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# CALL FOR INPUT

## Consultation paper: “Promoting better legal practices”

### COMPLIANCE-BASED ENTITY REGULATION TASK FORCE

January 2016



The Law Society  
of Upper Canada

Barreau du  
Haut-Canada

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## INTRODUCTION

### PURPOSE

The Law Society of Upper Canada’s Task Force on Compliance-Based Entity Regulation (Task Force) was established by Convocation in June 2015, to study and make recommendations on options for professional regulation that focus on objectives for the entities, or organizations, through which lawyers and paralegals provide legal services. The goal of this public interest initiative is to establish a proactive approach to regulation intended to help lawyers and paralegals (sometimes referred to as “practitioners” in this document) to improve their practice standards and client service.

The Task Force is seeking input from lawyers, paralegals and others about compliance-based regulation and entity regulation.

Task Force members are Ross Earnshaw (Chair), Gavin MacKenzie (Vice-Chair), Raj Anand, Robert Burd, Teresa Donnelly, Howard Goldblatt, Joseph Groia, Carol Hartman, Malcolm Mercer and Peter Wardle.

This document provides context and background on compliance-based regulation and entity regulation. All interested parties are encouraged to review this consultation paper and to comment on the paper as a whole and on the questions raised in it.

Please send written submissions to the Law Society by March 31, 2016, by email to [mdrent@lsuc.on.ca](mailto:mdrent@lsuc.on.ca). You can also respond online at [www.lsuc.on.ca/better-practices](http://www.lsuc.on.ca/better-practices). The Task Force also welcomes responses by regular mail to the following address:

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

All feedback will be carefully considered by the Task Force, which will be reporting to Convocation (the governing body of the Law Society) on these issues later in 2016.

## BACKGROUND AND CONTEXT FOR THE LAW SOCIETY'S INITIATIVE

### INTRODUCTION

The Law Society regulates lawyers and paralegals to achieve appropriate professional conduct by setting rules and by-laws which are applicable to individual practitioners. Spot Audit and Practice Review programs, extensive resource materials, and continuing professional development programs assist with compliance. However, the regulatory process is primarily reactive, responding to conduct that has already occurred. It does not formally recognize the influence of practice arrangements on the way that legal services are being provided, and is based on proscriptive rules that must be followed by all individual lawyers and paralegals.

These limitations have led the Law Society to look for a new approach, one that includes not only lawyers and paralegals, but also the entities through which they provide legal services. Compliance-based regulation supports individuals and entities to achieve best practices in a manner best suited to their environment. Rather than reacting to misconduct after it occurs, it would be much better for both the public and for practitioners if the problem never occurred in the first place.<sup>1</sup>

### WHAT IS COMPLIANCE-BASED REGULATION?

“Compliance-based regulation” emphasizes a proactive approach in which the regulator identifies practice management principles and establishes goals, expectations and tools to assist lawyers and paralegals in demonstrating compliance with these principles in practice. This approach recognizes the increased importance of the practice environment in influencing professional conduct and how practice systems can help to guide and direct conduct to meet appropriate professional standards. Lawyers and paralegals would report on their compliance with these expectations, and would have autonomy in deciding how to meet them. Practitioners would also have flexibility in deciding which policies and procedures should be adopted in order to achieve effective and compliant practice management.

### WHAT IS ENTITY REGULATION?

“Entity regulation” refers to the regulation of the business entity through which lawyers and/or paralegals provide services, and may include sole proprietors. For example, a law firm would be an entity.

Entity regulation recognizes that many professional decisions that were once made by an individual lawyer or partner are increasingly determined by law firm policies and procedures and firm decision-making processes. The environment in which a lawyer works plays an increasingly significant role in determining an individual's professional conduct.<sup>2</sup> Practice environment can also be an important influence on the professional conduct of paralegals, although paralegal firms tend to be smaller than many law firms.

## HOW DO COMPLIANCE-BASED REGULATION AND ENTITY REGULATION FIT TOGETHER?

“Compliance-based entity regulation” refers to the proactive regulation of the practice entity through which professional legal services are delivered. As noted in the Treasurer’s June 2015 Report to Convocation, which established the Task Force, compliance-based regulation has generally been implemented together with entity regulation. The reason for this is that practice management principles relate to the practice, or entity, as a whole, and not only to the individual practitioner.

Other Ontario regulators, including the Ontario Securities Commission and the Chartered Professional Accountants of Ontario, have already moved in this direction, regulating the entity, or practice structure, and introducing proactive requirements for regulated professionals.

## WOULD COMPLIANCE-BASED REGULATION AND ENTITY REGULATION HAVE TO BE IMPLEMENTED TOGETHER?

These two initiatives do not necessarily have to be implemented together, but proactive regulation may be more effective if the business entity is also involved. To ensure compliance with these principles by the entity as a whole, the Task Force believes there is merit to considering the regulation of the practice itself, in addition to the individual practitioner.

## WHY CONSIDER A NEW REGULATORY APPROACH?

### *Current Scope of the Law Society’s Regulatory Authority*

Regulation of lawyers and paralegals by the Law Society is currently based on the regulation of the individual practitioner, although some aspects of the Law Society’s regulatory activity affects firms. For example, the Law Society may restrict the name that a firm may use, and there are rules governing the ownership of firms. The Spot Audit Program, which is described in greater detail below, focuses on the firm, not the individual. However, the Law Society’s primary focus is on the regulation of the individual, rather than on the practice entity through which the legal services are provided.<sup>3</sup>

The current regulatory scheme at the Law Society is primarily reactive. Practice issues, such as client service issues, and questions about the lawyer’s or paralegal’s integrity, are usually identified after the fact through complaints.<sup>4</sup>

### *The Emergence of Proactive Regulation*

The Law Society’s research on developments in legal services regulation during the past 10 years provides support for the belief that lawyers and paralegals achieve greater success in their professional practices when they focus on how their practices are best managed and establish policies and procedures to achieve the professional goals set out in the Law Society’s rules and requirements.<sup>5</sup>

The Task Force believes that a focus on proactive regulation is appropriate, particularly given that the majority of complaints about lawyers and paralegals relate to practice management issues. In 2014, 4,781 complaints were referred to the Law Society's Professional Regulation Division.<sup>6</sup> More than half of these complaints involved client services (52 per cent) and other issues relating to practice management infrastructure, including financial matters. This could include a variety of issues, including a lack of effective communication by the practitioner with the client. Fourteen per cent concerned financial matters (such as books and records) and 8 per cent concerned conflicts of interest.<sup>7</sup> While not every complaint is well-founded, many complaints result in some form of warning or sanction for the lawyer or paralegal.

