Submissions on ABS Working Group Alternative Business Structures Discussion Paper

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LAWPRO Background

Lawyers' Professional Indemnity Company ("LAWPRO") is a wholly Canadian owned insurance company. LAWPRO's mission is to be an innovative provider of insurance products and services that enhance the viability and competitive position of the legal profession. Incorporated in 1990 by The Law Society of Upper Canada (the "Law Society"), LAWPRO has operated independently of the Law Society since 1995, with its own management and Board of Directors. LAWPRO provides the 25,000 lawyers in private practice in Ontario with cost-effective professional liability insurance (mandatory program and excess), expert claims administration, and proactive risk and practice management initiatives to help prevent claims. Through its practicePRO initiative, LAWPRO educates lawyers on where and why malpractice claims occur, and it provides them with tools and resources showing them the proactive steps they can take to reduce their claims exposure. Through its TitlePLUS operation, LAWPRO provides comprehensive title insurance and legal services coverage for residential purchase and mortgage-only/refinance transactions handled by lawyers (and Quebec notaries) across Canada.

Preface

LAWPRO management welcomes the opportunity to make submissions with respect to the discussion paper released by the Working Group (the "Working Group") on Alternative Business Structures ("ABS") on September 24, 2014 (the "discussion paper").

The discussion paper contains a request that those making submissions indicate their reasons for being interested in this topic. Being the provider of the mandatory professional liability insurance program for the Ontario bar, LAWPRO is uniquely positioned to comment from a risk perspective on a variety of issues affecting the bar from time to time. Also, LAWPRO has certain insights into the real estate market due to its TitlePLUS program and can comment specifically on implications for real estate conveyancing. Finally, LAWPRO's role as possible insurer in any Ontario ABS regime would need to be considered at a future date, and for that reason it is essential that LAWPRO continue to monitor developments in this area and provide any insights from an assurance or insurance perspective that may be helpful to the Working Group.

LAWPRO management has organized its comments in this submission around the five types of considerations listed by the Working Group at pages 10 to 21 of the discussion paper, as well as commenting on the four specific ABS models presented for discussion. LAWPRO's perspective highlights the protection of the public interest as the main driver for possible changes, which approach is consistent with the Law Society's statutory duty to protect the public. Of course, in LAWPRO's view, an important way that the public interest is protected is by minimizing lawyer negligence and ensuring that financial assurance stands behind the work of lawyers.

Executive Summary

In the view of LAWPRO management, there are many potential benefits for the public in the Law Society adopting a comprehensive ABS strategy. Chief among those benefits would be bringing currently unregulated legal service providers into the regulatory framework and rolling out entity regulation. Entity regulation would involve clearly defined service, complaints and ethical objectives, enforced by a compliance officer within the entity. Such changes should reduce risk in the provision of legal services and better protect clients.

Innovation that results in better technology, more sophisticated systems and/or better educated and trained employees could also help to reduce the risk of claims and improve the client experience.

To maintain existing client protection, it is imperative that the current system of financial assurance standing behind the work of Ontario lawyers be continued. This will also give the Law Society the best access to risk data and continuing *de facto* as well as *de jure* control over who is allowed to practice in Ontario. Thought needs to be given to addressing the new risks of failing ABS entities "going dark," which threatens client service continuity, and a possible increase in exposure to trust losses due to multiple business lines and/or interests within one entity.

Whether looking at the issue of non-lawyer ownership or combining legal services with non-legal services, the key issue is to maintain the role of the lawyer in protecting his or her client against competing interests in the transaction or litigation. This is not a technical conflicts issue: It is a common sense issue. Where there is no tradition of the lawyer negotiating with, or against, other traditional suppliers in the context of the client's retainer, there should likely be no issue with those fellow suppliers to the client owning the entity that provides the legal services or offering additional services to the client through the same entity. Where it is central to the lawyer's retainer to advise on or act against the interests of that other party or supplier, that type of legal service should not be open for ownership by, or combining of services with, that other party or supplier. As an example of this issue, questions related to real estate conveyancing are examined in detail, including a review of lessons to be learned from the American experience of real estate conveyancing.

Consideration #1 – Access Considerations

In general, LAWPRO is supportive of the Law Society's efforts to increase access to justice, whether through a reduction in the cost of services and/or new or more efficient delivery models, such as unbundling. Presumably the Law Society will continue to monitor the developments in other jurisdictions with a view to determining whether access to justice is enhanced through liberalization of legal service business models as described in the discussion paper.

Three important elements of the access issue may be summarized as follows:

(i) There are suggestions from commentators that the need for enhanced access does not cover all legal services:

> Let's step back and define what we are talking about. If we are talking about bringing market forces to bear on the cost and delivery of legal services we have already accomplished that in real estate, wills and estates, and basic corporate law. There is competition. There is choice. And costs are generally accessible. In real estate our fees are less than the HST on the commission of a real estate agent and we carry as much or more risk.[1]

This was also noted in the February 2014 *Report to Convocation* by the Professional Regulation Committee: "The Working Group's research showed that the legal services market in Ontario for retail or consumer services is very competitive."[2]

(ii) There is a rising chorus of commentators who point out the limitations of technology, for example, to help the truly vulnerable achieve increased access. This is a major theme in the recent report of the U.K. Legal Services Consumer Panel.[3]

(iii) It must be ensured that access across Ontario's geographical breadth does not decline as the result of new policy directions. For example, Mr. Downey has framed this concern as follows:

> My expectation is that if we allow non-legal entities to deliver legal services the presence of practitioners will decline in communities across Ontario. Availability of local legal advice in those less lucrative areas like criminal legal aid work will decrease. Every community group will have fewer lawyers to sit on their Boards and contribute to their cause. Big box stores do not do the things lawyers do in their communities and if we undercut lawyers by changing the rules after Alternative Business Structures come in, the public will not be served in the medium or long term.[4]

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[1] Doug Downey, "Alternative Business Structures", http://www.bencherelection.com/issues.html
[2] Professional Regulation Committee, *Report to Convocation*, February 27, 2014, http://www.lsuc.on.ca/uploadedFiles/ABS-report-to-Convocation-feb-2014.pdf, at 1446
[3] Legal Services Consumer Panel, *2020 Legal Services: How Regulators should Prepare for the Future*, Nov. 2014, http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/2020consumerchallenge.pdf
[4] Downey, *loc. cit.*

Consideration #2 – Technological Considerations

LAWPRO, through its practicePRO program, has been a strong supporter of increasing lawyers' use of technology tools to provide service to clients more effectively and economically, and with less risk. Good systems have the ability to significantly reduce the risk inherent in legal practice while increasing client satisfaction.

In particular, the possible use of a franchise model, within which world class technology could be implemented by more law firms, is an exciting possibility that could allow lawyers the ability to expand the range of clients served at more accessible fee levels.

Consideration #3 – Economic & Business Considerations

LAWPRO has long recognized that a lawyer facing economic and business challenges may have less time and fewer financial resources to focus on good risk management practices and enhancing client service. For that reason, LAWPRO is certainly in favour of initiatives that may result in law practices being better funded and staffed with better trained and supervised service providers.

As an aside, it should be noted that LAWPRO does not necessarily put a lot of weight on the concept of "direct" supervision as some may use that term. Based on anecdotal evidence and our observations from claim files, there is no consistent level of "direct" staff supervision in the legal profession in any event. LAWPRO recognizes that in the 21st century, there are many ways that good and effective supervision can be implemented, including technological solutions and more robust training, control and testing protocols, none of which are common in law firms today.

