CANADIAN
DEFENCE
LAWYERS

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Email address: mdrent@lsuc.on.ca

Call for Input on Compliance-Based Entity Regulation
Policy Secretariat
The Law Society of Upper Canada
130 Queen Street West
Toronto, ON M5H 2N6

Dear Messrs. and Mesdames:

Re: Task Force on Compliance-Based Entity Regulation, Call for Input

The Law Society of Upper Canada's Task Force on Compliance-Based Entity Regulation is seeking input from the profession. In reference to its *Call for Input: Consultation paper: "Promoting better legal practices"* (January 2016) https://www.lsuc.on.ca/uploadedFiles/compliance-based-entity-regulation-consultation-paper.pdf and Fact Sheet (January 2016) https://www.lsuc.on.ca/uploadedFiles/compliance-based-entity-regulation-fact-sheet.pdf, Canadian Defence Lawyers is pleased to offer the following input.

Canadian Defence Lawyers is an association of civil defence litigators with members in all Canadian provinces and territories. We speak for a membership of over 1,400 lawyers across Canada. For the most part, our clients are corporations, including but not limited to insurers, self-insured companies and reciprocal defence associations.

The LSUC seeks to address Ontario's regulatory scheme which is primarily reactive to complaints made about lawyers and in reference to the *Rules of Professional Conduct*. If implemented, a proactive regulatory scheme would attempt to reduce complaints by ensuring better practice management by lawyers in law firms. Additionally, the LSUC could address discipline issues which arise from actions of a firm, as opposed to the actions of individual lawyers in that firm.

The LSUC's Questions for Consideration are:

A. Principles for a Practice Management System

Do you have any comments about these proposed principles for the effective management of a legal practice, above?

Lawyers practising in the area of civil defence litigation are usually acting for corporations that are sophisticated consumers of legal services. Generally, these clients have reporting expectations and requirements of their lawyers which ask for regular written reporting, file assessment and billing procedures. Most clients also conduct periodic audits of a law firm's file inventory with that client. Because of the nature of the practice which often involves a large number of files, this category of lawyers operated with conflict of interest and confidentiality protocols which are employed with every file opening. Files are opened and maintained in accordance with Law Society standards.

B. Practice Arrangements to Which Compliance-Based Entity regulation May Apply

Should the Law Society seek to implement compliance-based entity regulation for lawyers and paralegals:
In sole practice?
In a small firm?
In a medium-sized firm?
In a large firm?
In a national or international firm?

Most of CDL's members practice in firms, like the majority of the lawyers in Ontario and in Canada. Some are in sole practice, and some are in large national firms. The majority are in small and medium-sized firms. CDL would advocate for an exemption for law firms whose practice is greater than 50% in the insurance or corporate defence field, because the client base already imposes a high level of regulation through procedures and metrics. There is no evidence, either anecdotally or in the discipline cases, of lawyers from insurance and corporate defence firms being disciplined for breaches of requirements for control over law office administration. Rare but famous law report cases where such firms have come under the courts' co-regulatory jurisdiction (eg., *C.N.R. v. McKercher*, [2013] 2 SCR 649), involve litigated disputes that are usually not coterminous with ordinary law society regulation.

In addition to the LSUC's existing system of Practice Reviews and Practice Audits (which involve the completion of the detailed Basic Management Checklist), the LSUC seeks to implement a further self-assessment checklist (like the one in place in Nova Scotia) which might include the principles of practice, file, client, financial and professional management as well as equity and diversity and access to justice issues. All firms subject to the new system adopted by the LSUC will be met with the burden of additional administrative requirements for these principles, which for the most part, are being already addressed by firms engaged in civil defence litigation by the nature of the practice and the nature of our clients.

To ensure that compliance-based entity regulation does not create an additional regulatory burden, what considerations should be kept in mind that would be particularly applicable to a sole practitioner or a small firm?

Compliance-based entity regulation is not relevant to the oversight of the sole practitioner or small firm because they are not organizations that exist beyond the lawyer, law partners or handful of support staff. There would be no justification for a group within the profession which is already under law society scrutiny.

Corporate and In-House Legal Departments

Many lawyers practicing civil defence litigation are working for corporations, including large number of lawyers who work as staff counsel for Canada's insurance companies, the majority of whom practice in Ontario. CDL understands that the LSUC will be consulting these practitioners at a later stage of this process. Canadian Defence Lawyers would like to offer its assistance in this regard, having recently created its first In-House Counsel Committee, to which the managers of all the in-house legal departments of any Canadian insurer has been invited.

