer shall advise the client honestly and candidly about the nature, extent and scope of the services that the lawyer can provide, and, where appropriate, whether the services can be provided within the financial means of the client.”
  - (R. 2-1A.1) “When providing legal services under a limited scope retainer, a lawyer shall confirm the services in writing and give the client a copy of the written document when practicable to do so.”
    - Rule does not apply if the legal services are *pro bono* summary legal services provided in a non-profit or court-annexed program (R.2-1A.2(e))

- Making legal services available (R. 4.1-1)
 

“A lawyer shall make legal services available to the public in an efficient and convenient way.”

  - Commentary: “[2] As a matter of access to justice, it is in keeping with the best traditions of the legal profession to provide services *pro bono* and to reduce or waive a fee when there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. The Law Society encourages lawyers to provide public interest legal services and to support organizations that provide services to persons of limited means.”

## 2) LawPRO Professional Liability Insurance Coverage

- Lawyers in private practice are generally covered under standard professional liability insurance against claims arising from *pro bono* services
  - all terms and provisions of the policy apply
  - if *pro bono* services are provided for a LawPRO-approved program with Pro Bono Ontario, the lawyer is not required to pay a deductible or claims history levy surcharge



- Exempt lawyers (*i.e.* exempt from payment of insurance premium levies) are:
  - covered against claims arising from *pro bono* services if services are provided through a LawPRO-approved Pro Bono Ontario program
  - not covered if services are provided to a not-for-profit organization that is not associated with Pro Bono Ontario are not covered
- Lawyers who provide professional services but do not bill for them (*e.g.* for family or friends) are not exempt lawyers and must pay the insurance premium and levies

### 3) Providing free legal information

- LawPRO generally does not cover legal seminars and education sessions; however
  - an audience member might interpret the information to be individual legal services (*i.e.* “phantom clients”)
  - the lawyer might provide a response to a question that goes beyond legal information and constitutes legal advice
- LawPRO may cover claims arising from these situations, depending on the circumstances, for an insured lawyer



### C. CONFLICTS OF INTEREST FOR LAWYERS IN ADVISING THE CHARITABLE CLIENT

- If a lawyer is a member of the board of a charity, the lawyer cannot receive any fees
- Lawyers who are members of a board may face conflict if called upon to provide legal advice to the charity
  - Lawyer may need to either remove him or herself as the solicitor for the charity or remove him or herself from the board



*“I’m afraid I can’t treat you, Mr. Fisk. I have a conflict of interest.”*

- Lawyer acting as solicitor for two related charities whose interests are at odds will need to recommend independent legal advice
- Lawyer acting for a charity cannot advise directors of that charity in their personal capacity
- Lawyer may need to communicate with board members directly where executive director is blocking communication from the lawyer
- Lawyer retained by the executive director for the charity but the board requires advice on what to do with regards to the performance of the executive director

## **D. BEST PRACTICES WHEN ADVISING A CHARITABLE CLIENT**

### **1) Minimizing the Lawyer's Exposure to Risk**

- Should develop a preventative proactive response
- Lawyer should be more than a legal technician
- Should change from giving passive advice that is reactive only to proactive advice given in a preventative context
- Should identify and avoid legal problems before they occur

## 2) Strategies to Address Those Risks

- Lawyer should be familiar with a broad range of the law in order to advise charitable clients of applicable legal issues, for example:
  - Federal and provincial tax issues
  - Federal and provincial corporate law matters
  - Trust issues
  - Contracts
  - Risk management
  - Privacy
  - Intellectual property
  - Board liability



- Lawyer should
  - assume that the charity knows little about charity law
  - be diligent in asking the charity questions
  - explain the relevant law to the charity in order to avoid problems in the future
  - fully explain consequences of intended course of action and alternatives
  - provide recommendations to rectify the problems identified

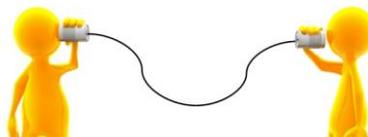


- provide a prioritization of action items to be undertaken
- provide explanation of steps that need to be taken and timeframe to do so, summarized in an organized report that is addressed to all members of the board of directors
- clearly place the onus to respond or take action on the charity, and communicate this expectation
- try to follow up with client, particularly where there is a change of staff or board members



### 3) Effectively Communicating with a Charity

- The collective memory of a charity can quickly lapse because a charity is an institution with changing stakeholders
  - e.g. frequent change of executive staff and/or directors
  - e.g. poor record keeping by the charity
- Confirm retainer with charity
  - What the lawyer is doing for the client
  - What the lawyer is not doing for the client



- Written report to charitable client is essential
- Report to client should be of an educational nature
  - Explain issues to be addressed
  - Explain law and application to facts
- Document advice given to charitable client
  - Identify who the advice is being given to
  - Confirm any verbal advice given
- Set out steps to remedy problems
- Explain areas of uncertainties



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