The Law Society of British Columbia

Agenda

Benchers

Date: Friday, September 25, 2015

Time: **7:30 am** Continental breakfast
8:30 am Call to order

Location: Bencher Room, 9th Floor, Law Society Building

Recording: ***Benchers, staff and guests should be aware that a digital audio recording is made at each Benchers meeting to ensure an accurate record of the proceedings.***

ITEM	TOPIC	TIME (min)	SPEAKER	MATERIALS	ACTION
1	Legal Services Society Update • Introduction of new Chair Suzette Narbonne	30	Tom Christensen Chair, Legal Services Society		Presentation
CONSENT AGENDA: The Consent Agenda matters are proposed to be dealt with by unanimous consent and without debate. Benchers may seek clarification or ask questions without removing a matter from the consent agenda. Any Bencher may request that a consent agenda item be moved to the regular agenda by notifying the President or the Manager, Executive Support (Renee Collins Goult) prior to the meeting.					
2	Consent Agenda • Minutes of July 10, 2015 meeting (regular session) • Minutes of July 10, 2015 meeting (*in camera* session) • Law Society Rules 2015, corrections • 2015 QC Appointments Advisory Committee • Capital Adequacy MCT Ratio – Amendment to Executive Limitation C.5(a)	1	President	Tab 2.1 Tab 2.2 Tab 2.3 Tab 2.4 Tab 2.5	Approval Approval Approval Approval Approval

The Law Society of British Columbia

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ITEM	TOPIC	TIME (min)	SPEAKER	MATERIALS	ACTION
EXECUTIVE REPORTS					
3	President's Report	15	President	Oral report (update on key issues)	Briefing
4	CEO's Report	15	CEO	(*To be circulated electronically before the meeting*)	Briefing
5	Briefing by the Law Society's Member of the Federation Council	5	Gavin Hume, QC		Briefing
DISCUSSION/DECISION					
6	Tribunal Program Review Task Force Final Report	30	President	Tab 6	Decision
7	Presentation of 2016 Budget & Fees	30	Peter Lloyd, FCA	Tab 7	Decision
8	Legal Aid Task Force	10	David Crossin, QC	Tab 8	Discussion/ Decision
9	Law Firm Regulation Task Force: Briefing on Consultation Paper	15	Herman Van Ommen, QC		Discussion
10	Equity & Diversity Advisory Committee: Diversity & Inclusion Award Draft Criteria and Process	10	Satwinder Bains	Tab 10	Discussion/ Decision

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REPORTS					
11	2015-2017 Strategic Plan Implementation Update • Equity and Diversity Advisory Committee	15	Satwinder Bains		Briefing
12	Report on Outstanding Hearing & Review Decisions	4	President	(*To be circulated at the meeting*)	Briefing
FOR INFORMATION					
13	• Letter from the Honourable Chief Justice Bauman: Attendance at Bencher Meetings			Tab 13	Information
14	• Federation National Admission Standards Project - National Assessment Proposal			Tab 14	Information
IN CAMERA					
15	*In camera* • Notaries Merger Update • Bencher concerns • Other business		President/CEO		Discussion/ Decision

The Law Society of British Columbia

Minutes

Benchers

Date: Friday, July 10, 2015

Present:
Ken Walker, QC, President
David Crossin, QC, 1st Vice-President
Herman Van Ommen, QC, 2nd Vice-President
Haydn Acheson
Joseph Arvay, QC
Satwinder Bains
Edmund Caissie
Pinder Cheema, QC
Jeevyn Dhaliwal
Lynal Doerksen
Thomas Fellhauer
Craig Ferris, QC
Martin Finch, QC
Miriam Kresivo, QC
Dean Lawton
Peter Lloyd, FCA
Jamie Maclaren
Sharon Matthews, QC
Nancy Merrill
Maria Morellato, QC
Greg Petrisor
Claude Richmond
Phil Riddell
Elizabeth Rowbotham
Sarah Westwood
Tony Wilson

Excused:
David Corey
David Mossop, QC
Lee Ongman
Cameron Ward

Staff Present:
Tim McGee, QC
Deborah Armour
Taylore Ashlie
Renee Collins Goult
Lance Cooke
Su Forbes, QC
Andrea Hilland
Jeffrey Hoskins, QC
Michael Lucas
Jeanette McPhee
Doug Munro
Tim Travis
Alan Treleaven
Adam Whitcombe

Guests:	Dom Bautista	Executive Director, Law Courts Center
	Johanne Blenkin	Chief Executive Officer, Courthouse Libraries BC
	Kari Boyle	Director of Strategic Initiatives, Mediate BC Society
	Maureen Cameron	Director of Membership and Communications, Canadian Bar Association, BC Branch
	Anne Chopra	Equity Ombudsperson, Law Society of BC
	Jennifer Chow	Vice President, Canadian Bar Association, BC Branch
	Prof. Catherine Dauvergne	Dean of Law, University of British Columbia
	Richard Fyfe, QC	Deputy Attorney General of BC, Ministry of Justice, representing the Attorney General
	Gavin Hume, QC	Law Society Member of the Council of the Federation of Law Societies of Canada
	Prof. Bradford Morse	Dean of Law, Thompson Rivers University
	Wayne Robertson, QC	Executive Director, Law Foundation of BC
	Rob Seto	Director of Programs, Continuing Legal Education Society of BC
	Krista Simon	President, Trial Lawyers Association of BC
	Monique Steensma	CEO, Mediate BC Society

INTRODUCTION

After noting absences, Mr. Walker introduced Dr. Catherine Dauvergne, the new Dean of the Peter A. Allard School of Law. Dean Dauvergne thanked Mr. Walker, and briefed the Benchers on current law school projects, including programming changes to develop an international human rights clinic, a women's clinic, a centre for business law, including small business needs, and a fuller suite of clinical, "hands-on" offerings. She noted as well the departure of several long-standing faculty members, and the corresponding addition of new faculty. In the Fall, the school will be awarding the $100,000 Allard prize in international integrity for people committed to transparency in governance, and looking for bilingual judges for the Laskin Moot.

Mr. Walker thanked Dean Dauvergne, and stressed the importance of a good working relationship between law schools and Benchers.

CONSENT AGENDA

1. Minutes

a. Minutes

The minutes of the meeting held on June 12, 2015 were approved as circulated.

The *in camera* minutes of the meeting held on June 12, 2015 were approved as circulated

b. Resolutions

The following resolution was passed unanimously and by consent.

BE IT RESOLVED to amend rule 3.7-9 of the Code of Professional Conduct for British Columbia as follows :

i. In the first line, by inserting the following words at the end of the sentence:

"as soon as practicable"

ii. In paragraph (a) (i) by striking the words "has withdrawn" and substituting:

"is no longer acting"

iii. by adding the following paragraph:

"(a.1) notify in writing all other parties, including the Crown where appropriate, that the lawyer is no longer acting;"

iv. At the beginning of paragraph (g), by adding the following words:

"notify in writing the court registry where the lawyer's name appears as counsel for the client that the lawyer is no longer acting and"

v. At the end of paragraph (g) by adding the following words:

"and any other requirements of the tribunal"

EXECUTIVE REPORTS

2. President's Report

Mr. Walker briefed the Benchers on various Law Society matters to which he has attended since the last meeting. He provided a summary of the June 25 Executive Committee meeting, at which the Committee reviewed next steps towards paralegal certification, the most recent budget projections, and the plan for executive development as part of succession planning. The Committee also discussed the status of work being done at the regulatory and advisory committee level, noting that the Lawyer Education Advisory Committee anticipates completing its review of the admissions program by December, and the Tribunal Program Review Task Force hopes to have a report to the Benchers for decision by September.

Additionally, Mr. Walker attended the Magna Carta dinner at the Lawyers Inn, the Victoria Bar Association dinner, and the Kamloops regional Call to the Bar which, with the addition of the first graduating class from Thompson Rivers Law School, was the largest ever in Kamloops at 18 new lawyers.

He also congratulated Mr. Arvay on his Award of Justice from the Advocate Society, which recognizes the finest traditions of advocacy in the context of socially or politically unpopular causes, and Ms. Bains, on her receipt of the Order of Abbotsford in recognition of her outstanding community contributions.

Finally, Mr. Walker noted that the date for the 2016 Retreat has been changed to accommodate conflicting schedules; the new date approved by the Executive Committee is June 2-4.

3. CEO's Report

Mr. McGee provided highlights of his monthly written report to the Benchers (attached as Appendix 1). With this report, he proposed to begin a series of briefings for the Benchers to provide context for the ongoing review and assessment of our strategic initiatives.

He began his series of briefings with discussion of an article by Professor Andrew Perlman which is a comprehensive review of international advances and innovations around the provision of legal services by lawyers and other providers. Issues raised in the article, including the competency of providers and the relevancy of consumer preference, can inform our own assessment of the direction we are taking with non-lawyer legal services.

Thus far, as part of our strategic priority to facilitate increased access to legal services, we have focused on the potential role of non-lawyers. However, other regulators have taken a different path, such as focusing on increasing access through alternative business structures. Review and assessment of other such approaches can help inform our decisions and the work we are doing.

Mr. McGee underscored the dynamic nature of the strategic plan, stressing the importance of ensuring that initiatives continue to make sense and hold up against competing views. Our current initiatives, seen as at the forefront of change, are being watched by others. Articles such as Professor Perlman's can help Benchers continue be well informed and engaged on strategic issues.

4. Briefing by the Law Society's Member of the Federation Council

Gavin Hume, QC briefed the Benchers as the Law Society's member of the Federation Council.

The Federation President, CEO and senior staff recently held their annual meeting with the Minister of Justice and senior government officials on current issues. Key matters related to draft legislation granting patent and trademark agents client communication privilege, access to justice, regulation of international trade and foreign legal services, and the Department of Justice's development of a Professional Responsibility Service.

When patent and trademark agents' communication privilege was discussed with the Minister of Justice, the Federation was told that there would be further consultation with law societies.

The Deputy Minister also raised questions about how law societies are dealing with the issue of money laundering, including how they are monitoring lawyer reporting following the recent Supreme Court of Canada decision. Mr. Hume noted the likelihood that individual law societies would be canvassed by the Federation or Federal government in the coming months. Mr. Walker queried whether, proactively, we could gather relevant statistics to share with the Federation. The Benchers indicated their interest in having a report showing lawyer compliance with our rules concerning money laundering. Ms. Armour and her staff will provide a report.

Mr. Hume also reported on other matters, including a meeting with the Public Prosecution Service of Canada to discuss the Model Code and mobility, the annual meeting with the CBA Executive to discuss issues of common interest focusing this year on access and the patent

agents' privilege issue, and the annual informal meeting between the President, CEO and the Chief Justice. He also reported on the annual meeting of CanLII and its ongoing successes.

Finally, Mr. Hume reminded the Benchers of the Federation's upcoming meeting in Winnipeg in September, focusing on Federation governance.

DISCUSSION/DECISION

5. Governance Committee Mid-Year Report

Committee Chair Miriam Kresivo, QC began by thanking the members of Committee for their commitment and hard work. She noted that their mid-year report focused on their work to date, including the items of Bencher governance education, terms of reference for committees, and options for electronic participation at Annual General Meetings (AGM's) and Bencher elections. The Committee has made recommendations and is seeking input and decisions from Benchers on the latter (see the written report at page 85 of the meeting materials for details).

a. Bencher governance education

After review of the Bencher evaluations completed in December, 2014, the Committee has agreed on changes to the process and is recommending changes to Bencher training and ongoing briefing to ensure a greater degree of participation, and to address emerging areas of concern. Additionally, a governance training session for Benchers has been arranged for December 4, 2015, to coincide with the orientation of new Benchers following the November elections.

b. Terms of Reference for Committees

The Governance Committee is recommending that all committees review and revise their terms of reference to ensure the terms are current and that the committees are working within them; the Governance Committee has begun with a revision of its own terms, and encourages the Chairs of each of the committees to undertake similar work.

c. AGM

The Governance Committee has been examining a variety of options aimed at increasing the accessibility of the AGM for members in communities outside of Vancouver, enabling us to maintain one live meeting and eliminate costly remote physical locations. These options include webcasting and electronic voting; while webcasting is feasible, the Committee has yet to find a technical option for real-time voting that meets our security requirements and is easily workable for our members. Electronic options used by other organizations, such as pre or post-meeting voting on resolutions, do not allow members their full voting entitlements, such as the right to vote on procedural motions raised during the meeting itself.

The Committee is recommending that this year's AGM be webcast, as an initial step toward full electronic participation, and that staff continue to explore workable options for electronic voting.

As another step, the Committee is also recommending the electronic distribution of AGM material, to replace the costly manual posting system. This will require a member resolution at the upcoming AGM.

d. Bencher elections:

Electronic voting has also been reviewed to facilitate increased member participation in Bencher elections. In this context, electronic voting options currently exist that would enable us to implement a fully electronic Bencher election this year, at a considerable reduction in cost compared to a manual election. Both Ontario and Alberta now conduct fully electronic elections, with a corresponding increase in the level of membership participation and accessibility. Transition to an electronic election would require a rule change, but does not require a member resolution.

A complicating factor is that the service provider best able to meet our technical and security needs is American, and houses information on an American-based server. British Columbian privacy legislation currently recommends against the use of American servers to house potentially private information. The information retained by the election service provider would be limited to public contact information and e-mail information, which, in some circumstances, could be construed as private.

Other concerns presented by the Committee include the management of the change in process, including the provision of adequate notice to the membership. It was noted that both Ontario and Alberta implemented transition provisions which involved offering both manual and electronic methods for at least one election cycle before going fully electronic.

To address concerns of privacy and of transition, the Committee presented an option of transitioning to an electronic process in next year's bi-election. The intervening time should allow for both ample notice of the change and exploration of Canadian providers able to meet our requirements; the smaller election should better allow the implementation of a new system.

Ms. Kresivo acknowledged the Committee's commitment to ensuring a timely transition to electronic systems that have increasingly become the norm in today's professional world; the Committee is also mindful of the logistics involved in such change. It is recommending that the Act and Rules Committee develop rules now enabling the Law Society to conduct Bencher elections electronically, but inviting discussion and input from the Benchers as to when and how to implement electronic elections.

Following Ms. Kresivo's report and recommendations, Mr. Walker asked for a motion that the Benchers put the following resolution to the members at the 2015 Annual General Meeting:

BE IT RESOLVED to authorize the Benchers to amend the Rules respecting general meetings to provide that the required notices of general meetings may be distributed by electronic means instead of by email as presently required.

(moved by Mr. Caissie, seconded by Mr. McLaren). In the discussion that followed, Ms. Kresivo confirmed that the membership has not yet been consulted about electronic distribution of AGM material, but as the change would not occur until next year, given that such a change requires a 2/3rds majority vote by the membership, there will be ample time for notice. Discussion also surrounded transition provisions, such as providing both electronic and hard copy materials to accommodate everyone. Ms. Kresivo noted that both Ontario and Alberta have become fully electronic, and that it is becoming increasingly rare for professionals not to have access to electronic information. In answer to questions, Mr. Whitcombe advised that, though we do not currently require provision of an email address, his recollection is that all but approximately 150 of our 13,000 members have provided an email address to us.

The motion was passed unanimously.

The Benchers then discussed the possibility of webcasting the 2015 AGM. Some questioned the additional costs and utility of webcasting without voting; Ms. Kresivo confirmed that webcasting represents a transition step towards full electronic participation. The Benchers also discussed whether or not we will be able to track online participation, to determine the location of the user, and whether the webcast will require secure login or be publicly available. Though the speculation was that identification of user location may not be possible, it was stressed that success will not necessarily be measured by the number or location of users. Rather, introduction of webcasting represents a message to members that we intend to transition away from remote physical locations, towards the fuller access provided by electronic participation. Regarding security, it has not yet been decided whether to secure the webcast through online login, or to provide wide access through the public website.

Following the discussion, the Benchers unanimously agreed that the 2015 AGM will be webcast.

Mr. Walker then summarized the options being discussed regarding Bencher elections, being: implementation of fully electronic elections this year; postponement of a fully electronic election to next year's bi-election; implementation of electronic distribution of election material this year but retention of paper balloting; or, a hybrid election this year or next which retains the manual paper balloting alongside electronic voting. He reiterated that the Governance Committee reached no consensus, and preferred to take direction from the Benchers.

Some favoured a fully electronic election this year, arguing it will increase access, it will be simpler and less expensive to run, and it will demonstrate that the Law Society is keeping pace with technological advancements that most members use already. Others preferred implementing a hybrid election next year, to allow for adequate planning and transition provisions. Some noted that whichever model is preferred, the information available on candidates should be increased and made more easily available, however others cautioned against voluminous electronic material.

There was a lengthy discussion on the ramifications of using an American provider to facilitate the electronic elections. It was reiterated that the only potentially private information involved would be email addresses of non-practicing or retired members; debate ensued regarding whether an email provided to the Law Society as regulator was by definition a business address, or whether it remained private information. Many sought more information on the privacy implications, and preferred to defer implementation of electronic elections until this issue could be resolved.

Taking into account the discussion and the concerns raised, Ms. Kresivo moved (seconded by Ms. Merrill) that the Law Society revise its Rules now to permit the Benchers to conduct a "hybrid" Bencher election for next year's bi-election, consisting of both paper and electronic voting and electronic distribution of election material, including information about the candidates.

The motion was passed by a vote of 18 to 6.

Following the vote, it was suggested that the Benchers consider revising the Rules to require the provision of an email address with the Annual Practice Declaration, to help facilitate electronic elections in the future.

REPORTS

6. Report on the Outstanding Hearing & Review Reports

There were no outstanding hearing decisions or conduct review reports this meeting.

7. Financial Report – May YTD 2015

Mr. Lloyd, Chair of the Finance and Audit Committee, summarized the May Year to Date Report, actual financial results to the end of May, together with projections to the end of the year. Ms. McPhee, Chief Financial Officer, then briefed the Benchers on the report (details of which are found at page 91 of the Agenda materials), noting a projected 2.3% negative variance

for the general fund, due in part to an increase in external counsel costs and lower than budgeted savings from staff vacancies.

Revenue and expenses for both the Trust Assurance Program and LIF are on track, with investment returns of 6.74% to the end of May.

In response to a question, Ms. Armour confirmed that external counsel normally provide discounted hourly rates.

Mid-Year Reports from the 2015 Advisory Committees:

- **Access to Legal Services Advisory Committee**

Mr. Riddell reported as chair, providing highlights of the committee's work in the first half of the year and outlining the committee's focus for the balance of the year (see the written report at page 104 of the meeting materials for details). In particular, he noted the committee's exploration of Mediate BC's concept to develop a roster of lawyers to provide independent legal advice in conjunction with its sliding scale mediation project. He indicated possible funding for the project would be explored with the Law Foundation and, if it were approved, some Law Society practice resources would have to be developed to support the project. He also noted the committee's consideration of possible projects to increase access to legal services in both an aboriginal and family law context. Mr. Riddell acknowledged the hard work of the committee members and thanked Doug Munro for his valuable assistance and guidance to the committee and its members.

- **Equity and Diversity Advisory Committee**

Ms. Bains reported as vice-chair, providing highlights of the committee's work in the first half of the year and outlining the committee's focus for the balance of the year (see the written report at page 117 of the meeting materials for details). In particular, she noted the committee's consideration of the Truth and Reconciliation Commission recommendations around the development of cultural competencies in law schools and PLTC, and the examination of the process around committee appointments. Ms. Bains also reviewed the Ombudsperson's Report. Ms. Bains acknowledged the hard work of the committee members and thanked Andrea Hilland for her valuable assistance and guidance to the committee and its members.

In ensuing discussion, Benchers noted the need to raise awareness of the Ombudsperson as a resource.

- **Rule of Law and Lawyer Independence Advisory Committee**

Mr. Crossin reported as chair, providing highlights of the committee's work in the first half of the year and outlining the committee's focus for the balance of the year (see the written report at page 142 of the meeting materials for details). In particular he noted the committee's proposal for public commentary on rule of law issues as a way to engage and communicate with members of the Bar and the public, as well as the committee's monitoring of legislation impacting solicitor client privilege in the name of national security. Much of the committee's efforts were directed to development of the Retreat Agenda discussing S. 3 of the Legal Professions Act. Mr. Crossin acknowledged the hard work of the committee members and thanked Policy and Legal Services Manager Michael Lucas, Lance Cooke and Doug Munro for their valuable assistance and guidance to the committee and its members.

- **Lawyer Education Advisory Committee**

Mr. Wilson reported as chair, providing highlights of the committee's work in the first half of the year and outlining the committee's continuing focus on Admission Program Review, including both articling and PLTC, for the balance of the year (see the written report at page 147 of the meeting materials for details). He encouraged Benchers to provide their feedback on the Admission Program. Mr. Wilson acknowledged the hard work of the committee members and thanked Director of Education and Practice Alan Treleaven for his valuable assistance and guidance to the committee and its members.

8. 2015-2017 Strategic Plan Implementation Update

Mr. Crossin, as chair of the Rule of Law and Independence Advisory Committee ("the Committee"), presented the committee's proposal for public commentary on rule of law issues, as noted above. The committee proposes to produce commentary from time to time on current issues by means of articles, blogs and other forms of media to demonstrate the importance and relevance of the rule of law. As an example, he cited the current debate on national security measures as an issue of fundamental importance meriting engagement with the Bar and the public.

Mr. Crossin (seconded by Mr. Petrisor) moved for the Benchers to adopt the following resolution:

Be it resolved that the Rule of Law and Lawyer Independence Advisory Committee be authorised, in the course of the Committee's monitoring activities, to selectively identify appropriate topics relating to the rule of law and to post a comment or brief article concerning such topics.

In discussion following, concern was expressed over ROLLIAC purporting to speak for the Law Society on major issues; if the issue is of importance, it should be for the Law Society itself to comment. In response, Mr. Crossin confirmed that the Committee's proposal does not contemplate it speaking in a representative role; debate ensued as to whether the Committee will be seen to be speaking representatively, whether or not that is the intent, and whether it should in fact speak representatively, despite its initial proposal. The distinction between providing educational commentary and taking a position was discussed, with many indicating the appropriateness of the former but not of the latter.

Mr. Walker noted that the proposal aligns with the strategic goal of promoting greater confidence in the rule of law and the administration of justice through public education. Those in agreement suggested this goal is sufficiently important to outweigh the risk of the Committee providing commentary before consulting with the Benchers as a whole, particularly if measures were established to ensure due diligence.

Mr. Crossin confirmed that ROLLIAC would proceed incrementally and respectfully, taking care to avoid positional language where possible, and consulting the Benchers if appropriate.

The motion was passed unanimously.

RCG
2015-07-10

The Law Society of British Columbia

CEO's Report to the Benchers

July 2015

Prepared for: Benchers

Prepared by: Timothy E. McGee

Current Events in Regulation

My report to the Benchers last month focused on operational mid–year reports and updates. I want to use this month's report to focus your attention on an excellent, thought provoking article entitled "Towards the Law of Legal Services" by Andrew Perlman, Professor of Law and Director of the Institute on Law Practice, at Suffolk University in Boston. This article has recently been released and is attached to this report together with a brief review of it entitled "Something's Afoot and it's time to Pay Attention: Thinking about Lawyer Regulation in a New Way" by Professor Laurel Terry, a frequent commentator in this area.

I would ask you to please set aside some time to read Professor Perlman's article and/or read Laurel Terry's review. To help with that request you will be pleased to see that the balance of my report fits onto one page.

What is special about the article in my view is that it speaks clearly and succinctly to most of the current main stream initiatives being pursued by regulators and others to reform the legal system in the western democracies. The author's insight and critique of those initiatives including, for example, alternative business structures, is particularly helpful for LSBC's own strategic thinking.

While I highly recommend the article in its entirety, I would draw your attention specifically to Part IV "Towards the Law of Legal Services" starting on page 35. In many respects, this section supports the decision of the Benchers in 2012 to pursue a strategy around expanding the availability of front line, non-lawyer, legal service providers. As the author says as the lead in to Part IV, "We need a law of legal services that can liberate but appropriately regulate new players". Critical questions such as who should be authorized, determining competency, the role of informed consumer choice, who addresses misconduct, and independence are all addressed by the author in this section of the article.

Like Laurel Terry you too may find yourself disagreeing in parts with Professor Perlman. However, I think that the more that we are informed and conversant with the topics and issues covered in the article, the better equipped we will be to make smart choices about our own strategic direction.

Financial Update

The Financial Report for the period year to date ending May 31 will be presented at the meeting for review and discussion.

Timothy E. McGee
Chief Executive Officer

Something's Afoot and it's Time to Pay Attention: Thinking About Lawyer Regulation in a New Way

http://legalpro.jotwell.com/somethings-afoot-and-its-time-to-pay-attention-thinking-about-lawyer-regulation-in-a-new-way/

Andrew M. Perlman, *Towards the Law of Legal Services,* Suffolk University Law School Research Paper No. 15-5 (2015), available at SSRN.

Laurel Terry

We all know about tipping points…when something that previously seemed rare or unlikely acquires enough weight or momentum that the balance or status quo changes. As I read Professor Andy Perlman's article called "Towards the Law of Legal Services" it occurred to me that we may be getting very close to a tipping point in the United States with respect to the issue of lawyer regulation.

Professor Perlman's article argues that the time has come to "reimagine" our lawyer-based regulatory framework. He asserts that instead of focusing on the "law of lawyering" – which is how people in our field often refer to what we study – we need to develop a broader "law of legal services" that would authorize, but appropriately regulate, the delivery of more legal and law-related assistance by people who do not have a J.D. degree. He argues that reimagining regulation in this fashion will spur innovation and expand access to justice.

What Professor Perlman is writing about is not a particularly new idea. For example, back in the 1980's and 1990's, Professor Deborah Rhode was writing about nonlawyer practice. The ABA issued a report on this topic in 1995.

What feels different at this point in time is the variety of directions from which these calls for reform are coming. For example, last year the ABA Task Force on the Future of Legal Education issued a report that included the following as part of one of its key findings: "To expand access to justice, state supreme courts, state bar associations, admitting authorities, and other regulators should devise and consider for adoption new or improved frameworks for licensing or otherwise authorizing providers of legal and related services. This should include authorizing bar admission for people whose preparation may be other than the traditional four-years of college plus three-years of classroom-based law school education, and licensing persons other than holders of a J.D. to deliver limited legal services." In August 2014, the ABA established the Commission on the Future of Legal Services [not lawyers] which has been asked, inter alia, to "propose new approaches that are not constrained by traditional models for delivering legal services and are rooted in the essential values of protecting the public, enhancing diversity and inclusion, and pursuing justice for all." For those who might have missed the news, after more than ten years of effort, which was led largely by its Supreme Court, Washington had its inaugural class of Limited License Legal Technicians (LLLT) take the required exams and begin their 3,000 hours of supervised work. Other states are talking about or exploring related ideas.

And this is just in the U.S. As Steve Mark, Tahlia Gordon and I noted in our 2012 article on Global Trends, jurisdictions around the world are grappling with a variety of issues related to lawyer regulation, including the

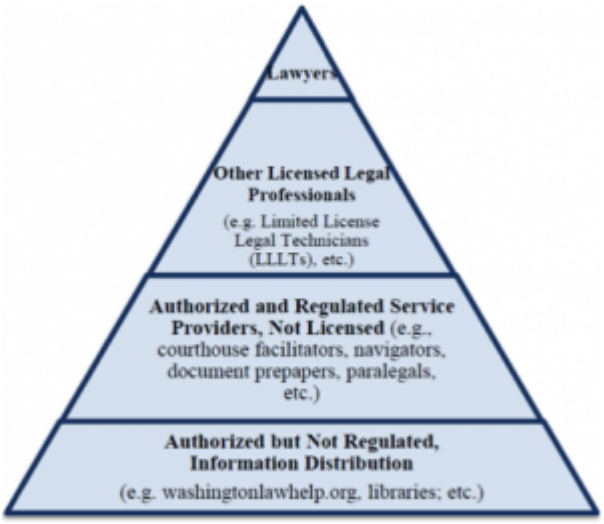
issue of ***what*** it is that should be regulated – lawyers or legal services. (We identified global trends regarding "***who*** regulates-***what*** or whom is regulated-***when*** regulation occurs-***where*** regulation occurs-***why*** regulation occurs-and-***how*** regulation occurs – the "who-what-when-where-why-and-how" of lawyer regulation.) Jurisdictions such as Australia, Canada, and the UK, are beginning to discuss or have already adopted an "entity" approach to regulation. Regulators in Ontario, Canada not only regulate lawyers, but have regulated paralegals for more than five years. Nova Scotia's "Transforming Regulation" initiative is very interesting and other Canadian provinces are exploring the issue of what it is they should be regulating.

It is against this backdrop that Professor Perlman's article is written. As a result of his experience as Chief Reporter (and one of the main technology gurus) for the ABA Commission on Ethics 20/20 and as Vice Chair of the ABA Commission on the Future of Legal Services, he brings to the article not only great familiarity with the issues, but a deep understanding of the difficulties involved in achieving the paradigm shift he recommends. But his methodical way of laying out the landscape and the arguments he offers may go a long way towards achieving the changes he recommends.

The first part of his article offers a hindsight look at the work of the Ethics 20/20 Commission, which was asked to evaluate what changes were needed to lawyer regulation in light of developments in technology and globalization. It also includes a response to some of the Commission's critics. Because I recently completed my own reflective essay about the work of the 20/20 Commission, I was much more interested in the subsequent part of his article, which was entitled "Towards a Law of Legal Services."

The "Towards a Law of Legal Services" section of Professor Perlman's article begins by describing the difficulties inherent in trying to define the practice of law. I found myself wholeheartedly agreeing with his conclusions in this section. I am continually dismayed when I hear lawyers, regulators, or judges suggest that the "solution" to some problem is to develop a better definition of the practice of law (and thus unauthorized practice of law or UPL). During the MDP debates in the 1990s, I came to the conclusion (see p. 872-873) that at least in the transactional setting, it is exceedingly difficult to develop – in an exclusive UPL sense, rather than an inclusive descriptive sense – a definition of what constitutes the practice of law. Thus, whenever I see "developing a definition of the practice of law" as the proposed solution to anything, I am dismayed since I do not believe that such efforts – even if properly motivated – will yield satisfactory results.

After explaining why it is difficult to define the practice of law, the article offers Professor Perlman's thesis that we "should ask a fundamentally different question: should someone without a law degree be 'authorized' to provide a particular service, even if it might be the "practice of law"? This section of the article includes this graphic to illustrate how one might respond to this question and begin to conceptualize a "law of legal services" that would supplemented the "law of lawyering:"



As Professor Perlman's text explained, "the bottom of the pyramid captures very routine law-related needs (e.g., the creation of a living will) that can be addressed by completing blank forms. Regulatory barriers should not prohibit people from making these forms available to the public through websites or otherwise. But as consumers' legal issues become more sophisticated, consumers typically need providers higher up on the pyramid. A central question for the law of legal service is this: at what point must a provider be subject to some kind of regulation?" (Professor Perlman's footnote acknowledged Paula Littlewood for conceptualizing the issue this way and creating a slightly different version of the pyramid.)

The article continues by discussing the principles (or regulatory objectives) that a "Law of Legal Services" might be designed to achieve, which is a topic near and dear to my heart. It also illustrates how the "Law of Legal Services" might work in specific contexts, such as automated legal document assembly. This section offers a proposal to regulate automated legal document assembly that could be "promulgated either as a court rule or statute." This section of the article also explains how Washington's Limited License Legal Technician regime fits within Professor Perlman's proposed approach. The article concludes with the following paragraph:

> The law of lawyering is undoubtedly important, but it offers few options for transforming the delivery of legal services. Nonlawyer ownership of law firms is one possible exception, but even that reform envisions a world where lawyers remain the exclusive deliverers of legal advice. The law of legal services reflects a different approach to regulatory innovation, one that seeks to authorize, but appropriately regulate, the delivery of legal and law-related assistance by more people who lack a traditional law license. At a time when legal services are increasingly unaffordable, the law of legal services may reflect a promising way to unlock innovation and reimagine the regulation of the twenty-first century legal marketplace.

There were certainly places in this article where I found myself disagreeing with Professor Perlman. For example, I thought he might have been unduly optimistic with respect to his conclusion about the access to justice results that will accrue by virtue of regulating legal services providers such as LLLTs because there may be too few licensed LLLTs to address the significant unmet legal need. As I have noted in previous Jots, I see a larger role for technology (see here and here) than he acknowledged in this article – LLLT's will help, but I don't think that they alone will solve our access to justice problems. My bottom line, however, is that I agree with much of what Professor Perlman said. *Towards the Law of Legal Services* is an important article about an important topic. Given the gigantic unserved legal needs in this country and the decades of our saying that we need to address this problem combined with our failure to do so, I think the time may be ripe to think about a

pyramid model of regulated legal services, in which lawyers are at the top of the pyramid, but not all clients necessarily need to see a lawyer. To steal (and paraphrase) a set of images that I heard Futures Commission Chair Judy Perry Martinez refer to at the 2015 ABA Midyear Meeting, a nurse may be a suitable provider to give a flu shot, a physician's assistant may be a suitable provider to treat a cold, an Internist may be suitable to do an annual checkup, but you probably want a surgeon if you are having heart surgery. A patient may choose to go to an MD for all of these services, but that does not mean that the regulatory system should require a "one provider fits all" system. Just as there is a continuum of medical needs (and providers), perhaps the time has come to discard our mode of thinking in which we divide the world into "legal services/not legal services, with the former requiring a lawyer and the latter not. Perhaps the time has come to envision legal services as a continuum or a pyramid where clients can choose the type of provider they want – and we recognize that a legal services provider need not be at the apex of the pyramid in order to be regulated or in order to provide services that help clients address their legal needs.

It is true that this type of "pyramid approach" creates the potential for a tiered system of access in which lawyers are primarily utilized by those with greater financial resources and those with lesser financial resources receive services from someone lower on the pyramid. However, given the data that suggests that a large number of individuals currently need but do not receive any legal services at all, I consider this a second order problem that can be addressed through a process of incremental change.

In sum, I sense that we may be getting close to a tipping point in which we begin to take seriously the notion of a "law of legal services." Professor Perlman's thoughtful and measured article, his legal services "pyramid," and the model rule he includes in his article provide a useful way to start thinking about whether and how we might go about reimagining the regulatory space in which we operate.

Cite as: Laurel Terry, *Something's Afoot and it's Time to Pay Attention: Thinking About Lawyer Regulation in a New Way*, JOTWELL (June 23, 2015) (reviewing Andrew M. Perlman, *Towards the Law of Legal Services*, Suffolk University Law School Research Paper No. 15-5 (2015), available at SSRN), http://legalpro.jotwell.com/somethings-afoot-and-its-time-to-pay-attention-thinking-about-lawyer-regulation-in-a-new-way/.

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Towards the Law of Legal Services

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TOWARDS THE LAW OF LEGAL SERVICES

*Andrew M. Perlman**

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* Professor of Law, Suffolk University Law School and Director of the Institute on Law Practice Technology and Innovation. I am grateful to Jordan Furlong, Paula Littlewood, Deborah Rhode, Ellyn Rosen, Joshua Silverstein, and Bradley Wendel for offering feedback on early drafts of this Article and to Cody Friesz for his outstanding research assistance. I also benefited greatly from conversations with the Regulatory Opportunities Working Group of the ABA Commission on the Future of Legal Services. This Article contains my own opinions and does not reflect the views of any ABA entity or other organization with which I am or have been affiliated.

INTRODUCTION

Imagine that someone asks you how legal services are regulated in the United States. You might answer that lawyers need a license in the jurisdictions where they intend to practice, typically after graduating from an ABA-accredited law school and passing the bar examination.[1] You could explain that lawyers are governed by rules of professional conduct and subject to discipline, including disbarment, for failing to comply.[2] You also might mention the growing patchwork of state and federal regulations that govern lawyers' behavior.[3] Each of these answers offers a slightly different perspective on the regulation of legal services, but they share one common feature: they are all about lawyers.

This Article contends that the current lawyer-based regulatory framework should be reimagined if we hope to spur more innovation and expand access to justice.[4] Rather than focusing on the so-called "law of lawyering"[5]—the body of rules and statutes regulating lawyers—this Article suggests that we need to develop a broader "law of legal services"

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[1] *See generally* NAT'L CONFERENCE OF BAR EXAM'RS & SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS (Erica Moeser & Claire Huismann eds. 2015), *available at* http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf, *archived at* https://perma.cc/VU22-YJM2?type=pdf. Of course, there are some exceptions to the general rule. For example, some states permit lawyers to gain admission without attending an ABA accredited law school. *Id.* at 8-11. Moreover, many states allow experienced lawyers from other jurisdictions to gain admission by motion. *Id.* at 34. Additionally, Wisconsin has the so-called diploma privilege, which allows lawyers to gain admission to the bar merely by graduating from a law school in the state. *See* WIS. SUP. CT. R. 40.03. New Hampshire has a more limited version of the diploma privilege. *See* N.H. SUP. CT. R. 42(XII).

[2] *See generally* CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N & STANDING COMM. ON PROF'L DISCIPLINE, AM. BAR ASS'N, 2013 SURVEY ON LAWYER DISCIPLINE SYSTEMS (S.O.L.D.) (2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2013_complete_sold_results.pdf, *archived at* http://perma.cc/UQ2T-7TTZ.

[3] *See* John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 961 (2009) (describing growth in legislative and administrative regulation of lawyers); Andrew Perlman, *The Parallel Law of Lawyering in Civil Litigation*, 79 FORDHAM L. REV. 1965, 1965-66 (2011) (discussing how parallel rules, such as Federal Rules of Civil Procedure, may conflict with Model Rules of Professional Conduct).

[4] The term "access to justice" is often used in this context, *see, e.g.*, DEBORAH L. RHODE, ACCESS TO JUSTICE (2004), but it may be more appropriate in some situations to say that the public needs better "access to legal services." After all, many important legal and law-related services (e.g., getting a will or health care proxy) are not necessarily about "justice," at least not in the usual sense of the word. That said, a significant percentage of legal services have a strong relationship to justice, so the phrase "access to justice" is appropriate in most circumstances. I use the terms interchangeably in this Article.

[5] *See generally, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000); GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING (3d ed. 2014).

that authorizes, but appropriately regulates, the delivery of more legal and law-related assistance by people who do not have a J.D. degree and do not work alongside lawyers. For example, the Washington Supreme Court recently adopted a framework for allowing specially educated and separately regulated professionals—Limited License Legal Technicians (LLLTs)—to deliver a narrow range of family law services without a traditional law license.[6] Some observers predict that LLLTs will be able to offer assistance at a lower cost than lawyers and improve access to legal services.[7] This type of regulatory reform,[8] which falls outside the law of lawyering, illustrates the growing importance and potential utility of the law of legal services.

The idea of looking beyond the law of lawyering for ways to encourage innovation is conceptually different from many recent calls for regulatory reforms, which focus on expanding opportunities for lawyers and people without a law degree to work together through alternative business structures (ABSs).[9] To be sure, ABSs are a potentially important development, but they are necessarily a creature of the law of lawyering. Consider, for example, the authorization of ABSs under the United Kingdom's Legal Services Act (LSA).[10] Passed in 2007, the LSA requires ABSs to have a lawyer manager,[11] provides detailed regulations about a

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[6] WASH. SUP. CT. R.: R. GEN. APPLICATION: ADMISSION & PRACTICE R. 28; *see also* Stephen R. Crossland & Paula C. Littlewood, *The Washington State Limited License Legal Technician Program: Enhancing Access to Justice and Ensuring the Integrity of the Legal Profession*, 65 S.C. L. REV. 611, 616 (2014).

[7] *See, e.g.*, Crossland & Littlewood, *supra* note 6, at 622; Jack P. Sahl, *Cracks in the Profession's Monopoly Armor*, 82 FORDHAM L. REV. 2635, 2662 (2014); Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. SUPRA 75, 90 n.62, 120 (2013).

[8] For other useful examples, *see* Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2615-16 (2014).

[9] *See, e.g.*, Benjamin H. Barton, *The Lawyer's Monopoly—What Goes and What Stays*, 82 FORDHAM L. REV. 3067, 3089 (2014); Michele DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 FORDHAM L. REV. 2791, 2845 (2012); Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 37-45 (2012); Cassandra Burke Robertson, *Private Ordering in the Market for Professional Services*, 94 B.U. L. REV. 179, 197, 234 (2014); *see also* William Henderson, *Connecting the Dots on the Structural Shift in the Legal Market*, LEGAL WHITEBOARD (Aug. 3, 2012), http://lawprofessors.typepad.com/legalwhiteboard/2012/08/connecting-the-dots-on-the-structural-shift-in-the-legal-market.html, *archived at* http://perma.cc/J6WB-SEHS. *But see* Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43, 44-46 (2014) (calling for greater attention to the myriad ways in which legal services could be delivered outside of ABSs); Levin, *supra* note 8, at 2615-17 (same).

[10] Legal Services Act, 2007, c. 29, pt. 5 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2007/29/pdfs/ukpga_20070029_en.pdf, *archived at* http://perma.cc/V6RA-QCYP.

[11] *See id.* § 83, sch. 11; SOLICITORS REGULATION AUTH., SRA HANDBOOK: AUTHORISATION AND PRACTISING REQUIREMENTS: PRACTICE FRAMEWORK RULES R. 14 (12th ed., 2014), *available at* http://www.sra.org.uk/solicitors/handbook/practising/content.page; *Practice Notes: Alternative Business Structures*, L. SOC'Y § 5.1 (July 22, 2013),

lawyer's role in the ABS, and explains the role that people without a law degree can play relative to lawyers.[12] The LSA does not purport to regulate other professionals who want to deliver legal services completely apart from the legal profession. In other words, reforms focused on ABSs overlook regulatory innovations outside the law of lawyering—like the LLLT program—that hold the promise of an even greater impact on legal services.

Part II explains the distinction between the law of lawyering and the law of legal services in more detail. I contend that most regulatory reform proposals are directed at the law of lawyering and that even seemingly radical proposals, such as those related to ABSs, are fundamentally lawyer-based regulations.

Part III describes the most recent law of lawyering reform effort in the United States—the ABA Commission on Ethics 20/20.[13] Drawing on my experience as the Commission's Chief Reporter, I review the changes that resulted from the Commission's work and argue that they illustrate the limited scope of the law of lawyering.

Part IV responds to common criticisms of the Commission—that it had an unduly narrow view of what was possible within the law of lawyering and that the Commission failed to achieve needed change.[14] I argue that these criticisms are misplaced for two reasons. First, the Commission was created to examine how the law of lawyering should be updated in light of technological change and globalization, and the Commission largely achieved that goal. It addressed quite a few practical new ethics issues that lawyers regularly encounter.[15]

Second, and more fundamentally, there was relatively little the Commission could have accomplished within the law of lawyering that would have had any meaningful effect on the delivery of legal services in the United States.[16] The only possible exception would have been a liberalization of Model Rule 5.4, which currently prohibits ABSs. Any such proposal at that time, however, was facing near certain defeat in the ABA's policymaking body, the House of Delegates.[17] More importantly, and less intuitively, preliminary evidence suggests that ABSs by themselves may not catalyze the bold changes that some have predicted.[18] I conclude that we can more effectively advance the interests of justice by authorizing people without a law degree to participate in the legal

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http://www.lawsociety.org.uk/support-services/advice/practice-notes/alternative-business-structures/, *archived at* http://perma.cc/5TD8-NPBP.

[12] Legal Services Act, § 82, sch. 11.

[13] *See ABA Commission on Ethics 20/20*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited Jan. 21, 2015), *archived at* http://perma.cc/FM6Y-W2A8.

[14] *See, e.g.*, Hadfield, *supra* note 9, at 44; James E. Moliterno, *Ethics 20/20 Successfully Achieved Its Mission: It "Protected, Preserved, and Maintained,"* 47 AKRON L. REV. 149, 152-53 (2014).

[15] *See infra* Part II.

[16] *See infra* Part III.A.

[17] *See infra* Part III.B.2.a.

[18] *See infra* Part III.B.2b.

marketplace with some form of regulatory oversight. To do so, we need to focus on developing the law of legal services rather than fixating exclusively on the law of lawyering and issues like ABS.

Part IV offers some preliminary thoughts on the regulatory objectives that should inform the law of legal services, such as ensuring competence, facilitating consumer choice, requiring transparency, providing remedies for misconduct, ensuring professional independence, and fostering faith in the justice system and the rule of law. I then describe two types of regulatory innovations that would satisfy these regulatory objectives and achieve significant change. First, new market actors should be authorized to participate in a market that has historically excluded them. For instance, Washington State's LLLT program is creating a new, and likely lower cost, option for consumers by allowing appropriately trained and regulated professionals to engage in some kinds of law practice without a law degree.[19] Second, by explicitly authorizing but appropriately regulating existing service providers, such as those offering automated legal document assembly (e.g., LegalZoom), these providers will have less to fear from restrictions on the unauthorized practice of law and have a greater incentive to innovate and expand.[20]

For too long, regulatory reforms have focused primarily on the limited options available within the law of lawyering. By looking beyond that body of law, we can unlock the innovative potential of new providers who are capable of delivering legal services to those who need them. In this way, the law of legal services can safely expand the public's options for addressing many legal needs, and it can do so in ways overlooked by conventional regulatory reform efforts.

I. DISTINGUISHING THE "LAW OF LAWYERING" AND THE "LAW OF LEGAL SERVICES"

A central contention in this Article is that the law of lawyering is inherently limited in scope and that regulatory innovations must emerge from what I call the law of legal services. The differences between these two concepts are not self-evident and require some explanation.

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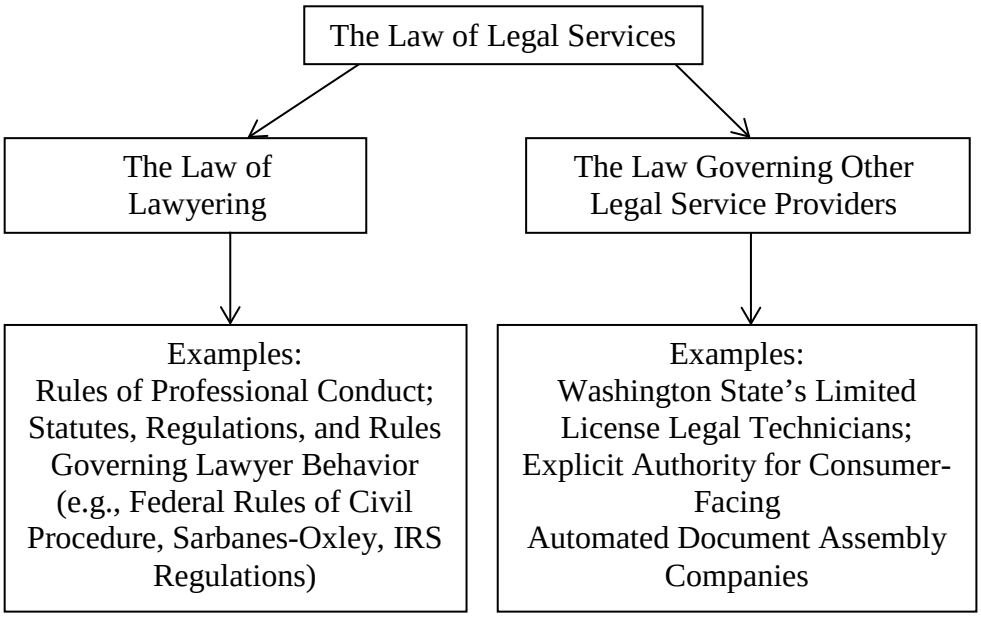
[19] *See* Crossland & Littlewood, *supra* note 6, at 612-13, 622 (offering an overview of the program); Elizabeth Chambliss, *Law School Training for Licensed "Legal Technicians"? Implications for the Consumer Market*, 65 S.C. L. REV. 579, 587-89 (2014) (same).

[20] Evidence suggests that enforcement of unauthorized practice provisions is commonplace. *See* Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2592-93 (2014). There is also evidence that automated legal document assembly companies are often the target of these enforcement actions. *See* Robert Ambrogi, *LegalZoom Suffers Setback in North Carolina*, L. STIES (May 19, 2014), http://www.lawsitesblog.com/2014/05/legalzoom-suffers-setback-north-carolina.html, *archived at* http://perma.cc/PK2K-RC8F; *see also* Report on Findings of Fact and Recommendation To Approve the Settlement Agreement, Medlock v. LegalZoom.com, Inc., No. 2012-208067 (S.C. Oct. 18, 2013), *available at* http://www.abajournal.com/files/SC_Supreme_Court_report_findings_fact_and_settlement_agreement.pdf, *archived at* http://perma.cc/BZD4-TMCC.

The law of lawyering, as its name suggests, concerns the law governing *lawyers*. It includes the rules of professional conduct as well as the growing number of laws, regulations, and rules (both state and federal) that govern lawyer behavior,[21] such as the Sarbanes-Oxley Act,[22] related Securities and Exchange Commission regulations,[23] IRS regulations,[24] federal and state rules of civil procedure and evidence,[25] and data privacy and security laws.[26] In contrast, the law of legal services is much broader. It includes the law of lawyering as well as regulations governing the role that others might play in the delivery of legal services, or what one might call the law governing other legal services providers.



Historically, regulators and scholars have focused much of their attention on the law of lawyering. Consider, for example, the names of leading professional and academic centers in this area: the American Bar Association's Center for Professional Responsibility, Harvard's Center on the Legal Profession, Stanford's Center on the Legal Profession, and Georgetown's Center for the Study of the Legal Profession. A leading treatise has the title "The Law of Lawyering,"[27] and there is a Restatement

[21] *See* Leubsdorf, *supra* note 3, at 981-82 (cataloging various ways in which lawyers are now regulated).
[22] Sarbanes-Oxley Act of 2002 § 307, 15 U.S.C. § 7245 (2012).
[23] Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8185, Exchange Act Release No. 47,276, Investment Company Act Release No. 25,919, 68 Fed. Reg. 6296 (Feb. 6, 2003) (codified at 17 C.F.R. §§ 205.1 to 205.7).
[24] Treas. Circular No. 230, 31 C.F.R. pt. 10; *see also* Leubsdorf, *supra* note 3, at 981-82.
[25] Rules of civil procedure often govern the work product doctrine as well as frivolous pleadings. *See, e.g.*, FED. R. CIV. P. 11, 26(b)(3). Rules of evidence typically govern the attorney-client privilege. *See, e.g.*, FED. R. EVID. 502.
[26] *See, e.g.*, NEV. REV. STAT. ANN. § 603A.010 et seq. (West 2014) (setting out requirements for the protection of personally identifiable information with no exceptions for law firms); 201 MASS. CODE REGS. 17.01 et seq. (2015) (same).
[27] *See, e.g.*, HAZARD, JR. ET AL., *supra* note 5.

of the "Law Governing Lawyers."[28] Many widely used casebooks have similar names and a similar orientation.[29]

The focus on the law of lawyering is not surprising. Until recently, the law governing other legal service providers has consisted primarily of unauthorized practice statutes and rules that have prohibited people who are not lawyers from playing any meaningful role in the delivery of legal services. As a result, the law in this area has traditionally received little attention beyond some important and longstanding efforts to liberalize unauthorized practice provisions (e.g., the work of Professor Deborah Rhode)[30] and a few other ways in which people without a law degree have been permitted to deliver legal or law-related services.[31]

To be sure, the law of lawyering addresses some issues that involve the work of people who do not have a law license. For example, Model Rule 5.3 imposes on a lawyer the duty to supervise "nonlawyers"[32] within the lawyer's firm or to monitor nonlawyers outside the firm who work on client matters,[33] and Model Rule 5.5 instructs lawyers that they are not permitted to facilitate the unauthorized practice of law.[34] These provisions, however, do not directly regulate people who are not lawyers.

Even in jurisdictions that allow ABSs, the regulatory attention is on lawyers. For instance, Washington, D.C. permits alternative business structures, but the relevant rule focuses primarily on the lawyer's role in supervising people who do not have a law license.[35] When the rule addresses the responsibility of these "nonlawyers," it merely instructs

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[28] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000).

[29] *See, e.g.*, STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS (9th ed. 2012); GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING (5th ed. 2010); LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW (3d ed. 2012).

[30] RHODE, *supra* note 4, at 87-91; Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701 (1996) [hereinafter Rhode, *Professionalism in Perspective*]; Project, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104, 123-29 (1976); Deborah L. Rhode, *The Delivery of Legal Services by Non-lawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990) [hereinafter Rhode, *The Delivery of Legal Services*]; Rhode & Ricca, *supra* note 20, at 2607-08.

[31] *See, e.g.*, Chambliss, *supra* note 19, at 582 n.16; Stephen Gillers, *How To Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365, 414 (2013); Levin, *supra* note 8, at 2614.

[32] The word "nonlawyer" is often and appropriately criticized because it suggests that the world is defined relative to lawyers. Alternative phrases, however, have their own problems. For example, it may be appropriate in some situations to refer to "other professionals," but sometimes the word "nonlawyer" is used to refer to people who are not necessarily professionals in other fields. The phrase "people who are not lawyers" is also problematic, because it is both bulky and still defines the world relative to lawyers. Nevertheless, I avoid the word "nonlawyer" in this Article.

[33] MODEL RULES OF PROF'L CONDUCT R. 5.3 (2013).

[34] *Id.* R. 5.5.

[35] D.C. RULES PROF'L CONDUCT R. 5.4(b)(3) (2007).

them to "abide by these Rules of Professional Conduct."[36]

Similarly, and as explained earlier, the U.K.'s seminal LSA requires an ABS to have a lawyer manager, provides detailed regulations about a lawyer's role in the entity, and explains the role that others can play relative to lawyers.[37] The LSA, however, does not offer much guidance to people who want to deliver legal services without the involvement of lawyers. Although the LSA does leave significant market opportunities for lawyers by retaining a narrow set of "reserved" services that only lawyers are permitted to offer,[38] the LSA does not provide any regulatory structure, guidance, or oversight regarding these non-reserved services. People who offer them are largely on their own from a regulatory perspective.[39]

The Canadian Bar Association recently issued a Futures Report that reflects a similar lawyer-centric approach.[40] The Report recommends ABSs and suggests a number of related regulatory innovations, but the Report expressly declines to address whether people without a law license should be permitted to deliver legal services in settings other than law firms or ABSs. The Report concludes that "[i]t is outside the scope of Futures' work to determine whether some legal activities should no longer be reserved [for lawyers] or what further role might be played by other regulated professionals."[41]

Australia has permitted ABSs for more than a decade. It even allows publicly traded legal practices,[42] making it one of the most liberal regimes in the world in this regard. But again, the regulatory structure for these arrangements is focused on either regulating lawyers or the role that people without a law license can play relative to lawyers.[43]

All of these liberalizations are not unimportant, but they are fundamentally law of lawyering reforms. As the discussion below

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[36] *Id.* R. 5.4(b)(2).

