



# Law Firm Regulation Consultation Brief

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## Law Firm Regulation Task Force:

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Prepared for: Consultation with Members

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**Table of Contents**

Introduction .....3

The Law Firm Regulation Task Force.....3

Consultation.....4

    The Consultation Process: Common Questions..... 4

The Task Force’s Law Firm Regulation Discussion to Date.....6

    1. The envisioned extent of law firm regulation..... 6

    2. Law firm regulation principles and policies or systems for compliance..... 6

    3. Failure to comply ..... 7

    4. Areas under consideration for law firm regulation ..... 7

    5. Registration versus licensing..... 8

    6. Designated contact ..... 8

    7. Application of law firm regulation to small firms and sole practitioners ..... 9

    8. Non-standard law firms (Government agencies, in-house counsel, sole practitioners in space-sharing arrangements, pro bono clinics, et al.) ..... 9

Law Firm Regulation Consultation: FAQs..... 11

## Introduction

In a variety of jurisdictions around the globe, lawyers' regulatory authorities are looking to principle-based, compliance-based, law firm regulation as a means to create a constructive relationship between lawyers and the regulatory body. Law firm regulation is designed to create and enhance opportunities for proactive regulation, to take advantage of the shared interest of entities that employ lawyers in promoting competence and ethical conduct, and to obtain the benefit for the public interest deriving from a legal profession with the highest attainable levels of competence and ethical conduct. A first step in the direction of these important goals is the shift in regulatory focus, to some extent away from direct prescriptive regulation of individual lawyers and toward proactive regulation of the law firms and other entities in which lawyers practice. Along the way, an important practical aspect in the development of successful regulatory frameworks is the enhancement of lawyers' professionalism without a significant increase in the regulatory burden felt by individual lawyers.

In 2011 the Benchers decided to increase significantly the extent to which the Law Society could regulate law firms, without having to do so indirectly via regulating individual lawyers at firms. The purpose of the change was to enable the Law Society to improve the quality, efficiency and effectiveness of its regulation and support of the legal profession. In 2012, following the Law Society's request, the British Columbia Legislative Assembly amended the *Legal Profession Act* to provide the Society with specific authority to make rules governing law firms and to provide that such rules would be binding on law firms.

The *Act* defines "law firm" broadly to mean "a legal entity or combination of legal entities carrying on the practice of law." Consequently, the statutory definition of "law firm" includes sole practitioners, as well as some other entities that do not resemble traditional law firms, and may even accommodate groups of independent law practices in space sharing arrangements.

The project of making law firm regulation a reality has been included in the Law Society's Strategic Plan 2015-2017 and in the Fall of 2014 a task force was created to make progress toward this strategic goal.

## The Law Firm Regulation Task Force

The Law Firm Regulation Task Force, chaired by Herman Van Ommen, QC, includes Benchers and non-bencher members of the profession and is supported by a team of Law Society staff members. The mandate of the Task Force is to develop and recommend a framework for law firm regulation to the Benchers. The Task Force has met several times and discussed many issues arising in working toward a framework for law firm regulation. At this time the Task Force wishes to inform the legal profession that the work toward a framework for law firm regulation is progressing and to seek the input of members of the profession through a consultation process.

## Consultation

The purpose of this publication is to bring the subject of law firm regulation to the attention of lawyers and law firms throughout British Columbia, to inform them that some version of law firm regulation is coming and will touch their professional lives in the future, and to encourage and enable consultation so that individual lawyers and law firms can provide their views and potentially their concerns for consideration by the Task Force. To that end, lawyers reading this publication are invited to complete the online survey at [https://www.lawsociety.bc.ca/apps/survey/web/survey.cfm?survey\\_id=125](https://www.lawsociety.bc.ca/apps/survey/web/survey.cfm?survey_id=125) and/or to provide their additional comments in writing:

**by email to:**

[firmregulation@lsbc.org](mailto:firmregulation@lsbc.org)