Even if the Law Society responds with some form of regulatory outcome for the lawyer or paralegal — for example, advice on how to change the process or activity that resulted in the problem — the client or clients may have already suffered the consequence of the poor practice. Further, research has shown that many clients who receive inadequate or improper service do not make a complaint to a Law Society.<sup>8</sup> This suggests that the practice management standards of some lawyers and paralegals could be improved for the benefit of clients and practitioners.

The malpractice claims LAWPRO handles paint a similar picture. Only one in eight claims involve a failure to know or apply the law. Year after year, one-third of claims involve lawyer/client communication issues (i.e., miscommunication, poor communication or lack of communication). Eighteen per cent of claims involve missed deadlines and procrastination issues. Five per cent of claims arise due to conflicts of interest. For claims reported to LAWPRO in 2014, indemnity payments to clients who suffered damages due to the negligence of their lawyer on just these three types of claims are estimated at \$12.1 million. Therefore, LAWPRO's claims data also clearly suggest that there is room for improvement in practice and file management standards.

Law Society data also indicate that the majority of complaints concern sole practitioners (53 per cent in 2014) and firms of between two and five lawyers (26 per cent of complaints during that year). Fifteen per cent of complaints were made against lawyers in medium-sized firms of between six and 20 lawyers. Six per cent were made against lawyers in firms of more than 20 lawyers. Seventy-three per cent of complaints made against paralegals in 2014 concerned sole practitioners. Twenty-one per cent concerned paralegals in small firms of two or three practitioners.<sup>9</sup>

The Task Force believes that encouraging all practitioners to reflect on and improve the systems they have in place could improve practice management overall and may have the effect of increasing client satisfaction and reducing the incidence of complaints and claims.

## HOW PROACTIVE REGULATION MAY BENEFIT LAWYERS AND PARALEGALS

Proactive regulation through a compliance-based approach could benefit legal practices in a number of ways:

1. Practitioners would have access to Law Society resources identifying and explaining principles of effective practice management. The implementation of proactive regulation would benefit the management and culture of the firm as a whole, which would promote and improve ethical best practices of both the firm and the lawyers and paralegals associated with it.<sup>10</sup>
2. Compliance-based entity regulation recognizes that a firm has a role to play in ensuring that the ethical behaviour of lawyers and paralegals is promoted and that a firm may be accountable for system failures that resulted in the lawyer's or paralegal's conduct.<sup>11</sup>
3. A focus on compliance could lead to reduced complaints, by encouraging practitioners to consider how practice management problems might be avoided, rather than reacting to problems after the fact. Responding to complaints can be time-consuming and stressful. As noted in *Innovating Regulation: A Collaboration of the Prairie Law Societies*, "this model of regulation seeks to prevent problems from arising in the first place".<sup>12</sup>
4. Compliance-based entity regulation provides practitioners the flexibility and autonomy to develop internal systems and processes that take into consideration risk, size, practice type, and client base.<sup>13</sup>
5. A renewed focus on effective practice management will better protect the public and increase public confidence in the legal profession.<sup>14</sup>
6. Compliance-based entity regulation allows the regulator to respond to new issues as they arise without having to create new rules.<sup>15</sup>

## CONSIDERATION OF PROACTIVE REGULATION BY OTHERS

### *Canadian Regulators*

Other Ontario regulators (the Ontario Securities Commission, Chartered Professional Accountants of Ontario, and some health regulatory colleges) have implemented various approaches, including the regulation of entities, proactive regulation, and self-assessment. The Ontario health regulatory colleges engage in a variety of proactive approaches. Some health regulatory colleges already regulate entities; other health regulators are currently exploring doing so.<sup>16</sup>

Among legal regulators across Canada, there is increasing interest in the potential for proactive and preventive initiatives to avoid matters becoming regulatory issues. These initiatives are described below.

The Law Society of British Columbia (LSBC) established a Task Force on Law Firm Regulation.<sup>17</sup> On November 9, 2015, the LSBC launched a consultation on law firm regulation.<sup>18</sup>

Initiatives are currently being undertaken by the Prairie law societies in this area, which have published a paper (“Innovating Regulation: A Collaboration of the Prairie Law Societies”), and will shortly be consulting with the profession. The Law Society of Saskatchewan now has legislative authority over law firms.<sup>19</sup> On November 5, 2015, the *Legal Profession Amendment Act* received Third Reading in the Legislative Assembly of Manitoba; the bill provides benchers of the Law Society of Manitoba with the legislative authority to regulate law firms.<sup>20</sup>

The Barreau du Québec (Barreau) requires firms to provide a detailed undertaking to facilitate the ethical behaviour of advocates working in the firm. The firm must provide a signed form listing the members of the firm indicating the following:

- a. The entity ensures that all members who engage in professional activities in the firm have a working environment that allows them to comply with any law applicable to the carrying on of their professional activities.
- b. The partnership or company, as well as all persons within it, shall comply with applicable legislation and regulations.