[37] *See supra* note 10-12.

[38] Legal Services Act, 2007, c. 29, §§ 13-17 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2007/29/pdfs/ukpga_20070029_en.pdf, *archived at* http://perma.cc/V6RA-QCYP.

[39] *See* LEGAL SERVS. INST., THE REGULATION OF LEGAL SERVICES: RESERVED LEGAL ACTIVITIES—HISTORY AND RATIONALE 2, 32 (2010), *available at* https://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2010-reserved-legal-activities-history-and-rationale.pdf, *archived at* https://perma.cc/H9HE-BLVU; *see also Will-Writing and Estate Administration*, LEGAL SERVICES BOARD, http://www.legalservicesboard.org.uk/Projects/reviewing_the_scope_of_regulation/will_writing_and_estate_administration.htm (last visited Jan. 21, 2015), *archived at* http://perma.cc/Y3P2-QHR6 (explaining concerns that some unreserved activities are unregulated).

[40] CANADIAN B. ASS'N, FUTURES: TRANSFORMING THE DELIVERY OF LEGAL SERVICES IN CANADA (2014), *available at* http://www.cbafutures.org/CBA/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf?ext=.pdf [hereinafter CBA Futures Report].

[41] *Id.* at 19.

[42] Steve Mark, *Views from an Australian Regulator*, 2009 J. PROF. LAW. 45, 47-50.

[43] *See id.*; *see also Legal Profession Act 2008* (WA) pt. 3 (Austl.), *available at* http://www5.austlii.edu.au/au/legis/wa/consol_act/lpa2008179/.

suggests, the law of lawyering is necessarily limited in terms of its potential to bring about significant change. A different conceptual focus may help to drive even more fundamental innovations in the delivery of, and the public's access to, legal and law-related services.

II. THE LIMITS OF THE LAW OF LAWYERING: THE ABA COMMISSION ON ETHICS 20/20 IN HINDSIGHT

The ABA Commission on Ethics 20/20 undertook the most recent law of lawyering reform effort in the U.S. Created in 2009 by then-ABA President Carolyn B. Lamm, the Commission was tasked with studying how the ABA Model Rules of Professional Conduct should be updated to address increasing globalization and changes in technology.[44] The Commission completed its work in February 2013, after successfully proposing numerous amendments to the Model Rules of Professional Conduct,[45] developing a new model court rule and amending another,[46]

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[44] *See* Press Release, Am. Bar Ass'n, ABA President Carolyn B. Lamm Creates Ethics Commission To Address Technology and Global Practice Challenges Facing U.S. Lawyers (Aug. 4, 2009), *available at* http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=730, *archived at* http://perma.cc/V537-6BSH. "The ethics commission will review lawyer ethics rules and regulation across the United States in the context of a global legal services marketplace." *Id.* To ensure a diversity of perspectives, President Lamm appointed commissioners from the judiciary, large law firms, small law firms, in-house legal departments, and academia. *See id.*; *see also ABA Commission on Ethics 20/20: About Us*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/about_us.html (last visited Jan. 21, 2015), *archived at* http://perma.cc/R93H-WBCM (listing Commission members). The Commission was co-chaired by Jamie Gorelick, a partner at WilmerHale and former deputy attorney general under President Clinton, and Michael Traynor, former President of the American Law Institute. *ABA Commission on Ethics 20/20: About Us*, *supra*. The Commission had several law professor "reporters" who advised the Commission on the law of lawyering. Paul Paton served as the reporter for the Alternative Business Structures working group, and Anthony Sebok and Bradley Wendel served as the reporters for the Alternative Litigation Finance working group. They helped to draft the Commission's work product (including proposals, white papers, and explanatory memoranda), and guided substantive deliberations during working group discussions and Commission meetings. The Commission was aided by the ABA Center for Professional Responsibility, particularly Ellyn Rosen, who served as the Commission's lead counsel and helped the Commission navigate the ABA's political structure. In my view, one fair criticism of the Commission and related legal ethics reform efforts is that they have failed to include people who are not lawyers. *See* Gillers, *supra* note 31, at 410; Moliterno, *supra* note 14, at 152.

[45] *See ABA Commission on Ethics 20/20: Work Product*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/work_product.html (last visited Jan. 21, 2015), *archived at* http://perma.cc/GE9E-W9U9. For two reports summarizing the Commission's work, *see* COMM'N ON ETHICS 20/20, AM. BAR ASS'N, INTRODUCTION AND OVERVIEW (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introdution_and_overview_report.pdf, *archived at* http://perma.cc/PHJ4-5RAB [hereinafter COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 2012] and COMM'N ON ETHICS 20/20, AM. BAR ASS'N, INTRODUCTION AND

releasing a white paper on alternative litigation financing,[47] submitting an informational report on lawyer rankings,[48] and referring several discrete topics to other ABA entities.[49]

As described below, the Commission accomplished the narrow objective it was given: updating the law of lawyering to give lawyers the guidance they need to address 21st century legal ethics issues. It did so by focusing on four important developments in the practice of law: (1) the increased use of technology in the delivery of legal services; (2) the advent of Internet-based client development tools; (3) the frequent disaggregation of law and law-related legal services through outsourcing; and (4) greater demand for lawyer mobility.[50]

To be clear, the Commission's work was not transformative, but that is exactly the point. The law of lawyering is primarily concerned with ethics issues arising for lawyers in their everyday practices. As explained in more detail in Part III.B, it does not offer many options for transforming the delivery of legal services.

A. Technology and the Delivery of Legal Services

The Commission's work produced several changes to the Model Rules that address issues arising out of technology's transformation of the

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OVERVIEW (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_overarching_report_final_with_disclaimer.pdf, *archived at* http://perma.cc/W3RF-2MYU [hereinafter COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 2013].

[46] The Commission successfully proposed a new Model Rule on Practice Pending Admission and amended the Model Rule on Admission by Motion. Memorandum, 2012 Annual Meeting of the American Bar Association and Meeting of the House of Delegates 12 (Aug. 29, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2012_hod_select_committee_report_annual_meeting.doc, *archived at* http://perma.cc/9BDK-B555 [hereinafter Memorandum, 2012 Annual Meeting].

[47] COMM'N ON ETHICS 20/20, AM. BAR ASS'N, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES: ALTERNATIVE LITIGATION FINANCE (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.pdf, *archived at* http://perma.cc/4KGR-TECF [hereinafter COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT ALTERNATIVE LITIGATION FINANCE].

[48] COMM'N ON ETHICS 20/20, AM. BAR ASS'N, INFORMATION REPORT TO THE HOUSE OF DELEGATES: NO. 7 (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/rankings_2011_hod_annual_meeting_informational_report.pdf, *archived at* http://perma.cc/V32X-S957 [hereinafter COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT NO. 7].

[49] *See infra* Part II.E.

[50] The Commission's reports reveal far more detail about the nature of (and reasons for) the changes than what appears below. Those reports can be found at *ABA Commission on Ethics 20/20: House of Delegates Filings*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/house_of_delegates_filings.html (last visited Jan. 21, 2015), *archived at* http://perma.cc/MT4G-7Y42.

delivery of legal services, including the duty of confidentiality, technological competence, and the inadvertent disclosure of information.[51]

1. The Duty of Confidentiality in a Digital Age

The Commission found that data security is playing an increasingly important role in modern law practice. In the past, lawyers could easily protect a client's confidential information by placing it in a locked file cabinet behind a locked office door. But today, lawyers store a range of information in the "cloud" (both private and public) as well as on the "ground," using smart phones, laptops, tablets, and flash drives.[52] This information is easily lost or stolen; it can be accessed without authority (e.g., through hacking); it can be inadvertently sent; and it can be intercepted while in transit.[53]

To address these issues, the Commission proposed—and the ABA's 560 member policymaking body, the House of Delegates, adopted—Model Rule 1.6(c).[54] The Model Rule now requires lawyers to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[55] New comment language identifies a number of factors lawyers should consider when determining whether their efforts have been "reasonable," including but not limited to "the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)."[56]

2. Technological Competence

Prior to the Commission's work, the Model Rules had not made any

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[51] ABA Comm'n on Ethics 20/20, Res. No. 105A rev., at 3-4 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120802_revised_resolution_105a.pdf, *archived at* http://perma.cc/9BS8-GHBF; *see also* Memorandum, 2012 Annual Meeting, *supra* note 46, at 12 (noting the adoption of Resolution 105A, as revised, by House of Delegates).

[52] Andrew Perlman, *Protecting Client Confidences in a Digital Age: The Case of the NSA*, JURIST (Mar. 5, 2014), http://jurist.org/forum/2014/03/andrew-perlman-client-confidences.php, *archived at* http://perma.cc/9ADY-9HR6.

[53] Andrew Perlman, *The Twenty-First Century Lawyer's Evolving Ethical Duty of Competence*, 22 THE PROF. LAW., no. 4, 2014, at 1, 2, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2532995.

[54] ABA Comm'n on Ethics 20/20, Res. No. 105A rev., at 4; *see also* Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[55] MODEL RULES OF PROF'L CONDUCT R. 1.6(c) (2013).

[56] *Id.* cmts. 18-19. The Commission decided not to propose more detailed guidance, concluding that many specific recommendations, such as how to safeguard information stored on a mobile device, are likely to be outdated within a few years.

explicit reference to the word "technology."[57] The Commission concluded that today's lawyers need to remain apprised of relevant technology, including the benefits and risks from its use.[58] An amendment to what is now Comment [8] to Model Rule 1.1 captures this new reality (underlined language is new):

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, <u>including the benefits and risks associated with relevant technology,</u> engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.[59]

The Commission did not try to define technological competence, recognizing that a lawyer's skillset necessarily needs to evolve along with technology itself.[60] But the change has underscored the evolving nature of a lawyer's ethical duty of competence and has proven to be among the most discussed pieces of the Commission's work.[61]

3. The Increased Frequency of Inadvertent Disclosures

In the past, the inadvertent disclosure of confidential information was relatively rare,[62] but digital communications and the rise of electronic discovery have made this issue considerably more common.[63] To address this concern, Model Rule 4.4 was amended in 2002 to instruct lawyers that they should notify senders of inadvertently disclosed information about their mistakes.[64]

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[57] *See generally* MODEL RULES OF PROF'L CONDUCT (2011).

[58] ABA Comm'n on Ethics 20/20, Res. No. 105A rev., at 3 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120802_revised_resolution_105a.pdf, *archived at* http://perma.cc/9BS8-GHBF.

[59] MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (2013) (emphasis added); *see also* ABA Comm'n on Ethics 20/20, Res. No. 105A rev., at 3; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[60] *See generally* RICHARD SUSSKIND, TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE (2013) (explaining various ways in which legal education will need to evolve to respond to the 21st century legal marketplace).

[61] A search for "rule 1.1" /s competence /s technology and da(aft 08/01/2012 and bef 08/01/2014)" in Westlaw's Journals and Law Reviews database yields more than 40 references to the new provision within the two years since it was adopted.

[62] *See* ABA Comm'n on Ethics 20/20, Res. No. 105A rev., at 5-6.

[63] *See id.*

[64] *Evaluation of Rules of Professional Conduct (Report No. 401)*, A.B.A. (Feb. 4-5, 2002), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics2000_report_hod_022002.authcheckdam.pdf, *archived at* http://perma.cc/T4HT-NZAS (noting adoption of proposed changes to Rule 4.4); *Ethics 2000 Commission: Report on the Model Rules of Professional Conduct*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_report_home.html (last visited Jan. 29, 2015), *archived at* http://perma.cc/FYR5-WBER (providing Ethics 2000 Commission's proposed changes to the Model Rules of Professional Conduct).

In light of the rapidly changing nature of the problem, the Commission concluded that the Model Rule and its accompanying comments could be usefully updated.[65] For example, the Model Rule had previously described a lawyer's duties when receiving inadvertently disclosed "documents," a word that offered limited guidance when the disclosure involved electronic information.[66] The Model Rule was amended to clarify that "electronically stored information," not just information in tangible form, can trigger Model Rule 4.4(b)'s notification requirements.[67] Moreover, the phrase "inadvertently sent" is now defined to give lawyers more guidance as to its meaning.[68] And new comment language addressed the particular problem of metadata, noting that the receipt of metadata—embedded electronic data that is not visible on the face of a file or document—triggers the Model Rule's notification duties, but only if the receiving lawyer knows or has reason to believe that the metadata was inadvertently sent.[69]

4. Odd and Ends

The Commission's work produced several other minor amendments that responded to changes in law practice technology. Amendments to Comment [9] of Model Rule 1.0 (Terminology) now make explicit that conflicts screens should prevent the sharing of both tangible and electronic information.[70] The definition of a "writing" in paragraph (n) of Model Rule 1.0 (Terminology) was updated to replace the word "e-mail" with the broader phrase "electronic information," ensuring that the definition captures the different ways a "writing" can occur.[71] Finally, the last sentence of Comment [4] to Model Rule 1.4, which had said that, "[c]lient telephone calls should be promptly returned or acknowledged,"[72] was replaced with an admonition that more accurately reflects the increasingly varied ways in which lawyers and clients communicate: "A lawyer should promptly respond to or acknowledge client communications."[73]

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[65] *See* COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 2-3, 6-7 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_resolution_and_report_technology_and_confidentiality_posting.authcheckdam.pdf, *archived at* http://perma.cc/V9QG-35GN.

[66] *See id.* at 6.

[67] *See* ABA Comm'n on Ethics 20/20, Res. No. 105A rev., at 5-6 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120802_revised_resolution_105a.pdf, *archived at* http://perma.cc/9BS8-GHBF; *see also* Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[68] *See* MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt. 2 (2013).

[69] *See id.*

[70] *See id.* R. 1.0 cmt. 9; *see also* ABA Comm'n on Ethics 20/20, Res. No. 105A rev., at 2-3; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[71] *See* MODEL RULES OF PROF'L CONDUCT R. 1.0(n); *see also* ABA Comm'n on Ethics 20/20, Res. No. 105A rev., at 1-3; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[72] MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 4 (2011).

[73] MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 4 (2013); *see also* ABA Comm'n on

In sum, these amendments address technology-driven changes to the practice of law and offer lawyers needed guidance on issues they commonly encounter. Put another way, the amendments reflect the relatively limited potential of the law of lawyering to change how legal services are delivered.

B. Technology and Client Development

The law of lawyering's banality is similarly illustrated by the Commission's work on ethics issues arising from new client development tools. The Commission found that a growing number of lawyers now use online marketing methods, including law firm websites, blogs, social and professional networking sites, pay-per-click ads, and lead generation services.[74] Although these tools are new and evolving, the Commission concluded that basic "principles underlying the existing Rules—preventing false and misleading advertising, protecting the public from the undue influence of solicitations, and safeguarding the confidences of prospective clients—remain valid."[75] For this reason, the Commission's proposals focused on explaining how the Model Rules should apply to new settings rather than developing an entirely new regulatory structure. The proposals addressed several common practical problems.

1. Prospective Clients in a Digital Age

Model Rule 1.18 recognizes that lawyers have ethical duties not just to clients, but to "prospective clients" as well.[76] For example, when someone shares confidential information with a lawyer in the lawyer's office about a possible legal matter and the lawyer refuses the case, the lawyer still owes the person—the "prospective client"—a number of ethical duties, including the duty of confidentiality and a modified duty to avoid conflicts of interest.[77] The problem is that people now interact with lawyers in new ways, such as through websites, social media, and online lead generation tools, making it difficult to determine when someone becomes a "prospective client." The Commission concluded that the definition of a "prospective client" should reflect how lawyers and the public interact,[78] so Model Rule 1.18(a) and the accompanying comments

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Ethics 20/20, Res. No. 105A rev., at 4 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120802_revised_resolution_105a.pdf, *archived at* http://perma.cc/9BS8-GHBF; *see also* Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[74] *See* COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 105B 1-5 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105b_filed_may_2012.pdf, *archived at* http://perma.cc/L9VT-PZCA [hereinafter COMM'N ON ETHICS 20/20, REPORT: RES 105B].

[75] COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 2012, *supra* note 45, at 9.

[76] *See* MODEL RULES OF PROF'L CONDUCT R. 1.18(b)-(d).

[77] *See id.*

[78] *See* COMM'N ON ETHICS 20/20, REPORT: RES 105B, *supra* note 74, at 2-3.

were amended to make clearer when a lawyer's interactions with the public, including online interactions, give rise to a prospective client relationship.[79]

2. Paying for "Recommendations"

Model Rule 7.2(b) prohibits a lawyer from giving someone anything of value (e.g., money) for recommending the lawyer's services, but it allows lawyers to pay for advertisements.[80] Until recently, lawyers had relatively little trouble distinguishing between these two kinds of payments.[81] The Internet, however, has blurred these traditional lines, so the definition of the word "recommendation" was updated to reflect modern forms of marketing.[82] Moreover, additional guidance was offered to help guide the growing industry of lead generation services (and the lawyers who use those services) to ensure reasonable consumer protections without unnecessarily impeding this new method for matching clients and lawyers.[83]

3. Defining Solicitations in the Internet Era

Model Rule 7.3(a) prohibits most kinds of in-person solicitations, but the Model Rule permits (yet regulates) less intrusive forms of solicitations, such as those sent by direct mail and email.[84] This distinction used to be reasonably clear, but new forms of marketing once again have blurred the traditional lines. The Commission sought to address some of these ambiguities by creating a new definition of a "solicitation."[85]

All of these changes have contributed to the law of lawyering by

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[79] *See* MODEL RULES OF PROF'L CONDUCT R. 1.18 (2013); ABA Comm'n on Ethics 20/20, Res. No. 105B, at 1-2 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105b.pdf, *archived at* http://perma.cc/3KCY-9L9S; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[80] MODEL RULES OF PROF'L CONDUCT R. 7.2(b).

[81] COMM'N ON ETHICS 20/20, REPORT: RES 105B, *supra* note 74, at 3-4.

[82] *See* MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 5; ABA Comm'n on Ethics 20/20, Res. No. 105B, at 4-5; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[83] MODEL RULES OF PROF'L CONDUCT R. 7.3 & cmts. 7, 9; ABA Comm'n on Ethics 20/20, Res. No. 105B, at 6-8; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12; *see also* COMM'N ON ETHICS 20/20, REPORT: RES 105B, *supra* note 74, at 3-7. There was some discussion about liberalizing Rule 7.2 and lifting all restrictions on paying for recommendations. *See* COMM'N ON ETHICS 20/20, REPORT: RES 105B, *supra* note 74, at 6. It was ultimately rejected, but even if adopted, the change would have had a relatively limited impact on the delivery of legal services.

[84] *See* MODEL RULES OF PROF'L CONDUCT R. 7.3.

[85] *See* MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. 1 (2013); ABA Comm'n on Ethics 20/20, Res. No. 105B, at 6 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105b.pdf, *archived at* http://perma.cc/3KCY-9L9S; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12; *see also* COMM'N ON ETHICS 20/20, REPORT: RES 105B, *supra* note 74, at 7-8.

giving lawyers the guidance they need to use new forms of client development. But again, the law of lawyering in this area offers few, if any, ways to transform the delivery of legal services.

C. The Disaggregation of Law and Law-Related Work (Outsourcing)

The Commission found that lawyers are "increasingly outsourcing legal and law-related work, both domestically and offshore" and that these practices should be permissible as long as lawyers follow certain guidelines.[86] With regard to the outsourcing of work to other lawyers, the comments to Model Rule 1.1 (Competence) were amended to identify the considerations lawyers should consider, such as the competence of the lawyers in the other firm.[87] With regard to work outsourced to people without a law license, the title and comments to Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistance) were amended to emphasize that lawyers should make reasonable efforts to ensure that outsourced work is performed in a manner compatible with the lawyer's own professional obligations, including the lawyer's obligation to protect client information.[88]

To be sure, outsourcing does have the potential to shape how legal services are delivered, at least to some degree. For example, legal services would probably be more expensive in certain contexts if outsourcing were unavailable. That said, the changes in this area largely codified existing practices and are unlikely to have much of an effect on the delivery of legal services.[89]

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[86] COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 105C 1 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c_filed_may_2012.pdf, *archived at* http://perma.cc/ME2S-8SN3.

[87] *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 6; ABA Comm'n on Ethics 20/20, Res. No. 105C, at 2 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c.pdf, *archived at* http://perma.cc/AKN6-33AL; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[88] *See* MODEL RULES OF PROF'L CONDUCT R. 5.3 & cmts. 3-4; ABA Comm'n on Ethics 20/20, Res. No. 105C, at 2-3; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[89] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008); Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2004-165 (2004); Colo. Bar Ass'n, Formal Op. 121 (2009); Fla. Bar Ass'n Comm. on Prof'l Ethics, Op. 07-2 (2008); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 762 (2003); N.Y.C. Bar Ass'n Comm. on Prof'l & Judicial Ethics, Formal Op. 2006-3 (2006); N.C. State Bar, 2007 Formal Op. 12 (2008); Ohio Ethics Comm'n, Advisory Op. 2009-06 (2009); COMM. ON PROF'L RESPONSIBILITY, N.Y.C. BAR ASS'N, REPORT ON THE OUTSOURCING OF LEGAL SERVICES OVERSEAS (2009), *available at* http://www.nycbar.org/pdf/report/uploads/20071813-ReportontheOutsourcingofLegalServicesOverseas.pdf, *archived at* http://perma.cc/P9ST-2WWQ; COUNCIL OF BARS & LAW SOC'YS OF EUR., CCBE GUIDELINES ON LEGAL OUTSOURCING (2010), *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Guidelines_on_leg1_1277906265.pdf, *archived at* http://perma.cc/7EDQ-GE62.

D. The Globalization of Legal Services

Lawyers traditionally practiced in a single jurisdiction for their entire careers and had little need to relocate.[90] Times have changed. Globalization and technology have transformed the legal marketplace and fueled considerably more cross-border practice and lawyer mobility.[91] The Commission's resolutions addressed some of these issues by creating a more permissive model for cross-border practice and mobility for both domestic and foreign lawyers.

1. Liberalizing the Model Rule on Admission by Motion

The ABA Model Rule on Admission by Motion, which was adopted in 2002,[92] allows licensed lawyers to gain admission to a new jurisdiction without having to sit for another bar examination. The Commission concluded that the Model Rule should be liberalized to allow lawyers to become eligible for this admission procedure after fewer years in practice (three years instead of five).[93] The ABA House of Delegates agreed and adopted the recommendation.[94] The Commission also successfully proposed a resolution that urged "jurisdictions that have not adopted the Model Rule on Admission by Motion to do so, and urge[d] jurisdictions that have adopted admission by motion procedures to eliminate any restrictions that do not appear in the Model Rule on Admission by Motion."[95]

2. The Model Rule on Practice Pending Admission

The Commission found that lawyers increasingly need to relocate to a new jurisdiction and start practicing there on shorter notice than an admission by motion procedure allows and that a temporary and more immediate practice authority would provide a useful bridge.[96] The new

[90] *See* COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 2012, *supra* note 45, at 6-7.
[91] *See id.*
[92] *See* COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 105E 2 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105e_filed_may_2012.authcheckdam.pdf, *archived at* http://perma.cc/JVD2-5KDM [hereinafter COMM'N ON ETHICS 20/20, REPORT: RES. 105E].
[93] *See id.*
[94] *See* MODEL RULES ON ADMISSION BY MOTION R. 1(c) (2012); Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.
[95] ABA Comm'n on Ethics 20/20, Res. No. 105E, at 2, *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105e.authcheckdam.pdf, *archived at* http://perma.cc/BSM4-M8EQ; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.
[96] *See* COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 105D, at 1 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_ann

Model Rule on Practice Pending Admission was adopted to enable lawyers who have been engaged in the active practice of law for three of the last five years to practice from an office in a new jurisdiction while pursuing admission through an authorized procedure, such as admission by motion or passage of that jurisdiction's bar examination.[97]

3. Greater Mobility for Foreign Lawyers

In a globalized world where a growing number of legal matters implicate the law of other countries, the Commission found that clients often need the expertise of lawyers licensed abroad.[98] The Commission's work has made it easier for lawyers licensed in foreign jurisdictions to practice in the U.S. In particular, the Model Rule on Pro Hac Vice Admission was amended to permit judges, at their discretion and subject to numerous limitations, to authorize foreign lawyers to appear *pro hac vice* in U.S. courts.[99] Amendments to Model Rule 5.5(d) authorize foreign lawyers to serve as in-house counsel from within the U.S.,[100] and corresponding amendments to the Model Rule for Registration of In-House Counsel provide a mechanism to identify, monitor, and hold these lawyers accountable.[101]

4. Choice of Rule Provisions

The increasing globalization of law practice has made it difficult for lawyers in certain contexts to be able to determine which jurisdiction's ethics rules apply when determining whether a conflict of interest

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ual_meeting_105d_filed_may_2012.pdf, *archived at* http://perma.cc/W9SZ-MH8L [hereinafter COMM'N ON ETHICS 20/20, REPORT: RES. 105D].

[97] *See* COMM'N ON ETHICS 20/20, REPORT: RES. 105D, *supra* note 96, at 2; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[98] *See* COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 2013, *supra* note 45, at 3.

[99] *See* ABA Comm'n on Ethics 20/20, Res. No. 107C (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2013_hod_midyear_meeting_107c_redline_with_floor_amendment.authcheckdam.pdf, *archived at* http://perma.cc/M2BM-P6JW; AM. BAR ASS'N, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES: 2013 MIDYEAR MEETING 6 (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2013_midyear_summaryofaction.authcheckdam.pdf, *archived at* http://perma.cc/W77K-SUC4 [hereinafter ABA, SUMMARY OF ACTION: 2013 MIDYEAR].

[100] *See* ABA Comm'n on Ethics 20/20, Res. No. 107A rev., at 2 (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20130201_revised_resolution_107a_resolution_only_redline.authcheckdam.pdf, *archived at* http://perma.cc/83TS-8GDE; ABA, SUMMARY OF ACTION: 2013 MIDYEAR, *supra* note 99, at 5-6.

[101] *See* ABA Comm'n on Ethics 20/20, Res. No. 107B rev. (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20130201_revised_resolution_107b_resolution_only_redline.authcheckdam.pdf, *archived at* http://perma.cc/45BL-2BLV; ABA, SUMMARY OF ACTION: 2013 MIDYEAR, *supra* note 99, at 6.

exists.[102] This problem is particularly pronounced for law firms with offices abroad, where the rules on conflicts are considerably different from those found in the U.S.[103] To address this issue, new language was added to Comment [5] of Model Rule 8.5 (Choice of Law) to expressly authorize lawyers and clients, subject to numerous restrictions, to specify which jurisdiction's conflict rules will apply to the relationship.[104]

5. Conflicts Checking When Moving Firms

Greater lateral movement among law firms and increased merger activity among firms have made it necessary for lawyers to disclose some types of confidential information to lawyers in other law firms in order to identify potential conflicts of interest.[105] The Commission found that the Model Rules did not explain how these necessary disclosures could occur in a manner that was consistent with the duty of confidentiality.[106] To address this problem, Model Rule 1.6 (Confidentiality of Information) was amended to clarify that lawyers have the authority to disclose discrete categories of information to other firms to ensure that conflicts of interest are detected before lawyers are hired or firms merge.[107] At the same time, the amendments make clear that such disclosures are impermissible if they would "compromise the attorney-client privilege or otherwise prejudice the client."[108] Comment language was revised to provide even more detailed guidance.[109]

E. Other Work Product and Referred Issues

In addition to recommending changes to the Model Rules, the Commission produced reports on lawyer rankings and alternative litigation

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[102] *See* COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 1-2 (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_choice_of_rule_resolution_and_report_final.pdf, *archived at* http://perma.cc/7UJV-CF96.

[103] *See id.*

[104] *See* ABA Comm'n on Ethics 20/20, Res. No. 107D, at 2-3 (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2013_hod_midyear_meeting_107d.authcheckdam.pdf, *archived at* http://perma.cc/RNL8-MCSV; ABA, SUMMARY OF ACTION: 2013 MIDYEAR, *supra* note 99, at 7.

[105] *See* COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 105F, at 1 (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105f.pdf, *archived at* http://perma.cc/N5NW-2AYT.

[106] *See id.*

[107] *See* ABA Comm'n on Ethics 20/20, Res. No. 105F rev. (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120802_revised_resolution_105f.authcheckdam.pdf, *archived at* http://perma.cc/XC4T-QLM2; Memorandum, 2012 Annual Meeting, *supra* note 46, at 12.

[108] ABA Comm'n on Ethics 20/20, Res. No. 105F rev., at 2.

[109] *See id.* at pp. 2-3.

finance.[110] The Commission also referred specific topics to ABA entities with the necessary expertise to address them. For example, the Commission asked the Standing Committee on Ethics and Professional Responsibility to develop ethics opinions on several topics, including two choice of law issues associated with ABSs (one of which led to an important ethics opinion)[111] as well as various issues arising from virtual law practice and other topics related to the increasing importance of technology in practice today.[112]

III. RESPONDING TO CRITICS OF THE COMMISSION

Some commentators have criticized the modest scope of the Commission's work, claiming that the Commission should have done more to achieve needed reforms within the law of lawyering.[113] I believe that these criticisms are misplaced for two reasons. First, as the preceding discussion suggests, the Commission fulfilled its charge by generating needed guidance on a number of important everyday practice and ethics issues. Second, and more importantly, the critics overestimate the extent to which the law of lawyering can produce meaningful reform. The reality is that bold changes like ABS may actually be less significant than proponents believe, and truly meaningful changes need to take place entirely outside of the law of lawyering.

A. The Commission Offered Needed Guidance

One commentator has provocatively suggested that the changes resulting from the Commission's work were so inconsequential that "casebook and treatise writers can make the Ethics 20/20 induced changes to their next editions in thirty minutes or less."[114]

This criticism contains more rhetoric than reality. As Part II describes, the Commission has helped lawyers navigate the increasingly

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[110] *See* COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT ALTERNATIVE LITIGATION FINANCE, *supra* note 47; COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT NO. 7, *supra* note 48.

[111] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 13-464 (2013).

[112] *See* Memorandum from Jamie Gorelick and Michael Traynor to Paula Frederick, ABA Commission on Ethics 20/20 – Ethics Opinion Referrals (September 6, 2011) (on file with author); Memorandum from Jamie Gorelick and Michael Traynor to Paula Frederick, The Commission's Proposal Concerning ABA Formal Opinion 91-360 (November 22, 2011) (on file with author).

[113] *See, e.g.*, Nathan M. Crystal & Francesca Giannoni-Crystal, *"One, No One and One Hundred Thousand" . . . Which Ethical Rule to Apply? Conflict of Ethical Rules in International Arbitration*, 32 MISS. C. L. REV. 283, 283 (2013) (criticizing Commission for failing to develop rules to address conflicting rules in international arbitrations); John S. Dzienkowski, *Ethical Decisionmaking and the Design of Rules of Ethics*, 42 HOFSTRA L. REV. 55, 71, 91 (2013) (suggesting that many scholars believed the Commission did not produce needed changes and "that the final work product of Ethics 20/20 was a major disappointment to those who believed that the Model Rules needed significant revision in light of the changes in the legal profession"); Moliterno, *supra* note 14; at 153-60.

[114] Moliterno, *supra* note 14, at 160.

common ethical issues associated with legal process outsourcing, Internet-based advertising, confidentiality obligations when changing employment, the receipt of inadvertently sent information, and cybersecurity, among many other issues. The Commission also enabled more lawyer mobility by liberalizing the Model Rule on Admission by Motion, creating a new Model Rule on Practice Pending Admission, and facilitating clients' use of foreign lawyers.[115] These changes have not produced a fundamental structural shift in the law of lawyering, but they do address important practical issues that lawyers regularly encounter in the 21st century.

Another reading of the criticism is that, even if the issues the Commission addressed are useful, the Commission's work merely reflected housekeeping or codifications of existing law.[116] The reality, however, is that some of the changes broke new ground. For example, the new Rule 1.6(c) regarding a lawyer's duty to protect confidential information is new,[117] as are the Comments relating to the definition of a solicitation,[118] the definition of a "recommendation" in Rule 7.2,[119] the emphasis on technological competence,[120] and the use of choice of rule agreements.[121]

Other changes produced guidance that had been available only in non-binding (and, in the case of ABA Formal Opinions, non-public)[122] ethics opinions. These changes included the amendments to Rule 1.6 authorizing the disclosure of confidential information to identify conflicts of interest,[123] the guidance on outsourcing,[124] and the definition of a prospective client.[125] The elevation of this preexisting guidance to the Model Rules of Professional Conduct will give lawyers clearer, more reliable, and more accessible guidance than previously existed.

Still other changes reflect regulatory approaches that had existed in only a small number of states. The new Model Rule on Practice Pending Admission, the liberalized Model Rule on Admission by Motion, and the rules relating to foreign lawyers all fit this description.[126]

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[115] *See supra* Part II.D.
[116] Moliterno, *supra* note 14, at 153-54.
[117] *See supra* Part II.A.1.
[118] *See supra* Part II.B.3.
[119] *See supra* Part II.B.2.
[120] *See supra* II.A.2.
[121] *See supra* Part II.D.4.
[122] These opinions are publicly available for a period of time after they are released, but they are then placed behind a paywall.
[123] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-455 (2009); *supra* Part II.D.5.
[124] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008); *supra* Part II.C.
[125] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010); *supra* Part II.B.1.
[126] *See* COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 2013, *supra* note 45, at 5-7 (documenting U.S. jurisdictions with already-liberalized rules allowing foreign lawyers greater authority to practice in U.S.); COMM'N ON ETHICS 20/20, REPORT: RES. 105D, *supra* note 96, at 2-3; (identifying several jurisdictions that have adopted approaches similar to the Model Rule on Practice Pending Admission); COMM'N ON

The helpfulness of these changes is illustrated by their relatively rapid adoption around the country. Only two years after the Commission completed its work, more than a dozen jurisdictions had adopted a significant portion of the changes.[127] The vast majority of states differ from the Model Rules in important respects, so states often ignore changes to the Model Rules in whole or in part.[128] The adoptions to date suggest that a large number of states find the changes to be more useful than critics have suggested.

Finally, the Commission's work has proven to be helpful even when it did not produce any doctrinal changes. For example, the Commission's report on the ethics of alternative litigation finance has been a valuable resource for lawyers, clients, and litigation funders on how to identify and avoid the various ethics-related issues arising in this context.[129] The Commission's work on ABSs could serve as a blueprint for future efforts in this area, either within the ABA or at the state level.[130] And referrals to other ABA entities have led to useful outcomes, such as a recently issued Formal Opinion that addresses a choice of law problem relating to ABSs.[131] In sum, the claim that the Commission's work was inconsequential understates the Commission's accomplishments or fails to appreciate the breadth of new issues that lawyers now face.

B. The "Law of Lawyering" Offers Few Bold Reform Options

A related, and more important, criticism is that the Commission should have sought "bolder" structural changes.[132] Critics, however, typically cite only two "bold" changes the Commission should have pursued within the law of lawyering: further liberalizing the rules on multijurisdictional practice and easing restrictions on the rules prohibiting ABSs.[133] As explained below, the Commission actually helped to

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ETHICS 20/20, REPORT: RES. 105E, *supra* note 92, at 1 n.5 (noting the widespread adoption of the Model Rule on Admission by Motion).

[127] *See* Policy Implementation Comm., Ctr. for Prof'l Responsibility, Am. Bar Ass'n, *State by State Adoption of Selected Ethics 20/20 Commission Policies and Guidelines for an International Regulatory Information Exchange*, A.B.A. (Jan. 27, 2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_implementation_selected_e20_20_rules.pdf, *archived at* http://perma.cc/5KWU-EW85 (revealing a significant number of additional jurisdictions studying the Commission's changes).

[128] *See* STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS (2015) (containing a chapter that documents numerous variations to each Model Rule).

[129] *See* COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT ALTERNATIVE LITIGATION FINANCE, *supra* note 47.

[130] *See* Letter from Jamie S. Gorelick & Michael Traynor, Co-Chairs, Comm'n on Ethics 20/20, Am. Bar Ass'n, to ABA Entities et al., For Comment: Discussion Paper on Alternative Law Practice Structures (Dec. 2, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.pdf, *archived at* http://perma.cc/2GXY-FTUU.

[131] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 13-464 (2013).

[132] *See supra* note 113.

[133] *See, e.g.*, Moliterno, *supra* note 14, at 155. To be sure, some have argued that the

liberalize the multijurisdictional practice rules, and additional changes would have had relatively little practical effect on the delivery of legal services.[134] With regard to ABSs, any proposals in this area were unlikely to be adopted by the House of Delegates at that time, and even less intuitively, such a change may not have been as transformative as proponents claim.[135]

1. Multijurisdictional Practice as Marginalia

The Commission moved the ball forward in this area in several important respects. First, the Model Rule on Admission by Motion was liberalized to allow lawyers to relocate to another jurisdiction without taking the bar examination after three years of practice (instead of five).[136] Second, a resolution was adopted encouraging states to drop restrictions on admission by motion that do not appear in the Model Rule and that unnecessarily hinder mobility (e.g., reciprocity requirements that restrict admission by motion to lawyers who are coming from jurisdictions that offer admission by motion on a reciprocal basis).[137] Third, foreign lawyers were given clearer and expanded practice authority when they come to the United States to serve clients.[138] And finally, a new Model Rule on Practice Pending Admission was created to authorize lawyers to practice immediately upon arriving in a new jurisdiction, thus helping lawyers who have to relocate with little advance notice.[139]

To be sure, multijurisdictional practice authority could be usefully expanded and clarified in the future, such as by making it even easier for lawyers to practice temporarily in jurisdictions where they are not licensed. For example, the Model Rules might be amended to offer the clarity and simplicity of states like Colorado, where lawyers from other U.S. jurisdictions are permitted to practice on a temporary basis with very few limitations.[140] That said, the Model Rules were liberalized significantly in 2002 by the ABA Commission on Multijurisdictional

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Commission should have sought other kinds of reforms, such as the development of rules for international arbitrations, Crystal & Giannoni-Crystal, *supra* note 113, at 283, or greater clarity regarding the mens rea requirements in the Model Rules, Dzienkowski, *supra* note 113, at 95 (citing Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 GEO. J. LEGAL ETHICS 1 (2010)), but these kinds of changes would not have had any significant effect on the delivery of legal services.

[134] *See infra* Part III.B.1.

[135] *See infra* Part III.B.2.b.

[136] *See supra* Part II.D.1

[137] *See id.*

[138] *See supra* Part II.D.3.

[139] *See supra* Part II.D.2.

[140] *See* COLO. R. CIV. P. 204, 205; COMM'N ON ETHICS 20/20, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 107A, at 2-3 (2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_model_rule_5_5_foreign_in_house_resolution_report_final.authcheckdam.pdf, *archived at* http://perma.cc/BY4Q-XWU3.

Practice,[141] and the practice authority given to lawyers in states like Colorado is not much more expansive than the Model Rules already provide as a practical matter.[142] Thus, there is little reason to believe that any additional temporary practice authority in the Model Rules will have any significant effect on the delivery of legal services or the structure of the profession. Put simply, additional changes in this area would not have produced any "bold" changes in the practice of law or the delivery of legal services.

2. ABSs ("Nonlawyer Ownership") as a Nonstarter

A change to the Model Rule prohibiting alternative business structures would certainly have been perceived as bold, but criticisms of the Commission in this area are overstated for two reasons. First, as explained below, such a proposal faced near certain defeat in the ABA House of Delegates, at least at that time. More importantly, and less intuitively, there are reasons to question whether ABSs will bring about the "bold" changes the public really needs.

a. Any Proposal to Allow ABSs Would Likely Have Failed

History offers a useful guide to why the ABA House of Delegates was highly likely to reject any changes proposed by the Commission in this area. Since the Model Rules were adopted more than thirty years ago, the House of Delegates has repeatedly indicated its strong opposition to the idea of ABSs.

The Kutak Commission was responsible for drafting the Model Rules in the late 1970s and early 1980s, and its initial proposed draft of Model Rule 5.4 allowed for the creation of an ABS.[143] The ABA House of Delegates rejected the idea for a variety of reasons, but concerns about competitive threats to the profession loomed large.[144] For example, during

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[141] *See generally* AM. BAR. ASS'N, REPORT OF THE COMMISION ON MULTIJURISDICTIONAL PRACTICE (2002), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/intro_cover.pdf, *archived at* http://perma.cc/5AGL-FYAE; COMM'N ON MULTIJURISDICTIONAL PRACTICE, REPORT TO THE HOUSE OF DELEGATES: REPORT 201B (2002), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201b.pdf, *archived at* http://perma.cc/83QE-5ANM.

[142] *See* MODEL RULES OF PROF'L CONDUCT R. 5.5(c) (2013). Model Rule 5.5(c) provides fairly expansive authority to practice temporarily in a jurisdiction where a lawyer is not licensed. *See id.* Although it contains more ambiguities than the Colorado Rule, particularly in Model Rule 5.5(c)(4), there is no evidence that significant innovations in the delivery of legal services are adversely affected because of the rules in this area.

[143] *See* MODEL RULES OF PROF'L CONDUCT R. 5.4 (Proposed Final Draft May 30, 1981), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_5-81.authcheckdam.pdf, *archived at* http://perma.cc/M9ST-JUZ3.

[144] Laurel S. Terry, *A Primer on MDPS: Should the "No" Rule Become a New Rule?*, 72 TEMP. L. REV. 869, 876-77 (1999).

the House debate, a member asked whether the proposal would have allowed Sears Roebuck to open a law office in each of its stores.[145] The Commissions' reporter—Professor Geoffrey Hazard—answered "yes," and the proposal was promptly defeated.[146] Contemporaneous accounts suggest that the House's vote was strongly motivated by concerns about competition from "nonlawyers"—the so-called "fear of Sears."[147]

More recently, the ABA Commission on Multidisciplinary Practice ("MDP Commission") faced similar resistance.[148] Created in 1998, the MDP Commission conducted numerous hearings, studied the issues, and concluded that lawyers and other professionals should be permitted to share fees as part of a multidisciplinary practice—a practice that delivers both legal and non-legal services.[149] The Commission's recommendation contained numerous restrictions, including careful regulations of MDPs that were designed to ensure client protection.[150] Nevertheless, in August 1999, by a vote of 304 to 98, the ABA House of Delegates effectively rejected the idea, concluding that it should not be pursued again "until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients."[151]

The MDP Commission responded by trying to conduct the requested "additional study" and released a revised recommendation and report the following year.[152] The House again rejected the recommendation by a three to one margin and adopted a resolution saying that MDPs were

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[145] *See id.*

[146] JAMES E. MOLITERNO, THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE 165-66 (2013).

[147] *Id.* Today, the fear would undoubtedly be of Walmart. Indeed, in Canada, lawyers have stalls at an increasing number of stores. *See* Debra Cassens Weiss, *Is Wal-Mart Law Coming to the US? Retailer Adds Lawyers on Site for Toronto-Area Shoppers*, A.B.A. J. (May 8, 2014), http://www.abajournal.com/news/article/is_walmart_law_coming_to_the_us_retailer_adds_lawyers_on_site_for_canadian_, *archived at* http://perma.cc/QJ37-W2A4. Similarly, Sam's Club has struck a deal with LegalZoom to offer Sam's Club members a special discount. *See* Debra Cassens Weiss, *LegalZoom Products Will Be Sold at a Discount Through Sam's Club*, A.B.A. J. (Oct. 27, 2014), http://www.abajournal.com/news/article/legalzoom_products_will_be_sold_at_a_discount_through_sams_club/, *archived at* http://perma.cc/2KWR-QT3J. What is notable about these developments is that the rules on ABSs are not an impediment. Lawyers in Canada are not controlled by Walmart, and LegalZoom is not a law firm. Thus, despite all of the concern about changes to Model Rule 5.4, legal services are creeping into chain stores through the backdoor (or the front sliding door).

[148] *See generally Commission on Multidisciplinary Practice*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice.html (last visited Jan. 31, 2015), *archived at* http://perma.cc/QXL7-ZQVU.

[149] *See* Laurel S. Terry, *The Work of the ABA Commission on Multidisciplinary Practice*, *in* STEPHEN J. MCGARRY, MULTIDISCIPLINARY PRACTICES AND PARTNERSHIPS: LAWYERS, CONSULTANTS AND CLIENTS 2-1(2002).

[150] *See id.* at 2-13.

[151] *Id.* at 2-4.

[152] *See id.* at 2-5.

inconsistent with the profession's "core values."[153] Signaling that it did not want to revisit the issue, the House concluded flatly that "[t]he law governing lawyers, that prohibits lawyers from sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law, should not be revised."[154] The House also passed a separate resolution that "discharged" the MDP Commission, preventing the MDP Commission from bringing any additional work to the House for its consideration.[155]

The Ethics 20/20 Commission came to the topic of ABSs with this history firmly in mind. Early in its work, the Commission decided not to propose multidisciplinary practices—lawyers and other professionals working together to deliver both legal and nonlegal services within a single practice—and instead developed a discussion draft containing a much more modest possible framework.[156] This framework would have allowed someone who did not have a law license to have an ownership interest in a law firm, but only if that person assisted the law firm in providing legal services to its clients and the law firm's "sole purpose" was to provide legal services.[157] For example, accountants could become partners in a law firm and share in the legal fees the firm generated, but the accountants could not have their own separate accounting practices within the law firm. They only would be permitted to assist the firm's lawyers in the delivery of legal services, thus reducing the risk that a practice area other than law might unduly influence the professional independence of lawyers. In this way, the discussion draft avoided the "Sears" scenario by prohibiting a single entity from offering legal and nonlegal services.

The discussion draft contained numerous other restrictions as well, such as caps on the percentage of ownership that other professionals could have and making lawyers responsible for ensuring that the other professionals' behavior was consistent with the rules of professional conduct.[158] In essence, this structure would have been more restrictive than the approach the District of Columbia has taken for more than 20 years.[159] It also would have been much more modest than the proposals put forward by the MDP Commission or the Kutak Commission before it.

Despite the incremental nature of the discussion draft, it prompted a markedly negative reaction.[160] The Commission received 29 comments in

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[153] *See id.* at 2-5 to 2-6.
[154] *Id.* at 2-6.
[155] *See id.* at 2-7.
[156] *See* Letter from Jamie S. Gorelick & Michael Traynor to ABA Entities et al., *supra* note 130. Even the name of the document—a discussion draft—reflected the contentious nature of the issue. Other draft proposals were released as "draft resolutions," but the controversy surrounding ABS was so intense that the Commission decided to call its initial draft a "discussion draft" to minimize the implication that it might become an actual proposal.
[157] *See id.* at 2.
[158] *See id.*
[159] *See id.*
[160] *See Alternative Law Practice Structures Comments Chart,* A.B.A.,

response to the discussion draft, and only 6 of those comments supported changes in this area.[161] Opposition came from important constituencies, including state bar associations,[162] and they began mounting a significant political effort to oppose any changes in this area.[163] The voices in support of change could best be characterized as lukewarm.[164]

At the same time, the Commission could not uncover empirical support for the idea that ABSs would benefit the public.[165] There is considerable academic speculation that changes in this area will have a

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http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/alps_working_group_comments_chart.authcheckdam.pdf (last updated Aug. 28, 2012), *archived at* http://perma.cc/M33L-GUZ5 (providing a list and links to comments on Discussion Paper).

[161] *See id.*

[162] *See* Letter from Susan A. Feeney, President, N.J. State Bar Ass'n, to Natalia Vera, Senior Research Paralegal, Comm'n on Ethics 20/20, Am. Bar Ass'n, Alternative Law Firm Structures (Jan. 31, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/njstatebarassociation_alpsdiscussiondraft.authcheckdam.pdf, *archived at* http://perma.cc/37S9-DTQ9; Letter from Joseph A. Kanefield, President, State Bar of Ariz., to Natalia Vera, Senior Research Paralegal, Comm'n on Ethics 20/20, Am. Bar Ass'n, ABA Commission on Ethics 20/20 Alternative Law Practice Structure (Mar. 12, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/statebarofarizona_alpsdiscussiondraft.authcheckdam.pdf, *archived at* http://perma.cc/MH5V-AA9D; Letter from John G. Locallo, President, Ill. Bar Ass'n, to Jamie S. Gorelick & Michael Traynor, Co-Chairs, Comm'n on Ethics 20/20, Am. Bar Ass'n, Fee Sharing and Alternative Law Practice Structures (Mar. 19, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/isba_comments_alpsdiscussiondraftandalpschoiceoflawinitialdraftproposal.authcheckdam.pdf, *archived at* http://perma.cc/D5CM-CNB9; Letter from Joseph E. Neuhaus, Chair, Comm. on Standards of Attorney Conduct, N.Y. State Bar Ass'n, to Comm'n on Ethics 20/20, Am. Bar Ass'n, Comments of the New York State Bar Association Committee on Standards of Attorney Conduct on Ethics 20/20 Issue Paper Concerning Alternative Business Structures (June 9, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/newyorkstatebarassociationcommitteeonstandardsofattorneyconduct_issuespaperconcerningalternativebusinessstructures.authcheckdam.pdf, *archived at* http://perma.cc/9H5W-PPLQ.

[163] *See* ILL. STATE BAR ASS'N & SENIOR LAWYERS DIV., AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 10A (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2012_hod_annual_meeting_10a.doc, *archived at* http://perma.cc/74R7-AUL8 [hereinafter ILL. STATE BAR ASS'N, REPORT: RESOLUTION 10A].

[164] The experience brings to mind Niccolo Machiavelli's famous quote: "[t]here is nothing more difficult to carry out, nor more doubtful of success, nor more dangerous to handle, than to initiate a new order of things. For the reformer has enemies in all those who profit by the old order, and only lukewarm defenders in all those who would profit by the new order, this lukewarmness arising partly from fear of their adversaries . . . and partly from the incredulity of mankind, who do not truly believe in anything new until they have had actual experience of it." NICCOLÒ MACHIAVELLI, THE PRINCE 22 (Luigi Ricci trans., Grant Richards 1903).

[165] Ellyn S. Rosen, *The Art of the Possible: Mississippi Law Review Symposium Key Note Address*, 32 MISS. C. L. REV. 237, 245 (2013).

beneficial effect,[166] but hard data to support this conclusion did not exist, either in the District of Columbia or countries that currently allow ABSs.[167] As a result, the Commission would have found it difficult to satisfy the House's request from a decade earlier to "demonstrate[ ] that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients." The Commission ultimately cited this paucity of evidence as one of the primary reasons it decided to drop further efforts to amend Model Rule 5.4, explaining that it had "considered the pros and cons . . . and concluded that the case had not been made for proceeding even with a form of nonlawyer ownership that is more limited than the D.C. model."[168]

Notably, any proposal would have met with considerable resistance even if the Commission had been able to produce evidence that a change would benefit the public without attendant harms.[169] Indeed, the Commission learned that some members of the House of Delegates were opposed to change as a matter of principle.[170]

The opposition was so intense that it continued even after the Commission announced that it would not propose any changes in this area. The opposition centered on the Commission's ongoing study of two discrete choice of law issues relating to ABSs. The first issue, which the Commission called the "inter-firm fee division" issue,[171] was whether a lawyer in a jurisdiction that prohibited ABSs could divide a fee with a *different* law firm that happened to be structured as an ABS and located in a jurisdiction where such ABSs were permissible.[172] The Commission developed a possible proposal to amend a Comment to Model Rule 1.5 to say that such fee divisions are permissible.[173]

The second issue, which the Commission called the "intra-firm fee

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[166] *See, e.g.*, Knake, *supra* note 9, at 45 (observing that "[p]roponents of corporate law practice ownership and investment maintain that this will bring affordable representation to the general population and address the well-documented, unmet need for lawyers").

[167] *See infra* Part III.B.2.b (explaining that data is now starting to emerge, but does not support the conclusion that ABS by itself is the key to significant innovation).

[168] Press Release, Comm'n on Ethics 20/20, Am. Bar Ass'n, ABA Commission on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms (Apr. 16, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120416_news_release_re_nonlawyer_ownership_law_firms.authcheckdam.pdf, *archived at* http://perma.cc/S3J4-LZGB.

[169] Joan C. Rogers, *Speakers Debate Nonlawyers' Role in Firms at First Ethics 20/20 Commission Hearing*, 26 Laws. Man. on Prof. Conduct (ABA/BNA) 110 ABA/BNA Lawyers' Manual on Professional Conduct, 26 Law. Man. Prof. Conduct 110 (Feb. 17, 2010).

[170] *Id.*

[171] *See* Comm'n on Ethics 20/20, Am. Bar Ass'n, *Initial Draft Proposal for Comment: Choice of Law-Alternative Law Practice Structures*, A.B.A. 2 (Dec. 2, 2011), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-alps_choice_of_law_r_and_r_final.pdf, *archived at* http://perma.cc/H942-7YW5.

[172] *See id.* at 2-3.

[173] *See id.*

sharing" issue,[174] concerned the problem of a law firm with multiple offices, at least one of which was located in a jurisdiction that prohibited ABSs and at least one of which was located in a jurisdiction (such as the District of Columbia or England) that allowed ABSs and had owners who were not lawyers.[175] The Commission developed a possible proposal that would have amended a Comment to Model Rule 5.4 to say that, as a matter of choice of law principles, such fee sharing should be permissible.[176]

There was a concerted effort within the House to stop the Commission from the mere study of these two narrow choice of law issues. A group spearheaded by the Illinois State Bar Association sought to pass a resolution—Resolution 10A—that would have reaffirmed the resolution passed in 2000 in response to the MDP Commission's work, asserting that MDPs are "inconsistent with the core values of the legal profession" and that "[t]he law governing lawyers [in this area] . . . should not be revised."[177] Proponents of Resolution 10A apparently believed that the earlier resolution meant that no rule relating to "nonlawyer ownership" – even rules relating to choice of law principles concerning existing jurisdictional variations in the area – should be revised. The Report accompanying Resolution 10A revealed this objective:

> The Commission has indicated that it intends to continue its consideration of the previously recommended amendments to Model Rule 1.5 and 5.4 which if adopted would change the current policy. Because of that intention, it is imperative that the House give its guidance and unambiguous direction as to how the Commission should proceed. A reaffirmation of the existing policy will make it clear that any forthcoming proposal should meet the test of the policy reaffirmed. The proposals that have been offered for consideration have been given great public distribution encouraging the public perception that the profession is interested in allowing nonlawyers to invest in and own law firms. *The American Bar Association should wait no longer to make it clear to the public that this is not going to happen. The evils of fee sharing with nonlawyers* in jurisdictions that permit nonlawyer ownership can have the same deleterious effect on lawyer independence and control as any other fee sharing with nonlawyers. The American concept and practice of lawyer independence is as important to proclaim and advocate throughout the world as is due process and the rule of law abroad.[178]

Resolution 10A was postponed indefinitely after a hotly contested debate,[179] but the attempt to short-circuit the Commission's deliberations

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[174] *See id.* at 3.
[175] *See* Comm'n on Ethics 20/20, *supra* note 171, at 3.
[176] *See id.* at 6.
[177] *See* ILL. STATE BAR ASS'N & SENIOR LAWYERS DIV., AM. BAR ASS'N, *supra* note 163.
[178] *See id.* at 4 (emphasis added).
[179] Debra Cassens Weiss, *ABA House Postpones Resolution Reaffirming Opposition to Nonlawyer Ownership of Law Firms*, A.B.A. J. (Aug. 6, 2012),

of the modest choice of law issues related to ABSs nicely illustrates the opposition to the Commission's position in this area.[180]

The Commission ultimately decided to drop both choice of law proposals – one (the intrafirm fee sharing issue) for reasonable substantive concerns – so it is not clear how the proposals would have fared in the House. But this history strongly suggests that efforts to allow ABSs generated enormous resistance at that time.

