The Law Society of British Columbia

Agenda - Consolidated Package

Benchers

Date: Friday, October 26, 2012

Time: **7:30 a.m.** Continental breakfast
8:30 a.m. Meeting begins

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.***

New Item: Item 15, pg. 15000

CONSENT AGENDA:
The following 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. If any Bencher wishes to debate or have a separate vote on an item on the consent agenda, he or she may request that the item be moved to the regular agenda by notifying the President or the Manager, Executive Support (Bill McIntosh) prior to the meeting.

1	**Minutes of September 7 meeting** • Draft minutes of the regular session	pg. 1000
2	**Approval of 2013 Fee Schedules** • Memorandum from Mr. Hoskins	pg. 2000
3	**Correction of Omission from Bill 40 Amendments** • Memorandum from Mr. Hoskins for the Act and Rules Subcommittee	pg. 3000
4	**Extending the Time for Parenting Coordinators to Meet New Training Requirements: "Grand-parenting Parenting Coordinators"** • Memorandum from the Family Law Task Force	pg. 4000

REGULAR AGENDA		
5	**President's Report** • Oral report to be presented at the meeting	
6	**CEO's Report** • Oral report to be presented at the meeting • Quarterly Financial Report prepared by Jeanette McPhee, CFO & Director of Trust Regulation	pg. 6000
7	**Federation of Law Societies of Canada: Council Report by the Law Society's Council Representative** Mr. Hume to report • Federation of Law Societies of Canada President's Report, October 2012 and; • Letter from John J.L. Hunter, QC, President of the Federation of Law Societies of Canada , to Bruce LeRose, QC regarding the Federation's National Admission Standards Project	pg. 7000
8	**Report on Outstanding Hearing & Review Reports** • Report to be distributed at the meeting	
GUEST PRESENTATIONS		
9	**FLSC National Committee on Accreditation Update** **Presentation by Deborah Wolfe, Managing Director**	pg. 9000
10	**"The Regulatory Challenge of New Structures for Delivering Legal Services"** **Presentation by Simon Chester of Heenan Blaikie, LLP**	
2012 – 2014 STRATEGIC PLAN IMPLEMENTATION		
11	**Strategic Plan Implementation Update** Mr. LeRose and Mr. McGee to report	

FOR INFORMATION ONLY		
12	**Letter from the Honourable Thomas J. Crabtree, Chief Judge of the BC Provincial Court, to Bruce LeRose, QC regarding Pilot Project – Paralegals in Provincial Court Family Law Proceedings** **Reply letter from Bruce LeRose, QC**	pg.12000
13	**Background for Agenda Item 10: Memo from Mr. Lucas for the Rule of Law and Lawyer Independence Advisory Committee regarding Alternative Business Structures**	pg.13000
14	**Rules Concerning Trust and Other Client Property – Lawyers Acting as Attorneys and Executors** • Memorandum from the Executive Committee	pg. 14000
15	**Memorandum from the Paralegal Pilot Project Working Group: "Law Society Evaluation of Paralegal Pilot Project"**	pg. 15000
IN CAMERA SESSION		
16	**Bencher Concerns**	

The Law Society of British Columbia

Minutes

Benchers

Date: Friday, September 07, 2012

Present:
Bruce LeRose, QC, President
Art Vertlieb, QC, 1st Vice-President
Jan Lindsay, QC 2nd Vice-President
Kathryn Berge, QC
David Crossin, QC
Thomas Fellhauer
Leon Getz, QC
Miriam Kresivo, QC
Nancy Merrill
Maria Morellato, QC
David Mossop, QC
Thelma O'Grady
Lee Ongman
Vincent Orchard, QC
Greg Petrisor
Richard Fyfe, QC, Deputy Attorney General of BC, Ministry of Justice, representing the Attorney General
David Renwick, QC
Phil Riddell
Catherine Sas, QC
Richard Stewart, QC
Herman Van Ommen
Ken Walker
Tony Wilson
Barry Zacharias
Haydn Acheson
Satwinder Bains
Stacy Kuiack
Peter Lloyd, FCA
Ben Meisner
Claude Richmond

Absent:
Rita Andreone, QC
David Crossin, QC
Bill Maclagan

Staff Present:
Tim McGee
Andrea Brownstone
Robyn Crisanti
Su Forbes, QC
Ben Hadaway
Jeffrey Hoskins, QC
Michael Lucas
Bill McIntosh
Jeanette McPhee
Doug Munro
Lesley Small
Alan Treleaven
Adam Whitcombe

Guests:

Dom Bautista, Executive Director, Law Courts Center
Johanne Blenkin, Chief Executive Officer, Courthouse Libraries BC
Kari Boyle, Executive Director, Mediate BC Society
Maureen Cameron, Director of Membership, Volunteers and Public Affairs, Canadian Bar Association, BC Branch
Ron Friesen, CEO, Continuing Legal Education Society of BC
Donna Greschner, Dean, Faculty of Law, University of Victoria
Jeremy Hainsworth, Reporter, Lawyers Weekly
Gavin Hume, QC, the Law Society's Representative on the Council of the Federation of Law Societies of Canada
Marc Kazimirski, President, Trial Lawyers Association of BC
Carmen Marolla, Director, Sponsorshop and Advertising, BC Paralegal Association
Wayne Robertson, QC, Executive Director, Law Foundation of BC
Jeremy Schmidt, Executive Coordinator, Faculty of Law, UBC
Kerry Simmons, Vice-President, Canadian Bar Association, BC Branch

CONSENT AGENDA

1. Minutes

The minutes of the meeting held on July 13, 2012 were approved as circulated.

The following resolution was passed unanimously and by consent.

2. Executive Committee Recommendation: Benchers' Appointment to Justice Education Society Board of Directors

BE IT RESOLVED that the Benchers nominate Leon Getz, QC for re-appointment as a member and director of the Justice Education Society for a second two-year term, effective September 1, 2012.

3. Rules to Implement Bill 40 Amendments to the Legal Profession Act

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

1. By rescinding Rule 3-7.1 and substituting the following:

Extraordinary action to protect public

3-7.1(1) An order may be made under this Rule with respect to a lawyer or articled student who is

(a) the subject of an investigation or intended investigation under Rule 3-5, and

(b) not the subject of a citation in connection with the matter under investigation or intended to be under investigation.

(2) If they are satisfied, on reasonable grounds, that extraordinary action is necessary to protect the public, 3 or more Benchers may

(b) impose conditions or limitations on the practice of a lawyer or on the enrolment of an articled student, or

(c) suspend a lawyer or the enrolment of an articled student.

(14) An order made under this Rule or varied under Rule 3-7.3 *[Procedure]* is effective until the first of

(a) final disposition of any citation authorized under Part 4 arising from the investigation, or

(b) rescission, variation or further variation under Rule 3-7.3.

Medical examination

3-7.2 (1) This Rule applies to a lawyer or articled student who is the subject of

(a) an investigation or intended investigation under Rule 3-5 *[Investigation of complaints]*, or

(b) a citation under Part 4.

(2) If they are of the opinion, on reasonable grounds, that the order is likely necessary to protect the public, 3 or more Benchers may make an order requiring a lawyer or articled student to

(a) submit to an examination by a medical practitioner specified by those Benchers, and

(b) instruct the medical practitioner to report to the Executive Director on the ability of the lawyer to practise law or, in the case of an articled student, the ability of the student to complete his or her articles.

(3) The Executive Director may deliver a copy of the report of a medical practitioner under this Rule to the Discipline Committee or the Practice Standards Committee.

(4) The report of a medical practitioner under this Rule

(a) may be used for any purpose consistent with the Act and these Rules, and

(b) is admissible in any hearing or proceeding under the Act and these Rules.

Procedure

3-7.3 (1) The Benchers referred to in Rules 3-7.1 to 3-7.3 must not include a member of the Discipline Committee.

(2) Before Benchers take action under Rule 3-7.1 or 3-7.2, there must be a proceeding at which 3 or more Benchers and discipline counsel are present.

(3) The proceeding referred to in subrule (2)

(a) must be initiated by the Discipline Committee, the Practice Standards Committee or the Executive Director, and

(b) may take place without notice to the lawyer or articled student if the majority of Benchers present are satisfied, on reasonable grounds, that notice would not be in the public interest.

(4) The lawyer or articled student and his or her counsel may be present at a proceeding under this Rule.

(5) All proceedings under this Rule must be recorded by a court reporter.

(6) Subject to the Act and these Rules, the Benchers present at a proceeding may determine the practice and procedure to be followed.

(7) Unless the Benchers present order otherwise, the proceeding is not open to the public.

(8) The lawyer or articled student or discipline counsel may request an adjournment of a proceeding conducted under this Rule.

(9) Rule 4-29 *[Adjournment]* applies to an application for an adjournment made before the commencement of the proceeding as if it were a hearing.

(10) Despite subrule (9), the Executive Director is not required to notify a complainant of a request made under subrule (8).

(11) After a proceeding has commenced, the Benchers present may adjourn the proceeding, with or without conditions, generally or to a specified date, time and place.

(12) An order made or varied under this Rule may be rescinded or varied by the Benchers who made the order, or a majority of them, on the application of the lawyer or articled student or discipline counsel.

(13) On an application under subrule (12) to vary or rescind an order,

(a) both the lawyer or articled student and discipline counsel must be given a reasonable opportunity to make submissions in writing, and

(b) the Benchers present may allow oral submissions if, in their discretion, it is appropriate to do so.

(14) If, for any reason, any of the Benchers who made an order under this Rule is unable to participate in the decision on an application under subrule (12), the President may assign another Bencher who is not a member of the Discipline Committee to participate in the decision in the place of each Bencher unable to participate.

2. In Rule 4-17,

(a) by rescinding the heading and substituting the following:

Interim suspension or practice conditions*, and*

(b) by rescinding subrules (1), (1.1), (3) and (4) and substituting the following:

(1) If there has been a direction under Rule 4-13(1) *[Direction to issue, expand or rescind citation]* to issue a citation, 3 or more Benchers may do any of the following:

(b) in any case not referred to in paragraph (b.1), impose conditions or limitations on the practice of a respondent who is a lawyer or on the enrolment of a respondent who is an articled student;

(b.1) suspend a respondent who is a lawyer, if the Benchers present consider, on the balance of probabilities, that the continued practice of the respondent will be dangerous to the public or the respondent's clients;

(c) suspend the enrolment of a respondent who is an articled student if the Benchers present consider, on the balance of probabilities, that the continuation of the student's articles will be dangerous to the public or a lawyer's clients.

(1.1) The Benchers referred to in subrule (1) must not include a member of the Discipline Committee.

(3) An order made under subrule (1) may be varied by the Benchers who made it, or a majority of them, on the application of the respondent or discipline counsel.

(4) On an application to vary an order under subrule (3),

(a) both the respondent and discipline counsel must be given a reasonable opportunity to make submissions in writing,

(b) the Benchers considering an application under subrule (3) may allow oral submissions if, in their discretion, it is appropriate to do so, and

(c) if, for any reason, any of the Benchers who made the order is unable to participate in the decision, the President may assign another Bencher who is not a member of the Discipline Committee to participate in the decision in the place of each Bencher unable to participate.

3. In Rule 4-19, by rescinding the heading and substituting the following:

Review of interim suspension or practice conditions*;*

4. In Rule 5-3(1), by rescinding paragraphs (b) and (c) and substituting the following:

(b) one of the Benchers who made an order under Rules 3-7.1 to 3-7.3 or Rule 4-17 regarding the respondent;

(c) a member of a panel that heard an application under Rule 4-19 *[Review of interim suspension or practice conditions]* to rescind or vary an interim suspension or practice condition or limitation in respect of the respondent.

BE IT RESOLVED to amend the Law Society Rules as follows, effective on proclamation of sections 36(a) and (c) to (g) and 37 of the Legal Profession Amendment Act, 2012:

1. In Rule 1:

(a) By rescinding the definitions of "conduct unbecoming a lawyer" and "respondent" and substituting the following:

"conduct unbecoming a lawyer" includes any matter, conduct or thing that is considered, in the judgment of the Benchers, a panel or a review board,

(a) to be contrary to the best interest of the public or of the legal profession, or

(b) to harm the standing of the legal profession;

"respondent" means a person whose conduct or competence is

(a) the subject of a citation directed to be issued under Rule 4-13(1) *[Direction to issue, expand or rescind citation]*, or

(b) under review by a review board under section 47 of the Act;***;***

(b) By rescinding paragraphs (c), (l) and (r) of the definition of "professional conduct record" and substituting the following:

(c) a decision by a panel or a review board to reject an application for enrolment, call and admission or reinstatement;

(l) an action taken by a review board under section 47 of the Act;

(r) the outcome of an appeal under section 48 of the Act;

(t) a decision of or action taken by the Benchers on a review of a decision of a hearing panel;***; and***

(c) By adding the following definition:

"review board" means a review board established in accordance with Part 5;**.**

2. In Rule 2-23.6, by rescinding subrules (5) and (8) and substituting the following:

(5) The lawyer applying under subrule (3) or the Executive Director may initiate a review by a review board on the record of a decision under subrule (4) by delivering to the President and the other party a notice of review.

(8) The person who applies for a review under subrule (5) may apply to the President for a stay of the cancellation pending the decision of the review board**..**

3. In Rule 2-26, by rescinding subrule (3) and substituting the following:

(3) The Credentials Committee may, with the consent of the person concerned, vary or remove practice conditions or limitations made under this Division or imposed on a review initiated under Rule 5-13(1) or (2) *[Initiating a review]***..**

4. In Rule 2-48, by rescinding subrule (4) and substituting the following:

(4) When the Credentials Committee has initiated a review under Rule 5-13 *[Initiating a review]* of a hearing panel's decision to enrol an articled student, the articled student is not eligible for call and admission until the review board has issued a final decision on the review or the review is withdrawn by the Credentials Committee**..**

5. In Rule 2-53(b), by striking "by the Benchers***" and substituting "***by the review board***".***

6. In Rule 2-63, by rescinding paragraph (b) and substituting the following:

(a.1) a review is initiated under section 47 of the Act,

(b) a person appeals a decision to the Court of Appeal under section 48 of the Act, or

7. In Rule 2-69.2, by rescinding subrule (7) and substituting the following:

(7) If, on a review of a panel decision rejecting an application, the review board approves the application, the applicant may apply to the review board under subrule (4), and subrules (3) to (6) apply as if the review board were a panel**..**

8. In Rule 4-20, by rescinding paragraph (b) and substituting the following:

(a.1) a review is initiated under section 47 of the Act,

(b) a person appeals a decision to the Court of Appeal under section 48 of the Act, or**.**

9. In Rule 4-38, by:

(a) rescinding subrule (1)(b) and substituting the following:

(b) at the conclusion of a hearing before a review board under section 47 of the Act,***; and***

(b) by rescinding subrule (3)(b) and substituting the following:

(b) all or part of the report of the hearing panel or review board, or**.**

10. In Rule 5-1(c), by striking "by the Benchers***" and substituting "***by a review board***".***

11. In Rule 5-2, by rescinding subrule (8) and substituting the following:

(8) The President may refer a matter that is before a panel to another panel, fill a vacancy on a panel or terminate an appointment to a panel.

12. In Rule 5-3, by rescinding subrule (3).

13. In Rule 5-9, by

(a) striking "The Benchers may***" in subrule (0.2) and substituting "***A review board may***";***

(b) striking "or the Benchers***" wherever it appears in subrules (1.1) and (1.2) and substituting "***or review board***"; and***

(c) striking "the panel or the Benchers have the discretion***" in subrules (3) and (3.1) and substituting "***the panel or review board has the discretion***".***

14. In Rule 5-10(4), by striking out "by the hearing panel or the Benchers***" and substituting "***by the hearing panel or review board***".***

15. By rescinding Rule 5-12 and substituting the following:

Review by review board

5-12(1) In Rules 5-12 to 5-21, **"review"** means a review of a hearing panel decision by a review board under section 47 of the Act.

(2) Subject to the Act and these Rules, a review board may determine the practice and procedure to be followed at a review.

(3) Delivery of documents to a respondent or applicant under Rules 5-12 to 5-21 may be effected by delivery to counsel representing the respondent or the applicant.

Review boards

5-12.1(1) A review board must consist of

(a) an odd number of persons, and

(b) more persons than the hearing panel that made the decision under review.

(2) A review board must be chaired by a Bencher who is a lawyer.

(3) Review board members must be permanent residents of British Columbia over the age of majority.

(4) The chair of a review board who ceases to be a Bencher may, with the consent of the President, continue to chair the review board, and the review board may complete any hearing or hearings already scheduled or begun.

(5) Two or more review boards may proceed with separate matters at the same time.

(6) The President may refer a matter that is before a review board to another review board, fill a vacancy on a review board and may terminate an appointment to a review board.

(7) Unless otherwise provided in the Act and these Rules, a review board must decide any matter by a majority, and the decision of the majority is the decision of the review board.

Disqualification

5-12.2 The following must not participate in a review board reviewing the decision of a hearing panel:

(a) a member of the hearing panel;

(b) a person who was disqualified under Rule 5-3 *[Disqualification]* from participation in the hearing panel.

16. By rescinding Rule 5-13(2) and (3) and substituting the following:

(2) Within 30 days after a decision of the panel in a credentials hearing, the Credentials Committee may, by resolution, refer the decision for a review on the record by a review board.

(3) Within 30 days after a decision of the panel in a hearing on a citation, the Discipline Committee may, by resolution, refer the decision for a review on the record by a review board.

(5) Within 30 days after the order of the Practice Standards Committee under Rule 3-18(1) *[Costs]*, the lawyer concerned may deliver a notice of review under Rule 5-15 *[Notice of review]* to the Executive Director.

17. By rescinding Rule 5-14(1) and substituting the following:

(1) When a review is initiated under Rule 5-13 *[Initiating a review]*, the order of the panel or the Practice Standards Committee with respect to costs is stayed.

18. In Rules 5-15(a), 5-16(2) and 5-17(2), by striking "the Benchers***" wherever it occurs and substituting "***the review board***".***

19. By adding the following Rule:

Record of an order for costs by the Practice Standards Committee

5-17.1(1) Unless counsel for the lawyer and for the Society agree otherwise, the record for a review of an order for costs under Rule 3-18 [Costs] consists of the following:

(a) the order;

(b) all correspondence between the Society and the lawyer relating to the assessment and ordering of costs;

(c) the Committee's written reasons for any decision on costs;

(e) the notice of review under Rule 5-15 *[Notice of review]*.

(2) If, in the opinion of the review board, there are special circumstances, the review board may admit evidence that is not part of the record.

20. In Rule 5-19, by rescinding subrule (5) and substituting the following:

(5) After a hearing has commenced, the chair of the review board may adjourn the hearing, with or without conditions, to a specified date, time and place.

21. By rescinding Rule 5-20 and substituting the following:

Decision on review

5-20(1) The decision of the review board on a review is made by majority vote.

(2) The review board must prepare written reasons for its decision on a review.

(4) When the review board gives written reasons for its decision, it must not disclose in those reasons any information that is confidential or subject to solicitor and client privilege.

(5) The Executive Director must promptly deliver a copy of the review board's written reasons prepared under subrule (2) to the applicant or respondent and counsel for the Society.

(6) On request, the Executive Director must disclose the review board's written reasons for its decision.

22. By adding the following Rule:

Appeal to Court of Appeal

5-22(1) The Discipline Committee may, by resolution, instruct the Executive Director to commence an appeal under section 48 of the Act of a decision of a panel or review board in a discipline hearing.

(2) The Credentials Committee may, by resolution, instruct the Executive Director to commence an appeal under section 48 of the Act of a decision of a panel or review board in a credentials hearing.

(3) The Practice Standards Committee may, by resolution, instruct the Executive Director to commence an appeal under section 48 of the Act of a decision of a review board with respect to an order for costs under Rule 3-18 *[Costs]*.

REGULAR AGENDA – for Discussion and Decision

4. President's Report

Mr. LeRose briefed the Benchers on various Law Society matters to which he has attended since the last meeting, including:

a) CBA National Council Meeting and Canadian Legal Conference (Vancouver, August 11 – 14, 2012)

Former Bencher Robert Brun, QC gave a strong and balanced speech as in-coming CBA National President. He noted the importance of the distinct and separate nature of the roles and responsibilities of the provincial branches of the CBA and the provincial law societies.

Ms. Berge attended the National Council meeting and the Conference proceedings as the Law Society's representative. Ms. Berge's written report is at TAB 10 of the meeting materials.

b) Law Society Representation at CBA National and Provincial Councils

Vancouver Bencher Maria Morellato, QC has replaced Victoria Bencher Kathryn Berge, QC as the Law Society President's nominee to the CBA National and Provincial Councils, for a one-year term effective September 1, 2012. Mr. LeRose thanked Ms. Berge for her dedicated and effective service as the Law Society's official representative to both Councils.

c) Governance Review Task Force Update

The Governance Review Task Force met recently with two members of the Working Group on Bencher Elections (Brian Wallace, QC (Chair) and Patrick Kelly, Mr. Hoskins also attending as staff support) to review the working group's draft report and recommendations.

Following the September 15 deadline for Benchers' written responses to the task force's interim report, task force members will interview the Benchers on the governance issues raised by the interim report and the Bencher responses.

A summary of the written responses will be prepared as part of the briefing material for the Benchers' workshop on Law Society governance scheduled for Saturday, October 27.

d) BC Courts Family Law Paralegals Pilot Project Update

On August 22 Law Society CEO Tim McGee, Staff Lawyer Doug Munro and President LeRose attended a productive meeting with a number of Provincial Court judges to review planning for a pilot project to provide paralegals in designated registries with limited right of audience in some family law proceedings. The key matters still to be resolved prior to implementation of the two-year pilot project are confirmation of the Provincial Court's commitment to the project, and completion of the project's evaluation protocol.

Project communication materials and business planning resources for lawyers are being developed by the Law Society's Communications department.

e) Request for Assistance from the Judicial Council of BC

The Judicial Council of BC has requested the assistance of the BC Branch of the CBA and the Law Society in encouraging a broad range of applicants for judicial office on the BC Provincial Court. The Equity and Diversity Advisory Committee has been asked to review the Judicial Council's request and then report back to the Executive Committee with recommendations for the Law Society's course of action.

5. CEO's Report

Mr. McGee provided highlights of his monthly written report to the Benchers (Appendix 1 to these minutes), including the following matters:

a) Paralegal Pilot Project – Communications Plan

b) Request of Minister of Justice and Attorney General for Recommendation for Regulatory Reform involving Law Society and Society of Notaries

c) 2012 Employee Survey

d) Review of Targets in the Key Performance Measures

e) International Institute of Law Association Chief Executives – Annual Conference

6. Federation of Law Societies of Canada: Council Report by the Law Society's Council Representative

Mr. Gavin Hume, QC reported as the Law Society's representative to the Council of the Federation of Law Societies of Canada. Mr. Hume updated the Benchers on various Federation matters, including:

a) Federation Council Meeting and Conference (Vancouver, September 2012) Agenda and Planning

National Competency Standards is a key topic on the Council meeting agenda, and *Strengthening Competency* is the theme of the two-day Conference to follow. Other topics on the Council meeting agenda are

- Mobility for Quebec lawyers
- Strategic planning and priorities, with emphasis on developing national standards for regulation and enhancing access to legal services
- 2013 Budget
    - no levy increase proposed for the coming year

b) Updates on Several Ongoing Federation Initiatives

- Common Law Degree Standards
    - on track for implementation by 2015
- Model Code of Professional Conduct Implementation Update
    - update on status of Model Code approvals by various provincial law societies
    - Standing Committee on the Model Code has three projects underway, directed at:
        - simplifying rules and systems for interprovincial transfers between firms

- simplifying rules on unbundled legal services
- resolving various and minor drafting issues in the Code provisions on current conflicts

- National Committee on Accreditation (NCA) Update
  - many new candidates are submitting applications
    - including a growing number of Canadians who are going oversees for their legal education and then seeking accreditation in Canada via the NCA
      - this year, 62 of 406 students in the Law Society's Admission Program are holders foreign law degrees, having come through the NCA
      - up from 32 students (out of 403) in 2009

7. Report on Outstanding Hearing & Review Reports

The Benchers received and reviewed a report on outstanding hearing decisions.

STRATEGIC PLANNING AND PRIORITIES MATTERS – For Discussion and/or Decision

8. Strategic Plan Implementation Update

Mr. LeRose noted that the Advisory Committees provided their mid-year reports at the July Bencher meeting, and that he had provided a Governance Review Task Force briefing earlier in the meeting (as part of his President's Report).

OTHER MATTERS – For Discussion and/or Decision

8a. The Cowper Report

Mr. LeRose briefed the Benchers on the recently released report of Geoffrey Cowper, QC (***A Criminal Justice System for the 21st Century***) and the **Law Society's preliminary response** to

the report and its recommendations. He confirmed the Law Society's ongoing engagement in this important process.