Members of CDL's In-House Counsel Committee are different from the typical in-house departmental counsel in that they serve as counsel on files, performing work that is similar to the work that external counsel perform. The analogy would be to Crown Law Civil, for which there are not many private sector equivalents.

<u>C. Role and Responsibilities of a "Designated Practitioner"</u>

In an entity other than a sole practice, who should be the designated practitioner?

The managing partner who is already responsible for trust fund accounting to the LSUC should usually be the designated practitioner. Firms should be permitted to appoint another lawyer in the firm, such as a partner in charge of training and competence. In larger organizations, that person is often different from the managing partner.

If an entity already has a managing partner, should the managing partner have these responsibilities?

Yes, subject to the comment above.

Given the above list, do you have any views about what the responsibilities of the designated practitioner should be?

In firms with members in CDL, there already exists a management system that promotes ethical legal practice, but there has not been a reporting requirement for these systems. Our clients require a high level of management – many frequently require all of their files to be audited for compliance with their

own corporate litigation guidelines. In many cases, the firms self-audit in advance of client audits to ensure practice and file management timelines and rules are being adhered to. Requiring an additional level of reporting to the Law Society of compliance with another level of management requirements will not be a simple task and will be, for the most part, redundant in our practice area.

In order to avoid duplication and waste, CDL recommends that the designated practitioner be permitted to refer to existing practices as opposed to having to address a separate set of criteria. In the absence of evidence that corporate defence counsel have significant brushes with discipline, there would be no justification for the additional level of compliance auditing.

D. Entity Regulation

Should entities be required to be registered?

Yes. The LSUC needs to define what a regulated entity is, so that all lawyers are able to be certain what organizational obligations are.

Should entity registration requirements for sole practitioners and small firms be different?

A sole practitioner and a small partnership are not entities separate from their constituent personnel. Accordingly, there would be no legal basis for registering them separately.

What information should an entity be required to provide and how often?

If, as the LSUC's *Call for Input Consultation Paper* suggests, the information to be provided would include the names of all lawyers and paralegals, the LSUC already has all that information from the annual filings for lawyers and paralegals. Similarly, the LSUC has the information about the location of the firm's trust accounts and general accounts. The suggestion that the firm provide the names of all employees "who maintain accounting records of the firm" and list of their job descriptions may be too onerous. Staff identities, positions, and job descriptions change frequently. Moreover, this information is not likely to be of additional assistance to the LSUC which will already have the designated practitioner/managing partner contact information.

Are there any challenges that might arise for practitioners in providing this information to the Law Society?

As it is noted, "the drawbacks of entity registration include the possibility that practitioners might find the administrative requirements onerous." As a first consideration, care should be taken to ensure that the information being requested is of some value to the LSUC. Second, the obligation to forever be updating names, job titles and descriptions seems unnecessarily onerous.

E. Views on Compliance-Based Entity Regulation

In your view, what are the practical benefits or drawbacks of compliance-based entity regulation?

Benefits

CDL shares the view of many commentators in the popular media, that lawyer advertising in the plaintiffs' personal injury law sector requires active regulation. Advertising that start with simple words or catch-phrases such as *Hurt?* or *Have you been in an accident?* or cast companies and insurers as evil are often misleading and demean both the profession and its clients. In order for the LSUC to regulate advertising effectively, some level of entity regulation would give the regulator the legal enforcement tools to clean up this practice.

Similarly, the marketing of legal referral services disguised as law firms directly serving the public, is an example of the use of entities to manipulate referral fee rules to the detriment of public confidence and informed choice of counsel.

Increasingly, accounting firms are creating captive law firms to perform niche litigation services. Similar firms may be in use to allow non-lawyers such as accountants and financial planners to provide what is tax law advice. CDL members, as proud members of the legal profession, are interested in ensuring that the value held by the public in legal opinions is not diluted. CDL is also concerned that lawyers in entities that are not controlled by lawyers may be providing risk management advice of a legal nature, when in fact the advice is driven by factors or motives that involve unlawful activity. LSUC oversight should ensure that lawyers in all types of entities are actually empowered to act professionally and ethically.

Drawbacks

CDL is concerned that entity regulation does not lead to the creation of new types of entities, in the absence of consultation. There is a perception, in some part rightly held, that this consultation is in fact a method of reintroducing majority non-lawyer Alternative Business Structures (ABS) model by stealth. On the one hand, there is very little awareness of it within the practising bar. On the other, the same or similar cast of characters appear to be promoting entity regulation as a stepping stone to non-lawyer majority ownership of firms. There has to be better communication by the Law Society to define what is on the table, and what is not on the table.