Having said all of this, I do agree with critics who say that the Commission should have at least tried to propose some changes to the Model Rules in this area. First, there is always a chance that a modest proposal similar to the discussion draft would have succeeded. Second, even though the Commission lacked empirical data to show that such a change would have been beneficial, it could have generated useful new ideas about structuring law firms in innovative ways without any serious risks. After all, the discussion draft reflected an approach more restrictive than the one in place for more than 20 years in the District of Columbia, where there have been no reports of harm.[181] Moreover, far more permissive approaches have emerged abroad, again without any evidence of harm.[182] Third, I do not believe that such a proposal would have jeopardized the Commission's other proposals, especially if it had been offered in February 2013 after the Commission's other work already had been approved. Indeed, a much more aggressive proposal had not undermined the work of the Kutak Commission thirty years earlier. Finally, even if the proposal failed, I believe it would have prompted a useful discussion about ABSs. But again, it is highly unlikely that the Commission could have brought about any significant change at that time.

In light of these experiences, I believe that there are two ways to facilitate reform in this area. First, the ABA can encourage states to experiment with variations to their versions of Model Rule 5.4. History reveals that the ABA does not typically initiate controversial changes to

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http://www.abajournal.com/news/article/resolution_confirms_aba_stance_against_nonlawyer_ownership_of_law_firms/, *archived at* http://perma.cc/TVN8-PU6W; Minutes of the Meeting, CPR/SOC Joint Comm. on Ethics & Professionalism (Aug. 4, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/cpr_soc_minutes_08_04_12_chicago.authcheckdam.pdf, *archived at* http://perma.cc/EA7X-TPW6.

[180] Notably, the defeat of Resolution 10A did not signal support for the Commission's proposed approach to the choice of law problems. A number of people who opposed Resolution 10A went on the record to say that they were skeptical of any proposal from the Commission to address the choice of law issues and that they opposed Resolution 10A only on procedural grounds. For more background on Resolution 10A, *see* Gillers, *supra* note 31, at 396-403.

[181] *See* Letter from Jamie S. Gorelick & Michael Traynor to ABA Entities et al., *supra* note 130, at 6.

[182] LEGAL SERVS. CONSUMER PANEL, CONSUMER IMPACT REPORT 15 (2014), *available at* http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/Consumer%20Impact%20Report%203.pdf, *archived at* http://perma.cc/KCY9-XZ9T (explaining, in the U.K., "[t]here have been no major disciplinary failings by ABS firms or unusual levels of complaints in the Legal Ombudsman's published data").

the Model Rules of Professional Conduct. For example, the liberalization of the advertising rules, expanded confidentiality disclosure options when clients commit crimes and frauds, and screening for laterally hired lawyers to prevent the imputation of conflicts of interest were incorporated into the Model Rules only after numerous states had made similar changes.[183] Of course, there is some value in having a nationally uniform body of ethics rules,[184] but there are strong arguments against a rigid adherence to uniformity.[185] After all, states regularly adopt variations to the Model Rules.[186] There is no reason why states should refrain from developing variations to the rules on ABSs. The District of Columbia has experimented in this area without any adverse consequences,[187] and the State of Washington recently took a step in this direction as well.[188] Greater state-based experimentation could produce additional information about possible benefits. Taking advantage of the states as the so-called "laboratories of democracy"[189] would produce invaluable information about how useful ABSs actually are and could lead to changes in the Model Rules in the future.

The second approach is to focus reform efforts on the law of legal services. Once the law in this area is more fully developed, I believe the legal profession's resistance to ABSs will eventually wane. Lawyers will have less to fear from people who do not have a law license after those people are appropriately regulated and shown to help the public. Moreover, as professionals without a law degree play a more prominent role in the delivery of those services outside of law firms, lawyers will recognize that they have much to lose if the traditional and strict prohibitions on partnering with people who lack a law license continue. Put another way, a loosening of restrictions on ABSs – changes in the law of lawyering – will not by itself drive dramatic changes to the delivery of legal services. Rather, the reverse may be true. Liberalizing and appropriately regulating how people without a law license deliver legal and law-related services (the development of the law of legal services) will ultimately spur changes to the law of lawyering and the delivery of legal services in the United States.

In sum, there is little question that the Commission could not have

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[183] CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013 (Arthur H. Garwin ed., 2013).

[184] *See, e.g.*, Robert A. Creamer, *Uniform Legal Ethics Rules? Yes—National Norms for a National Economy*, 22 PROF. LAW., no. 2, 2014, at 29, 30-31.

[185] *See, e.g.*, Stephen Gillers, *Uniform Legal Ethics Rules? No—An Elusive Dream Not Worth the Chase*, 22 PROF. LAW., no. 2, 2014, at 33, 35-36.

[186] *See* STEPHEN GILLERS ET AL., *supra* note 128 (containing a chapter that documents the numerous variations to each Model Rule).

[187] *See* Letter from Jamie S. Gorelick & Michael Traynor to ABA Entities et al., *supra* note 130, at 6.

[188] http://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&ruleId=garpc5.09&pdf=1

[189] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

achieved bold changes in this area. Although I personally believe the Commission should have proposed at least some modest reform and that there may be ways to facilitate such changes in the future, the Commission faced resistance that was quite consistent with past efforts and revealed that the ABA's policymaking body was not prepared at that time to liberalize the rules on ABSs.

b. Limited Data the Transformative Potential of ABSs

A less intuitive and more important reason to be skeptical of the "boldness" criticism is that, at the time of the Commission's deliberations, there was far less evidence supporting the idea that ABSs will produce helpful transformative change than many proponents of ABSs have implied. For example, in a 2014 article in the American Lawyer, Professor Gillian Hadfield was quoted as saying that, "[w]hen the 20/20 Commission concluded there was no compelling need for reform [regarding ABSs], it didn't research the public interest. . . . The only research it did was to survey lawyers and ask them if they wanted rule changes. That's not defensible."[190]

Hadfield's quote reflects a misunderstanding of the Commission's process and the actual evidence it sought. The Commission engaged in a significant effort to try to uncover empirical data on this subject, an effort that was ably led by Professor Paul Paton (now the Dean of the University of Alberta School of Law). Paton was the Commission reporter who had primary responsibility for this area, and importantly, he was a proponent of change.[191] He and the Commission's lead counsel, Ellyn Rosen (now the Deputy Director of the ABA Center for Professional Responsibility), searched for empirical or experiential evidence from the U.K., Australia, and the District of Columbia regarding public benefits from ABSs. They found little to none.[192] This is not to suggest that ABSs will not ultimately be helpful, but it is inaccurate to suggest that the Commission did not try to uncover the evidence about how ABSs might affect the public interest.

Significantly, preliminary data from abroad has been released since the Commission finished its work, and it suggests that the effects of change in this area may not be the panacea that proponents of ABS make it out to be. For example, early evidence from the U.K. suggests that alternative business structures (ABS) have not yet had a significant effect on how legal services are delivered there. The U.K. authorized ABSs in

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[190] *See* Susan Beck, *Emerging Technology Shapes Future of Law*, AM. LAW. (Aug. 4, 2014), http://www.americanlawyer.com/id=1202664266769/Emerging-Technology-Shapes-Future-of-Law, *archived at* http://perma.cc/3HAR-F2GB; *see also* Hadfield, *supra* note 9, at 44 (making a similar observation).

[191] *See* Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 FORDHAM L. REV. 2193, 2194 (2010) (arguing that the Commission's discussion of MDP was "essential" to refute the contention that the profession is inherently protectionist).

[192] *See* Letter from Jamie S. Gorelick & Michael Traynor to ABA Entities et al., *supra* note 130, at 6-8.

2007 (by statute) and has allowed firms to register as an ABS since 2012.[193] As of January 2015, approximately 350 firms had taken advantage of the opportunity,[194] and there is limited evidence that these entities have appreciably changed the legal services market in the U.K.[195] A 2013 survey reveals that 77% of entities registering as an ABS had not changed how they marketed themselves after becoming an ABS;[196] 91% had not changed their target client base;[197] and 83% had not changed their practice areas.[198] When asked how they differ from firms that are not an ABS, 41% said that they did not differ at all.[199] Only 22% said that being an ABS enabled them to be more competitively priced.[200]

Drawing on this data, Robert Cross, a member of the U.K. Legal Services Board, concluded in June 2014 that "[v]ery little has changed as far as the types of services they provide or whom they provide them to. The answer whether the ABS revolution has driven change would appear to be no."[201] He believes that recent innovations in the U.K. are not the result of ABS, but rather a product of broader and largely unrelated economic trends, such as technology and globalization.[202] A recent Consumer Impact Report reaches a similar conclusion, asserting that there have been "[m]any examples of innovation following the liberalisation measures, although no single transformative change [has occurred] and MDPs are yet to take off as has been hoped."[203] Of course, these results are very preliminary and may change considerably over time, especially if ABS licenses are granted more liberally,[204] but there is currently little evidence supporting the conclusion that ABSs are having a transformative effect on the delivery of legal services in the U.K.[205] And to the extent

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[193] *See supra* notes 11, 38-39 and accompanying text.

[194] *See Register of Licensed Bodies (ABS)*, SOLICITORS REGULATION AUTH., http://www.sra.org.uk/solicitors/firm-based-authorisation/abs/abs-search.page (last visited Feb. 1, 2015); *see also* LEGAL SERVS. CONSUMER PANEL, *supra* note 182, at 14 (noting that "there has been frustration about the take up of ABS, particularly the small numbers of multi-disciplinary practices").

[195] *See* LEGAL SERVS. CONSUMER PANEL, *supra* note 182, at 14.

[196] *See* LEGAL SERVS. BD., EVALUATION: CHANGES IN COMPETITION IN DIFFERENT LEGAL MARKETS: AN EMPIRICAL ANALYSIS 55 (2013), *available at* https://research.legalservicesboard.org.uk/wp-content/media/Changes-in-competition-in-market-segments-ANNEX.pdf, *archived at* https://perma.cc/A83C-E5HA.

[197] *See id.* at 56.

[198] *See id.*

[199] *See id.* at 58.

[200] *See* LEGAL SERVS. BD., *supra* note 196, at 58.

[201] Robert Cross, Research Manager, Legal Servs. Bd., Presentation at UCL International Access to Justice Conference: Balancing Regulatory Risk 20 (June 20, 2014), *available at* https://research.legalservicesboard.org.uk/wp-content/media/UCL-AtoJ-Conference-presentation-20-June-2014.pdf, *archived at* https://perma.cc/GX44-AJ6J.

[202] *See id*. at 21.

[203] LEGAL SERVS. CONSUMER PANEL, *supra* note 182, at 5.

[204] *See id.* at 10 (explaining that "[t]here have been concerns about the [U.K. Solicitors Regulation Authority's] licensing process holding back new entrants, particularly multi-disciplinary practices").

[205] *See* Noel Semple, *Access to Justice: Is Legal Services Regulation Blocking the Path*, 20 INT'L J. LEGAL PROFESSION 267 (2013); *see also* LEGAL SERVS. BD., *supra* note 196,

ABSs are having a significant effect, those effects appear to be disproportionately benefiting business clients, not ordinary consumers.[206]

The Law Society of Upper Canada recently released a report that raises a similar cautionary note.[207] It cites the testimony of scholars who conducted an economic analysis of ABS and concluded that "the introduction of the ABS model should facilitate innovation, but would not cause dramatic change to the way in which legal services are provided in Ontario."[208] Indeed, the authors of that study explain that "[e]xperience in the UK and Australia suggests that liberalization does invite change, although the pace of change appears to be much more evolutionary than revolutionary, at least to date."[209]

A research fellow at Harvard Law School recently reached the same conclusion. He conducted "the most extensive empirical investigation to date on the impact of non-lawyer ownership by focusing on its effects on civil legal services for poor and moderate-income populations."[210] He found that, "perhaps counter-intuitively, there is little evidence from the country and case studies to indicate that [ABSs] substantially improved access to civil legal services for poor to moderate-income populations."[211] The author posits four possible reasons for this conclusion:

> First, persons in need of civil legal services frequently have few resources and so it is unlikely that the market will provide them these services even where non-lawyer ownership is allowed. . . .
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> Second, many of the legal sectors, like personal injury and social security disability representation, that have seen the greatest investment by non-lawyers will likely not see corresponding increases in access. In these sectors clients are less sensitive to cost considerations since their lawyers are largely paid through conditional or contingency fees or by insurance companies. . . .
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> Third, non-lawyer investment may not take place in some areas of the legal market because many legal services may not be easy

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at 82.

[206] *See* LEGAL SERVS. BD., *supra* note 196, at 6.

[207] Alt. Bus. Structures Working Grp., Law Soc'y of Upper Can., *Alternative Business Structures and the Legal Profession in Ontario: A Discussion Paper*, L. SOC'Y UPPER CAN. 14, http://www.lsuc.on.ca/uploadedFiles/abs-discussion-paper.pdf (last visited Feb. 1, 2015), *archived at* http://perma.cc/6BKY-ACJ3.

[208] *Id*.

[209] Edward M. Iacobucci & Michael J. Trebilcock, *An Economic Analysis of Alternative Business Structures for the Practice of Law*, L. SOC'Y UPPER CAN. 59-60 (Sept. 20, 2013), http://www.lsuc.on.ca/uploadedFiles/ABS-report-Iacobucci-Trebilcock-september-2014.pdf, *archived at* http://perma.cc/L86X-77PF; *see also* Malcolm Mercer, *A Different Take on ABS—Proponents and Opponents Both Miss the Point*, SLAW (Oct. 31, 2014), http://www.slaw.ca/2014/10/31/a-different-take-on-abs-proponents-and-opponents-both-miss-the-point/, *archived at* http://perma.cc/EU2N-WNWV.

[210] Nick Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Ownership of Legal Services, Access, and Professionalism* 4 (Harvard Law Sch. Program on the Legal Profession, Research Paper No. 2014-20, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487878&download=yes.

[211] *Id*. at 40.

> to standardize or scale. . . .
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> Finally, some persons who could benefit from legal services may be resistant to purchasing them, even if they have ability to do so, either because they do not believe they need a legal service or there are cultural or psychological barriers to accessing the service.[212]

The idea that ABS does not drive transformative change is consistent with developments in the United States, where there has been considerable innovation throughout the legal industry despite the absence of ABS. These innovations have emerged from startups that offer automated document assembly, expert systems, e-discovery services, legal process outsourcing, online law practice management tools, data analytics, among other services.[213] In other words, significant innovations are simply taking place outside of law firms altogether and (as Mr. Cross suggested) are being driven by extant trends, such as rapid advanced in technology and globalization, not ABSs.[214]

This background suggests that, rather than focusing so fixedly on ABS as the key to unlocking transformative change, it may be more useful to develop regulations that facilitate but appropriately regulate the involvement of more people who do not have a law license in the delivery of legal services. Of course, these two reform options are not mutually exclusive, but if regulatory reform efforts focus on ABS alone, I believe we will overlook reforms that could produce even more useful changes.

In sum, the Commission can hardly be faulted for failing to produce "bold" reforms, because the law of lawyering is ultimately a poor vehicle for transforming the delivery of legal services. Although ABSs are a possible exception, I believe that bold regulatory reform requires us to think outside the law of lawyering box. We need a law of legal services that can liberate but appropriately regulate new players.

IV. TOWARDS THE LAW OF LEGAL SERVICES

To this point, I have argued that the law of lawyering does not offer significant reform options and that a more promising way to promote innovation is through the development of a parallel regulatory framework that permits, but appropriately regulates, greater involvement in the delivery of legal services by people who do not have a law license.[215]

This new framework is important for two reasons. First, people

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[212] *Id.* at 40-41 (internal footnotes omitted).

[213] *See generally* SUSSKIND, *supra* note 60 (offering an overview of a range of new legal industry providers).

[214] *See* LEGAL SERVS. CONSUMER PANEL, *supra* note 182, at 14 (noting that "it is difficult to separate the impact of the [U.K.'s] competition reforms from other drivers of change such as economic conditions, changes to legal aid availability and litigation funding reforms").

[215] I am not the first person to make the argument for pairing liberalization and regulation in the legal services industry. *See, e.g.*, RICHARD SUSSKIND, *supra* note 60; Gillers, *supra* note 31, at 415 (making a similar suggestion); Rhode & Ricca, *supra* note 20, at 2607-08.

without a law degree are playing an increasingly valuable and pervasive role in the delivery of legal and law-related services outside of law firms and ABSs.[216] Examples include automated document assembly services, expert systems, electronic discovery, and legal process outsourcing. Labeling these services as the unauthorized practice of law does not make good policy sense and is in many cases inaccurate, but permitting all of them to operate without any regulatory oversight is also potentially problematic, particularly with regard to consumer facing services. It is thus becoming more important to consider the possibility of regulation where it is needed while ensuring that these new services can flourish and meet marketplace demands. In other words, it is more necessary today than it was just a couple of decades ago to develop a coherent body of law addressing the role that people without a law license play in the legal industry.

Second, states have begun to experiment with the law governing other legal service providers in ways that extend well beyond mere liberalizations of unauthorized practice provisions. For example, Washington State's LLLTs are not lawyers, but they can deliver some kinds of legal services and advice after obtaining specialized training and licensing.[217] Additional states are considering similar innovations.[218]

These developments suggest that we need to think more holistically about the regulation of legal and law-related services and not focus so exclusively on the law of lawyering. That is, we need to develop a system that falls somewhere between the U.K. approach, where people who lack a law license are afforded considerable freedom to operate without any regulatory oversight, and the United States, where such individuals are often forbidden to engage in many kinds of law-related work or challenged if they do.

A. A Flawed Approach: Trying to Define the "Practice of Law"

When developing the law in this area, it is important to avoid the Siren call of defining the "practice of law." Such efforts typically result in a division of the world into two groups – those who "practice law" and those who do not. Those who practice law are required to be lawyers, and those who do not are largely free of any direct regulation or oversight.

There are at least two problems with this binary approach. First, we do not always need to choose between highly regulated lawyers and completely unregulated "others." It is possible to have a third group who can deliver legal and law-related services and advice while being subject to appropriate training and licensing. These kinds of innovations are not

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[216] *See* CBA Futures Report, *supra* note 40, at 19.

[217] *See infra* Part IV.D.2.

[218] *See* Robert Ambrogi, *Washington State Moves Around UPL, Using Legal Technicians to Help Close the Justice Gap*, A.B.A. J. (Jan. 1, 2015), http://www.abajournal.com/magazine/article/washington_state_moves_around_upl_using_legal_technicians_to_help_close_the/, *archived at* http://perma.cc/6ZMZ-26CS.

possible, or at least made more difficult, if the definition of "law practice" is the sole focus of attention.

A second and related problem is the intractability of defining the "practice of law." Numerous scholars have observed that existing definitions are vague and not much more helpful than the standard for defining obscenity: we know it when we see it.[219] Courts have acknowledged the "impossibility" of defining law practice,[220] and in 2003, an ABA Task Force on the Model Definition of the Practice of Law concluded that it could do no better, effectively giving up on the effort and suggesting that states should come up with their own definitions.[221] Moreover, some efforts to define the practice of law could implicate antitrust and related concerns.[222]

B. A Better Approach: Defining Who Should be Authorized

Rather than trying to define the practice of law, we should ask a fundamentally different question: should someone without a law degree be "authorized" to provide a particular service, even if it might be the "practice of law"? By focusing attention on whether the provider is competent to deliver a service, we can more effectively achieve what really matters: protecting the public.

Consider, for example, the work of accountants. An accountant arguably "practices law" under many plausible definitions of "law practice." Accountants analyze various features of tax law and make customized recommendations to clients based on their particular circumstances. [223] Accountants also produce a wide array of documents for clients that have important legal implications (e.g., tax returns). The reason that accountants are permitted to do their work without a law degree has nothing to do with the definition of "law practice." Rather,

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[219] *See supra* note 30.

[220] *See, e.g.*, Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. Civ.A. 3:97CV-2859H, 1999 WL 47235, at *4 (N.D. Tex. Jan. 22, 1999), *vacated and remanded*, 179 F.3d 956 (5th Cir. 1999); Bd. of Comm'rs of the Utah State Bar v. Petersen, 937 P.2d 1263, 1268 (Utah 1997).

[221] TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, AM. BAR ASS'N, REPORT (2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/taskforce_rpt_803.pdf, *archived at* http://perma.cc/PV25-L82K; TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, AM. BAR ASS'N ET AL., REPORT TO THE HOUSE OF DELEGATES (2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/recomm.pdf, *archived at* http://perma.cc/NX47-ZTZZ.

[222] Letter from R. Hewitt Pate, Acting Assistant Attorney Gen., Dept. of Justice, et al., to Task Force on the Model Definition of the Practice of Law, Am. Bar. Ass'n, Comments on the American Bar Association's Proposed Model Definition of the Practice of Law (Dec. 20, 2002), *available at* http://www.usdoj.gov/atr/public/comments/200604.htm, *archived at* http://perma.cc/9PJE-5RWC.

[223] CBA Futures Report, *supra* note 40, at 19 (noting that accountants, financial planners, and human resources professionals all "offer guidance and advice to their clients about rights and entitlements").

accountants are permitted to provide their services without a law degree because the public benefits from it.[224] Put another way, accountants are appropriately "authorized" through an extensive licensing regime that ultimately benefits (and protects) the public.[225] Financial planners and other kinds of licensed professionals are similar in this regard.[226]

The idea of rejecting a formal definition of the "practice of law" and focusing instead on whether a provider should be authorized to deliver a service (whether or not it is the "practice of law") is not new. The New Jersey Supreme Court has made the point this way:

> [Authorities] consistently reflect the conclusion that the determination of whether someone should be permitted to engage in conduct that is arguably the practice of law is governed not by attempting to apply some definition of what constitutes that practice, but rather by asking *whether the public interest is disserved* by permitting such conduct. The resolution of the question is determined by *practical, not theoretical*, considerations; the public interest is weighed by analyzing the competing policies and interests that may be involved in the case . . . .[227]

According to this view, we should ask whether the public's interests will be served by permitting someone without a law degree to provide a particular service (whether or not it is the practice of law) and, if so, determining what kinds of oversight or licensing might be necessary.[228] The challenge, of course, is figuring out what the public's interests actually are and (as the New Jersey Supreme Court suggests) identifying and "analyzing the competing policies and interests" at stake.

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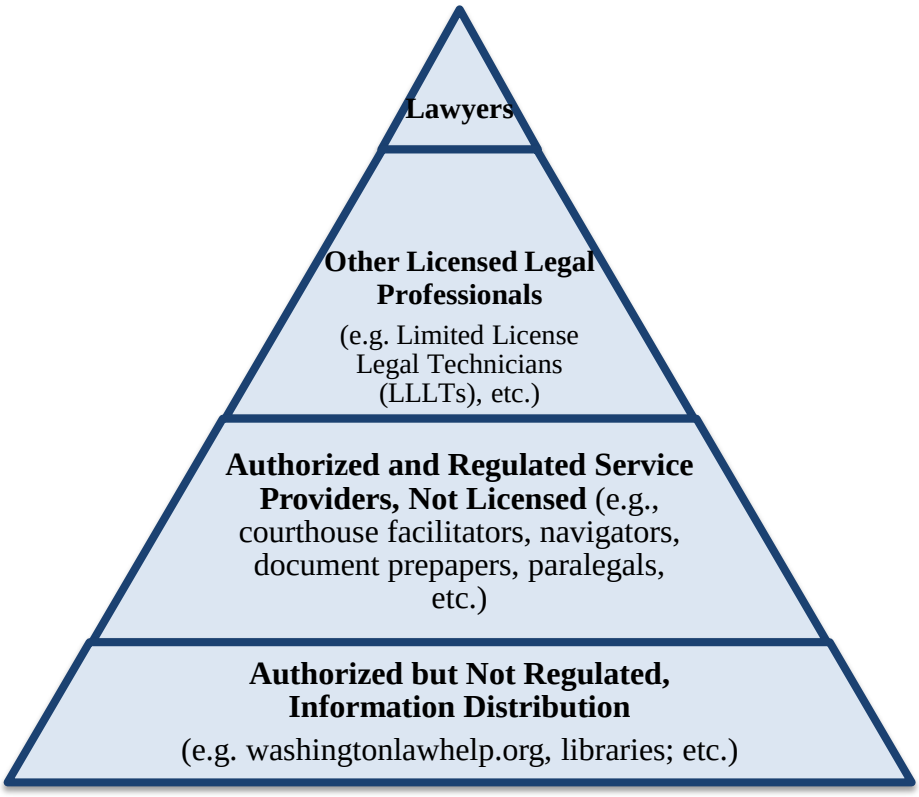
[224] *See, e.g.*, Rhode, *Professionalism in Perspective*, *supra* note 30, at 714.
[225] *See id.*
[226] *See id.*
[227] *In re* Opinion 33 of the Comm. on the Unauthorized Practice of Law, 733 A.2d 478, 484 (N.J. 1999) (emphases added) (quoting *In re* Opinion No. 26 of the Comm. on the Unauthorized Practice of Law, 654 A.2d 1344, 1352 (N.J. 1995)).
[228] Other professions adopt a similar approach. For instance, in the medical profession, people other than doctors provide a growing range of medical-related services. The growth and state approval of pharmacy clinics staffed by people who are not doctors is one example.



This pyramid reflects one way to think about the question.[229] The bottom of the pyramid captures very routine law-related needs (e.g., the creation of a living will) that can be addressed by completing blank forms. Regulatory barriers should not prohibit people from making these forms available to the public through websites or otherwise. But as consumers' legal issues become more sophisticated, consumers typically need providers higher up on the pyramid. A central question for the law of legal service is this: at what point must a provider be subject to some kind of regulation?

C. Identifying Principles for the Law of Legal Services

The following is a non-exclusive list of possible policies and interests that may be useful to consider when answering this important question. This list is certainly not the first attempt to define "regulatory objectives." Bar associations and scholars have tried to do the same, and the list below is informed by those efforts.[230]

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[229] I am grateful to Paula Littlewood for conceptualizing the issue this way and creating a slightly different version of this pyramid.

[230] *See, e.g.*, *Legal Profession Uniform Law Application Bill 2014* (NSW) (Austl.), *available at* http://www.parliament.nsw.gov.au/prod/parlment/NSWBills.nsf/1d436d3c74a9e047ca256e690001d75b/07eb41c6b04dca11ca257ca600183bba/$FILE/b2013-122-d11-House.pdf, *archived at* http://perma.cc/DJH2-ZDQL; Legal Services Act, 2007, c. 29 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2007/29/pdfs/ukpga_20070029_en.pdf, *archived at* http://perma.cc/V6RA-QCYP; Gillers, *supra* note 31, at 371-74; Laurel S.

To be clear, these considerations do not always point in one direction. In some cases, they suggest that additional oversight or regulation of might be necessary where it is currently absent. In other cases, they suggest that we should permit people who do not have a law license (or technology-enabled tools developed by such people) to deliver more legal and law-related services than is currently allowed, but with appropriate regulatory oversight. By identifying a list of relevant considerations, we can more effectively determine who should be permitted to provide legal and law-related services and the extent to which those who are so permitted should be subject to regulation.

1. Competence

The public has an obvious interest in ensuring that legal and law-related services are competently delivered. The goal is to figure out which services require a formal legal education (i.e., a J.D.), which services could be performed competently with training short of a law degree, and which ones do not need any specialized training at all.

The question here is not whether people without a law degree can perform a service as well as a lawyer, though there is evidence that they can.[231] The focus should be on whether a particular service can be performed competently by someone who does not have a traditional law license, not who can perform the service the *best*. After all, even when services must be performed by lawyers, we have never concluded that only the most skilled lawyers must handle a matter. The touchstone should be competence.[232]

Terry, *Why Your Jurisdiction Should Consider Jumping on the Regulatory Objectives Bandwagon*, 22 PROF. LAW., no. 1, 2013, at 28; Laurel S. Terry et al., *Adopting Regulatory Objectives for the Legal Profession*, 80 FORDHAM L. REV. 2685 (2012); *Consultation on Proposed Regulatory Objectives—Your Input is Requested*, N.S. BARRISTERS' SOC'Y (June 24, 2014), http://nsbs.org/sites/default/files/ftp/InForumPDFs/2014-07-07_ConsultationPartI&II.pdf, *archived at* http://perma.cc/9Y4A-7HNP; *Draft Regulatory Objectives—2014-05-16*, N.S. BARRISTERS' SOC'Y (May 16, 2014), http://nsbs.org/sites/default/files/ftp/InForumPDFs/2014-05-16_DraftRegObj_CouncilReview.pdf, *archived at* http://perma.cc/8UKP-84AL; Ethics & Prof'l Responsibility Comm., Can. Bar Ass'n, *Assessing Ethical Infrastructure in Your Law Firm: A Practical Guide*, CAN. B. ASS'N, http://www.cba.org/CBA/activities/pdf/ethicalinfrastructureguide-e.pdf (last visited Feb. 2, 2015), *archived at* http://perma.cc/8BPS-SEAX; *Regulation of Legal Services in England and Wales: Law Society Response*, THE LAW SOC'Y (Sept. 2, 2013), http://lawsociety.org.uk/representation/policy-discussion/regulation-of-legal-services/, *archived at* http://perma.cc/YZ3G-4VWP.

[231] RHODE, *supra* note 4, at 15 (explaining that "research concerning nonlawyer specialists in other countries and in American administrative tribunals suggests that these individuals are generally at least as qualified as lawyers to provide assistance on routine matters where legal needs are greatest"); Levin, *supra* note 8, at 2614; Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 WASH. U. J.L. & POL'Y 47, 58-59 (2003); Rhode, *Professionalism in Perspective*, *supra* note 30, at 709; Rhode, *The Delivery of Legal Services*, *supra* note 30, at 214 n.49.

[232] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013).

Another reason to avoid comparing the skills of lawyers and "others" is that it is often a false choice. A significant percentage of the public does not have the ability to pay for a lawyer,[233] so even if lawyers might be able to perform some tasks more effectively than someone without a law degree, the choice for many people is between a person who lacks a law license and no help at all. The ultimate question, therefore, should be whether people who do not have licenses are capable of competently providing assistance in a particular area, not whether lawyers are necessarily better.

Undoubtedly, there will be disagreement about who is competent to provide a particular service. Experimentation outside the U.S. (such as in the U.K., where very few services are reserved for lawyers) might provide useful insights, but data is often going to be lacking. Moreover, even if there is general agreement that people are *capable* of providing a specific service competently without a law license, there may be disagreement about the likelihood that such people actually provide that service competently and whether (and how) the public needs to be protected against the risk of incompetence. There also may be deep disagreement about how certain we need to be that the legal or law-related service can be performed competently by people who do not have a traditional law license. And even when our confidence level is high, we might still disagree about the extent to which regulation or oversight is necessary to provide the sufficient level of comfort.

In the absence of hard data (e.g., from abroad or from U.S. jurisdictions that already experiment in this area, such as Washington State), it is generally fair to say that the more standardized and repeatable the service, the more likely it is that a person without a law degree should be able to perform it competently, perhaps with some training or regulatory oversight. For example, technology-assisted tools, such as automated document assembly tools and expert systems, can reduce the likelihood of errors by making some services (e.g., the incorporation of a business) highly standardized. Other services may be highly standardized because of how routinely they can be performed (e.g., some areas of domestic relations law),[234] even in the absence of technology. The bottom line is that regulators need to consider the likelihood that a person without can competently deliver a particular service by examining available data (if any), the level of training needed to deliver the service, whether any regulation or oversight is necessary to provide the necessary assurance of competence, and the extent to which the process required for delivering the service is highly standardized and easily repeatable.

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[233] *See, e.g.*, LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1 (2009), *available at* http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf, *archived at* http://perma.cc/S668-66T6.

[234] *See, e.g.*, WASH. SUP. CT. R.: R. GEN. APPLICATION: ADMISSION & PRACTICE R. 28 app. (2013).

2. Free Markets and Consumer Choice (and Some Limits)

When the competence factor cannot be clearly resolved, regulators should generally defer to the market by allowing people to make their own choices. The public has a strong interest in freely choosing service providers and taking into account any number of relevant considerations, such as cost, the provider's training and experience, and consumer reviews.

On the other hand, markets can fail, and there are at least two ways they could fail in this context. First, the public is not always going to be able to assess the risk of choosing someone who does not have a law license, because many kinds of legal and law-related services are "credence goods" – services whose quality is difficult to measure or assess.[235] For example, the ordinary consumer can have a difficult time assessing whether some kinds of transactional document are well drafted and address a reasonable range of contingencies or existing law. If the public has difficulty assessing how well a service is performed, there is a greater need for regulation (though not necessarily a need to use lawyers; people who are not lawyers could be subject to rigorous licensing and regulation). In contrast, if the quality of the service can be readily determined or if the service is delivered to sophisticated clients (e.g., large companies), these kinds of concerns are less likely to arise.

Another possible problem is that a completely free market could have externalities in certain situations. For instance, if someone who is not a lawyer is permitted to represent people in court without any regulatory oversight or licensing, that person could act in ways that adversely affect third parties or the administration of justice (e.g., asserting frivolous claims).

The point here is that freedom of choice is an important consideration, but regulators also need to consider the extent to which the public can reasonably assess the quality of the services, the extent to which regulations could address any problems with such assessments, the existence of reasonably likely and significant externalities, and whether any regulatory remedies exist to address these possible externalities (e.g., a licensing system that increases the likelihood of quality and provides an administrative remedy for improper conduct).

3. Informed Consumer Choice

Regulators have an interest in ensuring that the public has sufficient and accurate information to make an informed choice about whether to use a particular provider. The needed transparency could take a number of forms. For example, regulators could require people who are not lawyers to prominently disclose their status (i.e., that they are not lawyers and are not a law firm), obtain affirmations from consumers that they understand that the service is not being delivered by a law firm and that a lawyer or

[235] *See* Hadfield, *supra* note 9, at 48 (making a similar observation).

law firm might be preferable in certain situations, disclosing the extent to which a lawyer has been involved in the creation or delivery of the service (and the identity and licensing jurisdiction of any such lawyers), and the implications for protections that might otherwise attach (e.g., the attorney-client privilege, the work product doctrine, the duty of confidentiality). Regulators also could require all advertising materials to satisfy the same standard lawyers follow under Model Rule 7.1 – i.e., advertising must be truthful and not misleading.[236]

The particular requirements will necessarily vary depending on the service and type of provider, but if consumers are given a greater range of options for obtaining legal services, it is reasonable to insist that consumers also have access to adequate information to make an informed choice.

4. Accessibility and Availability of Remedies for Incompetence

No matter who performs a legal or law-related service, there is a possibility it will be performed incompetently. In such cases, consumers deserve access to appropriate remedies. For licensed professionals, remedies are readily available through discipline or disbarment. When the provider is not licensed, however, other options may be necessary.

One possibility is litigation. To make this remedy realistic, regulators may need to require some service providers to carry insurance, prohibit them from disclaiming liability (e.g., in a "click through" agreement), or restrict the use of contractual provisions making litigation excessively difficult (e.g., provisions that require arbitration in some distant location or the application of the substantive law of a jurisdiction having nothing to do with the work done). These requirements can help to mitigate some of the concerns about giving the public the freedom to choose non-traditional providers.

One problem is that litigation is not always an available remedy. For example, if someone uses an automated document assembly service to create a will and it turns out to have been negligently created (e.g., it did not reflect important features of state law), the negligence might not be discovered until many years later, perhaps long after the company responsible for the service ceases to exist. Insurance requirements may help to address these kinds of concerns, but the point is that litigation is not a panacea.

The insufficiency of litigation in some contexts does not mean that the public should have to use lawyers. After all, if a lawyer drafts a will incompetently, similar problems can arise. The lawyer or firm responsible for the will may be long gone by the time any negligence is discovered, or the lawyer may not have carried sufficient (or any) malpractice insurance.[237] The point is that after-the-fact negligence lawsuits do not

[236] MODEL RULES OF PROF'L CONDUCT R. 7.1.

[237] Only one state—Oregon—requires lawyers to carry malpractice insurance, *see*

always offer an adequate remedy for incompetence. In these situations, regulators might reasonably conclude that some kind of licensing should be required so that discipline (including the loss of the license) is an available remedy and an additional incentive to ensure competence.

5. Addressing Other Forms of Misconduct

Even if providers of legal services are competent, they may engage in conduct that harms their clients, third parties, or the justice system. For example, if people who are not lawyers are permitted to represent clients in some types of civil cases, we would want to ensure that they follow the same kinds of rules as lawyers, such as rules prohibiting the filing of frivolous claims,[238] making false statements to the court,[239] and communicating with represented people.[240] Lawyers are subject to discipline and court sanctions for violating these rules, and regulators should ensure that, in some contexts, mechanisms exist to sanction any other advocates who engage in similar misconduct. This oversight might require the use of a licensing system that facilitates discipline or the loss of a license in appropriate cases. In other contexts, it might be sufficient to allow for monetary penalties. The point here is that regulators should consider whether mechanisms are needed to prevent or address misconduct that is not remediable through litigation.

6. Faith in the Justice System and the Rule of Law

Democratic societies require a widely shared commitment to the rule of law and faith in the system of justice.[241] In some cases, these goals can

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Standing Comm. on Client Protection, Am. Bar Ass'n, *State Implementation of ABA* Model Court Rule on Insurance Disclosure, A.B.A. 8 (Oct. 16, 2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_implementation_of_mcrid.pdf, *archived at* http://perma.cc/G9Z7-J349, and a not insignificant percentage of lawyers carry no malpractice coverage, *see* Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 549-50 (1994) (concluding "[a] significant number of lawyers, especially those struggling to make a living in handling small matters for individual clients, have neither malpractice coverage nor substantial personal assets that could be called upon to satisfy a malpractice judgment"); James M. Fischer, *External Control Over the American Bar*, 19 Geo. J. Legal Ethics 59, 90-91 (2006) (citing a study suggesting that between 25% and 55% of the bar has no malpractice insurance but contending that the statistics may be overstated); Ron Smith, *Task Force Suggests Malpractice Insurance Plan*, J. KAN. B. ASS'N, Apr. 1999, at 3 Journal of the Kansas Bar Ass'n, 68-APR J. Kan. B.A. 3 (1999) (stating that about 35% of Kansas lawyers have no malpractice insurance).

[238] *See* FED. R. CIV. P. 11; MODEL RULES OF PROF'L CONDUCT R. 3.1 (2013).

[239] *See* MODEL RULES OF PROF'L CONDUCT R. 3.3.

[240] *See id.* R. 4.2.

[241] *See generally* THE RULE OF LAW: NOMOS XXXVI (Ian Shapiro ed., 1994) (exploring the relationship between democracy and the rule of law); *see also* STEPHEN MAYSON, LEGAL SERVS. INST., LEGAL SERVICES REGULATION AND 'THE PUBLIC INTERETS' 11 (2011), *available at* http://stephenmayson.files.wordpress.com/2013/08/mayson-2013-legal-services-regulation-and-the-public-interest.pdf, *archived at* http://perma.cc/34JZ-

be more effectively achieved by requiring the use of – and assuring a right to – a lawyer. For example, even if a properly trained person who is not a lawyer could offer the same service as a lawyer in the criminal defense context, the Constitution wisely grants a right to counsel.[242] Without it, a fundamental feature of our system of justice could be legitimately called into question.[243]

It is not possible to address here the much larger debate about the civil *Gideon* movement, including which legal services should be provided as a matter of right,[244] though the meager government support for legal services is a significant problem that needs to be addressed.[245] The point here is that regulators should consider the importance of a particular service when deciding whether to grant a right to it, and if so, whether a lawyer should be the one to provide it. Moreover, assuming a service is not provided as of right, regulators need to consider the extent to which allowing people who are not lawyers to deliver the service will improve access to that service and enhance faith in social institutions by (for example) making the service more affordable and accessible.

7. Professional Independence and Other Client-Related Protections

Some raise the concern that people who are not lawyers cannot offer clients the same protections as lawyers. For example, people who are not lawyers are not bound by the rules of professional conduct, and communications are not necessarily covered by the attorney-client privilege.[246] It is also argued that, in the absence of a law license, people will not exercise professional independence and will cut corners in order to increase profits at the expense of protecting clients.[247]

8C5B (making a similar observation in the context of articulating regulatory objectives).

[242] U.S. CONST. amend. VI.

[243] Laura I. Appleman, *The Community Right to Counsel*, 17 BERKELEY J. CRIM. L. 1, 2 (2012) (tracing the history of the right to counsel and concluding that "counsel privileges were at least partially intended to stabilize the social order and reinforce community interests").

[244] *See* Rebecca Aviel, *Why Civil* Gideon *Won't Fix Family Law*, 122 YALE L.J. 2106 (2013). *Compare* Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 503-06 (1998) (summarizing the arguments in favor of expanding the right to counsel), *with* D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2121 (2012) (offering empirical data that raises the question of whether a right to counsel actually makes a difference in terms of outcomes and exploring the implications for the civil *Gideon* movement).

[245] *See* Gillian K. Hadfield, *Innovating To Improve Access: Changing the Way Courts Regulate Legal Markets*, J. AM. ACAD. ARTS & SCI., Summer 2014, at 83.

[246] *See, e.g.*, ILL. STATE BAR ASS'N, REPORT: RESOLUTION 10A, *supra* note 163, at 1; Lawrence J. Fox, *MDP Redux—Slay the Dragon Again . . . Now!*, A.B.A. 1 (2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/fox_alpsdiscussiondraft.authcheckdam.pdf, *archived at* http://perma.cc/ML2U-YF3L.

[247] *See* ILL. STATE BAR ASS'N, REPORT: RESOLUTION 10A, *supra* note 163, at 1.

When evaluating these concerns, regulators should consider three points. First, some of these concerns apply equally well to lawyers. For instance, lawyers already have an incentive to prioritize profits over client needs. Lawyers who charge flat fees can make more money if they cut corners.[248] Lawyers who charge contingent fees have an incentive to settle a case before spending a substantial amount of money on trial preparation, even if the client might recover more money by going to trial.[249] And lawyers who bill by the hour regularly spend more time than is necessary to solve a client's problems.[250] In other words, lawyers are also susceptible to the pressures of increased profits at a client's expense.

Second, regulators could address many of the disparities between lawyers and other professionals with regard to client protections. For example, it is possible to impose confidentiality obligations on other providers in contexts where they handle particularly sensitive information.[251] Similarly, the attorney-client privilege could be extended to include other licensed legal professionals, as has been done in Washington State.[252] Or rules could preserve professional independence by prohibiting these other professionals from taking instructions from anyone other than clients.[253]

Finally, to the extent that lawyers are able to offer clients more protections in certain contexts does not mean that clients should be *forced* to hire lawyers to solve legal and law-related problems. If someone who is not a lawyer is competent and conflict-free and if clients are made reasonably aware of the risks of selecting that person, the public should be given a choice of providers.

D. Illustrating the Law of Legal Services

To see how the regulatory objectives described above could be used to develop a more robust law of legal services, it is useful to consider two distinct groups of providers: those who are currently offering legal and law-related services and those who could be if they were so authorized.

1. Approaches to Existing Market Actors: Automated Document Assembly as an Example

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[248] *See, e.g.*, Susan P. Shapiro, *Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 LAW & SOC. INQUIRY 87, 118-119 (2003).

[249] *See* GEOFFREY C. HAZARD, JR. ET AL., *supra* note 29, at 799-800 (summarizing the ways in which a lawyer's and client's interests are not necessarily aligned when using contingent fees).

[250] *See generally id.* at 789-91 (summarizing the literature on billable hour fraud and fee padding); Douglas R. Richmond, *For a Few Dollars More: The Perplexing Problems of Unethical Billing Practices by Lawyers*, 60 S.C. L. REV. 63 (2008) (offering an overview of the problem and citing numerous authorities documenting the problem).

[251] *See* WASH. CT. R.: GEN. RULES R. 31.1.

[252] *See* WASH. SUP. CT. R.: R. GEN. APPLICATION: ADMISSION & PRACTICE R. 28. Ct. Admission to Practice Rule 28(k)(3) (2013) (extending attorney-client privilege to LLLTs).

[253] *See supra* note 251, at R. 5.4.

The number of people who are not lawyers and are already involved in the delivery of legal or law-related services is growing rapidly. They provide automated legal document assembly for consumers,[254] law firms, and corporate counsel;[255] expert systems that address legal issues through a series of branching questions and answers;[256] electronic discovery; legal process outsourcing;[257] legal process insourcing and design;[258] legal project management and process improvement; knowledge management;[259] online dispute resolution;[260] data analytics;[261] and many other services.[262] This section explores automated legal document assembly in detail, but the overarching question for all of these new providers is the same: whether they should be subject to regulation or oversight and, if so, what any such regulations should look like.

Some background principles should guide the discussion. First, regulations are more likely to be necessary when a service is offered directly to the public. When a service is purchased or used by lawyers, such as when a lawyer uses an electronic discovery service, indirect regulatory oversight already exists. Lawyers have an ethical responsibility

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[254] *See, e.g.*, *Our Products & Services*, LEGALZOOM, http://www.legalzoom.com/products-and-services.html (last visited Feb. 2, 2015), *archived at* http://perma.cc/T3Y8-XVY7.

[255] *See, e.g.*, *Document Services*, HOTDOCS, http://www.hotdocs.com/products/document-services (last visited Feb. 2, 2015), *archived at* http://perma.cc/HX5J-36BP.

[256] *See, e.g.*, *About*, NEOTA LOGIC, http://www.neotalogic.com/about (last visited Feb. 2, 2015), *archived at* http://perma.cc/BWB8-YN3K.

[257] These services include a range of legal processes, including some that are closely related to the delivery of legal services, such as legal research and document preparation.

[258] This category includes companies that design legal service delivery for corporate legal departments and supply the legal talent to execute the vision under the supervision of in-house counsel. *See* William Henderson, *Is Axiom the Bellwether for Disruption in the Legal Industry?*, THE LEGAL WHITEBOARD (Nov. 10, 2013), http://lawprofessors.typepad.com/legalwhiteboard/2013/11/is-axiom-the-bellwether-for-disruption-in-the-legal-industry-look-what-is-happening-in-houston.html, *archived at* http://perma.cc/F8ZE-4WEP; *see also* Jennifer Smith, *Companies Curb Use of Outside Law Firms: Staff Attorneys, Which Don't Bill by the Hour, Are Cheaper, Often More Efficient*, WALL ST. J., http://online.wsj.com/articles/companies-curb-use-of-outside-law-firms-1410735625 (last visited Feb. 2, 2015).

[259] Knowledge management enables lawyers to find information efficiently within a lawyer's own firm, such as by locating a pre-existing document that addresses a legal issue or identifying a lawyer who is already expert in the subject.

[260] *See, e.g.*, *About*, MODRIA, http://modria.com (last visited Feb. 2, 2015), *archived at* http://perma.cc/4VM4-FMDS (a company that, prior to being spun off from eBay, helped to develop its online consumer dispute resolution system).

[261] *See, e.g.*, *What We Do*, LEX MACHINA, https://lexmachina.com/what-we-do/ (last visited Feb. 2, 2015), *archived at* https://perma.cc/3NGF-QLRU (Lex Machina analyzes large data sets to predict outcomes in certain kinds of cases).

[262] *See, e.g.*, John S. Dzienkowski, *The Future of Big Law: Alternative Legal Service Providers to Corporate Clients*, 82 FORDHAM L. REV. 2995, 3002-15 (2014); John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041, 3057-58 (2014) (describing the increasingly important role new providers are playing in the delivery of legal services despite the existence of UPL statutes).

to supervise or monitor the "nonlawyer assistance" they use when representing clients.[263]

Second, even when a service is sold directly to the public, we should avoid the binary thinking that has characterized regulatory responses to date. For example, some states have accused automated legal document assembly companies (typically, LegalZoom) of the unauthorized practice of law and sought to shut them down,[264] while other regulators have taken a laissez faire approach and done nothing at all.

A third way is possible and desirable. We can recognize that consumer-facing services are often useful to the public and should be authorized to operate, yet acknowledge that there may be a need for some modest regulation.[265] This approach promotes innovation by giving existing providers and potential newcomers greater assurance that they will not be sued by regulators, while ensuring that consumers are adequately protected.

The automated document assembly industry provides a useful test case for this "third way."[266] The consumer facing portion of this industry is frequently accused of unauthorized practice, so it has the most to gain if states expressly authorize these kinds of services. At the same time, these services deserve close scrutiny because they sell directly to consumers and do not have lawyers as intermediaries.[267] In the section below, I apply the principles identified in Part IV.C and then propose a possible regulatory model.

a. Applying the Regulatory Principles

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[263] *See* MODEL RULES OF PROF'L CONDUCT R. 5.3 (2013).

[264] *See, e.g.*, Terry Carter, *LegalZoom Hits a Legal Hurdle in North Carolina*, A.B.A. J. (May 19, 2014), http://www.abajournal.com/news/article/legalzoom_hits_a_hurdle_in_north_carolina, *archived at* http://perma.cc/B6AA-54NS; Terry Carter, *LegalZoom Business Model Ok'd by South Carolina Supreme Court*, A.B.A. J. (Apr. 25, 2014), http://www.abajournal.com/news/article/legalzoom_business_model_okd_by_south_carolina_supreme_court/, *archived at* http://perma.cc/7JR9-V4FS; *see also* Assurance of Discontinuance, *In re* LegalZoom.com, Inc., (Wash. Super. Ct. Sept. 15, 2010), *available at* http://www.atg.wa.gov/uploadedFiles/Home/News/Press_Releases/2010/LegalZoomAOD.pdf, *archived at* http://perma.cc/P65E-RBTQ (describing a settlement in Washington State).

[265] *See* Gillers, *supra* note 31, at 415 (making a similar suggestion).

[266] Despite the recent growth of automated legal document assembly, this market segment is hardly new. Pioneers have been developing these kinds of tools since the 1980s. *See, e.g.*, Marc Lauritsen, *Second International Conference on Substantive Technology in the Law School*, LAW. PC, no. 6, 1992, at 10. What has changed is that these tools are more powerful and pervasive.

[267] The idea of pursuing a "third way" regulatory approach in this context is not new. For example, Deborah Rhode and Lucy Buford Ricca have argued that, when thinking about innovative companies, "the key focus should not be blocking these innovations from the market, but rather using regulation to ensure that the public's interests are met." Rhode & Ricca, *supra* note 20, at 2607-08; *see also* Gillers, supra note 31, at 415 (making a similar suggestion); Rhode & Ricca, *supra* note 20, at 2594 (quoting a bar official making the same point).

An important initial question for the consumer facing automated document assembly industry is whether it can competently deliver services to consumers. The answer undoubtedly turns on the nature of the service and the sophistication of the provider. For example, Consumer Reports asked experts to assess wills generated by three leading online providers and found that:

> [u]sing any of the three services is generally better than drafting the documents yourself without legal training or not having them at all. But unless your needs are simple—say, you want to leave your entire estate to your spouse—none of the will-writing products is likely to entirely meet your needs. And in some cases, the other documents aren't specific enough or contain language that could lead to 'an unintended result,' in [the] words [of one law professor, who was an expert reviewer].[268]

This report suggests a need for some caution, but at the same, it does not imply that we need an outright ban either. After all, more than one million consumers have used LegalZoom alone in just the last ten years,[269] and there is no reliable evidence of incompetence. In fact, the automated nature of the process likely reduces the chance of some kinds of errors.[270] In sum, there is no reason to think that this industry should be banned, but regulator also should have legitimate concerns about competence and adequate consumer disclosures.

The next consideration is consumer choice. Consumers are overwhelmingly interested in these kinds of services, as evidenced by the sheer number of people who have been willing to pay for them.

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[268] *Legal DIY Websites are No Match for a Pro: They Provide Services for a Fraction of What You'd Pay a Lawyer*, CONSUMER REPORTS.ORG (Sept. 2012), http://www.consumerreports.org/cro/magazine/2012/09/legal-diy-websites-are-no-match-for-a-pro/index.htm, *archived at* http://perma.cc/MZM2-HSJ7. The U.K. recently undertook a significant review of will preparers who are not lawyers and concluded that they should not be subject to new regulation. *See* MINISTRY OF JUSTICE, DECISION NOTICE RE: EXTENSION OF THE RESERVED LEGAL ACTIVITIES (2013), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/198838/Will_writing_decision_notice.pdf, *archived at* https://perma.cc/5VCK-WFCP. *But see* LEGAL SERVS. BD., SECTIONS 24 AND 26 INVESTIGATIONS: WILL-WRITING, ESTATE ADMINISTRATION AND PROBATE ACTIVITIES: FINAL REPORTS 14 (2013), *available at* http://www.legalservicesboard.org.uk/Projects/reviewing_the_scope_of_regulation/will_writing_and_estate_administration.htm, *archived at* http://perma.cc/3YFN-R9XQ (recommending that will preparation services be considered an activity reserved for lawyers); LEGAL SERVS. CONSUMER PANEL, REGULATING WILL-WRITING § 4.47 (2011), *available at* http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_WillwritingReport_Final.pdf, *archived at* http://perma.cc/8KL5-UF4V (advising that such providers be subject to new regulation, but acknowledging that automated form providers were not carefully studied).

[269] *LegalZoom Celebrates 10 Years*, LEGALZOOM (Feb. 2011), https://www.legalzoom.com/articles/legalzoom-celebrates-10-years, *archived at* https://perma.cc/M6C3-G2TC.

[270] *See* LEGAL SERVS. CONSUMER PANEL, *supra* note 268, § 4.45 (making a similar observation).

LegalZoom, which is just one of many players in the industry, filed an S-1 with the Securities and Exchange Commission in 2012, when the company was considering an initial public offering. In the year prior to the submission (2011), the company had reported $156 million in revenue.[271] As mentioned above, in its first ten years in business (from 2001 until 2011), LegalZoom had served more than one million customers.[272] Because LegalZoom is just one provider in the industry, these statistics suggest that consumers are increasingly aware of automated document assembly products and want to use them.