Deputy Attorney General Richard Fyfe, QC outlined the provincial government's expectations and planning for early next steps in that process. He confirmed that a White Paper is expected to be released by the end of October, setting out the government's objectives and related planning. Mr. Fyfe also noted that the White Paper may be released in two parts, starting with initial recommendations, with more detailed discussion of planning considerations and proposed initiatives to follow. Mr. Fyfe stressed the importance of early consultation by the Ministry of Attorney General with the Legal Services Society, the Law Society and others in the White Paper preparation process.

9. Final Report of the Family Law Task Force: *Qualifications for Lawyers Acting as Arbitrators, Mediators, and/or Parenting Coordinators in Family Law Matters*

Mr. LeRose introduced Life Bencher Carol Hickman, QC as Chair of the Family Law Task Force. Ms. Hickman outlined the background of the task force and its work since 2006 in developing best practices for family law lawyers, in conjunction with the provincial government's reform of the family law system in BC. She advised that those reforms include replacement of the *Family Relations Act* with the *Family Law Act*, which has received Royal Assent and comes into force on March 18, 2013.

Ms. Hickman referred to the report at TAB 9 of the meeting materials (at page 9003) for the task force's current mandate (as amended and approved by the Benchers at their July meeting:

> *The mandate of the Family Law Task Force is to develop for recommendation to the Benchers practice standards for lawyers who are acting as family law arbitrators, family law mediators, and/or parenting coordinators.* (those standards are referred to in the task force report as "Family Law ADR Qualifications")

Ms. Hickman highlighted the task force's extensive consultation efforts and time challenges over the summer months, noting that the provincial government has requested the Law Society to submit its proposed Family Law ADR Qualifications by September 30, for incorporation into the regulations to be promulgated under the *Family Law Act*. She acknowledged the commitment to collaboration shown by members of the policy group at the Ministry of Justice. She also noted the dedication and hard work over the summer months by the members of the task force, and by staff lawyer Doug Munro.

Ms. Hickman reviewed each of the task force's eight recommendations, set out in the task force report (pages 9006 – 9010 of the meeting materials and Appendix 2 to these minutes).

Mr. Stewart moved (seconded by Ms. Berge) that the Benchers accept the Family Law Task Force Report and adopt its eight recommendations.

Ms. O'Grady moved (seconded by Mr. Orchard) that Recommendation 6 be amended

- to *recommend* rather than *require* that…lawyers acting as family law arbitrators, family law mediators, and/or parenting coordinators … record a minimum of six hours of continuing professional development per year in dispute resolution skills training and/or theory

In the ensuing discussion

- Ms. O'Grady (Chair that the Lawyer Education Advisory Committee) noted that
    - the Committee's support for the proposed amendment is a strong majority, but not unanimous
    - if the Benchers approve this amendment, the Committee will forthwith consult with family law organizations, family law mediators, and relevant educational providers to assess
        1. whether to move to a mandatory continuing professional development requirement, and
        2. if so, how the specifics of the requirement might be articulated to best meet the educational needs of family law arbitrators, family law mediators, and parenting coordinators.
    - the Committee would report back to the Benchers with its recommendations in time for the Law Society to formalize its requirements and processes before March 18, 2013
- Mr. LeRose noted that the Executive Committee met yesterday to review this matter
    - the Committee's support for the task force's recommendations, including Recommendation 6, is a strong majority, but not unanimous
- key issues raised by a various Benchers were
    - whether requiring six hours of annual CPD on the designated topics
        - maintains professional standards and public confidence

- impairs access to legal services
- is necessary in light of the *Family Law* Act's creation of new statutory powers for practitioners

The motion to amend Recommendation 6 was defeated.

Mr. Walker moved (seconded by Mr. Richmond) that Recommendation 1 be amended to reduce the required current practice experience from "10" to "3" years

In the ensuing discussion

- Mr. Walker noted his concerns that
  - requiring 10 years of current practice experience would unduly restrict access to legal services
    - many family law disputes are not complex and do not warrant the cost of legal services provided by a lawyer with 10 years of experience
    - family law practitioners should be permitted to decide whether they have the requisite skills and practice experience
    - the market place should be permitted to determine the value of practitioners' services
- a "friendly amendment" to increase the required current practice experience from "3" to "5" years was proposed by Mr. Walker and accepted by the Benchers

The motion to amend Recommendation 1 was defeated.

Key issues raised by various Benchers in discussion of the main motion were

- judgment and experience
  - judgment comes with experience and judgment is vital in family law disputes
- importance of access to legal services
- importance of practice standards and professional regulation
- importance of the Law Society's credentialing oversight and flexibility in particular cases

- importance of public funding and support to enhancing access to legal services

The motion was carried.

Ms. Hickman noted the importance of Recommendation 5, particularly its consultation element:

> **Recommendation 5:** The Task Force recommends that the Law Society should alert lawyers of the obligation in s. 8 of the Family Law Act to screen for family violence. Lawyers who will be "advising a party in relation to a family law dispute" should be strongly encouraged to take courses in screening for family violence.

Mr. Stewart moved (seconded by Mr. Zacharias) that the mandate of the Family Law Task Force be extended through December 2013.

The motion was carried.

10. Report on CBA National Conference and Council Meeting

Ms. Berge provided a brief oral report to supplement her written report on the 2012 CBA National Conference and Council meeting held in Vancouver last month.

WKM
2012-10-12

The Law Society of British Columbia

Chief Executive Officer's Monthly Report

A Report to the Benchers by

Timothy E. McGee

September 7, 2012

Introduction

My report this month will be somewhat briefer than usual, as it follows my comprehensive mid-year report to the Benchers at the meeting in July. The items I would like to highlight for you are as follows.

1. Paralegal Pilot Project – Communications Plan

The initial focus of the expanded role that the Benchers have recently approved for paralegals and articling students (as part of the Law Society's strategic plan to enhance access to affordable legal services) will be on the paralegal pilot project in family law. However, the scope of the changes affecting paralegals goes beyond the family law area and extends to all legal advice and any court appearances permitted by the courts. These changes, which are currently anchored to the requirement for lawyer supervision over no more than two "designated" paralegals, have opened the door to a new model for the provision of legal services.

The Benchers have been clear that one of the key success factors for these changes will be the willingness of lawyers to take on the supervisory role and the extent to which they do so across the province. In other words, we should not assume that just because the rules have been changed that take-up will necessarily follow. Accordingly, we believe that a well-designed, multi-faceted plan to communicate the changes, the goals and the potential benefits of this new business model for legal services to the profession and the public should be undertaken. This is not a standard activity for the Law Society, but it is an excellent example of why we need to be able to adapt and respond to changing needs and circumstances where that is critical to achieving a strategic goal.

At the meeting we will review with the Benchers the initial outline of a proposed communications plan for the paralegal initiative. We will be seeking your feedback, input and suggestions on the plan. If at any time you have questions or ideas on this topic, please do not hesitate to contact Robyn Crisanti, Manager, Communications and Public Affairs, or me.

2. Request of Minister of Justice and Attorney General for Recommendation for Regulatory Reform involving Law Society and Society of Notaries

Following on meetings that President LeRose and I had with Minister of Justice and Attorney General Shirley Bond in the spring and early summer regarding how best to approach regulatory reform in connection with the role of the Law Society and the Society of Notaries Public of BC, our respective organizations received a request from Minister Bond to work together to

develop options for her consideration.

Bruce and I subsequently met with the President and CEO of the Society of Notaries to determine whether there was common ground for jointly pursuing Minister Bond's request. I am pleased to report that our meeting was very productive. We have now provided a joint response to Minister Bond outlining that we propose to approach the challenge she has put to us through the auspices of the Law Society's Legal Services Task Force, which will be chaired by Bruce LeRose, QC, and will be empanelled in the fall.

Bruce and I will provide additional details on this positive development and respond to any questions at the meeting.

3. 2012 Employee Survey

We will soon be conducting our annual employee survey. The annual survey provides staff with an opportunity to provide feedback on how we can improve job satisfaction and our effectiveness as an organization. Each year management designs an action plan around one or two of the most important findings from the survey. We will review the results of the survey and our action plan with the Benchers early in the New Year.

4. Review of Targets in the Key Performance Measures

The Key Performance Measures (KPMs) are the dashboard which the Benchers use to monitor the effectiveness of our core regulatory operations. They were designed and adopted by the Benchers five years ago and now form an important part of our accountability and transparency as an organization. The Law Society is the only law regulator in Canada (and one of only a few regulators) that publishes and reports annually on performance measures for all of its regulatory functions.

While the Audit Committee is charged with reviewing the results of the KPMs with management each year prior to their review by the Benchers and posting on our website, the Benchers have directed that the actual setting of the targets comprising the KPMs be delegated to the Executive Committee to oversee. At the last Executive Committee meeting in August, I reviewed this with the Committee and indicated that management will be preparing a report for the Committee's meeting in November setting out background and possible options for re-setting the KPM targets for their consideration. Our goal will be to bring any changes to the Benchers for consideration and adoption early in 2013.

5. International Institute of Law Association Chief Executives – Annual Conference

I am a member and currently on the Executive Committee of an international organization called the International Institute of Law Association Chief Executives (IILACE). IILACE brings together the CEOs of law regulatory and association bodies from around the world. The main focus for IILACE is the annual conference, which I attend and which is typically scheduled over four days in the fall. The 2010 conference was held here in Vancouver. This year's conference is in Hong Kong in October.

The program for this year's conference touches on the most pressing issues facing the legal profession and those involved in its regulation and advocacy today. The heads of the regulatory bodies from the UK, Australia, Canada, Germany, Scandinavia and several US and African jurisdictions attend. This year we have CEOs from Japan, China and India for the first time. The real advantage I find with IILACE is that the group is relatively small, approximately 30 – 40 CEOs, but with representation from all the most engaged jurisdictions around the world. The formula of a small group of senior leaders over four consecutive days with extensive participation is a good one. I will be reporting back to the Benchers on IILACE 2012 at our meeting in November.

Timothy E. McGee
Chief Executive Officer

RECOMMENDATIONS

Recommendation 1: Lawyers acting as family law arbitrators must meet the following qualifications:

1. 10 years of current practice experience, or experience as a judge or master;

2. A lawyer must possess sufficient knowledge, skills and experience relevant to family law to carry out the arbitral function in a fair and competent manner;

3. A minimum of 40 hours approved training in how to conduct an arbitration. Course work should include:

    a. Theory and skills training;

    b. Drafting;

    c. How to conduct an arbitration;

    d. The statutory framework of arbitration;

    e. Family dynamics;

    f. Administrative law principles governing arbitrations.

4. A minimum of 14 hours of approved training in family violence. The training should include skills for identifying, evaluating and managing family violence and issues of power dynamics in particular relation to the dispute resolution process;

5. Relevant courses taken to meet the current rule 3-20 requirement and any relevant courses taken since qualifying count towards these requirements

Recommendation 2.1: The Task Force recommends that the current approved course requirements for lawyers acting as family law mediators be amended to require the following:

1. A lawyer must possess sufficient knowledge, skills and experience relevant to family law to carry out the mediatory function in a fair and competent manner;

2. A minimum of 80 hours of approved mediation skills training. Course work should include:

    a. Theory and skills training;

    b. Drafting;

    c. How to conduct a mediation;

    d. The statutory framework of mediation;

    e. Family dynamics;

    f. A minimum of 10 hours of role playing scenarios.

3. A minimum of 14 hours of approved training in screening for family violence. The training should include skills for identifying, evaluating and managing family violence and issues of power dynamics in particular relation to the dispute resolution process.

Recommendation 2.2: Abolish the Law Society Rules, rule 3-20(1)(a) requiring three years of legal practice to qualify as a family law mediator.

Recommendation 2.3: The Task Force recommends the following approach to grand parenting existing family law mediators:

1. Lawyers who, as of the date the new rule 3-20 is approved, meet the family law mediator requirements under the current rule 3-20 will have until January 1, 2014 to ensure they meet the training requirements for family law mediators recommended in this report;

2. Courses taken to meet the current rule 3-20 requirement and any courses taken since qualifying count towards these requirements;

3. As of the adoption of this report, all lawyers who wish to qualify in the first instance to act as family law mediators must meet the requirements contained in this report;

4. Staff will determine how to implement the reporting requirement and the Law Society will provide notice to the profession regarding the required standards and how to report compliance.

Recommendation 3: The Task Force recommends that lawyers acting as parenting coordinators must meet the following qualifications:

1. 10 years of current practice experience, or experience as a judge or master;

2. A lawyer must possess sufficient knowledge, skills and experience relevant to family law to carry out the parenting coordination function in a fair and competent manner. This family law experience must include considerable experience dealing with high conflict families with children;

3. A minimum of 40 hours of approved parenting coordination training, which must include:

    a. Parenting coordination skills training and theory;

    b. Dealing with high conflict families and individuals;

    c. Child development, interviewing children, and the effects of separation and divorce on children;

    d. The effects of separation and divorce on adults.

4. The minimum approved training qualifications of a family law arbitrator, which include:

    a. A minimum of 40 hours training in how to conduct an arbitration. Course work should include:

        i. Theory and skills training;

        ii. Drafting;

iii. How to conduct an arbitration;

iv. The statutory framework of arbitration;

v. Family dynamics;

vi. Administrative law principles governing arbitrations.

5. The minimum approved training qualifications of a family law mediator, which include:

    a. A minimum of 80 hours of mediation skills training. Course work should include:

        i. Theory and skills training;

        ii. Drafting;

        iii. How to conduct a mediation;

        iv. The statutory framework of mediation;

        v. Family dynamics;

        vi. A minimum of 10 hours of role playing scenarios.

6. A minimum of 14 hours of approved training in screening for family violence. The training should include skills for identifying, evaluating and managing family violence and issues of power dynamics in particular relation to the dispute resolution process;

7. Relevant courses taken to meet the current rule 3-20 requirement and any relevant courses taken since qualifying count towards these requirements

Recommendation 4: The Credentials Committee can set criteria for approved courses for lawyers acting as family law arbitrators, family law mediators, or parenting coordinators. In exercising its authority to assess courses the Credentials Committee should be guided by the substantive minimum requirements set out above.

Recommendation 5: The Task Force recommends that the Law Society should alert lawyers of

the obligation in s. 8 of the Family Law Act to screen for family violence. Lawyers who will be "advising a party in relation to a family law dispute" should be strongly encouraged to take courses in screening for family violence.

Recommendation 6: The Task Force recommends that lawyers acting as family law arbitrators, family law mediators, and/or parenting coordinators be required to record a minimum of six hours of continuing professional development per year in dispute resolution skills training and/or theory.

Recommendation 7: The Task Force recommends that the Act and Rules Subcommittee assist the benchers in seeking a consequential amendment to the Legal Profession Act to make it clear that the Law Society may make rules for the governing of lawyers acting as alternative dispute resolution professionals.

Recommendation 8: The Task Force recommends that the Ethics Committee be asked to develop for inclusion in the BC Code the requirements for written agreements for lawyers acting as family law arbitrators, mediators and/or parenting coordinators. These provisions will include the present protections regarding avoidance of conflicts of interest, recommendations regarding the need for independent legal advice, and the requirement for a written agreement as are now set out in Appendix 2 in relation to lawyers acting as mediators.

An additional point to be added to this new provision is that if a lawyer's role changes from one where the lawyer acts as a facilitator of consensual resolution to one where the lawyer acts as a decision maker, the lawyer must clearly specify in writing the nature of the change in function and when the lawyer will begin to exercise the change. The written agreement between the lawyer and the parties must confirm that such changes in function will be specified in writing. For example: a lawyer may conduct a process designed to be a mediation-arbitration. When the mediation portion of the process fails, the lawyer puts on the arbitrator hat and the lawyer should confirm that shift in role in writing.

The Ethics Committee should attempt to have the amendments to the BC Code in place by March 18, 2013.

The Law Society of British Columbia

Memo

To: Benchers
From: Jeffrey G. Hoskins, QC
Date: September 21, 2012
Subject: **2013 Fee Schedules**

Before the end of each calendar year, the Benchers must revise the fee schedules, which appear as schedules to the Law Society Rules, to reflect changes taking effect on the following January 1.

Under section 23(1)(a) of the *Legal Profession Act*, as newly amended, the Benchers have approved a practice fee of $1,893.06 for 2013. The insurance fee was also approved at $1,750 for lawyers in full-time practice and $875 for those in part-time practice, both of which are unchanged from 2012. The special compensation fund assessment was eliminated by amendments to the Act and Rules earlier in the year.

I attach a suggested resolution that will give effect to the change.

JGH
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Attachments: resolution

TOPIC

SUGGESTED RESOLUTION:

2013 FEE SCHEDULES

BE IT RESOLVED to amend the Law Society Rules, effective January 1, 2013, as follows:

1. ***In Schedule 1, by striking "***$1,840.41***" at the end of item A1 and substituting "***$1,893.06***";***

2. ***In Schedule 2, by revising the prorated figures in each column accordingly; and***

3. ***In the headings of schedules 1, 2, and 3, by striking the year "2012" and substituting "2013".***

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

The Law Society of British Columbia

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Memo

To: Benchers
From: Jeffrey G. Hoskins, QC for Act and Rules Subcommittee
Date: October 15, 2012
Subject: **Correction of omission from Bill 40 amendments**

The Act and Rules Subcommittee recommends that the following change to Rule 1 should be made to accommodate the repeal of section 38(4)(c) of the *Legal Profession Act*:

Definitions

1 In these Rules, unless the context indicates otherwise:

"professional conduct record" means a record of all or some of the following information respecting a lawyer:

(j) a decision made under section 38(4)(b) ~~or (c)~~ of the Act;

Section 38(4)(c) formerly allowed hearing panels an open-ended third option for the outcome of a hearing on a citation:

(c) make any other disposition of the citation that it considers proper.

On the recommendation of the Act and Rules Subcommittee, the Benchers requested that that provision be repealed so that only a clear decision on the allegations in the citation was open to the panel. That change was made as part of Bill 40.

SUGGESTED RESOLUTION:

BE IT RESOLVED to amend the Law Society Rules by rescinding paragraph (j) of the definition of "professional conduct record" and substituting the following:

(j) a decision made under section 38(4)(b) of the Act;

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

JGH
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The Law Society of British Columbia

Memo

To: Benchers
From: Family Law Task Force
Date: September 26, 2012
Subject: Grand-parenting parenting coordinators

At the September 6, 2012 Benchers meeting the Benchers adopted the report of the Family Law Task Force. The Task Force was kept operative in order to publicize the report and also receive input as to the recommendations contained in the report.

On September 26, 2012 Carol Hickman, QC, Chair and Doug Munro attended at the CLE BC offices to discuss educational materials CLE BC is developing for both the paralegal pilot project and arising from the recommendations in the Family Law Task Force report.

The report recommends training requirements for family law arbitrators, family law mediators and parenting coordinators. Because the Law Society was increasing the training requirements for family law mediators the Benchers gave existing qualified family law mediators until January 1, 2014 to upgrade their training to meet the new standard. The report did not make a similar recommendation regarding parenting coordinators.

Staff at CLE BC identified a concern with Recommendation 3 of the report. Recommendation 3 requires parenting coordinators to meet the training requirements for family law arbitrators, family law mediators and take courses for parenting coordinators. Because CLE BC faces a logistical challenge of determining when to set courses for training arbitrators, mediators and parenting coordinators the question arose as to whether parenting coordinators could be granted a similar period of time to get up to date in training as was given to family law mediators.

The Family Law Task Force recommends that the Law Society give lawyers who are currently acting as family law parenting coordinators until January 1, 2014 to meet the training requirements contained in Recommendation 3 of the Family Law Task Force report. The reasons to do so are:

- Because a parenting coordinator is required to be a family law mediator, and family law mediators have until January 1, 2014 to upgrade mediation skills to the new qualification requirement, it harmonizes the approach;

- Parenting coordinators can be court appointed and it is important not to create a situation where a court appointed professional suddenly fails to meet the training requirements established by the regulator;

- Given the very tight timeframe between the adoption of the report and the implementation of the *Family Law Act* in March 18, 2013, CLE BC is under considerable pressure to develop and launch courses relating to the new *Family Law Act*, training for family law arbitrators, family law mediators, and parenting coordinators. Extending the grand-parenting provision to include parenting coordinators gives CLE BC greater administrative flexibility to design and bring to market the necessary courses.

Recommendation: The Benchers should amend Recommendation 3 of the Family Law Task Force report to include:

> 3(8) lawyers who, as of the date the new rule 3-20 is approved, are acting in the capacity of a parenting coordinator under an existing parenting coordinator agreement or order of the Court, will have until January 1, 2014 to meet the training requirements of parenting coordinators recommended in this report.

/DM

The Law Society of British Columbia

Quarterly Financial Report

September 30, 2012

Prepared for: Benchers

Prepared by: Jeanette McPhee, CFO & Director Trust Regulation
October 17, 2012

CFO Quarterly Financial Report – YTD September 2012

Attached are the financial results and highlights for the first nine months of 2012.

General Fund

General Fund (excluding capital and TAF)

The General Fund operations resulted in a $767,000 positive variance to the end of September 2012. The positive variance is due to the timing of operating expenses which are expected to occur in the fourth quarter.

Revenue

Revenue was $14,405,000, $90,000 (0.6%) ahead of budget due to slightly higher PLTC and electronic filing revenues.

Operating Expenses

Operating expenses were less than budget, finishing the third quarter at $13.4 million, $906,000 (6.3%) under budget. As mentioned above, this positive variance is due to the timing of operating expenses which are expected to occur in the fourth quarter.

2012 Forecast - General Fund (excluding capital and TAF)

Operating Revenue

Practicing membership is expected to be very close to budget, projected at 10,751 members compared to a budget of 10,787. There will be 410 PLTC students for the year, 10 students ahead of budget. Other revenues are expected to be slightly over budget by year end. Total operating revenue is projected to finish the year with an $80,000 positive variance.

Operating Expenses

Operating expenses are projected to finish the year with a $340,000 positive variance, due to the following:

A number of Bencher approved items after the 2012 budget was set, resulting in a $317,000 negative variance:

- Governance review - $115,000
- CBA REAL program - $75,000
- Federation levy - $40,000
- CBA conference sponsorship - $20,000
- Privacy review - $55,000

- New aboriginal scholarship - $12,000

Offsetting this, we are projecting other operating expense savings of $657,000 to year end mainly due to:

- Savings in external counsel fees and forensic accounting fees related to the number of files over the year - $275,000
- Staff salary savings due to vacancies and other savings - $280,000
- Lower hearing panel travel and training costs - $70,000

845/835 Building – net results

The 845/835 Cambie lease revenue is projected below budget. The Benchers agreed to forgive $60,000 in rent for CLE, and the projection assumes that the vacant lease space is not rented by year end, resulting in a revenue reduction of $380,000. Our agent continues to actively market the space.

Building maintenance expenses are projected to be on budget for the year.

Forecast

With the above mentioned results, we are projecting the General Fund operating results to be very close to budget by year end.

TAF-related Revenue and Expenses

The first two quarters of TAF revenue were $1,117,000, $138,000 below budget. This shortfall is more than offset by operating expense savings to the end of September 2012.

For the year, TAF revenue is projected at $2.2 million, $280,000 below budget. TAF operating expenses are projected to be below budget for the year, which is expected to offset this shortfall.

Special Compensation Fund

During the third quarter, the Fund received a $514,000 recovery of funds relating to a older claim. This recovery is budgeted in the 2013 fiscal year but was received earlier than expected.

Lawyers Insurance Fund

LIF operating revenues were $10.3 million to date, which is at budget. LIF operating expenses were $3.8 million, $600,000 below budget. The positive variance is due to savings from staff vacancies and the timing of general office expenses.

The market value of the LIF long term investments was $96 million at the end of September 2012, an increase of $5.9 million on a year to date basis. The year to date investment return was 6.3%, compared to a benchmark of 5.5%.