Consideration #4 – Professional & Ethical Considerations

LAWPRO strives to support a strong reputation for the profession through the excellence of its claims handling and the strength of its solvency. This aspect of the reputation of the profession (i.e., the financial assurance that stands behind the work of lawyers) should be carefully considered by the Working Group in the evaluation of options.

In terms of duties to clients and protecting solicitor-client privilege, LAWPRO has no specific comments at this time, but will likely have feedback in the future, if and when revised safeguards for these principles are released for discussion. As Nick Robinson has noted, "non-lawyer ownership does lead to new professionalism challenges…"[5] Ensuring that clients are appropriately protected and lawyers are able to implement any new standards to protect privilege will be important to managing the risk profile of the profession as a whole and avoiding individual claims.

Furthermore, in our view protecting the public is the main reason for bringing previously unregulated entities "into the tent" of legal regulation. (We are thinking, for example, of some websites that claim not to be providing legal services, but may be, and the range of document

[5] Nick Robinson, "When Lawyers don't get all the Profits: Non-lawyer Ownership of Legal Services, Access, and Professionalism", *HLS Program on the Legal Profession Research Paper No. 2014-20*, August 27, 2014, at 4

review services in support of litigation, some of which may involve the practice of law and some not. Once up-to-date definitions and boundaries are developed, the users of such service will be able to have clarity about what protections they are receiving (i.e., what the duties are to legal service clients in all settings) and what is, or is not, the scope of solicitor-client privilege in such settings.

To the extent there is some suggestion among commentators that the professional and ethical considerations in an ABS world are no different from those faced by in-house counsel currently, we would respectfully suggest that they are missing the point. Currently an in-house counsel owes loyalty to the corporation who is his or her client: That corporation is who the in-house counsel acts for and advises. There is a duality of duties between those owed to the corporation, as client, and those owed to the Law Society and the courts. But it is not a trinity of potentially conflicting relationships and duties. That only arises once the lawyer also owes a duty to a client, or customer, who is not the corporate employer of the lawyer.

Consideration #5 – Implementation Considerations: (a) Business Entity Regulation & Subordination of Business Interests

LAWPRO agrees that all interests related to the entity (including those of the owners) must be subordinated to the interests of the clients, the rule of law and the administration of justice. But how the "rubber will hit the road" on this issue is likely strongly linked to Implementation Consideration (b) – Conflicting Interests.

Apart from the issue of how business interests must be subordinated, LAWPRO supports entity-level regulation and is hopeful that it will enhance not only the ethical culture within entities, but also risk management and claims avoidance practices, all to the benefit of the clients.

Consideration #5 – Implementation Considerations: (b) Conflicting Interests

In LAWPRO's view, this is one of the most important issues in the ABS debate in terms of safeguarding the public interest and avoiding future claims. The Working Group has noted that professional independence must be maintained in both litigation and transactional matters. The discussion paper raises the question of whether it is necessary to ban all non-lawyer ownership in order to safeguard professional independence, or whether focused conflicts rules and the law of fiduciary relationships could effectively address the issue. It is an area where one must bear in mind the principle that restrictions on who may provide legal services must be proportionate to the regulatory objective to be achieved, a very important objective.

Robinson deals extensively with this issue in his recent paper, noting that non-lawyer ownership presents the potential for conflicts of a new kind than those previously faced by the profession.[6] He also notes that non-lawyer ownership may have very different types of impact depending on the jurisdiction or the sector of the legal market at issue.[7] The Working Group observed in its February, 2014 report to the Law Society that "there may well be types of services that are

[6] *Ibid.*, at 12
[7] *Ibid.*, at 4

inappropriate and likely to increase risk if provided together with legal services through the same entity."[8]

Furthermore, Robinson sees the issue of conflicts being most serious where the non-lawyer owners have other well-defined interests:

> Critics are correct to worry that the interests of clients and non-lawyer owners may sometimes conflict, placing new pressures on lawyers. However, such conflicts are most likely to occur, and be most serious, where non-lawyer owners have other well-defined commercial interests, such as in the case of a large corporation that offers multiple other services in the market, along with legal services.
> …
> A company that also offers other services or goods may be more likely to offer legal services geared towards increasing the bottom line of the core business of that company and may create the potential for more conflicts of interest.
> …
> While law firms' interests do not perfectly align with clients, enterprises that offer legal services that also have other commercial interests are more likely to have conflicting and potentially adversarial interests to their clients. For example, insurance companies have captured a large segment of the personal injury market in the U.K. Since insurance companies have an interest in reducing the amount they compensate claimants these companies may try to lobby for regulations that would reduce payouts or encourage their law firms to settle claims, both of which are positions that may be in conflict with their client's best interests.[9]

It is interesting to note the observation of Trebilcock and Csorgo, in the context of studying multi-disciplinary practices, that their success rests upon vertical integration, which helps to reduce transaction costs due to alignment of supply of different services under one roof and one technology system.[10] However, the essence of vertical integration is the ability of the one owner to control the process, the supply inputs, the package of services being offered, and the distribution methods: Where is the room in that system for an individual lawyer-employee to advise the client that his or her best service choices are outside the vertically integrated (or controlled) enterprise and if he or she does, what happens to any savings in terms of transaction costs?

(1) Example of the need for independence: Real Estate Conveyancing

Although much of the focus in the Ontario ABS debate is currently on the personal injury field, the discussion surrounding ABS is also a very important issue for real estate conveyancing in Ontario. This is an area where LAWPRO has unique insights to offer. In addition to its work over the past 20 years supporting the real estate bar through its TitlePLUS® program, real estate practice often produces by count and cost the most claims for LAWPRO's primary program on an annual basis.

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[8] Professional Regulation Committee, *op. cit.*, at 1493
[9] Robinson, *op. cit.*, at 14, 40 & 43
[10] Michael Trebilcock & Lilla Csorgo, "Multi-disciplinary Professional Practices: A Consumer Welfare Perspective", 24 *Dalhousie Law Journal*, 2001, 1, at 5 - 14

The Working Group itself has noted that "effective client representation and protection of our land titles system requires particular examination with respect to legal services involving residential real estate."[11]

The role of the real estate lawyer as independent advisor has been studied in the past and described as follows:

> The creation of the lawyer-client relationship involves obligations that extend beyond the lawyer's completion of technical or mechanical tasks for a client. Subject to the *Rules of Professional Conduct*, a lawyer must act in the best interests of the client. The lawyer's role in a real estate transaction is not simply to deliver an opinion of good title but to protect all of the client's rights and to act not only as a technician, but as a counsellor/advisor and fiduciary.
> …
> [L]awyers quarterback their clients' transactions and put on a simple solicitor-client basis, protect their client's interests. Lawyers' tasks in a transaction are rarely listed or delineated and are rarely qualified or limited. The client delegates responsibility for the transaction to the lawyer and the lawyer, as the client's fiduciary, protects the client's interest. The lawyer's duty is clear and their counsel is all-encompassing. [12]

Despite a significant change in Ontario residential real estate transactions (i.e., the rise of title insurance as a replacement for the lawyer's opinion on title), the role of the real estate lawyer as independent advisor has survived. However, it has not been an easy journey over the past 20 years.[13]