The Barreau requires firms to designate someone to act as a representative with the Barreau.<sup>21</sup>

The Nova Scotia Barristers’ Society (NSBS) has had authority over law firms since 2005.<sup>22</sup> Since 2013, NSBS has been involved in an extensive review of all aspects of its regulatory scheme. The ambit of this review is more wide-reaching than Ontario’s, and includes both entity and compliance-based regulation.<sup>23</sup>

In collaboration with the inaugural New South Wales Legal Services Commissioner and the former Research Projects Director from that office, NSBS Council has drafted a self-assessment tool, referred to as the “Management System for Ethical Legal Practice”. The NSBS Management System for Ethical Legal Practice, which is currently the subject of extensive stakeholder consultation, asks respondents to rate their compliance with each objective on a scale of 1-5.<sup>24</sup>

### ***International Jurisdictions***

In England and Wales, all lawyers holding practice certificates must work in regulated entities. The Solicitors Regulation Authority (SRA), which regulates solicitors in England and Wales, has established 10 professional and practice principles that apply to individuals and entities. The SRA has also identified five mandatory outcomes that individuals and entities are required to achieve to demonstrate compliance with the 10 principles. The SRA has the authority to monitor, investigate and sanction entities. The Bar Standards Board regulates barristers; in March 2015, it also began regulating entities.

There is a correlation in England between the implementation of proactive regulation and the reduction of complaints. According to the Legal Ombudsman of England and Wales, which has responsibility for these matters, there has been a 22 per cent reduction in complaints about law firms since 2011/2012. The chair of the Office of Legal Complaints in the Ombudsman’s



office suggests that one factor that may have contributed to this decline is an improvement in solicitors' ability to respond to complaints and ensure client satisfaction.<sup>25</sup>

In Australia, there is also a correlation between the implementation of proactive regulation and a reduction in the number of complaints. Researchers have studied the implementation of proactive regulation in New South Wales where Incorporated Legal Practices (ILPs), mainly small firms and sole practices, have been required to implement and maintain "Appropriate Management Systems" (AMS) for more than 10 years.<sup>26</sup>

Although AMS was not defined in the legislation, 10 practice management objectives were identified in collaboration with the profession, which became the subject of AMS.<sup>27</sup> A lawyer in the ILP was required to complete a Self-Assessment Form rating the entity's compliance with these objectives, and to submit this form to the regulator using an online portal. The regulator assisted law practices that appeared to be experiencing difficulties, based on the response to the form.

A 2008 article reported that the complaints rate for ILPs went down by two-thirds after self-assessment. The authors suggested that "it appears to be the learning and changes prompted by the process of self-assessment that makes a difference, not the actual (self-assessed) level of implementation of management systems".<sup>28</sup>

A second study involved the use of an anonymous online questionnaire which asked ILPs with two or more solicitors to assess the impact of AMS and self-assessment on these firms. The survey results revealed that the majority of respondents recognized the value of requiring firms to implement and maintain AMS, as well as to engage in self-assessment. Further, the process of self-assessment had a positive impact on firm management, risk management, and client services issues. The study's authors concluded that "the results from this study and earlier research should inspire regulators to consider proactive partnerships with lawyers, rather than resorting to the traditional paradigm of reactive complaints-driven regulation of firms".<sup>29</sup>

The Australian experience described above, suggests that self-assessment may be beneficial to firms of fewer than 10 lawyers. A study undertaken by Professor Susan Fortney of Texas A & M School of Law and Hofstra University examined the impact of self-assessment on the management of ILPs with between two and 10 solicitors. Eighty-eight per cent of respondents came from firms of fewer than 10 solicitors. Eighty-four per cent of the respondents in this study indicated that they had revised firm policies and procedures for the delivery of legal services.<sup>30</sup>

There have been some recent changes regarding legal services regulation in Australia, and an apparent move away from mandatory self-assessment. As a result of the implementation of the Legal Profession Uniform Law, which applies throughout Australia as of July 1, 2015, it appears that in New South Wales it is no longer a requirement that a lawyer in the firm completes a self-assessment regarding the entity's compliance with AMS.

It does not appear that the move away from mandatory self-assessment was motivated by a view that the process of self-assessment was not valuable. In Queensland, Western Australia, South Australia, the Northern Territory and the Australian Capital Territory, Legal Practitioner Directors of an ILP are still required to ensure that AMS are implemented and maintained.

Since the implementation of the Uniform Law, legal services regulators in New South Wales and Victoria may issue a direction to implement AMS following an audit, examination, or investigation, in which case the firm may be required to comply by implementing and maintaining an AMS and by periodic reporting to the regulator.<sup>31</sup>

## CURRENT PROACTIVE INITIATIVES OF THE LAW SOCIETY OF UPPER CANADA

The Law Society already engages in some proactive regulatory activity. The Spot Audit Program is a quality-assurance initiative that assesses a firm's compliance with financial record-keeping requirements. The lawyers selected for an audit in 2014 reported extremely high approval ratings for the program; 97 per cent were extremely satisfied with the overall experience.<sup>32</sup>

Another example of proactive regulatory activity is the Practice Review Program for lawyers, which involves three different initiatives:

1. **Practice Management Review (PMR):** Lawyers in the first eight years of practice may be referred to the program because of random risk-based selection by the Law Society. The selection reflects the percentage of firms represented in Law Society conduct matters (53 per cent sole practitioners; 26 per cent of firms of between two and five lawyers, etc.). A PMR covers all aspects of practice, including file management, time, client and financial management. In the course of conducting the review, Law Society staff may speak with firm leadership, managing partners, and firm administrators if any issues are uncovered that relate to firm-wide matters.
2. **Re-entry Review:** Lawyers re-entering the private practice of law after a hiatus of five years are required to undergo a review within 12 months from their return to practice as a sole or small firm practitioner.
3. **Focused Practice Review:** Lawyers whose practices are showing significant signs of deterioration, as suggested by increases in complaints or other *indicia*, may be required to participate in such a review.

