

Alternative business structures and access to justice

Introduction

This paper will discuss one form of an alternative business structure (ABS) for lawyers as a solution for current constraints with respect to access to justice.

There are two imperatives facing the Law Society. First, there is a desperate need for increased access to legal advice from people across the province. Second, there is an apparent glut of newly licensed lawyers who cannot secure meaningful employment in the profession. This paper will discuss how the two imperatives can be reconciled.

The ABS discussion solicited by the Law Society considers technology, non-lawyer compensation and financing to be substantial issues that face both the profession and its Law Society. These considerations may be distractions from the most serious bottleneck, potential liability of one lawyer for the misconduct of another. This paper discussed why this potential liability is so important as to be a deal-breaker.

Constraints to access to legal advice

There are two major reasons why the public does not have adequate access to legal advice. The first is one of geography, in that many people live in areas that are not serviced by lawyers. An offshoot of this is that many people live in urban communities that are just as under-serviced as are remote, rural communities. The second is one of cost, as the business structure used by most lawyers simply costs too much for many people to be able to afford.

What is the reason for the high cost structure currently in effect? If the overhead for a lawyer amounts to \$150 per billable hour, then the lawyer has to charge a fee that is at least enough to cover the overhead and leave room for some net income. At \$50,000 per annum, and based on 1,000 billable hours (just over 5 hours per working day), this requires that the lawyer bill and collect \$50 per hour in addition to overhead. Immediately, the cost to the client has to be greater than \$200 per hour.

What is shared overhead?

Overheads include the cost of premises, the cost of staff and the cost of services required to operate (including membership in the profession). Traditional law firm models give the lawyer a computer and a desk in an office, an assigned support staff (possibly shared), and a common area with boardrooms, computer servers, phone system and other equipment. Firms have to cover the costs of membership, promotion, accounting, continuing education, file supervision and quality assurance. Costs per billing lawyer can exceed \$100,000 per annum in urban centres. That is \$200 per billable hour for the average new call.

Most lawyers appreciate that they cannot be effective being all things to all clients. They restrict their areas of practice to those where they feel comfortable, either in terms of their abilities or in terms of their market, or both. They band together to offer a greater range of services, to offer coverage in the event of an absence, and reduce overhead costs per lawyer. It is this banding together that creates the efficiencies necessary to drive down overheads.

A novel solution – the Storefront

It is the banding together of lawyers that exposes these lawyers to the potential misconduct of their colleagues.

Consider a novel firm, which we will call the Storefront. The Storefront has a retail office in a neighborhood that is underserved by lawyers. The Storefront has a few professional offices, a few meeting rooms, and space for some support staff. The sign on the front of the Storefront identifies this as the Law Chambers for the neighborhood.

Who takes on the responsibility for the Storefront? This is driven by several requirements:

- The Storefront involves occupancy costs for the space, with a commitment for at least a fixed, minimum period of time.
- The Storefront must have a “back office” function, including billing, filing, access to technology, errors and omissions (E&O) insurance, reporting to the Law Society and the like.
- The Storefront will have support staff to perform some necessary functions better than do lawyers.
- The Storefront must develop a culture that offers quality services to the neighborhood. This requires standards, supervision, mentorship, participation in public activities and marketing.

What this firm clearly requires is access to senior lawyers who are onsite. These senior lawyers must be able and willing to manage the Storefront’s legal services and related activities. The Storefront also requires access to capital, technology and management expertise that does not have to come from lawyers, but which senior lawyers may be willing and able to provide.

Let’s focus on the senior lawyer(s) required to support such an operation as the Storefront. Assume for the moment that is one lawyer, although the number will depend upon the situation. This lawyer has to be able to attract lawyers to the Storefront. If the neighborhood could support a traditional law practice, then it would already be serviced by senior lawyers. It cannot, and therefore the Storefront must attract junior lawyers who are willing to seize an opportunity. The Storefront has to offer the services necessary to support these junior lawyers.

The Storefront does not require compliance with the traditional business model. There need not be an office for each lawyer. There need not be a support staff assigned to a specific lawyer. There need not be a telephone, a computer, or many of the other services that are traditionally attributed to the needs of a junior associate. While the Storefront should attract junior associates with the offer of access to clients, there does not have to be an assurance of 25 billable hours per week. Junior associates who are

willing to seize this opportunity will market themselves in the neighborhood. This marketing effort will support the Storefront. So, too, will the location of the office and the marketing efforts of other members support the junior associate.

Each retainer agreement should specify that the client retains just the junior associate with no liability by anyone who does not provide services directly to the client. The Law Society would have to make clear, through regulation or statute, that the senior lawyer is only liable to the degree of participation in the services rendered to that client. Alternately, the E&O policy would have to be expanded to protect the senior lawyer absent fraud or obvious misconduct on the part of that senior lawyer.