Regarding the issue of choice, it is important to remember that consumers are not always choosing automated document providers over lawyers. Because lawyers typically charge higher prices, the choice for many consumers is between an automated document assembly service and no service at all. So even if we assume for the sake of argument that lawyers always deliver higher quality documents than automated document assembly services, many consumers might reasonably decide to select an automated document assembly service, either because they cannot afford a lawyer or because they are willing to sacrifice quality for a lower price. As long as the services are delivered competently, consumers should have the freedom to make this choice.

For similar reasons, new providers are arguably advancing our shared commitment to the rule of law and faith in the system of justice. If more people can afford legal and law-related services because of the existence of consumer facing automated document assembly services, these services ultimately help to preserve the public's faith that our legal system is available to everyone.

Despite these benefits, there are at least two reasons to consider some regulatory oversight. First, as suggested in Part IV.C, many of the services offered are "credence goods,"[273] so the public is not in the best position to assess the quality of the products offered.[274] Second, some products (e.g., simple wills) have important legal effects, so mistakes and negligence can have significant consequences for consumers and third parties.

Together, these considerations suggest that some consumer protections are worth considering. For example, it might be reasonable to ensure that consumers have legal recourse in the event a service is incompetently performed (e.g., via lawsuits). One possibility is to prohibit providers from asking consumers to waive their rights to a lawsuit or resolve disputes in fora having nothing to do with the service performed. For similar reasons, it would be reasonable to require providers to carry

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[271] *See* Tomio Geron, *LegalZoom Files for IPO of Up to $120 Million*, FORBES (May 11, 2012), http://www.forbes.com/sites/tomiogeron/2012/05/11/legalzoom-files-for-ipo/, *archived at* http://perma.cc/KUC6-P9PW.
[272] *See LegalZoom Celebrates 10 Years*, *supra* note 269.
[273] *See supra* Part IV.C.2.
[274] LEGAL SERVS. CONSUMER PANEL, *supra* note 268, § 1.5 (making a similar point in the context of wills).

adequate insurance.[275]

Consumers are also entitled to accurate information about the limitations of the services offered. For instance, companies offering automated document assembly services should have to explain the nature of their products (i.e., that they are not offered by a law firm), whether lawyers were involved in preparing the substantive language for the forms or had a role in determining the questions to be asked, the licensing jurisdictions of any such lawyers, and the implications of using the service for protections that might otherwise attach (e.g., the attorney-client privilege, the work product doctrine, the duty confidentiality).[276] It also might be reasonable to restrict advertising using the same basic standard lawyers must follow under Model Rule 7.1 – i.e., the advertising should be truthful and not misleading.[277]

b. A Potential Regulatory Approach

The draft provision below, which could be promulgated either as a court rule or statute,[278] offers one way to resolve the competing policy considerations at stake.[279] Section 1 authorizes the delivery of automated legal document assembly tools, and Section 2 imposes some modest requirements on people who offer those services. Although the requirements in Section 2 are arguably more onerous than necessary, they may offer some comfort to those who are skeptical of the benefits of authorizing these providers and thus might provide a politically viable way

[275] Granted, lawyers in nearly every state (except Oregon) are not subject to the same insurance mandate, *see supra* note 237, but the failure of regulatory authorities to mandate insurance for lawyers is not a justification for failing to impose the obligation in other contexts where it is appropriate.

[276] As explained earlier, regulators might be able to address some of the disparity between the protections afforded to the public when they use lawyers as opposed to other service providers. *See supra* Part IV.C.3. For example, regulators could impose confidentiality obligations on other providers in contexts where they handle particularly sensitive information.

[277] MODEL RULES OF PROF'L CONDUCT R. 7.1 (2013). Another consideration mentioned in Part IV.C is whether providers might cause harm to third parties. To date, there is no evidence of such harms arising from this industry, and there is no reason to expect that automated document assembly services are likely to create these kinds of harms in the future. If this assumption is erroneous, regulators could consider a system of licensure, but in the meantime, such additional oversight seems unnecessary.

[278] This Article does not address the question of who should be responsible for producing these reforms. Possible options include state legislatures, state supreme courts, and even Congress. The ABA could produce model rules or provisions, or the American Law Institute could reframe the Restatement of the Law Governing Lawyers to focus on the Law of Legal Services. The Conference of Chief Justices could take on a similar project. The primary goal of this Article is to provide the framework for reimagining the law in this area, not to identify who should be responsible for creating it.

[279] Stephen Gillers has recommended a similar approach. *See* Gillers, *supra* note 31, at 417; *see also* Richard Granat, *North Carolina Lawyers Oppose Access to the Legal System*, E-LAWYERING BLOG (July 7, 2014), http://www.elawyeringredux.com/2014/07/articles/unauthorized-practice-of-law/north-carolina-oppose-access-to-the-legal-system/, *archived at* http://perma.cc/W2X9-PL6P.

to implement the "third way" approach.[280]

Definition.

A "Legal Forms Provider" is any person or entity offering law-related forms or documents to the public, including forms or documents generated automatically through guided questions and answers.

Section 1. Legal Forms Providers are authorized to operate in this jurisdiction subject to the limitations in Section 2.

Section 2. If a Legal Forms Provider is not otherwise authorized to practice law in this jurisdiction, is offering forms or documents traditionally offered primarily by lawyers, and is automatically generating the forms or documents through guided questions and answers,[281] the Legal Forms Provider must:

a. Disclose prominently that the Legal Forms Provider is not a lawyer or law firm;
b. Require consumers to affirm their understanding that the service is not being offered by a lawyer or law firm before consumers complete any forms or documents;
c. Disclose prominently whether any lawyers participated in the creation of the forms and, if so, identify the names and licensing jurisdictions of any such lawyers;[282]
d. Disclose prominently that the forms are not a substitute for legal advice provided by a lawyer or law firm and that some protections normally afforded to a client's communications with a lawyer or law firm, such as the attorney-client privilege or work product doctrine, may not apply;
e. Maintain insurance coverage against errors and omissions in the amount of at least $500,000 per claim and an aggregate coverage of the greater of either $5 million or 5% of annual gross revenue from the sale of forms or documents in the prior calendar year;
f. Allow consumers the right to file a lawsuit against the Legal Forms Provider and not disclaim or limit the Legal Forms Provider's liability or dictate where any lawsuits against the

[280] At least one jurisdiction has tried this kind of approach. *See* H. 663, 2013-2014 Gen. Assemb., First Sess. (N.C. 2013), *available at* http://www.ncga.state.nc.us/sessions/2013/bills/house/html/h663v4.html, *archived at* http://perma.cc/TSR4-2Y3C.

[281] The purpose of this phrase is to exclude automated document assembly services that are traditionally provided by other kinds of professionals, like accountants (e.g., TurboTax) and financial services professionals. This provision is also intended to exclude from regulation any services offering do-it-yourself blank forms without any substantive guidance.

[282] *See* Gillers, *supra* note 31, at 417 (making a similar recommendation).

Legal Forms Provider are filed;[283]

g. Disclose prominently whether any personally identifiable information provided by the consumer will be made available to a third party and, if so, obtain the consumer's affirmation that the consumer understands this fact;
h. Employ advertising and marketing methods that are truthful and not misleading.

Section 3. Any person or entity that violates Section 2 is not authorized to provide the services identified in Section 1 and is engaged in the unauthorized practice of law under [jurisdiction's unauthorized practice of law statute].

A few of these provisions require some explanation. First, the phrase "traditionally offered primarily by lawyers" is needed to ensure that the regulation does not apply to services that are already adequately regulated. Consider, for example, automated tax document assembly services, like TurboTax. Arguably, that product fits within Section 1, because it helps consumers to create automated law-related documents (i.e., tax forms) through guided questions and answers. There is no public policy reason to subject these kinds of services to the requirements set out in Section 2, because accounting is already subject to a separate regulatory regime. The goal here is to bring within the scope of regulation any law-related document assembly that has historically been reserved primarily for lawyers and where no other regulation currently exists. It is not intended to regulate services that have long been offered by others.

The word "public" in the definition of "Legal Forms Provider" is intended to exclude any services that are sold exclusively to lawyers or corporate counsel. As explained earlier, lawyers have an ethical duty to select competent providers,[284] so any risks arising from these services are significantly mitigated when lawyers serve as intermediaries. For this reason, Section 2 only applies to services offered directly to the public.

In Section 2, the phrase "automatically generating the forms or documents through guided questions and answers" is intended to make clear that the restrictions do not apply to Legal Forms Providers who offer blank legal forms for consumers to complete. The former services raise more consumer protection concerns because they involve some assessment of the questions that should be asked and imply an understanding of relevant laws or regulations.

The insurance provision is designed to ensure that, if a form is improperly prepared, there is sufficient insurance coverage to compensate people who might have been adversely affected. Because providers are offering the same form to many people simultaneously, providers should have insurance with sufficiently high single occurrence and aggregate limits.

In the end, this approach is designed to encourage potential innovators

[283] *See id.* (making similar recommendation).
[284] *See* MODEL RULES OF PROF'L CONDUCT R. 5.3 (2013).

who might otherwise fear accusations of unauthorized practice. Indeed, some of them appear to be in favor of some regulation in exchange for clearer authority to operate. For example, lawyers for LegalZoom recently submitted comments to the ABA Commission on the Future of Legal Services and argued that "[w]e need to focus on 'right' regulation and not "over" or "no" regulation."[285] In short, this approach seeks to accomplish a rare feat for new industry regulations: protecting consumers while spurring innovation and growth.

2. Approaches to New Market Actors: Limited License Legal Technicians as an Example

The law of legal services can also create new delivery options. For example, Washington State's LLLTs have less formal training than lawyers but receive targeted instruction designed to enable them to provide a narrow range of legal and law-related services.[286] In much the same way as healthcare providers other than doctors now deliver some kinds of services at walk-in pharmacy clinics and in numerous other contexts, LLLTs are legal service providers other than lawyers who have the authority to deliver some kinds of legal services and advice outside of a traditional law firm.[287] The question for this group of potential providers is whether they should be given the authority to deliver legal and law-related services at all and, if so, what the appropriate regulation and oversight should look like.

a. Background on the LLLT Program

In 2012, after a dozen years of study and vigorous debate,[288] the Washington Supreme Court adopted a rule authorizing LLLTs as a new category of licensed legal professionals.[289] The rule establishes a LLLT Board, which is responsible for administering the LLLT program and identifying practice areas suitable for LLLTs.[290] In March 2013, the

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[285] *See, e.g.*, Letter from Chas Rampenthal, Gen. Counsel, LegalZoom.com, Inc. & James Peters, Vice President, New Market Initiatives, LegalZoom.com, Inc. to Comm'n on the Future of Legal Servs., Am. Bar Ass'n, Comments on the ABA Issues Paper on the Future of Legal Services, *available at* http://www.americanbar.org/content/dam/aba/images/office_president/chas_rampenthal_and_james_peters.pdf, *archived at* http://perma.cc/KYG2-Y3BQ.

[286] *See* Crossland & Littlewood, *supra* note 6, at 616-18.

[287] *See id.* at 613-14 (drawing an analogy to the medical profession).

[288] *See id.* at 612.

[289] *See id.* at 611. Washington State actually has three categories of licensed legal professionals: lawyers, LLLTs, and Limited Practice Officers (LPOs). LPOs are "authorized to select, prepare, and complete documents in a form previously approved by the Limited Practice Board for use in closing a loan, extension of credit, sale, or other transfer of real or personal property." *Limited Practice Officers*, WASH. ST. B. ASS'N, http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Limited-Practice-Officers (last visited Feb. 2, 2015), *archived at* http://perma.cc/8NGS-CWQF.

[290] *See* Crossland & Littlewood, *supra* note 6, at 616.

Washington Supreme Court unanimously approved the Board's recommendation to make domestic relations the first LLLT practice area.[291] In particular, LLLTs will be authorized to participate in child support modification actions, dissolution and legal separation actions, domestic violence actions, committed intimate relationship actions, parenting and support actions, parenting plan modifications, paternity actions, and relocation actions.[292]

To obtain the necessary license, LLLTs are required to obtain at least an associate degree from a community college, receive specific practice area education at a law school, pass three exams (a core education exam, a practice area exam, and an ethics exam), and acquire 3,000 hours of substantive law-related experience (e.g., in a lawyer's office, either before or after passing the examination).[293] The inaugural group of LLLTs is expected to complete this program and become authorized to practice in spring 2015.[294]

The LLLT program has helped to generate new discussion about the possibility of licensing new categories of legal professionals. A recent report by the ABA Task Force on the Future of Legal Education highlighted the development and recommended greater experimentation in this area:

> *Broader Delivery of Legal and Related Services:* The delivery of legal and related services today is primarily by J.D.-trained lawyers. However, the services of these highly trained professionals may not be cost-effective for many actual or potential clients, and some communities and constituencies lack realistic access to essential legal services. To expand access to justice, state supreme courts, state bar associations, admitting authorities, and other regulators should devise and consider for adoption new or improved frameworks for licensing or otherwise authorizing providers of legal and related services. This should include authorizing bar admission for people whose preparation may be other than the traditional four-years of college plus three-years of classroom-based law school education, and licensing persons other than holders of a J.D. to deliver limited legal services.[295]

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[291] *See id.*

[292] *See* WASH. SUP. CT. R.: R. GEN. APPLICATION: ADMISSION & PRACTICE R. 28 app., Regulation 2 (2013).

[293] *See* Crossland & Littlewood, *supra* note 6, at 616-18.

[294] *See* Chambliss, *supra* note 19, at 580; *see also* Anna L. Endter, *Washington Limited License Legal Technician (LLLT) Research Guide*, GALLAGHER L. LIBR., U. WASH. (Jan. 22, 2015), https://lib.law.washington.edu/content/guides/llltguide, *archived at* https://perma.cc/D2YF-585M; *Limited License Legal Technicians (LLLT)*, WASH. ST. B. ASS'N, http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians (last visited Feb. 2, 2015), *archived at* http://perma.cc/4CZG-RDWN.

[295] TASK FORCE ON THE FUTURE OF LEGAL EDUC., AM. BAR ASS'N, REPORT AND RECOMMENDATIONS 3 (2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.pdf, *archived at* http://perma.cc/UU5J-

Similarly, the new ABA Commission on the Future of Legal Services has created a Regulatory Opportunities Working Group to study developments in Washington State,[296] and the Working Group is chaired by Washington State Bar Association Executive Director Paula Littlewood and Chief Justice Barbara Madsen of the Washington Supreme Court. Chief Justice Madsen signed the order authorizing LLLTs in Washington State, and Paula Littlewood was instrumental in the program's adoption and implementation.

Washington State is not the only jurisdiction looking at LLLTs. The California State Bar Board Committee on Regulation, Admission and Discipline Oversight created the California State Bar's Limited License Working Group, which on June 17, 2013 recommended that California offer limited-practice licenses.[297] The working group recommended that people without a law degree be authorized to provide "discrete, technical, limited scope of law activities in non-complicated legal matters in 1) creditor/debtor law; 2) family law; 3) landlord/tenant law; 4) immigration law."[298] The recommendation for limited-practice licenses is still in its early stages and will need to work its way through the California State Bar and eventually the California Supreme Court.

b. Application of the Regulatory Principles

The regulatory principles identified in Part IV.C suggest that the LLLT program is well worth considering. With regard to competence, properly trained professionals who do not have a law degree could effectively perform a fair number of legal and law-related services, especially given the level of required training before LLLTs are authorized to deliver services. A useful analogy here is to the medical field, where people who are not doctors deliver a significant percentage of health-related services.[299] Nurses, pharmacists, and medical technicians regularly perform tasks that arguably involve the practice of medicine. Indeed, many states have expanded access to medical services by permitting medical professionals other than doctors to provide routine medical care, such as at "Minute Clinics" in pharmacies.[300] The LLLT

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[296] *See* Letter from ABA Comm'n on the Future of Legal Servs., to ABA Entities et al., Issues Paper on the Future of Legal Services 2 (Nov. 3, 2014), *available at* http://www.americanbar.org/content/dam/aba/images/office_president/issues_paper.pdf, *archived at* http://perma.cc/2TCS-U8HP.

[297] *See* Memorandum from Staff, Limited License Working Grp., Legal Aid Ass'n of Cal. to Members, Limited License Working Grp., Legal Aid Ass'n of Cal. 2 (June 17, 2013), *available at* http://www.laaconline.org/clientimages/53618/working%20group%20recommendations_june%202013.pdf, *archived at* http://perma.cc/7WZ7-NE7Y.

[298] *Id.* at 3.

[299] *See* Crossland & Littlewood, *supra* note 6, at 613-14 (drawing the analogy to the medical profession).

[300] Bruce Japsen, *CVS Doubles Up Walgreen in Retail Clinics as Obamacare Patients Seek Care*, FORBES (June 5, 2014),

model is premised on a similar idea: useful services can be delivered competently in a limited scope by professionals with less extensive training than those who have traditional licenses.

The LLLT program ensures competence by limiting the work that LLLTs can perform.[301] Before a new area of practice is permitted, the LLLT Board must conclude that LLLTs can deliver the services competently, and the Washington Supreme Court must agree.[302] Moreover, the LLLTs must take subject matter specific coursework before obtaining a LLLTs license, and they must pass a special exam for each practice area in which they want to be licensed.[303] These restrictions and requirements provide a high level of confidence that LLLTs will be competent in their designated areas of specialty.

In many ways, the LLLT training and licensing process is arguably a greater guarantee of competence than the training most law students receive. After all, lawyers are permitted to practice in any area once they obtain a license, even if they have never had any formal training in the subject. In contrast, LLLTs are permitted to deliver services only in the very specific areas where they have had training. Put another way, there is no more reason to be concerned about the competence of LLLTs who practice in a narrow area than the competence of lawyers who only receive very general training and are permitted to practice in nearly any area of their choosing.

Another way to think about the competence issue is that the LLLT program helps to reduce the number of unauthorized providers. As the Washington Supreme Court observed, "[t]here are far too many unlicensed, unregulated and unscrupulous "practitioners" preying on those who need legal help but cannot afford an attorney. Establishing a rule for the application, regulation, oversight and discipline of non-attorney practitioners establishes a regulatory framework that reduces the risk that members of the public will fall victim to those who are currently filling the gap in affordable legal services."[304]

The facilitation of consumer choice also favors the LLLTs program. Just as consumers have benefited from having the option of visiting pharmacies to obtain routine medical care, consumers will benefit from having the option of choosing a LLLT to provide some kind of legal services. If a LLLT can perform a legal service competently and at a lower cost than a lawyer, consumer should have the right to select a LLLT.

At the same time, the transparency principle is important in this

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http://www.forbes.com/sites/brucejapsen/2014/06/05/cvs-dominates-walgreen-in-retail-clinics-as-obamacare-patients-seek-care/, *archived at* http://perma.cc/FAP9-P443.

[301] Order at 2, 10-11, *In re* Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-A-1005 (Wash. June 14, 2012).

[302] *See* WASH. SUP. CT. R.: R. GEN. APPLICATION: ADMISSION & PRACTICE R. 28(C)(2)(a) (2012).

[303] *See id.* R. 28 (C)(2)(c); WASH. SUP. CT. R.: R. GEN. APPLICATION: ADMISSION & PRACTICE R. 28 app., Regulation 8 (2013).

[304] *See* Order, *supra* note 301, at 10.

context to ensure that consumers who use LLLTs are fully aware that LLLTs are not lawyers, that a LLLT's services are necessarily limited, and that a LLLT has training that differs in kind relative to lawyers. For this reason, Washington State currently prohibits LLLTs from advertising in such a way that "could cause a client to believe that the [LLLT] possesses professional legal skills beyond those authorized by the license held by the [LLLT]."[305]

The regulatory principle of ensuring adequate consumer remedies is also easy to satisfy. Because LLLTs are licensed and subject to their own rules of professional conduct, they will be subject to discipline or license revocation if they engage in inappropriate conduct.[306] LLLTs also can be required to carry insurance; indeed, an insurance market has emerged in Washington State to serve the emerging LLLT category.[307]

Finally, the LLLT option also fosters faith in the justice system and the rule of law by expanding the options that people have to access needed legal and law-related services.

In the end, the LLLT program serves the public interest and advances the regulatory objectives that should form the core of the law of legal services. The Washington Supreme Court made the point nicely in its order creating the LLLT program:

> [T]he basis of any regulatory scheme, including our exercise of the exclusive authority to determine who can practice law in this state and under what circumstances, must start and end with the public interest; and any regulatory scheme must be designed to ensure that those who provide legal and law related services have the education, knowledge, skills and abilities to do so. Protecting the monopoly status of attorneys in any practice area is not a legitimate objective.[308]

As the Washington Supreme Court itself conceded, the LLLT program is a relatively modest reform and will not "solve the access to justice crisis for moderate income individuals with legal needs."[309] It nevertheless provides a useful starting place for thinking about how the law of legal services could bring about changes that are qualitatively different from, and potentially more dramatic than, reforms relying solely on the law of lawyering.

V. CONCLUSION

The law of lawyering is undoubtedly important, but it offers few options for transforming the delivery of legal services. ABS is one possible exception, but even that reform envisions a world where lawyers

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[305] WASH. SUP. CT. R.: R. GEN. APPLICATION: ADMISSION & PRACTICE R. 28(H)(4).
[306] *See id.* R. 28(C)(2)(h)(3)(A).
[307] *See* WASH. SUP. CT. R.: R. GEN. APPLICATION: ADMISSION & PRACTICE R. 28 app., Regulation 12.
[308] Order, *supra* note 301, at 7.
[309] *Id.* at 11.

remain the exclusive deliverers of legal advice. The law of legal services reflects a different approach to regulatory innovation, one that seeks to authorize, but appropriately regulate, the delivery of legal and law-related assistance by more people who lack a traditional law license. At a time when legal services are increasingly unaffordable, the law of legal services may reflect a promising way to unlock innovation and reimagine the regulation of the twenty-first century legal marketplace.

REDACTED MATERIALS

REDACTED MATERIALS

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The Law Society of British Columbia

Memo

To: Benchers
From: Jeffrey G. Hoskins, QC for Act and Rules Committee
Date: September 1, 2015
Subject: **Law Society Rules 2015 corrections**

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1. Despite months of checking and cross-checking by Act and Rules Committee members and numerous staff to avoid errors in the revised rules, a few small errors have come to light. The Committee recommends the following to the Benchers as amendments to the new rules to correct editorial oversights:

Refund when lawyer does not practise law

2-115 (1~~.~~2) A lawyer who has paid the annual fee for a year but who satisfies the Executive Director that the lawyer has totally abstained from practice in British Columbia during that year through disability, other than a suspension, is entitled to a refund of

(a) the difference between the practising fee set by the Benchers under section 23 (1) (a) *[Annual fees and practising certificate]* and the non-practising member fee specified in Schedule 1, and

(b) a portion of the annual insurance fee set under section 30 (3) (a) *[Professional liability insurance]*, in an amount determined by the Executive Director.

Withdrawal from separate trust account

3-66 (3) A lawyer who disburses trust funds received with instructions under Rule 3-58 (~~3~~2) *[Deposit of trust funds]* must keep a written record of the transaction.

Application to vary certain orders

5-12 (4) The President must refer an application under subrule (1) to one of the following, as may in the President's discretion appear appropriate:

(a) the same panel that made the order;

(b) a new panel;

(c) the Discipline Committee;

(d) the Credentials Committee.

SUGGESTED RULE AMENDMENT RESOLUTION—
[REVISED RULES CORRECTION]

BE IT RESOLVED to amend the Law Society Rules as follows:

1. ***In Rule 2-115 [Refund when lawyer does not practise law], by renumbering subrule (1.2) as subrule (1);***

2. ***In Rule 3-66, by striking "***Rule 3-58 (3) *[Deposit of trust funds]****" and substituting "***Rule 3-58 (~~3~~2) *[Deposit of trust funds]****"; and***

3. ***In Rule 5-12 (4), by adding the following paragraphs:***

(a) the same panel that made the order;

(b) a new panel;

(c) the Discipline Committee;

(d) the Credentials Committee**..**

JGH

The Law Society of British Columbia

Memo

To:	Benchers
From:	Executive Committee
Date:	September 10, 2015
Subject:	**Law Society Representation on the 2015 QC Appointments Advisory Committee**

1. Background

Historically, each fall two members of the Law Society appointed by the Benchers participate in an advisory committee that reviews all applications for appointment of Queen's Counsel, and recommends deserving candidates to the Attorney General. The Benchers' usual practice, on the recommendation of the Executive Committee, is to appoint the President and First Vice-President to represent the Law Society.

The other members of the QC Appointments Advisory Committee are the Chief Justices, the Chief Judge, the Deputy Attorney General and the CBABC President.

2. Recommendation

In advance of the fall meetings, we recommend that the Benchers appoint President Ken Walker, QC and First Vice-President David Crossin, QC as the Law Society's representatives on the 2015 QC Appointments Advisory Committee.

Memo

Lawyers Insurance Fund

To: Benchers
From: Finance and Audit Committee
Date: September 4, 2015
Subject: Lawyers Insurance Fund – Capital Adequacy MCT Ratio – Executive Limitation C.5(a)

During the development of the insurance fee recommendation for 2016, the Committee reviewed a memorandum form Ms. Forbes regarding the adequacy of the capital held by LIF, as referenced in Executive Limitation C.5(a). This limitation requires the CEO to "maintain an adequate surplus" or capital in the insurance fund.

Earlier this year, LIF's actuary was retained to conduct an analysis of the unrestricted net assets. The actuary's principal approach was to apply a capital adequacy test – the Office of the Superintendent of Financial Institutions' Minimum Capital Test ("MCT") – that is widely used in the insurance industry to ensure that an insurer's assets are sufficient to meet its present and future obligations. The MCT calculates a ratio of capital available to capital required based on a prescribed framework that assesses the risks associated with a particular insurer. OSFI's minimum allowable MCT ratio is 100% and the supervisory target capital ratio is 150%. Insurers are expected to maintain a target MCT ratio no less than the supervisory target level.

As the insurance industry has evolved since Executive Limitation C.5(a) was established, the Committee is of the view that the limitation should be amended to bring it into line with current practices, and should require the CEO to "maintain adequate capital" at a minimum in accordance with OSFI's supervisory target capital ratio, which is currently 150%. The Committee is further of the view that an actuary should review and the Committee should monitor LIF's MCT annually.

Redlined and clean versions of the proposed amendment to Executive Limitation C.5(a) are attached.

The Committee recommends that the Benchers adopt the following resolution:

Be it resolved that Executive Limitation C.5(a) be amended to state the following:

Accordingly, the CEO must ensure that Law Society budgeting:

5. in the Insurance Fund:

(a) Maintains adequate capital, which shall be reviewed by an actuary and monitored by the Finance and Audit Committee annually, and shall not be less than the amount required to meet the Office of the Superintendent of Financial Institutions' supervisory target Minimum Capital Test ratio […]

Redlined version

C. Budgeting / forecasting

In budgeting for all or part of any fiscal year, the CEO must not deviate materially from priorities set in Part 1, "Mission and Ends," risk fiscal jeopardy or fail to employ a multi-year plan.

Accordingly, the CEO must ensure that Law Society budgeting:

[…]

5. in the Insurance Fund:

(a) maintains ~~an~~ adequate ~~surplus~~ capital, which shall be reviewed by an actuary and monitored by the Finance and Audit Committee annually, and shall not be less than the amount required to meet the Office of the Superintendent of Financial Institutions' supervisory target Minimum Capital Test ratio,and

(b) results in budgeted revenues being adequate to ensure that:

(i) projected losses for all prior claim years and for the budget year can be paid,

(ii) the ULAE is properly funded, and

(iii) the administrative costs of the insurance program for the budget year are paid.

[04/1994; 09/1994; 02/1996; 06/1997; 09/1998; 10/2000; 06/2002; 09/2006; 11/2008; 07/2011]

Clean version

5. in the Insurance Fund:

(a) maintains adequate capital, which shall be reviewed by an actuary and monitored by the Finance and Audit Committee annually, and shall not be less than the amount required to meet the Office of the Superintendent of Financial Institutions' supervisory target Minimum Capital Test ratio, and

The Law Society of British Columbia

Report of the Tribunal Program Review Task Force

Tribunal Program Review Task Force

Ken Walker, QC (Chair)
Haydn Acheson
Pinder Cheema, QC
David Layton
Linda Michaluk
David Mossop, QC

September 25, 2015

Prepared for:	Benchers
Prepared by:	Jeffrey G. Hoskins, QC
Purpose:	Decision

REPORT OF THE TRIBUNAL PROGRAM REVIEW TASK FORCE

Introduction

1. The Tribunal Program Review Task Force was struck by the Benchers in May 2014. It comprises Benchers Ken Walker, QC (Chair), Haydn Acheson, Pinder Cheema, QC, and David Mossop, QC, along with non-Bencher lawyer David Layton and public representative Linda Michaluk. Tribunal and Legislative Counsel Jeff Hoskins, QC, Hearing Administrator Michelle Robertson and Policy Manager Michael Lucas provide staff support.

2. This was the resolution adopted by the Benchers at that time:

   BE IT RESOLVED to form a task force of Benchers and others to

   - review the progress of the changes to the tribunal system implemented since 2011;
   - recommend changes for the improvement of the system and correction of any problems;
   - identify any further reforms that the benchers should consider at this time;
   - report to the Benchers as soon as possible, and in any event before the end of 2014.

3. The materials before the Benchers at the meeting in May 2014 included 16 topics and issues for the Task Force to consider and make recommendations for the consideration of the Benchers. The Task Force made a number of interim reports to the Benchers beginning in December 2014.

4. At that time, the Task Force made two recommendations, which were accepted by the Benchers. As a result, the appointment of all the adjudicators, other than Benchers, was extended to the end of 2015, and the Law Society Rules were amended to reduce the risk of one of the members of a hearing panel or review board not being able to continue causing the loss of a hearing in process.

5. This is the final report and recommendations of the Task Force. Appendix 1 to this report is a summary of the recommendations of the Task Force to the Benchers.

Background

6. In 2008, the Lawyer Independence and Self-Governance Committee reported to the Benchers on its concerns about potential threats to the independence of the legal profession in British

Columbia. The Committee reviewed the core functions of the Law Society "to consider whether the processes and activities of the Law Society can be expected to maintain the public's confidence in the Law Society's discharge of its statutory and common law duties, thereby adequately preserving and promoting independence and effective self-governance of lawyers."

7. The Committee's review of the prosecutorial and adjudicative functions concluded that the Benchers should consider more effectively differentiating between the two aspects of Bencher involvement, either within the ranks of the Benchers or by separating the functions altogether. The Committee reported, in part:

(d) Prosecutorial and Adjudicative Functions

There is an overlap between the prosecutorial and adjudicative functions of the Law Society. The Law Society is responsible for the prosecution of discipline hearings and credentials applications, a process that is overseen by the Discipline and Credentials Committees of the Benchers. The President appoints the members of hearing panels and panels must be chaired by a lawyer Bencher. In practice, hearing panels are routinely comprised of Benchers or life-Benchers.

The Committee recognizes that, on its face, this overlap of functions could be viewed as a conflict and may raise an apprehension of bias on the part of both the public at large and members of the Law Society. If the Law Society regulatory processes are perceived to be biased, the credibility of the organization may be impaired. …

As there are good legal arguments that the processes used by the Law Society are procedurally fair, the Committee does not believe that this issue is one that requires immediate attention. The Committee remains mindful of public perception and confidence, however. Would the public consider that the Benchers, elected by the group that they are required to regulate, are sufficiently independent in order to discharge the necessary regulatory responsibilities entrusted to them in the public interest? Would a separation of the functions assist? … The Committee believes that it would be prudent for the Benchers to identify this issue as one for possible future (although not necessarily immediate) consideration, and to keep a close eye on developments concerning this issue in other jurisdictions. For example, if the Benchers remain responsible for both the investigative and adjudicative functions of lawyer regulation, should there be a more rigid division of functions within the ranks of the Benchers themselves? Alternatively, the Law Society may consider separating its adjudicative function from its investigative function entirely.

8. The Benchers received the Committee's report in April 2008. In November of that year, the Benchers considered a further policy paper on the question, entitled "An Examination of Issues in Connection with the Dual Prosecutorial and Adjudicative Functions of the Benchers." That paper set out considerations for and against separating the investigative and adjudicative functions of the Benchers and compared the processes in comparable regulatory bodies in other jurisdictions and in other professions. The Benchers discussed the issues and resolved to refer the matter to the Independence and Self-Governance Advisory Committee, forerunner of the current Rule of Law and Lawyer Independence Advisory Committee.

9. At the end of the following year, that Committee reported to the Benchers on its consideration of the issues. The report included this report on a policy conference of the Federation of Law Societies earlier in the year:

> … Mr. Donaldson advised that the tenor of the Conference produced a "vigorous" overall discussion on the issue of the separation of the adjudicative and investigative functions. One of the principal themes was that "he who makes the rules ought not to sit on panels adjudicating their alleged breach." Many at the Conference, Mr. Donaldson advised, had a strong sense that there should be a separation of the functions. British Columbia is one of a minority of provinces where hearing panels are generally made up solely of Benchers who also make the rules. He expressed concern that one day these overlapping functions would be challenged and that the Court of Appeal may not be sympathetic to the Law Society's process.

10. The Committee concluded that the modern situation "warrants a change away from the combined function of responsibility for both the investigation and adjudication of complaints." They presented the Benchers with a number of options, including the Benchers retaining the responsibility for investigations and charge approvals and relinquishing the adjudication function. That option was recommended to the Benchers, who resolved to

> strike a task force to develop models for separation of the Law Society's adjudicative and investigative functions (based on Option 1 in the Committee's report), and to make recommendations about which model to adopt.

11. This brought about the formation of the Task Force Examining the Separation of Adjudicative and Investigative Functions of the Benchers, who reported to the Benchers in July 2010. The Benchers, nearly unanimously, adopted the Task Force's recommendation to "create a pool of individuals who can be appointed to hearing panels" and that the pool include:

    - sitting Benchers (the "Bencher pool")

- life Benchers, and former lawyer Benchers and other lawyers … (the "lawyer pool"); and

- life appointed Benchers, former appointed Benchers, and other non-lawyer non-benchers … (the "public pool").

12. The new program was to be implemented for a trial period of three years, after which there would be a full review of outcomes. The minutes of the meeting indicate that the chair of the Task Force informed the Benchers that its recommendations were considered to be "the easiest first step" to separation of the Benchers' adjudicative and investigative roles.

13. In December 2010, the Benchers took an important step toward implementation of the new tribunal program by adopting criteria for the composition and operation of new hearing panel pools. The Executive Committee was empowered to make appointments of individual non-Benchers and non-lawyers on the advice of a Subcommittee to be appointed for the purpose.

14. The Benchers approved criteria for appointment intended to ensure the independence, qualification and diversity of adjudicators. They also adopted provisions that would make it mandatory for all members of the hearing panel pools to receive training appropriate to the role that they were asked to fulfill.

15. It was further decided that non-lawyer members of hearing panels would be paid an honorarium on the same basis as the appointed Benchers are recognized.

16. In the following months, the Law Society advertised for expressions of interest in participating in the Law Society Tribunal from both lawyers and members of the public. The response was very impressive with over 100 lawyers and nearly 600 non-lawyers making applications to be considered for the job. The Executive Committee appointed a Subcommittee, chaired by Gavin Hume, QC to make recommendations on the final appointments. The Subcommittee, in turn, considered it appropriate to have the applications vetted by an independent agency, which made recommendations that were implemented by the Executive Committee.

17. Following an intensive training program led by the BC Council of Administrative Tribunals, hearing panels comprising a Bencher chair, a non-Bencher lawyer and a public representative began conducting hearings at the end of 2011. Hearing panels appointed on that configuration continue to the present.

18. Reviews of hearing panel decisions continued to be heard by a quorum of the Benchers. Legislation was required to provide for non-Bencher and public participation. An amendment to section 47 of the *Legal Profession Act* and changes to the Law Society Rules governing reviews came into effect January 1, 2013. Any review on a citation issued or

credentials hearing ordered after that date are to be reviewed by a review board comprising Benchers, non-Bencher lawyers and public representatives.

The way it is

19. Before getting to the recommendations of the Task Force for changes to the way things are now done, it may be worthwhile reviewing the current situation. The basic requirements and process for appointment to hearing panels and review boards are set out in the Panel and Review Board Appointment Protocol (the "Protocol"), which is attached as Appendix 2.

20. The current pool of individuals qualified to participate in Law Society Tribunal hearing panels and review boards consists of all of the 25 current elected Benchers, a group of 19 lawyers who are not currently elected Benchers and a group of 23 members of the public, including some who are currently appointed Benchers.

21. In order to qualify to participate in a hearing panel, all members of the adjudicator pool must complete an introductory course in administrative law, including the statutory and regulatory law that applies to the Law Society. All lawyers are required to attend a two-day decision-writing workshop, and all Bencher lawyers are required to attend a two-day workshop on hearing skills. These courses are mandatory for each category of adjudicator regardless of past experience in order to ensure that all adjudicators have a similar grounding in the Law Society processes.

22. Each hearing panel consists of an elected lawyer-Bencher, who must be the chair of the panel, another lawyer who is not currently a Bencher and a public representative. The public representative could be an appointed Bencher, but in the vast majority of cases is not.

23. Review boards, which review decisions of hearing panels on application of one of the parties, consist of three Benchers, at least two of whom must be lawyers and one of whom acts as the chair, two non-Bencher lawyers and two non-Bencher public representatives. Before sitting as a member of a review board, each adjudicator must participate in one hearing panel.

24. There are guidelines for appointment to hearing panels and review boards designed to avoid actual or apparent conflicts. These include that Benchers who are members of the Discipline Committee or Credentials Committee do not participate in hearings or reviews arising from their respective Committee. That may be obvious where the Bencher has participated in the decision to issue the citation or order the credentials hearing, but it is not limited to those cases. So the number of Benchers available for discipline hearings and reviews is reduced by the number appointed to the Discipline Committee each year, and similarly the number available for credentials hearings and reviews is reduced by the number on the Credentials Committee.

25. Hearing panels and review boards are appointed by the President. The Protocol provides for a rotation of adjudicators in each pool, subject to a number of exceptions and disqualifications and, naturally, dependent on availability. In practice, the Hearing Administrator has the function of applying the Protocol to establish hearing panels and review boards for the President's approval.

26. Nonetheless, the President has the discretion to depart from the rotation in appropriate circumstances. Under the Rules the President also has the discretion to terminate a panel or a panel member. The President is obliged to adjudicate certain applications or appoint another Bencher to adjudicate. When a prehearing or pre-review conference is needed, the President must set the time and place and appoint a Bencher to preside.

27. At the same time, the Rules give the Executive Director the discretion to make many decisions pertaining to the publication of hearing panel and review board decisions and summaries. While the discretion is generally exercised in favour of publication in the interests of transparency and accountability of the Law Society and the Tribunal, some lawyers, students and applicants affected by decisions occasionally bring applications for exceptions of one kind or another. These applications must be adjudicated by the Executive Director.

28. When the parties are unable or unwilling to agree on a date, time and place for a hearing, the Rules give the power to set the date to the Executive Director or a Bencher presiding at a prehearing conference.

29. When non-Benchers were brought into the adjudicator group, it was decided that the public representatives should be compensated for their contribution to the legal profession, as well as the public interest, at the same rate that Appointed Benchers received for acting as directors of the organization and other duties. That is a fairly modest honorarium of $250 per day. Because appointed Benchers were available for relatively few hearings in the past, that has increased the cost of most hearings by that amount. In our view that is a good investment in public input and well worth the modest cost.

30. When it came to the volunteer involvement of members of the profession, however, the Benchers decided to extend the traditional voluntary nature of contributions of lawyer adjudicators to their own profession. As a result, no honorarium or per diem amount is paid to lawyers.

31. The reasonable expenses of all adjudicators for travel, accommodation and meals are fully reimbursed. This does not appear to affect the cost of the tribunal program significantly, since Benchers also claim expenses when sitting on hearing panels and review boards.

Process

32. The Task Force met eight times in the course of something over a year. We started by reviewing the tribunal process as it has existed since 2012, including statistics and financial information resulting from that activity.

33. We sought and obtained information from other Canadian law societies and regulatory bodies in BC. Appendix 3 to this report is a table summarizing the responses. It is clear from the information that we obtained and examined that there is no one way to operate a professional regulatory tribunal. There is, in fact, a wide variation in the way that law societies and other professional bodies go about it.

34. Nova Scotia and New Brunswick do not draw their adjudicators from among the Benchers at all. (Although, in New Brunswick, one adjudicator also happens to be a member of Council.) Others, like Ontario and Manitoba, as well as British Columbia, use a mix of Benchers, non-Bencher lawyers and public representatives. Alberta is the last provincial law society to use only Benchers on hearing panels, but we understand that Alberta is actively engaged in redesigning its tribunal program.

35. We were also interested to hear that Ontario and Manitoba have more recently made the leadership of their tribunals independent of the Benchers by appointing independent, non-Bencher chairs. In keeping with the respective sizes of those law societies, the position is full-time in Ontario and part-time in Manitoba.

36. By way of contrast, in Alberta the chair of the committee that approves charges, the equivalent of our Discipline Committee, also appoints the Benchers to the hearing panel. As we mentioned, that is currently under review.

37. We sought written comments from former Benchers, from Counsel representing the Law Society and from those appearing for lawyers subject to hearings. We held an informative meeting with counsel who have acted for or against the Law Society, or both, in discipline and credentials matters. We were impressed with the emphasis that experienced counsel placed on having hearing panels chaired by experienced adjudicators.

38. We heard from adjudicators participating. This occurred at a dinner/training session on March 4. Appendix 4 to this report contains a summary of the remarks of adjudicators following three years of experience.

39. At the Benchers Retreat in May, we had the opportunity to hear a preliminary discussion of some of the Task Force's thoughts as we formulated our recommendations. It was clear from most of the discussion, in which a large proportion of the Benchers participated, that the

group is not ready to phase in the complete separation of their roles as policy makers and legislators for the profession from their roles as adjudicators.

Matters not needing change

40. There are a number of the innovations adopted in 2011 that the Task Force considers are working well and we make no recommendation for change.

41. **Public participation in the panels.** This is near universally accepted as a very positive development. The public panel members were selected by a neutral third party looking for skills needed for the position including previous (though not legal) decision-making experience. This has been very positive. The public panellists applaud the move. They enjoy the experience including training. They enjoy participating in the decision-making process. Each of these public participants is now an advocate for our decision making process. The Law Society has more individuals educating others about the Law Society mandate and its values.

42. We see the participation of public representatives in the hearing process as a marked success. It has opened the process to more diverse input by including the general public, whose interests the Law Society is mandated to serve and protect. We note the degree of media attention and general welcoming given the changes allowing for the inclusion of non-Benchers and non-lawyers when they were made in 2011.

43. **Non-Bencher lawyer participation in panels.** Similarly, we see the participation of lawyers who are not currently Benchers as a positive approach. It also opens the process to more diverse input by including a broader spectrum of members of the profession. We were impressed with the professional approach and enthusiasm of the non-Benchers in the pool, particularly those who had never been Benchers. It is important to maintain this new connection with the profession.

44. We also note the significant step that the changes represent in moving toward separation of the adjudicative and prosecutorial functions of the Law Society. We note that our present program is similar to the "hybrid" system in place in Ontario, Manitoba and other provinces. That is, some Bencher involvement with others also participating. We were attracted to the fully separated system now used in Nova Scotia and New Brunswick. While we seriously considered recommending further separation, we do not recommend a change in that respect at this time. We do recommend that the Benchers and the Tribunal continue to monitor developments in the rest of Canada with a view to considering further changes in the future.

45. **Mandatory training.** Our review concludes this was very positive. We are leaders here. The Federation of Law Societies is now coordinating a move to create standards to achieve what we have achieved on a national scale.

46. The mandatory training program appears to have improved the quality of the tribunal program and proven useful to adjudicators in fulfilling their function. All adjudicators should continue to attend the two-day introductory program for an overview of administrative law principles, ethics and decision-writing and hearing skills, attend the two-day workshop on decision-writing before writing a decision and attend the two-day workshop on hearing skills before chairing a hearing panel.

47. Subject to the recommendations of the Federation of Law Society's working group that is putting together a national program for adjudicator education, we see no reason for change in this area.

48. **Compensation of adjudicators.** We considered the compensation that some other law societies pay to their adjudicators, including lawyers acting in that capacity. While we consider it entirely appropriate that non-lawyer public representatives be entitled to per diem compensation at the same rate established for the appointed Benchers, we appreciate that lawyers giving their time to their profession has traditionally been done as unpaid volunteers.

49. We do not recommend a change in the payment of honoraria to non-lawyer adjudicators and do not recommend initiating payment to lawyer adjudicators.

Issues and recommendations

50. On review of our three-year project, some issues were identified where, in our view, changes and improvements should be made in order to ensure better operation of the tribunal function of the Law Society. We set out below a discussion of each of those issues and, where appropriate, our recommendation to the Benchers for changes.

51. **Tribunal Code of Conduct.** In our view, the expectations of adjudicators and the ethical standards that they should attain should be set out expressly in a single code of conduct for the guidance of members of the Law Society hearing panel pools.

52. We looked at some codes of conduct adopted by other tribunals. Some were long and complicated and some were shorter and simpler. All had something to offer, but we did not see it as part of our mandate to draft an appropriate document. Rather, we simply recommend that adoption of a code of conduct become a priority for the Tribunal following this review. It may be that a new working group of members of the pools would be the best means of achieving that end.

RECOMMENDATION 1—Create a Code of conduct.

We recommend that a concise and readable code of conduct for the Tribunal be developed and adopted once the current review is concluded.

53. **New appointments to the hearing panel pools.** In 2011, the Law Society advertised widely for adjudicators for the Tribunal. There was a working group that was tasked with finding the best qualified applicants for appointment to the hearing panel pools. Wisely, the working group chose not to make the selections themselves, but to retain a firm of "head-hunters" to vet the applications and recommend the best applicants for appointment based on criteria established by the working group and some senior staff.

54. Although the resulting appointments have been a major success, the Task Force looked closely at the criteria used in the first round of appointments. We also looked at some other sets of criteria for appointment of adjudicators, such as those used by the Provincial Judicial Council in recommending candidates for the Provincial Court.

55. In our view, the criteria for appointment of non-Bencher lawyers and for non-lawyers used in 2011 are essentially appropriate for use in future recruitment. We have edited the criteria for brevity and clarity and attached as Appendix 5 the criteria that we recommend for future use when recruiting new members to both pools of adjudicators.

RECOMMENDATION 2—Adjust criteria for appointment to hearing panel pool.

We recommend that the criteria for selection for non-Bencher members of the lawyer and public pools be adjusted only slightly from those used in 2011. Recommended criteria for lawyers and for non-lawyers appear in list form in Appendix 5 to this report.

56. **The number of adjudicators in each of the pools.** The original task force was concerned that too few people would be a problem and therefore estimated 25 as the 'right' number for each pool. Since the initial appointments, the Executive Committee has added a number of life benchers to the pools.

57. The result has been the opposite of the original task force's main concern. Over the last three years, most panel members averaged only one or two hearings per year. That is not enough experience to make full and effective use of the training program in which the Law Society has invested its resources and panel members have invested their time and efforts.

58. The number of lawyer Benchers available for hearing panels and review boards varies. The maximum is 25, but it takes time for new Benchers to get the required training. Disqualifications and conflicts resulting from committee work and other causes further

reduce the number of Benchers available for adjudication in each case. Generally, there are about 12 to 15 Benchers qualified for each of discipline or credentials cases.

59. In our view, the size of the other pools, non-Bencher lawyers and public representatives, should be reduced to approximately the same size. This is to ensure that members of the pool are assigned to panels and review boards sufficiently frequently that they gain an appropriate level of experience while maintaining a pool large enough that adjudicators are available when needed.

60. We recommend the size of each pool be reduced to 15 to 18 adjudicators in each pool.

RECOMMENDATION 3—Reduce the size of public and non-Bencher lawyer pools to create experience.

We recommend the pool size be reduced. The public pool should be reduced to 15 to 18 to allow more (but not too many) hearings per pool member per year. The number of non-Bencher lawyers in the pool should be reduced to a similar range.

61. **Three different panellists.** In the course of our work, the Task Force learned about the process of establishing hearing panels and review boards. Getting appropriate adjudicators together at the same time for a hearing or review has always had its complexities, but the new regime involving three different categories of participants drawn from three lists on a rotational basis has added to the complexity.

62. Previously, the Hearing Administrator would email all the Benchers and the first three to reply affirmatively were appointed to the hearing panel. Likewise, the first seven or more Benchers to reply became a review panel. This was efficient but perhaps not the best method or use of the adjudicators. The requirement for diversity in the panels and a more fair rotation system are definitely an improvement.

63. However, the mandatory requirement of a panel member from each pool (public, lawyer, Bencher) has caused scheduling issues and other unexpected issues. Michelle Robertson, the Hearing Administrator, is required to use one person from each pool, which has caused occasional delays. The most common problem is finding an available lawyer Bencher to chair a hearing panel or to chair or participate in a review board. This is largely because of the fluctuating number of available Benchers and the participation of Benchers in the committees that initiate the hearing processes. To date, there have not been significant difficulties filling the non-Bencher lawyer and public representative positions, but that could happen in the future, particularly if the sizes of the relevant pools are decreased.

64. In our view, flexibility is very important. More flexibility is required to allow timely hearings and to avoid administrative nightmares. We recommend that the lawyer pool and

the lawyer Bencher pool be combined to allow two from that large group be two members of the panel. The third member, in each case, would continue to be a public representative.

65. This change is intended only to enhance flexibility so that hearing and review dates are not jeopardized by availability issues. The Protocol should be amended to indicate that the norm will continue to be that one lawyer Bencher and one non-Bencher lawyer should sit on each hearing panel. Likewise, each review board would continue to include three Benchers and two non-Bencher lawyers. However, when no lawyer Bencher is available, a hearing can proceed on the date set with two qualified non-Bencher lawyers. Similarly, if no non-Bencher lawyer is available, a hearing can proceed with two lawyer Benchers.

RECOMMENDATION 4—Combine lawyer and Bencher pools to allow administrative flexibility in extraordinary circumstances.

We recommend that the lawyer pool and the lawyer Bencher pool be combined. The norm would be that each panel would include one lawyer Bencher and one non-Bencher lawyer, but so that hearings would not be lost due to the inability to find one from each group, there would be flexibility for occasions when a member of each group is not available. The third panellist would continue to be a public member in each case.

66. **Chair of hearing panels.** Before 2012, new lawyer Benchers had the opportunity to sit on a number of hearing panels as new wingers and benefit from the example and advice of experienced Benchers chairing the panels. The new Bencher listened and learned on the job, at that time with relatively little training. The experienced Benchers would mentor and assist until new Benchers had experience. They could then move into the chair position with relative ease. This old school system created an experienced capable pool of decision makers. It also provided a more reasonable and stress-free introduction to the tribunal program for newly-elected Benchers.

67. The Rules require that each hearing panel be chaired by a current Bencher who is a lawyer. This mandatory requirement created an unforeseen issue. The rule was created at the time that non-lawyers were first included in hearing panels. For the first 23 years, those were only Appointed Benchers. Since it was considered that lawyers were more likely to have experience with hearings and the training to deal with evidentiary questions and the like, the rule assigned chairing duties to lawyer Benchers. When the new system was introduced, there did not appear to be any reason to change that rule. Lawyer Benchers were required to take the workshop on hearing skills and proceeded to carry on presiding at hearings. Of course, the new arrangement meant that lawyer Benchers can only participate in hearings that they chair.

68. That worked well until 2014 when there was a new crop of elected lawyer Benchers. They were required to complete all three two-day training courses before they could participate in

a hearing panel. Then, without any direct experience with Law Society hearings, they were required to act as chair of the panel from day one. We were fortunate that experienced "winger" lawyers were available to assist in most cases.

69. In our view, previous experience on hearing panels should be mandatory for a leadership role in a hearing panel. We now have a number of lawyer adjudicators with more than three years' experience. We should take advantage of that to get experienced leadership in the chair and, at the same time, create a more sensible introduction to the tribunal program for new Benchers.

70. We recommend that the chair of a hearing panel or review board should be the most experienced of the two lawyers, whether a Bencher or not. To chair, a lawyer should have sat on at least five hearings and attended the hearing skills workshop prior to first chairing.

71. Qualification to sit as a lawyer winger on a hearing panel does not include the hearing skills workshop, so new lawyer Benchers would be available for hearing panel duties earlier in their Bencher careers. This would help to alleviate the shortage of available Benchers that occurs after each general election and help new lawyer Benchers get hearing experience more quickly.

RECOMMENDATION 5—Appoint experienced lawyers as chairs.

The chair of a hearing panel or review board should be a lawyer with training and experience in conducting hearings. We recommend that, to be eligible to be appointed as chair of a hearing panel or review board, a lawyer must have participated in a minimum of five previous hearings or reviews, as the case may be, and must have completed the hearing skills workshop, regardless of whether he or she is a Bencher.

72. **Independent Tribunal chair.** The degree of separation between the adjudicative and prosecutorial functions of the Law Society has been enhanced by the new configuration of tribunals. While Benchers have provided the steady hand of experienced adjudicators in the past, there is now a sizable group of lawyers and non-lawyers who have had significant hearing experience.

73. While the President appoints the members of the Discipline Committee to consider investigation reports and issue citations where appropriate, he or she also populates the panel that will decide the citation and the review board that reviews the decision. Similarly, the President appoints the members of the Credentials Committee that orders credentials hearings and also populates credentials hearing panels and review boards.

74. As the chair of the Tribunal, the President is restricted in the role that he or she can play in supporting and monitoring the regulatory activities of the Law Society. Alternatively, if the

President is involved in investigations and prosecutions, the role of the chair of the Tribunal is prone to conflicts and disqualifications.

75. The Executive Director is responsible for the management of the investigation of complaints and credentials applications, the prosecution of citations and credentials matters, but also can unilaterally set dates for hearings and exercises discretion on the publication of hearing and review decisions. In other jurisdictions (Manitoba, Ontario, Nova Scotia) an independent chair of the tribunal fulfills functions like those.

76. We recommend creation of the position of Chair of the Law Society Tribunal. The position would be independent of the Law Society structure, Discipline and Credentials Committees, the Benchers and the staff. The Tribunal Chair would be clearly associated only with the adjudication function and separate from the investigation and prosecutorial side of the Law Society.

77. The Tribunal Chair would be appointed by the Benchers for a fixed term and removable by the Benchers only for cause. He or she would be accountable through a regular (annual or semi-annual) report to the Benchers, which would be made generally available to the public. The independent Chair would also be charged with monitoring developments in the tribunals of other law societies across Canada and other professional bodies in British Columbia and making recommendations for improvements and reforms to the Benchers as appropriate.