The Law Society of British Columbia

Summary of Financial Highlights - Sep 2012
($000's)

2012 General Fund Results - YTD Sep 2012 (Excluding Capital Allocation & Depreciation)

	Actual	Budget	$ Var	% Var
Revenue (excluding Capital)				
Membership fees	11,446	11,442	4	0.0%
PLTC and enrolment fees	1,007	979	28	2.9%
Electronic filing revenue	653	598	55	9.2%
Interest income	217	285	(68)	-23.9%
Other revenue	1,082	1,011	71	7.0%
	14,405	14,315	90	0.6%
Expenses before 845 Cambie (excl. dep'n)	13,397	14,303	906	6.3%
	1,008	12	996	
845 Cambie St. - net results (excl. dep'n)	452	681	(229)	-33.6%
	1,460	693	767	

2012 General Fund Year End Forecast (Excluding Capital Allocation & Depreciation)

Practice Fee Revenue	**Avg # of Members**
2008 Actual	10,035
2009 Actual	10,213
2010 Actual	10,368
2011 Actual	10,564
2012 Projection	10,751
2012 Budget	10,787
2012 Actual YTD	**10,742**

	Actual Variance
Revenue	
Membership Revenue - 36 members less than budget	(50)
PLTC - 10 students more than budget	25
Electronic Filing	55
Late Payment Fees	25
Members' Manual / Benchers' Bulletin	20
Miscellaneous	5
	80
Expenses	
Professional Services - external counsel fees - regulation	80
- external counsel fees - other departments	75
- forensic accounting fees	120
Staff salaries	280
Hearing Panel - travel & training	70
Governance Review consulting fees*	(115)
CBA REAL Initiative contribution*	(75)
Privacy Review consulting fees*	(55)
FLS Contribution - rate increase *	(40)
Exec Comm - CBA Canadian legal conference sponsorship contribution *	(20)
Aboriginal Scholarship*	(12)
Miscellaneous	32
	340
845 Cambie Building	
CLE Lease Forgiveness*	(60)
Lease revenue	(380)
Expense savings	20
	(420)
2012 General Fund Forecast Variance	-
2012 General Fund Budget	-
2012 General Fund Actual	-

* Bencher approved items after budget set

Trust Assurance Program Forecast

	2012 Forecast	2012 Budget	Variance	% Var
TAF Revenue	2,223	2,500	(277)	-11.1%
Trust Assurance Department	2,198	2,468	270	10.9%
Net Trust Assurance Program	25	32	(7)	

2012 Lawyers Insurance Fund Long Term Investments - YTD Sep 2012 *Before investment management fees*

Performance	6.3%
Benchmark Performance	5.5%

The Law Society of British Columbia
General Fund
Results for the 9 Months ended September 30, 2012
($000's)

	2012 Actual	2012 Budget	$ Var	% Var
Revenue				
Membership fees **(1)**	13,337	13,340		
PLTC and enrolment fees	1,007	979		
Electronic filing revenue	653	598		
Interest income	217	285		
Other revenue	1,082	1,011		
Total Revenues	16,296	16,213	83	0.5%
Expenses				
Regulation	4,987	5,574		
Education and Practice	2,549	2,659		
Corporate Services	1,897	2,065		
Bencher Governance	1,323	1,197		
Communications and Information Services	1,444	1,437		
Policy and Legal Services	1,198	1,372		
Depreciation	222	299		
Total Expenses	13,620	14,603	983	6.7%
General Fund Results before 845 Cambie and TAP	2,676	1,610	1,066	
845 Cambie net results	37	131	(94)	
General Fund Results before TAP	**2,713**	**1,741**	**972**	
Trust Administration Program (TAP)				
TAF revenues	1,117	1,255	(138)	
TAP expenses	1,675	1,842	167	9%
TAP Results	**(558)**	**(587)**	**29**	
General Fund Results including TAP	**2,155**	**1,154**	**1,001**	

(1) Membership fees include capital allocation of $1.891m (YTD capital allocation budget = $1.898m).

The Law Society of British Columbia
General Fund - Balance Sheet
As at September 30, 2012
($000's)

	Sept 30 2012	Dec 31 2011
Assets		
Current assets		
Cash and cash equivalents	132	279
Unclaimed trust funds	1,670	1,848
Accounts receivable and prepaid expenses	821	1,129
B.C. Courthouse Library Fund	1,115	678
Due from Lawyers Insurance Fund	5,329	19,331
	9,067	23,265
Property, plant and equipment		
Cambie Street property	11,518	11,739
Other - net	1,633	1,362
	22,218	36,366
Liabilities		
Current liabilities		
Accounts payable and accrued liabilities	1,044	4,040
Liability for unclaimed trust funds	1,670	1,848
Current portion of building loan payable	500	500
Deferred revenue	4,428	17,491
Deferred capital contributions	61	70
B.C. Courthouse Library Grant	1,115	678
Deposits	33	27
	8,851	24,654
Building loan payable	4,100	4,600
	12,951	29,254
Net assets		
Capital Allocation	2,477	1,874
Unrestricted Net Assets	6,790	5,238
	9,267	7,112
	22,218	36,366

The Law Society of British Columbia
General Fund - Statement of Changes in Net Assets
For the 9 Months ended September 30, 2012
($000's)

	Invested in P,P & E net of associated debt	Unrestricted	Unrestricted Net Assets	Capital Allocation	2012 Total	2011 Total
	$	$		$	$	$
Net assets - December 31, 2011	8,010	(2,769)	5,238	1,874	7,112	6,691
Net (deficiency) excess of revenue over expense for the period	(685)	949	264	1,891	2,155	421
Repayment of building loan	500	-	500	(500)	-	-
Purchase of capital assets:						
LSBC Operations	235	-	235	(235)	-	-
845 Cambie	553	-	553	(553)	-	-
Net assets - September 30, 2012	8,613	(1,820)	6,790	2,477	9,267	7,112

The Law Society of British Columbia
Special Compensation Fund
Results for the 9 Months ended September 30, 2012
($000's)

	2012 Actual	2012 Budget	$ Var	% Var
Revenue				
Annual assessment	8	8		
Recoveries	514	-		
Total Revenues	522	8	514	6425.0%
Expenses				
Claims and costs, net of recoveries	-	538		
Administrative and general costs	35	40		
Loan interest expense	(20)	-		
Total Expenses	15	578	(563)	-97.4%
Special Compensation Fund Results	507	(570)	1,077	

The Law Society of British Columbia
Special Compensation Fund - Balance Sheet
As at September 30, 2012
($000's)

	Sept 30 2012	Dec 31 2011
Assets		
Current assets		
Cash and cash equivalents	1	1
Due from Lawyers Insurance Fund	1,447	950
	1,448	951
Liabilities		
Current liabilities		
Accounts payable and accrued liabilities	6	8
Deferred revenue	3	11
	9	19
Net assets		
Unrestricted net assets	1,439	932
	1,439	932
	1,448	951

The Law Society of British Columbia
Special Compensation Fund - Statement of Changes in Net Assets
For the 9 Months ended September 30, 2012
($000's)

	2012 $	2011 $
Unrestricted Net assets - December 31, 2011	932	831
Net excess of revenue over expense for the period	507	101
Net assets - September 30, 2012	1,439	932

The Law Society of British Columbia
Lawyers Insurance Fund
Results for the 9 Months ended September 30, 2012
($000's)

	2012 Actual	2012 Budget	$ Var	% Var
Revenue				
Annual assessment	10,299	10,294		
Investment income	5,801	4,420		
Other income	90	62		
Total Revenues	16,190	14,776	1,414	9.6%
Expenses				
Insurance Expense				
Provision for settlement of claims	11,149	11,148		
Salaries and benefits	1,694	2,067		
Contribution to program and administrative costs of General Fund	1,130	1,177		
Office	570	736		
Actuaries, consultants and investment brokers' fees	293	316		
Allocated office rent	111	111		
Premium taxes	14	13		
	14,961	15,568		
Loss Prevention Expense				
Contribution to co-sponsored program costs of General Fund	538	531		
Total Expenses	15,499	16,099	600	3.7%
Lawyers Insurance Fund Results before 750 Cambie	691	(1,323)	2,014	
750 Cambie net results	275	234	41	
Lawyers Insurance Fund Results	**966**	**(1,089)**	**2,055**	

The Law Society of British Columbia
Lawyers Insurance Fund - Balance Sheet
As at September 30, 2012
($000's)

	Sept 30 2012	Dec 31 2011
Assets		
Cash and cash equivalents	4,807	23,719
Accounts receivable and prepaid expenses	930	654
Due from members	64	67
General Fund building loan	4,600	5,100
Investments	105,798	102,895
	116,199	132,435
Liabilities		
Accounts payable and accrued liabilities	364	1,609
Deferred revenue	3,421	6,813
Due to General Fund	5,330	19,331
Due to Special Compensation Fund	1,447	950
Provision for claims	53,775	52,876
Provision for ULAE	7,105	7,065
	71,442	88,644
Net assets		
Unrestricted net assets	27,257	26,291
Internally restricted net assets	17,500	17,500
	44,757	43,791
	116,199	132,435

The Law Society of British Columbia
Lawyers Insurance Fund - Statement of Changes in Net Assets
For the 9 Months ended September 30, 2012
($000's)

	Unrestricted	Internally Restricted	2012 Total	2011 Total
	$	$	$	$
Net assets - December 31, 2011	26,291	17,500	43,791	33,962
Net excess of revenue over expense for the period	966	-	966	9,827
Net assets - September 30, 2012	27,257	17,500	44,757	43,789

President's Report to the Law Societies

October 2012

From: **John J. L. Hunter, Q.C., President**
Federation of Law Societies of Canada

To: **All Law Societies**

Date: **October 12, 2012**

This is my last report to the Canada's law societies as President of the Federation of Law Societies of Canada. I do so with a great deal of satisfaction that over the last year, the Federation has moved forward in its public interest mission and continues to respond to the desire of its member law societies to lead important national initiatives in the area of regulation of Canada's legal profession.

The Council of the Federation meets four times each year – twice in conjunction with major national conferences which bring together the top leadership of the law societies including Presidents, Vice Presidents and senior staff. On September 20-22, 2012, the Federation held its Annual Conference and business meetings in Vancouver, BC.

The following is my report of the highlights of the Council meeting, as well as of the Conference which focused on national admissions standards and the move toward a consistent approach to how these standards should be implemented.

COUNCIL MEETING

Strategic Planning and Priorities

1. The Federation Council, in consultation with member law societies, sets the strategic direction and priorities for the Federation. The Strategic Plan for 2010-2012 has been reviewed and monitored by the Council through the last year. At its most recent meeting, Council adopted a revised Strategic Plan for 2012-2015. The focus continues to be on national standards of regulation and access to legal services. The priorities for the current year are to stay the course on major projects currently underway, the status of which is discussed below. A copy of the latest Strategic Plan and this year's priorities is attached to this report.

National Standards Initiatives

2. **Mobility.** The national mobility regime for Canada's legal profession continues to lie at the heart of the Federation's work and the drive by Canada's law societies toward harmonized standards of legal regulation. At this meeting, the Council took the very significant step of approving as a priority for the Federation the development of a simpler mobility regime between Canada's common law jurisdictions and the Province of Quebec. The current Bâtonnier of the Barreau du Québec, Nicolas Plourde, has demonstrated strong leadership by proposing a regime which recognizes that members of the legal profession from both legal traditions have much more in common than differences, and that the transferability of these individuals between law societies should be based on the overriding ethical obligation we all share to practice our profession only in areas where we are competent to do so. The initial reaction from many law society leaders has been very positive. A process is underway to develop briefing

materials and a draft protocol in the near future so law societies can move promptly to consider and take advantage of this opportunity.

3. **Admission Standards.** Foremost among the Federation's national initiatives is the move toward national standards for admission with the objective that they be applied consistently across Canada. After a concerted two-year effort, the Council adopted a new national competency profile as a standard for admission to the legal profession. With phase one of the project behind us, the Federation now turns to the next phase – implementation. Law societies will be directly involved in this effort every step of the way and will be hearing more about how this process will unfold in the weeks and months to come. Integral to this project is work to develop a good character standard. That effort continues apace. The attention law society leaders are paying to national admission standards is evidenced by the two-day conference we held on the subject which I will report on below.

4. **Law School Common Law Program Approvals.** Work is well underway by the Federation's Common Law Degree Program Approval Committee to monitor compliance by Canada's law schools with the national requirement for law degree programs which was adopted by Canada's law societies in 2011. Law school reports are currently being reviewed. The national requirement will need to be met for individuals who graduate from Canadian law schools in 2015.

5. **National Committee on Accreditation.** The NCA continues to experience increased demand for assessment of international legal credentials. In the past year, the NCA assessed 1,249 applications and administered over 4,600 examinations in substantive areas of the law. Over 700 Certificates of Qualification were issued to applicants wishing to apply to Canadian law society bar admission programs.

6. **Model Code of Professional Conduct.** With the adoption by Council of the Model Code, a mechanism is in place, led by the Standing Committee on the Model Code, to gather any suggested improvements to the Model Code at the national level in order to avoid having a checkerboard of rules adopted at the provincial and territorial levels. In the area of conflicts of interest, the Federation will be seeking leave at the Supreme Court of Canada to intervene in the matter of *CNR v. McKercher*. This intervention will afford the Federation an opportunity to promote its approach to conflicts of interest as set out in the Model Code.

7. **Discipline Standards.** It was reported that a pilot project involving thirteen of Canada's law societies began in April 2012 to test standards in the areas of timeliness, fairness, transparency, public participation and accessibility in matters dealing with complaints about and discipline for members of the legal profession. The ultimate goal of this initiative is to raise the bar on how all law societies fulfill these core responsibilities in the public interest.

Other Projects and Initiatives

8. **Access to Legal Services.** Addressing challenges to the public's access to legal services is a priority for the Federation, just as it is for its member law societies. The Federation continues to play a leading role within the Chief Justice of Canada's National Action Committee on Access to Justice in Civil and Family Matters. In particular, the Federation's Chair of the Standing Committee on Access to Legal Services, Jeff Hirsch, has played a key role in the development of a report of a Working Group on Access to Legal Services which was released this fall.

9. **CanLII**. This online, free search engine for the public and Canada's legal profession continues to be a source of pride and achievement for the Federation and its members. The Council heard from CanLII's President and Chief Executive Officer, Colin Lachance, who reported on an important user survey which was completed this summer with the help of the law societies and which will inform CanLII about how the service can be improved.

10. **Anti-Money Laundering Advocacy**. This month, the Federation will be urging the British Columbia Court of Appeal to uphold the lower Court decision rendered in September 2011 which found the Federal Government's client identification rules to be unconstitutional and a violation of solicitor-client privilege. The British Columbia Supreme Court held that Canada's law societies' "No-Cash Rule" and client identification and verification rules are effective tools in the fight against money-laundering.

11. **Continuing Legal Education Programs**. The Federation provides support for two best-in-class CLE programs in criminal law and in family law. This summer, the National Criminal Law Program held its 39th consecutive edition in Victoria, BC. The National Family Law Program, which is held every two years, was offered in Halifax, NS. Both programs were sold out and highly praised for the top quality of their sessions and faculty.

Law Society and External Relations, Administration and Leadership

12. **Outreach**. Law society leaders will know the importance of the President's role as a spokesperson and ambassador. My role on behalf of the Federation is no different. It has been a priority of mine to be in touch with law society leaders from across Canada throughout the year and I have personally visited most member jurisdictions. I have also attended and participated in meetings of the International Bar Association and American Bar Association and will soon be at the Annual Congress of the Union internationale des avocats. Together with other elected law society leaders and senior staff, I recently participated in the first ever International Legal Regulators Conference in London, UK, an event which holds the promise of future opportunities to exchange best practices and trends in the world of legal regulation.

Through the year I have seen the profile and stature of the Federation continue to grow as a significant institution among those involved in the administration of justice in Canada. We maintain constructive relationships with the Canadian Bar Association, the Department of Justice and other Federal government agencies, the Supreme Court of Canada, as well as the the Council of Canadian Law Deans.

13. **Administration**. The Federation operated within the approved budget for 2011-2012 and finished the year with a clean audit. Council approved the Federation's budget for 2013-2014 which will not require an increase in the current levy from the law societies. In accordance with the current year's budget, the Federation will add staff capacity with the hiring of a new Director, Regulatory Affairs and an administrative assistant.

14. **Leadership.** In accordance with our policies, the Council elected new executive officers who begin their one-year terms on November 15, 2012. Our new President will be Gérald R. Tremblay, O.C., O.Q, Q.C., a former Bâtonnier of the Barreau du Québec. Thomas Conway, the current Treasurer of the Law Society of Upper Canada, will be Vice President and President-elect. Also elected Vice President was Marie-Claude Bélanger-Richard, formerly President of the Law Society of New Brunswick.

2012 ANNUAL CONFERENCE

"Strengthening Admission Standards: Towards a Consistent National Approach"

15. Every six months, the Federation brings together the Presidents and Vice Presidents of Canada's law societies, as well as the Federation Executive and Council, law society CEOs and other senior staff to discuss issues of common interest and to tackle important questions about how best to regulate the legal profession. The focus of the 2012 Annual Conference in Vancouver was national admission standards and how best to implement them in a consistent way across Canada.

16. Law societies have been hearing about the national admissions standards project for some time. There is a general consensus that the time has come to take a national approach to admissions standards in a world where mobility of the profession has been a reality for a number of years. At the Conference, participants heard an overview of Phase I of the project which culminated with Council's adoption of a national competency profile for admission to the practice of law in Canada. The competency profile has now been formally referred to the law societies subject to the approval of an implementation plan. Further communications materials are being developed to help law society leaders understand the importance, background and next steps in this initiative.

17. The Conference also provided an opportunity to learn about how standards have been developed and implemented in other jurisdictions such as Australia, the United States and the United Kingdom. Closer to home, participants learned about the experiences of Canada's medical and accounting professions in their move to national admission standards. By comparison, Canada's legal profession is many years behind the other professions in moving toward national approaches to measuring entry-level competencies.

18. An important component of the entry-level competencies for new members of the profession is the combination of skills one should have in order to be adequately prepared for the practice of law. Conference participants explored a variety of methodologies through which these skills may be obtained. The opportunities and challenges presented by the articling experience was among them, and we were updated on the work being done in Ontario to address shortages in articling positions. We also heard about the approach taken at the Barreau du Québec to focus on skills during Bar School, as well as other innovations in experiential learning offered within some Canadian law schools.

19. Discussions turned to how law societies can achieve consistency in how national standards are achieved for admission to the legal profession. A key outcome of our discussions was the consensus that all law societies need to be not only informed about potential strategies for achieving consistency, but need to be actively engaged in the process. It is with this objective in mind that the Federation now moves to the second phase of its national admissions standards project, the success of which will ultimately depend on the buy-in and leadership within the provincial and territorial law societies.

I look forward to following the progress of this important initiative that will contribute to our ongoing efforts to provide effective regulation of the profession in the interest of the public.

FEDERATION OF LAW SOCIETIES OF CANADA

STRATEGIC PLAN 2012-2015

(Revision - September 2012)

VISION

The vision of the Federation of Law Societies of Canada is:

> ***"Acting in the public interest by strengthening Canada's system of governance of an independent legal profession, reinforcing public confidence in it and making it a leading example for justice systems around the world."***

MISSION

Acting in the public interest, the Federation of Law Societies of Canada is committed to:

1. ***Bringing together Canada's law societies*** to enhance open and transparent governance of an independent legal profession in Canada, and to set national standards and harmonize provincial and territorial rules and procedures;

2. ***Promoting the cause of justice and the Rule of Law***;

3. ***Providing a forum for the exchange and analysis of information*** of mutual interest to Canada's law societies;

4. ***Undertaking national initiatives on behalf of Canada's law societies***;

5. ***Speaking nationally and internationally on behalf of Canada's law societies***;

6. ***Informing the public, governments and members of the legal profession*** about the role, responsibilities and activities of the Federation of Law Societies of Canada and of Canada's law societies; and

7. ***Sharing the expertise of Canada's law societies*** to contribute to the development of effective regulation of an independent legal profession around the world.

VALUES

The Federation of Law Societies of Canada fulfills its mission in a manner which is:

1. Focused on the public interest;
2. Responsive and accountable;
3. Consistent with the highest standards of professionalism, excellence, ethics and good governance; and
4. Respectful of Canada's bilingual and bi-juridical nature.

STRATEGIC OBJECTIVES 2012-2015

The strategic objectives of the Federation of Law Societies of Canada for 2012-2015 are:

1. ***To develop and implement high, consistent and transparent national standards for Canada's law societies in core areas of their mandates.***

   In order to achieve this objective, the Federation will:

   (a) develop national competency and good character standards, as well as harmonized evaluation practices for admission to the legal profession in Canada;

   2012-2013 PRIORITIES*:*

   ● *completion of a draft national good character standard for admission to the legal profession in Canada for Council's consideration and approval, with a view toward referring such standard to Canada's law societies for their ultimate approval and implementation;*

   ● *develop recommendations for a plan to implement a national competency profile and a good character standard on a consistent basis throughout Canada;*

   (b) set common benchmarks to measure how law societies process complaints about members of the legal profession and implement systems for monitoring compliance with such benchmarks, all with a view to improving law society complaints handling procedures and outcomes;

(c) harmonize the rules of professional conduct for members of the legal profession across Canada; and

2012-2013 PRIORITY

● *ensure the effectiveness of the Federation's Standing Committee on the Model Code of Conduct as the central clearinghouse for law society and other stakeholder recommendations for improvement to the Model Code, with a view to ensuring that the Model Code is implemented in a consistent fashion across Canada;*

(d) review national mobility arrangements to ensure that they are effective and consistently applied.

2012-2013 PRIORITY

● *develop a proposal for the replacement of the Canadian Legal Advisor regime with a new, simplified, reciprocal arrangement for mobility of members of the legal profession between Quebec and common law provinces.*

2. ***To collaborate with other participants in Canada's justice system to foster greater public satisfaction with access to legal services.***

In order to achieve this objective, the Federation will:

(a) play a meaningful role in the work of the National Action Committee on Access to Justice led by the Chief Justice of Canada;

(b) facilitate the exchange of information between Canada's law societies about local initiatives relating to legal service providers and the affordability of legal services; and

(c) work to identify, within the mandates of the Federation and Canada's law societies, possible initiatives designed to help alleviate barriers to public access to legal services.

3. ***To enhance the Federation's internal and external communications, including how it conveys information about its mission and activities to Canada's law societies and external audiences, as well***

as how Canada's law societies exchange information of mutual interest.

In order to achieve this objective, the Federation will:

(a) gather and make available relevant information and provide analysis relating to the work of Canada's law societies including statistical, practical and technical information, as well as research and policy information, all with a view toward fostering a better understanding of the similarities and distinctions between them and avoiding duplication of work, where appropriate;

(b) enhance opportunities for law society volunteers and staff to meet with each other and with those of the Federation for the purpose of exchanging information; and

(c) develop common policy positions and key messages on all matters where it is appropriate for a national perspective to be expressed in relation to the work of Canada's law societies.

4. ***To contribute to the improvement of effective regulation of an independent legal profession around the world.***

In order to achieve this objective, the Federation will:

(a) consult with Canada's law societies about resources that may be available for the purpose of sharing their expertise with international stakeholders involved in the development of systems of governance of the legal profession;

(b) explore how it may collaborate with other stakeholders in Canada's legal system and abroad in order to share such expertise; and

(c) seek opportunities to actively engage with legal regulators outside of Canada and international legal organizations in order to share knowledge and expertise relevant to the effective governance of the legal profession.

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

BY E-MAIL

October 10, 2012

Mr. Bruce A. LeRose, Q.C.
President
Law Society of British Columbia
845 Cambie Street
Vancouver, BC V6B 4Z9

RE: National Admission Standards Project

Dear Mr. LeRose,

The recent meeting in Vancouver of the Federation Council marked an important step in the realization of one of the Federation's key strategic objectives, the development and implementation of consistent, high standards of regulation. Members of Council voted unanimously to approve the National Entry-Level Competency Profile for Lawyers and Quebec Notaries (the "Competency Profile") as a national standard and to submit it to the law societies for their adoption. Council also approved a process for the exploration of options for implementation of the standard. The next step will be for each law society to consider approval of the Competency Profile. A copy of the Competency Profile and the resolution approved by Council are attached.

During the course of the Federation Conference following the Council meeting, you and your colleagues expressed a clear desire for support as you move forward with the process of approving the Competency Profile. In the coming weeks, the Steering Committee of the National Admission Standards Project (the "Steering Committee") will be developing communications materials to address the many questions that will inevitably arise as the leaders of the law societies consider approval of the national standard. We recognize that success in this endeavour depends in large measure on ensuring that you and your fellow benchers have the information you need. For that reason I am asking that you delay seeking approval of the Competency Profile until we have the communications materials in your hands later this fall.

With the approval of the Competency Profile, the National Admission Standards Project has moved into the next phase. As mandated by Council, members of the Steering Committee, supported by senior admissions staff from across the country, will now begin the work of exploring the options for implementation of national standards for admission to the legal profession in Canada. A broad range of options is expected to be considered; the Committee's work will include researching both the merits of the various options and the implications that each might have for the current admission practices of the law societies and will culminate in a recommendation to Council.

The involvement and input of the law societies has been critically important to this project from the outset. Law society leaders and staff from across the country played an invaluable role in the development and testing of the Competency Profile and this role will continue in the second phase of the project. As they examine what implementation might look like, the members of the Steering Committee will be consulting closely with the leaders of each law society to ensure that your views are reflected in the Committee's ultimate recommendation to Council. We will also be engaging senior staff from every jurisdiction to assist us as the project to develop national standards for admission moves forward.

I look forward to your continued collaboration and cooperation in this important undertaking.