**or by letter to:**

Law Firm Regulation Task Force  
c/o Michael Lucas  
Law Society of British Columbia  
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Vancouver, BC V6B 4Z9

## The Consultation Process: Common Questions

### **Are my comments important? Who should participate in this consultation?**

The Task Force is interested in receiving responses from as many lawyers as possible, covering a broad range of demographic segments across the legal profession. It will be important that the Task Force receives feedback from sole practitioners as well as members of larger firms, from lawyers at small firms in more remote or rural locations, from lawyers who do not work in the standard private practice environment, from lawyers who work for the Crown, and from lawyers who function as in-house counsel at a variety of different kinds of organizations. In short, your comments are important and the Task Force wants to hear from you!

### **What will happen to the consultation responses and input from lawyers and law firms?**

All comments received in a timely manner will be considered by the Task Force as it progresses with its work. The online survey will remain active until November 27, 2015.

### **Will there be additional consultation opportunities in the future?**

The Task Force is considering the potential for further consultation opportunities beyond the present Consultation Paper and Survey but the extent and shape of such consultation has not been finalized.

If you are interested in participating in further consultation on the development of law firm regulation in BC, please email your name and contact information to [firmregulation@lsbc.org](mailto:firmregulation@lsbc.org).

This information is collected for the purposes of contacting you about future consultation opportunities and will not be used for any other purpose. If you have any questions about the collection of this information, please contact the Law Society's Privacy Compliance Officer at [privacy@lsbc.org](mailto:privacy@lsbc.org)

**Where can I find out more about law firm regulation in general or about efforts to develop law firm regulation in other jurisdictions?**

There is a significant and growing amount of written material focused on law firm regulation or "entity regulation," as it is sometimes called. Here is a sampling of written perspectives on the topic:

- [\*\*"Regulating Law Firms in Canada,"\*\*](#) by Adam M. Dodek
- [\*\*"Transforming Regulation and Governance in the Public Interest,"\*\*](#) by Victoria Rees of the Nova Scotia Barristers Society
- Canadian Bar Association's [\*\*"Assessing Ethical Infrastructure in Your Law Firm: A Practical Guide"\*\*](#)

# **The Task Force's Law Firm Regulation Discussion to Date**

## **1. The envisioned extent of law firm regulation**

At this stage in the development of law firm regulation, the Task Force does not see itself as recommending a full scale replacement of the existing, individual-focused, rule-based regulatory system. Instead, the Task Force has been looking for specific areas where some amount of law firm regulation makes sense as an overlay or supplement to the existing system. For some areas of concern, it may be appropriate to shift responsibility away from the individual lawyer and onto the firm.

The Task Force has been looking at areas where it makes sense for firms to have the responsibility to employ and maintain systems or policies to support their member lawyers' practices and to encourage appropriate standards of professional conduct and competence. Some of these areas are places where many firms already have systems in place but there may be benefits derived from encouraging all firms to have such systems and even to providing model systems for potential adoption by firms that lack any system, or providing some support and guidance on how systems may be scaled to best fit different sized firms.

At the same time, the Task Force is considering that firms should play a role in the process with respect to at least some kinds of complaints about their member lawyers' conduct. The relationship between a firm and its member lawyers may provide a good basis for addressing such issues in a way that is both effective from a regulatory perspective and responsive to the concerns of a complainant. In other situations, that relationship may be less useful or even problematic. So the Task Force has been considering whether there is a way to tailor a law firm regulation framework to make use of that relationship in the circumstances where it would be potentially productive.