In the 1990s, the risks of allowing a corporate entity to take over the central role in conveyancing were summarized as follows:[14]

- Ability to define the nature of acceptable title, as opposed to as defined by purchasers and vendors in the agreement of purchase and sale; and

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[11] Professional Regulation Committee, *loc. cit.*

[12] Sidney H. Troister & Kathleen A. Waters, *Real Estate Conveyancing in Ontario: A Nineties Perspective*, September, 1996 (commissioned by Lawyers' Professional Indemnity Company), at 4 & 65

[13] The title insurance "wars" of the mid to late 1990s have been described in the following: John Beaufoy, "Real estate lawyers being edged out of profession", *Law Times*, September 9-15, 1996, at 1; Julius Melnitzer, "The 'Unholy War' over Title Insurance: Will it mean the end of the Residential Real Estate Bar?", *Canadian Lawyer*, July, 1998, at 14; Julius Melnitzer, "The Fallout from Title Insurance", *Canadian Lawyer*, August, 1998, at 27. Attempts in 2003-05 to introduce corporate intermediaries between lawyers and lenders, with the corporation preparing the mortgage document and instructing the lawyer, also gave rise to controversy. In one case, the arrangement mandated the purchase of lender title insurance coverage from a specific lender. The Ontario Bar Association and County and District Law Presidents' Association (CDLPA) formed a task force to investigate and advocate with lenders on behalf of consumers and lawyers. The common theme in the pilot projects was that the purchaser client could end up spending more money, either for mandatory title insurance or due to technology/document processing fees. See Deborah Rogers, "Real estate bar mobilizes task force over lenders' outsourcing", in *The Lawyers` Weekly*, July 18, 2003. The Law Society of Upper Canada released a Notice to the Profession, entitled "Real Estate Transactions – Use of Third Party Service Providers by Lenders to Process Residential Mortgages" on August 6, 2003. The Law Society of Alberta issued a Bulletin, entitled "Third Party Service Providers" in January, 2005

[14] Troister & Waters, *op. cit.*, at 100

- Protection of the land registry system, in the face of possible corporate decisions not to register interests, or not to register them promptly.

There are two significant issues to be considered: (a) the importance of protecting the public land registry system in Ontario; and (b) the need for independent lawyers to be available to advise individuals on issues related to real estate transactions, including title and compliance issues.

In terms of the latter issue, some may argue that the survival of the real estate lawyer's role as independent advisor in Ontario is due to O. Reg. 69/07, which requires a concurrent certificate of title from a lawyer not in the employ of the title insurer each time a title insurance policy is issued.

This regulation has a long history, as described below:

> This regulation appears to have been in place since July, 1957. According to the 1956 minutes of Convocation of the Law Society of Upper Canada, any insurance company then licensed as a guarantee company under the *Insurance Act* was permitted to issue title insurance policies. However, it was not until 1956 that any company was intending to do so. The Law Society became involved when a company applied for a licence to issue title policies since such activity might have constituted the unauthorized practice of law. Following a series of meetings with the title insurance company then applying for a licence, the Attorney General's office, the Superintendent of Insurance and the Master of Titles, the regulation, substantially in the current form, was accepted.[15]

One queries how the requirement of the regulation would be interpreted if lawyers acting on transactions came to be employees of title insurers or of corporations that had title insurance licences as well as legal service ABS status. Would that effectively mean those lawyers could only obtain policies from other title insurers for their transactions? Or would a shadow industry of certificate-signing lawyers emerge, providing certificates in bulk on superficial review of the title documentation, but having no advisory relationship with the client?

As an example of the type of conflict of interest that must be guarded against, consider the central role of the title insurance policy in securing Ontarians' interests in real estate. It would be against the public interest to suggest the real estate lawyer should not be in a position of independence to negotiate coverage for the client. Given the highly technical nature of real estate title and compliance knowledge that is needed, there is no obvious substitute for the role of the lawyer. The conflict has been described as follows:

> When purchasing title insurance, professional assistance is advisable in assessing the extent of coverage required, negotiating the premium, properly naming the insured and describing the insured property, whether survey issues should be examined, the face amount of the policy, what endorsements are appropriate for added coverage and at what cost, the financial soundness of the insurer, and the reputation of the insurer in denying coverage or disputing claims with its own insureds.

[15] *Ibid.*, at 99

> …
> Ontarians should be particularly concerned about the potential imbalance in market power between the house purchaser and the large title insurer. If someone who has a professional duty to that client is not protecting the consumer's rights, the residents of Ontario will likely "do business" with title insurers in a dangerous state of ignorance.
> …
> Title insurance may obviate the need for some title review work currently done by real estate practitioners, but might, in certain cases, replace it with insurance-related work.
> …
> [W]e question whether an employee of the title insurer could ever adequately provide independent representation regarding the policy itself. The conflict of interest would go to the heart of every matter to be discussed, as the employer's financial interest would be directly affected. One commentator has suggested that title insurance could reduce the extent of independent advice individuals receive.[16]

The court stated the following in *Walter Rogge Inc., v. Chelsea Title & Guaranty Company*, 562 A.2d 208 (1989, N.J. S.C.):

> Real estate title insurance policies, like other aspects of the transfer of real estate, are unavoidably technical. That technicality counsels a prudent purchaser to consult qualified experts such as lawyers and surveyors. The reason is that the purchase of real estate, even something as commonplace as a single-family residence, is quantitatively different from the purchase of personal property such as furniture, automobiles, and securities. Lawyers, who are familiar with the technicalities and terminology of real estate law, are not only helpful but virtually essential for the protection of the rights of anyone purchasing real estate.

That this is an important duty in protection of the public interest is evidenced by the recent spate of negligence claims received by LAWPRO as a result of a (relatively) new exception to coverage introduced by most title insurers into policies issued in favour of private mortgage lenders.[17] If the lawyer is not reviewing the exceptions and advising the client, there is no one else with the necessary knowledge of title, compliance issues and the deal itself to do so. Clearly the title insurer is not under an obligation to the insured to act only in his or her best interest, or such exceptions would never be created.

The need for independence was embedded in the mid-1990s when discussions between the Financial Services Commission of Ontario ("FSCO") and the Law Society resulted in the implementation of new rules and commentary in the *Rules of Professional Conduct*. It was viewed as particularly important to maintain the independence of lawyers and thus that there be no direct or indirect payments from title insurers, agents or intermediaries to lawyers for recommending a specific title insurance product to their client.[18] The lawyer is required to

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[16] *Ibid.*, at 6, 101 & 106
[17] http://avoidaclaim.com/2014/warning-re-claims-exposure-where-private-mortgage-advance-goes-to-third-party/
[18] The Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 3.2-9.5

disclose that no commission or fee is being furnished to the lawyer with respect to any title insurance coverage.[19] In addition, the lawyer is required to assess all reasonable options to assure title and advise not only that title insurance is not mandatory, but also that it is not the only option available to protect the client's interests in a real estate transaction.[20]

The experience in the United States makes it clear that the Law Society and FSCO were not misguided in their joint desire to protect the public interest in the 1990s. In the U.S. the rise of controlled (or affiliated) business relationships have become common in the real estate settlement process and this has not benefited consumers.