Paralegals holding a P1 license may also be selected for participation in Practice Audit by random selection.<sup>33</sup> Like the PMR for lawyers, the practice audit program is a holistic review and covers all aspects of practice. Unlike PMR, it is not confined to the first eight years of practice.

Lawyers and paralegals have provided very positive feedback about these proactive initiatives. A 2015 report indicated that over 96 per cent of lawyers who underwent a PMR indicated that they found the process to be constructive and helpful to the management of their practice.<sup>34</sup>

The positive response from the profession to Spot Audit, Practice Review, and Practice Audit suggests that a more comprehensive framework for proactive regulation would have similar benefits for lawyers and paralegals.

## THE ROLE OF PRACTICE MANAGEMENT PRINCIPLES

The linchpin of a proactive system is the development of a list of practice management principles that practitioners would be required to implement in their practice. These principles may be developed collaboratively by the regulator and the profession. They might include, for example, the development of competent practice standards, effective, timely and civil communication by the firm, confidentiality, and avoidance of conflict of interest. The principles might address issues that are frequently the subject of complaints, but the principles may also relate to other aspects of the professional practice. (An example would be a commitment to work to improve access to justice).

The Canadian Bar Association (CBA) Ethics and Professional Responsibility Committee has developed an Ethical Practices Self-Evaluation Tool intended to assist Canadian law firms and lawyers to examine the ethical infrastructure that supports their legal practices.<sup>35</sup> The Tool identifies 10 components of a law firm's ethical infrastructure, and organizes them in three main categories. These categories are:

- a. relationship to clients (which includes, for example, client communication and preservation of a client's property/trust accounting);
- b. relationship to students, employees and others (this could include hiring and supervision issues); and
- c. relationship to the regulator, third parties and the public generally (this category could include access to justice).

To assist practitioners, the tool explains each objective and provides questions a practitioner may ask when assessing compliance with the objective. The tool provides examples of systems and practices to ensure the objective is met, as well as examples of available resources.

Lawyers and paralegals should have flexibility in demonstrating that they have implemented the principles in their practice. For example, the CBA Ethical Practices Self-Evaluation Tool includes "conflict of interest" as a client-management issue. The CBA Tool suggests that the practitioner should ensure that there are policies and procedures in place with respect to checking for and evaluating conflicts of interest, without prescribing the precise nature of the policy or procedure that would fulfil this requirement. Examples of available resources are provided to which practitioners may wish to refer in developing their own policy, if they do not already have one.

A variety of terms are used to describe these principles. In Nova Scotia, for example, the term “Management-Based System for Ethical Legal Practice” is used. In New South Wales, Australia, the principles are referred to as “Appropriate Management Systems”.

### PARADIGM SHIFT – A CONTINUUM OF REGULATORY RESPONSES

Currently, if lawyers and paralegals do not comply with Law Society requirements, there is a regulatory response from the Law Society. In the same way, if compliance-based entity regulation were to be implemented, non-compliance with professional standards would result in a response from the Law Society. There would be a continuum of possible responses, and the Law Society would consider remedial measures wherever possible.

For example, if an entity were having difficulty implementing or complying with practice management principles, the Law Society might contact the entity to discuss the reasons for the entity’s non-compliance and to discuss whether its policies and procedures might be improved. This new approach may be a paradigm shift for some practitioners, the entities in which they work, and the Law Society. Another possible response might be a compliance audit similar to the Practice Management Review program mentioned above. The objective of a compliance audit, or review, would be to assist the entity to ensure that it has implemented the practice management principles.

It may be necessary to develop rules of conduct for entities to provide that an entity’s lack of compliance with a principle could lead to investigation and discipline. An entity’s failure to comply with these requirements could lead to a more serious response, including disciplinary action. These consequences might be warranted, for example, where the professional misconduct of a lawyer or paralegal was the result of the entity’s flawed policies, a lack of policies or procedures, or an entity’s failure to adhere to them.

### THE STARTING POINT

Private practices directly serving the public are most readily the starting point for compliance-based entity regulation. If Convocation approves this form of proactive regulation, there is merit to exploring how this approach might also be applied to other groups such as corporate and in-house counsel, government lawyers; lawyers and paralegals practising in legal clinics, and other practice settings. Practitioners in these settings may have different challenges and some of the Practice Management Principles may not be as relevant or applicable in the same way in those settings as may be in private practice. While entity regulation is most suitable to private practices, proactive regulation may be more generally applicable.

The Task Force has met with other Canadian law societies considering these issues. These discussions suggest that if implemented, there would be an incremental approach to the application of proactive regulation to government lawyers, corporate and other in-house counsel, practitioners in legal clinics, and other settings.

## INTRODUCTION TO THE QUESTIONS

A key component of the mission of The Law Society of Upper Canada is to ensure that all persons who practice law or provide legal services in Ontario meet standards of professional competence and conduct. In carrying out this function, the Law Society monitors new developments in the regulatory world, including compliance-based entity regulation.

Consistent with this approach, the Task Force has developed the questions in this document, which are designed to encourage feedback and participation in this project from practitioners and the public. Participation in the Call for Input is an important component in the Law Society's consideration of this initiative. The Task Force welcomes your input.

### Questions for Consideration

#### A. PRINCIPLES FOR A PRACTICE MANAGEMENT SYSTEM

The Task Force is seeking input on the key components, or principles, for compliance and entity regulation. As explained earlier, the phrase "practice management system" refers to the development of these key components.