## **2. Law firm regulation principles and policies or systems for compliance**

The Task Force is considering a model where law firms would be required to maintain systems and policies to be in compliance with a limited list of broadly stated principles. Law firms would thus play a role in ensuring that their member lawyers are adequately trained and supported to enable them to avoid running into problems with specific regulatory issues. A clear example would be a policy and/or system to deal with potential conflicts of interests. Most firms already have such policies in place and all lawyers should be guided by reliable systems to avoid problematic conflicts. The need to have reliable means for identifying and avoiding problematic conflicts is equally important for a sole practitioner in a one lawyer firm as for those who practice in a much larger multi-lawyer firm, but the specifics of the system required may be quite different depending on the context of the firms' size and the individual lawyers' practices. Thus the specifics of what

policies or systems to adopt would be left up to the firms in the first instance. So long as a firm's choices are sufficient to ensure that the firm's member lawyers avoid conflicts, the details of the systems do not need to be the subject of specific regulation. However, as part of an effort to engage in supportive, proactive regulation, the Law Society could strive to assist any firms that might struggle to find and maintain adequate systems.

### 3. Failure to comply

The regulatory model the Task Force is considering is a pro-active model that encourages firms to employ systems to improve the practice of their member lawyers and to reduce the incidence of complaints. If a complaint were made against a lawyer that related to a failure of one of the required systems, the Law Society could involve the firm to seek an explanation. If the law firm had no system in place, or did not properly implement the system it had, then the firm would be subject to regulatory follow-up by the Law Society. The Task Force is considering that circumstances including a failure to comply and, possibly, a resistance to compliance, could warrant the imposition of sanctions against the firm.

### 4. Areas under consideration for law firm regulation

In addition to the area of conflicts of interest, the Task Force has had discussions about other areas or law firm activities that could be included in the scope of law firm regulation, where compliance principles may be developed and law firm compliance may be required. It is important to note that the decision on which areas to include in the Task Force's recommendation to the Benchers has not yet been made. Some areas under consideration may be excluded from the law firm regulation recommendations and new areas for consideration may arise during the period of consultation.

Potential areas the Task Force has recognized and discussed so far include the following:

- **conflicts of interest:** systems and policies for identifying and avoiding potential conflicts and managing or resolving any conflicts situations that do arise, in a manner that is consistent with lawyers' ethical obligations;
- **accounting:** to more appropriately locate the responsibility for trust and general accounts and accounting practices on the firm instead of individual lawyers, who may be only incidental users of the accounts;
- **lawyer and firm succession planning:** policies to follow in the event of the retirement, death, or incapacitation of individual lawyers or the dissolution of the law firm;
- **marketing:** compliance with principles of fairness and accuracy in law firm communications with potential clients and the public in general;
- **mentoring, training and supervision:** policies and systems to ensure that lawyers, articling students and other non-lawyer employees receive sufficient training and support to be able to meet their individual responsibilities;

- **client service complaints and client relations:** policies reflecting quality assurance, timeliness, effective communications, client identification and verification, and sound retainer agreements;
- **file management:** systems to ensure that time sensitive issues such as filing dates and limitations periods are noted and ‘brought forward’ for appropriate handling and that essential tasks such as fulfillment of outstanding undertakings are not overlooked;
- **privacy and confidentiality:** policies, systems and facilities to comply with requirements for secure information storage, avoiding inappropriate disclosure, addressing cybersecurity concerns, and appropriate handling of any discovered breaches of confidentiality;
- **safe workplace and interpersonal relations:** policies to address any interpersonal workplace issues that may arise, including safety concerns and allegations of potential harassment, discrimination, or bullying;
- **crisis and personal assistance:** policies for responding effectively to assist individuals who are struggling with difficult personal circumstances when those situations are recognized; and
- **conduct and competence issues:** policies to ensure that any known issues of improper conduct or failures of competence among a firm’s member lawyers are handled in a constructive and ethically appropriate manner.

In its discussions of these areas for potential inclusion in law firm regulation, the Task Force has noted that some areas may overlap. The precise delineation of each potential law firm regulation area, just as the decision on which areas to include, is still work in progress, and one on which the input of the profession is welcomed.