The U.S. Department of Justice conducted a detailed analysis of the issues affecting the pricing and marketing of title insurance in 1977.[21] It noted situations of real estate brokers forming affiliated title companies to do title searching and issuance of title policies.[22] The problem was described as follows:

> When the producer [i.e., the person with the relationship to the buyer, be it the real estate agent, mortgage broker, lawyer, etc.] has an affiliate [i.e., a title agency/company] that issues the policy [underwritten by a licensed title insurer], naturally the producer will direct all of its title insurance business to its affiliate. Title insurers… will bargain with the producer's affiliate in order to get a guaranteed source of title underwriting business; that is, the producer's affiliate will contract with whatever title insurer offers the best deal to have <u>all</u> of its policies underwritten by that one insurer. [writer's emphasis]
>
> …
>
> The only way a title insurer can guarantee itself adequate business is to outbid its competition in negotiating the percentage of the premium for the title policy that it is willing to accept as an underwriting fee or to outbid them [i.e., the competing title insurers] in providing the work product and services normally assumed by the producer's affiliated title company (i.e., providing a search package requiring the title company to do little other than deliver the policy and collect the fee). Naturally, as the title insurer's profits decline due to reduced underwriting fees or because of increased costs due to commitments to assume more of the duties normally provided by a title company, the cost of title insurance will inevitably rise.
>
> …
>
> [T]he presence of the controlled title company creates other anticompetitive problems. Real estate brokers and others will have no desire to direct business to the best title company; rather they will direct business to their own companies. Instead of receiving a kickback for this service, they will receive corporate dividends…
>
> …
>
> Reverse competition would be strengthened since the affiliate's decision as to whom it chooses to underwrite its policies would be based on how much it would receive as

[19] *Ibid.*, Rule 3.2-9.6
[20] *Ibid.*, Rule 3.2-9.4
[21] U.S. Dept. of Justice, *The Pricing and Marketing of Insurance* (1977) (A report of the U.S. Dept. of Justice to the Task Group on Antitrust Immunities, January, 1977)
[22] *Ibid.*, at 252

> compensation, not how much the policy will cost the purchaser; and the producer, who profits as the controlled title company profits, will continue to direct business to its own affiliate.
> …
> To sum up the major evils of controlled title companies, where a real estate settlement producer is able to direct the purchaser of a title insurance policy to a particular title company and at the same time that producer owns the title company, the purchaser is likely to end up (1) paying unreasonably high premiums, (2) accepting unusually poor service, or (3) accepting faulty title examinations and policies from the controlled title company.[23]

In addition to producer-owned title agencies, commentators have noted the anti-competitive effect of what is effectively vertical integration, when a title company/agency is acquired by a title insurer and thereafter ceases to do business with multiple title insurers and instead directs all business to the acquiring title insurer.[24] In fact, one commentator has noted that title insurers like affiliated business arrangements because it gives them more control over the conveyancing process, including the "problem" of agents using multiple underwriters (i.e., title insurers).[25]

In summary, the current *Rules* and Reg. 69/07 give us an example of conflict concerns that already have solutions embedded in Ontario real estate conveyancing.

By way of contrast with the title insurance example, one may consider the possible ownership role of institutional lenders. In residential mortgage transactions, lawyers are allowed under the *Rules* to act for both the purchaser/borrower and institutional lender. The assumption is that both are equally focused on the deal closing, so there is an alignment of interest in most cases. However, there is also the implicit assumption that institutional lenders are effectively represented by their in-house counsel when underwriting requirements and standard-form mortgage documents (including commitments and instructions to solicitors) are being developed: The role of the individual real estate lawyer is to implement the steps set out in the instructions and register the mortgage. There is virtually no advisory role on the part of outside counsel in favour of the institutional lender in the individual residential transaction, although clearly a duty to communicate adverse information exists. On balance, acting for the institutional lender on a residential closing is more of a task-based retainer, with relatively discrete duties.

Where, on the other hand, there is less expectation that the lender has its own internal legal advice that has already been embedded in the deal (i.e., retainers from private lenders), there is a requirement for two lawyers on the transaction (subject to minimal exceptions).[26]

But even in the institutional mortgage loan setting, the fiduciary duty of the lawyer to the borrower often requires him or her to question the institutional lender-client on the borrower's behalf. What if the commitment or instructions to solicitor do not reflect what the borrower

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[23] *Ibid.*, at 269-273
[24] Birny Birnbaum, *Report to the California Insurance Commissioner: An Analysis of Competition in the California Title Insurance and Escrow Industry*, December 2005, at 57
[25] Rich Patterson, "Keeping Lawyers in the Future of Residential Real Estate Conveyancing: The American Experience", CBA, Canadian Legal Conference, August 13-15, 2006, at 11
[26] *Rules of Professional Conduct*, Rules 3.4-12 to 3.4-16

believes the deal to be? What if the lawyer is being instructed to implement conditions of closing or mortgage terms that do not accord with the commitment? The duty to achieve clarification in such circumstances is not usually considered a conflict requiring the lawyer to withdraw from representation, absent other issues in the file.

Also, if retained before a loan commitment is finalized, the lawyer has a role to advise the borrower about financing options. Currently a lawyer would not be bound in any way to favour one lender (or lending product) over another, when providing the client with general information and advice about how to get a mortgage.

So, although it is not as stark as the title insurance example, from a consumer protection perspective it is not necessarily risk-free to take the position that institutional lenders should be allowed to own legal practices, just because real estate lawyers are currently allowed to act for them as well as borrowers where there is no dispute that would require independent representation.

There are clearly many issues to be considered in this area. In LAWPRO's view it is not necessary to ban all non-lawyer ownership. But non-lawyer ownership where it is central to the retainer that the lawyer regularly protect the client against, or negotiate against the interests of, the potential "owner" should be unacceptable.

(2) The Quest for Less Regulation

A large part of the purported value in moving to an ABS regime is to simplify regulation, in order to release innovation and save costs. Once again, LAWPRO will use real estate conveyancing as a sample area, to demonstrate that in some cases less regulation in one area can actually produce more of another type.

If real estate practice is released from the traditional Ontario model to a less constrained model as seen in the United States, where anyone can control a title agency, the provincial regulation of real estate conveyancing will likely have to become more intense. For 20 years this has been regarded as a highly unattractive proposition, by both the Law Society and the Ontario government.

This was identified as a key issue in the 1990s, when policy directions for real estate conveyancing in Ontario were being debated, in light of the advent of title insurance:

> The present system operates with minimal public or governmental intervention because of the framework of duties and obligations within which the lawyer functions. If the title and non-title aspects of a real estate transaction are removed from that framework, a statutory, government-monitored system will have to be created to replace all of the current protections.
> …

> It is our view that without independent legal advice regarding title policies, such as is effectively ensured by Regulation 666 [now O. Reg. 69/07] Ontario residents will require governmental intervention to ensure:
>
> (a) adequate consumer protection – When title policies are drafted, hundreds of years of real estate common law and many statutes and regulations are taken into consideration. The expectations of consumers arising from their agreements to purchase land that are now satisfied by their lawyers will have to be replaced by a policy of insurance. Without extraordinary time and study, the consumer cannot be expected to evaluate the appropriateness of a policy, the practices of the insurer and the differences between the protection offered by the insurer and the client's entitlement under the contract. At present, the lawyer, as an independent advisor, is governed by professional duties and responsibilities and a standard of care in opining on titles that has been developing, evolving and expanding. The Government will have to either: (i) decide what is or is not to be covered by the policies (perhaps adopting standard-form policies), and/or (ii) impose stringent disclosure requirements.
>
> (b) underwriting in accordance with reasonable risk-evaluation – In Ontario, the lawyers' standard of care demands a title search as a precondition to giving a title opinion. Where a search of title is required to be made by the insurer varies throughout the United States. (Depending on location, this is a contractual, common law or statutory issue.) If insurers are allowed to take on risks blindly, there is no assurance for purchasers that the face amount of the policy will be enough to solve potential problems. The "homeowner" could end up with cash from an insurance payment and no home, especially if the property has appreciated since the policy was issued and comparable homes now cost more.[27]

Ontario has elected since the mid-1990s not to move in the direction of enhanced governmental control of real estate conveyancing, beyond the absolutely essential changes introduced in 2006 to combat real estate fraud.[28]

The hypothesis underlying many themes in the discussion paper is that regulatory simplification in the area of legal services will result in innovation and costs savings is largely based on analysis from an antitrust perspective. What can we learn from antitrust analysis of real estate conveyancing south of the border?