Sincerely,

John J.L. Hunter, Q.C.

JJLH/cj

c.c. Mr. Timothy E. McGee, Chief Executive Officer
Law Society of British Columbia

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

MEMORANDUM

FROM : Federation Executive

TO: Council of the Federation
Law society CEOs (for information)

DATE : September 4, 2012

SUBJECT : National Admission Standards Project – Phase 1 Report

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ACTION REQUIRED : **Decision of Council**

DRAFT MOTION:

WHEREAS In October 2009 Council approved a project to develop national standards for admission to the legal profession (the "National Admission Standards Project");

WHEREAS the deliverables from Phase 1 of the National Admission Standards Project included a profile of the competencies required for admission to the legal profession and a common standard for ensuring that applicants meet the requirement to be of good character;

WHEREAS the Steering Committee has prepared a report on Phase 1 of the National Admission Standards project that provides an update on the work on a national fitness and suitability standard and includes recommendations to approve a competency profile and a process for exploring implementation of the national standards ("Phase 1 Report");

RESLOVED THAT the Council approve the following recommendations contained in the report of the National Admission Standards Project Steering Committee:

1. The competency profile attached as Appendix "B" to the Phase 1 Report be approved by Council of the Federation as a national admission standard;

2. The competency profile be submitted to member law societies for approval on the understanding that the law societies' adoption is subject to the development and adoption of a plan for implementation; and

3. The following process for completion of the national fitness and suitability standard and development of recommendations for the implementation of national admission standards be approved by Council of the Federation:

   (a) The Steering Committee be requested to complete the drafting of the national fitness and suitability standard and be mandated to consult on the draft with the law societies with a goal to submitting the standard to Council for approval by June 2013;

   (b) The Steering Committee be mandated to identify and explore the options for implementation of national admission standards, including options for teaching and training, and for mechanisms to ensure that all candidates meet the national standards, taking into account the implications of each option for law societies and future candidates and its likelihood to achieve a high degree of consistency in admissions;

   (c) The Steering Committee be mandated to consult with leaders and senior law society staff as well as such other stakeholders as it sees fit on possible options for implementation;

   (d) The Steering Committee be mandated to make a recommendation to Council on implementation of the national admission standards that includes a method for assessing compliance with the standards and addresses issues related to teaching and training of candidates;

   (e) The Steering Committee be requested to include with its recommendation a detailed roadmap of the process for implementation, a plan to manage the transition to national standards, and identification of the resources that will be necessary to manage the implementation process;

   (f) The membership on the Steering Committee be maintained with the addition of two new members, at least one of whom is a member of Council;

   (g) The Steering Committee be requested to provide Council with an anticipated timeline for its work and to provide regular progress reports to Council and law societies, the first being provided no later than the March 2013 meeting of Council.

ISSUE

1. The Council is requested to approve the recommendations of the National Admissions Standards Project Steering Committee set out in its report on Phase 1 of the project.

BACKGROUND

2. In October 2009, motivated largely by recognition that mobility of the profession makes differences in the standards for admission in different jurisdictions undesirable, the Council of the Federation approved a plan for a project to develop national standards for admission to the legal profession.

3. The project plan identified the following overall goal for the project:

> "To develop consistent, defensible standards for admission to the legal profession and to ensure every applicant admitted to the bar meets these standards."

4. Two specific goals for the first phase of the project were also identified:

(a) The development of a profile of the competencies required upon entry to the legal profession; and

(b) The development of a common standard for assessing whether candidates for admission are of good character.

5. The National Admission Standards Project Steering Committee has provided a report on Phase 1 of the project (attached as Appendix "A" to this memorandum). The report provides a detailed account of the work on the project and includes recommendations for approval of a national competency profile, a process for completing the national fitness and suitability standard, and a process for identifying and exploring options for implementation of the standards. Those recommendations are set out in the draft resolution above.

RECOMMENDATIONS

6. The Executive recommends that the resolution set out on pages one and two of this memorandum be adopted.

Note: This was adopted by the Council of the Federation of Law Societies of Canada on September 20, 2012.

Federation of Law Societies of Canada
Fédération des ordres professionnels de juristes du Canada

National Admission Standards Project

Appendix B

National Entry to Practice Competency Profile for Lawyers and Quebec Notaries

As approved by the Council of the Federation of Law Societies of Canada

September 2012

NATIONAL ENTRY TO PRACTICE COMPETENCY PROFILE FOR LAWYERS AND QUEBEC NOTARIES

1. SUBSTANTIVE LEGAL KNOWLEDGE

All applicants are required to demonstrate a general understanding of the core legal concepts applicable to the practice of law in Canada in the following areas:

1.1. Canadian Legal System

(a) The constitutional law of Canada, including federalism and the distribution of legislative powers
(b) The Charter of Rights and Freedoms
(c) Human rights principles and the rights of Aboriginal peoples of Canada and in addition for candidates in Quebec, the Quebec Charter of Human Rights and Freedoms
(d) For candidates in Canadian common law jurisdictions, key principles of common law and equity. For candidates in Quebec, key principles of civil law
(e) Administration of the law in Canada, including the organization of the courts, tribunals, appeal processes and non-court dispute resolution systems
(f) Legislative and regulatory system
(g) Statutory construction and interpretation

1.2 Canadian Substantive Law

(a) Contracts and in addition for candidates in Quebec: obligations and sureties
(b) Property
(c) Torts
(d) Family, and in addition for lawyers and notaries in Quebec, the law of persons
(e) Corporate and commercial
(f) Wills and estates
(g) Criminal, except for Quebec notary candidates
(h) Administrative
(i) Evidence (for Quebec notaries, only as applicable to uncontested proceedings)
(j) Rules of procedure
    i. Civil
    ii. Criminal, except for Quebec notary candidates
    iii. Administrative
    iv. Alternative dispute resolution processes

(k) Procedures applicable to the following types of transactions:
    i. Commercial
    ii. Real Estate
    iii. Wills and estates

1.3 Ethics and Professionalism

(a) Principles of ethics and professionalism applying to the practice of law in Canada

1.4 Practice Management

(a) Client development
(b) Time management
(c) Task management

2. SKILLS

All applicants are required to demonstrate that they possess the following skills:

2.1 Ethics and Professionalism Skills

(a) Identifying ethical issues and problems
(b) Engaging in critical thinking about ethical issues
(c) Making informed and reasoned decisions about ethical issues

2.2 Oral and Written Communication Skills

(a) Communicating clearly in the English or French language, and in addition for candidates in Quebec, the ability to communicate in French as prescribed by law
(b) Identifying the purpose of the proposed communication
(c) Using correct grammar and spelling
(d) Using language suitable to the purpose of the communication and the intended audience
(e) Eliciting information from clients and others
(f) Explaining the law in language appropriate to audience
(g) Obtaining instructions
(h) Effectively formulating and presenting well-reasoned and accurate legal argument, analysis, advice or submissions
(i) Advocating in a manner appropriate to the legal and factual context. This item does not apply to applicants to the Chambre des notaires du Québec
(j) Negotiating in a manner appropriate to the legal and factual context

2.3 Analytical Skills

(a) Identifying client's goals and objectives
(b) Identifying relevant facts, and legal, ethical, and practical issues
(c) Analyzing the results of research
(d) Identifying due diligence required
(e) Applying the law to the legal and factual context
(f) Assessing possible courses of action and range of likely outcomes
(g) Identifying and evaluating the appropriateness of alternatives for resolution of the issue or dispute

2.4 Research Skills

(a) Conducting factual research
(b) Conducting legal research including:
    i. Identifying legal issues
    ii. Selecting relevant sources and methods
    iii. Using techniques of legal reasoning and argument, such as case analysis and statutory interpretation, to analyze legal issues
    iv. Identifying, interpreting and applying results of research
    v. Effectively communicating the results of research

(c) Conducting research on procedural issues

2.5 Client Relationship Management Skills

(a) Managing client relationships (including establishing and maintaining client confidence and managing client expectations throughout the retainer)
(b) Developing legal strategy and advising client in light of client's circumstances (for example, diversity, age, language, disability, socioeconomic, and cultural context)
(c) Advising client in light of client's circumstances (for example, diversity, age, language, disability, socioeconomic, and cultural context)
(d) Maintaining client communications
(e) Documenting advice given to and instructions received from client

2.6 Practice Management Skills

(a) Managing time (including prioritizing and managing tasks, tracking deadlines)
(b) Delegating tasks and providing appropriate supervision
(c) Managing files (including opening/closing files, checklist development, file storage/destruction)
(d) Managing finances (including trust accounting)
(e) Managing professional responsibilities (including ethical, licensing, and other professional responsibilities)

3. TASKS

All applicants are required to demonstrate that they can perform the following tasks:

3.1 GENERAL TASKS

3.1.1 Ethics, professionalism and practice management

(a) Identify and resolve ethical issues
(b) Use client conflict management systems
(c) Identify need for independent legal advice
(d) Use time tracking, limitation reminder, and bring forward systems
(e) Use systems for trust accounting
(f) Use systems for general accounting
(g) Use systems for client records and files
(h) Use practice checklists
(i) Use billing and collection systems

3.1.2 Establishing client relationship

(a) Interview potential client
(b) Confirm who is being represented
(c) Confirm client's identity pursuant to applicable standards/rules
(d) Assess client's capacity and fitness
(e) Confirm who will be providing instructions
(f) Draft retainer/engagement letter
(g) Document client consent/instructions
(h) Discuss and set fees and retainer

3.1.3 Conducting matter

(a) Gather facts through interviews, searches and other methods
(b) Identify applicable areas of law
(c) Seek additional expertise when necessary
(d) Conduct legal research and analysis
(e) Develop case strategy
(f) Identify mode of dispute resolution
(g) Conduct due diligence (including ensuring all relevant information has been obtained and reviewed)
(h) Draft opinion letter
(i) Draft demand letter
(j) Draft affidavit/statutory declaration
(k) Draft written submission
(l) Draft simple contract/agreement
(m) Draft legal accounting (for example, statement of adjustment, marital financial statement, estate division, bill of costs)
(n) Impose, accept, or refuse trust condition or undertaking
(o) Negotiate resolution of dispute or legal problem
(p) Draft release
(q) Review financial statements and income tax returns

3.1.4 Concluding Retainer

(a) Address outstanding client concerns
(b) Draft exit/reporting letter

3.2 ADJUDICATION/ALTERNATIVE DISPUTE RESOLUTION

3.2.1. All applicants, except for applicants for admission to the Chambre des notaires du Québec, are required to demonstrate that they can perform the following tasks:

(a) Draft pleading
(b) Draft court order
(c) Prepare or respond to motion or application (civil or criminal)
(d) Interview and brief witness
(e) Conduct simple hearing or trial before an adjudicative body

3.2.2 All applicants are required to demonstrate that they can perform the following tasks:

(a) Prepare list of documents or an affidavit of documents
(b) Request and produce/disclose documents
(c) Draft brief

3.3. TRANSACTIONAL/ADVISORY MATTERS

3.3.1 Applicants for admission to the Chambre des notaires du Québec are required to demonstrate that they can perform the following tasks:

(a) Conduct basic commercial transaction
(b) Conduct basic real property transaction
(c) Incorporate company
(d) Register partnership
(e) Draft corporate resolution
(f) Maintain corporate records
(g) Draft basic will
(h) Draft personal care directive
(i) Draft powers of attorney

The National Committee on Accreditation

Deborah Wolfe, P.Eng.
Managing Director
National Committee on Accreditation

Today's Presentation

- Introduction to the NCA
- History of the NCA
- How the NCA works

“The Federation of Law Societies of Canada is the national coordinating body of the 14 law societies which are mandated by provincial and territorial law to regulate Canada’s 100,000 lawyers and Quebec’s 4,000 notaries in the public interest.”

The mandate of the NCA is to assess the qualifications of individuals with legal education and professional experience obtained outside of Canada, or in a Canadian civil law program, who wish to be admitted to a common law bar in Canada.

The NCA's History

- Until 1977, each law society evaluated foreign trained applicants independently
- The Federation and the Deans created The Joint Committee on Accreditation in 1977
- Initially all common law, law societies used the JCA except Alberta
- LSA joined the NCA in 2001

The NCA's History, cont'd

- Assessments determined what credit, or advanced standing, should be given to the applicant's education
- Initially, all applicants were required to complete at least some law school

The NCA's History, cont'd

- In 1995, the LSUC commissioned a study on the NCA. The MacKenzie report, 1997, laid out 11 recommendations including that the LSUC continue to use the NCA.
- The Federation established a committee to consider the MacKenzie report. The Wallace Report was issued in 1998, and led to changes in the NCA's policies and operations.

The NCA's History, cont'd

- The Wallace recommendations, most implemented over the next decade, included:
  - Standards of assessment
  - Delegation
  - Assessment decisions
  - Competency based assessment
- The report also specified the composition of the NCA

The NCA's History, cont'd

- Discussions on NCA competencies continued, culminating in a major assessment policy change in 2009 and further revisions in 2011
- Over the same timeframe, the Federation developed new policies, the "National Requirement", for the approval of Canadian common law degree programs
- The NCA's next policy task is to bring the NCA's policies into compliance with the National Requirement

NCA Members - 2012

- **Graeme Mitchell, Q.C.**, Chair
- **Donna Greschner,** Dean, UVictoria
- **Mayo Moran**, Dean, UToronto
- **Malcolm Mercer,** McCarthy's, Toronto
- **Alan Treleaven,** Senior Staff, LSBC
- **Miriam Carey, PhD**, lay member, LSA

- Managing Director: **Deborah Wolfe, P.Eng.**

NCA Staff

- **Deborah Wolfe, P.Eng.,** Managing Director
- **Lynn Allenby**, Administrative Assistant
- **Aislinn Walsh**, Assessment Clerk
- **Christine Mayer**, Examination Manager
- **Fred Tang**, Examination Clerk

Statistics
July 1, 2009 - June 30, 2010

More than 1,000 applications
(42% increase from previous year)

392 Certificates issued
(51% increase from previous year)

More than 3,000 examinations
(6 countries, more than 25 different sites)

Statistics
July 1, 2010 - June 30, 2011

More than 1,000 applications
(3% increase from previous year)

466 Certificates issued
(19% increase from previous year)
(2,000 common law degrees granted annually in Canada)

Almost 4,000 examinations
(between 18 and 21 sites per session, New Delhi now a permanent site)

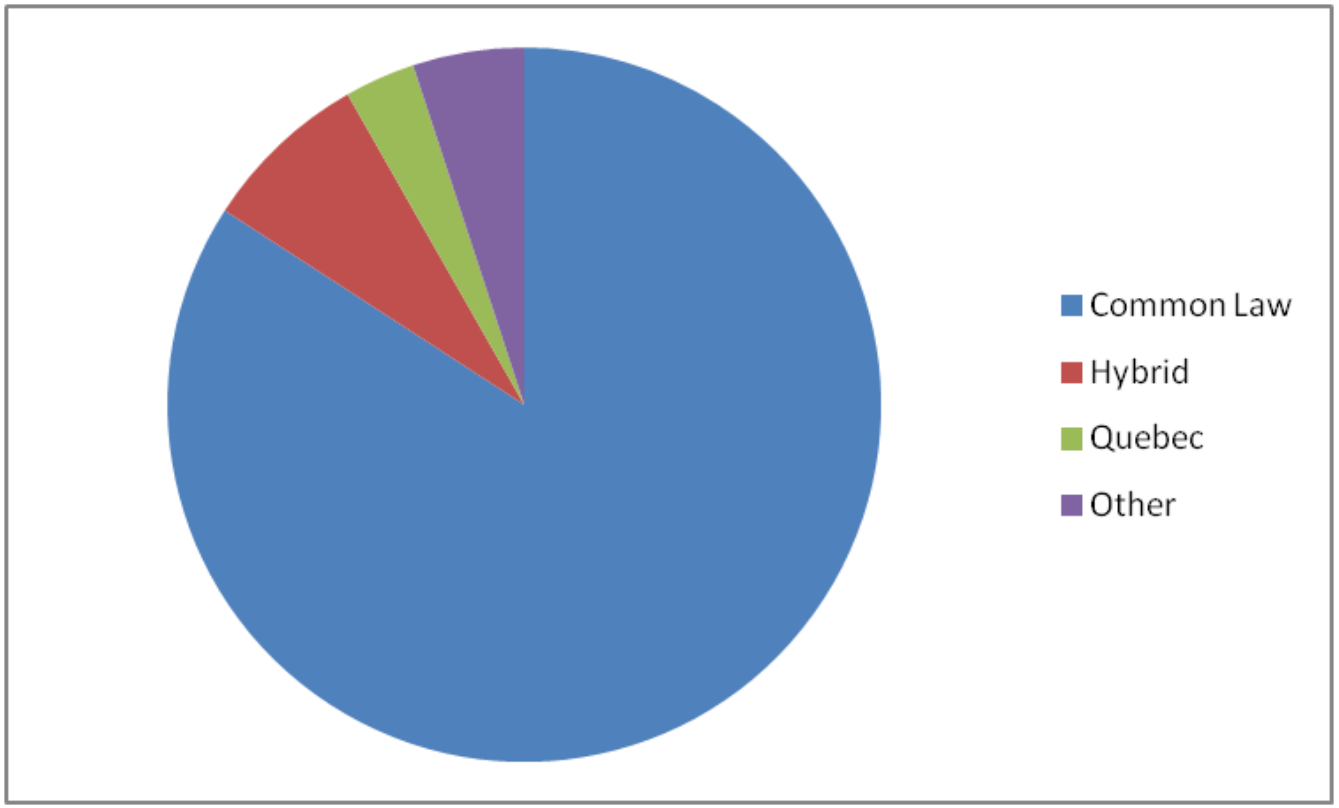
Statistics
July 1, 2011 - June 30, 2012

Almost 1,250 applications
(14% increase from previous year)

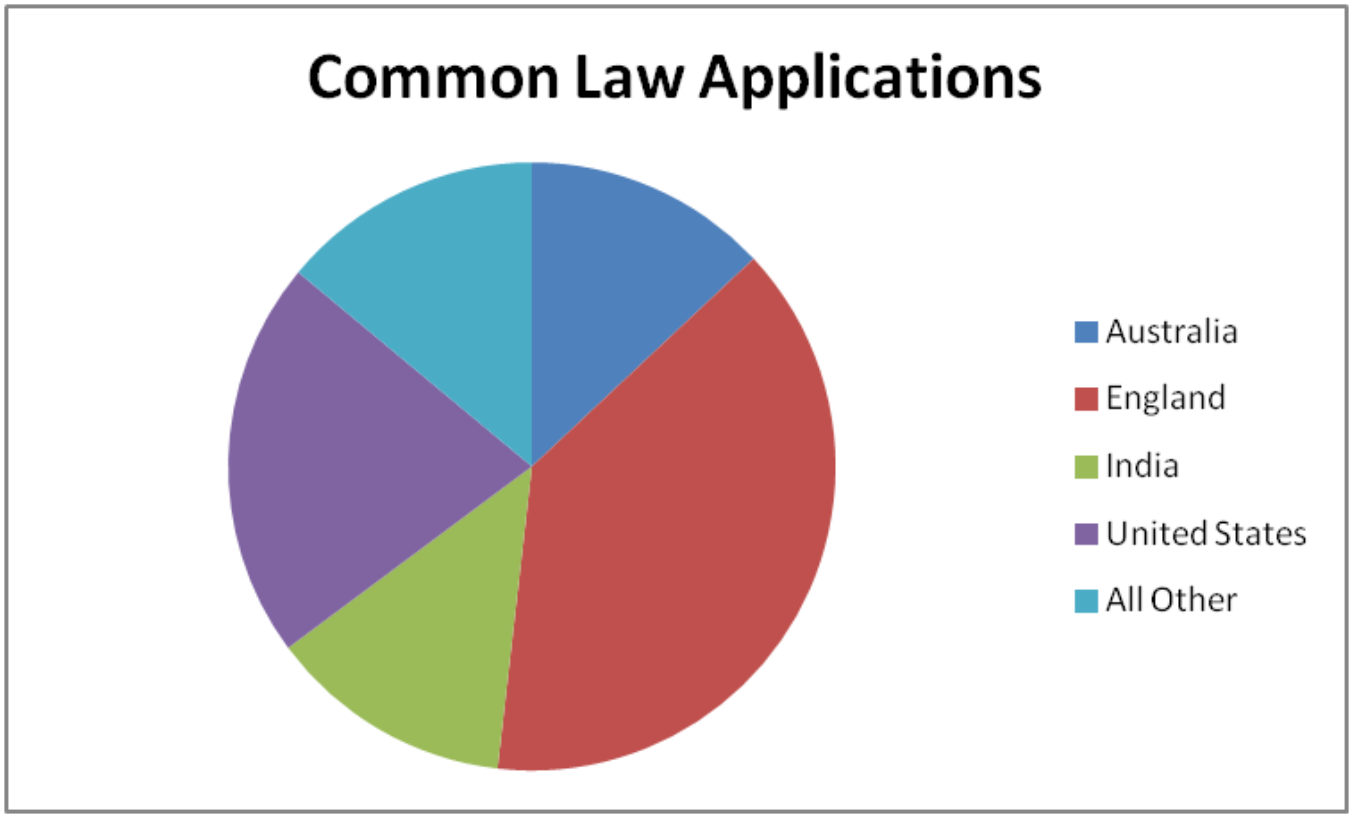
709 Certificates issued
(52% increase from previous year)
(2,000 common law degrees granted annually in Canada)

Over 5,000 examinations
(between 18 and 21 sites per session, New Delhi now a permanent site)

Legal Tradition of Applicants – 2011/2012



Country of Education of Common Law Applicants - 2011/2012



Composition of Applicants

- Almost 85% of applicants obtained their education in a common law jurisdiction
- 768 of the 1,249 applicants in 2011/2012 were educated in England, U.S. and Australia
- Many of the applicants from these three countries, but not all, are Canadians going overseas for their law degrees

Steps in the NCA Process:

1. Application
2. Assessment
3. Completion of Requirements
4. Issue Certificate of Qualification
5. Certificate accepted by law societies in common law Canada

Step 1 - Application

- All forms and instructions posted on website (www.flsc.ca)
- Transcripts and Certificates of Membership must be sent directly from issuing institution
- Applicants may apply from anywhere in the world, and do not need to be Canadian citizens or permanent residents
- Cost: $450
- Timeline: Assessment completed within three months of receipt of all material

Step 2 - Assessment

- Depending on qualifications, applicants are required to complete examinations and/or law school courses, or refused any recognition
- Criteria for assessment:
  - Legal tradition (common law, civil law, mixed jurisdiction)
  - Mode of study (in class, distance)
  - Law school recognition
  - Courses taken as compared to the NCA core competencies, academic performance
  - Licensure and professional experience

Sample Assessment - 1

- Common Law Applicant – England
  - Qualifying Law Degree approved by the Solicitors Regulation Authority?
  - Three year degree or two year degree (graduate entry or senior status)?
  - Classification of Degree (First class, etc.)?
  - Courses taken from the NCA core competency list?
  - Academic performance on core courses?
  - Attended Bar School? Licensed? Professional experience in a common law jurisdiction?
  - Typical assessment is 5-7 exams unless licensed then normally 4 exams

Sample Assessment - 2

- Common Law Applicant – Distance Education
  - Degree approved by relevant legal authority? If not, no recognition.
  - Classification of Degree (First class, etc.)? If third class or pass class in England, no recognition.
  - Attended Bar School? Licensed? If Bar School was in class, then do not treat as distance ed
  - Professional experience in a common law jurisdiction?
  - LL.M.? If LL.M. was in class, then do not treat as distance ed
  - Typical assessment is 6 exams plus one year in law school

Sample Assessment - 3

- Common Law Applicant – U.S.
  - ABA approved degree?
  - Courses taken from the NCA core competency list?
  - Academic performance on core courses?
  - Completed Bar Exam? Licensed? Professional experience in a common law jurisdiction?
  - Typical assessment is 4-6 exams unless licensed then normally 4 exams

Sample Assessment - 4

- Common Law Applicant – Bond University
  - GPA?
  - Courses taken from the NCA core competency list?
  - NCA mandatory Canadian courses taken?
  - Academic performance on core and mandatory courses?
  - Attended Bar School? Licensed? Professional experience in a common law jurisdiction?
  - Typical assessment is 0-4 exams
  - Some applicants with poor to very poor academic performance: 5-10 exams (before implementation of new GPA policy)