78. We envision the appointment of a senior lawyer with experience with adjudication in the courts or tribunals. He or she might be a retired judge or tribunal chair. It would require only part-time work and, of course, part-time compensation.

79. The Chair would be the spokesperson for the Tribunal. It would be difficult and confusing for the President to speak for the Law Society as regulator, investigator and prosecutor and at the same time speak for the Law Society Tribunal.

80. The Tribunal Chair would manage the size and experience of the pools. The Chair would also populate panels from existing pool members, act as a mentor to adjudicators, assist them and evaluate their performance.

81. Further duties would include the current regulatory duties of the President and Executive Director and overseeing a skills-based appointments process for new members of the hearing panel pools. A schedule of possible duties for an independent Tribunal Chair is attached as Appendix 6.

82. The appointment of an independent Tribunal Chair would be a further step towards separation of the regulatory and decision-making functions of the Law Society. In other jurisdictions (Manitoba, Ontario, Nova Scotia) an independent chair of the tribunal fulfills functions like the ones we have suggested.

RECOMMENDATION 6—Appoint an independent Tribunal Chair.

We recommend the appointment of an independent Chair of the Law Society Tribunal who would be the leader and administrative head of the Tribunal. This Chair would appoint panels and review boards from existing members of the adjudicator pools. He or she would also manage the size and experience of the pools, act as a mentor to adjudicators, assist them and evaluate their performance.

Further duties would include the current regulatory duties of the President and the Executive Director and overseeing a skills-based appointments process for new members of the hearing panel pools. The Tribunal Chair would also be the spokesperson for the Tribunal when one is needed and make a regular (annual or semi-annual) report to the Benchers and the public on the activities of the Tribunal.

83. **"Supernumerary" Benchers.** The Task Force is concerned that every effort be made to alleviate any potential problem with the availability of adjudicators. We suggest that Life Benchers who are qualified to sit on hearing panels when they complete their Bencher term limit continue to qualify as a spare or "supernumerary" adjudicator. We recommend that Life Benchers only remain available for two years after ceasing to be a Bencher and that they be appointed to hearing panels only in the case of need. This would apply to both elected and appointed Benchers. So, when there are no adjudicators available in either the lawyer or public representative category, a properly trained and experienced Life Bencher in the category could be appointed to the panel and the hearing need not be re-scheduled.

RECOMMENDATION 7—Keep Life Benchers as spares to be used in extraordinary circumstances.

We recommend that Benchers, both elected and appointed, who have reached the term limit and become Life Benchers remain eligible for appointment to hearing panels for two years. Life Benchers would be appointed only in the event that no current member of the appropriate pool was available.

84. **Continuity and renewal.** When the Task Force heard from counsel who had appeared before the Law Society Tribunal, as discipline counsel, Law Society counsel in a credentials matter or on behalf of a respondent or applicant, the most important message that we took from the discussion was the importance of experience for adjudicators. In order to achieve that, continuity in the membership of the adjudicator pool is essential.

85. However, we are also very aware that the long-term success of the Tribunal requires a modest degree of periodic renewal of its membership. We discussed at some length the appropriate way to balance the two requirements in order to maintain the confidence of the profession and the public while providing continued growth and diversity. It is also

important to allow for changes in individual circumstances and a way to replace individuals who are not suited to the work or the position.

86. The result is, of necessity, somewhat arbitrary, but our recommendation is that adjudicators be appointed for four-year terms. We consider that sufficient time to gain experience and facility with the types of decisions required. It justifies the investment in training by both the individual and the Tribunal. It is also, in our view, sufficiently long to provide a significant degree of independence, but is not so long to create a lack of accountability. We recommend that adjudicators be eligible for one reappointment, which would bring the term limit in line with the usual period applied to Benchers.

RECOMMENDATION 8—Appoint pool members to a four-year term, renewable only once.

We recommend that the term of appointment to the hearing panel pool be four years and that a member be eligible for one reappointment of four years. Benchers are limited to their terms of office as elected or appointed Benchers.

87. **Staggered terms.** Continuity in an adjudicative body is important. To that end, it is not desirable to have the personnel of the body disrupted by changes too often. On the other hand, it is also important not to have the entire membership of the body up for renewal or replacement at the same time.

88. Our recommendation to avoid both of those undesirable situations is to have half of the membership up for renewal or replacement every two years. We believe that a two-year run without scheduled changes would foster a reasonable degree of stability. At the same time, an infusion of new adjudicators every two years would give the Tribunal an appropriate degree of renewal. The changes would not overly burden the Tribunal Chair and others required to manage the changes and ensure that individual cases are appropriately continued.

RECOMMENDATION 9—Stagger terms of appointment to ensure continuity as well renewal.

We recommend that the terms of office of non-Bencher hearing panel pool members be staggered so that half expire every two years. In order to achieve that outcome, some appointments in 2016 would have to be made for two years only. In order to ensure an appropriate rate of renewal, only a limited number of members would be re-appointed in 2018 and 2020.

Transmittal

89. We ask that the Benchers approve the recommendations contained in this report and refer them to the Act and Rules Committee to consider how they might best be implemented through amendments to the Act and Rules.

APPENDIX 1

SUMMARY OF RECOMMENDATIONS

These are the recommendations of the Task Force for adoption by the Benchers:

RECOMMENDATION 1—Create a Code of conduct.

We recommend that a concise and readable code of conduct for the Tribunal be developed and adopted once the current review is concluded.

RECOMMENDATION 2—Adjust criteria for appointment to hearing panel pool.

We recommend that the criteria for selection for non-Bencher members of the lawyer and public pools be adjusted only slightly from those used in 2011. Recommended criteria for lawyers and for non-lawyers appear in list form in Appendix 5 to this report.

RECOMMENDATION 3—Reduce the size of public and non-Bencher lawyer pools to create experience.

We recommend the pool size be reduced. The public pool should be reduced to 15 to 18 to allow more (but not too many) hearings per pool member per year. The number of non-Bencher lawyers in the pool should be reduced to a similar range.

RECOMMENDATION 4—Combine lawyer and Bencher pools to allow administrative flexibility in extraordinary circumstances.

We recommend that the lawyer pool and the lawyer Bencher pool be combined. The norm would be that each panel would include one lawyer Bencher and one non-Bencher lawyer, but so that hearings would not be lost due to the inability to find one from each group, there would be flexibility for occasions when a member of each group is not available. The third panellist would continue to be a public member in each case.

RECOMMENDATION 5—Appoint experienced lawyers as chairs.

The chair of a hearing panel or review board should be a lawyer with training and experience in conducting hearings. We recommend that, to be eligible to be appointed as chair of a hearing panel or review board, a lawyer must have participated in a minimum of five previous hearings or reviews, as the case may be, and must have completed the hearing skills workshop, regardless of whether he or she is a Bencher.

RECOMMENDATION 6—Appoint an independent Tribunal Chair.

We recommend the appointment of an independent Chair of the Law Society Tribunal who would be the leader and administrative head of the Tribunal. This Chair would appoint panels and review boards from existing members of the adjudicator pools. He or she would also manage the size and experience of the pools, act as a mentor to adjudicators, assist them and evaluate their performance.

Further duties would include the current regulatory duties of the President and the Executive Director and overseeing a skills-based appointments process for new members of the hearing panel pools. The Chair would also be the spokesperson for the Tribunal when one is needed and make a regular (annual or semi-annual) report to the Benchers and the public on the activities of the Tribunal.

RECOMMENDATION 7—Keep Life Benchers as "spares" to be used in extraordinary circumstances.

We recommend that Benchers, both elected and appointed, who have reached the term limit and become Life Benchers remain eligible for appointment to hearing panels for two years. Life Benchers would be appointed only in the event that no current member of the appropriate pool was available.

RECOMMENDATION 8—Appoint pool members to a four-year term, renewable only once.

We recommend that the term of appointment to the hearing panel pool be four years and that a member be eligible for one reappointment of four years. Benchers are limited to their terms of office as elected or appointed Benchers.

RECOMMENDATION 9—Stagger terms of appointment to ensure continuity as well renewal.

We recommend that the terms of office of non-Bencher hearing panel pool members be staggered so that half expire every two years. In order to achieve that outcome, some appointments in 2016 would have to be made for two years only. In order to ensure an appropriate rate of renewal, only a limited number of members would be re-appointed in 2018 and 2020.

APPENDIX 2

The Law Society of British Columbia

PANEL AND REVIEW BOARD APPOINTMENT PROTOCOL

Under the Law Society Rules, the appointment of hearing panels and review boards is in the discretion of the President. This protocol sets out guidelines for the exercise of that discretion, based on Benchers resolutions and operational practice.

1. Each hearing panel is chaired by a Bencher who is a lawyer and includes two members of the hearing panel pool:
    - one lawyer who is not a current Bencher, and
    - one person who is not a lawyer.

2. Each review board is chaired by a Bencher who is a lawyer and includes two additional Benchers and four members of the hearing panel pool:
    - two lawyers who are not current Benchers, and
    - two people who are not lawyers.

3. When a current Appointed Bencher is appointed to a review board, he or she is considered a Bencher, and two others will be appointed from the non-lawyer roster of the hearing panel pool. No more than one current Appointed Bencher will be appointed.

4. The hearing administrator maintains three rosters:
    - a roster of current lawyer Benchers who qualify to chair hearing panels and review boards;
    - a roster of non-Bencher lawyers who are members of the hearing panel pool; and

- a roster of non-lawyer members of the hearing panel pools, including current Appointed Benchers.

5. When a member of the hearing panel pool or a lawyer-Bencher completes the required training courses, his or her name is added to the bottom of the appropriate roster.

6. The required courses are as follows:

- for all panellists, the introductory course on administrative justice and any annual updates required by the Benchers;
- for all lawyers, the decision-writing workshop; and
- for all lawyer Benchers, the hearing skills workshop;

7. When a hearing panel or review board is to be appointed, the hearing administrator determines the highest member(s) on each roster who

- is not disqualified under Rule 5-3(1) or (2);
- is not a member of the Committee that ordered the hearing, either at the time the hearing was ordered or at the time of the hearing;
- has not had previous dealings with the respondent or applicant that could give rise to a reasonable apprehension of bias;
- is not the subject of a complaint investigation or discipline matter;
- is available on the hearing dates.

8. Before being appointed to a review board, a member of the hearing panel pool or a Bencher must have completed at least one hearing as a member of the hearing panel.

9. The President establishes hearing panels composed of the three pool members under clause 1, and review boards composed of seven pool members under clauses 2 and 3.

10. The President may appoint members of the pool out of order in a case that, in the President's opinion, requires special skill, expertise or experience.

11. When a member of the pool is appointed to a hearing panel or review board, his or her name goes to the bottom of the appropriate roster. If the hearing or review does not proceed, or if the pool member does not begin the hearing or review, for any reason, he or she may request that his or her name be returned to the top of the roster.

12. If a pool member at the top of a roster is not available for three or more consecutive hearings panels or review boards, the President may direct the hearing administrator to place the pool member's name at the bottom of the appropriate roster.

13. The hearing administrator keeps a complete record of the appointment process for each hearing panel or review board.

14. Pool members and Benchers may enquire of the hearing administrator as to where they stand on the applicable roster.

Province Reg. Body	Hearings per Year	Annual Budget	Composition of Panels	Training	Appointment System	Separation of Pool	Appointment of Panels	Length of Appt Term	Re-Appointments	Evaluation	Removal
Alberta	45	$582,000	24 Benchers 4 public	Twice yearly, voluntary after initial session	Bencher elections	No	By chair of charging committee	While bencher	Bencher elections	N/A	N/A
Ontario	½ yr = 60	$2 mil	83 total 31 Benchers 3 paralegals 7 Lay Benchers 28 appointees 14 *Ex Officio*	2 days Plus 2 – 3-hr sessions/year	Inside appointments /outside advertise occasionally	yes	Convocation appoints Chair – lawyer, non-Bencher; full-time/paid	Benchers – 2 yrs; lawyers staggered	Yes – evaluation process	yes	Formal process for removal of Chair; not other members
Manitoba	12 – 15	No separate budget figures	14 Benchers 44 lawyers 8 public	1 full-day/year Some noon-hours 2 days – public	Inside/public advert	Independent Chair Vice-chair is Bencher 1 public rep/2 lawyers No Bencher required	Independent Chair; part-time/paid	Lawyers – year to year; public reps not changed since start of program, 5 yrs ago	More or less same year to year	No	No – but annual reappointment gives opportunity not to continue a member
Saskatchewan	14		24 Governors (less Benchers on Conduct Investigation Comm.) 12 – 14 public	When available being developed	none	no	Bencher Chair appoints panels; Hearing Chair designated	Benchers – 2 3-yr terms, max of 6 yrs; public reps – up to 2 3-year appointments	Better to have more staggered change with new replacements	No – developing as part of governance strategy	no
New Brunswick	6 – 10	No fixed budget	15 lawyers 4 public 1 Governor	No formal training	Inside/advert for public reps	Kept at arm's length from Soc. functions	Registrar appoints panels	Terms are 7 yrs; try to stagger exits	Have occurred; 7 yr policy new, not likely reappoint after 7	no	no

Province Reg. Body	Hearings per Year	Annual Budget	Composition of Panels	Training	Appointment System	Separation of Pool	Appointment of Panels	Length of Appt Term	Re-Appointments	Evaluation	Removal
Nova Scotia	3 - 4	$52 K	24 lawyers 4-5 public no Hearing Comm. Members on Council (fully independent)	1 full day plus skills matrix	Appointed by council	yes	Hearing Comm. Chair is volunteer	No spec term – suggests no more than 3 2-yr terms; do stagger	No specified term – no more than 3 2-yr terms; do stagger changeover	Not unless appeal	Yes – by recommendation from Chair to President
Physicians & Surgeons	None for 5 yrs	No budget needed	None; Council – 10 elected MDS 5 public	Orientation on role of committee and governance; no admin law	Public – appointed by government Inside – 6 yr limit	no	No hearings	no hearings	No hearings	No hearings	Council members have been asked to resign – is formal process
Dental Surgeons	1 - 3	$250 K	1 Bencher 10 dentists 5 public	Annual plus refresher	inside	yes only 1 Board on Disc Comm.	Chair or Vice-Chair appoints panels – volunteers	2 years, with reappointments staggered	Yes – consideration and recom-mendation from Gov. Comm.	No – in process of developing evaluation framework	no
BC	40 - 50	$128 K (excl salaries)	19 Benchers 22 lawyers 25 public	2 to 6 days of training	Benchers elected/appointed, others applied and evaluated independently	Mostly	President	3 years	Extended for additional year pending review	No	No

APPENDIX 4

LAW SOCIETY TRIBUNAL ADJUDICATORS

SUMMARY OF REMARKS ON THEIR EXPERIENCE

MARCH 4, 2015

JOHN LANE: I have done I think about five hearings. I found the hearings to be absolutely excellent in the sense that they are so well organized and so straightforward and I think one of the biggest thing I found as a lay person is in every case the chairs that I have had the opportunity to work with have been extremely helpful and beneficial and very knowledgeable. I have sat on other tribunals, and they don't go as well, and they are not as straightforward.

GRAEME ROBERTS: I found everybody most helpful. There was never a moment where I felt that I was alone. I was always given the opportunity to ask the questions, and I just have the highest degree of respect for all those that I work with.

JOHN WADDELL, QC: I have sat on four or five panels. Two things have impressed me the most, one is the quality of training available to all of us and secondly the quality of counsel that has appeared in front of us on behalf of both the Law Society and the members.

SHARON MATTHEWS, QC: I have sat on, I think, eight or nine hearings in four matters, and I was pleasantly surprised at how much I enjoyed both the adjudicating and the writing. The training was far more scary than the reality, so the hearings are well-organized by Law Society counsel and the member's counsel.

JAMIE MACLAREN: I have sat on two panels now and felt well-prepared, though still quite daunted by the prospect of it all. I thought that counsel were particularly helpful in being patient and guiding me when needed and also my fellow panel members, including the public representatives.

LAURA NASHMAN: I have sat on I think three or four panels and enjoyed it very much. I learned that lawyers are people too and appreciated very much the humanity that is brought to the process.

JUNE PRESTON: I have high regard for the Law Society and how they work in the best interest of the public. Benchers hold that as their vision and why they want to get elected and get on the board. I have sat on panels over the last ten years before it became organized this way and was very glad to know that it was becoming more organized. I took training over the years and always felt so supported by the members who really cared about each other, including the lay people on them.

I also think they are respectful of their own members who are being brought before a hearing. I think it's really important that a person can present their side and so on, and I think it's important that that will always be continued.

CAROL HICKMAN, QC: I also do work as a family law arbitrator, so I find the training very valuable in both capacities. I'm like June because of doing hearings both as a bencher and now sitting in this capacity. I continue to enjoy the work and always appreciate the refreshers and the training that we get.

WOODY HAYES: Being a lay member, I have been particularly impressed with the fairness of the process, and everybody seems to bend over backwards in order to make it as fair to everyone involved as they possibly can.

SANDRA WEAFER: I have sat on probably four or five hearings, including my first review hearing, which I found to be an interesting exercise. I very much appreciated the structure of the panels and the different perspectives that the benchers, the lay members and the non-bencher lawyers bring to the issues. I found it very educational, very useful experience.

JOOST BLOM, QC: I was a bencher for eight years and sat on a decent number of hearings during that time. I thought the process was good, but I think the current process, which came in just as I was finishing, is better.

CAROL GIBSON: I have been on about four hearings, and I have been particularly impressed by how seriously the Law Society and all of the lawyers take their responsibility to the public and to the profession. I just wish that the general public was aware of that.

LYNAL DOERKSEN: I can say, despite the fact that I am constantly in court, I was very impressed with the training we had and how much there was to learn about actually being on the other side and not being an advocate and chairing a panel. It has been very challenging, and I have learned a lot.

JIM DORSEY, QC: I have sat as an administrative arbitrator, both public and private, for thousands of days over four decades, and what I particularly enjoy about this process is the extensive and thorough preparation that occurs before we get to a hearing and at the hearing, the respect, courtesy and competence of all of the people that I have been dealing with.

GAIL BELLWARD: I have become one of your biggest boosters because I have done a lot of work in the Health Sciences with physicians, pharmacists, nurses, that sort of thing. It's really important that this type of thing where there is the respect, where there is the detail where people go into it knowing exactly what is going to happen and see the end result, the learning is just incredible and the elevation of your profession is constant as a result I think is just magnificent.

PAULA CAYLEY: The first hearing I had, we brought somebody back to the profession who had been disbarred, so I really felt the seriousness certainly of the role and the respect that everybody gave to that person in that process. I was very impressed. I have sat on a few panels, and it has been a really positive experience. I have really been impressed with Law Society counsel and the challenge of their role in this process

GLENYS BLACKADDER: I have previous experience in tribunals, but I find that the most rewarding work that I have been able to do have been with the Law Society and I appreciate the opportunity. There is a divergence of interesting opinions in most of the discussions, and I really enjoy that particularly.

DAVID LAYTON: I have been really impressed with the professionalism and the transparency of the tribunal process. I am particularly impressed with the Law Society's effort to constantly assess and reassess and modify this process so that it has become and will continue to become a leader in Canada in terms of really a sound adjudicative process in administrating professions.

JASMIN AHMAD: I have sat on about five or six or maybe more hearings, credentials and discipline. What struck me about the hearings is what everyone, the benchers, the lawyers, the lay representatives have brought to the compassion, the sympathy, the empathy but at the same time the over-arching principle of the interest of the public. That has been present and apparent and brought to the table by everyone, and so it has really struck me. I think that the Law Society is doing a wonderful job in bringing all of the experience and the perspectives they have in bringing this format.

LANCE OLLENBERGER: I'm hoping that it is a mutually beneficial experience because it has been very beneficial to me in my other life, working with the panels, observing and participating in the adjudicative process and determining that things are not always cut and dried the way at times that we feel that they are. So I really appreciate the process we go through, the back and forth, the discussions and decisions that we make so for me, it has been very beneficial. I think five hearings, both credential and discipline, so thank you.

DON SILVERSIDES, QC: Since this panel has been set up, I have had at least two credentials hearings, two discipline hearings and a review. I think that having public representatives really benefits the process. They are not shrinking violets, they participate fully and, in my experience, on every panel, their views, which are very much grounded in common sense, have often carried the day.

BOB SMITH: As a public member on these panels, I honestly feel privileged to be representing the public in the deliberations that the panel is hearing. I look forward, having had only three sessions, some others were cancelled at the 11th hour, so maybe I would have had more, but I look forward to continuing to be able to participate and hopefully more frequently.

HAYDN ACHESON: I have done many hearings over the years, sat on the original task force, probably four or five years ago, where we reviewed the tribunal process, made the recommendation to go outside the bencher table. On the current task force, evaluating the three-year trial, as I look around the room and the diversity I think we made the right decision in the trial. I think the public is served very well by having the diverse group.

GAVIN HUME, QC: I was involved in the setting up of these tribunals, so it is a great pleasure to me to hear about the successes that we are having. I continue to sit, I don't know how many I have done, and I very much appreciate also the training. I was dumped in, like many of us when we first started as benchers, and the training I think has been very useful.

TOM FELLHAUER: I have experienced both the hearing panels being all benchers and also the new regime. I would have to say that I am really, really impressed. There is a completely different feeling when you have a public representative on the hearing panel, and I have had a number of instances where we have been dealing with a situation or asking questions and the public representative has come up with a question that is just spot-on and really captures what I would say, you know, the more public interest

ELIZABETH ROWBOTHAM: I have had about four or five panels in the past year. I have chaired two disciplinary and credential. I find the benefit of the input of advice from both the lawyers and the public representatives very helpful and integral to a successful panel hearing.

CLAYTON SHULTZ: The inclusiveness I found very welcomed from the Law Society and the genuine welcome, which is evident from the comments around this room. It's been a rewarding experience, and I have looked back on it with great enthusiasm.

BRUCE LEROSE, QC: I have to tell you that when current Ken Walker was the chair of this task force that brought this forward to the benchers, the vote was 30 to 1 in favour of Ken's recommendations; I was the one. I have to tell you that I am an absolute convert. Having had the opportunity over the last three years to sit with the likes of Clayton and Woody Hayes and others, they have added so much to the process, and it is a much better process. I'm proud to say that I was wrong. With respect to the training, you are never too old to learn, it's been wonderful training and despite the fact I had the opportunity to sit on many and many of these hearings prior to us getting the training, it has helped me immeasurably.

BILL EVERETT, QC: I have been most impressed by the training that we have all received in preparing us to sit on these panels. I think it's been first-class, and it's allowed us to be able to write really excellent decisions and to conduct the hearings in the fairest manner possible. I am also very impressed by the lay people who serve on the panels. As others have said, they come up with the question that cuts right through it all and goes right to the heart of the matter, and I have been very impressed by that. I also like the way in which the new system separates the

prosecutorial arm from the hearing panel so that we have truly independent and transparent hearing panels judging the lawyers that come before us.

PETER WARNER, QC: I have done about six or seven hearings under this new panel system. I did a number when I was a bencher from 1992 to 98, and I think this system is a better system. I think having members of the public sitting on the bench, as it were, is a sobering experience for either students or lawyers who are in trouble or who are in front of us. With the public there, it is a bigger carpet they are being called upon, so I think it has worked very well.

THELMA SIGLOS: I agree with many of the things that were said here. I totally welcomed the training that I was receiving because I felt it helped me in some of the work that I was doing. I am really grateful for that training.

The second thing is that I was totally impressed with the fairness of the process in terms of transparency, and the respect given to the lawyer who was in front of us and the other counsel and the time given to me when I asked certain questions to understand, and the process itself. I say I took my stand or perspective as a public representative very seriously in that respect.

Thirdly, I was grateful also for the process of giving us copies of the decisions, that to me was a wealth of understanding, seeing what happened in some of the cases and being able to say, yeah how this differs from the matter that I was part of. So overall I am grateful to be part of this process and I learned a lot.

DAN GOODLEAF: I am now in the midst of my fifth panel, and I will share with you a bit of a secret that I had at the beginning. I had some doubts. I thought what is the Law Society of British Columbia doing? Is this window dressing? Is there is some kind of pressure that came its way that is causing them to do what it is doing? So I had the doubts, maybe I was with Bruce on the one that decided to keep the barbarians away from the door. I will tell you that after the first session, any doubts that I had were taken away. As a lay person, as a public representative, at least in the five panels I have been on, you are brought in as an equal, you are treated as an equal, you are expected to carry your own weight, you are expected to have views and not just sit there, and you are expected to defend those views.

DON AMOS: I have sat on other tribunals, and I found my experience here just excellent. The whole process has been just first-class. I also recently sat on my first review hearing, and again this was a very very good process.

GREG PETRISOR: I appreciate the opportunity to do these training sessions. It gives you a chance to maybe have some feedback and discussion with other people who sit on panels because you are kind of alone up there trying to make decisions quickly and answer questions that come up. So, I appreciate the opportunity.

JORY FAIBISH: My experience has been the same as I have heard from many of my colleagues: warm welcome, great deal of consideration in terms of any input that I have to make and I have really appreciated that. I have to say it was a surprise, and a welcomed surprise. I have been on a couple of panels.

APPENDIX 5

CRITERIA FOR APPOINTMENT TO HEARING PANEL POOLS

These are the basic criteria that we recommend for lawyers:

Outstanding legal career, including:

- Excellence in chosen area(s) of law
- Teaching experience – law school, CLE
- Contributions to the profession

A variety of practice backgrounds, with value placed on specialization in:

- Administrative law
- Regulatory law
- Criminal law
- Civil Litigation
- Accounting
- Securities
- Real estate
- Immigration

Adjudication skills

- Sound judgment, independence and objectivity
- Patience
- Decisiveness

Communication skills

- Ability to communicate effectively in hearings and meetings
- Ability to write clearly and effectively in a timely fashion

Diversity:

- Gender
- Geography
- Minority representation

- Experience with cultural and ethnic diversity

These are the basic criteria that we recommend for non-lawyers:

Community service (leadership roles a plus) and recognition

Board experience (leadership roles a plus)

Career leadership / professional or management experience

Regulatory experience

Decision-making skills

- Sound judgment, independence and objectivity
- Patience
- Decisiveness

Communication skills

- Ability to communicate effectively in hearings and meetings
- Ability to write clearly and effectively in a timely fashion

Diversity

- Gender
- Geography
- Minority representation
- Experience with cultural and ethnic diversity

APPENDIX 6

ROLE OF INDEPENDENT TRIBUNAL CHAIR

1. Basically, the role of the Chair would be those of

    a) member of lawyer pool;

    b) chief of Tribunal;

    c) chambers bencher (subject to delegation);

    d) adjudicator on publication issues.

    all subject to *Legal Profession Act* and Law Society Rules.

2. The functions of the independent chair would include these:

    a. Establish panels and review boards, appoint members, remove, replace, consent to continuation, etc., supported by staff and guided by Protocol;

    b. Participate in hearings as chair of panel in rotation with other members of lawyer pool;

    c. Conduct pre-hearing and pre-review conferences or appoint another member of the lawyer pool;

    d. Adjudicate applications made before and after hearing or review, such as adjournments, stays, variation of orders, or appoint another member of the lawyer pool. Direct applications to Committee or panel where appropriate;

    e. Act as spokesperson for the Tribunal;

    f. Be responsible for the disclosure and publication of citations, decisions and other Tribunal information and documents. Adjudicate applications relevant to exercise of discretion in relation to publication and disclosure;

    g. Set date for hearing or review when counsel cannot agree;

    h. Designate three or more Benchers to consider applications for interim suspension, etc.;

i. Be a leader, mentor and coach with all tribunal members;

j. Participate in the appointment and re-appointment process;

k. Report to the Benchers and the public annually or semi-annually on the activities of the Tribunal;

l. Monitor developments in other jurisdictions in Canada and make recommendations to the Benchers on areas of improvement relevant to the Tribunal.

The Law Society of British Columbia

The Law Society of British Columbia

2016 Fees and Budget Report

Presented to:
Benchers
September 25, 2015

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THE LAW SOCIETY OF BRITISH COLUMBIA
2016 Fees and Budget Report

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Law Society Overview

The 2016 Law Society Budget results in an annual practice fee of $2,057.09, and an insurance assessment of $1,750. This is a $65.09 (1.7%) increase over the 2015 annual mandatory fees.

The components of the mandatory fees for insured, practising lawyers for 2016 are as follows:

The Law Society of BC
2016 Budget
Components of Fee Chart

	2016	2015	Difference	% change
Law Society Operations	$ 1,663.67	$ 1,605.46	$ 58.21	3.6%
Federation of Law Societies	30.00	30.00	-	-
CanLII	40.00	36.98	3.02	8.2%
Pro bono/Access to legal services*	29.57	30.06	(0.49)	-1.6%
REAL	4.35	-	4.35	N/A
CLBC	195.00	195.00	-	-
LAP	67.00	67.00	-	-
Advocate	27.50	27.50	-	-
Total Annual Practice Fee	$ 2,057.09	$ 1,992.00	$ 65.09	3.3%
Insurance Assessment	1,750.00	1,750.00	-	-
Total Mandatory Fee (excluding taxes)	$ 3,807.09	$ 3,742.00	$ 65.09	1.7%

** Total contribution to pro bono and access to legal services is $340,000, as recommended by the Access to Legal Services Advisory Committee. Per member contribution decreases due to number of members.*

General Practice Fee

General Fund – Law Society Operations

The Law Society's 2016 annual budget was created based on input and consultation with Leadership Council and Management, and included an in-depth "bottom-up" review of all departmental expenses.

The focus of this budget, in addition to delivering the core regulatory programs and meeting the established Key Performance Measures, is to support the continuing initiatives under the Law Society's strategic plan and mandate, and in particular, supporting proactive regulation to ensure that the Law Society remains an innovative and effective professional regulatory body.

Other key assumptions that have been considered in preparing the 2016 budget are:

- 1.68% growth projected in full-time equivalent practicing members, to 11,500
- 500 PLTC students
- Market based staff salary and compensation adjustments
- Increase in external counsel fee funding based on current trends
- Reduction of 1.2 FTE staff positions
- Reduce operating expenses where possible
- Continued review of knowledge management initiatives
- Maintain capital allocation levy at same level
- To reduce the impact on the practice fee, the use of reserve funding for one-time costs related to the possible notaries merger and the review of the practice standards program
- Reserve levels in line with the Executive Limitations, no short-term borrowing to fund operations during the year

Budget Risks

- Inflation – Inflation has remained low for several years, which could mean that we may enter a phase of rising inflation. Staff salaries comprise 70% of the total expense budget, so rising inflation and related salary market levels may put pressure on compensation costs. Rising inflation may also cause an increase in other operating expenses.

- Collective Agreement - The 2016 collective agreement with the PEA has not been negotiated and compensation costs may be affected by the result of those negotiations.

- External Counsel Fees – External counsel fees represent a significant portion of the overall budget (9%). While these costs are managed and tracked rigorously, they can also be unpredictable in nature. These costs are typically driven by three factors, conflicts, work load and the requirement of special skills. Also, the complexity of new cases cannot be anticipated, which can have a significant impact on costs. In recent years, the increase in the complexity and difficulty of cases, is reflected in an increase in the number of reviews and hearing days. Accordingly, based on actual prior year trends, the external counsel fee funding levels for 2016 must increase to better reflect anticipated demand levels.

- Staff Vacancy Savings – In order to anticipate vacancies in staff positions during the year, and reduce practice fee requirements, a staff vacancy savings budget is estimated each year based on historical trends. As the amount of staff vacancy savings depends on the total amount of staff vacancies in any given year, there may be more or less savings than budgeted. If there are lower vacancies than estimated in the vacancy budget, operating savings will be overestimated, resulting in budget pressure.

2016 Revenue Summary

General Fund revenues are budgeted at $22.4 million (excluding capital funding). The budgeted revenue includes 11,500 full-time equivalent practicing members, 500 PLTC students, and other revenues at similar levels to 2015.

2016 Operating Expense Summary

General Fund expenses are budgeted at $22.4 million, $1.29 million (6.1%) over the 2015 budget. A large portion of the change is due to structural adjustments to external counsel fees (3.3% of the 6.1%), with the remaining 2.8% increase due to market based staff compensation adjustments, offset by other savings. Management has performed a detailed review of every cost center and examined the delivery of programs. There have been both increases identified and savings generated through this process.

THE LAW SOCIETY OF BRITISH COLUMBIA
GENERAL FUND EXPENSES SUMMARY

	2016 Budget	2015 Budget	2016B vs 2015B Variance	%
GENERAL FUND EXPENSES				
Benchers Governance	766,655	765,501	1,154	0.2%
Corporate Services	3,058,932	3,042,729	16,203	0.5%
Education & Practice	3,681,517	3,535,933	145,583	4.1%
Executive Services	2,161,209	2,098,503	62,706	3.0%
Policy and Legal Services	2,423,458	2,272,730	150,728	6.6%
Regulation	8,397,872	7,555,734	842,138	11.1%
Building costs	1,886,393	1,814,431	71,962	4.0%
TOTAL GENERAL FUND EXPENSES	**22,376,036**	**21,085,561**	**1,290,475**	**6.1%**

A summary of the significant changes to operating expenses are noted below:

Staffing

Staffing levels have been reviewed in detail and although there were requests for additional staff in certain areas, no new positions will be added at this time. In addition, productivity gains have been realized with the reduction of 1.2 FTE staff positions in practice advice and LIF, reducing overall expenses by $96,000.

Staff Compensation Costs

The Law Society is a service organization, with salaries and benefits comprising 70% of the total costs of the operation. The Law Society staff compensation polices ensure that staff compensation is consistent with the market and maintains staff compensation at the 50th percentile (P50) for comparable positions, and market based wage adjustments are made each year based on bi-annual external independent benchmarking. In addition, wage adjustments for union employees are made each year according to the Professional Employees Association collective agreement. The increase in compensation costs related to union and non-union salary adjustments is estimated at $380,000.

Additionally, the staff vacancy savings budget will be reduced by $200,000 to $700,000, based on current experience levels, which effectively increases operating expense by $200,000.

External Counsel Fees

External counsel fees in the areas of Regulation, Legal Services and Credentials make up a significant portion of the budget, totaling $1.9 million (9% of operating expenses). Since 2012, these fees have been steadily increasing for a number of reasons, with $1.97 million in 2014 and $1.84 million projected in 2015.

As the cases and files are driven by member incidents, committee decisions and hearing panels, it is difficult to predict exactly what level of external counsel fees will be incurred during the year. Regulation case files are sent to external counsel for conflict reasons, and in addition, files are referred outside due to case load levels, staff vacancies or when specialized expertise is required.

Over the past few years, there have been a number of trends that are affecting the work required on cases in the discipline, professional conduct, legal defense and credentials areas:

1. An increase in the complexity of files and difficult cases, increasing the time required on files, and the number of hearing days.
2. An increased number of reviews have been initiated by members and the Discipline and Credentials Committees, increasing hearing days.

3. An increase in the quality of work performed on professional conduct files, utilizing interviewing and other investigative techniques to enhance the effectiveness of investigations.
4. With staffing vacancies, files may need to be sent out to ensure the timelines, key performance measures and national discipline standards are being met.

These trends are evidenced by the number of s.47 reviews initiated and the number of hearing days which have increased steadily over the last several years. The number of hearing days in 2014 and projected for 2015, are more than double, compared to previous years. It is also evident that the number of citations outstanding at the beginning of each year continues to grow, due to the nature and complexity of files.

As it is difficult to predict with precision how many and what type of cases may arise during the year, a significant amount of time is spent managing file work and monitoring costs throughout the year. The mix of files being handled inside and outside is continuously monitored, while keeping timelines and the mandate of the Law Society in mind. Several strategies are used to manage external counsel costs, including, using skilled employees to handle difficult files in-house, bringing complex external files in-house that were initially placed with outside counsel, choosing efficient lawyers, establishing discounted hourly rates, and negotiating caps on file costs with external lawyers.

With all of these factors in mind, the overall external counsel fees budget has been increased by $700,000 over the 2015 budget, in line with expense trends over recent years. This includes professional conduct, discipline, legal defence, custodianships, credentials, unauthorized practice, FOI, and interventions.

Other Operating Expense Reductions

Offsetting some of the increase in the external counsel fee budgets, total savings of $314,000 in other operating expenses have been identified.

General Fund Net Assets

Overall, the General Fund remains financially sound, with a reserve level of $8.7 million at the end of 2014 (excluding capital allocation and TAF funding). This reserve level ensures that no short-term borrowing to fund operations will occur during the year.

The following one-time costs are expected to be incurred over the next year, which will be paid out of the reserve, and not included in the practice fee:

- Proactive Practice Standards project - To maximize the use of existing and new data sources to identify at-risk lawyers, to design and implement protocols for remediating at-risk lawyers, and to monitor outcomes and adjust protocols. Estimated cost is $55,000.

- Possible notaries merger – With discussions with notaries about a possible merger, there may need to be an external review. Estimated cost is $75,000.

In addition, in 2014, a Knowledge Management staff working group was struck to develop and implement an organization-wide knowledge management system for the Law Society. At that time, $235,000 was estimated for this initiative, to be paid out of the reserve and not included in the practice fee. This project is on-going and recommendations are expected over the next year. The Knowledge Management system would support the mandate of the Law Society by a number of methods, including facilitating the aggregation and dissemination of practice support and advice information for lawyers, and using various means to share knowledge, including technology.

Capital

The Law Society maintains a 10 year capital plan to ensure that capital funding is available for capital projects required to maintain the 845 Cambie building and to provide capital for operational requirements, such as computer technology, furniture and workspace improvements. In addition, the capital plan funds the annual $500,000 debt service payment on the 845 Cambie building loan from LIF.

The annual capital allocation levy is included in the annual practice fee, and remains unchanged at $176 per member.

In the 2016 capital plan, $1.65 million is budgeted for capital projects (Appendix C). Projects include $650,000 in base building maintenance, including replacement of post tension strands and elevator upgrade. In addition, operational capital includes replacing computer hardware, furniture, renewal of computer software licenses, updates to the telephone system to VOIP (voice over internet protocol) and office workspaces.

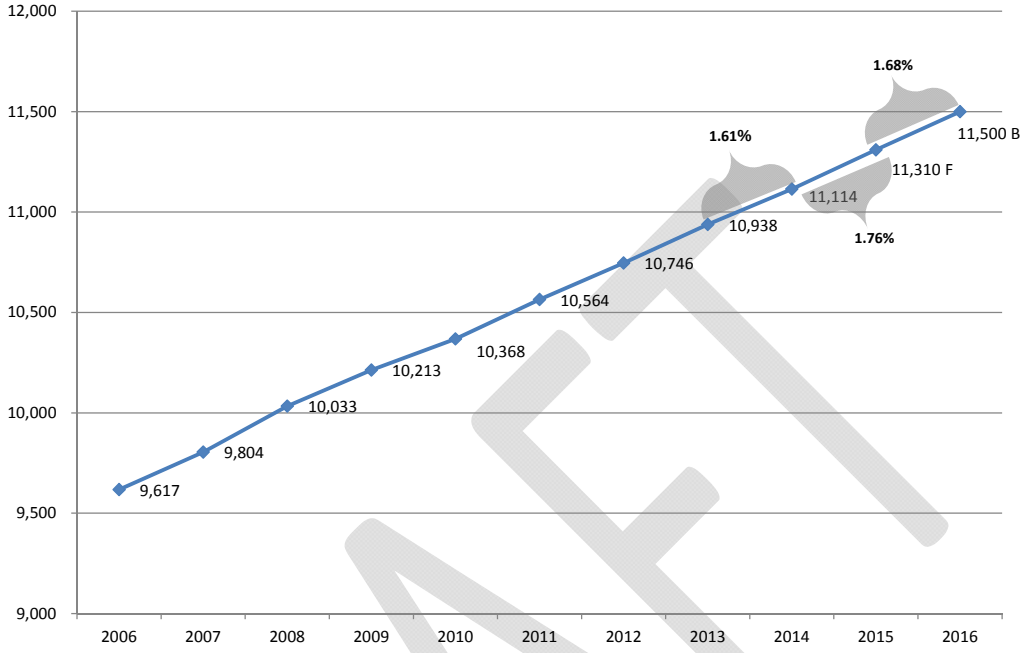
2016 Operating Revenue

Total revenues, excluding the capital allocation levy, are budgeted at $22.4 million, an increase of $1.29 million (6.1%) over the 2015 budget (Appendix A).

Membership revenues, excluding the capital allocation levy, are budgeted at $17.6 million, a 5.7% increase from 2015 budget due to the projected growth in the number of practising lawyers and the increase in the annual practice fee. Based on the average growth in membership over the last few years, budgeted full-time equivalent practicing membership is projected to increase to 11,500 members, 1.68% over the 2015

membership projection. Other categories of membership are assumed to remain consistent with previous years.

Practising Membership Projection



PLTC revenues are budgeted at $1.38 million, based on 500 students, the highest number of PLTC students in the Law Society's history.

Electronic filing revenues are budgeted at $665,000, similar to 2014 levels and 2015 trends.

Other revenues, which include credentials and incorporation fees, fines, penalties and cost recoveries, are budgeted at $1.2 million. At this time, we have assumed that the Law Foundation will continue funding $100,000 in 2016 to support the delivery of PLTC at Thompson Rivers University.

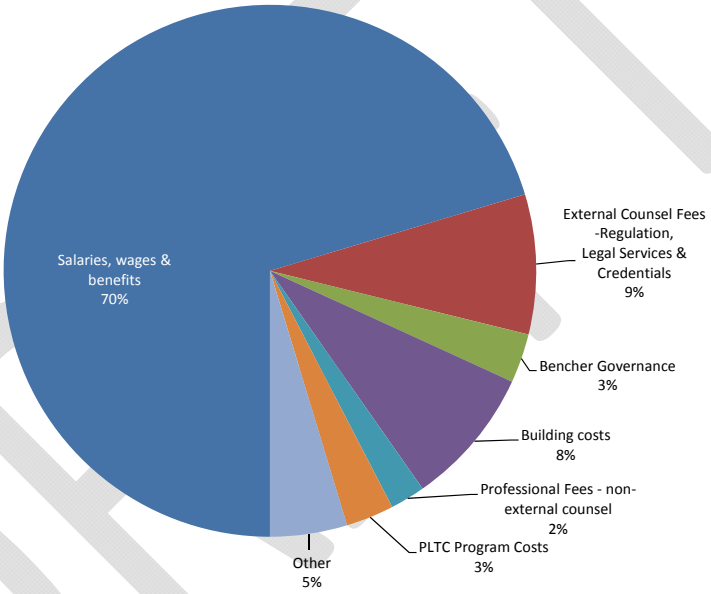
Building revenue and recoveries are budgeted at $1.2 million in 2016. The Law Society owns the 845/835 Cambie building, occupies the majority of space, and the space that is not occupied by the Law Society is leased out to external tenants. In 2016, external lease revenues are budgeted at $687,000, similar to 2015. Also included in lease revenues is an inter-fund rent allocation of $415,000 charged by the General Fund for space occupied at 845 Cambie by the Lawyers Insurance Fund and the Trust Assurance Program.

2016 Operating Expenses

The total operating expense budget has increased by $1.29 million (6.1%) (Appendix A). A large portion of the increase is due to a structural adjustment to external counsel fees (3.3% of the 6.1%), with the remaining 2.8% increase due to market based staff salary and compensation adjustments offset by other savings.

The chart below provides information on the type of operating expenses within the General Fund.

Operating Expenses - Composition by type



Departmental Summaries:

Bencher Governance

The Bencher Governance area includes the costs of the Bencher and committee meetings, including travel and meeting costs, which are required to govern the Law Society, as well as the costs of any new initiatives related to the Bencher Strategic Plan and Priorities.

The 2016 Bencher Governance operating expense budget has been kept at similar levels to 2015, at $767,000, $1,154 above the 2015 budget.

Corporate Services

The departments that are included in Corporate Services are; General Administration (includes the Office of the Chief Executive Officer), Finance, Human Resources, and Records Management.

General Administration includes the Office of the CEO, who leads the Law Society operations and reports directly to the Benchers. General administration also includes the Operations department which provides general administrative services, such as reception and office services, and office renovation services.

Finance provides oversight over all the financial affairs of the Law Society, including financial reporting, operating and capital budgeting, audit, payroll and benefits administration, cash and investment management, and internal controls.

Human Resources develops and maintains the human resource policies and procedures, and provides services related to recruiting, compensation, performance management, employee and labor relations, and training.

Records Management is responsible for the records management, library and archives program, including the oversight of the electronic document management system.

The 2016 Corporate Services operating expense budget is $3.1 million, a minimal increase of $16,200 (0.5%) over 2015 budget mainly due to market based salary adjustments, offset by reductions in external recruiting costs.

Education & Practice

The departments included in Education and Practice are; Member Services, Credentials, PLTC and Education, Practice Standards and Practice Advice.

Member Services provides services to members, including member status changes, fee billings, unclaimed trust funds, Juricert registration, and the Call Ceremonies. This department also administers the annual continuing professional development program for all lawyers.

Credentials ensures new and transferring lawyers are properly qualified to practise law in BC by preparing and assessing applicants for call and admission to the Law Society, and licensing them to practice.

PLTC & Education helps articled students make the transition from law school to legal practice. Taught by experienced lawyers, PLTC uses case files and model transactions that replicate as closely as possible what students will experience during articles and when practising. Successful completion of the intensive, 10-week course is one of the conditions law school graduates must meet to practice law in British Columbia.

PLTC celebrated its 30th anniversary in 2014 and was Canada's first skill-based bar admission training program. Student numbers continue to steadily increase.

Practice Standards addresses issues of lawyer competency with online courses, practice management support and other resources. The program is a remedial program that assists lawyers who have difficulty in meeting core competencies and who exhibit practice concerns, which may include issues of client management, office management, personal matters, and substantive law. The Practice Standards department conducts practice reviews of lawyers whose competence is in question, and recommends and monitors remedial programs.

The Department also supports lawyer effectiveness by overseeing the operation of the following Bencher-approved online lawyer support programs: the Small Firm Practice Course, Practice Refresher Course, Bookkeeper Support Program and Succession and Emergency Planning Program.

Practice Advice helps lawyers serve the public effectively by providing advice and assistance on ethical, practice and office management issues. This is primarily provided by telephone service. In the average year the Practice Advice lawyers will receive 6,300 calls. In years where new issues occur, such as PST, and the BC Code, as in 2013, call volume increases to approximately 7,400 calls a year. In 2014, there were no new issues, and the call volume leveled to approximately 6,200 calls.

The Practice Advice lawyers also provide written resources such as Practice Watch, CBA Bar Talk, and the Notice to the Profession to lawyers. The goal of these resources is to be preemptive and notify lawyers of their duties, obligations and pitfalls in advance of difficulty.

The Practice Advice lawyers have reached a level of support that can no longer be sustained with the current resources and current methodology. Environmental factors as such as a change in lawyer demographics, technology and a culture of instant response has necessitated a need for a new direction. As a result the Practice Advice lawyers have implemented a new strategic plan as of May 2015. The new plan sets out goals to:

a. Reduce call volume
b. Increase web resources
c. Reclassify and redirect information requests to various digital resources
d. Implement a new intake system and response system.

The ultimate object is to increase coverage, provide an efficient response to inquiries and prevent employee burnout.

The total 2016 Education & Practice operating expense budget is $3.7 million, an increase of $146,000 (4.1%) from the 2015 budget. The increase is due to market based salary adjustments and an increase in Credentials external counsel costs. In addition, the PLTC program has been reviewed, resulting in cost reduction benefits in 2016.

Also, there is a review of the Practice Standards program to help move towards a more proactive approach (funded by one-time costs of $55,000, paid from reserve).

Executive Services

The departments that are included in Executive Services are; Communications, Information Services and Executive Services.

Communications is responsible for all member, government and public relations and provides strategic communication advice to all areas of the Law Society. The department also manages and maintains the Law Society website, electronic communications and produces our regular publications such as the Bencher Bulletin, the E-Brief and the Annual Review. In addition, this department has taken on the responsibility to review and implement the Knowledge Management initiatives.

Information Services is responsible for all technical services relating to computer business systems and databases, networks, websites and data storage and communication technology.

Executive Services coordinates and organizes the Bencher and Executive meetings, coordinates external appointments, and plans and provides administrative and logistical support for the annual general meeting and Bencher elections.

The 2016 Executive Services operating expense budget is $2.2 million, an increase of $63,000 (3.0%) over the 2015 budget, primarily due to market based salary adjustments.

Policy & Legal Services

Policy & Legal Services includes a number of functions including policy, legal services, external litigation and interventions, ethics, tribunal and legislation, information and privacy, and unauthorized practice.

Policy and Legal Services assists the Law Society with policy development, legal research and legislative drafting, and monitoring developments involving professional regulation, independence of the Bar and Judiciary, access to justice, and equity and diversity in the legal profession, and provides advice for ethical consideration and supports the Ethics Committee. In addition, includes external counsel fees providing services for legal defense cases and interventions on behalf of the Law Society.

Tribunals and Legislation supports the work of Law Society hearing and review tribunals and drafts new rules and proposed amendments to the *Legal Profession Act*.

Information & Privacy handles requests made of the Law Society and maintains compliance of the Law Society data and training under the Freedom of Information and Protection of Privacy Act (FOIPPA).

Unauthorized Practice investigates complaints of unauthorized practice of law by unregulated, uninsured non-lawyers.

The 2016 Policy and Legal Services operating expense budget is $2.4 million, an increase of $171,000 (7.5%) over the 2015 budget. This increase is made up primarily of market based salary adjustments, as well as increased legal defense and intervention external counsel costs.

Regulation

There are four areas that are included in Regulation; Professional Conduct, Discipline, Forensic Accounting and Custodianships.

In 2014, Professional Conduct opened 1,067 complaint files and closed 1,139. Of the files closed in 2014, 94% were closed in less than one year. The Complainants' Review Committee and the Ombudsperson continue to be satisfied with the complaint handling processes and procedures.

Professional Conduct includes the Intake and Early Resolution and the Investigations, Monitoring and Enforcement groups, which investigate complaints about lawyers' conduct and recommend disciplinary action where appropriate.

Discipline manages the conduct meeting and conduct review processes, represents the Law Society at discipline hearings and provides legal advice on investigations.

Forensic Accounting provides forensic investigation services to support the regulatory process.

Custodianships provides for the arrangement of locum agreements or custodians to manage and, where appropriate, wind-up legal practices when members cannot continue to practice due to illness, death, or disciplinary actions.

In 2014, the Law Society was appointed as a custodian over 13 practices (2013: 13 practices) and staff coordinated 24 locum placements (2013: 14 locum placements). Discharges were granted on 9 custodianships during the year resulting in an increase to 29 in the total custodianships under administration at year end. The average length of time under the current in-house program to complete a custodianship continues to be less than the average under the previous external custodianship program.

The 2016 Regulation operating expense budget is $8.4 million, an increase of $822,000 (10.9%) over the 2015 budget. Expense increases relate to market based salary adjustments and increased external counsel fee budgets in professional conduct, discipline and custodianships.

Building Costs

The Law Society owns the 845 Cambie Street building and occupies 74% of the available space. The cost of occupying and maintaining the building is partially offset by lease revenues from tenants, which are recorded in the revenue section.

The property management department provides services in relation to tenant relations, leasing, building maintenance and preservation, fire and safety, energy management, and minor and major capital project management.

The 2016 building operating expense budget is $1.9 million, an increase of $72,000 (4.0%) over the 2015 budget due primarily to increased property taxes and required building maintenance.

Portion of Practice Fee funding Law Society operations

Taking all of the above into account, $1,663.67 of the 2016 annual practice fee funds the Law Society operations. This is an increase of $58.21 (3.6%) over 2015.

Funding of External Programs

The Law Society collects a number of fees for external programs, which are included in the annual practice fee:

Federation of Law Societies – The Federation fee is estimated to remain unchanged at $30.00 per member. The Federation of Law Societies of Canada provides a national voice for provincial and territorial law societies on important national and international issues.

CanLII – fee is estimated to increase to $40 per member. CanLII is a not-for-profit organization initiated by the Federation of Law Societies of Canada. CanLII's goal is to make primary sources of Canadian Law accessible for free on its website at www.canlii.org. All provincial and territorial law societies have committed to provide funding to CanLII.

Pro bono and access to justice funding – In 2014, the Access to Legal Services Advisory Committee recommended the contribution to pro bono and access to legal services funding which is sent to the Law Foundation for distribution increase to a flat amount of $340,000 per year. In 2016, the funding level continues to be $340,000.

Courthouse Libraries of B.C. (CLBC) – CLBC provides lawyers and the public in BC with access to legal information, as well as training and support in finding and using legal information. Through its expanding digital collections, website content and training, the library provides practice support for lawyers across the province; and for the public through the Clicklaw website, public library legal collections, as well as individual assistance. The Law Society's contribution for 2016 is $195 per member, the same as 2015.

Lawyer's Assistance Program (LAP) – The LAP fee remains the same at $67 per member. LAP provides confidential outreach, education, support and referrals to lawyers and other members of British Columbia's legal community.

The Advocate – The Advocate subscription fee remains the same, at $27.50 per member. The Advocate publication is distributed bi-monthly to all BC lawyers.

REAL initiative – The Rural Education and Access to Lawyers (REAL) initiative is funded by the Law Society and the Law Foundation, with in-kind support from the Canadian Bar Association, BC Branch. The REAL initiative is a set of programs established to address current and future projected shortages of legal services in small communities and rural areas of the province, and improve access to justice. The

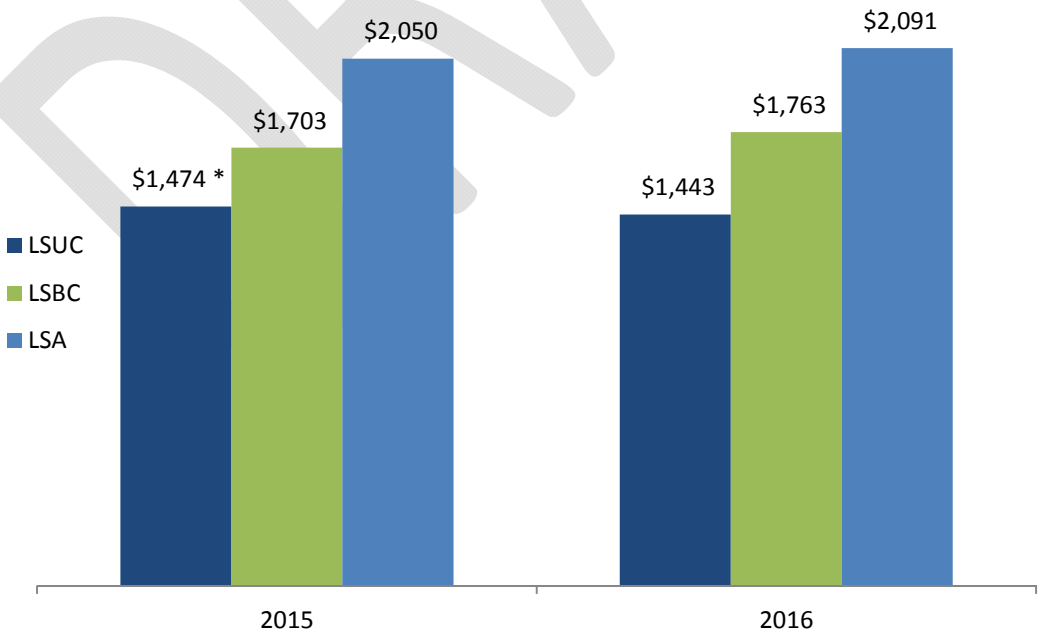
program supports the placement of summer law students in small communities and rural areas of BC, with a goal to encourage future lawyers to practice in these areas.