In the United States, where attorneys do not generally have a monopoly over conveyancing, the control of the title insurance community over conveyancing has been described as an oligopoly:

> Instead of focusing on prices and better coverage, competition in the United States has been focused on the referral sources (such as real estate brokers, lenders and lawyers), which is known as "reverse competition". Cook states the following:

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[27] Troister & Waters, *op. cit.*, at 6 &102-103

[28] *An Act to modernize various Acts administered by or affecting the Ministry of Government Services*, S.O. 2006, c. 34, ss. 14-15

> "Reverse competition" has often taken the form of payments to the real estate professional, in the form of rebates, commissions, fees, or kickbacks, and are far in excess of the payment justified by the work performed. As a result, the consumer pays a much higher premium than he would pay in a purely competitive situation.[29]

> Title insurance is a breeding ground for such practices because the nuances of title insurance [or real estate conveyancing, generally] are not easily understood by the consumer and there is little incentive to become knowledgeable, especially at a time of great stress (buying or selling a house).[30]

In summary, two issues have been identified in the U.S. literature: reverse competition and information asymmetry (the former resulting largely from the latter).

The dangers of reverse marketing were also described in a 2006 *Forbes* magazine article on the American title insurance industry:

> In the old days title agents looking to attract more business paid kickbacks that were modest and in-kind – baseball tickets, spa trips, free meals, luxury boxes at concerts… But in recent years, as the gross profit per customer topped $1200 in many cases, title agents have devised new ways to sluice larger sums to the partners that send business their way.
>
> [One title insurer]… allegedly arranged for sales agents, mortgage brokers and developers around the country to start their own "reinsurance" companies. Then, every time one of them sent a customer…, it would pay his newly formed shop to reinsure the policy, a subtle and tidy little kickback. In one type of arrangement [the title insurer]… paid them 35% of its revenue to assume half the risk; yet the newly minted "reinsurers" were never asked to pay up in the rare instances when a title search missed an old claim…[31]

The significance of "information asymmetry" issues in preventing the efficient operation of a market has also been identified by Passmore and Roy when studying referral fees in the U.K. and the role of the oversight regulator when focusing on the regulatory treatment of referral fees.[32]

This market asymmetry in real estate conveyancing has resulted in forty years of federal real estate settlement legislation in the United States. There have been 11 amendments since the *Real*

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[29] Deborah J. Cook, "Iowa's Prohibition of Title Insurance – Leadership or Folly?" (1983) 33 *Drake Law Review* 683, at 696

[30] Troister & Waters, *op. cit.*, at 89

[31] Scott Woolley, "Inside America's Richest Insurance Racket", November 13, 2006, http://www.forbes.com/forbes/2006/1113/148_print.html

[32] Crispin Passmore & Alex Roy, "Referral Fees-Access to Justice or Road to Hell?", http://www.legalservicesboard.org.uk/what_we_do/research/research_events/pdf/referral_fees-access_to_justice_or_road_to_hell.pdf

Estate Settlement Procedures Act[33] ("*RESPA*") was first passed in 1974, and there are extensive regulations.[34] It has been described as follows:

> The United States Congress [originally] passed *RESPA* in 1974 as consumer disclosure and anti-kickback legislation. *RESPA* was meant to combat allegedly deceptive practices like referral fees and paid "vacations" that had crept into the U.S. real estate closing market. These practices artificially raised transaction costs, and were partially offset by inducements between institutional players (like volume discounts) that might lower the costs of determining creditworthiness. It was expected that these practices could be curbed by requiring lenders to provide buyers and sellers of real property with full disclosure of the transaction's costs, and by prohibiting kickbacks and other fees between players in the transaction, which would otherwise drive up real property transaction costs.
>
> *RESPA*'s critics argue that while the closing regime established by the legislation was meant to reduce the cost of borrowing, *RESPA*-mandated disclosure has raised real estate closing costs over time, as a proliferation of transaction fees and increasingly complex legal documents have added to the borrower's load.[35]

The efficacy of *RESPA* has varied over time:

> For a period of nearly ten years, *RESPA* had the desired effect of reducing, if not eliminating, payments to referrers of title business. However, by the mid-1980s, due to problems with the language of the statute, lax enforcement by the lead administrative agency (HUD), several adverse court rulings, and a change in political atmosphere, there was increasing dissatisfaction with *RESPA*. In 1983, Congress amended the statute to permit so-called "Affiliated Business Arrangements" (AfBAs). Initially, the title industry opposed such arrangements, viewing them as little more than authorized kickbacks. Over time, however, acceptance of AfBAs grew among title insurers.
>
> The acceptance grew as the number and significance of AfBAs expanded. HUD facilitated this growth by providing definitive guidance as to what it considered necessary for an AfBA to be legitimate and thus not subject to prosecution. Title insurers also realized that they could be more profitable forming an affiliated business (a title agency) with a major customer such as a builder or mortgage lender, operating that agency and splitting its profits with the agency's partner, than by maintaining an agent [or in Canada, a lawyer] network. Attorneys were not generally

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[33] 12 USC 2601-2617 (1998)

[34] Pub. L. 93-533, Pub. L. 94-205, Pub. L. 98-181, Pub. L. 100-242, Pub. L. 101-625, Pub. L. 102-27, Pub. L. 102-54, Pub. L. 102-550, Pub. L. 103-325, Pub. L. 104-208, Pub. L. 111-203. The current relevant regulations made by the Consumer Financial Protection Bureau are in the Code of Federal Regulations, Title 12, Volume 1, Part 4; Volume 8, Part 1024 (a.k.a. Regulation X); and Volume 9; Part 1026 (a.k.a. Regulation Z)

[35] Kathleen A. Waters & Jonathan L. Schwartz, "What is '*RESPA*' and Why should you Care?", in The Law Society of Upper Canada, *The Six-Minute Real Estate Lawyer 2003*, Tab 21, at 21-2 to 21-3

> considered to be desirable AfBA partners because [in the U.S.] they do not control a sufficient quantity of business to make the arrangement profitable.[36]

Even the American Land Title Association ("ALTA"), in an undated letter in response to the *Forbes* article quoted above, has stated: "Our industry has experienced frustration over the ambiguous language in many of the regulations. We have repeatedly sought guidance from regulators on how vague rules apply to certain business practices… We also want greater clarity over how those laws and guidelines apply to specific business practices".[37]