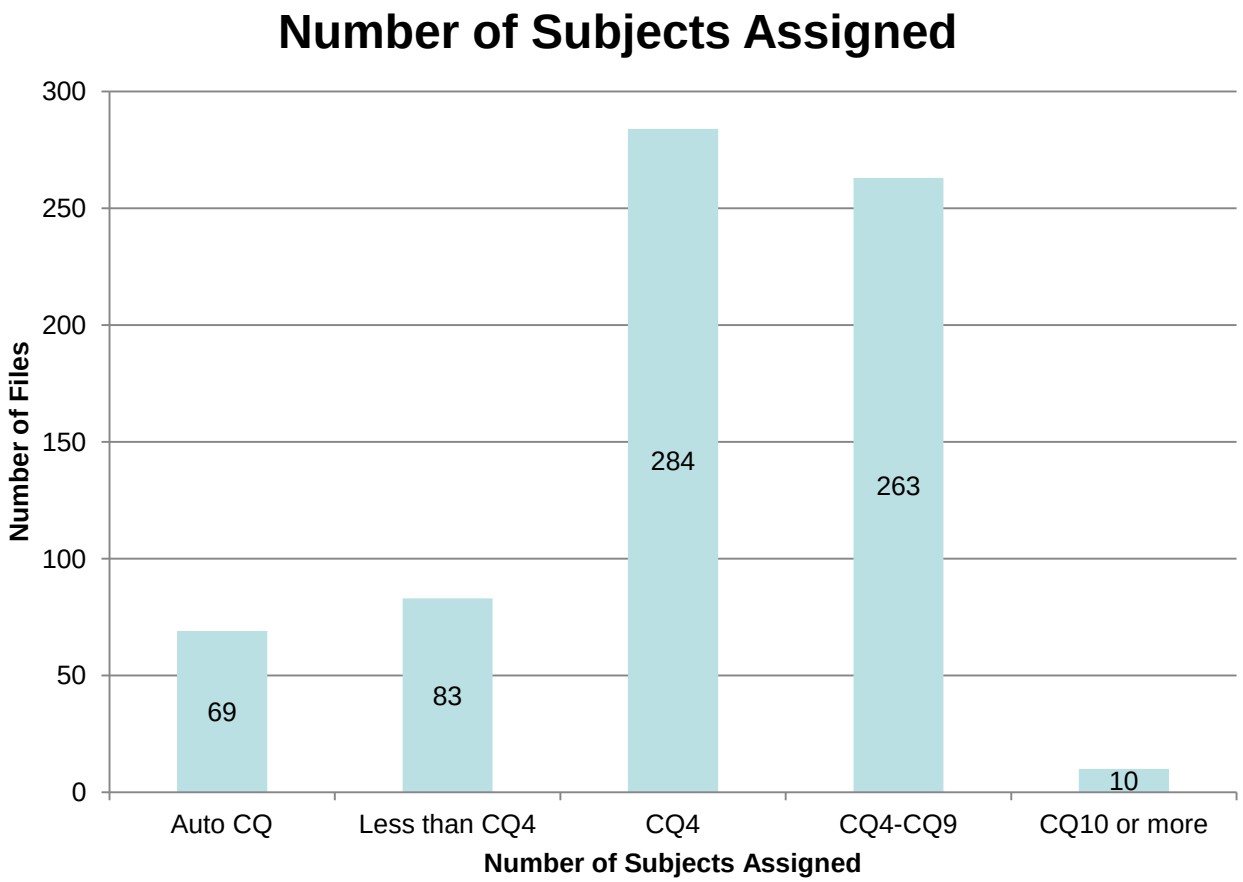
Sample Assessment - 5

- Hybrid Applicant (mixed legal tradition with some common law content)
  - Degree approved by relevant authority?
  - Classification of Degree (First class, etc.)?
  - Contracts, Torts, Property and Evidence assigned unless taught as common law
  - Corporate Law and Professional Responsibility taken? Academic Performance?
  - Attended Bar School? Licensed?
  - Education, licensure and/or professional work experience in a common law jurisdiction?
  - Typical assessment is 8-10 exams

Sample Assessment - 6

- Canadian Civil Law Applicant
  - LL.L. or BCL degree
  - Licensed in Quebec or completed Professional Responsibility course?
  - Typical assessment is 7 exams
  - Completed a DESS at Université de Montréal or Université de Sherbrooke? Then, issue CQ.
  - Practised and/or licensed in a common law jurisdiction? Assess on case by case basis.

Certificates Issued - 2011/2012



Step 3 – Completion of Requirements

- NCA examinations:
  - ✓ Four times a year
  - ✓ Four standard locations, others arranged on request
  - ✓ New standard location in New Delhi
  - ✓ Cost: $350/exam (as of Jan. 2013)
- Law School:
  - ✓ Applicants responsible for admission
  - ✓ Over 85% of applicants given the option to do examinations only

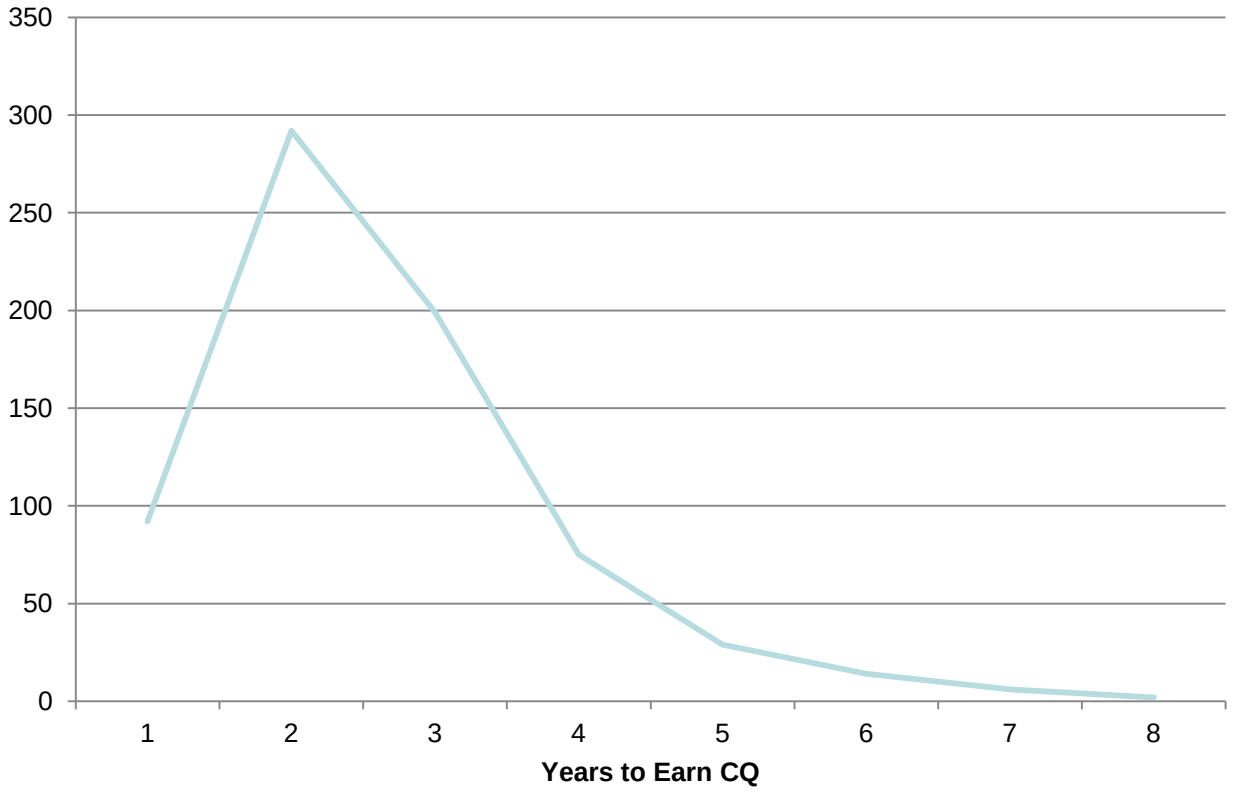
Canadian Law School Initiatives

- University of Toronto – Internationally Trained Lawyers Program
- Osgoode Hall Law School – tutoring program
- University of British Columbia – Common Law LL.M.

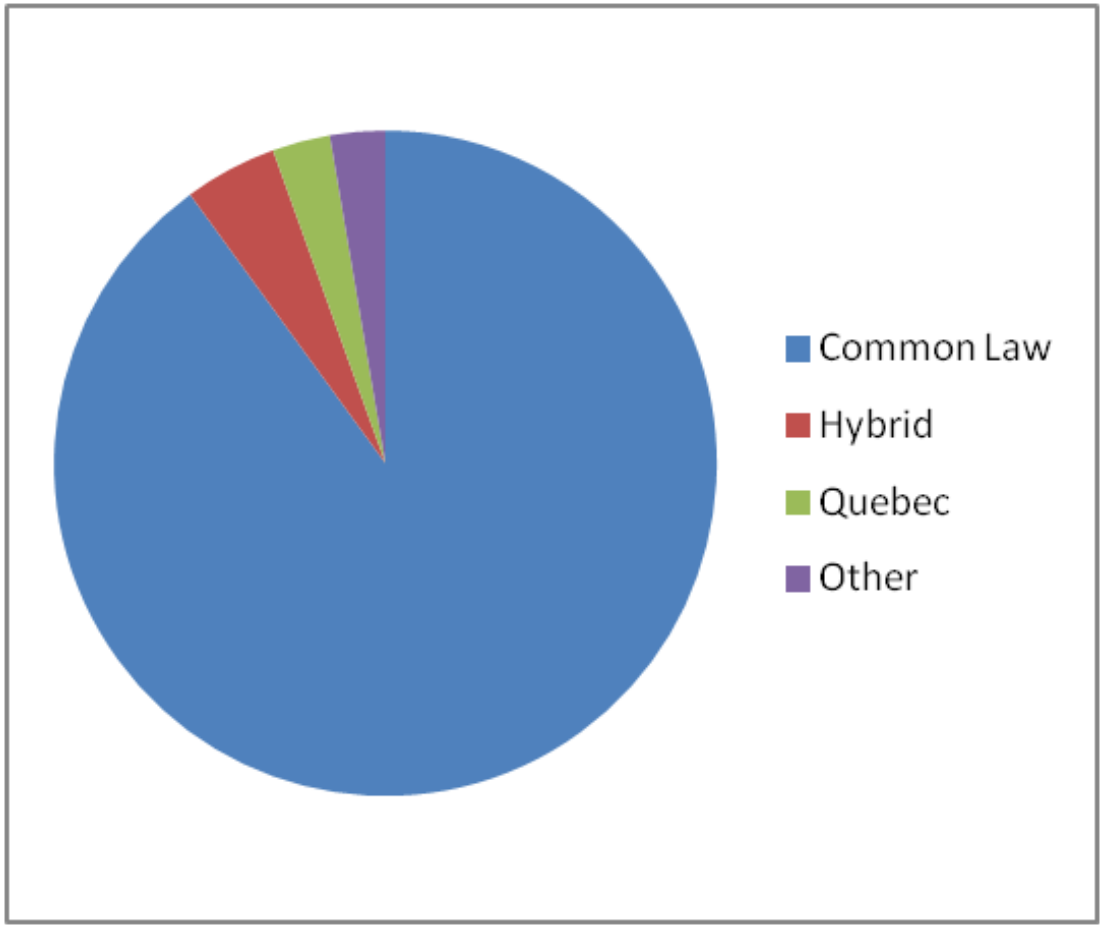
Steps 4 & 5

- Once all requirements are completed, the applicant receives a Certificate of Qualification
- Certificate accepted by common law, law societies as equivalent to graduation from a Canadian law school
- Certificants then complete the licensing process (bar admissions)
- Some qualify for article abridgement

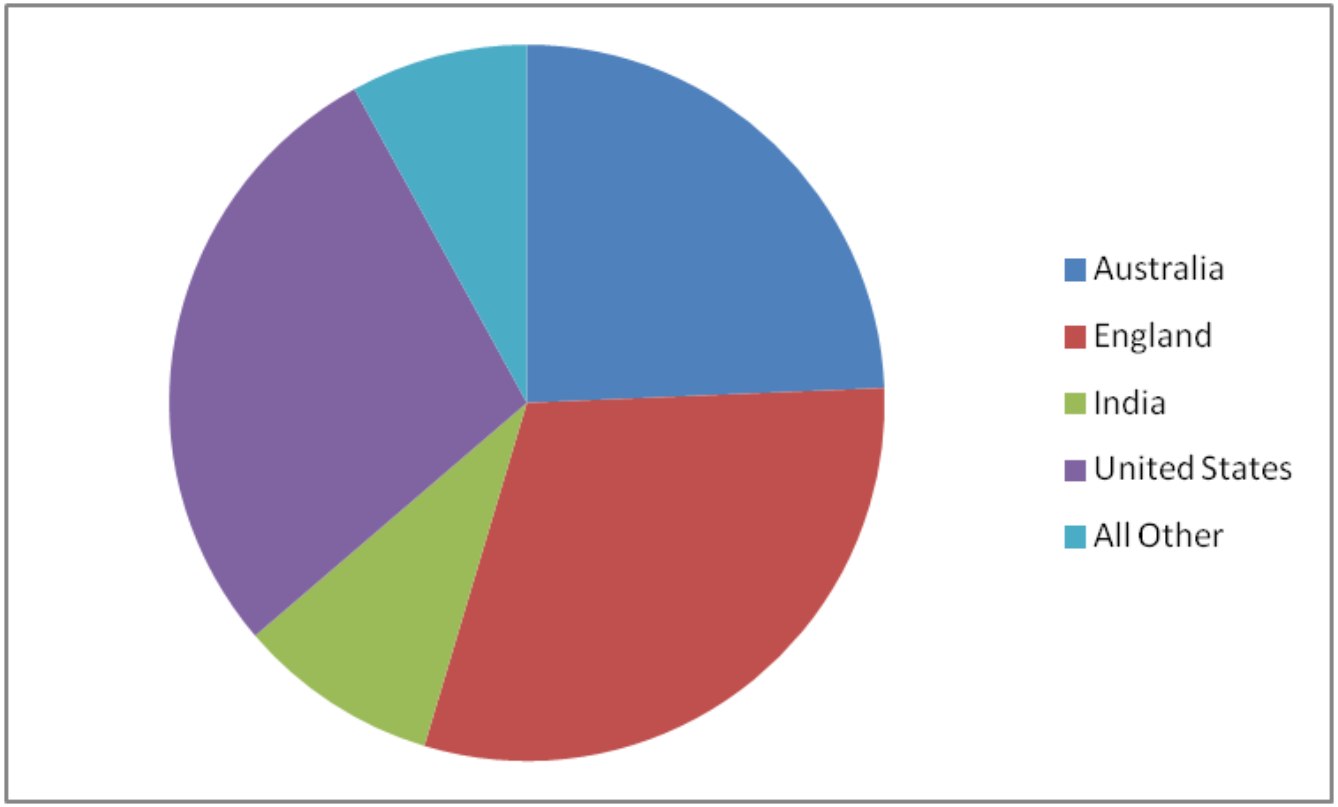
Number of Certificates issued by Years to Complete Requirements – 2011/2012



Certificates issued by Legal Tradition – 2011/2012



Country of Education of Common Law Certificants – 2011/2012



Appeals

- The NCA approved an appeal policy in August 2011, updated in July 2012
- Applicants may appeal their assessments within the bounds of the approved policy
- Discussions on appeal process be held at each NCA meeting

Communications

- Website (information available on demand, all policies posted)
- RSS feed
- Phone calls, emails
- Twitter?
- Facebook?

Internal Factors

- Federation's new 'National Requirement' for content of a Canadian common law degree will need to be incorporated into NCA policies
- Legal education and qualification processes in other similar countries (U.S., England, Australia) monitored for changes

External Influences

- Provincial credentialing agencies developed “General Guiding Principles for Good Practice in the Assessment of Foreign Credentials”
- UNESCO’s Lisbon Convention on the recognition of higher education
- Fairness Commissioners

Federation of Law Societies of Canada

www.flsc.ca

National Committee on Accreditation

http://www.flsc.ca/en/nca/

613-236-1700

nca@flsc.ca

THE HONOURABLE THOMAS J. CRABTREE
CHIEF JUDGE

THE PROVINCIAL COURT
OF BRITISH COLUMBIA

SUITE 602, 700 W. GEORGIA STREET
BOX 10287 PACIFIC CENTRE
VANCOUVER, B.C. V7Y 1E8
FAX (604) 660-1108
(604) 660-2864

September 24, 2012

Bruce A. LeRose, Q.C.
President
The Law Society of British Columbia
845 Cambie Street
Vancouver, BC V6B 4Z9

Dear Mr. LeRose:

Re: Pilot Project – Paralegals in Provincial Court Family Law Proceedings

I am writing to advise that a decision has been made by the Provincial Court of British Columbia to endorse the proposed pilot project for paralegals to have a limited right of audience on certain matters in family law proceedings.

I understand that the Law Society has some further work to do before the pilot project can be launched. As well, the evaluation process has yet to be finalized. Once this further work has been completed, the Court is committed to undertaking the pilot project for a period of two years in the Cariboo Northeast District and in Surrey.

The members of the Law Society's Paralegal Pilot Project Working Group are to be commended for their hard work to date in moving this initiative forward.

Yours truly,

Thomas J. Crabtree
Chief Judge
TJC/pag

The Law Society
of British Columbia

September 26, 2012

The Honourable Thomas Crabtree
Chief Judge, Provincial Court of BC
PO Box 10287, Pacific Centre
Vancouver, BC V7Y 1E8

Bruce A. LeRose, QC
President

Dear Chief Judge Crabtree:

Re: Pilot Project – Paralegals in Provincial Court Family Law Proceedings

I am in receipt of your letter of September 24, 2012 in which you endorse the proposed pilot project allowing paralegals to have a limited right of audience on certain matters in family law proceedings. Personally, and on behalf of my fellow Benchers and the staff at the Law Society, I wish to thank the Court for its willingness to participate in this important pilot project.

We are in the process of setting up a meeting with Associate Chief Judge Phillips and her working group to discuss and hopefully finalize the pilot project. We are exploring a range of dates in mid-October. We are also developing the model by which the Law Society will seek to evaluate the pilots in both courts. The plan is to discuss the evaluation model at the Executive Committee meeting on October 16th, at which time I hope the method will be endorsed. We would then share the proposed model with both courts to see if the approach is acceptable.

The Law Society will launch a communications plan in the fall. This would include posting a description of both pilot projects on our website so lawyers, paralegals and members of the public will be able to see in clear terms what the project entails. Once web-content is live we will advise the courts in the event you wish to create links to that resource.

845 Cambie Street, Vancouver, BC, Canada V6B 4Z9
t 604-669-2533 | f 604-669-5232
BC toll-free 1.800.903.5300 | TTY 604.443.5700
lawsociety.bc.ca

We are very pleased that the Court has endorsed this project, and I am aware and appreciate your own efforts at keeping this discussion alive and moving forward in a constructive fashion. If there is any addition information the Court requires or other ways we can be of assistance as we move towards the January 1, 2013 launch date please do not hesitate to contact me.

Yours truly,

Bruce LeRose, QC
President

c. Timothy McGee, CEO

The Law Society of British Columbia

Memo

To: The Benchers
From: Michael Lucas for the Rule of Law and Lawyer Independence Advisory Committee
Date: October 10, 2012
Subject: Alternative Business Structures

At the October 21, 2011 Benchers meeting, the Benchers adopted and resolved to publish the Independence and Self Governance Advisory Committee's report entitled *Alternative Business Structures in the Legal Profession: Preliminary Discussion and Recommendations*. A commitment was also made that the Law Society monitor developments in ownership and operational structures of law firms in other jurisdictions.

The Committee has continued to monitor the subject, but has not yet had an opportunity to consider the information that has been gathered for the purposes of analyzing the issues.

The following points are noted and documents are attached.

1. British Columbia

(a) The Report of the Independence and Self Governance Advisory entitled *Alternative Business Structures in the Legal Profession: Preliminary Discussion and Recommendations* dated October 21, 2011.

2. USA

The American Bar Association does not appear to be endorsing alternative business structures:

(a) ABA issues paper concerning Alternative Business Structures, April 5, 2011;

(b) Comments of the New York State Bar Association Committee on Standards of the Attorney Conduct;

(c) New York State Bar Association International Section Task Force on Non-Lawyer Ownership – Interim Report;

(d) Comments of the U.S. Chamber Institute for Legal Reform to the ABA Issues Paper concerning Alternate Business Structures, June 1, 2011;

(e) ABA Commission on Ethics 20/20: Initial Draft Proposal for Comment on Choice of Law – Alternative Law Practice Structures, December 2, 2011;

(f) Ethics 20/20 Commission Suspends Campaign to Draft a Proposal on Nonlawyer Ownership of Law Firms, www.abajournal.com, posted April 16, 2012;

(g) IBA 2012: former president of American bar dismisses 'risky' ABS model, the Law Gazette, October 4, 2012.

3. Germany

The German Federal Bar appears to adopt the position taken by the American Bar Association:

(a) Position of the Bundesreshtsanwaltskammer (The German Federal Bar) on the Issues Papers of the ABA Commission of Ethics 20/20 concerning Multijurisdictional Practice of Law and Alternative Business Structures.

4. England and Wales

The Solicitors Regulation Authority in England and Wales has approved the creation of a number of Alternative Business Structures. The entire list is set out in Item (c) below. The Law Society of England and Wales continues to be a relatively enthusiastic supporter of the concept, and Solicitors Regulation Authority (which licenses ABSs) speaks favourably of their processes. The most notable recent development in the licensing of ABSs in England and Wales is the fact that the Co-op has recently been granted a license. The Co-op is the first "big brand" to get an ABS license, and will provide a full range of family law services, including divorce, child protection, mediation and financial issues at fixed fees. The Co-op advertises its entry into the legal services market through an ABS as being "vital" in order to make it as easy as possible for people to gain access to justice. The Co-op believes that their model will appeal to prospective clients who are currently reluctant to access family law services.

(a) The Law Society's approach to Alternative Business Structures (ABS) (this document appears on the American Bar Association website, but appears to be from the Law Society of England and Wales);

(b) What the authorisation process looks like and what you can expect: Solicitors Regulation Authority, June 29, 2012;

(c) Register of licensed bodies (ABS): Solicitors Regulation Authority;

(d) Recent developments in England and Wales and their implications for the future: Conference on the Future of the Legal Profession and the Bar, May 16, 2012.

The Law Society of British Columbia

Alternative Business Structures in the Legal Profession: Preliminary Discussion and Recommendations

For: **The Benchers**
Date: **October 21, 2011**

Purpose of Report: **Information, Discussion and Approval of Recommendations**

Prepared by: **The Independence and Self-Governance Advisory Committee**

Michael Lucas
Policy and Legal Services Department
604-443-5777

Alternative Business Structures in the Legal Profession: Preliminary Discussion and Recommendations

I. Executive Summary

Alternative Business Structures or ABSs refer to any form of business model through which legal services are delivered that is different from the standard sole proprietorship or partnership model. They include models of outside ownership and delivery of legal services by third-party providers. Such models are already available to some extent in Australia. They have recently been permitted in England, subject to regulatory structures coming into place which are expected soon.

Proponents of ABSs argue that they will lay the foundation for the creation of business models that will increase access to legal services. They will be more consumer-oriented and market-driven to meet consumer needs. Opponents caution against the adverse effect they say ABSs will have on the core values of the legal profession, including lawyer independence, client confidentiality, and the duties owed by lawyers to a client – particularly the duty to avoid conflicts of interest.

The Independence and Self-Governance Committee, at the request of the Benchers, has examined the debate surrounding ABSs and in this Report outlines its views on

- the effect ABSs may have on the legal profession in British Columbia,
- whether ABSs will really benefit the delivery of and access to legal services, and
- whether ABSs will negatively affect self-regulation and the public right to independent lawyers.

The Committee concludes that, while it is skeptical that ABSs will improve access to and delivery of legal services, the possible benefits are valuable and that, in order to discharge its mandate, the Law Society would need to consider them. Ultimately, the *form* of the structure through which legal services are offered is less important than it is to ensure that the services that are offered are properly regulated. The Committee concludes that the alleged harm presented by ABSs could be addressed through appropriate regulations, and sets out what matters would need to be addressed through regulation should ABSs be permitted.

It is important, however, to be able to demonstrate that ABSs will improve access to and delivery of legal services in order that the users of such services will benefit. The Committee is concerned about the lack of empirical evidence given by proponents of ABSs, and believes that if the only demonstrable effect of ABSs was to enrich the legal profession or those who invested in it, the image of the profession and the Law Society would be tarnished. Consequently, some considerable caution needs to be exercised to

ensure that there is a public value in ABSs (such as improving access to legal services) and that valuable public protections that currently exist (such as client confidentiality, an absence of conflicts of interest, and the public right to an independent lawyer) are not lost.

With this in mind, the Committee has concluded that some outside ownership involvement in law firms could be considered, provided it is properly regulated and that lawyers remain in control of the provision of the legal services offered. On the other hand, the Committee is not convinced that the public sale, through securities markets for example, of shares in a law firm is warranted, as it is not convinced that there are benefits to users of legal services that outweigh identified risks.