In the popular discourse, one sees frequent references to the 'CBA Futures Report', often referred to as the Canadian Bar Association's official position. (See, for example, the white paper prepared by staff of the Nova Scotia Barristers Society, footnote 1: http://nsbs.org/sites/default/files/ftp/ERU_Newsletter/2015-06-24-IBATransformingRegulation.pdf.) It is not widely known that the recommendations in this report is ***not*** CBA policy and that attempts to make them part of CBA policy have been shelved for lack of support within CBA membership.

The reason for CDL raising the small size and fringe standing of the Futures committee within CBA is that CDL's membership, which the CDL Board of Directors and Executive represent, is in fact much more representative of the practising bar than the small group within the CBA, many of whom are non-practising lawyers, who form the 'Futures' committee. Given that any compliance-based organizational regulation will directly impact the practice of law, the LSUC should give more weight to the impact of reforms on practising lawyers as opposed to legal futurists, bloggers, scholars and those seeking to profit from consulting law firms on entity regulation.

The discourse concerning entity-based regulation is being influenced to some extent by a pro-ABS lobby. The consultant employed by the Nova Scotia Barristers' Society, Creative Consequences, is a collaborator with the managing director of Slater & Gordon in a widely-disseminated 2015 paper advocating for ABS and, in its conclusions, the virtues of the Slater & Gordon law firm. Slater & Gordon, as the LSUC is aware, is an international share-capital law firm based in Australia. While nothing is hidden, it is also unlikely that the average practising lawyer who stands to be affected by regulatory reform will not have the interest or knowledge to understand that there are vested interests at play in the debate.

Any new layer of organizational regulation will have to be paid for. Who will pay? Will there be zero-based accounting, such that entity regulation will capture or replace regulation of individual lawyers? If law firms have to hire consultants to help with compliance, will the added costs be passed on to clients? Will client confidentiality be compromised by the sharing of such consulting firms?

CDL members pride themselves as engaged lawyers who comply with ethical standards. As in the case of any form of professional regulation, the rule-abiding will be subsidizing the participation of the non-abiding. This economic issue is one of which the LSUC should be very much aware.

Are there other benefits that you see, beyond those listed above?

The LSUC has indicated that it is exploring changes to the *Rules of Professional Conduct* to further regulate advertising by law firms. To the members of CDL, this is an important issue. CDL would appreciate the opportunity to be consulted in any changes the Rules Committee seeks to implement with respect to advertising. Although for the most part CDL members and their firms do not engage in aggressive advertising, our lawyers are affected, as are we all, by advertising campaigns which risk misleading the public or cheapening the important work we as litigators do. If entity regulation will permit the LSUC to address in a more pro-active way (instead of complaints for violated *Rules of Professional Conduct*) the proliferation of advertising in the insurance and personal injury Bar in Ontario, that would be a benefit.

Are there aspects of compliance-based entity regulation that are particularly appealing to you, or not?

The advent of compliance-based entity regulation appears to be a precursor to non-lawyer ownership of law firms in Ontario. This is of major concern to CDL. While we acknowledge the need in certain areas of

practice for improved access to justice, the risks of permitted equity investment in law firms represents a fundamental change in the way we practice law and could potentially negatively affect our practice, livelihoods and service to our clients. Enclosed is CDL's 2015 submission to the Alternative Business Structure working group of the LSUC's Policy Secretariat. It is hoped that additional opportunities for consultation and comment on the issue of ABS will be provided by the LSUC.
The resistance to non-lawyer ownership of law firms in Ontario has to do with control. Ultimately, Ontario law firms are behind other professions and other jurisdictions in not permitting minority ownership of law firms in the small firm setting. Permitting small firms to operate like family businesses will help many firms survive and provide legal services to the public, especially in suburban and rural communities.

What are the key challenges or problems that you foresee with this type of regulatory approach?

CDL's members are from across Canada, and may practice in firms with offices in different provinces and with a national presence. The requirement to harmonize the regulatory framework that each of those firms must comply with is a key consideration for CDL. The LSUC advised in its February 8, 2016 webcast that it would be addressing the issue of compliance-based entity regulation with other law societies across Canada. CDL would be pleased to be of assistance in that regard, should the LSUC request it.

Canadian Defence Lawyers appreciates the opportunity to consult with the LSUC and would be pleased to provide any additional feedback which might be of assistance.

Respectfully,

David Bertschi
President, Canadian Defence Lawyers

Enclosure - CDL's submissions on ABS