A practice management system is also sometimes referred to as an "ethical infrastructure", a term used to refer to policies, procedures, structures and workplace culture within a law practice that help lawyers fulfil their ethical duties.<sup>36</sup> Professor Amy Salyzyn describes ethical infrastructure as "everything within a law practice that impacts how members of that law practice relate to, or fulfil, the duties owed to clients, the justice system and the public more generally".<sup>37</sup>

The Law Society of Upper Canada currently requires lawyers selected for Practice Review, as well as paralegals involved in Practice Audit, to complete a detailed Basic Management Checklist (checklist). This document is a tool to be used by practitioners to focus on specific aspects of their practice about which questions will be asked during the Practice Review or Audit.<sup>38</sup> The checklist is returned to the Law Society prior to the attendance date.

Having reviewed principles of compliance and entity regulation that have been developed in other jurisdictions and the Law Society's checklist, the Task Force considered that the principles may include the following:

1. **Practice Management**, which refers to active supervision of
  - the practice;
  - practitioners; and
  - staff to ensure competent delivery of legal services;
2. **Client Management**, which refers to
  - conflicts of interest;
  - client communication; and

- management of client expectations at each stage of a client matter in an effective, timely and courteous way to ensure delivery of quality legal services;
3. **File Management**, which refers to
    - consistent opening of client files;
    - client file documentation; and
    - consistent policies regarding file closure to ensure the physical integrity and confidentiality of the file and to increase efficiency in the handling of client matters;
  4. **Financial Management and Sustainability**, which refers to
    - business planning and budgeting;
    - the entity's management of its finances in accordance with Law Society By-Law 9;
    - adoption of consistent billing practices to ensure that both firm and client needs are met;
    - appropriate consideration of insurance needs; and
    - adoption of business continuity and succession planning/wind-down plans as appropriate.
  5. **Professional Management**, which refers to the entity's support of practitioners in
    - efforts to maintain currency in their chosen practice areas;
    - initiatives to build competence and capacity in new practice areas; and
    - maintenance of collegial relationships within the profession.
  6. **Equity, Diversity and Inclusion**, which refers to the entity's policies regarding matters such as
    - a respectful workplace environment that appropriately accommodates equity, diversity, inclusion, and disabilities;
    - equality of opportunity and respect for diversity and inclusion in recruitment and hiring;
    - equality of opportunity and respect for diversity and inclusion in decision-making regarding advancement; and
    - cultural competency in the delivery of legal services.\*
  7. **Access to Justice** (the entity plays a role in improving the administration of justice and enhancing access to legal services).

\*The Challenges Faced By Racialized Licensees Working Group has been considering equity, diversity and inclusion issues for Racialized Licensees in the legal professions. It is expected that the Working Group will report to Convocation in 2016. In the event that Convocation adopts recommendations in these areas, there may be additional guidance respecting the implementation of this proposed framework.

**Question:**

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

**B. PRACTICE ARRANGEMENTS TO WHICH COMPLIANCE-BASED ENTITY REGULATION MAY APPLY**

The questions for consideration below concern whether sole practitioners and small firms would be included in the scope of compliance-based entity regulation, as well as medium and large firms.

As noted earlier, an “entity” could include a firm as well as an individual practitioner. Ontario lawyers and paralegals are currently permitted to practice law or provide legal services through a sole proprietorship, a partnership, a limited liability partnership, a professional corporation, or a multi-disciplinary practice.

The Task Force is considering whether sole practitioners and small firms should be required to establish a practice management system in a similar manner as larger firms or practices, if at all. The version of compliance-based entity regulation that might apply to sole practitioners and small firms might be different from the approach for medium and large firms.

The Task Force’s view is that if compliance-based entity regulation applies to sole practitioners and small firms, it should not impose an undue burden on them and that the Law Society should make resources available to assist all practitioners with compliance systems, irrespective of practice size. Based on the Law Society’s experience with complaints, practice review, and practice audit, it is clear that many practitioners would benefit from assistance in these areas. In designing these resources, it should be borne in mind that different practitioners will have varying needs based on their unique practice circumstances.

The Task Force is aware that many medium and large law firms already have considerable ethical infrastructure in place. These existing systems could likely be adapted to respond to any new regulatory requirements regarding practice management principles for entities. These systems could be integrated into a new regulatory scheme and the further development of a firm’s ethical infrastructure.

***Corporate and In-House Legal Departments, Government Legal Departments, Legal Clinics, or Other Practice Settings***

Many Ontario lawyers and paralegals practice in corporate and in-house legal departments, government legal departments, legal clinics, and other practice settings.

While the initial focus of compliance-based entity regulation would primarily be on practitioners in private practice, there may be some benefits for practitioners in these corporate and in-house legal departments, government legal departments, legal clinics, and

other settings. These practitioners would be consulted at a later stage regarding the possible application of proactive regulation to them.

**Questions:**

1. Should the Law Society seek to implement compliance-based entity regulation for lawyers and paralegals:
  - a. in sole practice?
  - b. in a small firm?
  - c. in a medium-sized firm?
  - d. in a large firm?
  - e. in a national or international firm?
2. 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?



### C. ROLE AND RESPONSIBILITIES OF A DESIGNATED PRACTITIONER

The issue under consideration is whether a lawyer or paralegal should be designated by each entity to have particular regulatory responsibilities.

The Task Force reviewed legislation in Canadian jurisdictions where legal services regulators have statutory authority over firms. These requirements are described below.

- a. In Alberta, where its Law Society does not currently have regulatory authority over firms, a “responsible lawyer” with respect to trust accounting is accountable for:
  - i. the controls in relation to, and the operation of, all law firm trust accounts and general accounts;
  - ii. the accuracy of all reporting requirements of the law firm;
  - iii. the accuracy of all filing requirements of the law firm; and
  - iv. any of the above that has been designated to another person.<sup>39</sup>
- b. In Manitoba, law firms are required to designate a practising lawyer of the firm who is to receive official communications from its Law Society.
- c. In Nova Scotia, the designated lawyer is also responsible for receiving a complaint against the firm and for filing an annual law firm report with the Barristers’ Society, among other things.