Therefore, the Committee recommends that the Law Society give serious consideration to ABSs. However, before more work is done, the Committee recommends waiting to see if the case for improving access to legal services through ABSs can be more clearly demonstrated. The Law Society should await the outcome of the debate currently underway through the American Bar Association, should follow what happens in England and Wales once ABSs come into being, and should continue to monitor the situation in Australia. In many ways, England could provide some direct evidence about whether access to legal services can be improved through ABSs as well as giving an indication about whether they can be effectively regulated.

If there is an appetite to consider permitting properly regulated ABSs in British Columbia, the Committee recommends a wider consultation within the legal profession (including users of legal services) and the business community.

II. Introduction and Purpose of Report

> *Business development strategies have to adapt to legal principles rather than the other way around.*
> *R v. Neil,* [2002] 2 S.C.R. 631 per Binnie J.

Through its history as a profession, law has been practised mostly by sole practitioners or through a partnership model. Indeed, even now, lawyers in private practice in British Columbia generally practise law this way. Statistics in British Columbia show 75% of all law firms in the Province are sole practitioners and another 19% of firms comprise two to five lawyers. It has only been relatively recently that large partnerships have become a more common model of business structure for lawyers, but even so, in British Columbia firms of more than 16 lawyers comprise just slightly over 1% of the total number of law firms, although 30% of the lawyers who provide legal services to the public practice in such firms. National firms are an even more recent model, but these are still based on the partnership model.

Lawyers in British Columbia are not, however, limited to providing legal services either by themselves or through the partnership model with other lawyers. Offering legal services through a "law corporation" has been available since the late 1980s, and recently

lawyers have been able to provide legal services through a "multi-disciplinary partnership" where other professionals can become partners with lawyers. In each instance, the Benchers engaged in a considerable amount of policy debate about the form of the business structure that would be allowed, and how it would be regulated to protect the public interest. In each case, decisions were made by which lawyers were required to remain in control of the entity, and the entity was either only able to provide legal services (law corporations) or provide services ancillary to the provision of legal services (multi-disciplinary partnerships).

"Alternative Business Structures" (commonly referred to as "ABS") is a term that has been used to denote the developments in other jurisdictions toward permitting the delivery of legal services through business entities that may quite starkly contrast with the current delivery model in British Columbia. ABSs contemplate the "outside ownership" (that is, ownership by people who are not lawyers) of businesses that offer legal services. Two of the most commonly discussed examples of ABSs are:

- Incorporated law practices in which shares are offered publicly and where the shares issued may trade on a public securities exchange;

- Third party providers of legal services, often dubbed "Tesco-law" after the name of a chain of supermarkets in England. Through this model, a non-lawyer business could hire lawyers to provide legal services to the public.

Proponents of ABSs argue that they will lay the foundation for the creation of business models that will increase access to legal services. They will be more consumer-oriented and market-driven to meet consumer needs. Opponents caution against the adverse effect they say ABSs will have on the core values of the legal profession, including lawyer independence, client confidentiality, and the duties owed by lawyers to a client – particularly the duty to avoid conflicts of interest. These issues will be dealt with more fully further on in this Report.

As part of its monitoring function, the Independence and Self-Governance Committee has been paying close attention to the development of and the debate surrounding ABSs, as it had identified concerns that ABSs could adversely affect lawyer independence or self-governance.

The Committee has noted:

- Australian jurisdictions permit "Incorporated Legal Practices" ("ILP") which may provide legal and other services and in which lawyers and other service providers may practice together. External investment in these ILPs is allowed, and the ILP may be listed on the Australian Stock Exchange;

- In England, ABSs are now permitted under the *Legal Services Act 2007* and it is expected such structures will begin to exist early in 2012 (after an initial start date of October 2011 was moved back);

- European Bars appear to have reservations about ABSs;

- In the United States, the American Bar Association's "Ethics 20/20" initiative has recently conducted a consultation on this subject, which was the subject of debate at the Association's 2011 meeting in Toronto, at which members gave some direction on the subject. A further proposal is being drafted.

Comments about ABSs in the legal media from major Commonwealth jurisdictions has varied. Some refer to the move to permit ABSs in Australia and England as the "de-regulation of the legal profession" and liken it to the "big bang" in the de-regulation of the financial services industry beginning in the mid-1980s. Proponents advocate that ABSs will mark a watershed event in the way legal services are delivered, allowing consumers to shop for legal services in a way they never have before. However, fears over the consequences of the financial services industry's big bang (on which many commentators blame much of the 2008 recession) give critics an opportunity to call for caution. Others call the move to permit ABSs a "big whimper" and expect it will not have much effect on the profession at all.

Whichever is true, the Committee recognizes that the legal profession in British Columbia and Canada, as well as other potentially interested parties (including, perhaps the Competition Bureau), are or will be following the debate concerning and development of ABSs. The Committee therefore recommended that, as part of the Law Society's Strategic Plan, it would be prudent for the Law Society to begin an examination of the benefits and detriments of ABSs in order to begin to develop a position concerning whether they should be permitted in British Columbia, and if so, how that might be accomplished. In this sense, the Committee recommends the start of a policy debate, much the same way as was the case when law corporations and MDPs were considered by the Benchers.

The Benchers adopted the Committee's recommendation as part of the Law Society's Strategic Plan, and this Report is prepared to begin the process.

III. Alternative Business Structures

What are ABSs and why are they at issue?

ABS is a generic reference to any form of business model through which legal services are delivered that is different from the standard sole proprietorship or partnership model. Law corporations or MDPs in British Columbia are therefore really ABSs, although law corporations in this province are quite tightly regulated with the result that the model of delivery usually resembles either a sole proprietorship or partnership. It remains to be seen how "alternate" a business structure an MDP is, as to date there has been only one application made to the Law Society to form an MDP.

There are other ways to structure a business model through which legal services could be provided beyond the partnership and sole proprietorship model. Historically, however, such structures have generally not been possible due to prohibitions against fee-splitting with non-lawyers, which are meant to avoid the risk that a lawyer's independence might be compromised by a non-lawyer's interest in the fee.[1] Fee splitting prohibitions also ensure that third party non-lawyers do not have a financial interest in directing the lawyer's conduct of a file or retainer.

Over the past decade in particular, likely in part as a result of various factors such as globalization, the expansion of the size of some international firms, mergers within the legal profession, financial needs for law firm expansion, and investments in information systems and technology, some legal service providers have needed to access greater quantities of capital. For example, Clifford Chance raised $150 million (US) in 2002 through the private debt market in order to finance its move to new offices and related infrastructure needs.[2]

Australian states began reforms in the 1990s. New South Wales permitted a limited form of MDP in 1994 that permitted partners in a law firm who were not members of the legal profession, but required legal practitioners to retain at least 51% of the net partnership income in order to ensure that the MDP maintained proper ethical practices.[3] Later, competition authority pressure seeking to enhance consumer interests lead to the creation of MDPs and Incorporated Legal Practices ("ILPs"). MDPs permit Australian lawyers and non-lawyers to provide legal services and other services. ILPs also allow Australian lawyers to provide legal services with other service providers who may or may not be lawyers. Moreover, ILPs themselves are not required to have a legal practice certificate and may have external investors. They may also be listed on the Australian Stock Exchange.[4]

In April 2007, Slater & Gordon (a firm based in Melbourne) issued a Prospectus for the sale of 35 million shares at A$1 per share, becoming the first firm to do so. The offer was fully subscribed. The "Use of Funds" as stated in the Prospectus was:

- A$17.3 million represented by the sell down of shares by Vendor shareholders; to be paid to the Vendor shareholders and

- A$17.7 million represented by an issue of new shares to be applied in the short term to meet the costs of the offer (A$2.3 million) and to reduce the amount drawn down by the Company under its debt facilities, and thereafter to draw down debt to fund the Company's growth strategy, including the investigation of the

[1] Law Society of Upper Canada, Report to Convocation by the Professional Regulation Committee, January 27, 2005, para 74

[2] *Ibid*, para 57

[3] Issues Paper Concerning Alternate Business Structures, prepared by ABA Commission on Ethics 20/20 Working Group on Alternate Business Structure, April 5, 2011, page 8.

[4] For a general description of MDPs and ILPs in Australia, see pages 8-10 of the ABA Issues Paper Concerning Alternate Business Structures.

> potential acquisition of law firms, advertising, project litigation and additional working capital.

But moreover, developments in England have really brought a focus to the debate on ABSs. These arise from the focus on "consumer interests" in the legal market place, and the lack of alternatives that consumers have when "purchasing" legal services. The English government released a report in 2003 titled "Competition and regulation in the legal services market" that supported ABSs provided they were appropriately regulated to protect both public interests and the core values of the legal professions[5].

Interestingly, the report on the review of the Regulatory Framework for Legal Services in England and Wales (the "Clementi Report"), released in December 2004, discussed the benefits consumers might realize from ABSs, but it was focused on partnerships between legal professionals ("LDPs") and on MDPs. It made no recommendations, nor did it really address, ABSs beyond the LDP or MDP models. Despite this, the English government in its White Paper that preceded the *Legal Services Act 2007* (UK) indicated that it was prepared to move beyond the recommendations in the Clementi Report to provide for the creation of a much broader range of ABS. The *Legal Services Act* created a framework allowing for "full ABSs" – including models of outside ownership of the entity providing the legal services, subject to regulation.

In the Explanatory Notes to part 5 of the *Legal Services Act 2007* (the Part that deals with ABSs), the following background is noted:

> 180. Historically, there have been a number of statutory restrictions on the type of business structures through which legal services may be provided. Some existing regulators have also prohibited lawyers from entering into partnership with non-lawyers. Certain regulators have also placed restrictions on the ways in which non-lawyers can participate in the management of firms. In other cases, regulators do not have the powers they need to regulate a more diverse range of business structures.
>
> 181.In March 2001, the [Office of Fair Trading (OFT)] identified a number of rules of the legal profession that were potentially unduly restrictive, and that might have negative implications for consumers. The OFT recommended that rules governing the legal professions should be fully subject to competition law and that unjustified restrictions on competition should be removed.
>
> 182.Following the 2004 Clementi Review, in 2005 the Government published a White Paper, *The Future of Legal Services: Putting Consumers First*. It proposed ABS, which would allow different types of lawyers and non-lawyers to work together in an ABS firm

[5] "The Government supports in principle enabling legal services to be provided through alternative business structures. Such new structures would provide an opportunity for increased investment and therefore enhanced development and innovation, for improved efficiency and lower costs...." Competition and regulation in the legal services market, CP(R2) 07/02 DCA, July 2003

> or company, and/or the possibility of non-lawyer ownership and investment. It identified potential benefits for both consumers and legal services providers.[6] (footnotes omitted)

III. The Benefits of and Concerns About ABSs

The Committee has reviewed a number of articles, reports, press releases of various organizations, "backgrounders" to legislation, and media commentary about ABSs in an effort to try to outline succinctly what benefits may be realized through ABSs as well as what legitimate concerns ABSs may create. Its considerations follow.

As a general comment, however, the Committee cautions that there is little, if any, empirical evidence that any of the stated benefits can actually be realized through ABS structures, or for that matter that ABSs would create undue harm to the provision of legal services or professionalism within the legal profession. When the *Legal Services Act 2007* was debated in the House of Lords, an amendment was passed to require the Lord Chancellor to commission an independent report on ABSs before they were allowed. The report was also to have analysed threats to the independence of lawyers. This recommendation was not, however, passed by the House of Commons when the Bill was eventually voted on and thus a useful opportunity for an independent discussion and analysis of ABSs was lost.

(a) Benefits of ABSs

Proponents of ABSs say that they will benefit the interests of consumers of legal services by providing for increased competition between forms of legal service providers through the opening-up of business models that will permit non-lawyer participation. This, it has been argued, will permit innovations that will improve the efficient and cost-effective provision of legal services. Access to public capital will improve a law practice's ability to enhance its technological services to improve the delivery of legal services. A liberalized market will improve access to justice and protect and promote consumer interests while promoting competition. An independent, strong diverse and effective legal profession will be encouraged in the result.[7]

Further, proponents suggest that being able to offer legal services through third-party providers will benefit consumers by making legal services easier, and less intimidating, to access. For example in a 2010 Consultation Paper, the Legal Services Board (England and Wales) states[8]:

> ABSs…remove many of the barriers in relation to non-lawyers owning organisations providing legal services and provide new opportunities for

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[6] *Legal Services Act 2007* Explanatory Notes. http://www.legislation.gov.uk/ukpga/2007/29/notes/division/7/5/1

[7] See *Wider Access, Better Value, Strong Protection*: Discussion Paper on developing a Regulatory regime for Alternative Business Structures. Legal Services Board, 2009. Para 4.1

[8] *Alternative Business Structures: Approaches to Licensing*, Consultation Paper on Draft Guidance to Licensing Authorities on the Content of Licensing Rules, 2010 at para 3.

innovation, wider access to justice and the reshaping of legal services in the consumer interest.

The Ministry of Justice (England and Wales) created a "Legal Services Reform Fact Sheet". It describes the "main benefits of ABSs", which include:

- ABSs will increase access to finance: at present, providers can face constraints on the amount of equity they can raise;

- New providers in the marketplace should lead to innovation and price reductions, which should result in more people being able to access legal services.

The Explanatory Notes to the *Legal Profession Act 2007* stated potential benefits of ABSs as follows:

> Potential benefits for consumers:
>
> - more choice: consumers will have greater flexibility in deciding from where to obtain legal and some non-legal services;
> - reduced prices: consumers should be able to purchase some legal services more cheaply. This should arise where ABS firms realise savings through economies of scale and reduce transaction costs where different types of legal professionals are part of the same firm;
> - better access to justice: ABS firms might find it easier to provide services in rural areas or to less mobile consumers;
> - improved consumer service: consumers may benefit from a better service where ABS firms are able to access external finance and specialist non-legal expertise;
> - greater convenience: ABS firms can provide one-stop-shopping for related services, for example car insurance and legal services for accident claims; and
> - increased consumer confidence: higher consumer protection levels and an increase in the quality of legal services could flow from ABS firms which have a good reputation in providing non-legal services. These firms will have a strong incentive to keep that reputation when providing legal services.
>
> Potential benefits for legal service providers:
>
> - increased access to finance: at present, providers can face constraints on the amount of equity, mainly debt equity, they can raise. Allowing alternative business structures will facilitate

expansion by firms (including into international markets) and investment in large-scale capital projects that increase efficiency;

- better spread of risk: a firm could spread its risk more effectively among shareholders. This will lower the required rate of return on any investment, facilitate investment and could deliver lower prices;
- increased flexibility: non-legal firms such as insurance companies, banks and estate agents will have the freedom to realise synergies with legal firms by forming ABS firms and offering integrated legal and associated services;
- easier to hire and retain high-quality non-legal staff: ABS firms will be able to reward non-legal staff in the same way as lawyers; and
- more choice for new legal professionals: ABS firms could contribute to greater diversity by offering those who are currently under-represented more opportunities to enter and remain within the profession.[9] (footnotes omitted)

Others have suggested that incorporation and listing of law firms present an opportunity to *improve* ethical practices in law firms by allowing for the development of new models for ethical practice in the business of law, and to develop better models for regulating law firms' practice. This would include ensuring that incorporated firms put in place management systems that are appropriate and ensure that professional obligations are met.[10] [11]

(b) Concerns about ABSs

Concerns about ABSs generally focus on three issues:

- Core values of the legal profession
- Conflicts of Duty
- Quality of Service

[9] http://www.legislation.gov.uk/ukpga/2007/29/notes/division/7/5/1

[10] Parker, Christine: *Peering Over the Ethical Precipice: Incorporation, Listing and the Ethical Responsibilities of Law Firms* Melbourne Law School Legal Studies Research Paper no. 339, University of Melbourne April, 2008;

[11] Parker, Christine: *Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible* University of Queensland Law Journal, Vol. 23, No. 2, pp. 347-380, 2004

1. Effects on Core Values of the Legal Profession

Opponents of ABSs have raised a number of concerns about the effect of new business structures. These are based primarily on the effect that ABSs may have on the core values of the legal profession. It was these concerns that brought the issue to the attention of the Committee in the first place, which prompted the Committee to recommend that an early consideration be given to the issue, rather than an after-the-event-occurs "catching up."

The Council of the Bars and Law Societies of Europe ("CCBE") has expressed concern about ABSs. It has questioned whether any safeguards other than an outright ban are enough.[12] It has also been quite outspoken on the dangers that ABSs pose to the core values of the legal profession. In fact, in its response to the Legal Services Board's 2009 consultation paper on ABSs, the CCBE said that it would advise, if the question were asked, "not to go ahead with the ABS project."[13]

The CCBE notes that common "core values" of the legal profession protect the client's interests while at the same time guarantee the proper administration of justice. These core values include lawyer independence, client confidentiality, and the avoidance of any conflict of interest. The CCBE states that while lawyers have a need to make a profit on the provision of their services, lawyers (like other professionals) are presumed to operate their law firm

> not with a purely economic objective, but also from a professional perspective. Their private interest concerned with making a profit is thus tempered by their training, by their professional experience, and by the responsibility which they owe, given the fact that any breach of the legal rules of professional conduct undermines not only the value of their investment but also their own professional existence.
>
> It seems to us evident that non-lawyers who invest their money in ABSs [presumably as investors or as non-lawyer owners] can neither be expected to be in that situation, nor can they be expected to refrain from the legitimate demand to influence the firm's policies and to seek the economically appropriate return on investment.[14]

In its conclusion, the CCBE said:

> We see the lawyer's duties to maintain independence, avoid conflicts of interest, and to respect client confidentiality endangered if non-lawyers are allowed a significant degree of control over the affairs of the firm. …
>
> Non-lawyers, who do not practice as regulated professionals themselves, constitute risks to clients and to the due administration of justice. The public's perception of their participation as investors... could compromise the integrity of the business structure as a whole…

[12] Council of Bars and Law Societies of Europe: CCBE Position on Non-Lawyer Owned Firms, June 2005

[13] Council of Bars and Law Societies of Europe: CCBE Response to the Solicitors Regulation Authority's Consultation on New Forms of Practice and Regulation for Alternative Business Structures, September 4, 2009

[14] ibid

> Lawyers in most jurisdictions are obliged to accept instructions that, from a purely economic point of view, are not profitable e.g. legal aid. The client needs to be confident that its case, even under these circumstances, is given the necessary attention. Where mere economic aspects seem to prevail, doubts will arise whether the defence of the client's rights is taken more seriously that other interests, even where the regulation stipulates that the company's duty to the court will prevail over all other duties, and the duties to its clients will prevail over the duty to shareholders.[15]

When examining issues concerning publicly-traded law firms in 2004, the Law Society of Upper Canada quoted from the Final Report of the Working Group on Multi-Discipline Partnerships, September 25, 1998 concerning the need for lawyer's independence:

> Independence requires for its efficacy untrammeled freedom on the part of the lawyer to interact with, for and on behalf of the client. Questions necessarily arise as to whether any such environment could be maintained where the lawyer is but a small part of a larger commercial enterprise, full service in nature, in which inter-professional dependencies are vital to its well-being. Is the lawyer's practical freedom to react in the best interests of the client not likely to be compromised in these circumstances, more so where the enterprise is controlled by non-lawyers?[16]

Some concern has also been raised about the potential for dual or even conflicting regulation in the case of publicly listed firms. While law societies would be expected to administer and enforce professional duties (including financial accounting) and ensure competence in connection with the provision of legal services, securities commissions have strict regulatory and enforcement regimes over public companies. For example, would securities commissions need to access confidential client information to enforce their regulatory and public interest protection requirements?

2. Conflicts of Duties

"Conflicts of Duties" has been raised frequently as a concern with ABSs, particularly in the publicly-traded-shares model of ABS. A lawyer's primary duty is to the court, with a very close secondary duty to the client. The duty of a director of a company, however, is to act "honestly in good faith in the best interest of the company." Shareholders of the company are entitled to rely on the directors to do so, and have rights of action where they do not. It is not difficult to envisage circumstances where lawyers of a publicly-listed company could find their obligations to the court or their client to conflict with corporate obligations and shareholder interests. The Committee notes that this conflict may already exist with in-house counsel who are also directors, but that conflict may still be capable of resolution in extreme circumstances through the resignation of counsel. Could that be done in a publicly-traded firm in the same way?

Slater & Gordon's Prospectus notes that lawyers have a primary duty to the courts and a secondary duty to their clients, which duties are paramount given the nature of the business of the Company. It continues: "[t]here could be circumstances in which the

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[15] *Ibid*

[16] See footnote 1. Quote appears in para 77.

lawyers of Slater & Gordon are required to act in accordance with these duties and against the interests of shareholders or the short-term profitability of the company."[17]

The conflict of duties is therefore a concern of enough severity to warrant specific disclosure as a "risk" to investment under a prospectus. The Slater & Gordon Prospectus deals with the issue by advising of the risk to alert investors. The Committee has wondered, however, (without seeking to legally determine) whether a company can purport to disengage a statutory and common law duty owed by directors to the company, under which all directors must act, by giving primacy to a professional ethical obligation arising out of the nature of business conducted by the company.

3. Quality of Service

The debate about ABSs has also raised concerns about the quality of service and advice that may be offered through them.[18] How the law applies to the particular needs of a client can vary considerably depending on the circumstances presented by the client. A move toward commoditization, which has been suggested as likely on some models of ABSs – particularly the "Tesco-law" model - would apply a more basic "one-size-fits-all approach" that may not in fact meet the need of the consumer. While the cost to obtain the advice may well be cheaper, the actual advice received may not meet the client's needs. Moreover, the business imperative to address the cost of delivery could, some have suggested, reduce the time the lawyer is prepared or able to give to the client to explain the advice offered.

IV. Discussion

1. What is the effect of ABSs on the legal profession

There are clearly a number of possible benefits that could be realized through the adoption of ABS structures. Any innovations that improve access to legal services or present opportunities to increase the ethical or professional responsibilities of the deliverers of legal services cannot be ignored and need to be considered seriously.

However, there are also a number of concerns that need to be taken into account when determining whether ABSs should be permitted. Concerns about quality of services and effects on the core values of and protections offered by the legal profession are not to be lightly dismissed.

The Committee has had an opportunity to discuss and consider the benefits and concerns that ABSs raise. As with any "new direction," understanding the ramifications of such models is fraught with difficulties. Moreover, while the legal profession is generally quite conservative and may be less inclined to jump into a new venture, the business community is a much different beast, more inclined to accept risk if a reasonable business model and plan can be devised. Consequently, if ABSs are permitted in Canada at some

[17] Slater & Gordon Limited, Prospectus, April 13, 2007 at page 84.
[18] ABS drive is "threat" to quality of advice. *Gazette* [2007] 5 July

future date, the Committee is convinced that some business entity (including, possibly, law firms) will create a model that would utilize some form of ABS. Ensuring that the Law Society knew where it stood with respect to such models, together with having a clearer understanding of the effects they may have, would therefore be highly advisable in order, with confidence, to ensure that it is able to protect the public interest in the administration of justice properly with regard to regulations addressing the issue.

No independent analysis of the public interest risks and benefits appears to have taken place in England. The English government seems to have been prepared to take a leap of faith into ABSs and to bring the profession along with it. Consumer groups in the United Kingdom advocated for the creation of ABSs, and the Law Society of England and Wales has supported the introduction of ABSs for almost a decade.

The Law Society of Scotland, on the other hand, engaged in a consultation from which it made a recommendation endorsing ABSs in principle. Ultimately, however, a very acrimonious debate grew within the profession about ABSs and the Law Society's role. The debate was ultimately resolved – at least for present purposes – when a compromise was reached requiring majority ownership of an ABS to be retained by legal professionals. However, the Scottish example shows the dangers of the regulator being, perhaps, somewhat underprepared on the issue and not understanding the perspectives of all interested parties.

As noted by the Legal Services Board in England[19] the safeguards that the LSB considers are "inherent in ABS are viewed skeptically by several other national bars in Europe who may choose to prohibit ABS in some respects because of the perceived loss of independence of lawyers who work within such ABS." Germany and Austria have expressed concerns that the opening up of law firms to capital would be contrary to basic principles of the profession in other European member states,[20] and as stated above, the CCBE has expressed concerns. Questions were raised as to whether firms that accepted external capital would be allowed to trade in European countries. The Committee understands that the ABS approach in England continues to be viewed with caution in Europe on the belief that core values of the profession may be compromised to an unacceptable degree.

2. Will ABSs really be a benefit to the delivery of and access to legal services?

The Committee considered a number of points in the discussion of benefits and concerns about ABSs. It has noted that advocates for ABSs claim that an improvement to the access to legal services will be realised through ABSs, but believes that the claims that are made are largely, if not completely, untested, such as the presumption that ABSs will improve consumer confidence in the delivery of legal services by having well-known non-legal brands entering the legal market and having a strong incentive to maintain their reputation when providing legal services.[21] It notes that the potential benefits of ABSs

[19] Footnote 8 at para. 329
[20] "City firms face global Clementi Backlash" *Gazette* [2005] 26 May.
[21] See for example, "New Bedfellows," *Gazette* [2005] 24 November

listed by the Explanatory Notes to the *Legal Services Act 2007* are stated in conditional language, with many "coulds," "mays" and "mights."