The Law Society contribution for 2012 to 2015 was funded through the reserve, but it is recommended that any further contributions be recommended to be funded through the practice fee. The 2016 contribution will be $50,000, or $4.35 per member.

Other Law Society Practice Fees

Although it is difficult to compare annual fees to other law societies because of the difference in the number of members, responsibilities, and fund/financial structure, we have included the other Canadian law society annual fees for comparison purposes (Appendix E).

The Law Society of B.C.'s 2016 practice fee, including the Federation of Law Societies contribution, the CanLII contribution, and the Pro Bono contribution; and excluding CLBC, CBA REAL, the Lawyers Assistance Program (LAP) and the Advocate is $1,763.24. For comparative purposes, The Law Society of Upper Canada's ("LSUC") 2016 projected practice fee is $1,443. The Law Society of Alberta's ("LSA") 2015 practice fee has been increased by 2% for inflation for 2016, to $2,091.



*2015 LSUC practice fee has been increased to reflect $1.35 million planned use of reserve for on-going operating costs, $35.37 per member

Trust Assurance Fee and Program

The goal of the Trust Assurance program is to ensure that law firms comply with the rules regarding proper handling of clients' trust funds and trust accounting records. This is achieved by conducting trust accounting compliance audits at law firms, reviewing annual trust reports, and providing member advice and resources. The compliance audit program ensures that all firms are audited at least once within a six year cycle.

In 2014, 509 compliance audits were conducted. Approximately, 4,200 have been conducted since the inception of the trust assurance program. The program continues to provide proactive oversight of law firm trust accounting and receives positive feedback through the member survey results.

The Trust Administration Fee (TAF) is currently set at $15 per transaction, and will remain the same for 2016. Assuming current TAF transactions levels, 2016 TAF revenue is budgeted at $3.5 million, which will result in a TAF reserve of $2.8 million by the end of 2016. This equates to approximately 12 months of operating expenses, and corresponds to the recommended reserve of 6 to 12 months, with any additional reserve beyond this level to be allocated to Part B insurance funding. The TAF reserve levels will continue to be monitored during 2016.

The 2016 Trust Assurance department budgeted expenditures are $2.6 million, an increase of $59,000 (2.4%), due to market based salary adjustments.

Special Compensation Fund

The Special Compensation Fund was maintained pursuant to Section 31 of the Legal Profession Act, was financed by members' annual assessments, and claims were recorded net of recoveries when they had been approved for payment. Since 2004, the Lawyers Insurance Fund has been providing coverage for dishonest appropriation of funds by lawyers.

During 2012, the Legal Profession Amendment Act, 2012 repealed section 31 of the Legal Profession Act. In addition, Section 23 of the Legal Profession Act was amended to remove the requirement that practising lawyers pay the Special Compensation Fund assessment, which meant that, effective 2013 and onwards, there is no fee assessed for the Special Compensation Fund.

Section 50 of the Legal Profession Amendment Act, 2012 provides for the transfer of unused reserves that remain within the Special Compensation Fund to the Lawyers

Insurance Fund for the purposes of the insurance program. The remaining Special Compensation Fund net assets are expected to be transferred by the end of 2015.

Lawyers Insurance Fund

The goal of LIF is to maintain a professional liability insurance program for BC lawyers that provides reasonable limits of coverage for the protection of both lawyers and their clients and exceptional service, at a reasonable cost to lawyers. This is within an overarching objective of maintaining a financially stable program over the long term, in the interest of the public and the profession.

Overall, there are a number of factors that influence the financial stability of our insurance program.

The first factor is the total incidence of claims and potential claims, or "reports". The number of reports appears to be increasing from recent levels. In the 5 year period from 2004 to and including 2008, the average number of reports annually was 945. The 4 years that followed, 2009 to 2012, reflected the impact of the recession on claims and generated an annual average of 1032 reports. In 2013, the number of reports fell to 983, and in 2014, increased to 1036. For 2015, projecting to the end of the year, we expect the number or reports to increase again to almost 1,100.

This increase is reflected in the report frequencies (number of reports divided by the number of insured lawyers) for the year-to-date (Jul 31) compared with the past 5 years:

2010	**2011**	**2012**	**2013**	**2014**	**2015**
13.3%	14.0%	12.5%	12.0%	12.4%	13.0%

The second factor is the amount paid to defend and resolve claims. The severity (the dollar value) of claim payments on a calendar year basis suggests that overall severity is gradually increasing – with the exception of this year's projected results. In the 5 year period from 2004 to 2008, the average annual payments were $10M. The 5 years that followed, 2009 to 2013, generated average annual payments of $12.7M and in 2014, almost $14M. In what could be an atypical year, extrapolating payments in the first 7 months of 2015 to the end of the year results in projected total payments of $8.5M, lower than in previous years.

With respect to trust protection coverage under Part B of the policy, these same factors apply but because of the small number of claims and potential claims, the year-over-year experience is more volatile. 2014 closed out the year much higher on the frequency scale, with 22 claims compared to an annual average in the previous 5 years of 14.6 reports. We've received 9 reports so far in 2015, which is consistent with the average. As to severity, claim payments increased in 2014 to $133,000, and we expect to pay approximately $175,000 in 2015. The average severity since Part B's inception is $84,000 annually; 2014 and especially 2015 exceed the average in payments.

The third factor is the risk of increased future claims. The new Limitation Act, Family Law Act, and Wills, Estates and Succession Act and probate rules will likely usher in additional exposures to the Fund. We predict that the shortened limitation periods in the Limitation Act that took effect in June, 2015 will catch some lawyers unawares, and the new Family Law Act has so far resulted in two large potential claims and another that we are attempting to "repair". Fortunately, further significant claims are unlikely as family practitioners become familiar with the new regime. WESA came into effect in March, 2014 and will likely give rise to claims against lawyers for failing to adequately satisfy themselves and document that the will reflects the testator's true intentions, free from undue influence.

The fourth factor is the assets available to fund the insurance program. The 2014 return on LIF long-term investments - at 9.6% - while solid, underperformed the benchmark and the prior year. In addition, the Fund's investment managers predict more modest future returns. On the plus side, the LIF reserve as at December 31, 2014 grew to $65.8M, including $17.5M set aside for trust protection claims under Part B. The unrestricted net asset position of the fund at year-end was therefore $48.3M.

In addition to the investment return, there is a need to maintain a certain amount of the fund for contingencies and adverse developments. Applying the Minimum Capital Test (MCT) – an industry-wide solvency benchmark for insurers – the Fund's actuary has analyzed LIF's future risks relative to its unrestricted net assets and advised on an appropriate level of capital funding. They are of the view that LIF is currently adequately funded. Due to uncertainties and risks in future investment performance and claim payments, LIF should maintain as a minimum its current level of unrestricted net assets against future contingencies.

According to the actuary's projections, to maintain the unrestricted net assets at the appropriate level, the insurance fee may require an increase in the next few years, depending on annual results over this period. However, the fee can be maintained at the existing level in 2016.

Revenue

Total Lawyers Insurance Fund assessment revenues are budgeted at $14.4 million, which is based on 7,481 full-time and 1,158 part-time insured lawyers. Investment income is $6.6 million, based on an estimated investment return of 5.9% (Appendix D).

Expenses

Operating expenses, excluding the provision for claim payments, are $6.9 million, an increase of $40,000 (0.6%) over the 2015 budget (Appendix D). The increase is due to market based salary adjustments and the hosting of the NABRICO conference.

Taking all factors into account, it is recommended there be no increase to the annual insurance fee of $1,750 for 2016.

Conclusion

The 2016 fees and budgets were reviewed by the Finance and Audit Committee in June and September 2015, and the Executive Committee in September 2015. The Finance and Audit Committee recommended the 2016 Fees to the Benchers at the September 25th Bencher meeting and the fees were approved as presented above.

The Law Society of British Columbia continues to be in a strong financial position, with capital funding in place to maintain the operations and building capital needs, and adequate reserve levels in the General Fund and the Lawyers Insurance Fund to help absorb unknown economic conditions in the future.

The Law Society's overall objective when setting the fees is to ensure that the operations are appropriately funded to enable the Law Society to efficiently and effectively fulfill its statutory mandate of protecting the public interest in the administration of justice.

APPENDIX A

THE LAW SOCIETY OF BRITISH COLUMBIA
OPERATING BUDGET (excluding capital/depreciation)
For the Year ended December 31, 2016
GENERAL FUND SUMMARY

	2016 Budget	2015 Budget	2014 Actual	2016B vs 2015B Variance	%	2016B vs 2014A Variance	%	2016 Budget FTEs	2015 Budget FTEs	FTE Change
GENERAL FUND REVENUES										
Membership fees	17,628,363	16,683,418	16,026,393							
PLTC and enrolment fees	1,380,000	1,249,050	1,178,550							
Electronic filing revenue	665,000	693,500	743,562							
Interest income	350,000	322,500	392,764							
Other revenue	1,184,495	996,903	1,453,483							
Building revenue and recoveries	1,168,178	1,140,190	1,007,472							
TOTAL GENERAL FUND REVENUES	**22,376,036**	**21,085,561**	**20,802,224**	**1,290,475**	**6.1%**	**1,573,812**	**7.6%**			
GENERAL FUND EXPENSES										
Benchers Governance	766,655	765,501	958,057					0.35	0.35	-
Corporate Services	3,058,932	3,042,731	3,012,136					23.00	23.00	-
Education & Practice	3,681,517	3,535,932	3,707,279					33.97	34.97	(1.00)
Executive Services	2,161,209	2,098,503	1,935,599					20.60	20.60	-
Policy and Legal Services	2,443,458	2,272,729	2,277,733					14.00	14.00	-
Regulation	8,377,872	7,555,734	7,580,768					60.20	60.20	-
Building costs	1,886,393	1,814,431	1,791,124					2.00	2.00	-
TOTAL GENERAL FUND EXPENSES	**22,376,036**	**21,085,561**	**21,262,696**	**1,290,476**	**6.1%**	**1,113,340**	**5.2%**	**154.12**	**155.12**	**(1.00)**
GENERAL FUND NET CONTRIBUTION	**-**	**-**	**(460,472)**	**-**		**460,473**		**154.12**	**155.12**	**(1.00)**
Trust Assurance Program										
Trust Administration Fee Revenue	3,497,430	3,247,500	3,500,090	249,930	**7.7%**	(2,660)	**-0.1%**			
Trust Administration Department	2,571,963	2,512,847	2,423,686	59,116	**2.4%**	148,278	**6.1%**			
Net Trust Assurance Program	**925,467**	**734,653**	**1,076,404**	**190,814**		**(150,938)**		**17.00**	**17.00**	-
TOTAL NET GENERAL FUND & TAP CONTRIBUTION	**925,467**	**734,653**	**615,932**	**190,814**		**309,534**		**171.12**	**172.12**	**(1.00)**
							LIF FTE's	**22.60**	**22.80**	(0.20)
							TOTAL Law Society FTE's	**193.72**	**194.92**	**(1.20)**

APPENDIX B

THE LAW SOCIETY OF BRITISH COLUMBIA
Operating Budget (excluding capital/depreciation)
For the Year ended December 31, 2016
GENERAL FUND SUMMARY OF REVENUE AND EXPENSES

	2016 Budget	*2015 Budget*	*2014 Actual*	*2016 v 2015 Budget Var*	*2016 v 2014 Actual Var*
GENERAL FUND REVENUES					
Fee and Assessment Revenues					
Membership Fees	$ 17,628,363	$ 16,683,418	$ 16,026,393	$ 944,945	$ 1,601,970
PLTC Fees	1,380,000	1,249,050	1,178,550	130,950	201,450
Other Credentials Fees	355,875	323,000	356,075	32,875	(200)
GLA, LLP, FLC and Law Corporation Fees	152,750	107,775	151,575	44,975	1,175
Authenticiations and Certificates of Standing	80,500	81,000	79,511	(500)	989
Electronic Filing Revenue	665,000	693,500	743,562	(28,500)	(78,562)
Interest Income	350,000	322,500	392,764	27,500	(42,764)
Other Income	9,000	6,500	14,039	2,500	(5,039)
Law Foundation Grant Revenue	180,970	81,378	341,283	99,592	(160,313)
Fines, Penalties and Recoveries					
Fines, Penalties and Recoveries	405,400	397,250	511,000	8,150	(105,600)
Building Revenue and Recoveries					
LIF and Trust Administration Program	415,079	405,601	371,127	9,478	43,952
Outside Tenants Including Recoveries	686,639	675,089	576,247	11,550	110,392
Other	66,460	59,500	60,098	6,960	6,362
TOTAL GENERAL FUND REVENUES	**$ 22,376,036**	**$ 21,085,561**	**$ 20,802,224**	**$ 1,290,475**	**$ 1,573,812**
PROGRAM AREA EXPENSES					
Benchers and Governance Committees					
Bencher Meetings	$ 223,660	$ 229,044	$ 213,385	$ (5,384)	$ 10,275
Office of the President	209,200	244,732	199,847	(35,532)	9,353
Benchers Retreat	85,250	85,000	88,795	250	(3,545)
Life Benchers Dinner	24,910	23,900	24,769	1,010	141
Certificate Luncheon	3,050	5,220	2,869	(2,170)	181
LS Award/Bench and Bar Dinner	2,395	2,280	3,730	115	(1,335)
Public Forums	-	-	956	-	(956)
Federation of Law Societies Meetings	117,621	107,328	126,035	10,292	(8,414)
General Meetings	111,900	66,183	106,828	45,717	5,072
QC Reception	8,320	5,000	5,000	3,320	3,320
Welcome/Farewell Dinner	18,900	19,000	18,971	(100)	(71)
Volunteer Gifts	12,030	12,875	11,645	(845)	385
Gold Medal Award	4,375	7,075	4,007	(2,700)	368
Executive Committee	17,992	19,041	35,463	(1,049)	(17,471)
Audit Committee	10,150	3,500	10,174	6,650	(24)
Equity and Diversity Advisory Committee	5,000	10,000	7,278	(5,000)	(2,278)
Access to Legal Services Advisory Committee	5,000	5,000	10,610	0	(5,610)
Independence and Self-Governance Advisory Committee	5,000	5,000	6,015	0	(1,015)
Acts and Rules Subcommittee	5,100	5,180	5,635	(80)	(535)
Family Law Task Force	-	-	479	-	(479)
Cloud Computing Working Group	-	-	1,165	-	(1,165)
Courthouse Libraries BC Review	-	-	34	-	(34)
Governance Review Task Force	-	-	70	-	(70)
Legal Service Providers Task Force	-	-	759	-	(759)
Governance Review Committee	5,000	5,000	3,158	-	1,842
REAL - Law Foundation	-	-	47,710	-	(47,710)
TWU Law School Application	-	-	197,105	-	(197,105)
Legal Services Regulatory Framework Task Force	1,000	10,000	4,352	(9,000)	(3,352)
Tribunal Program Review Task Force	-	-	1,915	-	(1,915)
Law Firm Regulation Task Force	2,500	-	204	2,500	2,296
Budget Contingency	75,000	75,000	-	-	75,000
Bencher, AGM and other committees	**$ 953,353**	**$ 945,358**	**$ 1,138,960**	**$ 7,995**	**$ (185,607)**
Pro Bono Contribution	-	-	4,802	-	(4,802)
Interfund Cost Recovery	(186,698)	(179,857)	(185,706)	(6,841)	(992)
Bencher Governance	**$ 766,655**	**$ 765,501**	**$ 958,057**	**$ 1,154**	**$ (191,402)**

APPENDIX B-2

Corporate Services					
General Operations and Administration	$ 1,547,588	$ 1,508,315	$ 1,385,740	$ 39,273	$ 161,847
Records Management	313,535	320,396	340,533	(6,861)	(26,998)
Finance	1,052,586	1,028,343	957,756	24,243	94,830
Human Resources	863,085	976,618	947,731	(113,533)	(84,646)
Staff Vacancies	(104,890)	(117,293)	-	12,403	(104,890)
Interfund Cost Recovery	(612,971)	(673,648)	(619,623)	60,677	6,652
Corporate Services	**$ 3,058,932**	**$ 3,042,731**	**$ 3,012,136**	**$ 16,201**	**$ 46,796**
Education and Practice					
Credentials	$ 434,954	$ 434,813	$ 493,971	$ 141	$ (59,017)
Credentials - External Files	300,000	123,000	278,149	177,000	21,851
Member Services	758,255	724,555	715,332	33,700	42,923
Professional Legal Training Course and Education	1,815,009	1,943,602	1,730,045	(128,593)	84,964
Practice Standards	628,955	586,473	611,194	42,482	17,761
Practice Advice	656,332	721,672	627,379	(65,340)	28,953
Membership Assistance Programs	236,000	236,000	201,930	0	34,070
Staff Vacancies	(134,620)	(168,375)	-	33,755	(134,620)
Interfund Cost Recovery	(120,536)	(120,193)	(121,746)	(343)	1,210
Interfund Program Recovery	(892,832)	(945,614)	(828,975)	52,782	(63,857)
Education and Practice	**$ 3,681,517**	**$ 3,535,932**	**$ 3,707,279**	**$ 145,584**	**$ (25,761)**
Executive Services					
Communications	$ 887,419	$ 893,086	$ 695,956	$ (5,667)	$ 191,462
Executive Support	315,043	345,336	323,478	(30,293)	(8,435)
Information Services	1,419,439	1,362,596	1,288,219	56,843	131,220
Staff Vacancies	(87,035)	(96,949)	-	9,914	(87,035)
Interfund Cost Recovery	(373,657)	(405,566)	(372,055)	31,909	(1,602)
Executive Services	**$ 2,161,209**	**$ 2,098,503**	**$ 1,935,599**	**$ 62,706**	**$ 225,610**
Policy and Legal Services					
Ethics	$ 7,500	$ 8,000	$ 79,495	$ (500)	$ (71,995)
Policy and Tribunal	1,937,402	1,854,308	1,626,623	83,094	310,780
External Litigation and Interventions	475,000	385,000	453,278	90,000	21,722
Unauthorized Practice	357,877	344,291	341,244	13,586	16,633
Staff Vacancies	(78,324)	(87,241)	-	8,917	(78,324)
Interfund Cost Recovery	(255,997)	(231,629)	(222,907)	(24,368)	(33,090)
Policy and Legal Services	**$ 2,443,458**	**$ 2,272,729**	**$ 2,277,733**	**$ 170,729**	**$ 165,725**
Regulation					
Professional Conduct - Intake and Investigations	$ 4,219,678	$ 4,127,659	$ 3,788,309	$ 92,019	$ 431,370
Professional Conduct - External Files	452,300	278,300	455,054	174,000	(2,754)
Discipline	1,112,649	1,104,310	1,037,470	8,339	75,179
Discipline External Files	469,700	212,200	468,452	257,500	1,248
Forensic Accounting	1,005,293	940,479	489,021	64,814	516,272
Custodianships	1,413,383	1,322,928	1,342,463	90,455	70,920
Staff Vacancies	(295,131)	(430,142)	-	135,011	(295,131)
Regulation	**$ 8,377,872**	**$ 7,555,734**	**$ 7,580,768**	**$ 822,138**	**$ 797,104**
Building Costs					
Property Taxes	$ 582,091	$ 520,344	$ 554,371	$ 61,747	$ 27,720
Financing Costs	75,732	75,673	72,030	59	3,702
Building Operating Costs	1,228,570	1,218,414	1,164,723	10,156	63,848
Total Building Costs	**1,886,393**	**1,814,431**	**1,791,124**	**71,962**	**95,270**
TOTAL PROGRAM EXPENSES BEFORE TAP	**$ 22,376,036**	**$ 21,085,561**	**$ 21,262,696**	**$ 1,290,475**	**$ 1,113,341**
Trust Administration Program					
Trust Administration Fee Revenue	$ 3,497,430	$ 3,247,500	$ 3,500,090	$ 249,930	$ (2,660)
Trust Assurance Program Expenses	2,571,963	2,512,847	2,423,686	59,116	148,277
Trust Assurance Program	**$ 925,467**	**$ 734,653**	**$ 1,076,404**	**$ 190,814**	**$ (150,937)**
TOTAL GENERAL FUND CONTRIBUTION	**$ 925,467**	**$ 734,653**	**$ 615,932**	**$ 190,814**	**$ 309,535**

APPENDIX C

THE LAW SOCIETY OF BRITISH COLUMBIA
For the Year ended December 31, 2016
BUDGETED CAPITAL EXPENDITURES

Computers, printers, laptops, LCDs, server storage & multifunction printers	167,000
Software - Windows (Enterprise & Standard) and Security Information & Event Mgmt replacement	103,000
Voice over internet protocol (VOIP) system and headset replacement	282,000
Miscellaneous	25,500
Computer HW, SW & Phone Replacement	**577,500**
Furniture/workstation replacement	38,000
New workstations	97,000
Miscellaneous	20,000
Equipment, F&F replacement	**155,000**
LSBC workspace improvements	270,000
LSBC operations	**270,000**
Elevator upgrade	112,000
Replace variable air volume boxes and install heat recovery systems	112,000
Post tensioning strands	426,000
Base Building Maintenance Projects	**650,000**
TOTAL 2016 BUDGETED CAPITAL EXPENDITURES	**1,652,500**

APPENDIX D

THE LAW SOCIETY OF BRITISH COLUMBIA
Lawyers Insurance Fund
For the Year ended December 31, 2016
CONSOLIDATED STATEMENT OF REVENUE AND EXPENSE

	2016 Budget	2015 Budget	2015/2014 Budget Variance	%	2016 Budget FTEs	2015 Budget FTEs	FTE Change
Revenue							
Annual assessment	14,360,600	14,090,300					
Investment income	6,640,268	6,647,874					
Other income	60,000	70,000					
Total Revenue	**21,060,868**	**20,808,174**	**252,694**	**1.2%**			
Insurance Expense							
Actuaries, consultants and investment brokers' fees	523,250	528,131					
Allocated office rent	290,981	245,965					
Contribution to program and administration costs of General Fund	1,249,859	1,325,812					
Legal	40,000	40,000					
Insurance	458,928	430,585					
Office	466,355	395,598					
Premium taxes	8,856	8,236					
Actuarial provision for claim payments	14,702,000	14,703,000					
Salaries, wages and benefits	2,984,974	2,955,477					
	20,725,203	**20,632,804**	**92,399**	**0.4%**			
Loss Prevention Expense							
Contribution to co-sponsored program costs of General Fund	892,900	945,614					
Total Expense	**21,618,103**	**21,578,418**	**39,685**	**0.2%**			
Net Contribution	**(557,235)**	**(770,244)**	**213,009**		**22.60**	**22.80**	**(0.20)**

APPENDIX E

THE LAW SOCIETY OF BRITISH COLUMBIA
For the Year ended December 31, 2016
MANDATORY FEE COMPARISON
(Full Time Practicing Insured Lawyers)

- 2016 LSBC practice fee compared to 2016 projections or 2015 practice fee of other Law Societies, increased by 2%

The Law Society of British Columbia

2016 Fees and Budget
Funding Effective Regulation

Presentation to:
Benchers
September 25, 2015

The Law Society of British Columbia

General Fund

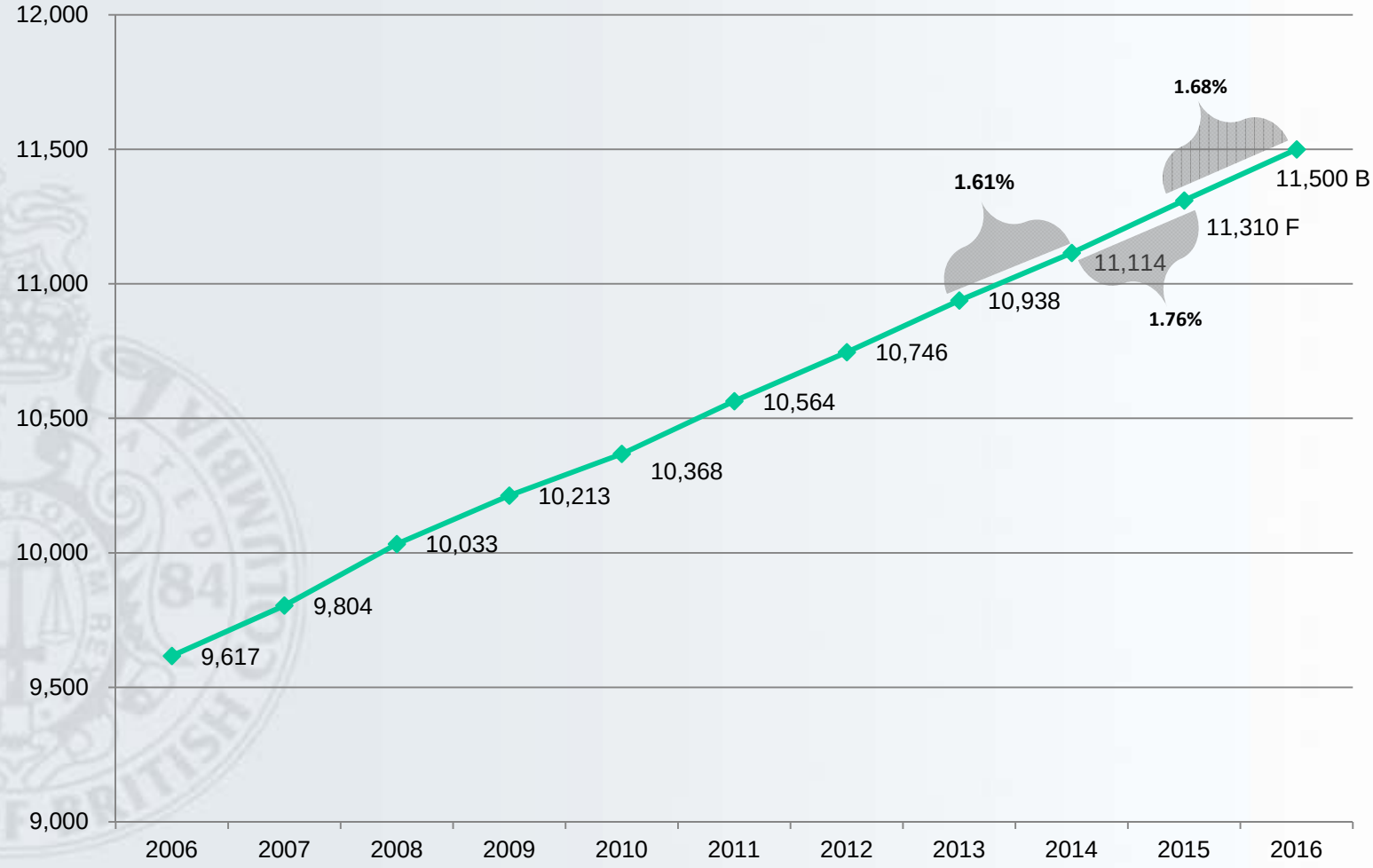
General Fund Overview

- Zero based budgeting process, bottom up, full management participation
- Deliver core regulatory programs and meet KPMs
- Continued support of Law Society Mandate and Strategic Plan, moving towards proactive regulation to ensure the Law Society remains an innovative and effective professional regulatory body:
  - External counsel fees budgets adjusted based on recent trends
  - Continued review of Knowledge Management initiatives
  - Contribution to Pro bono/Access to legal services initiatives through Law Foundation
  - $75,000 Bencher contingency for strategic initiatives during year
- No staff additions, and a decrease of 1.2 FTE positions overall
- Operating expense increase limited to 6.1%, with 3.3% of that increase due to a structural adjustment to external counsel fees (see page 8), and 2.8% due to market based staff salary and compensation adjustments, offset by decreases in other operating costs
- Use of reserve to fund one-time costs related to the Proactive Practice Standards project of $55,000, and potential costs for an external review of the possible notaries merger of $75,000. In addition, as discussed during the 2014 budget meetings, recommendations regarding the knowledge management initiative are expected over the next year, with an estimated allocation from reserve of $235,000
- Projected 2016 reserve (excluding capital and TAF) - $9.4 million, mainly invested in capital assets
- Portion of general practice fee funding Law Society operations is $1,663.67, an increase of $58.21 (3.6%) from 2015

Revenue

Practising Membership Projection

The Law Society of British Columbia



2016 full fee paying equivalent members projected at 11,500

Revenue
Other Revenue

- PLTC – 500 students – increase of 15 students from 2015B – the highest number of students in the Law Society's history
- Electronic Filing revenue – similar to 2014 levels and 2015 trends
- Other non-practice fee revenue – includes assumed $100,000 in funding from the Law Foundation to support the delivery of PLTC at TRU
- Building lease revenue – similar to 2015
- Internal rent allocation of $415,000 charged by General Fund for space occupied at 845 Cambie - Lawyers Insurance Fund and the Trust Assurance Program

Operating Expense
Salary Costs – General Wage Increase

- The Executive Limitation Part 2.G requires that "the Executive Director must establish current compensation and benefits consistent with the geographic or professional market for the skills employed"
- Law Society aims to maintain staff compensation at the 50th percentile (P50) for comparable positions in this marketplace
- Increases include market based GWI staff adjustments for non-bargaining unit employees plus market based P50 external independent benchmarking adjustments, as necessary, plus,
- Staff compensation wage adjustments for PEA employees pursuant to terms of current Collective Agreement (new agreement to be negotiated in for 2016 and forward)
- Total cost for salary adjustments is estimated at $380,000

Operating Expense
External Counsel Fees

The Law Society of British Columbia

- Based on recent trends, recommend increase in external counsel fee budgets in legal defense, investigations, discipline, and credentials, net change of $700,000
- Since 2012, these fees have been steadily increasing for a number of reasons as stated below, with $1.97 million in 2014 and $1.84 million projected in 2015
- Files are typically sent to outside counsel for 1) conflicts, 2) case load levels, 3) staff vacancies, and 4) specialized expertise
- Several trends have emerged that have a significant impact on cases:
  - Increased complexity of investigative and discipline files
  - Increased number of reviews and hearing days (double the number of days in 2014 and 2015 to date, compared to prior years)
  - Case loads and staff vacancies
  - Increased quality of work performed due to more effective investigative procedures
- Total external counsel fees budgets set at $1.9 million (9% of operating expenses)

Capital Plans

- Ten year capital plan updated (Appendix C)
- Capital plan is funded by $176 capital allocation, included in the Practice Fee, no change required in 2016
- Capital funding includes annual 845 Cambie building loan repayment of $500,000 to LIF
- 2016 capital expenditures noted below:

Operations	Computer hardware, software and telephone system replacement (VOIP)	$ 577,500
	Equipment, furniture and fixtures replacement	$ 155,000
	Workspace Improvements	$ 270,000
845 Cambie St.	Building projects – post tension strands/elevator	$ 650,000
	Total	$1,652,500

Reserve
Use of Reserve in 2016

The Law Society of British Columbia

- Forecast unrestricted reserve (excluding capital and TAF) at December 31, 2016 = $9.4 million, mainly invested in capital assets at 845 Cambie Street

- This level of reserve ensures no short-term borrowing to fund General Fund operations, per Executive Limitation Part 2.C.3(b)

- One-time costs to be paid out of the reserve over the 2016 year:
  - Proactive Practice Standards Project $ 55,000
  - External review of potential notaries merger $ 75,000

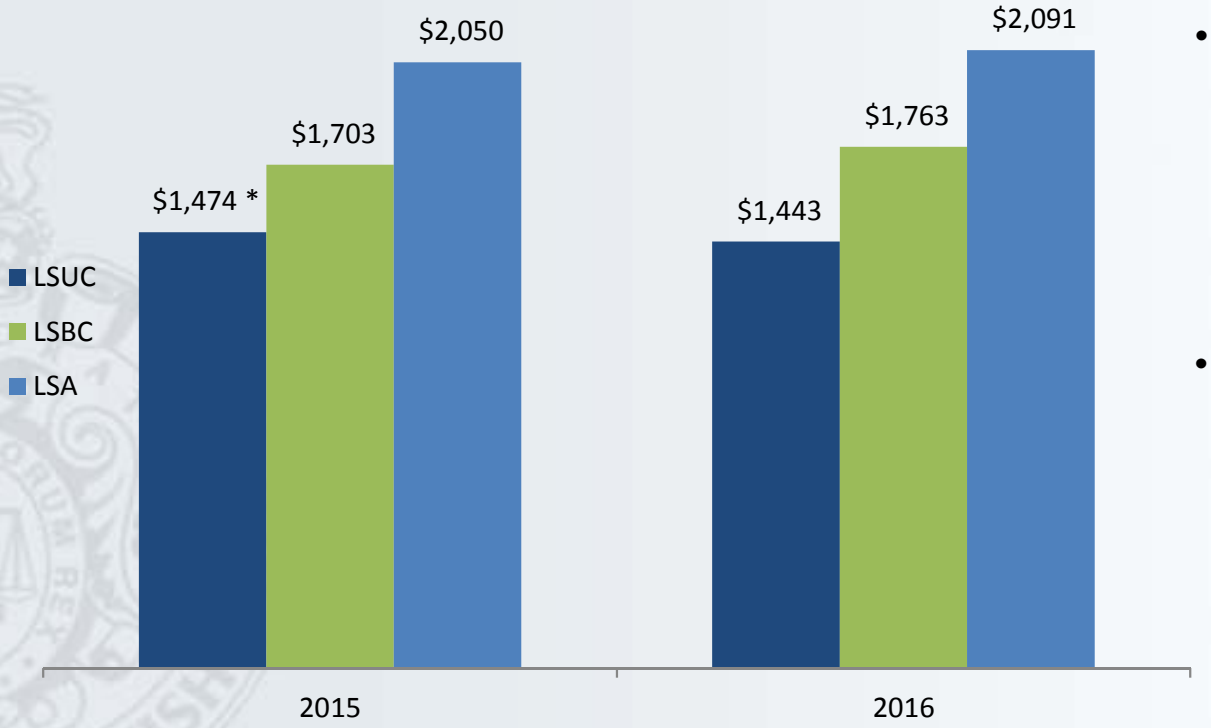
- The Knowledge Management project began in 2014, with an estimated allocation from reserve expected of $235,000. The goal of the project is to improve the aggregation and dissemination of knowledge both within and outside the Law Society, including practice support and advice. This review is on-going, with formal recommendations expected over the next year.

Funding of External Programs

- Federation levy to remain the same at $30.00
- Increase in CanLII levy to $40.00 (increase of $3.02)
- Pro bono/Access to legal services contribution distributed by Law Foundation – same flat amount of $340,000
- CLBC to remain the same at $195
- LAP remains the same at $67
- Advocate subscription fee stays the same at $27.50
- REAL initiative - $50,000 or $4.35

The Law Society of British Columbia

Key Practice Fee Comparisons



*Fees do not include library, LAP, Advocate, if applicable

- 2016 LSBC practice fee compared to 2015 LSA practice fees, increased by 2%. 2016 LSUC fee based on projection by LSUC
- 2015 LSUC practice fee increased to reflect $1.35 million planned use of reserve for on-going operating costs, $35.37 per member

The Law Society of British Columbia

2016 Fee Recommendation

	2016	2015	Difference	% change
Law Society Operations	$ 1,663.67	$ 1,605.46	$ 58.21	3.6%
Federation of Law Societies	30.00	30.00	-	-
CanLII	40.00	36.98	3.02	8.2%
Pro bono/Access to legal services*	29.57	30.06	(0.49)	-1.6%
REAL	4.35	-	4.35	N/A
CLBC	195.00	195.00	-	-
LAP	67.00	67.00	-	-
Advocate	27.50	27.50	-	-
Total Annual Practice Fee	$ 2,057.09	$ 1,992.00	$ 65.09	3.3%
Insurance Assessment	1,750.00	1,750.00	-	-
Total Mandatory Fee (excluding taxes)	$ 3,807.09	$ 3,742.00	$ 65.09	1.7%

** Total contribution to pro bono and access to legal services is $340,000, as recommended by the Access to Legal Services Advisory Committee. Per member contribution decreases due to number of members.*

TAF and Trust Assurance Program

- TAF revenue had decreased over the 7 years, prior to 2014, due to decreasing real estate unit sales, resulting in insufficient funding of the trust assurance program
- In 2014, TAF was increased to $15 to provide sufficient funding to support program
- Executive Limitation regarding Trust Program reserve levels recommends the Trust Program reserve level be six to twelve months of operating expenses, and any additional revenue beyond this level will be allocated to Part B insurance funding
- Trust Program reserve is projected at a surplus of $2.8 million at the end of 2016, approximately twelve months of operating costs
- Recommend TAF remain at $15 per transaction
- Trust Program reserve levels will be monitored on an annual basis
- 2016 Trust Assurance department costs are $2.6 million, similar to the 2015 budget

The Law Society of British Columbia

Special Compensation Fund

Special Compensation Fund

- Section 50 of the Legal Profession Amendment Act, 2012 provides for the transfer of unused reserves that remain within the Special Compensation Fund to the Lawyers Insurance Fund for the purposes of the insurance program.
- The remaining Special Compensation Fund net assets are expected to be transferred by the end of 2015.

The Law Society of British Columbia

Insurance Assessment

The Law Society of British Columbia

2016 Lawyers Insurance Fund

- Number of insurance reports in 2015 increasing: from a 3-year average of 1009 or a frequency of 12.3%, for 2015 we expect 1,100 reports for a frequency of over 13%

- Annual payments also trending up from an average of $10M in 2004-2008 to $12.7M in 2009-2013. While 2014 closed the year at a high of $14M, projections for 2015 show dip in payments to approximately $8.5M

- New *Limitation Act, Wills, Estates and Succession Act* and probate rules, and to a lesser extent, *Family Law Act*, expected to give rise to additional exposures for the Fund

- Off-setting the increases in frequency and new risk exposures, at 9.6%, 2014 investment returns higher than projected although lower than benchmark. Assume a long term return of 5.9% - for 2016, based on actuarial projections

- LIF net assets at December 31, 2014 were $65.8M, including internally restricted reserve of $17.5M for Part B. Unrestricted net assets were $48.3M. Actuarial advice indicates existing net assets adequate

- Recommend no increase to insurance fee - remain at $1,750 for 2016.

The Law Society of British Columbia

RESOLUTIONS

General Fund

The Law Society of British Columbia

Be it resolved that, commencing January 1, 2016, the practice fee be set at $2,057.09, pursuant to section 23(1)(a) of the *Legal Profession Act*, consisting of the following amounts:

General Fund	$1,663.67
Federation of Law Societies contribution	30.00
CanLII contribution	40.00
Pro bono/Access to legal services contribution	29.57
CBA REAL program contribution	4.35
CLBC contribution	195.00
LAP contribution	67.00
Advocate subscription fee	27.50
Practice Fee	$2,057.09

Lawyers Insurance Fund

The Law Society of British Columbia

Be it resolved that:

- the insurance fee for 2016 pursuant to section 30(3) of the *Legal Profession Act* be set at $1,750;
- the part-time insurance fee for 2016 pursuant to Rule 3-40(2) be set at $875; and
- the insurance surcharge for 2016 pursuant to Rule 3-44(2) be set at $1,000.

The Law Society of British Columbia

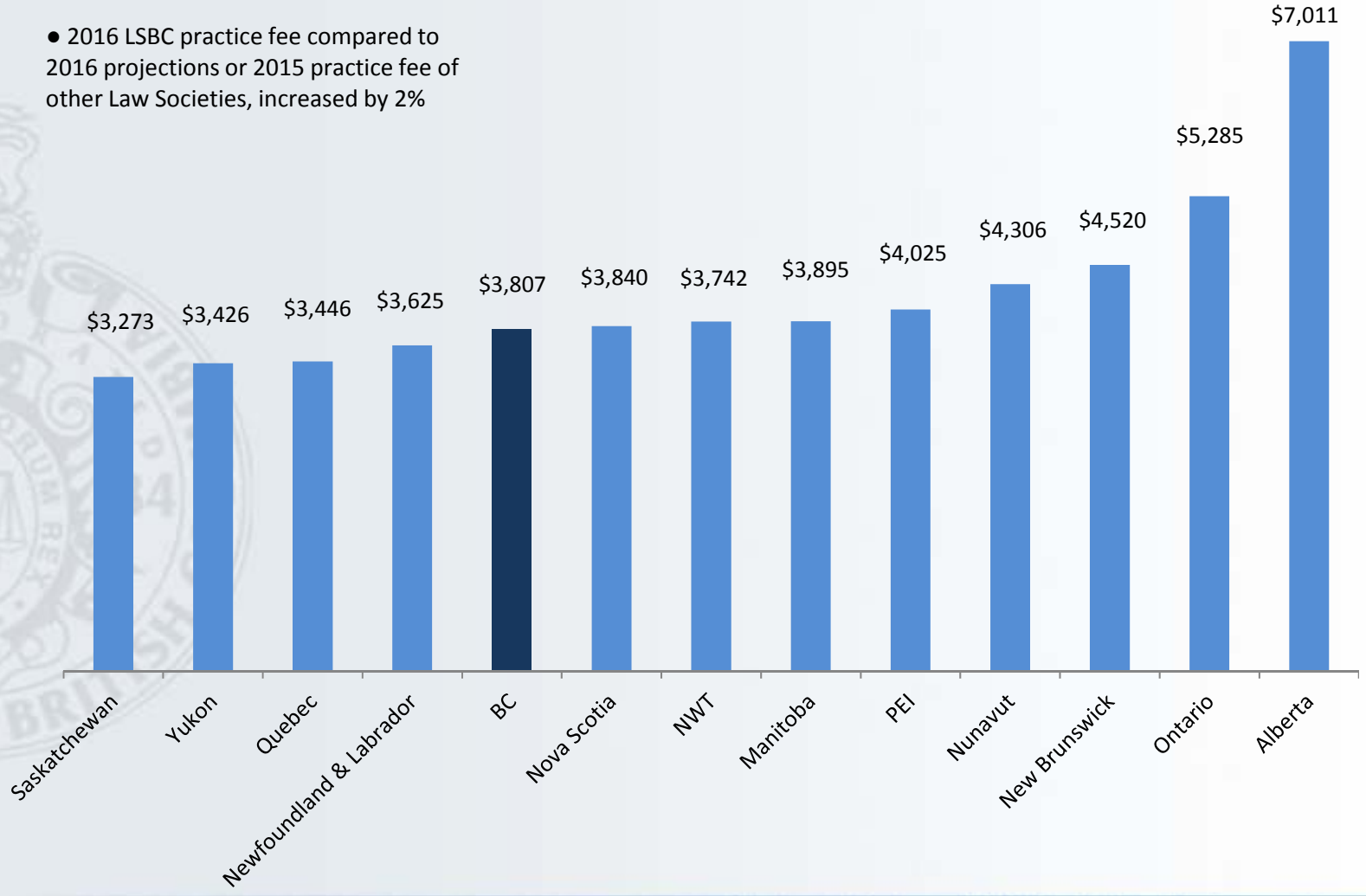
APPENDICES

Appendix A

Mandatory Fee Comparison
(Full Time Practising Insured Lawyer)

The Law Society of British Columbia

- 2016 LSBC practice fee compared to 2016 projections or 2015 practice fee of other Law Societies, increased by 2%



Appendix B

THE LAW SOCIETY OF BRITISH COLUMBIA
OPERATING BUDGET (excluding capital/depreciation)
For the Year ended December 31, 2016
GENERAL FUND SUMMARY

The Law Society of British Columbia

	2016 Budget	2015 Budget	2014 Actual	2016B vs 2015B Variance	%	2016B vs 2014A Variance	%	2016 Budget FTEs	2015 Budget FTEs	FTE Change
GENERAL FUND REVENUES										
Membership fees	17,628,363	16,683,418	16,026,393							
PLTC and enrolment fees	1,380,000	1,249,050	1,178,550							
Electronic filing revenue	665,000	693,500	743,562							
Interest income	350,000	322,500	392,764							
Other revenue	1,184,495	996,903	1,453,483							
Building revenue and recoveries	1,168,178	1,140,190	1,007,472							
TOTAL GENERAL FUND REVENUES	**22,376,036**	**21,085,561**	**20,802,224**	**1,290,475**	**6.1%**	**1,573,812**	**7.6%**			
GENERAL FUND EXPENSES										
Benchers Governance	766,655	765,501	958,057					0.35	0.35	-
Corporate Services	3,058,932	3,042,731	3,012,136					23.00	23.00	-
Education & Practice	3,681,517	3,535,932	3,707,279					33.97	34.97	(1.00)
Executive Services	2,161,209	2,098,503	1,935,599					20.60	20.60	-
Policy and Legal Services	2,443,458	2,272,729	2,277,733					14.00	14.00	-
Regulation	8,377,872	7,555,734	7,580,768					60.20	60.20	-
Building costs	1,886,393	1,814,431	1,791,124					2.00	2.00	-
TOTAL GENERAL FUND EXPENSES	**22,376,036**	**21,085,561**	**21,262,696**	**1,290,476**	**6.1%**	**1,113,340**	**5.2%**	**154.12**	**155.12**	**(1.00)**
GENERAL FUND NET CONTRIBUTION	**-**	**-**	**(460,472)**	**-**		**460,473**		**154.12**	**155.12**	**(1.00)**
Trust Assurance Program										
Trust Administration Fee Revenue	3,497,430	3,247,500	3,500,090	249,930	**7.7%**	(2,660)	**-0.1%**			
Trust Administration Department	2,571,963	2,512,847	2,423,686	59,116	**2.4%**	148,278	**6.1%**			
Net Trust Assurance Program	**925,467**	**734,653**	**1,076,404**	**190,814**		**(150,938)**		**17.00**	**17.00**	-
TOTAL NET GENERAL FUND & TAP CONTRIBUTION	**925,467**	**734,653**	**615,932**	**190,814**		**309,534**		**171.12**	**172.12**	**(1.00)**
							LIF FTE's	**22.60**	**22.80**	(0.20)
							TOTAL Law Society FTE's	**193.72**	**194.92**	**(1.20)**

Appendix C

Capital Costs – 10 year plan

LAW SOCIETY CAPITAL SUMMARY
2016 10-Year Capital Plan

	TOTAL	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025
INFORMATION TECHNOLOGY											
Computer Hardware	1,565,480	171,540	181,640	308,490	154,590	85,390	164,350	85,390	164,350	85,390	164,350
Computer Software	1,041,400	113,400	60,000	54,000	10,000	134,000	134,000	134,000	134,000	134,000	134,000
System Upgrades	-	-	-	-	-	-	-	-	-	-	-
Phone System	387,000	292,500	10,500	10,500	10,500	10,500	10,500	10,500	10,500	10,500	10,500
Subtotal	2,993,880	577,440	252,140	372,990	175,090	229,890	308,850	229,890	308,850	229,890	308,850
OPERATIONS											
Equipment, Furniture & Fixtures	1,862,000	155,000	158,000	135,000	308,000	208,000	298,000	150,000	150,000	150,000	150,000
Subtotal	4,855,880	732,440	410,140	507,990	483,090	437,890	606,850	379,890	458,850	379,890	458,850
845 BUILDING											
Base Building/Tenant Improvements	6,531,146	650,180	470,237	729,904	690,825	890,000	540,000	740,000	540,000	740,000	540,000
LSBC Workspace Renovations	4,367,000	270,000	400,000	391,000	350,000	350,000	430,000	785,000	600,000	350,000	441,000
Subtotal	10,898,146	920,180	870,237	1,120,904	1,040,825	1,240,000	970,000	1,525,000	1,140,000	1,090,000	981,000
TOTAL CAPITAL PLAN	15,754,026	1,652,620	1,280,377	1,628,894	1,523,915	1,677,890	1,576,850	1,904,890	1,598,850	1,469,890	1,439,850

Number of members (FTEs)	11,500	11,673	11,848	12,025	12,206	12,389	12,575	12,763	12,955	13,149
Capital Fee Portion	176	176	176	176	176	176	176	176	176	176
Cumulative funded C/F	(259,058)	(387,678)	(113,695)	(157,414)	(64,876)	(94,566)	9,007	217,246	864,722	1,674,853
Current Year Capital Fee Collection	2,024,000	2,054,360	2,085,175	2,116,453	2,148,200	2,180,423	2,213,129	2,246,326	2,280,021	2,314,221
Total Capital Fee Available	1,764,942	1,666,682	1,971,480	1,959,039	2,083,324	2,085,857	2,222,136	2,463,572	3,144,743	3,989,075
$500,000 building loan repayment	(500,000)	(500,000)	(500,000)	(500,000)	(500,000)	(500,000)	(100,000)	-	-	-
Capital expenditures as above	(1,652,620)	(1,280,377)	(1,628,894)	(1,523,915)	(1,677,890)	(1,576,850)	(1,904,890)	(1,598,850)	(1,469,890)	(1,439,850)
Cumulative Over/(Under) funded *	(387,678)	(113,695)	(157,414)	(64,876)	(94,566)	9,007	217,246	864,722	1,674,853	2,549,225

*Capital loan of $1 million authorized

Appendix D

THE LAW SOCIETY OF BRITISH COLUMBIA
Lawyers Insurance Fund
For the Year ended December 31, 2016
CONSOLIDATED STATEMENT OF REVENUE AND EXPENSE

	2016 Budget	2015 Budget	2015/2014 Budget Variance	%	2016 Budget FTEs	2015 Budget FTEs	FTE Change
Revenue							
Annual assessment	14,360,600	14,090,300					
Investment income	6,640,268	6,647,874					
Other income	60,000	70,000					
Total Revenue	**21,060,868**	**20,808,174**	**252,694**	**1.2%**			
Insurance Expense							
Actuaries, consultants and investment brokers' fees	523,250	528,131					
Allocated office rent	290,981	245,965					
Contribution to program and administration costs of General Fund	1,249,859	1,325,812					
Legal	40,000	40,000					
Insurance	458,928	430,585					
Office	466,355	395,598					
Premium taxes	8,856	8,236					
Actuarial provision for claim payments	14,702,000	14,703,000					
Salaries, wages and benefits	2,984,974	2,955,477					
	20,725,203	**20,632,804**	**92,399**	**0.4%**			
Loss Prevention Expense							
Contribution to co-sponsored program costs of General Fund	892,900	945,614					
Total Expense	**21,618,103**	**21,578,418**	**39,685**	**0.2%**			
Net Contribution	**(557,235)**	**(770,244)**	**213,009**		**22.60**	**22.80**	**(0.20)**

The Law Society of British Columbia

Memo

To:	The Benchers
From:	The Executive Committee
Date:	September 11, 2015
Subject:	Creation of the Legal Aid Task Force

Recommendation

The following resolution is proposed:

BE IT RESOLVED to create the Legal Aid Task Force, whose mandate is to:

1. develop a principled vision for the Law Society concerning publicly funded legal aid:

2. identify what sources of funding for legal aid programs might exist apart from government;

3. identify ways that the Law Society could promote and improve lawyer involvement in delivering legal services through legal aid plans;

4. identify ways to enhance Law Society leadership concerning legal aid; and

5. develop the best methods engagement with other organizations to coordinate the efficient use of resources in improving publicly funded legal aid.

Discussion

One of the main goals of the current Strategic Plan is that the public will have better access to justice. One of the strategies identified to achieve this goal was to increase assistance to the public seeking legal services, and one of the initiatives under that strategy [Initiative 1-2(c)] was to examine the Law Society's position on legal aid, including what constitutes appropriate funding and whether other sources of funding, aside from government, can be identified.

Developing a public position on legal aid has been a long standing recommendation from the Access to Legal Services Advisory Committee, having noted that the Law Society has not been engaged, much less in the forefront, of advocating for legal aid funding and that an exploration of the issue is required.

The Committee, in coming to its recommendation, has noted:

- developing a principled position on legal aid is an opportunity for the Law Society to take leadership on the initiative;
- while other bodies, such as the courts, may be constrained in what can be done by way of advocacy, the Law Society's public interest mandate creates no institutional impediment to taking up this initiative;
- the public interest requires adequate funding of legal aid, and it is important that the Law Society speak up;
- data is being gathered outside of Canada that examines cost benefits of providing legal aid. They suggest it can have a marked impact;
- it is important to appreciate and support appropriate funding. Calls for appropriate funding have been raised constantly over the past decade or more and have consistently failed. It is also important to be creative in supporting a sustainable legal aid plan outside the notion of simply funding.

Creating a task force to develop a position for the Law Society on publicly funded legal aid is an opportunity for the Law Society to constructively and consistently engage in the discussion, which could and should evolve into leadership on this topic. The Law Society mandate is to protect the public interest in the administration of justice. The Benchers agreed at their recent retreat that access to justice is clearly something included within that mandate and legal aid is clearly part of that discussion. The public interest in the administration of justice requires adequate funding for legal aid, and it is therefore important that the Law Society develop a principled vision on what that means. Consideration should also be given to areas that are essential services that the public interest may expect ought to be covered by government funding.

However, while government funding of legal aid programs is obviously important, the Task Force should spend some time exploring whether other sources of funding can be identified.

While this is something that the Advisory Committee could itself work on, it is anticipated that assigning this initiative to a Task Force, with a specified mandate, would lead to more expeditious reporting as it would be the sole work of the Task Force rather than one of many items for consideration by the Access to Legal Services Advisory Committee. The Advisory Committee recognized this as a possibility and, indeed, proposed it as an option.

Conclusion

The Executive Committee has therefore concluded that it is time to create a Bencher Task Force to consider the literature and precedents concerning legal aid together with the history with respect to the Law Society's development of, and past positions on, legal aid, and to prepare a report on the mandate items. It is inevitable that the Task Force will consult with the stakeholder groups in the legal profession, including the government. The Task Force can then use the information that is gathered and analyzed to report on its findings, from which the Benchers can articulate a principled vision in going forward into the future concerning this very important issue.