The Law Society of Upper Canada does not currently require the designation of a “responsible lawyer” with respect to trust accounting. That said, the Lawyer Annual Report usually asks several questions regarding firm trust funds and trust property, which may be answered by a firm’s managing partner.

In England and Wales, the SRA requires entities to designate a Compliance Officer for Legal Practice (COLP) and a Compliance Officer for Finance and Administration (COFA) to ensure that the entity adheres to statutory and regulatory requirements.<sup>40</sup> The COLP supports risk management, and is required to take all reasonable steps to ensure the entity conducts business in accordance with the terms under which it is authorised to work, including compliance with relevant statutory obligations. The COLP is responsible for reporting any material failures with compliance to the regulator.

The COFA is responsible for the overall financial management of the firm. Like the COLP, the COFA is required to ensure that an authorised body, its employees and managers, comply with the SRA Accounts Rules. The COFA must keep a record of any failure to comply, and make the record available to the regulator. The COFA is also required to report material failures to the SRA.<sup>41</sup>

Another model is found in New South Wales, Australia, where an ILP is required to have at least one “Authorized Principal” (AP). The AP must hold a practicing certificate that enables him or her to supervise others. The Legal Profession Uniform Law (NSW) provides:

34(1) Each principal of a law practice is responsible for ensuring that reasonable steps are taken to ensure that

- i. All legal practitioner associates of the law practice comply with their obligations under this Law and the Uniform Rules and other professional obligations; and
- ii. The legal services provided by the law practice are provided in accordance with this Law, the Uniform Rules, and other professional obligations.

(2) A failure to uphold that responsibility is capable of constituting unsatisfactory professional conduct or professional misconduct.<sup>42</sup>

In summary, the responsibilities of a designated practitioner in Ontario could include:

- a. establishing and maintaining a management system that promotes ethical legal practice;
- b. reporting on the entity's implementation of the practice management principles under "Principles for a Practice Management System", described earlier in this paper;
- c. communicating to the Law Society that the entity has been and remains in compliance with the principles;
- d. receiving notification of complaints regarding the conduct of a lawyer, paralegal, or other staff member of the entity, or the entity itself;
- e. reporting about entity trust accounting matters as well as ensuring that the firm's record-keeping is current.

From the point of view of lawyers and paralegals who practice in firms or professional corporations, it would be beneficial if the designated practitioner could be responsible for fulfilling certain regulatory requirements on behalf of all lawyers and paralegals in the entity.

These responsibilities might most appropriately be assumed by a managing partner, depending on the size of the firm.

**Questions:**

1. In an entity other than a sole practice, who should be the designated practitioner?
2. If an entity already has a managing partner, should the managing partner have these responsibilities?
3. Given the above list, do you have any views about what the responsibilities of the designated practitioner should be?

#### D. ENTITY REGISTRATION

The Task Force would like to hear your views about whether entities should be required to be registered with the Law Society.

The Law Society could create a public registry of law firms, which would be searchable on the Law Society website. The information to be included in this register could include the elements

listed later in this document. It could also include any disciplinary history of law firms, the members of the Law Society who practise at the firm, and information regarding pending discipline proceedings against the firm or its members.<sup>43</sup>

Registration of entities may benefit members of the public, who would be able to search the Law Society database. It might also be more efficient for the Law Society and for the entity, as the Law Society could communicate directly with the designated practitioner regarding certain issues.

Drawbacks of entity registration include the possibility that practitioners might find the administrative requirements onerous. Given that a lawyer or paralegal who practises alone would effectively be the designated practitioner, and is already registered with the Law Society in an individual capacity, a different approach with respect to registration requirements for sole practitioners might well be appropriate.

The information to be provided could include the extent to which the entity has implemented the practice management principles mentioned earlier under “Principles for a Practice Management System”. It could also include:

- a. the names of all lawyers and paralegals associated with the firm and the nature of their association;
- b. the location and particulars of all trust accounts and firm bank accounts;
- c. the names and responsibilities of all employees of the firm, or others, who maintain the accounting records of the firm;
- d. the name of an official representative designated for the purpose of communicating with the Law Society; and
- e. the name of the firm “ethics counsel”, if applicable.

**Questions:**

1. Should entities be required to be registered?
2. Should entity registration requirements for sole practitioners and small firms be different?
3. What information should an entity be required to provide, and how often?
4. Are there any challenges that might arise for practitioners in providing this information to the Law Society?

## E. YOUR VIEWS ON COMPLIANCE-BASED ENTITY REGULATION

This document has outlined some benefits that may result from a proactive approach to regulation. These benefits include:

- a. improvements to practice management, which would promote and enhance ethical best practices both of the firm itself and the lawyers and paralegals in it;

- b. recognition that a firm has a role to play in ensuring ethical conduct of lawyers and paralegals;
- c. a reduction in complaints, as a result of a proactive approach;
- d. flexibility and autonomy for practitioners and entities to develop internal systems and processes that take into consideration risk, size, practice type, and client base;
- e. a renewed focus on practice management, which will better protect the public; and
- f. flexibility for the Law Society in responding to issues as they arise, rather than having to create new proscriptive rules.

The Task Force is interested in views about how lawyers and paralegals might apply such a regulatory approach in their practices.

**Questions:**

1. In your view, what are the practical benefits or drawbacks of compliance-based entity regulation?
2. Are there other benefits that you see, beyond those listed above?
3. Are there aspects of compliance-based entity regulation that are particularly appealing to you, or not?
4. What are the key challenges or problems that you foresee with this type of regulatory approach?

**Thank you for taking the time to provide your feedback. If you have any other comments that you would like to provide, the Task Force would be pleased to hear from you. The Task Force will carefully consider all responses and greatly appreciates your participation and contribution to this initiative.**

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<sup>1</sup> This point is made by Amy Salyzyn in “What If We Didn’t Wait?: Canadian Law Societies and the Promotion of Ethical Infrastructure in Law Practices”, (2015) 92 Canadian Bar Review, 507 at 608.