What is the incentive?

This opportunity will not appeal to every senior lawyer. It requires a degree of entrepreneurial drive, the willingness to delegate and a comfort with mentorship and training. Junior associates cannot afford to pay for this as a normal service. They can afford to pay some fee that is based upon their billable hours, say \$25 or \$35 per hour. If there were 10 junior associates affiliated with one senior lawyer, that might be more than \$5000 per week of revenue.

In addition, junior associates who make use of overheads will have to pay for some of that use. The small hourly increment may be sufficient to gain membership into the Storefront with a quota for the use of offices, boardrooms, equipment and staff. Any usage above the quota would be build out to the associate and, ultimately, to the client. This might be on a cost recovery basis and should not be a high bar for clients to overcome.

So long as the senior lawyer already occupies the Storefront property with support staff, the incremental cost of adding offices and support staff for junior associates is substantially less than necessary to set up an office from scratch.

While it would be a distraction to the senior lawyer to have new calls constantly seeking time and attention, this has to be part of the deal. If the senior lawyer enjoys mentorship, training and supervision - and many do - the need for monetary incentive is reduced somewhat. Does the senior lawyer have a sense of pride when the new calls win their first cases, bring in their first clients, or close their first deals? This is a "turn on" for many senior lawyers. Look at all those partners of prestigious law firms who teach at law schools on a part-time basis for negligible compensation. Look at all of those who volunteer as mentors outside their firms. As a profession, we are blessed with senior members who are driven by a need to give back.

What is the deal-breaker?

No senior lawyer will be willing to take the risk of hiring or contracting with a junior associate where there is an increased risk of liability. This increase would result if the client relationship were connected to the senior lawyer so as to create a duty of care. In a traditional firm, there are active supervisory constraints in place that lead to substantial built-in costs to the client. This covers the cost of vicarious liability. There is E&O coverage to deal with this, as well.

Consider that the client may retain a lawyer in the traditional law firm, who then assigns a junior associate to perform some of the services. Both lawyers charge the file, as do their respective staff, with a substantial duplication of effort that is commensurate with the account. This duplication is necessary to ensure that the services meet the standards of the firm. In the Storefront, however, the client cannot afford to have a second set of eyes deal with all problems.

There is also the ethical issue that the more associates participate in the Storefront, the less able is the “back office” function to keep tabs on the activities of all the participants. There is therefore a greater exposure to different forms of misconduct, spanning from innocent misrepresentation to negligence to fraud. Why would a senior lawyer become involved in a situation that would lead to such liability?

While the senior lawyer who runs the Storefront may be prepared, and should be encouraged, to provide training, supervision and mentorship services, such services must be compensated. By assigning a small overhead charge to the junior associate, the trainer, supervisor and mentor can be compensated for this participation. The Law Society is responsible to assure that the junior associate is competent and honest. It may be that E&O providers must adjust their product offerings accordingly. It may be that the profession has to absorb the extra risk and exposure. So long as the senior lawyer who runs the Storefront has to bear that risk, the Storefront will fail. By making the senior lawyer liable for the errors and omissions of the junior associate, that senior lawyer will be punished for what should be in the public interest, being the nurturing of new calls and creating access to legal services.

Possible operation

How would the Storefront operate? Each neighborhood will be different. It may be that there are facilities that currently provide services to the public that can offer low-cost to the Storefront. This could be a drugstore, a department store, a community center or a municipal office. Possibly, the Storefront would rent space of its own in a neighborhood. So long as there is a sufficient number of junior associates to contribute to the overhead, the senior lawyer can cover the costs with a profit incentive.

The senior lawyer may have a busy practice already. If so, that lawyer likely has support staff. The incremental cost of increasing staff is relatively small. As with making a few offices available to many service providers, economies of scale factor into the equation quickly. Junior associates would be responsible for their own laptop and cell phone, their own membership fees and insurance. The Storefront would sell access to its back office at a price per billable hour. This price could be modest. The Storefront might also offer common accounting services that meet the requirement of the Law Society. Rather than simply offering these services, these might be mandatory to ensure regulatory compliance.

Over an intermediate period of time, the junior associates should decrease their reliance upon the Storefront management. They would develop an ability and willingness to rely on each other or on their own resources. If the associate could not succeed, this would become evident in a relatively short time. Some associates would be attractive to other firms with a traditional business model. Some would be attractive to employers. Some would simply fail. One could imagine associates forming their own

businesses or partnerships and striking out on their own. All of this would serve to increase access to justice for the neighborhood.

Conclusion

The major constraint to this business model is the liability taken on by the senior lawyer due to involvement in the affairs of the junior associates.

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