MDL/al

The Law Society of British Columbia

Memo

To: Benchers
From: Andrea Hilland
Date: September 1, 2015
Subject: Diversity and Inclusion Award

For Decision

In May of 2000, the Benchers approved the development and implementation of an award to recognize people who were historically excluded from the legal profession in British Columbia due to discriminatory reasons. At that time, the Benchers tasked the Equity and Diversity Committee with developing a description and selection criteria for the award. However, the details of the award never materialized. Appendix A to this memo contains a draft description and selection criteria for a Diversity and Inclusion Award for decision by the Benchers.

Background

In 1948, the Benchers of the Law Society of British Columbia considered the application of Gordon Martin of Nanaimo, BC, for call to the Bar and admission as a solicitor of the Supreme Court of British Columbia. At the time of his application for admission, Mr. Martin had an LLB and had completed his articles. The Benchers refused Mr. Martin's application to the bar on the basis that Mr. Martin had admitted to being a Communist, and was therefore not fit to practice law and had failed to satisfy the Benchers that he was a person of good repute within the meaning and intent of the *Legal Profession Act*. Mr. Martin subsequently applied to the courts to review this decision, but was unsuccessful. Mr. Martin has since passed away.

In April 1999, Harry Rankin, acting on behalf of the Martin family, approached the Benchers requesting monetary compensation. In June, 1999, the Benchers decided that it would be inappropriate for the Law Society to compensate the Martin family. However, the Benchers agreed to consider endowing an award in Mr. Martin's name.

In May 2000, the Benchers approved the following motion:

(a) That the Law Society establish an annual award to be given to the lawyer who has made the most significant contribution to human rights in British Columbia;

(b) The award be given an appropriate generic name (e.g. the Law Society Human Rights Award, or the Law Society Equity and Diversity Award) but that the names of William Gordon Martin and others who historically sought inclusion in the legal profession be explicitly mentioned in the preamble or the conditions of the award;

(c) The award consist of a recognizable trophy or plaque accompanied by appropriate public recognition and a cash award of $1000; and

(d) The Equity and Diversity Committee establish the selection criteria for the award, assess applicants for the award and recommend finalists to the Benchers for approval.

Following the approval, the Benchers tasked the Equity and Diversity Committee with developing a description, selection criteria, and implementation process for the award. However, these tasks were never completed.

The Gordon Martin issue was informally raised again, by email in November of 2014. The Equity and Diversity Advisory Committee discussed the award description and criteria at its March 5, April 9, and July 9, 2015 meetings. Appendix A to this memo contains a draft description, selection criteria, and implementation process for a Diversity and Inclusion Award for decision by the Benchers.

The Law Society of British Columbia

Diversity and Inclusion Award

In 2015, the Benchers of the Law Society of British Columbia instituted the Diversity and Inclusion Award. The Award honours a person who has made significant contributions to diversity and inclusion in the legal profession or the law in British Columbia over the previous two years.

Diversity and Inclusion

The Law Society is committed to fostering a more diverse and inclusive legal profession. It recognizes that public faith and participation in the justice system are best served by a legal profession that reflects and respects the full range of human differences within civil society, including but not limited to race, ethnicity, gender, gender identity, sexual orientation, age, social class, physical ability or attributes, religious or ethical values, national origin and political beliefs.

The Diversity and Inclusion Award is given in acknowledgement of individuals and groups who were historically excluded from the practice of law in British Columbia due to discriminatory barriers. From 1918 until 1949, membership in the Law Society of BC was linked to registration on the provincial voters list. In 1875, Chinese Canadians and Aboriginal peoples were excluded from the voters list. This exclusion was extended to Japanese Canadians in 1895, to South Asian Canadians in 1907, and to Doukhobors, Mennonites and Hutterites in 1931. Although women were excluded from the provincial voters list until 1917, Mabel Penery French became the first woman to be called to the British Columbia bar in 1912 after petitioning the provincial government to pass legislation to admit women to the bar. In 1947, Chinese and South Asian Canadians were added to the provincial voters list. The prohibition was removed for Aboriginal peoples, Japanese Canadians, Mennonites and Hutterites in 1948.

Some specific examples of exclusion from the legal profession in BC include:

- Gordon Cumyow, a British subject of Chinese descent, applied for admission to the Law Society in 1918, and was denied admission in 1919.
- In 1919, Mr. Yamada was dissuaded from studying law in British Columbia based on the Law Society's exclusionary admission criteria;
- In 1922, Andrew Paull, a First Nations man from North Vancouver, was informed that he would not meet the Law Society's admission requirements;
- An individual with a surname indicating Japanese descent petitioned to be permitted to enter into articles of clerkship in order to be called to the bar in 1932; his petition was refused; and
- William Gordon Martin was denied Law Society membership in 1948 for failing to renounce his belief in communism.

Many others were undoubtedly deterred from pursuing legal careers based on the Law Society's exclusionary admission rule.

The Award

The Award will be made to the nominee selected by the Benchers, based on the recommendations of the Equity and Diversity Advisory Committee, and will be presented once every two years at the Law Society's Annual General Meeting.

The Award is an original piece of Aboriginal art with a plaque featuring the Law Society crest.

Eligibility Criteria

In selecting recipients for the Award, the Diversity and Inclusion Award Selection Committee will consider three criteria:

1. Professional achievements: the recipient demonstrates significant commitment and accomplishments with respect to improving diversity and inclusion in the legal profession in British Columbia;

2. Service: the recipient has made exceptional volunteer contributions of time and energy to the removal of barriers to enhance the advancement of diversity and inclusion in the legal profession in British Columbia, either personally or through recognized societies or organizations;

3. Impact: the recipient's contributions to diversity and inclusion initiatives have had positive impact on removing barriers to greater diversity and inclusion in the legal profession in British Columbia.

The Award is available to:

- Present Law Society members;
- Former Law Society members; and
- Any person in British Columbia working in the legal field or justice system who has made an outstanding contribution in furtherance of diversity and inclusion in the legal profession in BC.

Those ineligible for the Award include current:

- Benchers;
- Law Society committee members; and
- Law Society employees.

The Award is made chiefly in recognition of contributions to the advancement of diversity and inclusion in the legal profession or the law, but public service outside of the legal profession may also be considered.

Nominations

Any person may nominate an eligible candidate to receive the Award in [year]. Nominations must be received by [deadline].

When submitting a nomination, please include the nominee's curriculum vitae, and a cover letter[1] explaining your views on why he or she should receive the Award. Please note that a nomination must be accompanied by this material for the nomination to be considered by the Selection Committee.

Nominations should be sent to:

Diversity and Inclusion Award Selection Committee
c/o Andrea Hilland, Diversity and Inclusion Lawyer
The Law Society of British Columbia
845 Cambie Street
Vancouver BC, V6B 4Z9
Email: ahilland@lsbc.org

[1] The cover letter should have no more than 500 words.

THE HONOURABLE ROBERT J. BAUMAN
CHIEF JUSTICE OF BRITISH COLUMBIA

COURT OF APPEAL

THE LAW COURTS
400-800 HORNBY STREET
VANCOUVER, B.C.
V6Z 2C5
Tel. (604) 660-2710
Fax. (604) 660-2833
e-mail: Robert.Bauman@courts.gov.bc.ca

27 July 2015

Ken Walker, Q.C.
President, Law Society of BC
845 Cambie Street
Vancouver, BC V6B 4Z9

Dear Mr. Walker:

I would be pleased to attend the scheduled Law Society meeting on 4 December 2015.

I would also be pleased to attend the swearing in of the incoming President, Mr. David Crossin, Q.C., on 29 January 2016.

Yours sincerely,

Robert J. Bauman
Chief Justice of British Columbia

The Law Society of British Columbia

Memo

FOR INFORMATION

To: The Benchers
From: Alan Treleaven
Date: September 14, 2015
Subject: Federation National Admission Standards Assessment Proposal Report

In 2013, law societies adopted the Federation's National Competency Profile, which lists the knowledge and skills that students must possess, and the tasks that they must be able to perform upon entry to the profession.

The Federation's National Admission Standards Project Steering Committee has now presented its Proposal for national assessments as the next step in the National Admission Standards project. The Proposal invites law societies to endeavour by the end of 2015 to be ready to make a decision about whether they will commit to the Proposal.

The Lawyer Education Advisory Committee will consider the Proposal, and report with recommendations to the Benchers by year-end, as a part of its Admission Program Review and pursuant to the following provisions of the 2015-17 Strategic Plan.

> ***Strategy 2-1***
> *Improve the admission, education and continuing competence of students and lawyers.*
> ***Initiative 2-1(a)****: Evaluate the current admission program (PLTC and articles), including the role of lawyers and law firms, and develop principles for what an admission program is meant to achieve.*
> ***Initiative 2-1(b)****: Monitor the Federation's development of national standards and the need for a consistent approach to admission requirements in light of interprovincial mobility.*
> ***Initiative 2-1(e)****: Examine alternatives to articling, including Ontario's new law practice program and Lakehead University's integrated co-op law degree program, and assess their potential effects in British Columbia.*

National Admission Standards Project

Assessing Candidates to Ensure They Meet the National Standard: A Proposal for Moving Forward

National Admission Standards Project Steering Committee

August 2015

Prepared by the National Admission Standards Project Steering Committee:

Don Thompson, Law Society of Alberta, Chair
Marie-Claude Bélanger-Richard, Past President, Federation of Law Societies of Canada
Allan Fineblit, Thompson Dorfman Sweatman LLP (formerly Law Society of Manitoba)
Jeff Hirsch, Vice President and President-elect, Federation of Law Societies of Canada
Robert Lapper, Law Society of Upper Canada
Tim McGee, Law Society of British Columbia
Diana Miles, Law Society of Upper Canada
Laurie Pawlitza, Council Member, Federation of Law Societies of Canada
Darrel Pink, Nova Scotia Barristers' Society
Bernard Synnott, Barreau du Québec
Alan Treleaven, Law Society of British Columbia
Lise Tremblay, Barreau du Québec
Jonathan Herman, Federation of Law Societies of Canada

Support to the Steering Committee is provided by:
Frederica Wilson, Senior Director, Regulatory and Public Affairs, and
Stephanie Spiers, Director, Regulatory Affairs and project manager

INTRODUCTION

Law societies across Canada have been working collaboratively to develop national admission standards since 2009. The primary driver for national admission standards is mobility.

Legal professionals can now move from one jurisdiction to another with relative ease and this makes differences in admission practices difficult to defend as being in the public interest. Enhanced mobility has propelled the need for greater consistency in admission practices across Canada.

In 2013, law societies adopted the National Competency Profile, which describes the competencies required of new lawyers and Quebec notaries. Law societies must now decide how best to assess whether applicants have demonstrated that they possess these competencies. This proposal sets out a plan for a national assessment regime that:

- recognizes the primacy of law societies' public protection mandate;
- adopts assessment best practices used by many other professions in Canada; and
- follows practical and realistic strategies from both a time and cost perspective.

This proposal provides a vision and structure for moving forward with the development and implementation of a national assessment regime. The assessment plan is practical; it will occur in phases and at a cost that is consistent with what most law societies spend on assessment now. The assessment regime envisaged involves written examinations in an online context and assessment of applicants in the experiential (articling) phase. Skills are the focus of assessment.

Our work has reached a critical juncture. Law societies are being asked to make a decision by the end of 2015 to commit to the direction for moving forward outlined in this proposal. We recognize that the timing will ultimately depend on when law societies are ready to move ahead.

As we take the next step toward implementing a national assessment regime, we will have to maintain flexibility. Our destination is a defensible national assessment program that is alive to the practical realities facing law societies; aligns with best practices, and fulfills our duty to protect the public interest. The proposal provides a road map for the journey. We expect that some adjustments will need to be made along the way as we learn from each step in the process and navigate the best route forward together.

Proposal Overview

1. This proposal describes the exciting next step in the National Admission Standards project – how to move forward with the assessment of the competencies in the National Competency Profile. The National Competency Profile lists the knowledge and skills that candidates must possess, and the tasks that they must be able to perform upon entry to the profession. Law Societies are being asked to decide how they will participate in this next phase of the project.

2. Having identified the necessary competencies, we are now focussing on how to assess whether applicants can demonstrate that they possess those competencies. We know there are two other important pieces of the admissions puzzle: professional training (e.g. bar admission programs) and experiential learning (e.g. articling and the Law Practice Program in Ontario). Articling is included in this proposal. A national approach to professional training, on the other hand, has been reserved for a later stage of our work to ensure that the project maintains momentum and that the necessary time and resources can be dedicated to a national dialogue on training.

3. The proposed assessment regime will focus on skills. The knowledge competencies in the National Competency Profile will provide the context for all assessment activities. Candidates will not be directly tested on those knowledge competencies in the National Competency Profile that are also included in the common law degree national requirement. The proposed national assessment is designed to be national in application, and to address the competencies of lawyers no matter where they practise in Canada. Law societies wanting to address local law or other specific issues can add a local assessment for their candidates.

4. This document is written specifically for law society leaders and other law society stakeholders with an interest in legal professional education. It is intended to provide the necessary information to assist law societies in determining whether they will participate in the national assessment regime. We expect that further dialogue is needed with individual law societies to work through the issues raised in the proposal.

5. We will meet with law societies throughout the fall of 2015 to discuss the proposal. Law societies are being asked to sign on to the proposal following this period of engagement and internal review in each jurisdiction. Our goal is to move forward by the end of 2015. We recognize that timing will depend on when law societies are ready to proceed.

6. This proposal is a pivotal step in our collaborative effort to develop National Admission Standards. It provides a strategy for building on law societies' long history and strong foundation in the preparation and assessment of candidates in order to achieve greater consistency, efficiency, accountability, and overall quality in how candidates are assessed for admission to practice law in Canada.

Why change how law societies assess candidates?

7. Presently, each law society has its own procedures for assessing candidates for admission to practice. A snapshot of admission practices across Canada is available at **Appendix 1**. Members of the legal profession in Canada today enjoy unprecedented mobility between jurisdictions and this has generated increased reflection about what law societies do and why. With admission as a lawyer in one jurisdiction effectively opening the door to admission in all jurisdictions in Canada, mobility makes different regulatory practices difficult to justify as being in the public interest.

8. Although considerable differences exist in how law societies train, prepare and assess candidates, there are also many similarities. With agreement on the entry level competencies described in the National Competency Profile, a harmonized assessment of the competencies will serve as a vehicle for bridging the different education and training practices that exist among law societies. This will give law societies greater confidence in the competence of their lawyers regardless of where they were admitted. Canadian consumers will also have enhanced confidence in the ability of lawyers to provide competent and ethical legal services.

9. A national assessment strategy will also take advantage of the latest theory and practice in assessment of competence at entry to practice. Training and assessment methodology and technology have evolved dramatically since many law societies developed their current bar admission courses. A national assessment would enable all law societies to benefit from the latest tools and best practices, many of which are employed by other professions in Canada.

10. Dramatic changes in legal education and training in Canada are taking place. Significant numbers of students now enter law society admission programs with a law degree from outside Canada. In 2014, Lakehead University adopted an Integrated Practice Curriculum (“IPC”) in which practice skills are integrated into the curriculum. In September, 2015, the University of Calgary will launch its new curriculum designed to offer students more opportunities to develop performance, deepen their competence and to be engaged in their learning, breaking down the separation between academic inquiry and practice. These new models of legal education may provide an indication of the law school curriculum of the future.

11. Preparation for professional practice occurs on a continuum and the law school academic phase and law society practical preparation phase are closely interconnected. The move to a nationally consistent, defensible competency assessment framework will facilitate the coordination and alignment of all facets of lawyer education and preparation, including the process for approving common law degree programs, and the assessment of internationally trained candidates through the National Committee on Accreditation (“NCA”). This alignment is critical to the regulator’s duty to protect the public.

12. The transition to a national assessment regime will:

I. Deliver an appropriate degree of consistency between jurisdictions given the mobility of the legal profession.

II. Align different facets of lawyer education and preparation, including the Canadian common law degree approval process and the NCA.

III. Enhance the confidence in and accountability of assessments by employing best practices and drawing on the latest testing practices, resources and tools.

IV. Improve the efficiency of assessment by pooling expertise and avoiding duplication of effort across the country.

V. Ensure fairness for candidates through a standardized assessment.

VI. Assist law societies to meet their public interest mandate through consistent, defensible and high standards for admission to the legal profession.

VII. Ensure that candidates have demonstrated the required knowledge and skills for admission to the legal profession.

The Proposal

13. The Federation met with law societies in 2014 to discuss options for assessing the competencies in the National Competency Profile. The meetings revealed a broad consensus amongst the law societies that there is value in a defensible and nationally harmonized assessment regime.

14. The Steering Committee has identified a number of outcomes, or psychometric qualities, which must flow from a national assessment regime if all participants and stakeholders are to have confidence in its strength, quality and reliability. The assessment program should result in outcomes that are:

- Valid: it will assess what it says it does;
- Consistent: other assessors would make the same or comparable judgements on the basis of the same evidence;
- Fair: the assessment will allow all candidates to demonstrate their competence;
- Relevant: the assessment reflects real life scenarios and situations;
- Defensible: the assessment follows testing best practices, including the above principles.

15. The National Competency Profile will be used as the starting point for developing an assessment regime that is valid, consistent, fair, relevant and defensible. Before assessment methods can be chosen and specific assessment tools can be designed, the information (or evidence) that demonstrates a candidate is competent in relation to a given competency must first be identified. The process of identifying the evidence and developing an assessment program from the competencies in the National Competency Profile involves numerous steps.

16. It begins with describing what an applicant will be required to demonstrate in relation to each competency. This listing is then translated into discrete statements of performance. The survey data obtained to derive the profile, and the ratings of importance and frequency are then used to refine and define how the statements will be prioritized and organized for testing. This process helps determine the relative proportion that each competency area should represent in the assessment. This is known as the "blueprinting" process.

17. The blueprinting process began after law societies adopted the National Competency Profile. This early work led to the development of options for assessment. The process will continue and will require further work with psychometricians and input from law societies, which will in turn guide the ultimate outcome or final assessment product. It is not possible to know what that outcome might be before the development process is completed. While we can describe the kinds of assessments that might be used, the final decisions will be based on the results of the blueprinting work.

18. With these limitations in mind, the Steering Committee has prepared a proposal that provides a vision and structure for moving forward with the development of a national qualifying assessment system for admission to the legal profession in Canada. The Steering Committee asked one of its members with the appropriate expertise, Diana Miles, to prepare a work-up of how the assessment regime might play out. The resulting Business and Implementation Plan ("Business Plan") expands on the proposal and provides a model of what the assessment regime might look like in operation, including the specific assessment methods and tools. The Business Plan is intended to serve as a starting point for a collaborative discussion about the details of the national assessment regime among jurisdictions that commit to this proposal.

19. The Business Plan provides background on the purpose and objectives to be achieved, the reasons for undertaking each step of the development process, and the operational tasks that must be completed. The plan goes into extensive detail on all of these elements in an effort to provide a clearer understanding of what will be involved and the complexities of developing a national assessment system. It also provides more detail on a possible governance structure and funding. The Business Plan is available at **Appendix 2**.

20. The proposed assessment regime occurs in three core phases that build upon each other and that are phased in over time. In Phase One, candidates will demonstrate the ability to learn and apply practical legal knowledge and procedure. In Phase Two, candidates will apply skills to complete more complex legal work. The focus in Phases One and Two is on the assessment of skills and tasks in the context of substantive and procedural law – the knowledge competencies. The knowledge competencies contained in the common law degree national requirement would not be retested. It is proposed that Phases One and Two would rely exclusively on computer-based testing through designated testing facilities across the country.

21. Law societies told us that experiential training is an important component of preparation for legal practice. The proposed assessment regime acknowledges the central role of articling and its alternatives in Ontario, the Law Practice Program and the IPC through Lakehead University. Phase Three of the assessment regime will introduce performance measures for articling students. Law societies would continue to set the rules and general requirements of articling in their respective jurisdictions. Training and tools would be provided to articling principals to be able to assess students in a consistent manner. Phase Three would help to clarify training expectations through assessing and documenting students' achievement of specified learning outcomes.

22. A further two phases, Phase Four and Phase Five, will provide for coordination and alignment of the national qualifying assessment regime, the process for approving common law degree programs, and the National Committee on Accreditation.

23. The Business Plan elaborates an operational model of each phase in order to work through the policy and practical considerations involved. The table below provides a summary of what each phase might entail for illustration purposes. The left column lists what would be assessed in Phases One through Three. The right column lists the specific assessment methods and tools that might be used to accomplish each phase, and the rationale for their use.

A SNAPSHOT OF WHAT THE ASSESSMENT REGIME MIGHT INCLUDE:

WHAT IS ASSESSED	ASSESSMENT METHOD & RATIONALE
PHASE ONE	
The focus is on assessing skills and the application of knowledge in a knowledge-based context. Cognitive and analytical reasoning and response, factual analysis, legal analysis and reasoning, problem solving, and identification and resolution of ethical dilemmas are assessed.	Assessment may include single multiple choice questions ("MCQ") and case-based MCQs completed online. MCQs permit the examination of a wide range of content very efficiently and are highly reliable, objective and fair. MCQs provide an anchor for the assessment methods proposed for Phases Two and Three, which provide more in-depth assessment of select competencies (but less breadth of coverage).
PHASE TWO	
The focus is on assessing skills and tasks in a knowledge-based context. Phase Two introduces more complex skills and tasks including ability in problem solving and decision making; the identification and resolution of ethical dilemmas; legal research; written communication; client communication, and the organization and management of legal issues and tasks.	Test items may include questions requiring long answers using information supports provided online (e.g. facts, case law), through to skills assessment requiring task completion, e.g., drafting an opinion, affidavit, pleading, or case analysis. With the addition of interactive, audiovisual components, simulated practice scenarios will be used in which test takers must apply critical and analytical thinking skills. For example, candidates may view a series of short videos of a lawyer interviewing a client or undertaking a negotiation. They may be asked to analyze the performance of the lawyer and discuss how competencies or standards for the practice of law have or have not been demonstrated.
PHASE THREE	
The focus is on demonstrated experience in the workplace (articling) or alternative environment. Phase Three involves application of the skills and tasks outlined in Phases One and Two, and includes the ability to complete assigned tasks, engage in productive interaction and team work, exhibit improvement, develop personal growth strategies, and engage in self-reflection and feedback.	This phase may involve enhancements to articling and its alternatives, beginning with the creation of a framework of competencies that must be demonstrated and a set of performance criteria and ratings supporting the assessment of skills and tasks. By specifying learning outcomes based on standardized performance reporting, a degree of validity and defensibility is achieved. Needed flexibility is also maintained, given the diversity of workplace experiences common to articling.

Adding to the National Assessment

24. The Proposal recognizes that some law societies may see the need for a separate assessment reflecting content considered relevant to its jurisdiction alone. Should a law society consider it necessary, it may choose to add (or keep) a local law exam. However, modifications to the national assessment to accommodate local content will not be possible.

Candidate Preparation

25. The assessment regime will integrate preparation materials and test simulation opportunities designed to assist candidates to be successful on the assessment. Preparation of test takers is considered critical for the validity of the examinations. Providing examinees with sample tests that mirror the test-taking environment will ensure that the testing format is not a factor in performance.

26. The proposed assessment regime does not address existing in-class instruction or formal training programs. It is anticipated that law societies will continue with their existing bar admission instruction courses and that they will adapt them to the National Competency Profile as they see fit.

Ongoing Evaluation of the Assessment Regime

27. The Business Plan provides for ongoing evaluation to ensure that the assessment regime is meeting its objectives and continues to be viable and current.

Other Assessment Models

28. The proposed assessment regime is the result of extensive consultations with law societies, the research and technical work carried out with our consultant ProExam and a team of advisors from the law societies (the Technical Advisory Committee), and input from the Steering Committee. It is a best estimate of the operational and policy dimensions of a future assessment regime based on our research about law societies' ability to support the project financially and otherwise. Some assumptions were necessary in order to provide an operational model. Assumptions will be tested with law societies as we meet to discuss the proposal.

29. From the outset, discussions with law societies about how the National Competency Profile will be assessed have included the possibility of performance-based assessment. Preliminary consideration has been given to whether Objective Structured Clinical Examinations ("OSCE") or OSCE-style assessment should form part of the national assessment program. OSCEs are commonly used in the health professions to assess candidates at entry to practice. They consist of a circuit of short stations in which candidates are examined on a particular task (e.g. examining a patient) with one or more examiners and typically an actor or real patient.

30. Developing and implementing an OSCE program across the country is resource intensive and would present significant challenges. Given the high cost and impracticality of OSCEs, and the ability to effectively test skills and tasks through other means (as outlined in Phases Two and Three), the Steering Committee is not proposing OSCE-style assessment.

31. The Proposal recognizes that face-to-face, performance-based assessment has deep roots in the culture of many bar admission programs, and that further consideration of this issue may be required as we delve into the details of the plan. One option for law societies is to add an OSCE-style performance-based assessment of candidates for high priority skills such as advocacy, interviewing and dispute-resolution in the context of Phase Three.

Who will be involved in the development of Phases One through Three?

32. The following groups will be involved in the development process:

- Practitioner subject matter experts from across the country
- Law society expert staff
- Psychometricians and other expert external providers (e.g. video production support)

33. Law society staff with the appropriate expertise will be asked to contribute their time and knowledge on the understanding that a formula will be developed to compensate law societies for such in-kind contributions.

34. Management costs for Phase One assume that one or more experienced law society administrators will be seconded into required roles to allow the development process to leverage existing knowledge and skill, avoid extensive staff training and begin development on a timely basis. The Proposal relies heavily on the extensive experience and resources of the law societies and leverages existing tools and expertise, including exam banks, reference materials and advances in online assessment.

35. An experienced, interim management and staff team is contemplated for Phase One. Toward the end of the Phase One development period, and with the benefit of greater insight into the national processes, a full-time staff complement will be hired and office space and other operational infrastructure will be established to sustain the new national assessment regime.

Transition Planning

36. Participation in the national assessment regime will require significant change to our existing business practices. Understandably, law societies are eager to hear the details about the transition plan. What will the move to a national assessment regime mean for current bar admission programs? The national assessment regime is designed to replace existing testing practices. Changes to existing teaching programs are not part of this proposal: law societies will

have to assess the impact of the national assessment program on their current bar courses, staffing, budget and overall operations.

37. Each law society's transition plan is an important aspect of the overall plan. Ultimately, each jurisdiction will determine how best to design and manage the transition process. We contemplate working with each law society to develop a transition plan tailored to its unique circumstances and responsive to local needs.

Funding and Costs

38. The estimated costs of the new assessment regime are divided into development costs and operating costs for the ongoing administration once the program is implemented. The projected capital development cost for creating Phases One, Two and Three, net of taxes, is approximately $2.8 million.

39. Start-up funding will be needed to begin development of the assessment tools proposed. The Federation will contribute to the start-up development costs from its surplus fund. Funding options for the development stage, which may include a cost-sharing formula, a repayable loan, or other possible models, will be explored in greater depth with law societies.

40. The projected annual operating cost for administering the new assessment regime is approximately $1,725 per candidate, based on the participation of 3800 candidates. This includes candidates of all law societies except the Barreau du Québec and the Chambre des notaires du Québec. The per-candidate cost is dependent on the number of law societies that ultimately participate in the assessment regime. The cost of $1,725 per candidate equates to an annual operating budget of $6.5 million, which we expect will be largely paid for by student fees.

41. This fee covers the cost of assessment only. Our analysis is that this is close to what individual programs across the country are now spending on assessment, although most programs bundle assessment in with other costs. How this will line up with current fees for bar admission programs that include both training and assessment will be worked out in consultation with each law society during transition planning. Our goal is an assessment regime that will be cost neutral and that may also bring cost savings to local bar programs in the long term.

42. The Barreau du Quebec has a sophisticated and psychometrically defensible system to assess the competencies of future lawyers that is recognized as highly reliable. The Barreau du Quebec supports the need for a National Competency Profile for future lawyers in order to protect the public, and views the national assessment as one of several possible measures that can be taken to ensure consistent application of the Competency Profile. In the circumstances, including the necessity of ensuring assessment of candidates meets the requirements of Quebec's statutes and regulations, the Barreau has decided not to participate in the national assessment regime.

43. The Chambre des notaires du Quebec has not yet adopted the National Competency Profile. The Chambre has not been in a position to fully participate in national admission standards due to its significant education-related reform in connection with Bill No. 17, *An Act to amend the Act respecting the Barreau du Québec, the Notaries Act and the Professional Code*. Given that the Chambre's new training program has just begun and that it must also ensure that assessment of applicants meets the requirements of Quebec's statutes and regulations, the Chambre will not participate in the project at this time.

Governance Structure

44. Phase One will require significant dedicated resources in a short time. This requires that the senior law society managers involved in developing Phase One be able to make decisions without the confines of a complex committee structure, yet with the appropriate oversight and policy direction from an oversight committee.

45. An interim governance model for Phase One might include modifications to the composition of the National Admission Standards Project Steering Committee, which oversees all aspects of the project. The exact model will be agreed upon with input from participating law societies. In the meantime, work on developing a permanent governance structure will begin. The permanent governance body should be independent and skills based. It would oversee the ongoing administration of the assessment regime once Phase One is ready to be implemented.

Looking Forward

46. Collectively, law societies have made a considerable investment in national admission standards through the development of the National Competency Profile and identification of assessment options. We are at a crucial stage of the project. Law societies are being asked to make a decision to commit to the direction for moving forward outlined in this proposal, and illustrated in more detail in the Business Plan. We want to build on the momentum and good will to move the project forward, while acknowledging that each law society will have to carefully consider the plan before deciding if they will participate.

47. Canada's legal regulators have been engaged in an incremental and open process of review and policy development in relation to the creation of National Admission Standards since 2009. The past steps in the National Admission Standards project are available at **Appendix 3.**

48. This project provides an opportunity to rethink how we prepare candidates for practice and to look ahead to the next generation of legal professionals. What does the state of the art in assessment tell us about how skills are acquired and assessed? What are the needs of tomorrow's candidates? These questions will be explored in our discussions with law societies.

Next Steps

49. Given the nature of this project, including both the financial requirements and the significant local changes it will create for some law societies, we are asking law societies to make a firm commitment to move forward with this proposal. The exact nature of the assessment tools and details of the program require further blueprinting work and involvement from law societies. At each stage of the process there will be opportunities for input so that law societies are comfortable with the plan as the project progresses.

50. It will be up to each law society to decide whether they are ready to commit to the proposed plan, and it may be that not all law societies will be ready to move forward at the same time. This is the case, for example, with the Barreau and the Chambre. Law societies that commit at the outset will have the opportunity to be involved in the development process. Some law societies may decide to take a wait and watch approach, and join at a later stage of implementation.

51. At this time, we anticipate moving forward with those jurisdictions that are ready to commit to the proposal. Law societies that are not in a position to sign on to the proposal may wish to align their bar admission programs to the National Competency Profile as some law societies have already begun to do.

52. We anticipate holding meetings (both in person and electronically, as appropriate) with law societies throughout the summer and fall to discuss this proposal and answer questions.

53. The meetings with law societies will give us a better sense of the time law societies need to reach a decision on participation. We are hopeful that we can meet an end-of-year timeframe. The ultimate timeline will be driven by law societies. A general timetable for the technical work required to develop the assessment program follows. It is premised on a start date of early 2016:

2016 - 2018	Phase One is developed between 2016 and 2018, including the examination pilot test, and implementation of the first assessment.
2018 - 2020	Phases Two and Three are developed between 2018 and 2020.

Conclusion

54. Law societies are being asked to share their resources and leverage their extensive knowledge in the preparation and assessment of candidates in order to develop a national assessment regime. The goal of the new assessment regime is to improve law societies' collective ability to protect the public interest.

55. The mobility of legal professionals in Canada has been the main driver for more consistent admission practices. Significant changes affecting law society admission processes

may also signal that the time is ripe to re-evaluate admission practices through a national lens and along the continuum of lawyer preparation, from law school through to articling. These changes include the marked increase in the number of internationally-trained applicants in recent years; the advent of new programs emphasizing practice skills at several Canadian law schools, and changes to experiential training requirements in Ontario. Creating a national assessment program will provide an opportunity for greater coherence in the preparation of future lawyers while also achieving greater consistency, efficiency, accountability, and overall quality in how candidates are assessed for admission to practice law in Canada.

Admission Landscape

- BC, Que, NB – In-class Training, Skills Assessment, Written Test
- AB, Sask, Man – In-class & Online Training, Online Assessment, Skills Assessment, Written Test
- Ontario –Written Test
- NS/PEI – In-class & Online Training, Online Assessment, Skills Assessment, Written Test (plus local test in PEI)
- NFLD & Lab – In-class Training, Written Test
- The North -- Bar Admission Course elsewhere, plus local test

APPENDIX 2

National Law Practice Qualifying Assessment Business and Implementation Plan

National Admission Standards Project Steering Committee

August 2015

Table of Contents

Executive Summary

This business and implementation plan provides a vision and structure to move forward with the development of a national law practice qualifying assessment system for admission to the legal profession in Canada. The plan of implementation begins with the National Admission Standards Competency Profile as approved by the members of the Federation of Law Societies of Canada ("Federation"). The Competency Profile will be used as the starting point for further development and implementation activities.

The plan also assumes that candidates who have completed a law degree from an accredited Canadian law school or received a Certificate of Qualification from the National Committee on Accreditation have been exposed to and assessed on sufficient substantive law information and analysis so that:

a) Candidates need not be tested on the "why" of the legal system, or what may be referred to as "foundational law concepts" at the point of admission to practice;

b) Candidate assessment will focus on proficiency related to determining what and how law should be applied in varied practising circumstances and must include sufficient and appropriate practice and procedural contexts to ensure that assessment activities address reasonable expectations of knowledge, skill, ability, attitude and judgment in a law practice environment at entry to the profession.

Qualifying Assessment Requirements

A skilled team of developers, working on behalf of the participating members of the Federation and what will eventually become a newly established independent assessment agency will be tasked with the responsibility of developing the plan for and implementing a progressive and defensible assessment regime for law practice. The qualifying assessment regime will be developed in phases and will include the following components.

Phase 1: National Law Practice Qualifying Examination

In this assessment component, the following assessment outcomes will be addressed:

- Ability to learn and apply practical legal knowledge and procedure by demonstrating ability in cognitive and analytical reasoning and response, factual analysis, legal analysis, reasoning, problem solving, identification and resolution of ethical dilemmas.

Phase 2: National Law Practice Qualifying Examination – Skills and Tasks

In this assessment component, the following assessment outcomes will be addressed:

- Application of skill to complete complex multi-dimensional legal work by demonstrating ability in problem solving, aptitude and decision making, identification and resolution of ethical dilemmas, legal research, written communication, client communication, organization and management of legal issues and tasks.

Phase 3: National Law Practice Qualifying Experiential Learning Requirement

In this assessment component, the following assessment outcomes will be addressed:

- Demonstrated experience in the legal workplace or alternative environments applying the skills and abilities outlined in phases 1 and 2 including the ability to complete assigned tasks, engage in productive interaction and team work, exhibit iterative improvement, develop personal growth strategies, engage in self-reflection and feedback activities.

In addition to the three components of assessment set out above, a further two phases of redevelopment related to pre-admission activities are recommended. Although the details of the development of these additional phases are outside of the scope of this plan, they are foundational components in the continuum of legal learning and should be a part of the change management dialogue to ensure that the overall national qualifying process is moving proactively toward defensibility in all aspects of the assessment regime.

Further validation on the scope and application of the competencies for entry level legal professional practice will occur during implementation of phases 1, 2 and 3 of the plan. This will assist in defining the need for and extent of the oversight, criteria and accreditation activities related to law degree accreditation and equivalencies testing for internationally trained law candidates. The following phases of development should then be addressed.

Phase 4: Canadian Law Degree Approval

In this learning and assessment component, the following training and assessment outcomes should be addressed:

- Demonstrated achievement in the instruction and assessment of foundational legal knowledge, including the provision of supports and resources necessary to ensure a comprehensive and progressive curriculum of legal learning.

Phase 5: Accreditation for Internationally Trained Law Candidates

In this assessment component, the following assessment outcomes will be addressed:

- Knowledge and ability at equivalence to the level of competency required at completion of a comprehensive law school curriculum, with an emphasis on foundational law competencies and also expanded to include competencies directly related to achieving success in the national law practice qualifying assessment process and the actual practice of law.

Plan of Implementation

The development process for establishing the national law practice qualifying assessment regime set out in phases 1, 2 and 3 of the plan is scheduled to commence as soon as practicable and will continue for four years. In the first two years of the development, phase 1 will be completed. In year three and four, phases 2 and 3, the skills and tasks assessment and the experiential training requirements, will be completed contiguously.

The work that must be completed in phase 1 of this implementation plan is critical to all components of the development process. Without a robust and exacting development process in phase 1, the components of the national process will not be achievable. Projected costs are more significant in phase 1 as the development process lays down all of the ground work to ensure standardized, consistent, fair and defensible assessment processes.

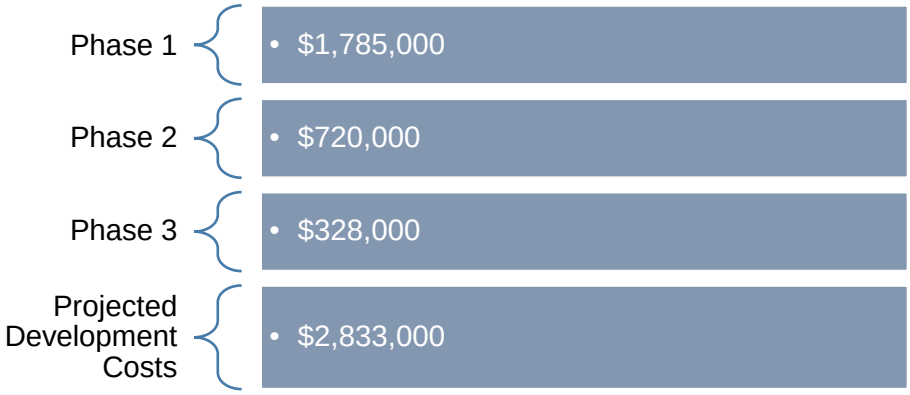
Process of Development

The business and implementation plan provides information on how a defensible system of licensure is developed. It provides background on the purpose and objectives to be achieved, the reasons for undertaking each step of the development process, and the actual operational tasks that must be completed. The plan goes into extensive detail on all of these elements, in an effort to provide a clearer understanding of why each step must be taken and the complexities of such a development.

Cost Projections

The estimated costs for each phase of the plan are based on actual experiences with similar systems of development and operations. At this early stage in the planning, it is not possible to determine if cost savings may be achieved through economies of scale or leveraging of existing admission assessment content. Where it was reasonable to make such assumptions, those have been made. Otherwise, the cost analysis assumes a significant level of grassroots development will be required to achieve the level of defensibility necessary to support internationally accepted standards of licensure.

The projected costs for the development phases set out in this plan, with all costs calculated net of taxes, are:



Governance

The discussion of governance for the model of oversight that will be employed to support the operations of a new national assessment system has been left to the end of the report. The choice of governance structure will be informed by the extent of the ongoing development and operational activities outlined in this plan.

Business and Implementation Plan Overview

Purpose of National Law Practice Qualifying Assessment Process

Assessment in the context of law practice admission is a high stakes activity. Such an assessment system should support the legal regulatory mandate to protect the public interest by assuring competence at entry to the profession. It should also be acceptable to the profession as relevant and defensible, and should be acceptable to the test takers as a process that is valid, fair, and consistent.

An assessment system for professional licensure must take into account what is assessed, how it is assessed, and the assessment's usefulness in fostering ongoing learning. By the time candidates for admission to the legal profession apply for licensing to respective law societies across Canada, they have engaged in a lengthy and high quality academic experience. They have been exposed to significant legal issues and applications and, in some cases, practical legal experiences either through law school courses or on-the-job opportunities.

Candidates arrive at the law practice admission gate knowing why the law has been developed and applied. For admission to the profession, the law societies that regulate entry are obligated to assure that each candidate has the requisite knowledge, skill and ability to understand what and how legal concepts should be applied to competently serve clients.

In addition to the need to protect the public by denying entry to the profession to those candidates who are not able to overcome entry level competency deficiencies, the desired outcomes of a high stakes qualifying assessment regime include:

- Fostering learning
- Inspiring confidence in the candidate
- Enhancing the candidate's understanding of their strengths and weaknesses
- Enhancing the candidate's ability to self-monitor and drive personal improvement and ongoing learning and skills development.

Competence is an inferred quality. In the legal profession it builds upon a foundation of basic legal skills, legal knowledge, and ethical development. It includes a cognitive component – acquiring and using knowledge to solve real life legal problems; an integrative function – using information and learning in legal reasoning activities; and a relational function – communicating effectively with clients and colleagues.

Professional competence is also developmental, impermanent and context-dependent. It follows that a qualifying assessment process for lawyers is a point-in-time assessment only and it should be developed and applied with the objective of gaining reasonable assurance that a candidate for admission is capable of providing competent legal services at entry to the profession.

Implementing a valid, fair and defensible national law practice qualifying assessment regime will assist law societies to obtain that reasonable assurance.

Objectives of Development Process

The critical objective of a national qualifying assessment system is to achieve a level of uniformity in the application of testing criteria to all admission candidates. To support the assessments in phase 1, 2 and 3, significant additional psychometric development is required to clarify and enhance the competency profile work that has already been conducted. The additional work will have to be completed in phase 1 to support continuity of outcomes in the assessment process as a whole. This ensures alignment between all competencies and test formats throughout the entirety of the national process.

The focus of the national assessment regime will be on assuring entry level comprehension and analytical ability related predominantly to skills competencies. Knowledge, ability and judgment in the application of skills can be effectively and validly assessed in a written format and is being tested in this manner in numerous professional environments in Canada and internationally. However, it is not possible to undertake such testing of skills competencies without placing the assessment questions in context.

Learning can be greatly enhanced by summative assessment, but only when that assessment is relevant to the learner. Relevance is most reliably achieved when the assessment reflects real life scenarios and situations within which the learner is required to apply their knowledge or skill. Therefore, a key premise of the national qualifying assessment regime will be that knowledge and enabling skills and abilities will only be effectively assessed through the use of context-specific situations.

Scope of the Development Process

The focus of phase 1 will be on skills and tasks competencies assessed by integrating them into knowledge-based issues that have strong cross-representation in participating jurisdictions and that support the achievement of practising law competencies, specifically.

Most Canadian law societies currently engage in admission testing that is supported by robust knowledge-based study or preparation materials for candidates. These materials are relatively consistent across the country, as should be expected given the similar practice competencies applied by law societies and the history of information exchange and dialogue between law society admission groups.

For purposes of defining the relevant and contextually appropriate knowledge competencies within which the skills and tasks will be assessed, law society expert staff from the participating jurisdictions will be asked to work with psychometricians to develop a framework of the core practising law competency categories and contexts.

The cross-representational competency categories will then be validated by practitioner subject matter expert work that will be undertaken to derive the assessments, as discussed later in this plan.

Expectations of the Development Process

A word about an ongoing concern that has frustrated the timely development of a national law practice qualifying assessment system – the need for "local testing".

At its best, a well-defined national assessment would potentially eliminate the need for testing on "local" law and issues – placing the focus on the underlying competencies achievements in the practice of law, and not on the particulars of statutory or other legal nuances. It is not unreasonable to assume that candidates who have completed a law degree and then have also successfully applied their cognitive and analytical abilities to manage the higher-level assessment processes proposed in this plan, are capable of applying themselves to the task of developing practice strategies to deal with unique jurisdictional laws and policies as they begin to apply them. Having proven mastery of entry level competencies, a candidate's next obligation is to develop growth strategies for maintaining and enhancing competence in law practice.

If further or other proof of law practice ability is required, it would more logically come after the new entrant has selected an area of legal expertise – at which time a more directed assessment that focuses on measures of success in a specific practice area might be a consideration, in the public interest.

But it is acknowledged that proof of concept will take time. As is the case with all new national regulatory processes, the development of the qualifying assessment system will occur in stages, will be iterative and regulatory participants will have to acquire a level of comfort with the outcomes at each stage.

In the interim, participating law societies may continue to feel the need to engage their candidates in further assessment focusing specifically on the unique law and/or circumstances of serving clients in their particular jurisdiction. That need is to be respected as an additional opportunity to enhance the training of candidates.

Ideally, any law society deeming it necessary to engage in further assessment of local legal knowledge would consider availing themselves of the use of the new national law practice qualifying agency, its skills, staff and expert providers such as psychometricians. In doing so, individual law societies could begin to follow a similar path of re-development, supporting consistency in the application and testing of competencies across the country regardless of the form that any additional testing may take.

Schedule of Development Process

Based on the development activities outlined in this plan, the following general timetable of events is anticipated.

National Law Practice Qualifying Examination

Phase 1

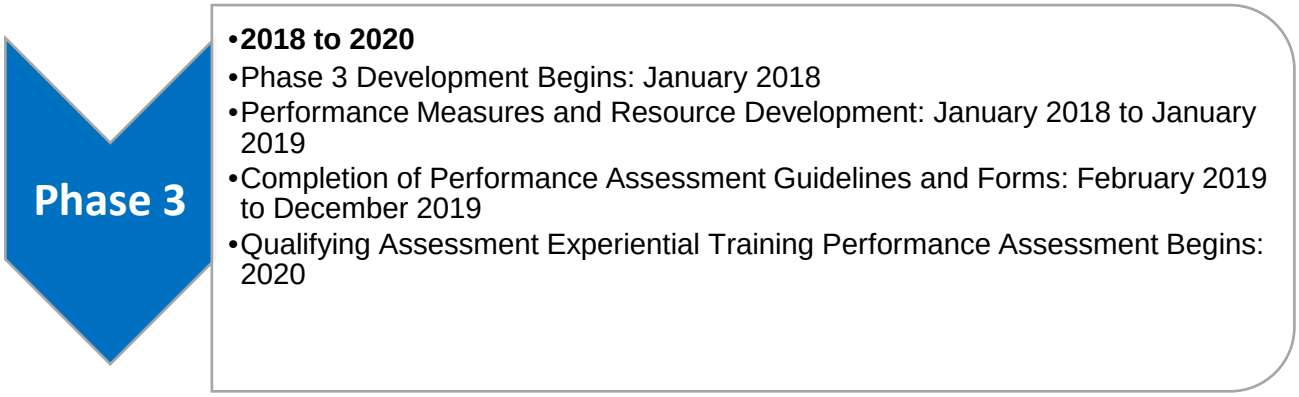
- **2016 to 2018**
- Phase 1 Development Begins: January 2016
- Blueprinting and Content Development: January 2016 to August 2016
- Item/Test Question Development: August 2016 to June 2017
- Development/Organization of Testing Platform (online): July 2016 to June, 2017
- Examination pilot test: August 2017 to September 2017
- Completion of first test form: September 2017 to October 2017
- Qualifying Assessment Part 1 begins: 2018

National Law Practice Qualifying Examination – Skills and Tasks

Phase 2

- **2018 to 2020**
- Phase 2 Development Begins: January 2018
- Content/Test Question Development: January 2018 to September 2018
- Production of Content: October 2018 to June 2019
- Completion of Test Form: July 2019 to October 2019
- Qualifying Assessment Part 2 begins: 2010

National Law Practice Qualifying Experiential Learning Requirement



The Plan

With this as the background for the national law practice qualifying assessment process, the business and implementation plan that follows will provide the explanation of and particulars for the development process, supports and costs.

PHASE 1
National Law Practice Qualifying Assessment
Project Development Plan

National Law Practice Qualifying Examination

In the development of the phase 1 qualifying examination, focus will be on the following components:

A. Defining the scope of the examination
B. Development of examination content
C. Format of the examination
D. Assuring validity of the examination

A. Defining the Scope of the Examination

The first step to building a technically sound and legally defensible licensure examination is the completion of a practice analysis. The practice analysis provides a way to evaluate the knowledge, skills and tasks required of lawyers entering the profession. It determines the feasibility and resources required for assessment, and also supports the development of an assessment blueprint documenting the content, length, time allotment and other requirements of the examination.

Key to the development of any competency profile derived from such a practice analysis and used for assessment in licensure is to ensure that the competencies to be assessed by the test are those that:

- Have the most direct impact on public protection
- Influence effective and ethical practice
- Can be measured reliably and validly by the assessment format used by the examination.

Under the oversight of the Federation's National Admission Standards Steering Group, the first step in this practice analysis has been completed. The national competency profile articulates the knowledge, skills and tasks required of entry level lawyers.

However, the current competency profile sets out the general competencies required for entry only at the highest competency category level. Those categories have yet to be distilled to set out the specific demonstration of knowledge and skill required in each. Attaining this level of clarity will require further meetings of subject matter experts to define the scope of achievements in each of the categories. A lack of clarity in these categories could result in the inadvertent expansion of the scope of the assessments outside of the boundaries of entry level competency, and cause developers and subject matter experts to struggle with the determination of how to most accurately assess the required level of achievement.

From this additional competency definition activity, an assessment blueprint will begin to form setting out the particulars of the assessment – breadth and depth. An assessment blueprint is essentially the key specifications document that will be used to develop and administer all national assessments. Specifications of the blueprint will be applied to every examination or other test format and will ensure consistency and fairness in all assessment outcomes. The framework for a blueprint applicable to a national law practice qualifying examination is attached to this plan as Addendum A.

Once the competencies have been revisited by subject matter experts and distilled into targeted requirements of achievement, test questions will be developed. The parameters in the blueprint form the basis for content validity and legal defensibility of the assessment tool and its test items.

B. Development of Examination Content

The development of the phase 1 national law practice examination will include the following steps:

i) Define knowledge and skills eligible for assessment
ii) Determine structure of assessment
iii) Define the examinable content
iv) Develop test items/questions
v) Pilot test questions
vi) Construct the official test form
vii) Develop feedback mechanisms for test takers.

i) Define the knowledge and skills eligible for assessment

The starting point for defining the scope of the phase 1 examination begins with the existing competency profile. A process of further development will result in a lengthier and more robust listing of the expected demonstrated knowledge, skill and task activities expected in the practice repertoire of candidates seeking admission to the legal profession.

This review of the competencies and their breakdown into more discrete and manageable statements of achievement will be supported by psychometricians who will facilitate subject matter expert legal practitioners through the process.

The subject matter experts will draft a set of statements that clarify the knowledge, skills and tasks required for entry level lawyers under each category set out in the competency profile. The supporting survey data obtained to derive the profile, and the ratings of relevance, importance and frequency, will assist this group to clarify, refine and then define how the statements will be prioritized and organized for testing. They will also determine the relative proportion that each competency area should represent on the examination. This is known as the “blueprinting” process.

ii) Determine structure of the assessments

For purposes of this process, the blueprint will be developed for the assessment of all components of the national system to ensure consistency in approach. Some skills and tasks may not be capable of assessment in the phase 1 examination and will become the primary focus of phase 2. The phase 1 examination is likely to be comprised of multiple choice, single question and case-based multiple question formats.

Multiple choice testing offers the opportunity for breadth of coverage of subject areas which cannot be duplicated using only essay questions or performance tests. Multiple choice can also be scored objectively and fairly, and the results are capable of being scaled to ensure adjustments for difficulty. This assures comparability between test administrations and consistent applications of difficulty as between tests and candidates regardless of the test taken.

As the first stage of assessment in a new national system of assessment, multiple choice testing will provide an anchor for other more subjective skills testing and assessment.

iii) Define examinable content

Using the completed blueprint, the examinable content will be mapped against the competency requirements. The first step in this process will be to review the pre-existing and robust reference materials currently used by the law societies, leveraging the wealth of high quality law admission content and assessment work. Experienced law society admission staff will assist to establish the practising categories and develop a set of limited, but critical, cross-representational competencies for each. These will form the contexts and background for the entire assessment process.

The second step will then refine the existing, and/or develop new, reference materials to match the competencies requirements that will be set out in the profile and blueprint. The materials will be the source of study for all candidates. They should hold within them all relevant information or referrals to such information as is necessary for the test taker to prepare to be successful on the examination. Practitioner subject matter experts chosen for their breadth and depth of knowledge and skill in the relevant competency category will be selected to assist with that content matching process.

iv) Develop test items/questions

Using the blueprint and the reference materials, test question or “item” development will begin. Item writers will require specific training on the art of writing test questions. Lawyers will be recruited to draft test questions. Each question is created with the assistance of psychometricians to confirm the match to specifications, accuracy, and relevance.

In the development of multiple choice test questions, the distractors (incorrect answers) provided in the selection of possible answers are equally important as and often far more onerous to develop than the correct answer. All multiple choice options may be correct, but only one choice will be optimal in the circumstances and context of the question. On average, a high quality multiple choice item development process will see only 25 to 30 draft test questions produced in a full day of item development by a team of six to eight subject matter experts.

Following further assessment of the questions, perhaps 20 of those will be judged adequate to support the assessment process without having to be significantly rewritten.
Questions will also be reviewed by staff developers and psychometricians for editorial quality to ensure they meet test development guidelines for the construction of questions, for example, avoiding cultural or other biases in the creation of the item.

Once formed, questions will go to item assessors who are a different group of subject matter expert practitioners. They will review for accuracy, relevance, match to specifications and other criteria. Item assessors may choose to approve, propose revisions for, or reject a test question. Proposed revisions will be returned and reconsidered by item writers, revised if necessary, and sent out to other item assessors for confirmation. A rejected item will be returned to item writers for reconstruction.

Before commencing the administration of the very first national law practice examination, a minimum number of items will be required for the databank. The number of initial items will be determined by the blueprint which will set out the length of the examination based on the need to assure assessment of the competencies in proportion to their importance and frequency.

As an example, a full day or six to seven hour examination, taken in two parts of approximately three or more hours each, is likely to require 200 to 250 test questions. To ensure that the examination item bank has effectively covered all competencies, and taking into account the need to hold more than one administration of the examination in any given year, it is likely that the initial item databank will require a minimum of approximately 750 operational items.

How will the test items be developed for the first administration of the examination?

In order to formulate the first national qualifying examination in accordance with the schedule of development set out in this plan, it is proposed that the development process should look to the participating law societies for contributions, saving on time and cost by leveraging existing test question content and databanks.

Participating law societies with applicable test item content will be requested to submit items relevant to the competencies that have been validated through the blueprinting process. Experienced law society staff will review their item banks with the assistance of a framework developed by psychometricians and with a view to matching questions as closely as possible to the new competency profile and blueprint.

The test items that align with the competencies profile will be submitted for further analysis *on an anonymous basis*. The items will be put through the review processes without attribution to ensure an objective review of applicability. Only the most aligned items will be accepted for purposes of the examination system, regardless of origin, and will then be revised as necessary by item writers to meet the specifications.

v) Pilot test questions

Pilot testing the law practice examination questions is an important requirement in the development process and complements all of the subject matter expert reviews that have already been completed to this point.