<sup>2</sup> CBA Futures Inquiry: Ethics and Regulatory Issues Team, Final Report, April 1, 2014, p. 14.

<sup>3</sup> This point is made in “Innovating Regulation: A Collaboration of the Prairie Law Societies”, November 2015, p. 6. [www.lawsociety.sk.ca/media/127107/INNOVATINGREGULATION.pdf](http://www.lawsociety.sk.ca/media/127107/INNOVATINGREGULATION.pdf). Section 62(0.1)28 of the *Law Society Act*, R.S.O. 1990, c. L.8, online at <http://www.ontario.ca/laws/statute/90l08>, provides that Convocation may make by-laws governing the practice of law and the provision of legal services by limited liability partnerships. Convocation also has by-law making authority with respect to the practice of law and the provision of legal services through professional corporations under s. 62(0.1)28.1 of the Act. Convocation has enacted by-law 7 (Business Entities) to provide a regulatory framework for limited liability partnerships and professional corporations. Section 61.0.4(2) currently permits audit, investigation and prosecution of a professional corporation, as well as of individuals. This authority has not been implemented through Law Society by-laws or policy.

<sup>4</sup> The Law Society of Upper Canada 2014 Annual Report, online at <http://www.annualreport.lsuc.on.ca/2014/en/annual-report-data.html>.

<sup>5</sup> Treasurer’s Report to Convocation, June 25, 2015, (Part 2), Proposed Task Force on Compliance-Based Entity Regulation, paragraph 37, online at [http://www.lsuc.on.ca/uploadedFiles/For the Public/About the Law Society/Convocation Decisions/2015/convocation-june-2015-treasurer.pdf](http://www.lsuc.on.ca/uploadedFiles/For%20the%20Public/About%20the%20Law%20Society/Convocation%20Decisions/2015/convocation-june-2015-treasurer.pdf).

<sup>6</sup> The Law Society of Upper Canada 2014 Annual Report, *supra* note 4.

<sup>7</sup> *Ibid.*

<sup>8</sup> Amy Salyzyn, “What If We Didn’t Wait?”, *supra* note 1 at 524.

<sup>9</sup> *Ibid.*

<sup>10</sup> “Innovating Regulation: A Collaboration of the Prairie Law Societies”, *supra* note 3 at 36.

<sup>11</sup> “Entity Regulation: Frequently Asked Questions”, paper presented at the International Conference of Legal Regulators, Toronto, July 27-28, 2015, online at [http://docs.flsc.ca/INTLegalReg-EntityRegulationCommitteeFAQsFINAL07142015\(1\).pdf](http://docs.flsc.ca/INTLegalReg-EntityRegulationCommitteeFAQsFINAL07142015(1).pdf).

<sup>12</sup> “Innovating Regulation: A Collaboration of the Prairie Law Societies”, *supra* note 3 at 36.

<sup>13</sup> *Ibid.*

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<sup>14</sup> Ibid., p. 7.

<sup>15</sup> Julia Black, “Principles-based regulation: risks, challenges and opportunities”. 28 March 2007, Sydney, Australia, online at [http://eprints.lse.ac.uk/62814/1/lse.ac.uk\\_storage\\_LIBRARY\\_Secondary\\_libfile\\_shared\\_repository\\_Content\\_Black%2C%20J\\_Principles%20based%20regulation\\_Black\\_Principles%20based%20regulation\\_2015.pdf](http://eprints.lse.ac.uk/62814/1/lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repository_Content_Black%2C%20J_Principles%20based%20regulation_Black_Principles%20based%20regulation_2015.pdf).

<sup>16</sup> This initiative, which relates to oversight of clinics in which Ontario-regulated health professionals practice, is described at <http://www.ontarioclinicregulation.com/>.

<sup>17</sup> Further information regarding the Law Society of British Columbia Task Force is available at <https://www.lawsociety.bc.ca/page.cfm?cid=3966&t=Law-Firm-Regulation-Task-Force>.

<sup>18</sup> The Law Society of British Columbia (LSBC) has had statutory authority to investigate a law firm, and to discipline a firm by reprimand, fine, or other order since 2012. *Legal Profession Act*, S.B.C. 1998, c. 9, online at [http://www.bclaws.ca/civix/document/id/complete/statreg/98009\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/98009_01). The relevant statutory provisions are ss. 11(1) and (3), 26(2), 27(2)(e), 32, 33 and 36, cited in CBA Futures Inquiry: Ethics and Regulatory Issues Team, Final Report, April 1, 2014, p. 14. Further information regarding the LSBC consultation is available at: <https://www.lawsociety.bc.ca/newsroom/highlights.cfm#c4153>.

<sup>19</sup> *Legal Profession Act, 1990*, S.S. 1990-91, c. L-10.1, online at <http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/L10-1.pdf>.

<sup>20</sup> *Legal Profession Amendment Act*, 4<sup>th</sup> Sess., 40<sup>th</sup> Leg., Manitoba, online at <http://web2.gov.mb.ca/bills/40-4/b019e.php>.

<sup>21</sup> Regulation respecting the practice of the profession of advocate within a limited liability partnership or joint-stock company and in multidisciplinary, CQLR c. B-1, r. 9, online at <https://www.canlii.org/en/qc/laws/regu/cqlr-c-b-1-r-9/latest/cqlr-c-b-1-r-9.html> cited in Adam Dodek, “Regulating Law Firms in Canada”, (2011) 90 Canadian Bar Review 383 at 410.

<sup>22</sup> *Legal Profession Act*, S.N.S. 2004, c. 28, online at <http://cdn2.nsbs.org/sites/default/files/cms/menu-pdf/legalprofessionact.pdf>.