Some empirical evidence that ABSs would improve the delivery of and access to legal services would have been much appreciated. On the basis of what it has reviewed, the Committee is somewhat skeptical that the introduction of ABSs will lead to a marked improvement in the delivery of or access to legal services.

a. Access to Capital Markets

Firstly, concerning access to finance and the capital markets through the sale of shares to the public and the listing of shares on securities exchanges, the Committee notes that the most likely candidates to utilize this model would be large firms. They would be perceived to have the most value, and it would be expected that they would generate the most interest by investors. However, access to capital is not currently a difficult problem for large firms. It is true that such access is generally reliant on debt equity or partnership contributions or both, but the Committee does not understand that large firms, at least in Canada, have suffered by not being able to access capital when needed. The Committee notes that similar comments are noted in a recent Report prepared for the Legal Services Board in England and Wales, which states:

> …large firms believed that they could easily fund their business plans through retained profits or through borrowing directly from banks if they had a particular need. There was considerable reluctance among firms to seek external funding that would involve partners ceding control of the firm to external investors. Furthermore, interviewees generally saw little advantage of seeking external investment for which a proportion of the future profit stream would have to be paid, preferring instead to maintain full ownership of that profit stream.[22]

The ability to finance through a public equity offering would simply be to create a new method of accessing capital. The Committee is not entirely convinced that the ability to access capital in this manner would improve access to or the delivery of legal services any more than current avenues available to access capital. It is worth noting that a one-half of the proceeds raised by Slater & Gordon represented the sell down of shares by Vendor shareholders to be paid to the Vendor shareholders.

The Committee does recognize that access to capital through the markets might allow partners to convert debt into capital equity. It is unclear to the Committee, however, how this would benefit consumers, unless it could be established that there was a more direct link between investment of capital into a law firm and delivery of legal services. If that could be established, and if it was more likely that law firms would access capital through the markets than through debt financing, the Committee would be less skeptical. The fact that so few firms have accessed the capital markets in Australia suggests otherwise. The Committee believes it is equally likely that partners would not be interested in sharing profits with outside investors unless it was not possible to raise capital in any other way,

[22] *Benchmarking the Supply of Legal Services by City Law Firms* A Report prepared by Charles River Associates for the Legal Services Board, August 2011, page 24.

and to date this has not appeared to be the case. This model might be of interest to partners nearing retirement, as there is a possibility that publicly traded shares in a law firm would be worth more than the value of a privately held partnership interest[23], but the Committee does not believe that increasing the value of a lawyer's retirement fund is proof of an ability to improve the access to legal services.

On the other hand, the Committee recognizes that some commentators and proponents of ABSs adamantly assert that access to capital, particularly if invested in firm infrastructure, allows for the development of innovative ways to improve a business's delivery of its services. A New York lawyer, quoted in an article in the Canadian Bar Association's *National* Magazine, noted that "all ways of growing law firms are increasingly capital-intensive. I think it's a failure of imagination that law firms couldn't do more if they had real access to capital."[24] The Committee does not want to discount the ability of creative minds to develop innovative ways to improve the delivery of legal services in an effort to reduce their costs. However, as stated above, there are already ways to access capital, so these innovations may not necessarily be dependent upon access to the capital markets.

b. Third Party Delivery of Legal Services

The Committee gave a good deal of thought to the ABS model by which legal services might be provided through non-lawyer businesses hiring lawyers to provide legal services to customers.

The Committee is less skeptical that this model might improve access to legal services, although again, it would be more comforted if there was some empirical evidence to support any assertions to this end. However, the Committee recognizes that attendance at a law firm – whatever its size – can be a daunting prospect for many people. If the ability to approach lawyers through a business with which a consumer was more familiar would lead individuals in need of legal advice to seek it more frequently and in a more timely manner, the Committee could see that there would be a benefit to the overall access to legal services. Advertising and "brand recognition" might assist consumers/clients to compare prices and understand how to shop around to obtain the services they seek. It will be interesting to see whether access to legal services improves though the recent agreement in England between the "Quality Solicitors" group and WHSmith Books, as it may be a precursor to the development of a true ABS model. However, the Committee wondered if the better use of the advertising rules in British Columbia, which now allow comparative advertising by lawyers, would also improve the client's interests and access to services. In other words, perhaps the solution lies in a better use of the tools that already exist rather than the development of a new model.

While recognizing this model might generate some benefits, the Committee is still cautious. The corporate structure of the business through which the legal services are offered may limit the types of services or clients that the lawyer is allowed to offer or

[23] See *Who owns the firm?* CBA National Magazine, Sept, 2008, page 19
[24] *Ibid,* pg 21

represent. The prospects for the offering of *pro bono* legal services might be remote, for example, unless such services were mandated by the Law Society. However, these sorts of concerns also exist in some law firms, so it is possible that an ABS model to this end would be no worse.

From its review of the literature on this subject, the Committee is also concerned that this model might be more likely to deliver legal services capable of being commoditized, such as real estate transactions, wills, and incorporations, as they might be viewed as being the most cost-effective services to offer. However, there is currently less of a general problem in the delivery of or access to these sorts of legal services. The Committee is much less confident that businesses with a market-wide reputation to maintain would be interested in providing legal services in areas where access is perceived to be more difficult (such as family law, for example), because the opposing party may also be a customer of the business. Acting against an individual in an acrimonious legal matter would not be expected to be a good business model to retain the continued business of that party.

3. Will ABSs negatively affect lawyer independence or self-regulation?

There is a danger that lawyer independence and self-regulation could be affected by ABSs, because the more that lawyers engage in business activities with other professionals or with non-lawyer investors, the more that the line between business and the practice of law will blur. If core values of the legal profession are not addressed or adhered to through regulations governing ABSs (should ABSs be permitted), the Committee believes that independence and self-regulation will be affected. A deterioration of lawyer independence, in particular, could have serious consequences on an important public right and safeguard of the rule of law.

The danger of this line blurring exists, however, even without the development of ABSs, and must be addressed by the profession. As has been pointed out by one commentator on this subject:

> [t]he incorporation and listing of law firms accentuate and bring into focus certain ethical issues, but it is not incorporation and listing as such that are the main thing we should worry about. Law is already a business as well as a profession and has been so for a very long time. The ethical issues that come with incorporation and listing are already with us at least among the largest firms and those that aspire to them.[25]

This danger is recognized by the Supreme Court of Canada in the quote from *R. v. Neil* in the introduction to this paper. In Canada, legal principles must taking precedence over business development strategies.

That being said however, the Committee is not convinced that the form through which legal services are provided would necessarily affect the ability of lawyers to act independently or to regulate themselves, provided that core values of the legal profession

[25] See Parker, footnote 11 above at page 29.

are protected and regulated appropriately and that the public interest is always given primacy in regulation or the development of business models. Proper education about the role of a lawyer in society, combined with the effective regulation of legal services, is necessary to ensure that the line between professionalism and business does not get obliterated. The Committee notes with interest that a similar caution was given and a similar conclusion was reached in 1990 by the Planning Committee's Multi-Disciplinary Practice Subcommittee.[26]

V. Current Considerations by the American Bar Association Concerning ABSs

As mentioned above, the American Bar Association distributed in April, 2011 an "Issues Paper Concerning Alternative Business Structures."[27] The paper examines ABSs, outlines the history of the consideration of ABSs by the American Bar Association, explains developments in other jurisdictions, and sets out some possible approaches for consideration. ABSs have not been permitted by ABA rules and, more importantly, are not permitted in any U.S. jurisdiction except the District of Columbia (which allows some non-lawyer ownership in law firms).

The topic was debated by the ABA's Commission on Legal Ethics 20/20 in August 2011 at the American Bar Association Conference in Toronto. There was, by all reports, a lively debate on the topic. Ultimately, the Commission voted to circulate a proposed rule change that would allow law firms to include non-lawyers in *minority* ownership roles. In addition, the proposal includes a recommendation that any non-lawyer owner must demonstrate good character and be otherwise fit to hold a stake in an entity that provides legal services.[28]

A draft revised proposal to amend Model Rule of Professional Conduct 5.4 (the Model Rule that governs lawyers' professional independence) is to be prepared and circulated in September 2011 for comment, and the final proposal is to be submitted for consideration by the House of Delegates at the ABA Annual Meeting in August 2012.

On the basis of this outcome, the development of ABSs in the United States may well be destined for a markedly different outcome than has been the case in England and Wales and Australia. How the ultimate decision by the ABA may affect the development of ABSs in other jurisdictions, or how the tension between directions might resolve itself internationally, is an open question, but one that may have a considerable effect on whether ABSs have much relevance in Canada. The debate by the ABA is therefore very much worth following, and making a final decision on ABSs should perhaps await a final resolution of that debate.

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[26] *Multi-Disciplinary Practice* A Report prepared for the Planning Committee of the Law Society of British Columbia by the Multi-Disciplinary Practice Subcommittee, October 4, 1990.

[27] See footnote 3, above.

[28] For a report on the meeting, see http://www.bna.com/ethics-2020-commission-n12884903114/

VI. Balancing the Perceived Benefits Against the Alleged Harm

As explained in this Report, the perceived benefits of ABSs are in improvements to the access to and delivery of legal services. While untested, these benefits, if capable of being realized, are valuable. They are benefits that, in order to discharge its public interest mandate, the Law Society would need to consider. The alleged harm that ABSs may cause is their perceived effects on the core values of the legal profession and on the quality of advice that consumers may receive.

The Committee believes that it would be possible to address the alleged harm through appropriate regulations, if the perceived benefits are considered worthwhile. The English model contemplates – indeed, requires – regulation, and the delay to date in the implementation of ABSs in England has been in order to get a regulatory model in place. Certainly, the Committee considers that the unregulated provision of ABSs would likely be disastrous. The unregulated – or too lightly regulated - expansion of the financial services industry is widely blamed for the 2008 recession. If ABSs are permitted, even jurisdictions that seem destined to embrace them have concluded that some form of regulation would be necessary. The delay beyond the initially announced date for full implementation of ABSs in England and Wales suggests that identifying all the regulatory parametres and requirements is not simple.

One issue concerning regulation that would need to be addressed at the outset is who would regulate the ABS? In England, with many different regulators of the legal profession, there has been a degree of jockeying between regulators in deciding whether to seek approval from the Legal Services Board to regulate ABSs. The Committee wonders if competition between regulatory bodies in this regard might at some point lead to differing regulatory mechanisms – some seeking perhaps to be more "light touch" than others in order to entice ABSs to seek regulation through a particular regulator – which may affect regulatory standards. Given the structure of the legal profession in Canada, this may be less of an issue, but if ownership of a law firm is opened to individuals other than lawyers, would other regulators (perhaps the Society of Notaries Public, for example), seek to regulate the entity?

This Report does not intend to draft a regulatory regime for ABSs. However, the following matters appear to factor in places where regulation is being considered (such as England), and merit being noted:

1. <u>General requirements</u>[29]

- Regulations that would require the protection of the core values of the legal profession and the quality of service expected of competent legal professionals;

- "Fitness to own" requirements, akin to those required of non-lawyer partners in a MDP;

[29] The requirements listed draw on suggestions from the 2004 Clementi Report and the Report of the Law Society of Scotland *Delivering Legal Services: Policy Paper on Alternative Business Structures*

- Indemnification by outside owners in respect of loss of clients' money caused by an ABS;

- Requirements for a designated lawyer to be Head of Legal Practice within an ABS;

- Clear regulations concerning conflicts of interest, such as rules prohibiting an ABS representing a client were an outside owner has an adverse interest in the legal outcome;

- A prohibition on outside owners being able to interfere in individual client cases or have access to client files or other information about individual cases;

- A consideration whether regulatory requirements should be imposed against the *lawyers* providing legal services, or against the ABS itself. In other words, should the regulation be of the ABS directly, or indirectly through the lawyers practising in them?

2. Level of Outside Ownership

How much outside ownership should be permitted? The English model seems to contemplate unlimited ownership of an ABS by non-lawyers. On the other hand, the model that seems to have been approved in Scotland (after a very acrimonious debate) would require the majority of the ownership of the ABS to be held by legal professionals. It seems the direction currently considered by the American Bar Association is similar to that in Scotland.

The *form* of participation of outside ownership could be considered, as well. For example the *Legal Profession Act* permits only lawyers to own voting shares in a law corporation. Non-lawyer members of the law corporation (limited by statute to a limited group of related persons) may only own non-voting shares. Consideration could be given to whether "outside" investors in an ABS should be limited to non-voting membership. Such a limitation would, of course, be expected to reduce the potential value of the shares.

3. Disclosure Requirements

If a public offering of shares in a ABS is permitted, some consideration should be given to what sort of disclosure requirements might be required in the Prospectus. The Slater & Gordon prospectus does address risk and specifically identifies the duty to the court and clients as superseding a duty to shareholders.

VII. Recommendations

After a considerable amount of discussion, the Committee has concluded that the *form* of structure through which legal services are offered is less important than it is to ensure that the services that are offered can be properly regulated. Consequently, the Committee believes that the Law Society should not take a position against ABSs solely on the basis that they may involve outside interests of ownership of business entities that deliver legal services.

Rather, the Law Society should consider ways to encourage innovations in providing legal services, provided that:

1. core values of the legal profession are protected, and

2. access to legal services can be improved through the new forms created.

If ABSs were permitted, and their only demonstrable effect was to enrich the legal profession or those who invested in it, the image of the profession and the Law Society would be tarnished. Consequently, some considerable caution needs to be exercised to ensure that there is a public value in ABSs (such as improving access to legal services) and that valuable public protections (such as client confidentiality, an absence of conflicts of interest, and the public right to an independent lawyer) that currently exist are not lost.

The Committee believes that some outside ownership involvement in law firms, provided it is properly regulated and lawyers remain in control of the provision of legal services offered by the ABS (subject to reasonable limits placed on the outside ownership, provided these are not contrary to core values of the profession), could conceivably benefit the consumers of legal services and still protect the public interest. It is possible, although speculative, that access to such services would be easier and less "intimidating" for the client, and that the services may be able to be offered at a lower price. The Committee is not fully convinced that the types of legal services that such an ABS would want to offer, however, would necessarily be services that the public is currently having difficulty accessing, but that remains to be seen.

On the other hand, the Committee is not convinced that the public sale, through securities markets, of shares in a law firm is warranted, as it is not convinced that the benefits to users of legal services outweigh the risks identified above.

However, even though it expresses cautious support for ABSs, the Committee believes that the benefits that have been stated by ABS proponents (including the English government) are at best very speculative and are based more on surmise than actual evidence.

Therefore, the Committee recommends that the Law Society give serious consideration to ABSs. However, before more work is done, the Committee recommends waiting to see if the case for improving access to legal services through ABSs can be more clearly

demonstrated. The Law Society should await the outcome of the debate currently underway through the American Bar Association, should follow what happens in England and Wales once ABSs come into being, and should continue to monitor the situation in Australia. In many ways, England could provide some direct evidence about whether access to legal services can be improved through ABSs as well as giving an indication about whether they can be effectively regulated.

The Committee therefore recommends against developing *specific* proposals for ABSs at this time.

If there is an appetite in the future to consider permitting properly regulated ABSs in British Columbia, the Committee believes that such regulatory models must:

- protect and promote the public interest above the interest of lawyers
- support the rule of law and independence of the legal profession
- ensure protection of the core values of the legal profession.

Should the issue be considered in the future, the Committee recommends a wider consultation within the legal profession (including users of legal services) and business community in British Columbia. A series of options could be developed at that time for the purposes of such a consultation, including:

- No ABSs beyond law corporations and MDPs
- Limited forms of ABSs, such as non-lawyer owned corporations providing legal services to third parties
    - Unlimited outside ownership models
    - Outside ownership limited to 49%
- Unlimited forms of ABSs.

VIII. Conclusion

There are many calls for significant changes in the way that legal services are offered. The current model does not seem to be working in a way that allows people who need to access legal advice to obtain it in an affordable way. There will be considerable pressure to adopt new models for the delivery of legal services, and the Law Society as the regulator of lawyers and the body charged with the responsibility of protecting the public interest in the administration of justice in British Columbia must be prepared to give them serious consideration. However, core values of the legal profession and important rights that clients who need legal advice are entitled to expect must not be lost in a rush to adopt new ideas simply because business and competition models argue in their favour. Many

of the protections that the legal profession offers clients have been obtained at significant cost over the centuries and to abandon them lightly would be undesirable for all concerned. However, where benefits to the consumer can be attained with proper regulation to ensure that professional values are not lost, the Law Society must develop proper regulation to allow for changes to the profession through which improved access to legal services can be attained.

MDL/al
2011-09-20 Report Independence Alternative Business Structures (6)

AMERICAN BAR ASSOCIATION

ABA Commission on Ethics 20/20
321 N. Clark Street
Chicago, IL 60654-7598
Phone: (312) 988-5311
Fax: (312) 988-5280
Website: www.abanet.org/ethics2020

To: **ABA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, and Individuals**

From: **ABA Commission on Ethics 20/20 Working Group on Alternative Business Structures**[1]

Re: **For Comment: Issues Paper Concerning Alternative Business Structures**

Date: **April 5, 2011**

I. Introduction and Questions Concerning Alternative Business Structures

The American Bar Association Commission on Ethics 20/20 is examining the impact of globalization and technology on the legal profession. The principles guiding the Commission's work are protection of the public; preservation of core professional values; and maintenance of a strong, independent and self-regulated profession.

The Commission's November 2009 Preliminary Issues Outline invited consideration of how "core principles of client and public protection [can] be satisfied while simultaneously permitting U.S. lawyers and law firms to participate on a level playing field in a global legal services marketplace that includes the increased use of one or more forms of alternative business structures."[2] To address these challenges, the Commission formed a Working Group that has been studying the impact of domestic and international developments in this regard and is considering whether lawyers and law firms, in order to better serve their clients, should be able to structure themselves differently than is currently permitted under the Model Rules of Professional Conduct.

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[1] The members of the Working Group are George W. Jones (Co-Chair and Commissioner), Professor Theodore J. Schneyer (Co-Chair and Commissioner), Jeffrey B. Golden (Commissioner), Roberta Cooper Ramo (Commissioner), Professor Carole Silver (Commissioner), Chief Justice Gerald W. VandeWalle (Commissioner), Donald B. Hilliker (ABA Center for Professional Responsibility, Kathleen J. Hopkins (ABA General Practice, Solo and Small Firm Division), George Ripplinger (ABA Standing Committee on Ethics and Professional Responsibility), and Gene Shipp (National Organization of Bar Counsel), and Robert D. Welden (ABA Standing Committee on Professional Discipline). Paul D. Paton serves as Reporter. Ellyn S. Rosen, Commission Counsel, and Arthur Garwin, Deputy Director of the ABA Center for Professional Responsibility provided counsel to the Working Group.

[2] *See* ABA Commission on Ethics 20/20, Preliminary Issues Outline at 6, *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/preliminary_issues_outline.authcheckdam.pdf.

At present, only the District of Columbia permits nonlawyer ownership or management of law firms.[3] Except in very limited circumstances, there is a similar restriction on fee-sharing with nonlawyers. In March 2011, legislation to permit nonlawyer equity owners of incorporated law firms was introduced in North Carolina.[4]

The ABA has undertaken several previous efforts to examine alternative business structures (ABS), and the Working Group's efforts are necessarily informed by them. Since the House of Delegates last considered recommendations on multidisciplinary practice in July 2000, few jurisdictions within the United States have examined the issue of MDP or any other form of ABS. In the intervening period, however, other countries have implemented a wide range of approaches. Understanding how those models might be adapted or implemented domestically, as well as the challenges these approaches pose in the global legal services marketplace, is important given this Commission's charge. The economic challenges of the intervening period also invite reconsideration of whether ABS might serve to enhance access to legal services for those otherwise unable to afford them, and to provide new and varied opportunities for lawyers and firms domestically to better serve clients.

At its February 2011 meeting in Atlanta, the Commission decided that two options for alternative business structures -- passive equity investment in law firms and the public trading of shares in law firms -- would not be appropriate to recommend for implementation in the United States at this time, though both have been adopted elsewhere since July 2000. However, the Commission has invited the Working Group to continue analyzing previously unavailable data and information to determine whether and to what extent other structural reforms may now be desirable in the U.S. and, if so, how they might be implemented in our regulatory scheme in a manner consonant with the principles guiding the Commission's work.

This paper describes several issues and approaches that the Working Group has identified and is evaluating. The Working Group appreciates that, in many respects, the description of the current ABS landscape described below is very detailed. However, the Working Group believes that this level of detail will facilitate informed discussion and comments about these issues.

Apart from the February 2011 decisions about passive equity investment and the public trading of shares in law firms noted above, the Commission has taken no positions about the matters addressed in this paper. To assist the Commission in determining what, if any, other

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[3] District of Columbia Rule of Professional Conduct 5.4 provides in relevant part that: (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that: . . . . (4) Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b) . . . (b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if: (1) The partnership or organization has as its sole purpose providing legal services to clients; (2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct; (3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1; (4) The foregoing conditions are set forth in writing. (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

[4] *See* An Act to Allow Nonattorney Ownership of Professional Corporation Law Firms, Subject to Certain Requirements, *available at* http://www.ncleg.net/Sessions/2011/Bills/Senate/HTML/S254v0.html.

recommendations should be made regarding whether to permit U.S. law firms to structure themselves in a manner not currently permitted under the Model Rules of Professional Conduct, the Commission seeks input regarding the following questions by **June 1, 2011**:

1. Are there client services that U.S. lawyers and law firms should be permitted to offer, but that they currently are not permitted to offer due to restrictions set forth in Rule of Professional Conduct 5.4, including the prohibitions on sharing fees with nonlawyers?

2. Would maintaining the present restrictions contained in the Rules of Professional Conduct impede U.S. lawyers and law firms from participating on a level playing field in a global legal services marketplace that includes the increased use of one or more forms of alternative business structures (e.g., including but not limited, to the cost of services or the ability to recruit lawyers and nonalwyers)? If so, in what ways?

   a. What guidance is required for U.S. lawyers and law firms practicing in countries that currently permit forms of ABS?

3. What types of nonlawyer service providers (other than administrative assistants, paralegals, receptionists and other support staff) currently assist you in serving your clients?

   a. Are they employees of the firm, independent contractors, or do they have some other status?

   b. If you employ these nonlawyers directly, why do you choose to do so rather than through a separately organized business structure, such as a law-related business as defined under Rule 5.7 of the ABA Model Rules of Professional Conduct?

   c. If you were permitted to have nonlawyer partners in your firm would you do so?

4. The District of Columbia's version of Model Rule of Professional Conduct 5.4 permits (with certain restrictions set forth in footnote 3) a lawyer to practice law in a partnership or other form of organization in which nonlawyers hold a financial interest or have managerial authority.

   a. Do you believe that the District of Columbia Rule provides adequate protections to clients?

   b. If not, do you believe that District of Columbia Rule 5.4, along with limitations on the percentage of nonlawyer participation, would adequately protect clients?

II. A Brief History of the ABA's Consideration of ABS

As noted above, the ABA has previously studied ABS. In doing so, it has recognized that there is a relationship between those efforts, advances in technology, and increases in the globalization of legal practice. In 1999, a background paper made the following observation:

> The delivery of legal services in the United States faces unprecedented challenges. Revolutionary advances in technology and information sharing, the globalization of the capital and financial services markets, and more expansive government regulation of commercial and private activities have reshaped client demands for legal advice and advocacy. [5]

These same challenges are equally apparent today and are arguably even greater. As this Commission's Preliminary Issues Outline noted, "already the profession is encountering the competitive and ethical implications of U.S. lawyers and law firms seeking to represent American and foreign clients abroad and foreign lawyers seeking access to the U.S. legal market."[6]

A. Pre-Model Rules Treatment of ABS

Prior to 1969, Canon 33 of the ABA Canons of Professional Ethics provided that "[p]artnerships between lawyers and members of other professions or nonprofessional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law."

In 1969, this prohibition was carried forward in the ABA Model Code of Professional Responsibility. DR 3-103(A) prohibited a lawyer from forming "a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law." Moreover, under DR 3-102(A), lawyers could not "share legal fees with a non-lawyer" except under narrow circumstances.

B. The Kutak Commission – Model Rule 5.4

Between 1977 and 1983, the Commission on Evaluation of Professional Standards (Kutak Commission) developed the Model Rules of Professional Conduct. The Kutak Commission carefully considered the issue of lawyers partnering with nonlawyers and initially proposed that such partnerships should be permitted as long as certain safeguards were employed. The 1982 draft of Model Rule 5.4 provided as follows:

> *Professional Independence of a Firm*
>
> A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if the terms of the relationship provide in writing that:

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[5] Commission on Multidisciplinary Practice, *Background Paper on Multidisciplinary Practice: Issues and Development*, at 1 (January 1999), *available at* http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/multicomreport0199.html.