Has legislation (instead of having a lawyer with fiduciary duties at the centre of the transaction) brought simplicity, clarity and lower costs in the U.S.? The use of a disclosure (or "sunshine") solution to market challenges has been criticized because lack of information is not the only problem in the world of real estate transactions: "Both buyers and sellers need transparency and simplicity, and neither is identical with disclosure".[38]

Also, the complex legal regime surrounding real estate conveyancing has resulted in a plethora of prosecutions and regulatory actions in the U.S. over the years.[39] A 2008 article in the *Wall Street Journal* stated the following:

> Since 2003, title insurers, their agents or affiliates have paid more than $100 million in fines, penalties and settlement money in cases brought by state and federal regulators, according to a 2007 report by the Government Accountability Office. The report also cited a lack of competition in most states.[40]

RESPA has not even attempted to resolve the controlled or affiliated business problem described above. In testimony before the House Committee on Financial Services Subcommittee on Housing and Community Opportunity in 2006, J. Robert Hunter, Director of Insurance, stated the following:

> …RESPA does not prohibit making payments to partner or affiliated firms, so title agents have an incentive to become affiliated with insurers to receive these benefits. Title agencies may create captive firms which can receive premium rebates for illusory services to maintain their cut of the title insurance business; for example, creating reinsurance firms that are not true reinsurance firms but are created to siphon profits into the title agents pockets. These agents own these captive reinsurance operations. In these sham reinsurance operations, the title insurance company "fronts" for the reinsurer and establishes arrangements removing most of the risk from the reinsurer, often guaranteeing profits for the reinsurer. Several major

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[36] Patterson, *op. cit.*, at 10

[37] Letter from James R. Maher, Executive Vice President, American Land Title Association to Steve Forbes, Editor in Chief, Forbes, undated

[38] Mark Shroder, "The Value of Sunshine: The Efficacy of the *Real Estate Settlements Procedures Act* Disclosure Strategy", in July/August 2008 *Probate & Property*, at 19

[39] For example, see Birnbaum, *op. cit.*, at 45, and Testimony of J. Robert Hunter, Director of Insurance before the House Committee on Financial Services Subcommittee on Housing and Community Opportunity, *Title Insurance Cost and Competition*, April 26, 2006, Appendices A and B

[40] John R. Wilke, "Scrutiny tightens for Title Insurers", *The Wall Street Journal*, February 12, 2008, at A1

> title insurance firms pay up to half of their premiums to captive reinsurance firms operated by homebuilders or developers.[41]

While the Working Group studies on-going ABS developments in the U.K., it is respectfully submitted that there is much to be learned from the conveyancing "laboratory" to the south, where evidence suggests the free market was not functioning well by the 1970s, and conveyancing legislation has yet to solve the problems of information asymmetry and reverse competition.

(3) Meaning of "material"

The Working Group has suggested that the interests of all "material" ABS owners could be treated as interests of the ABS for conflicts purposes. So, for example, a material interest in a legal practice by a lender, insurer or real estate broker could be considered to be a conflicting ABS interest with respect to the interest of a real estate purchaser.

But that simply moves the debate to the meaning of "material". How would that be defined? The U.K.'s *Legal Services Act, 2007* (Schedule 13) contains a definition of materiality that would make any investment above 10% in the body, or parent to the body, material.[42] A similar concept in the Canadian *Income Tax Act* is that of "significant" interest. Once again, a 10% test is used.[43]

The Ontario *Securities Act* contains a definition of "control person". Material control is deemed to occur when one owns more than 20 percent of the voting rights.[44]

Another approach may be non-numeric. The "CSA Consultation Paper 91-406 – Derivatives: OTC Central Counterparty Clearing" defines "material relationship" as "a relationship which could… be reasonably expected to interfere with the exercise of a member's independent judgment".[45]

Careful consideration must be given to human nature in this process. Unless the permitted ownership percentage is very minor, the odds of there being uncritical loyalty to the products or services of the owner is high. Given the relative inequality in knowledge between the lawyer and the client, purporting to solve the conflict by disclosure to the client is unlikely to achieve true choice in the market, especially in areas of significant technicality where the client has few exposures over a lifetime.

Consideration #5 – Implementation Considerations: (c) ABS Approval & Supervision

LAWPRO is of the view that the implementation model adopted by the Solicitors' Regulation Authority (the "SRA") is the appropriate model for Ontario, if the Law Society decides to

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[41] Hunter, *op. cit.*, at 16
[42] (U.K.), s. 29, Sch. 13, ss. 3(1)
[43] R.S.C., 1985, c. 1 (5th Supp.), ss. 34.2(1)
[44] R.S.O. 1990, c. S.5. ss. 1(1)
[45] 35 OSCB 5638, at s 8.1

liberalize the current regime to allow ABS entities to provide legal services. This would, presumably, mean that any ABS would be specifically preapproved and regulated by the Law Society, so that it would be subject to regulatory obligations, ongoing scrutiny and discipline.

The following would be important implementation issues, in terms of public protection: (1) financial assurance, or insurance, to stand behind the work performed; (2) fidelity protection (typically a form of bonding) to stand behind any handling of client funds; and (3) the process to transition client files if the ABS ceases operation.

(1) Financial Assurance

As LAWPRO has previously indicated to the Working Group, the financial assurance of a malpractice insurance policy standing behind the provision of legal services to the citizens of Ontario has been a key element of public protection since 1972. One only needs to look at the *Toronto Star* (and other publications) in recent months to see the level of public furor when it is alleged that a client has suffered financial harm at the hands of a lawyer. Furthermore, the adoption of a mandatory, universal insurance program operated by a captive insurer has brought relative stability to premiums and coverage since the mid-1990s. For a thorough review of the rationale for such programs and the international experience when there have been problems accessing legal professional liability insurance, please visit:

http://www.practicepro.ca/LawPROmag/Mandatory-Insurance-Global-Perspective.pdf

http://www.practicepro.ca/LawPROmag/Malpractice_Foreign_Jurisdictions.pdf

Therefore, the availability of financial assurance should be one of the criteria considered when accessing new regulatory models and structures. The position of the Canadian Bar Association in its *Futures* initiative is that ABSs should be required to purchase insurance covering claims from clients in respect of legal services with the current per claim and aggregate limit as required for lawyers, but with increasing limits required depending on the size of the ABS business.[46]

The single provider mandatory approach currently operating in every Canadian jurisdiction has many advantages to the insureds and indirectly to the Law Society and the public:

i. all claims are adjudicated on the same basis, without regard to lawyer-client business relationship issues (which could otherwise result in some clients receiving preferential treatment, while others are left without compensation because they have little future business value to the lawyer/service entity);
ii. the insurer does not have the option of abandoning the type of insurance or leaving the jurisdiction (as has happened elsewhere). As noted above, LAWPRO published an article in the spring, 2014 edition of *LAWPRO Magazine* which reviewed challenging developments in the international lawyer liability insurance market; [47]

[46] CBA Legal Futures Initiative, *Futures: Transforming the Delivery of Legal Services in Canada*, August, 2014, at 42