<sup>23</sup> Victoria Rees, *Transforming Regulation and Governance in the Public Interest*, Prepared for Council of the Nova Scotia Barristers’ Society, October 15, 2013, online at <https://nsbs.org/sites/default/files/cms/news/2013-10-30transformingregulation.pdf>.

<sup>24</sup> Further information regarding the NSBS Entity Regulation Steering Committee in particular may be viewed at <http://nsbs.org/welcome-entity-regulation-steering-committee>.

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<sup>25</sup> “Complaints about lawyers tumble as LeO reviews name and shame”, 1 December 2015, The Law Society Gazette [UK], online at <http://www.lawgazette.co.uk/practice/complaints-about-lawyers-tumble-as-leo-reviews-name-and-shame/5052518.fullarticle>.

<sup>26</sup> Nova Scotia Barristers’ Society, “Glossary”, Incorporated Legal Practice, online at <http://nsbs.org/glossary-terms>. Also see <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1021145.pdf>.

<sup>27</sup> These 10 areas were: negligence, communications, delay, retainer and billing practices, conflicts of interest, management of records and undertakings, and the management of books and records.

<sup>28</sup> Tahlia Gordon, Steve Mark, and Christine Parker, “Regulating Law Firm Ethics Management: An Empirical Assessment of the Regulation of Incorporated Legal Practices in NSW”, J.L. & Soc. (2010), Legal Studies Research Paper No. 453. [https://www.researchgate.net/publication/228192433\\_Regulating\\_Law\\_Firm\\_Ethics\\_Management\\_An\\_Empirical\\_Assessment\\_of\\_the\\_Regulation\\_of\\_Incorporated\\_Legal\\_Practices\\_in\\_NSW](https://www.researchgate.net/publication/228192433_Regulating_Law_Firm_Ethics_Management_An_Empirical_Assessment_of_the_Regulation_of_Incorporated_Legal_Practices_in_NSW)

<sup>29</sup> Susan Fortney and Tahlia Gordon, “Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation” (2012) 10 U. St. Thomas L.J. 152.

<sup>30</sup> Susan Saab Fortney, “Promoting Public Protection through an ‘Attorney Integrity’ System: Lessons from the Australian Experience with Proactive Regulation of Lawyers”, *The Professional Lawyer*, Vol. 23, No. 1, 2015, online at [http://www.americanbar.org/publications/professional\\_lawyer/2015/volume\\_23\\_number\\_1/promoting\\_public\\_protection\\_through\\_attorney\\_integrity\\_system\\_lessons\\_the\\_australian\\_experience\\_proactive\\_regulation\\_lawyers.html](http://www.americanbar.org/publications/professional_lawyer/2015/volume_23_number_1/promoting_public_protection_through_attorney_integrity_system_lessons_the_australian_experience_proactive_regulation_lawyers.html).

<sup>31</sup> New South Wales Office of the Legal Services Commissioner, “Practice Management”, online at [http://www.olsc.nsw.gov.au/Pages/lsc\\_practice\\_management/lsc\\_practice\\_management.aspx](http://www.olsc.nsw.gov.au/Pages/lsc_practice_management/lsc_practice_management.aspx).

<sup>32</sup> Professional Development and Competence Division Resource and Program Report to Convocation, January 2015, p. 20, online at [http://www.lsuc.on.ca/uploadedFiles/For\\_the\\_Public/About\\_the\\_Law\\_Society/Convocation\\_Decisions/2015/convocation-january-2015-PDC.pdf](http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2015/convocation-january-2015-PDC.pdf).

<sup>33</sup> For a description of the Law Society’s Paralegal Practice Audit Program, please see <http://www.lsuc.on.ca/paralegal-practice-audit/>.

<sup>34</sup> Professional Development and Competence Division Resource and Program Report to Convocation, *supra* note 31 at 21.

<sup>35</sup> CBA Ethical Practices Self-Evaluation Tool, online at <https://www.cba.org/CBA-Legal-Futures-Initiative/Resources/Ethical-Practices-Self-Evaluation-Tool>.

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<sup>36</sup> Amy Salyzyn, “What If We Didn’t Wait?: Canadian Law Societies and the Promotion of Ethical Infrastructure in Law Practices”, *supra* note 1 at 508.

<sup>37</sup> *Ibid.*, p. 513.

<sup>38</sup> The Lawyer Practice Review Basic Management Checklist may be accessed at <http://www.lsuc.on.ca/For-Lawyers/Manage-Your-Practice/>. The Paralegal Practice Audit Basic Checklist may be accessed at [http://www.lsuc.on.ca/uploadedFiles/PDC/Practice\\_Review/Basic%20Management%20Checklist%20\(BMC\)%20-%20PARALEGAL%20-%20Nov%202013.pdf](http://www.lsuc.on.ca/uploadedFiles/PDC/Practice_Review/Basic%20Management%20Checklist%20(BMC)%20-%20PARALEGAL%20-%20Nov%202013.pdf)

<sup>39</sup> The Rules of the Law Society of Alberta, online at <http://www.lawsociety.ab.ca/docs/default-source/regulations/rules7b8d07ad53956b1d9ea9ff0000251143.pdf?sfvrsn=2>.

<sup>40</sup> The Bar Standards Board is the regulator for Barristers. The SRA is the independent regulatory body of the Law Society of England and Wales.

<sup>41</sup> Solicitors Regulation Authority, “What is a COLP and COFA?”, online at <http://www.sra.org.uk/solicitors/colp-cofa/ethos-roles.page>.

<sup>42</sup> *Legal Profession Uniform Law (NSW)*, online at [http://www5.austlii.edu.au/au/legis/nsw/consol\\_act/lpul333/](http://www5.austlii.edu.au/au/legis/nsw/consol_act/lpul333/).

<sup>43</sup> This is discussed by Adam Dodek in “Regulating Law Firms in Canada”, *supra* note 21.