## 5. Registration versus licensing

The Task Force has agreed that the practical reality of regulating law firms makes it necessary to know and confirm what firms there are and which lawyers participate in each firm. This recognition likely suggests some form of registration for the firm, which could be supported perhaps by an additional question on lawyers’ Annual Practice Declaration. However, other jurisdictions with substantial entity regulation programs require firms to be *licensed* (not merely registered), in addition to (or instead of) the licensing of individual lawyers. In BC licensing is done on the individual lawyer basis and to date the Task Force has not been moved to attempt to reconstruct that licensing system or to add a level of firm licensing into the mix. The Task Force has been guided by its ongoing concern to avoid unnecessary increases in the regulatory burden on individual lawyers; consequently it is not attracted by an unnecessary duplication of process.

## 6. Designated contact

The Task Force has considered that it will likely be necessary to have a “designated contact” person at each firm who will have primary responsibility for communications between the Law Society and the firm regarding firm compliance with law firm regulation and any required

information about the firm. While the designated contact role would presumably carry some level of responsibility with respect to such required communications, the view of the Task Force thus far is that the role of the designated contact would not imply personal responsibility in the event of a firm's non-compliance with some aspect of law firm regulation.

## **7. Application of law firm regulation to small firms and sole practitioners**

On the basis of the statutory definition of "law firms," all lawyers would be recognized as practising with law firms and thus will come within the scope of law firm regulation, although the way in which different firms and different lawyers will meet their law firm regulation compliance responsibilities may vary with the firm and practice context. For example, consider a single lawyer firm and the responsibility to have a designated contact person. The designation of the only lawyer in the firm is nominal but the communications responsibility within the firm is effectively circumscribed because there are no other lawyers at the firm to keep track of or to make aware of any regulatory issues. Individual lawyers already have a professional responsibility to respond to Law Society communications so the requirement of a designated contact person should not represent a substantial additional burden for the sole practitioner in dealing with the Law Society. In firms of more than one lawyer, the role of the designated contact may include communications within the firm, such that the firm as a whole is appropriately informed to bring itself into compliance or to maintain compliance with law firm regulation.

Depending on which principles are included, the focus of the various principles that fall within the scope of law firm regulation may or may not apply to sole practitioners. If a principle truly has no application then there is no issue to raise. But generally the principles can be viewed as broad statements of professional responsibility that lawyers already have. For example, lawyers already have a duty to avoid problematic conflicts of interest. That responsibility is not new or 'additional' for the individual lawyer. The new aspect is the regulatory recognition that in many cases law firms have a responsibility to assist lawyers to meet their professional responsibilities.

## **8. Non-standard law firms (Government agencies, in-house counsel, sole practitioners in space-sharing arrangements, pro bono clinics, et al.)**

The Task Force is aware that many lawyers in British Columbia practice in government departments or agencies, as in-house counsel within corporations whose primary business may not be the practice of law, or in other non-governmental agencies and organizations that are distinctly different from the usual private law firm or law partnership.

Also, many individual lawyers practice in space-sharing arrangements. Space-sharing lawyers who maintain independent law practices may find it most convenient to address potentially applicable aspects of law firm regulation as a group. If, as sole practitioners, each would be responsible for compliance with a principle of law firm regulation in any event, they may find it preferable to meet that compliance responsibility together. Obviously the potential to participate as a group will depend in part on exactly which principles are eventually included in the scope of law firm regulation. However, the Task Force is aware that facilitating group participation for space-sharing lawyers, where possible, may result in the most effective compliance for the lawyers and the best outcomes for all concerned.

With respect to the potential application of law firm regulation to in-house counsel, space-sharing individuals, or any other ‘non-standard firms,’ the intention of the Task Force is to include these organizations in law firm regulation where doing so may make sense and be beneficial to the regulation of the practice of law in the public interest. However, the Task Force acknowledges that, similar to sole practitioners, for some of these groups or organizations there may be some aspects of law firm regulation that have no practical application. With such organizations, the Task Force will be guided by its concern not to increase the regulatory burden on lawyers unnecessarily and to avoid unnecessary duplication of regulation and regulatory processes, and will be mindful of jurisdictional limits to the imposition of regulatory requirements.