[47] http://www.practicepro.ca/LawPROmag/Malpractice_Foreign_Jurisdictions.pdf

iii. the insurer has a complete picture of the risk profile of the profession and thus has the best possible data for making decisions about where to intervene and provide claims prevention information in order to shape conduct to the benefit of the insured group as a whole, and indirectly, to the clients;
iv. the insurer has sufficient resources and motivation to provide a claims prevention program and risk management resources that are available to all members of the profession without charge (e.g., the practicePRO program);
v. by deciding which files to take to trial and/or appeal, there is some control over the development of the standard of care in the jurisdiction;
vi. everyone accredited by the regulator to undertake the relevant work is guaranteed insurance. This is, in part, dependent on the ability to deliver more predictability in premium for the individual lawyer, especially in circumstances after a claim has occurred. But more generally, the commercial insurance market is precluded from effectively deciding which areas of legal service should (or should not) be made available to the public by charging very high premiums for certain areas and/or refusing to insure some lawyers or firms. This brings the risk that the commercial insurance market becomes the *de facto* regulator of the legal profession, while the Law Society becomes the *de jure* regulator.[48]

If the Law Society were to move in a direction that required only the lawyers in the more traditional law firms (i.e., non-ABS entities) to buy the primary program insurance coverage from LAWPRO, the following could result:

i. over time (if not immediately) the pool of insureds could shrink and eventually threaten the viability of the program on a free-standing basis;
ii. the comprehensive access to claim and risk data, and the ability to influence conduct to the benefit of members of the public, would be much diminished;
iii. there would be a risk of ABS entities "cherry-picking" which clients would be favoured through the entity's complaint or insurance programs;
iv. once a commercial insurer had decided to exit the type of insurance or the jurisdiction, insureds could find a different claims-handling philosophy and/or process emerging; and
v. allowing lawyers in entities to be uninsured due to the size of the entity would require solvency-style regulation that is, for example, exercised by financial service regulators over banks and insurance companies, a very complicated and ever evolving process.

Consequently, in our view there needs to be careful consideration in due course of the following:

i. **whether LAWPRO is going to insure "lawyers" or the provision of legal services within entities accredited by the Law Society.** If the latter, is it just the

[48] As an aside, it should be noted that part of the rationale for the introduction of the TitlePLUS program was to ensure that commercial title insurers could not come to control who could practice real estate law in Ontario, if title insurance was made mandatory by the lending community. This was considered an important issue due to the geographic breadth of Ontario, and the desire to maintain legal practice throughout Ontario, for the benefit of the public.

legal services or the work undertaken by the lawyers that is being insured, or other types of work that are also being undertaken? For example, LAWPRO has insured MDPs for many years, but under current Law Society requirements there is a strong nexus between the work of the non-licensee multi-disciplinary partners and the legal services being provided to the client. The current model has not, to date, presented any material adverse risk scenarios. This should be an area for further discussion as the Law Society evaluates the different options presented and in particular, considers ss. 16 and 17 of By-law 7, which currently restrict the services of the MDP non-licensee partners to those that support or supplement the provision of legal services;

ii. **how damaging to the size of the insured pool (and to Ontario lawyers as indirect investors in LAWPRO) it would be if all lawyers employed by corporate or other entities (not traditional law firms) who are acting for someone other than the employer, were suddenly allowed to opt out of the primary program.** There is truly a symbiotic relationship between LAWPRO and its current pool of insureds. Since 1995 the private practice bar has made a $200 million investment in LAWPRO, as currently represented by its shareholder's equity. This was built up to provide an excellent financial back-stop to the services provided by lawyers to the Ontario public. Why should lawyers serving the public (and indirectly, the public itself) not continue to enjoy insurance protection from the organization where they have built up the capital over the years, instead of corporate employers having to collect fees to pay insurance premiums that will in part build capital pools in other commercial lawyer professional liability programs?

iii. **whether technology-based services meant to address the public's legal needs are going to come within the regulatory sphere of the Law Society.** If so, there needs to be clear direction as to whether these are allowed to function outside the sphere of traditional financial assurance. It is very common for web-based services to have strict limitations of liability, and even where lawyers are "behind" the site, they almost always have detailed warnings that the site "is not providing legal advice," for example. Is it expected that LAWPRO will insure these undertakings? If so, it would mean a different and possibly greater exposure to claims risks and thus different underwriting and potentially a different premium structure. With little past data to guide us, LAWPRO would want to proceed with due diligence before this occurs. Having said that, LAWPRO has a demonstrated track record of insurance product innovation (such as the Real Estate Practice Coverage Option, known as REPCO, and the TitlePLUS legal service coverage).

(2) Fidelity Protection

In LAWPRO's view, the issue of fidelity protection becomes, arguably, more important the more complex the ABS services are. Currently there are risks to trust funds from pressures arising in the lawyer's personal life or the handling of the practice, in addition to the typical fidelity risks (such as dishonest employees) that exist in all businesses. There are currently few risks to lawyer-managed trust funds from business trends in other types of services because, apart from a few

MDPs, lawyers only provide legal services in their firms. This will have to be considered if complex combinations of services with varying business risks and trends will be permitted within an ABS. This risk could be addressed through more robust innocent party coverage or trust security insurance program within the LAWPRO primary program of insurance. Another possibility would be bonding from the commercial insurance market.

(3) Client Transition Protection (Service Continuity)

A significant aim of potential ABS liberalization is to release the forces of innovation. It has been suggested that lawyers are currently less likely to innovate because they have to give a personal covenant to obtain the money for innovation (i.e., obtain a loan, likely with security) and for that reason, they cannot afford to have an initiative fail. So, not only is money from the capital markets (private or public) needed for innovation, but also an openness to the possibility of failure. This likelihood of failure (at least in early attempts at innovation) has been raised by commentators.[49]

Where will the clients stand in case of entity failure? It is true that lawyer practices do fail under the current regulatory framework. But lawyers are directly responsible to their clients, without any intervening entity (like a corporation whose shareholders benefit from limited liability protection) to take the blame. This provides an important practical incentive to truly put the clients' interests first, given that most lawyers in private practice would have to declare personal bankruptcy in order to fully walk away from obligations to clients (and even then, bankruptcy would not likely avoid liability for fraud). Would lawyers as employees of a typical corporation be able to walk away from client work, leaving the corporation (perhaps already insolvent and having exhausted its insurance coverage) to ostensibly answer to the clients?

One answer may involve evaluating the nature of the proposed retainers in an ABS and requiring any ABS expected to undertake long-term relationships with clients to have a plan for "going dark." This has, for example, become a significant issue in the financial services community, with large, complex financial institutions being required to produce plans for how they could be wound down with minimal harm to clients or the economy.[50] These plans are sometimes called "living wills" or "effective resolution" plans.

Ironically, one of the theoretical arguments in the last century for maintaining the separation among the "four pillars" of the financial community (i.e., the chartered banks, insurance companies, trust companies and investment dealers) was that competition could result in bank failure, to the detriment of depositors.[51] Then in the 1980s there was a significant movement away from maintaining the four pillar structure, in favour of freer competition. By 2011, however, the UK chancellor was in support of a movement to require banks to "ring fence" their retail services from their investment banking services: "The purpose of ring-fencing is to ensure

[49] For example, see Jordan Furlong, "The Failure of Legal Innovation", May 29, 2014, http://www.law21.ca/2014/05/failure-legal-innovation/

[50] For example, see http://www.osfi-bsif.gc.ca/Eng/Docs/mz20130108.pdf, http://www.canadiancompliancegroup.com/trend-spotting/international-developments/, http://www.financialstabilityboard.org/wp-content/uploads/r_141015.pdf

[51] Jason Evans, "Has Financial Sector Deregulation eased Competition Policy Concerns over Big Bank Mergers in Canada?". 2005, at 1

that, in the event of a major crisis, 'a retail bank could be hived off and saved by the Bank of England at less cost to taxpayers, because the investment banking part of the same bank would be allowed to fail'".[52] Perhaps the same approach will be needed to separate the legal service retainers from other services the ABS may provide.