Using newly licensed lawyers from across Canada (fewer than two years of practice), a pilot examination will be formed and administered in an environment that as closely as possible resembles a true examination administration. The results of the pretest will be analyzed with specific reference to:

- Item difficulty – did the percentage of candidates expected to get the answer right, actually get the answer right?
- Distribution of responses – are there any areas of the test that performed better or worse than other areas of the test?
- Item to test correlation – how did the performance on each question compare to the performance on other questions?

Questions that do not achieve the performance specifications set out in the blueprint will go back for review to item writers to determine if they will be deleted, or revised and accepted for future use.

In addition, pilot tester commentary on the format and experience of the test will assist to inform policies and administration improvements in preparation for the first formal examination.

Test item development is an ongoing process and will be regularly scheduled throughout each year. All test items developed following the first official administration of the examination will be pretested by being included as “experimental” items in each test. Items that are experimental are items that have not yet been pretested. A certain percentage of questions in each examination administration will be experimental and will not be included in the final calculation of the candidate scores. Instead, the results of the responses to each question will be assessed and analyzed by psychometricians and subject matter experts and if the question performed adequately, will be made “operational” and become a permanent part of the item bank for use in future examinations.

vi) Construct official test form

The construction, or particulars, of the examination will have been set out in the blueprint. The first test form, and all test forms thereafter, will be organized to meet the blueprint specifications on a variety of dimensions. The goal is to have test versions that are comparable to each other. They must be fair to all candidates, regardless of which version of the test is taken.

Content specifications for the examination describe how many questions of each type will be included. This includes the format of the questions – single or case-based multiple question – and the distribution of the questions, or percentage of questions in each competency category.

Once the test is formed, it is again reviewed based on a variety of criteria by the psychometricians and an appointed subject matter expert advisory group, in preparation for

formal test administration. This process of assessing the test form will occur before every sitting of every examination that is held.

Following administration of the examination, it will be scored and put through a psychometric analysis. The results will be returned to the appointed advisory group for review.

Once the advisory group and psychometricians are satisfied that all questions fairly and accurately assess for entry level competence, the examination will be finalized and candidates will receive their results.

vii) Develop feedback mechanisms for test takers

Candidates who fail the examination must receive input and direction on their areas of weakness. A profile of their results, as compared to the rest of the test taking group, will be provided to support their iterative improvement in anticipation of rewriting the examination. The results profile information and format must also be determined and derived during the development process.

C. Format of the Assessments

Implementing a robust national law practice qualifying assessment system that will serve thousands of candidates every year will require a significant shift in thinking about the modalities to be used for the testing environment.

Given the size of the cohort and the need to ensure multiple test taking opportunities and geographic locations for test takers, it is highly recommended that the national assessment system be enabled through computer based testing (“CBT”).

CBT has many practical advantages and it also has the ability to facilitate enhanced validity for assessments. It has been shown to be generally popular with examination takers and efficient for delivery and marking. It is ideal for a large number of test takers, with benefits including greater efficiency, lower costs, provision of a level playing field (standardization), delivery convenience and flexibility, without compromising examination integrity.

CBT can be delivered anywhere via a secure computer network and is increasingly invigilated at commercial computer-based assessment centres located across the country. These test centres are usually some distance from the test source, but invariably closer to the test taker to provide greater convenience, flexibility and ease of scheduling. Test centres have closely monitored testing rooms with partitioned cubicles and use audio and video surveillance.

In-person invigilation continues to be an accepted requirement for assessments that are high-stakes and summative in nature. The national law practice qualifying assessment is such a high stakes effort. It is anticipated that any CBT environment used to support law practice testing will apply stringent security and administrative policies including robust invigilation. The benefit of CBT enabled systems is that test taking activities, facilities, and provision of invigilation and security can be outsourced to providers of such high stakes services, decreasing overall costs for participants – regulators and candidates alike.

CBT Process

The law practice assessment process will utilize an external provider of CBT systems. That provider will support registration and scheduling for individual assessments, delivery of the assessment, transfer of scores, and candidate management as required.

Based on a review of potential CBT providers, it is anticipated that this will allow candidate access to real-time scheduling on a 24/7 basis, provide an online test site and appointment locator, appointment confirmations and rescheduling. These services will allow participating law societies to reduce their administration costs by outsourcing what can be a very labour intensive process of managing candidate examination registration and processing.

The CBT provider will be required to have a robust system for and broad experience in the provision of accommodation for candidates requiring specialized assessment supports and services. Their approach to test accommodation must increase accessibility and create a high quality testing experience for candidates. The CBT provider will be expected to have significant experience in the application of adaptive systems to support self-service access and create consistency in the authorization, notification, delivery and tracking of testing accommodations.

Finally, the CBT provider must be fully able to provide all facets of their examination, including invigilation, scheduling and support services in both English and French.

Given the large cohort of candidates moving through the processes, windows of opportunity will be scheduled for the taking of assessment(s). Although still to be determined through the blueprinting process, it is likely that there will be one to two week windows of opportunity, three times per year. During those periods, candidates may schedule themselves directly with the CBT provider for their assessment in accordance with their personal scheduling needs. As there will be candidates writing the same examination throughout each window, albeit in different versions, it will be critical to ensure strict and high quality security services are enabled for the assessment processes.

In addition to essential test services, a variety of security measures are highly recommended to ensure that the assessment process is not compromised. Standardized security measures that can be provided by the CBT service may include fingerprint collection and comparison or palm printing identification, wanding and emptying of pockets, surveillance as required, diligent proctoring of the testing room at all times, monitoring and reporting of suspicious behaviour. Services should also include dedicated hardware and software, data encryption throughout the testing lifecycle, encrypted virtual private network connections, and intrusion protection systems during testing sessions.

It is also recommended that the law practice assessment process consider engaging an external provider of specialized fraud and audit services to conduct forensic data review during all assessment cycles. Such a service would reach out into the internet and monitor online exchanges for test content dissemination, and other security breaches. Such services may also be able to locate and advise on the individual who may be engaging in a breach of the

confidentiality of the examination. This is an important risk mitigation tool supporting the efficacy and defensibility of the testing system, and may provide information on a candidate's professionalism and future governability.

D. Assuring Validity of the Examination

To ensure that the assessment system is fair in its application, there must be an alignment between learning and testing. An assessment is most reliable when the format of the examination is not a factor in performance. This means that test takers should have had prior exposure to, and preferably actual experience with, the test format.

For this reason, practice tests will be developed and provided for use by candidates in their preparation activities. These supports will be offered in the same format and through the same modality as the official assessment, providing candidates with an opportunity to experience the testing platform and learn how to navigate the system prior to the test.

In addition, the newly defined competency profile with all competency achievement statements and expectations will be publicly available so that candidates may fully understand the extent of the anticipated testing in advance of registering for admission to the profession.

It is recommended that the new law practice qualifying assessment agency engage in the active provision of assessment preparatory supports for candidates. The preparatory activities would be directly aligned with the actual content, items and modalities of the national assessment making the use of the preparatory package directly supportive of candidate success on the test. This is unlike "bar admission prep" courses that have developed in Canada and market themselves as support systems to prepare for law societies' current examinations. A review of those third party preparatory courses shows a lack of alignment and applicability to the actual examinations – providing limited or no benefit to the test taker for an often high cost of time and money.

The preparatory package that is offered by the national assessment agency would be computer enabled and supported through the same CBT provider platform. It would utilize test questions that are actually derived during the item writing activities, and would support enhanced learning of the content and the actual test taking environment.

In the case of the phase 1 multiple choice testing, the preparatory package will allow candidates access to the CBT system that will be used in their actual assessment, providing the opportunity to engage with the software and systems as they answer practice test questions. It is recommended that there would be no additional cost to candidates for this access, as it is a natural extension of the testing platform and included in the development specifications. For the phase 2 case-based skills testing, a comprehensive package of preparatory supports that would serve both as a practice test and a formative learning opportunity might be offered as part of the assessment package or as a value-added support for a nominal fee.

Phase 1 Development Costs

Assumptions for Development of Phase 1

The following assumptions have been made to determine the development activities and estimate costs of the system of assessment that is described in this plan:

- Phase 1 written test will be multiple choice and approximately 6 to 7 hours in length
- Assessment will be supported by computer-based testing
- Psychometricians will be placed on retainer for all relevant ongoing competency profile, blueprint and item development and redevelopment
- Subject matter expert ("SME") practitioners will be paid an honorarium to recognize the contribution made to supporting defensibility of law practice entry assessment
- Law society subject matter expert participation will be in-kind
- All costs are calculated net of taxes.

Development Process and Costs

1 • Confirm scope of competencies for assessment

Psychometrician and law society SME review of competency achievements in law practice contexts.

- 5 to 8 law society (staff) SMEs
- Minimum 2 day meeting
- Psychometricians – 4 day prep + 2 days facilitation
- Cost $15,000

2 • Refine competency framework and clarify competencies for blueprinting and test item writing

Practitioner SME teams, from across the participating jurisdictions, working with Psychometricians and staff to clarify competency achievement, by category.

- 12 practitioner SMEs x 2 key competency categories (advocacy and transactional)
- 2 sessions of 4 full days each
- SME honorarium of $250 each
- Psychometricians – 2 days prep + 8 days facilitation
- Cost $75,000

3 • Develop content specifications for assessment reference materials and derive content

Given the wealth of high quality reference materials available in law societies, and general consensus on scope of competencies that will be achieved in step 2, content will be developed and validated through group work with law society/staff SMEs and practitioner SMEs.

- Law society SMEs
- Assumes a minimum of 20 practitioner SMEs
- Honorarium to practitioner SMEs revise existing and/or develop new content to support the testing of the underlying competencies
- Honorarium = $2000 per practitioner SME
- Cost $40,000

4 • Validation of competencies

External SME teams working with Psychometricians and staff to ensure that the competencies are progressive, practical and relevant to today's entry level lawyer practitioner market.

- 8 practitioner SMEs x 2 key competency categories (advocacy and transactional)
- 1 session of 2 days each
- Honorarium of $250 per day
- Psychometricians – 1 day prep + 4 days facilitation
- Cost $20,000

5 • Map competencies to reference materials

Law Society SMEs and a select group of SME practitioners review all competencies and content to ensure appropriate coverage in accordance with profile and blueprint.

- 3 – 5 Law Society SMEs
- 5 practitioner SMEs x 2 key competency categories
- 1 session of 2 days each
- Honorarium of $250 per day
- Psychometricians – 2 days prep + 4 days facilitation
- Cost $20,000

6 • Finalize competencies and test specifications for the assessment process

Same group as in step 2 will come back together to do a final review of the competencies and will assess the scope and depth of testing, refining the blueprint and finalizing the criteria for administration of each assessment.

- 12 SMEs x 2 key competency categories (advocacy and transactional)
- 1 session of 2 days each
- Honorarium of $250 per day
- Psychometricians – 2 days prep + 4 days facilitation
- Cost $24,000

7 • Develop test items: Leverage existing content

Item, or question, development will begin once the blueprinting is finalized and will include:

a) Receipt and review of all items from participating law societies and mapping to the blueprinted competencies
b) Revision of currently existing databank items from various jurisdictions to support the new competency profile.

- Minimum of 8 SMEs x 2 key competency categories (advocacy and transactional)
- 2 sessions per category of 3 days each
- Honorarium of $500 per day
- Psychometricians – 2 days prep + 12 days facilitation
- Cost $85,000

8 • Develop test items: Create new test items

Practitioner SME development of originating items to ensure sufficient items available to adequately test every competency category and articulated practice achievements.

- 8 SMEs x 2 competency categories (advocacy and transactional)
- 3 sessions per category of 3 days each
- Honorarium of $500 per day
- Psychometricians – 6 days prep + 18 days facilitation
- Cost $135,000

9

- Conduct pilot test

Psychometricians will derive a test format approximating the anticipated standardized test, based on the blueprint. The pilot is the opportunity to measure test results against blueprint metrics, such as length, difficulty, validity of items. The test taker group will be randomly selected lawyers, newly called to the bar.

- 50 to 100 test takers
- Honorarium of $250 per test taker
- Psychometricians – derive pilot test, complete analysis of results and reporting
- Cost $35,000

10

- Form Advisory Groups and Approve First Test Form for Administration

At this point in the process, it is advisable that the oversight entity be constituted. Membership on the Advisory Groups/skills-based committees should be established and participants should receive training to provide ongoing analysis of assessments and setting of scores. They will train and then process the first examination form. For purposes of the first assessment administration only, the following will apply:

- 10 SMEs per Advisor group, 2 competency categories (advocacy and transactional)
- 1 session per category for 3 days each
- Honorarium of $500 per day
- Psychometricians – 4 days prep + 6 days facilitation
- Cost $56,000

Costs for phase 1 related to development of content and test items by subject matter expert practitioners and providers, for the period from early 2016 through to and including the completion and approval of the first examination form for test administration in early 2018, are projected at $505,000.

There are also associated costs for SME travel, meals and accommodation expenses and for potential facilities rental and catering for meetings. See *Table 1.1* on the following page for all projected costs.

Table 1.1

Activity	Cost
Development Process	
Confirm scope of competencies for assessment	15,000
Refine competency framework and clarify competencies for blueprinting and test item writing	75,000
Develop content specifications for assessment reference materials and derive content	40,000
Validation of competencies	20,000
Map competencies to reference materials	20,000
Finalize competencies and test specifications for the assessment process	24,000
Develop test items: Leverage existing test items	85,000
Develop test items: Create new test items	135,000
Conduct pilot testing	35,000
Form Advisory Groups/Approve first test form	56,000
	$ 505,000
Additional Associated Costs	
SME travel, meals and accommodation expenses	200,000
Facilities rental and catering for meetings	80,000
	$ 280,000
Total	**$ 785,000**

Phase 1 Management and Operations Costs

To advance planning for the implementation of a high quality national law practice qualifying assessment regime as set out in this plan, it will be necessary to appoint an experienced management and staff team.

At a minimum, it is anticipated that the personnel supports and operational supports set out in *Table 1.2* will be required. Expenditures are spread across the full development cycle for phase 1, or two full years from early 2016 to early 2018. In 2018, an oversight agency will have been established will full-time staff and operational controls. See Governance discussion.

Management costs for phase 1 assume that one or more experienced law society administrators will be seconded into required roles. This will allow the national development process to leverage existing knowledge and skill, avoid extensive staff training, and begin development on a timelier basis. It also avoids full-time employment agreement commitments in advance of establishing a viable system of national assessments.

Operational costs for phase 1 assume that the seconded, contracted or employed staff will be able to work virtually, in many instances, and that seconded staff will be invited to continue to work out of their offices in their respective law societies. For this reason, the projected costs for seconded staff will likely be provided to the law societies as a contribution toward the salary of those individuals, in recognition for the law society's willingness to allow the secondment.

Toward the end of the phase 1 development period, and with the benefit of greater insight into the national processes, a full-time staff complement will be hired and office space and other operational infrastructure will be established to sustain the new national law practice qualifying assessment services.

Table 1.2 sets out the project costs for management and operations for the phase 1 development.

Table 1.2

Expense Category	Cost (two years)
Management and Staffing	
Interim Executive Director (secondment – contribution to the home jurisdiction) • Hands-on leadership in the development including oversight of all components of the process through to implementation of phase 1	200,000
Team Leader – Psychometrics (secondment – contribution to home jurisdiction) • Senior manager with experience in the development of competency regimes and test items, adult learning designation preferred	150,000
Coordinator x 2 (secondments if possible, otherwise term contracts)	200,000
Provision for Additional Staff (contract or secondment)	100,000
	$ 650,000
Operations	
Technology Development • Retainers to develop programming, systems and tracking, assessment results, secure/encrypted information exchange	200,000
Office Expenses • Telephony/technology use contributions to home jurisdictions, courier, print production, translation, staff travel, other	150,000
	$ 350,000
Total	**$ 1,000,000**

Phase 1 Development Costs and Funding Model

Total costs including all phase 1 examination development, management and staffing will be approximately $1,800,000 across a two-year period that commences in early 2016. Assuming that the costs will be spread across the entirety of 2018, providing law societies with additional time to plan for monetary commitments, the estimated phase 1 development and operational cost commitment will be:

Funding Model

The availability of sufficient funding for the development of the new national law practice qualifying assessment process will be critical in achieving completion of a high quality, psychometrically sound, and acceptable test system. It is important that ample funding be readily available to meet scheduling and quality targets.

There are a variety of options for financing of the development process by law societies. Two potential models are set out here, but with limited detail. *Further exploration of options for the funding model should be undertaken with the assistance of a financial advisor.*

Included in the options could be a request for contributions from each participating law society that is derived based on a cost sharing model that may consider the number of full-time equivalent members, the number of candidates registered in the jurisdiction, or another agreed formula. Contributions would be placed into a fund from which monies will be drawn as required.

The cost sharing formula is likely to require modification to acknowledge the contributions of participating law societies to the provision of foundational content that will be used in the system.

It is generally accepted in the licensure arena that the cost of deriving just one multiple-choice examination question is in the range of $5000 to $6000. Managers of the development process will be required to track the usage of content received from law societies. This contribution by individual law societies may greatly reduce both the development and ongoing operational costs of the new system and that value should be attributed accordingly. Until development begins and the activities set out in phase 1, activities 1 through 7 of this plan (pages 21 – 23) are completed, it is not possible to estimate the value of these potential contributions.

It is feasible that a system of funding that includes a repayable loan model could be established. Participating law societies might contribute to the financing of the development process, or an

independent loan arranged with a financial institution, and the new assessment agency will be required to achieve a modest annual income used to pay down the loan over time.

In such a funding model, any income should only be derived from ancillary revenue sources. New candidates into the admission system should not pay for original development costs which are an investment in the future of competency assessment for the Canadian legal profession generally. Opportunities for income may come from revenues generated from the preparatory supports that will be provided for phase 2 of the assessment process, or a percentage of revenues generated from the payment of the assessment fees for rewriting the examinations.

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PHASE 2
National Law Practice Qualifying Assessment
Project Development Plan

National Law Practice Qualifying Examination – Skills and Tasks

In phase 2 of the project, development will begin on an enhanced online assessment that includes interactive components. Candidates will complete test items requiring constructed responses.

A constructed response may range from questions requiring long answers using information supports provided online, through to skills assessment using task completion. With the addition of audiovisual components, simulated practice scenarios will also be incorporated to enhance the opportunity for test takers to apply critical and analytical thinking skills, make judgments and draw conclusions – higher level competencies that form an integral part of an entry level lawyer's repertoire.

The skills based segment of the assessment regime will require extensive examination infrastructure. The development process will hope to avail itself of existing content developed by participating law societies and then refine and expand as necessary in accordance with the new competency profile and blueprint.

Without predetermining the outcomes of the blueprinting process, and based on existing skills and tasks competency requirements in participating law societies and the current competency profile, it is quite feasible to suggest the following outline as a sample full-day assessment developed in phase 2 of this plan:

- Test Component 1: candidates for assessment are provided with a statement of facts and access to legal databases or static legal information (both relevant and irrelevant in the circumstances) and are required to draft an opinion letter for the client or memorandum to a senior partner – 60 minutes

- Test Component 2: candidates for assessment are provided with a statement of facts, client interview information or abbreviated transcripts, and are required to draft an affidavit or a short pleading – 90 minutes

- Test Component 3: candidates for assessment are provided with two or three ethical scenarios and access to relevant online documentation and are required to draft an analysis of the situations – 60 minutes

- Test Component 4: candidates for assessment view a series of three short videos of a lawyer interviewing a client, undertaking a negotiation, or other examples of professional interactions, and are required to analyze the performance and discuss how competencies/standards for the practice of law have or have not been demonstrated – 90 - 120 minutes

In the same manner as the blueprint that was developed during phase 1 is then applied to the phase 1 assessment questions, the blueprint will be applied to the development of cases and questions for phase 2 testing.

Phase 2 will also require additional test items to be developed to ensure an accumulation of content prior to launching the assessment. It is recommended that a minimum development of three completed segments for every one assessment be produced in advance of the first iteration of the phase 2 examination. In essence, accumulating the equivalent of a minimum of one full year of test items prior to implementation.

The development will include practitioner subject matter expert assistance with case development, script development and validation along with expert external providers to support video production support. Psychometric supports will be required to ensure that the achievement of the outcomes aligns appropriately with the competency profile and that test versions meet the expectations of the blueprint.

In addition to developing the first iteration of the phase 2 examination content, significant work must be completed on the development of scoring rubrics for those examination components. Constructed response and task completion questions will be manually scored by legal practitioners. This will require the development of training plans and formal training sessions for a significant number of practitioner assessors who will be requested to assist in the scoring activities. It will also require psychometric support to align all of the scoring rubric requirements with the competency profile and blueprint, ensuring validity and fairness in their application.

In the phase 2 national law practice qualifying examination creation, the focus will be on the same components of development as in phase 1:

A. Defining the scope of the examination
B. Development of examination content
C. Format of the examination
D. Assuring validity of the examination

A. Defining the Scope of the Examination

The preliminary practice analysis for the skills and tasks examination components was completed under the oversight of the National Admission Standards Steering Group. The skills and tasks categories will be further distilled to set out the specific demonstration of competency required in each. The new competency profile and the blueprint derived in phase 1 will complete all of this work, including a review by subject matter expert practitioners to ensure that there are targeted requirements of achievement against which to develop case-based scenarios for skills testing.

B. Development of Examination Content

The process of development of examination content will be very similar in nature to phase 1 activities, except that the content for phase 2 test questions will require a different level of creative application of experienced subject matter expert knowledge. The derivation of long form, case-based, questions that will meet the targeted competency requirements must be a carefully managed process including multiple levels of development, review and validation.

During this component of development, the structure of the assessment must also be defined to ensure that the skills and tasks competencies will be validly assessed. The structure of phase 2 testing will require increased candidate interactivity with the test modality if it is going to reliably assess skills and tasks competencies.

The examinable content will be mapped against the competency requirements and will be developed by practitioner subject matter experts chosen for their breadth and depth of experience in the application of skills in the relevant practice contexts within which the skill or task will be integrated.

Test question development in this phase will include an increased emphasis on the application of adult learning assessment techniques applied by experienced administrators or others retained for this purpose. The art of creating case-based assessment questions is as complicated and exacting as creating multiple-choice distractor options, but with the added requirement of ensuring a logical flow of expanded content through scenario building. Case question developers must be trained to assist with this work.

C. Format of the Assessments

The phase 2 assessment system will rely on CBT to effectively and efficiently serve the number of candidates moving through the qualifying examinations.

A significant benefit of using a CBT environment for the national law practice qualifying examination components will be in its application to phase 2 where more interactive test forms will be integrated.

The types of assessment forms provided through CBT may be substantially enhanced through the application of multimedia. In particular, test questions may be made dynamic by adding video and audio and will allow for a broader set of critical and interpretive skills to be assessed than would be feasible using a paper-based testing method. A multimedia task may measure important elements of professional competency that more conventional assessment modalities may not.

Simulations are increasingly used for authentic formative assessments and also for summative assessments. Simulations can combine audiovisual and data resources to create realistic client situations, and the test taker can interact with the simulation by completing tasks, making judgments and observations, and drawing conclusions.

In performance-based CBT, test takers are assessed by having them perform tasks similar to what would be required “on-the-job” rather than simply asking them a series of questions about those tasks and then inferring from their answers that they know how to do those tasks.

Given the high cost of engaging in performance based testing in the legal profession – testing that approximates Objective Structured Clinical Examinations used in some of the healthcare professions – the use of innovative applications of CBT are a viable and cost effective way to assess legal skills competencies at entry to the profession.

D. Assuring Validity of the Examination

The provision of preparatory supports for candidates taking the phase 2 testing will be particularly important as it is likely that many will not have had prior exposure to skills-based testing. In most cases, candidates in the process will have just completed law school and will not have encountered this type of modularized online testing requiring the completion of tasks and the use of audiovisual enabled testing content.

Validity will be enhanced by providing the opportunity to experience the assessment format in advance of formal testing. Consideration should be given to the development of an extended preparatory package that will reflect the actual types of case scenarios and response activities that the test taker will be presented at the time of formal assessment. Developing and providing a more robust preparatory package will reduce or eliminate concerns about lack of exposure to the test content and the test taking environment which in turn will improve the defensibility of the outcomes.

Phase 2 Development Costs

Assumptions for Estimating Costs of Development in Phase 2

The following assumptions have been made to determine the development activities and estimate costs of the system of assessment that is described in this plan:

- Phase 2 written test will be case-based, focused on skills and tasks and approximately 5 to 7 hours in length
- Assessment will be supported by CBT
- Psychometricians will be placed on retainer for all relevant ongoing competency profile, blueprint and item development and redevelopment
- Subject matter expert practitioners will be paid an honorarium to recognize the contribution made to supporting defensibility of law practice entry assessment
- Law society subject matter expert participation will be in-kind
- All costs are calculated net of taxes.

Case-based Skills and Tasks Content and Item Development Process and Costs

1 • Develop cases for Components 1, 2 and 3

Practitioner SMEs working with law society SMEs and the development team will derive a series of case-based scenarios that address required competencies as set out in the profile and blueprint.

- 2 practitioner SMEs per item x 3 components with multiple items, along with developer (staff) SMEs
- 3 cases for every one item required in each of the components (approximately 9 independent items, 3 case versions = 27 items)
- Average of 3 days development per item
- Honorarium of $500 per day
- Psychometricians – 3 days prep + 3 day case review to align competencies with profile and blueprint
- Cost $95,000

2 • Validate cases for Components 1, 2 and 3

Practitioner SMEs review, revise and validate the content of each case item to be used in the test components. Psychometrician and developer SME review thereafter and integration of further adult-learning requirements.

- Validation by 2 practitioner SMEs per each item in each component
- Average of 1 day validation per item, for 27 items
- Honorarium of $500 per day
- Psychometricians – 3 day review to finalize validation of case competencies
- Cost $35,000

3 • Develop content and scripts for videos in Component 4

Assumes three videos will be used in Component 4. Developer SMEs will work with practitioner SMEs to derive content and produce a supporting script to enable video creation. Practitioner SMEs will also act as quality control during video production.

- 9 videos (3 per item x 3 items in the bank) in English and French = 18 videos
- 2 Practitioner SMEs per video = 36 SMEs
- Average of 2 day development per video outline and script = 72 days
- Honorarium of $500 per day
- Psychometricians – 9 days script validation to align competencies with profile and blueprint
- Cost $60,000

4 • Validate content and scripts for videos in Component 4

Practitioner SMEs review, revise and validate the content of each video. Psychometrician and developer SME review thereafter and integration of further adult-learning requirements.

- 3 Practitioner SMEs to review each script, two English and one French
- 1 day to review each script
- 18 scripts - 9 each in English(2) and French(1) = 27 SMEs
- Honorarium of $500 per day
- Psychometricians – 2 day review of overall validation results with SME developers
- Cost $20,000

5 • Produce Component 4 videos

Production outsourced to video production company.

- Script training of actors, including SME participation – minimum of 1 practitioner SME from above present during video shooting to ensure authenticity
- ½ to 1 day video shoot per video = 5 to 9 days of shooting
- For purposes of estimating cost, assume 1 day shoot x 18 videos (English and French) x 2 SMEs
- Honorarium of $500 per day
- Video production by production provider: casting (actor and union fees), facilities, production requirements, editing
- Cost $320,000

6 • Develop of Scoring Rubrics for all Components

Case-based skills testing will require manual scoring. Key to assuring the validity of the assessment format is the reliable application of the assessment rubrics for marking.

- SME participation in development and validation of rubrics
- 4 to 6 SMEs per component = 24 SMEs
- Average of 2 days of development for each component
- Honorarium of $500 per day
- Psychometrician facilitation – 2 days prep + 8 days facilitation
- Cost $50,000

7 • Validate Scoring Rubrics for all Components

Review and confirmation that rubrics align with competency requirements.

- 2 new SMES per component = 8 SMEs
- 1 day for validation per component
- Honorarium of $500 per day
- Psychometrician facilitation – 1 day prep + 4 days
- Cost $20,000

Costs for phase 2 related to development of content and test items by subject matter expert practitioners and providers, for the period from early 2018 through to and including the completion and approval of the first examination form for test administration in the latter half of 2019, are projected at $600,000.

There are also associated costs for SME travel, meals and accommodation expenses and for potential facilities rental and catering for meetings. See *Table 2.1* below for all projected costs.

Table 2.1

Activity	Cost
Development Process	
Develop cases for Components 1, 2 and 3	95,000
Validate cases for Components 1, 2 and 3	35,000
Develop content and scripts for videos in Component 4	60,000
Validate content and scripts for videos in Component 4	20,000
Produce Component 4 videos	320,000
Develop Scoring Rubrics for all Components	50,000
Validate Scoring Rubrics for all Components	20,000
	$ 600,000
Additional Associated Costs	
SME travel, meals and accommodation expenses	70,000
Facilities Rental and catering for meetings	50,000
	$ 120,000
Total	**$ 720,000**

Phase 2 Development Costs and Funding Model

At this point in the development process, it is assumed that the new national law practice qualifying assessment agency will have been formally constituted. Ongoing operational costs including management and staffing, as distinct from assessment development costs, will have been integrated into budgeting activities and will be supported by revenues generated from phase 1 examination fees, on a cost recovery basis.

Development costs for phase 2 are comparable to phase 1 but predominantly relate to provider services for production activity as opposed to subject matter expert participation. Some activities such as script writing and video production management will be supported by existing administrators or contracted out to expert providers such as accredited adult educators, skilled in the development of case-based scenarios used in testing environments. The most significant cost will be in video production to create an accumulation of content for a full year of testing.

Funding of this segment of the development process would mirror the financing structure chosen for phase 1 development.

These decisions will be taken in 2017 in preparation for establishing the 2018 budget for the national law practice qualifying assessment system.

PHASE 3
National Law Practice Qualifying Assessment
Project Development Plan

National Law Practice Qualifying Experiential Learning Requirement

A significant component of law admission processes for law societies is the experiential learning requirement. Articling programs or their alternatives in each jurisdiction vary somewhat in form and length, but overall the expected learning outcomes – the skills and tasks achievements – are the same.

As the requirement of the admission process that depends on support of the profession to meet its objectives, regulatory control over learning outcomes in articling is significantly more challenging. However, greater clarity in training expectations and increased focus on documenting achievement of validated learning outcomes will assist all law societies to confirm appropriate entry level skills achievement prior to admission.

Redefining Experiential Learning

For purposes of the national law practice qualifying assessments, the activity of articling or its alternatives would remain the domain of each participating law society. To validate articling or alternatives as an appropriate experiential learning activity in preparation for admission to the legal profession, law societies would move forward with an agreement to support increased accountability, and therefore increased integrity and defensibility, of this component.

The experiential learning activities of the admission process become even more important in light of the outcomes of the national competency profile. It is clear from the foundational competency development work undertaken under the oversight of the National Admission Standards Steering Group, that articling or some other form of experiential learning continues to be a foundational expectation of training for new lawyers. It is the only component capable of supporting hands-on formative learning. But it must be acknowledged that articling systems across the country lack consistency, validated performance targets, and a sufficient level of regulatory oversight and accountability to serve as a defensible component of qualifying assessment.

One method of overcoming the perceived deficiencies of current experiential training programs is to develop, and require the application of, specified learning outcomes based on standardized performance reporting. It is quite feasible to do so while still recognizing that there must be sufficient flexibility in the application of learning outcomes to accommodate a myriad of experiential opportunities – not all workplace experiences are created alike.

This plan proposes the development of a framework of standardized competencies achievements during experiential learning including a formal set of performance criteria and performance ratings supporting the assessment of those skills and tasks. In this way, regulators,

supervisors and candidates will be in a better position to meet and confirm expectations for entry level competence.

Those skills and tasks have been articulated in the competency profile and the criteria for demonstration of appropriate performance can and should be included in the competencies validation and blueprinting process that will take place during phase 1 development. This will ensure that all law practice assessment processes are aligned and delegated to the appropriate component of the law practice assessment activities.

Development Process for Phase 3

In the development of the experiential component of the qualifying assessments required by law societies, focus will be on the following components:

A. Defining the scope of experiential assessment
B. Development of experiential assessment performance criteria and rating systems
C. Creation of formal documentation and reporting requirements for experiential assessments

A. Defining the scope of experiential assessment

The national law practice qualifying assessment development team will be in a position, with assistance from retained psychometricians, to develop a performance assessment framework and then assist participating law societies to integrate the learning requirements into formal reporting procedures.

The objective of validating experiential learning requirements will be to move toward a standardized assessment rubric for practical experience requirements regardless of the format of the articling program or alternatives. This phase of assessment must recognize that the disparity in the size of candidate groups across the country may make complete consistency of ***form*** for experiential learning an unreasonable expectation, but that consistency in the ***function*** of the experiential assessment requirement can and should be defined and measured.

Fundamentally, the defensibility of articling programs can only be enhanced if the legal profession accepts the notion that there is a need to improve the performance achievements during that process and to more consistently evaluate candidates.

By re-validating experiential learning through a psychometric review of skills and tasks requirements, the experiential training becomes more consistent and candidate entry level competency is enhanced.

B. Development of experiential assessment performance criteria and rating systems

Following the psychometric development of skills and tasks competencies achievement in a viable and defensible articling placement, a standardized set of performance criteria will be established with the assistance of practitioner subject matter experts. This process will acknowledge the tremendous diversity of professional environments within which a candidate may undertake experiential learning. It will integrate flexibility in the definition of the core skills and tasks competencies that will become the standardized expectations of achievement.

The criteria will support the creation of a performance rating system that can be applied consistently by all supervisors to assess candidate skills and tasks achievements. The criteria will be translated into appropriate competency achievement statements and a performance management process will be created to support assessments and feedback. This system of rating will utilize behaviourally anchored statements of achievement and will provide supervisors with a means and consistent prompts to score the articling candidate and provide feedback and reasons for that scoring.

Candidates for admission will participate actively in the performance rating exercises. They will improve their learning and development receiving appropriate feedback that is channeled to focus on core competencies leading to effective and ethical entry level practice.

C. Creation of formal documentation and reporting requirements for experiential assessment

The final development activity in phase 3 will be to create formal and consistent reporting mechanisms for supervisors and candidates. Guidelines and resources will be provided to enhance the performance management experience.

It is often assumed that members of the profession will be less likely to support an articling placement if the reporting obligations are increased. A recent experience in Ontario appears to dispel that notion.

The work of Ontario's Articling Task Force elicited input from the profession that there was concern for the fact that articling experiences are not equivalent, calling the defensibility of articling into question. Many respondents in the consultation process indicated that the experiential learning component would benefit from greater definition. When this translated into new performance evaluation requirements, increasing the amount of time and effort that would be required to oversee an articling candidate, supervisors accepted the challenge and fulfilled all new obligations willingly and at a high level of quality.

In Ontario, significantly more onerous documentation and tracking requirements have initially been met with a 96% completion rate. Input indicates that providing supervisors with criteria and tools for use in performance review and feedback allows them to participate more meaningfully in entry level lawyer competence assurance, and they appear to be embracing this enhanced obligation.

Phase 3 Development Costs

Assumptions for Estimating Costs of Development in Phase 3

The following assumptions have been made to determine the development activities and estimate costs of the system of assessment that is described in this plan:

- Phase 3 competency assessment will be focused on skills and tasks achieved in an articling placement or alternative skills environment
- Assessment will be supported by performance criteria and rating systems
- Psychometricians will be retained to develop defensible criteria and behaviorally anchored rating scales
- Subject matter expert practitioners will be paid an honorarium to recognize the contribution made to supporting defensibility of law practice entry assessment
- Any law society subject matter expert participation will be in-kind
- All costs are calculated net of taxes.

Development Process and Costs

1 • Confirm scope of experiential learning competencies assessment

Practitioner SME teams, from across participating jurisdictions, working with Psychometricians to clarify skills and tasks achievements in articling placements.

- 12 SMEs
- 1 session of 3 days
- Honorarium of $250 per day
- Psychometricians – 2 days prep + 3 days facilitation
- Cost $22,000

2 • Develop performance criteria and rating scales

Practitioner SMEs and Psychometricians define the performance expectations in each skill or task.

- 12 SMEs
- 2 session of 2 days
- Honorarium of $250 per day
- Psychometricians – 1 day prep + 2 days facilitation
- Cost $20,000

3

- Validate performance criteria and rating scales

Different group of practitioner SMEs and Psychometricians review, refine, and validate.

- 12 SMEs
- 1 session of 2 days
- Honorarium of $250
- Psychometricians – 1 day prep + 2 day facilitation + 5 days final compilation into rating system
- Cost $26,000

Costs for phase 3 related to development of performance measures and rating systems by subject matter expert practitioners and providers, for the period from early 2018 through to and including the completion and approval of the first administration of the new articling performance standards in the latter half of 2019, are projected at $68,000.

There are also associated costs for technical development related to developing and providing the supporting reporting forms and materials in an online format for greater efficiency of use by supervisors and candidates. Other ancillary costs include SME travel, meals and accommodation expenses and for potential facilities rental and catering for meetings. See *Table 3.1* on the following page for all projected costs.

Table 2.1

Activity	Cost
Development Process	
Confirm scope of experiential learning competencies assessment	22,000
Develop performance criteria and rating scales	20,000
Validate performance criteria and rating scales	26,000
	$ 68,000
Additional Associated Costs	
Technical supports for standardized forms and reporting	150,000
SME travel, meals and accommodation expenses	60,000
Facilities Rental and catering for meetings	50,000
	$ 260,000
Total	**$ 328,000**

Phase 3 Development Costs and Funding Model

Phase 3 development will occur contiguously with phase 2. As these expenditures will be required during the same schedule as phase 2, the costs will be incorporated into the ongoing operational budget for the new assessment agency with decisions on funding taken in 2017 in preparation for establishing the 2018 budget of the new agency.

National Law Practice Qualifying Assessment
Annual Operation

Once the test formats have been developed and validated, the system will be ready to administer the admission examinations. The full day multiple choice examination is scheduled to commence after January 2018, the full day skills and tasks examination after January 2020. Annual operational costs set out in this section of the plan relate to anticipated expenditures to support all components thereafter.

The estimates of cost for the development of the process set out in the previous sections of this business and implementation plan included some investment in future development; for instance, the development of additional test questions or skills-based cases to ensure a sufficient accumulation of content and test items as the process moves forward. This will assist administrators to effectively manage the very first and next administration of assessments in the new regime, particularly in light of the rather aggressive time frames set out in this plan.

This section of the plan sets out the anticipated ongoing annual administration costs following completion of the development and implementation of phases 1, 2 and 3.

Assessment Development Expenditures

The system will benefit from input of practitioner subject matter experts who will act as ongoing advisors in this effort. In particular, a highly skilled and trained group of legal practitioners will be required to work with staff and psychometricians to support a variety of validation activities, including: reviewing all versions of the examinations; confirming passing scores for all test items; validating scoring rubrics for cases; assessing examination outcomes against expected results; and generally confirming that all aspects of the competency profile and blueprint are being adequately supported in accordance with internationally accepted norms for licensure.

Item writing for the full-day multiple choice examination will be undertaken, at a minimum, three times per year, for three days per session in each competency category. This assumes there will be a sufficient accumulation of test items banked after participating law societies contribute their item content. If not, then additional item writing sessions will be required for a few years. Case development for the full-day skills and tasks examination will also be undertaken, at a minimum, three times per year, for two days per session.

Content for the supporting reference materials will require review, revision, editorial and production annually, once again by practitioner subject matter experts and supporting staff. All test items must also be ‘tagged’ to the materials to ensure that the assessable competencies are integrated in accordance with the blueprint requirements.

In each activity, from participation on subject matter expert advisory groups through to subject matter expert content development, exemplary practitioners will be recruited to assist. It is proposed that they will be paid an honorarium of $500 per day.

Psychometricians will be placed on retainer to work with various subject matter expert groups as they continue to develop test questions and cases, monitor the application of the competency profile and blueprint to all aspects of the assessment system, and evolve the testing platform accordingly.

Anticipated costs related to ongoing development and psychometric defensibility is anticipated to be in the range of $1,200,000 annually beginning in 2020.

Assessment Format Expenditures

The estimated cost of providing a full-day examination through CBT, based on discussions with providers, will be in the range of $225 per candidate. For purposes of this business plan, it is estimated that there will be approximately 3800 test takers completing the two day examination for the first time. It is further estimated that approximately 25% of test takers will be required to retake the examinations one or more times. This results in an estimated 4750 or more candidates moving through the test taking environment per year.

For 4750 candidates, the CBT provider cost for one full day of testing is estimated to be $1,100,000 per annum.

Once the phase 2 skills-based assessment is added, the cost of CBT provision will increase to support admission testing serving 9500 or more test takers. For purposes of estimating ongoing operational expenses, and *factoring some cost reduction recognizing economies of scale* achieved through negotiation with the provider, this plan estimates annual CBT services in the range of $1,900,000 annually.

Assessment Scoring Expenditures

The phase 1 full day multiple choice examination will be scored electronically. Individual test results will be communicated via secure channels back to the national assessment agency. The appointed subject matter expert group will work with psychometricians to confirm final pass scores. The agency will then forward results to the participating law societies, also via secure channels, for integration into their respective candidate record keeping systems. As a result, significant technology and database systems development will be required to support phases 1 and 2.

The phase 2 case-based skills testing will require additional administration and costs related to scoring, including the need to have trained practitioner assessors manually score the results based on an established rubric. It may be possible to automate this scoring activity to the extent that in-person scoring sessions will not be required, saving significant time and facilities costs. The secure exchange of candidate test responses with trained practitioner assessors will be further explored, but for purposes of this plan, it is assumed to be achievable.

To assure the fairness and validity of phase 2 outcomes, significant investment must be made in the development of the scoring rubrics and the training of large numbers of qualified assessors.

To support this cost analysis, it is assumed each of the four components of the phase 2 assessment will require an average of 30 minutes to score – or two hours of assessor time to score one complete examination. This is equivalent to 9500 hours of scoring for 4750 candidates (3800 plus 25% rewrite) per year.

It is also necessary to allow for secondary scoring, in the event that a candidate receives a failed grade on the examination. All failed examinations must be evaluated by a different assessor to validate the results.

Rather than paying assessors at a daily rate, it would be more effective and economical to address the value of their contribution on a production model, by the number of examinations scored or re-evaluated. It is recommended that assessors receive $100 for each examination scored, and $50 for each examination re-scored.

Assuming two hours of time required to score one examination, or approximately three examinations “per day”, that would require approximately 1700 to 1900 “days” of effort during each calendar year to complete original scoring and re-scoring activities. Further assuming that assessors would be willing to commit 10 days of their time throughout the year to complete this work, the system will require at least 190 practitioners trained to support the effort.

Assessor training is a critical component of defensible licensure systems. Prior to each scoring session, a review of scoring protocols, rubrics and test samples will be required. This plan proposes that at least one-half of a day will be required from each assessor to undertake that training in advance of every scoring session. It is proposed that assessors will receive $250 for each training session.

The anticipated costs related to phase 2 scoring activities, per annum, consisting of the provision of honoraria to practitioner assessors for training and scoring time will be in the range of $650,000.

While it is feasible to rely on the good will of the profession and seek to have them participate as assessors free of charge, adding a value to the work emphasizes the importance of this activity in the public interest. These assessors will be guided through a valid and defensible process for vetting the competencies achievement of new candidates and should have their time and dedication to that task acknowledged. This small monetary recognition is reasonable in the circumstances, and represents a critical investment in and commitment to the profession’s acceptance of the process, by those who regulate it. It also acknowledges that subject matter expert participants are being paid for the provision of a service that is governed by the regulator, and they accept the protocols and apply them as required.

Operational Expenditures

The national law practice qualifying assessment entity will require a highly skilled full-time staff complement. A number of the management and staff of the organization must be formally accredited and/or highly experienced adult educators with expertise in licensure and assessment.

It is anticipated that a minimum of 12 – 15 full-time staff will be required to support the ongoing administration of the assessment system outlined in this plan. Estimated salary and benefits will be in the range of $1.5 million per year.

General program and office expenses are estimated in the range of $1.2 million and include various categories of fixed and variable expenses required to support the system.

Table 3.1 sets out anticipated annual expenditures for a fully operational national law practice assessment system.

Operating Costs for Ongoing Administration

This cost projection is based on an anticipated candidate cohort of 3800, assumes full cost recovery through the application of examination fees, and is calculated net of taxes. The projected candidate fee is for the first attempt of both examination days. Additional fees for further attempts at each examination will be derived on the basis of a cost recovery model.

Table 3.1

Expense Category	Annual Cost (2019 and beyond)
Assessment Activities	
Ongoing Development of Items, Cases, Reference Materials, Review and Analysis (SME Honoraria and Psychometrician Retainers)	1,200,000
CBT Provision and Services	1,900,000
SME Assessor Scoring Honoraria	650,000
	$ 3,750,000
Operations	
Salaries and Benefits	1,500,000
Program, and Other Consulting/Skilled Provider Contracts	200,000
Production, development, supports and services	300,000
Travel, accommodation, catering, facilities	200,000
Office Expenses, Technology Systems, Human Resources, Communications, Finance, Legal, Leasehold, other	500,000
	$ 2,700,000
Governance	
Board, Committee, Law Society liaison	100,000
Total	**$ 6,550,000**
Cost per Candidate (first writing, both test days, not including taxes)	**$ 1,724**

Governance

Interim Oversight for Development Process

During the transition process, which is defined as the period of time and activities up to and including the completion of all aspects of phase 1 of this plan, it is proposed that interim reporting be established under the oversight of the National Admission Standards Project Steering Committee of the Federation. Consideration will be given to modifying the composition of the Steering Committee for this purpose. The governance model for the transition process will be agreed upon with input from participating law societies.

In phase 1 of the development process, it is proposed that an interim Executive Director be appointed to implement the plan, as approved. Given the aggressive timelines for development of phase 1, the Executive Director should be able to focus on the hands-on development activities without the encumbrance of a complex committee structure. Managing a significant governance implementation at the same time as deriving the foundational assessment process is likely to be detrimental to meeting scheduled milestones. An oversight committee such as the Steering Committee can provide the appropriate oversight and policy direction.

Following phase 1 development, it is recommended that the participating law societies create an independent entity for purposes of continuing the implementation and fulfilling obligations of the national law practice qualifying assessment system.

New Governance Entity

The new permanent governance entity would be responsible for providing participating law societies with access to valid and defensible assessments for candidates seeking entry to the legal profession in Canada.

The new entity will require independence from the law societies to ensure that its activities and assessment processes remain consistent, fair and defensible, avoiding any suggestion of preferential treatment, bias or influence. The assessment results must stand for themselves as demonstrating the highest quality and defensibility of assessment processes, applied consistently and fairly, and supporting recognized international standards in professional licensure.

The permanent governance body should also be skills based. While further work is required to flesh out the details of the new governance entity, the intent is for participating law societies to determine how the body will be structured and constituted.

Addendum A

Blueprint Purpose and Development

A competency-based blueprint serves the following purposes:

- ensures the relevance of the assessment/examination by indicating links to the competency profile for entry level lawyer professionals
- maximizes the functional equivalence of alternative versions of the examination
- provides direction for content developers when writing new items for the examinations
- facilitates evaluations of the appropriateness and effectiveness of the examination by content experts and other stakeholders.

The competency-based blueprint advances these purposes by definitively stating what is assessed, for what purpose, to what extent, with what types of items, in what contexts, to what standards and provides documentation of the processes leading to each of these decisions.

A comprehensive blueprint development identifies key assessment information including the process, content, structure, context and scoring of the examination.

The blueprint will establish all of the following specifications for use in the assessment activities:

Process

- a clear statement of the purpose of the examination
- a definition of the candidate target population
- the methodology employed for all key blueprint activities
- a list of the content experts involved in the blueprint development process

Content

- competencies related to the purpose of the examination
- entry level lawyer competency weightings (the extent to which they will be represented on the examination)
- entry level lawyer competency categories (used to organize competencies to support provision of feedback to test takers – each category must be assessed by a sufficiently high number of examination items to provide reliable results)
- cognitive domain weightings of the examination (ensures competencies are measured at different levels of cognitive ability – knowledge/comprehension, application, and critical thinking)

Structure

- item format of the examination
- item presentation of the examination (individual, case, multiple response)
- response format of the examination (selected, constructed, written, computerized)
- examination length, duration and breaks
- assessment aids permitted for writing the examination

- percentage of ‘new’ content to appear on new versions of the examination

- number of experimental items to be assessed on each administration of the examination
- number of forms of the examination (versions)

Context

- client type specified in the examination (individual, family, population, community)
- client age and gender specified in the examination
- client legal situation specified in the examination
- client culture included in the examination

Scoring

- standard setting method(s) employed for the examination
- an overview of the scoring procedures of the examination
- acceptable statistical item characteristics.

APPENDIX 3

THE NATIONAL ADMISSION STANDARDS PROJECT

BACKGROUND SUMMARY

1. In 2009, the CEOs of the law societies and the Council of the Federation identified the need to develop national standards for admission to practice and the National Admission Standards project was launched. The project reflects an important strategic priority identified by the Council of the Federation: the development and implementation of high, consistent and transparent national standards for the regulation of the legal profession.

2. General oversight of the project is provided by a Steering Committee. The members of the committee are:
Don Thompson, Q.C., Executive Director, Law Society of Alberta, Committee Chair
Tim McGee, Q.C., CEO, Law Society of British Columbia
Alan Treleaven, Director, Education and Practice, Law Society of British Columbia
Jeff Hirsch, Thompson Dorfman Sweatman LLP, Council Vice-President and President-elect, and past president, Law Society of Manitoba
Allan Fineblit, Q.C., Thompson Dorfman Sweatman LLP and former CEO, Law Society of Manitoba
Laurie Pawlitza, Council member and past Treasurer, Law Society of Upper Canada
Robert Lapper, CEO, Law Society of Upper Canada
Diana Miles, Executive Director, Organizational Strategy / Professional Development and Competence, Law Society of Upper Canada
Lise Tremblay, CEO, Barreau du Quebec
Bâtonnier Bernard Synnott, former Bâtonnier, Barreau du Quebec
Darrel Pink, Executive Director, Nova Scotia Barristers' Society
Bâtonnière Marie-Claude Bélanger-Richard, Q.C., Federation past president and former Bâtonnière, Law Society of New Brunswick
Jonathan Herman, Federation CEO
Support to the Steering Committee is provided by Federation personnel as follows:
Frederica Wilson, Senior Director, Regulatory and Public Affairs
Stephanie Spiers, Director, Regulatory Affairs and project manager
Daphne Keevil-Harrold, Policy Counsel

3. The first phase of the project had two goals: the development of a profile of the competencies required upon entry to the profession, and a standard for ensuring that applicants meet the requirement to be of good character. Law societies have agreed on the benchmark for entry-level competence through the National Competency Profile, which has been adopted by 13 law societies on the understanding that adoption is subject to the development and approval of a plan for implementation.

Development of the National Competency Profile

4. The Federation engaged a consultant with expertise in credentialing, Professional Examination Services (ProExam) to ensure that The National Entry-Level Competency Profile for Lawyers and Quebec Notaries (“National Competency Profile”) was developed in accordance with best practices. ProExam guided work on the profile and senior admissions staff from five law societies played a critical role as members of a Technical Advisory Committee ("TAC").

5. The TAC drew from the various competency profiles in use by law societies across the country as their starting point, creating an outline that organized the competencies into substantive knowledge, skills, and tasks categories. A Competency Development Task Force comprised of 11 practitioners in their first 10 years of practice from every region in the country then fleshed out the profile. Members of the task force drafted a profile intended to reflect the tasks actually performed and the knowledge and skills actually required of general practitioners at the point of admission to the profession.

6. This draft was then reviewed by 30 practitioners identified and recruited with the assistance of law societies. The draft profile was also reviewed by a small working group of representatives of the Barreau du Québec and the Chambre des notaires du Québec to ensure that it is reflective of the nature of legal practice in Quebec.

7. In accordance with best practices, the revised draft profile was then validated through a survey of entry-level lawyers and Quebec notaries. Survey respondents were asked to rate each individual competency on two scales: how frequently they performed or used the competency; and how serious the consequences would be if an entry-level practitioner in their area of practice did not possess or was unable to perform the competency. Information was also gathered on the respondents’ practice area, practice setting and year of call to the bar. The data from the survey was used to refine the competency profile to ensure that it accurately reflected the competencies required of new practitioners today.

8. The work on the National Competency Profile was carried about between 2010 and 2012. The Council of the Federation approved the National Competency Profile in 2012. Between 2012 and 2013, thirteen law societies adopted the National Competency Profile.

Development of a National Good Character (suitability to practise) Standard

9. As part of the National Admissions Standards Project, the Federation has worked on developing a common good character standard. A Working Group comprised of staff from various law societies was established to develop a draft good character standard based on the principle that the standard must be clear, consistent, fair and defensible.

10. In July 2013, the Working Group presented its preliminary views in a Consultation Report and sought input from law societies and other interested stakeholders.

11. The Working Group received responses from most law societies, as well as from the Canadian Bar Association, several law professors and law students. Responses raised both policy considerations and operational concerns. Work on the good character standard is on hold while we focus on the assessment plan, and is expected to resume in due course.

Implementing National Admission Standards

12. The second phase of the project is focused on how law societies will assess the competencies in the National Competency Profile. Identification and assessment of the competencies required of applicants, appropriately focused professional training, and experiential learning are all important elements of national admission standards.

13. The Federation engaged ProExam to identify a range of options for assessment of the competencies in the National Competency Profile. ProExam's work was informed by advice from a newly composed seven-member Technical Advisory Committee (TAC) comprised of law society senior admission staff. The TAC and ProExam worked together throughout the spring and summer of 2013.

14. In the fall of 2013, the Federation circulated a Discussion Paper and a report prepared by ProExam that reviewed a range of possible methods for assessing the competencies.

15. Meetings were held with ten law societies in 2014 to consider ProExam's report and discuss options for assessment, including the need for a high level of consistency in assessment. The feedback from law societies provided direction on areas of common agreement.

16. The National Admission Standards Project Steering Committee drew from the feedback provided by law societies in developing a proposal on assessment and a detailed Business Plan.

17. The proposal and Business Plan will be shared with law societies in the summer of 2015. The goal is to discuss the proposal with each law society in the fall and winter of 2015, so that law societies are in a position to decide whether they will sign on to the plan by early 2016, recognizing that the timing will ultimately depend on when law societies are ready to move forward.

Engaging with Law Societies

18. Throughout the project, law societies have been kept informed about progress through various means including: targeted written communiqués; the Federation e-Briefing (electronic newsletter); teleconferences with admissions staff and CEOs, in-person meetings with elected leaders, staff, CEOs and other law society volunteers, and presentations to law society groups. Reports, papers and project updates have been distributed by email and made available on the Federation intranet. Some project documents are also available on the Federation's public website.