# Law Firm Regulation Consultation: FAQs

## **(a) What is law firm regulation?**

Law firm regulation is a limited form of “entity regulation.” It amounts to a shift in some of the Law Society’s regulatory focus from individual lawyers to the law firms or other entities in which lawyers practice. However, the statutory definition of “law firm” includes sole practitioners so the Task Force is considering the implications for one-lawyer firms and even for groups of sole practitioners in space-sharing arrangements.

## **(b) What is “proactive regulation?”**

Proactive regulation refers to steps taken by the regulator, or aspects built into the structure of regulation, that attempt to eliminate potential problems before they may surface in the form of actual complaints to the Law Society. The opposite course may be described as “reactive regulation,” which may include both the creation of additional rules after problematic behaviour has been identified and the investigation of complaints after they are received, as well as any subsequent disciplinary steps. Proactive regulation generally involves the setting of standards or principles with which compliance is expected or required. Reactive regulation may be focused more on specific prohibitions and what happens when such prohibitions are violated.

## **(c) Is the Law Society’s law firm regulation going to be the same as what has been developed in other jurisdictions? (England/New South Wales/Nova Scotia/Ontario)**

Although there may be some similarities with some aspects of the law firm regulation systems that have been developed in other jurisdictions, the intention of the Task Force is not to simply recreate those systems. The Task Force has proceeded on the basis that they need to create a framework that will fit well with the existing regulatory system in the British Columbia context.

## **(d) Is the Task Force considering the implications of law firm regulation for small firms and sole practitioners?**

Yes; the Task Force has been aware that they need to take the circumstances of small law firms and sole practitioners into account in creating the law firm regulation framework. Some of the discussion in this ‘Consultation Paper’ is aimed specifically at this issue.

**(e) Does law firm regulation imply ABSs<sup>1</sup>?**

Not necessarily and certainly not initially. The ABS question (whether to allow non-lawyer controlling ownership of legal services providers) is a separate matter from law firm regulation. The Task Force’s recommendations on law firm regulation will focus on what components of regulation law firm regulation should cover, what kind of regulatory framework is most suitable for law firm regulation, and what kind of support and resources may be required in support of law firm regulation. At least initially, these aspects of law firm regulation can be addressed independently of questions such as whether law firm ownership restrictions should be changed or whether the Law Society should be engaged in the regulation of other kinds of entities.

**(f) Will there be support and assistance available for law firms who may struggle with meeting new compliance requirements?**

The intention of the Task Force is that any new requirements must be set so they can be met by all of the law firms for which they would have a practical application. It is anticipated that there will be some amount of assistance available from the Law Society to help firms where needed. The specifics and extent of that assistance have yet to be developed but it may include the creation of model policies and systems that firms may adopt and implement.

**(g) Where can I find out more about law firm regulation in general or about efforts to develop law firm regulation in other Jurisdictions?**

There is a significant and growing amount of written material focused on law firm regulation or “entity regulation,” as it is sometimes called. Here is a sampling of written perspectives on the topic:

- [“Regulating Law Firms in Canada,”](#) by Adam M. Dodek
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- Canadian Bar Association’s [“Assessing Ethical Infrastructure in Your Law Firm: A Practical Guide”](#)

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<sup>1</sup> “ABSs” is short for alternative business structures, which are usually identified as business vehicles that do not have the ownership restrictions that currently apply to law corporations and law firms in British Columbia. Most significant from a regulatory perspective is that ABSs would allow the separation of the ownership and control of the business of a law firm from those lawyers who have the professional and ethical obligations that go along with handling the firm’s files and advising and representing the clients.

**(h) Will there be additional consultation opportunities in the future?**

The Task Force is considering the potential for further consultation opportunities beyond the present Consultation Brief but the extent and shape of such consultation has not been finalized. If you are interested in participating in further consultation on the development of law firm regulation in BC, please email your name and contact information to [firmregulation@lsbc.org](mailto:firmregulation@lsbc.org).

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