This would be less of an issue in situations where clients are expected to have relatively discrete, time-limited engagements with the ABS (such as using a website to create a power of attorney). But even in those cases, the available run-off insurance coverage (the coverage in place for claims that arise after the ABS entity is gone) could be a significant issue.

Specific Models for Discussion: Models #1, 2, 3 & 4 – Percentage Ownership Issue

Our comments on this topic apply to all 4 models listed. In LAWPRO's view, the most significant issue is not the percentage of non-licensee ownership: It is the nature or type of that ownership and the possibility of conflicting ownership interests being against the greater public interest. This is in accord with Robinson's view, as follows:

> [M]any of the most concerning new professionalism challenges identified in this article did not arise from non-lawyer ownership *per se*, but rather non-lawyer ownership that involves enterprises that also offer other services, and then only a sub-set of these enterprises. This suggests that jurisdictions adopting non-lawyer ownership should consider banning, or at least more heavily regulating, this type of ownership where the potential for conflict of interest is high…[53]

Where the conflicting ownership will influence the lawyer to recommend only specific solutions not necessarily in the client's best interests, that raises the possibility of client harm, insurance claims and damage to the profession's reputation. Please refer to our comments above under Consideration #5.

The percentage ownership issue may also have implications for the issue of service continuity. A majority non-licensee ownership venture would, presumably, be easier for the non-licensee to shut down if returns are not as expected, thus making it more vulnerable to the "going dark" risk noted above. Whether for good or bad (in some cases), a licensee is more likely to soldier on serving clients even if the financial return is not as hoped for, due to other professional options being limited. Unrestricted capital does not have this issue. Even if a licensee under our current regime realizes a new professional setting is needed for his or her practice, having client files to take to a new professional home is a valuable asset. This is a built-in incentive for the individual lawyer to look after his or her clients, despite difficult circumstances. This would be less likely to occur where the client relationship was with a corporation, absent regulatory requirements forcing continuity pre-planning.

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[52] Ashwini Srikantiah, "The Toronto-Dominion Bank and Canada's 'Little Bang' of 1987", 2012, at 14-15
[53] Robinson, *op. cit.*, at 51

Specific Models for Discussion: Models #3 & 4 – Legal and Non-legal Services

In general, LAWPRO is in favour of the creation of business entities providing both legal and non-legal services. This may in fact reduce overall risk in some areas of practice because it will be easier for the lawyer to get the client direct access to helpful non-legal services. So, this could avoid claims where the lawyer gets sued for what is really an accounting, investment, business or even psychological issue: the claim becomes an expensive dispute over whether or not there is a legal service at issue and/or whether the lawyer made, or should have made, an appropriate referral. The easier it is to get the client connected with the appropriate fellow professional for advice, the less likely the lawyer is going to get blamed for a complicated mess in the client's business or personal life.

However, there will need to be clear disclosure to the client (as has been implemented, at least in part, in the U.K. by the SRA), so the client really understands:

- which are legal services and which are something else;
- which services have third party insurance backstops versus less insurance protection and/or possible limitations of liability;
- that there is no obligation to use the combination of services suggested;
- how the fees are structured, so that comparison shopping can be done.

But even when such safeguards are put in place, some areas may not be suitable for one-stop shopping. Trebilcock and Csorgo recognized that "[p]rofessional services for some transactions for certain types of consumers are more efficiently provided by MDPs, while others are more efficiently provided by more specialized firms".[54] Where an area of legal services is not suitable for combination with other services, the result could be similar to the U.S. situation with controlled business arrangements in the real estate sphere. A report prepared in 2005 for the California Insurance Commissioner stated the following:

> Controlled business arrangements, for the purpose of this competitive analysis, refer to business organizations with joint ownership by a title insurance company, underwritten title company [i.e., insurance agent or broker], real estate agent, developer, mortgage broker, lender or other entity in a position to refer business to a title insurer or underwritten title company.
>
> Proponents of controlled business arrangements claim that – when they are not sham arrangements – they benefit consumers by providing one-stop shopping for real estate brokerage, lending, title and escrow services and provide consumers with "greater convenience, accountability, and often lower prices than exist with unaffiliated settlement vendors".[55]
>
> …
>
> Despite the claims of proponents of controlled business arrangements, we have found no evidence in California of reduced costs to the ultimate consumer from controlled business arrangements. There are examples of controlled business arrangements that

[54] Trebilcock & Csorgo, *op. cit.*, at 5

[55] Letter from Susan Johnson, Executive Director of RESPRO Real Estate Service Providers Council, Inc., to the National Association of Insurance Commissioner's Title Insurance Working Group, March 18, 2005, at 2

> manifest reverse competition in costs and prices of title insurance and escrow services greater that would occur in markets with price competition.[56]

The California report goes on to describe the opposition of ALTA to controlled business arrangements, arguing that they result in higher prices for title insurance services and a deterioration of the quality of title services.[57]

Also, as described above, the combination of legal and non-legal services may increase to some extent the risk of misapplication of trust funds due to different business pressures affecting various parts of the service offering, but that risk could largely be addressed through appropriate bonding or insurance solutions.

[56] Birnbaum, *op. cit.*, at 53-55
[57] *Ibid.*, at 55-56

Conclusion

In the view of LAWPRO management, there are many potential benefits for the public in the Law Society adopting a comprehensive ABS strategy. Chief among those benefits would be bringing currently unregulated legal service providers into the regulatory framework and rolling out entity regulation. Entity regulation would involve clearly defined service, complaints and ethical objectives, enforced by a compliance officer within the entity. Such changes should reduce risk in the provision of legal services and better protect clients.

Innovation that results in better technology, more sophisticated systems and/or better educated and trained employees could also help to reduce the risk of claims and improve the client experience.

To maintain existing client protection, it is imperative that the current system of financial assurance standing behind the work of Ontario lawyers be continued. This will also give the Law Society the best access to risk data and continuing *de facto* as well as *de jure* control over who is allowed to practice in Ontario. Thought needs to be given to addressing the new risks of failing ABS entities "going dark," which threatens client service continuity, and a possible increase in exposure to trust losses due to multiple business lines and/or interests within one entity.

Whether looking at the issue of non-lawyer ownership or combining legal services with non-legal services, the key issue is to maintain the role of the lawyer in protecting his or her client against competing interests in the transaction or litigation. This is not a technical conflicts issue: It is a common sense issue. Where there is no tradition of the lawyer negotiating with, or against, other traditional suppliers in the context of the client's retainer, there should likely be no issue with those fellow suppliers to the client owning the entity that provides the legal services or offering additional services to the client through the same entity. Where it is central to the lawyer's retainer to advise on or act against the interests of that other party or supplier, that type of legal service should not be open for ownership by, or combining of services with, that other party or supplier. As an example of this issue, questions related to real estate conveyancing are examined in detail, including a review of lessons to be learned from the American experience of real estate conveyancing.