[6] Preliminary Issues Outline, *supra* note 2, at 1.

> (a) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;
>
> (b) information relating to representation of a client is protected as required by Rule 1.6;
>
> (c) the arrangement does not involve advertising or personal contract with prospective clients prohibited by Rules 7.2 and 7.3; and
>
> (d) the arrangement does not result in charging a fee that violates Rule 1.5.

The House of Delegates rejected this proposed version of Model Rule 5.4. A revised version of Model Rule 5.4 was subsequently adopted in 1983 and has remained largely intact, except for relatively minor subsequent amendments that have not affected the basic prohibition on lawyer/nonlawyer partnerships and sharing of fees.

C. The Commission on Multidisciplinary Practice

In the late 1990s, the legal profession took note of the extent to which consulting firms had become associated with the then-"Big-5" accounting firms. In particular, these consulting firms had begun to engage in work that was similar to the work being performed by law firms.[7]

In August 1998, then-ABA President Philip S. Anderson appointed the Commission on Multidisciplinary Practice (MDP Commission) "to study and report on the extent to which and the manner in which professional service firms operated by accountants and others who are not lawyers are seeking to provide legal services to the public."[8] The Commission was asked to analyze:

> •The experience of clients, foreign and domestic, who had received legal services from professional service firms, and report on international trade developments relevant to the issue;
>
> •Existing state and federal legislative frameworks within which professional service firms were providing legal services, and recommend any modifications or additions to that framework that would be in the public interest;
>
> •The impact of receiving legal services from professional service firms on a client's ability to protect privileged communications and to have the benefit of advice free from conflicts of interest; and
>
> • The application of current ethical rules and principles to the provision of legal services by professional service firms, and to recommend any modifications or additions that would serve the public interest.[9]

Though large accounting firms were the impetus for the MDP Commission's work, it heard testimony and received written comments that suggested that the Model Rules should be revised to permit multidisciplinary practices and that such changes would benefit both lawyers

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[7] *Supra* note 5, at 2.
[8] *See* The Commission on Multidisciplinary Practice, About The Commission, at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice.html.
[9] *Id.*

and the public.[10] Accordingly, the MDP Commission's August 1999 Report to the House of Delegates contained a Recommendation that the Model Rules of Professional Conduct be amended to permit multidisciplinary practices, but with certain safeguards in place to ensure that the core values of the legal profession were maintained.[11] The recommendation was accompanied by illustrations of possible amendments to the Model Rules of Professional Conduct that would have been considered at a later time if the underlying recommendation were adopted.[12]

In response to the MDP Commission's recommendation, the House adopted the following resolution:

> That the American Bar Association make no change, addition or amendment to the Model Rules of Professional Conduct which permits a lawyer to offer legal services through a multidisciplinary practice unless and 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.[13]

The MDP Commission proceeded to take more testimony and receive additional comments. It returned to the House of Delegates with a new Report in July 2000, which once again recommended changes to the Model Rules of Professional Conduct, but with less detail than in 1999 and in a manner that imposed more restrictions on proposed multidisciplinary practices.[14] The key change from the prior recommendation was that only lawyer-controlled MDPs would be permitted under the new recommendation. The House again rejected the Commission's recommendation, and this time adopted a recommendation that included the following language:

> The sharing of legal fees with nonlawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession.
>
> The 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.
>
> * * * *
>
> FURTHER RESOLVED that the American Bar Association recommends that in jurisdictions that permit lawyers and law firms to own and operate nonlegal businesses, no nonlawyer or nonlegal entity involved in the provision of such services should own or control the practice of law by a lawyer or law firm or

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[10] *See* Report to the House of Delegates 109 (August 1999) at C9-10, *available at* http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpfinalreport.html.

[11] *Id*.

[12] *Id*.

[13] Report to the House of Delegates 10B (as revised) (August 1999).

[14] Report to the House of Delegates 117 (July 2000), *available at* http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpfinalrep2000.html.

> otherwise be permitted to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person.[15]

During the time that the MDP Commission was in existence, forty-four states and the District of Columbia formed committees to study the multidisciplinary practice issue.[16] A variety of recommendations followed.[17] When the Commission's work ended in July 2000, however, state initiatives in this area lost their impetus.

III. ABS Abroad

As noted in the Introduction, since July 2000, few jurisdictions within the United States have examined the issue of multidisciplinary practices or any other form of ABS. Other countries, however, have moved forward in this area, adopting a wide range of approaches. The competitive environment in which U.S. firms of all sizes now operate has changed, and at least one New York-based litigation firm with fewer than 40 lawyers converted its office in London, England to operate as a Legal Disciplinary Partnership (LDP), a form of ABS discussed below that permits up to 25% of a law firm's partnership to be formed by nonlawyers. Accordingly, while the regulatory environment elsewhere may not directly map the regulatory structures in place in the United States, U.S. firms and lawyers are already participating in ABS abroad. The discussion is no longer simply theoretical.

Further, the impact of the economic challenges of the intervening period also invites reconsideration of whether ABS might serve to enhance access to legal services for those otherwise unable to afford them, and to provide new and varied opportunities for lawyers and firms domestically to better serve the public. Though many of the issues and concerns present in the period leading up to the July 2000 resolution remain at the core of the assessment of ABS, the domestic and global context within which they are to be considered has changed.

A. Regulatory Reform in Australia

Australia has adopted an expansive approach to ABS. Australia is a Federation of six States, each with a plenary constitutional power to regulate the legal profession and the provision of legal services. Two self-governing Territories have primary regulatory power over the legal profession. In most jurisdictions it is a bifurcated profession (barristers and solicitors), with approximately 56,000 solicitors and 5,200 barristers as of December 2010. The profession is made up overwhelmingly of sole practitioners and small law firms, constituting approximately 80 percent of the total.[18]

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[15] *See* Revised Recommendation 10F, *available at* http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecom10f.html.

[16] *See* charts at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpstats.html and http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdp_state_summ.html.

[17] *Id*.

[18] Murray Hawkins, Director, National Legal Profession Project, "Australian Models of Regulating the Legal Profession," Presentation to the Federation of Law Societies of Canada Semi-Annual Conference, 17-19 March 2011.

Australia's reforms began in 1994, when New South Wales became the first Australian jurisdiction (and the first of any common law jurisdiction) to permit multidisciplinary practices.[19] In that year, legislation authorized multidisciplinary partnerships, but required legal practitioners to retain at least 51% of the net partnership income in order to ensure that these firms retained the ethical practices of a law firm.[20] At that time, lawyers and firms did not express much interest in adopting these alternative business structures, in part because of prevailing attitudes that law should remain a profession and not be treated as a business.[21]

Subsequently, pressure from national competition authorities to reform regulatory structures to create greater accountability and enhance consumer interest and protection, and increased interest in innovation led to proposals to eliminate the 51% rule and to permit Incorporated Legal Practices [described below], including multidisciplinary practices and publicly traded law firms. These proposals raised concerns within the profession about conflicting duties and increased risks of unethical behavior. Regulators and the organized bar were able to overcome these reservations and to adopt these forms of alternative business structures.

As of December 2010, there were approximately 2,000 Incorporated Legal Practices in Australia, and this number is growing rapidly.[22] Most Incorporated Legal Practices are smaller firms, but mid-sized and large national firms also have incorporated. There are around 70 known multidisciplinary partnerships.[23] In New South Wales, the State with the largest number of firms and practitioners, as of August 2010, more than 20% of the legal profession was employed within non-traditional business structures (more than 1,000 of them operating as Incorporated Legal Practices).[24] Approximately 30 New South Wales firms operate as multidisciplinary practices. A primary reason for Australian lawyers taking advantage of these structures is the growing reality and perception that the traditional structure of law firms no longer meets the needs of many practitioners and clients.[25] A drive to promote competitiveness and participation in international markets for goods and services, the need to enhance consumer interests and protection, and the need for the national legal services market to complement and facilitate national competition have been consistent themes animating regulatory reform.[26]

1. Incorporated Legal Practices

Each Australian state or territory's Legal Profession Act sets forth the primary rules applicable to Incorporated Legal Practices (ILP).[27] Australian legal practitioners with valid

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[19] Steve Mark, Tahlia Gordon, Marlene Le Brun, and Gary Tamsitt, *Preserving the Ethics and Integrity of the Legal Profession in an Evolving Market: A Comparative Regulatory Response*, (2010) (hereafter "Mark & Gordon").

[20] *Id.*

[21] *Id.*

[22] Hawkins, *supra* note 18.

[23] *Id.*

[24] Steve Mark, Regulating for Professionalism, the New South Wales Approach, August 5, 2010. This paper was presented as part of the Ethics 20/20 Commission's Showcase CLE Presentation at the 2010 Annual Meeting in San Francisco and is attached. (hereinafter "Mark")

[25] Mark & Gordon, *supra* note 19.

[26] Hawkins, *supra* note 18.

[27] For purposes of illustration, reference is made in this part to the legislation and regulations for New South Wales.

practice certificates can provide legal services either alone or alongside other service providers who may, or may not, be lawyers.[28] An ILP may provide legal and any other lawful service, except it may not operate a "managed investment scheme" or provide other services prohibited by applicable regulations.[29] The ILP itself is not required to have an Australian legal practice certificate.[30]

The law relating to attorney-client privilege or applicable legal professional privileges continues to apply to legal practitioners who are officers or employees of ILPs.[31] The ILP and each lawyer who is a legal practitioner director, employee or officer must have professional liability insurance and comply with all other rules and regulations governing the profession.[32]

ILPs may have external investors and be listed on the Australian Stock Exchange. They also must operate in compliance with the Australian Federal Corporations Act, including registration with the Australian Securities & Investment Commission. In Australia, a lawyer's professional duty is owed first to the court and then to the client, whereas a corporation's primary duty is to its shareholders. As a result, the New South Wales' Legal Services Commissioner worked closely with Slater & Gordon, the world's first publicly listed law firm, to ensure that its prospectus, constituent documents and shareholder agreements provided that its duty to the court remained primary, that duties to its clients followed, and that the firm's obligations to shareholders were last.

Upon incorporation an ILP must appoint at least one Legal Practitioner Director responsible for the management of the legal services provided by the entity. If the ILP operates in more than one jurisdiction, it is not required to have a Legal Practitioner Director in each jurisdiction in which it operates. The Legal Practitioner Director must implement and maintain appropriate management systems that allow the entity to provide legal services in accordance with the professional obligations of legal practitioners. A failure to do so may constitute misconduct.[33]

In addition to self-assessment and audit requirements, Legal Practitioner Directors must report to the regulator the conduct of any director of their ILP (whether or not the Legal Practitioner Director) that has resulted in, or is likely to result in a violation of that person's professional obligations or other obligations imposed by or under the Act.[34] The Legal Practitioner Director also must report to the appropriate regulator any professional misconduct of a solicitor employed by the practice and take all reasonable action to address any professional misconduct or unsatisfactory professional conduct by a solicitor employed by the ILP. Finally, a Legal Practitioner Director has an obligation to disclose to clients the services to be provided by

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[28] Legal Profession Act 2004, http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/; (hereinafter "LPA 2004") Legal Profession Regulation 2005, http://www.austlii.edu.au/au/legis/nsw/consol_reg/lpr2005270/.

[29] *Id.* at Section 112.

[30] *Id*. at Section 136.

[31] *Id.* at Section 112.

[32] *Id*. at Section 144.

[33] The New South Wales Office of the Legal Services Commissioner, the Law Society of New South Wales, the College of Law, and LawCover (the primary professional liability insurer in New South Wales) have developed key criteria designed to help the Legal Practitioner Director and ILPs demonstrate that they have developed and implemented these management systems. *See* Mark & Gordon *supra* note 19; Mark, *supra* note 24.

[34] *See* Mark & Gordon s*upra* note 19; Mark, *supra* note 24; LPA 2004 *supra* note 29.

the ILP, and whether or not the legal services to be provided will be provided by a legal practitioner.[35]

Sanctions for violations of the regulations governing ILPs can be taken against the entity as well as against the Legal Practitioner Director or other licensed legal practitioners for professional misconduct they commit.[36] Discipline can include canceling the practice certificate of the Legal Practitioner Director. Nonlawyers also may be prohibited from serving as officers or from acting as a manager of an ILP.[37] Upon application to the Supreme Court by the bar association or the Legal Services Commissioner, the Court can enter an order disqualifying the ILP from providing legal services; this means it must cease to be an ILP.[38]

Australia does not have a prerequisite "fit to own" test for nonlawyer managers/owners of alternative business structures like that described below for England, Wales, and Scotland. Also, the United Kingdom's "fit to own" test applies to all business structures permitted, not just incorporated practices.

2. Multidisciplinary Partnerships

Lawyers in Australia also may form multidisciplinary partnerships.[39] A multidisciplinary partnership is defined as "a partnership between one or more Australian legal practitioners and one or more other persons who are not Australian legal practitioners, where the business of the partnership includes the provision of legal services in this jurisdiction as well as other services."[40] Partnerships between Australian lawyers and Australian-registered foreign lawyers do not count as multidisciplinary partnerships.[41] Each lawyer partner is responsible for the management of the legal services provided by the partnership and must ensure that appropriate management systems are implemented and maintained as required by the rules and regulations governing the professional obligations of Australian legal practitioners.[42] Requirements for professional liability insurance apply and the Australian legal practitioner partners retain the attorney-client and other applicable legal professional privileges.

The legal practitioner partners of multidisciplinary partnerships may be found to have committed misconduct if any of the other legal practitioner partners commit professional misconduct, if the conduct of any nonlawyer partner adversely affects the provision of legal services by the partnership or if a nonlawyer partner is found to be unsuitable to serve in that capacity.[43] On application by the bar association or the Regulator, the Supreme Court can prohibit an Australian legal practitioner from being a partner with a nonlawyer in a firm that provides legal and other services if the Court finds that the nonlawyer is not a "fit and proper person" to be a partner or has committed conduct that, if committed by an Australian legal practitioner, would violate applicable professional conduct rules.[44]

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[35] *See* Mark & Gordon, *supra* note 19.
[36] *See* LPA 2004 *supra* note 29 at Section 153.
[37] *Id*. at Section 154.
[38] *"Without Prejudice" supra*.
[39] *See* LPA 2004, *supra* note 29 at Section 165.
[40] *Id.*
[41] *Id.*
[42] *Id.* at Section 168
[43] *Id*. at Section 169.
[44] *Id*. at Section 179.

B. Multidisciplinary Practices in Canada

Multidisciplinary practices are permitted in two Canadian common-law provinces, Ontario and British Columbia, and in Quebec, which is a civil law jurisdiction. MDPs have been permitted in Ontario since 1999 and in British Columbia since 2010. The Ontario and British Columbia MDP regime is permissive but with significant restrictions: the lawyers involved in the partnership must have effective control over the legal services the partnership provides, and nonlawyer partners are not permitted to provide services to the public unless they "support or supplement the practice of law by the MDP."[45] For example, By-Law 7 of the Law Society of Upper Canada, which regulates lawyers in the Province of Ontario, permits a lawyer ("licensee") to form a partnership or other association (but not a corporation) with a nonlawyer professional "for the purpose of permitting the licensee to provide to clients the services of the professional" if application is made and a series of conditions are satisfied.[46] The conditions include a good character requirement for the nonlawyer professional, that the nonlawyer professional is "qualified to practise a profession, trade or occupation that supports or supplements the practice of law or provision of legal services," and that the lawyer "shall have effective control" over the nonlawyer's professional practice of his or her profession.[47]

In addition, the Law Society of Upper Canada has had rules in place since 2001 to regulate "affiliated" law firms. The Law Society's Multi-Disciplinary Practice Task Force had been tasked in 1998 and 1999 with examining a "captive law firm model," the provision of legal services to the public through law practices affiliated with professional-service or accounting firms.[48] As a result of the Task Force's deliberations, there are now provisions that impose a notification requirement on a lawyer member or firm that "affiliates with an affiliated entity" as well as various restrictions on such arrangements. For purposes of the By-Law, a lawyer "affiliates with an affiliated entity when the [lawyer] on a regular basis joins with the affiliated entity in the delivery or promotion and delivery of the services of the licensee and the services of the affiliated entity."[49] The Task Force acknowledged at the time that "the definition of affiliation captures more than law firms and non-law firms who by design operate under comprehensive arrangements for the joint delivery of legal and non-legal services."[50]

The section further requires that the lawyer member or firm in such an arrangement shall:

(a) own the professional business through which the [lawyer] practises law or provides legal services […]

(b) maintain control over the professional business through which the [lawyer] practises law or provides legal services; and

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[45] Law Society of British Columbia, Law Society Rules, Multi-Disciplinary practice, Section 2-23.3(2)(a)(i), *available at* http://www.lawsociety.bc.ca/publications_forms/rules/rules_part02.html#2-23-3.
[46] Law Society of Upper Canada, By-Law 7, PART III, MULTI-DISCIPLINE PRACTICES (hereinafter By-Law 7), Section 18, *available at* http://www.lsuc.on.ca/media/bylaw7.pdf.
[47] *Id*.
[48] THE LAW SOC'Y OF UPPER CAN., MULTI-DISCIPLINARY PRACTICE TASK FORCE, IMPLEMENTATION PHASE: REPORT TO CONVOCATION 1 n.1 (Apr. 26, 2001) [hereinafter IMPLEMENTATION REPORT] (quoting The Law Society of Upper Canada Transcript of Convocation 218 (Sept. 25, 1998)), *available at* http://www.lsuc.on.ca/media/mdptaskforcereport.pdf.
[49] Law Society of Upper Canada, By-Law 7, PART IV, AFFILIATIONS, Section 31(2), *available at* http://www.lsuc.on.ca/media/bylaw7.pdf.
[50] IMPLEMENTATION REPORT, *supra* note 48 at 14.

(c) carry on the professional business through which the [lawyer] practises law or provides legal services, other than the practice of law or the provision of legal services that involves the delivery of the services of the [lawyer] jointly with the services of the affiliated entity, from premises that are not used by the affiliated entity for the delivery of its services, other than those that are delivered by the affiliated entity jointly with the delivery of the services of the [lawyer].[51]

The notification requirements include the following information:

1. The financial arrangements that exist between the [lawyer] and the affiliated entity.
2. The arrangements that exist between the [lawyer] and the affiliated entity with respect to
    i. the ownership, control and management of the professional business through which the licensee practises law or provides legal services,
    ii. the [lawyer's] compliance with the Society's rules, policies and guidelines on conflicts of interest in relation to clients of the licensee who are also clients of the affiliated entity, and
    iii. the [lawyer's] compliance with the Society's rules, policies and guidelines on confidentiality of information in relation to information provided to the [lawyer] by clients who are also clients of the affiliated entity.[52]

No fee-splitting or profit-sharing is permitted between the law firm and the affiliated entity, and the conflicts clearance requirements in essence treat the law firm and the affiliated entity "economically as if they were one firm."[53]

In contrast to the restrictive approach adopted in Ontario and British Columbia, amendments to regulations under the *Code des professions* (Professional Code) of Quebec in 2010 provide for a far more liberal multidisciplinary practice regime, requiring simple majority ownership by members of the Barreau du Quebec of the firm through which the professional services are provided.[54] Nonlawyer membership is restricted to those members of various other recognized professional bodies (including actuaries, patent agents, and members of the Chambre de l'assurance de dommages)[55] [damage insurance adjusters and brokers] or the Chambre de la securite financiere[56] [financial planners and insurance agents], but the regulation does not require that their activities "support or supplement the practice of law" in the manner of the Ontario and British Columbia MDP rules.

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[51] By-Law 7, Part IV, at Section 32.
[52] *Id.*, at Section 33(2).
[53] IMPLEMENTATION REPORT, *supra* note 48 at 3.
[54] Quebec, Reglement sur l'exercice de la profession d'avocat en societe et en multidisciplinarite, Loi sur le Barreau (L.R.Q., c. B-1, a.4), Code des professions (L.R.Q., c C-26, a. 93 et 94), [hereafter Quebec Regulation] Sections 1 and 5, *available at* http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=%2F%2FC_26%2FC26R19_1_2.htm.
[55] *See* http://www.chad.ca/en/index.html.
[56] *See* http://www.chambresf.com/en/chamber/.

The firm is required to provide an undertaking to the Barreau du Quebec that in essence ensures that all members of the partnership comply with rules of law so as to permit the lawyer members to carry on their professional activities, particularly as regards the following:

a) professional secrecy, the confidentiality of information contained in client files and the preservation thereof;
b) professional independence;
c) the prevention of situations of conflict of interests;
d) activities reserved for advocates;
e) liability insurance;
f) professional inspections;
g) advertising;
h) billing and trust accounts; and
i) access by the syndic of the Barreau to this undertaking and, if applicable, to every contract or agreement regarding a [member of the Barreau][57]

C. England and Wales: The Legal Services Act 2007

The approach in England and Wales is the result of passage of the Legal Services Act of 2007 (LSA). The LSA sets forth the following "regulatory objectives":

(a) protecting and promoting the public interest;

(b) supporting the constitutional principle of the rule of law;

(c) improving access to justice;

(d) protecting and promoting the interests of consumers;

(e) promoting competition in the provision of services within subsection (2);

(f) encouraging an independent, strong, diverse and effective legal profession;

(g) increasing public understanding of the citizen's legal rights and duties;

(h) promoting and maintaining adherence to the professional principles.[58]

Under the LSA, alternative business structures are defined as entities that have lawyer and nonlawyer management and/or ownership and that provide only legal services or legal services in combination with non-legal services.[59] The Legal Services Board (the overarching regulator) has designated the Solicitors Regulation Authority (SRA) as an approved regulator for these entities. There also may be other approved regulators. All entities with a nonlawyer manager and/or owner must be licensed, and all individual participants also must be authorized. As noted above, unlike the current Australian regulatory regime, the LSA takes a front-end approach by requiring nonlawyer owners and managers to pass a "fit to own" test.[60] Disciplinary

[57] Quebec Regulation, at Schedule B (s.3) [in translation, French version official].
[58] *See* Legal Services Act 2007, Part I, The Regulatory Objectives, *available at* http://www.sra.org.uk/lsa.
[59] *See* http://www.sra.org.uk/sra/legal-services-act/faqs/ABS-faqs.page*; and* http://www.sra.org.uk/sra/legal-services-act/lsa-glossary.page.
[60] *See, e.g.*, Solicitors Regulation Authority Recognized Bodies Regulations, Regulation 3, at http://www.sra.org.uk/solicitors/change-tracker/code-of-conduct/recognised-bodies-regulations.page#r3.

sanctions can be imposed against the entity as well as lawyer and nonlawyer managers and employees.

1. Legal Disciplinary Practices

Since March 31, 2009, firms have been able to become licensed as a Legal Disciplinary Practice (LDP). An LDP can engage only in the provision of legal services, but may have managers who are different types of lawyers (barristers and solicitors) and up to 25% nonlawyer managers.[61] External owners are not permitted.[62] As noted above, nonlawyer managers are subject to a fitness review and approval by the SRA.[63] The SRA imposes an approval fee of £250 plus the cost of the criminal background check for nonlawyer managers.[64] The SRA can withdraw approval of a nonlawyer manager. The SRA may direct an LDP to appoint a person analogous to a Head of Legal Practice under Part 5 of the LSA to ensure compliance with the LDP's obligations and duties under the LSA, the Solicitors Code or Conduct, and other applicable rules and regulations, including the disciplinary rules and procedures. LDPs are required to maintain professional liability insurance.[65]

At the ABA Commission on Ethics 20/20's August 2010 meeting, the Chief Executive of the Law Society of England and Wales reported that, as of June 2010, there existed 254 LDPs; 184 of them were firms of 10 members or fewer. Types of nonlawyer partners include accountants, financial planners, barristers, and teachers. To date, no disciplinary problems with LDPs have been reported.

2. Full Alternative Business Structures

The SRA has reported that implementation of the full range of alternative business structures (ABS) permitted under the LSA will occur in October 2011.[66] At that time, existing LDPs will be able to "passport" into other permitted forms of ABS. The regulations under which the SRA will oversee full ABS are still under development. The SRA is developing a Handbook that will set forth the regulatory framework for solicitors and ABS that includes a new form of "outcome-focused" or "risk-based" regulation as opposed to primarily rule-based regulation. The Handbook is the subject of numerous consultations within the U.K. legal profession.[67]

As noted above, an ABS can have external investment by nonlawyers and may be a multidisciplinary practice. Potential external investors who will own a 10% or greater interest in an ABS must also pass the "fit to own" test. The SRA does not plan to prohibit any particular model under which an approved and licensed entity can operate. Rather, it would require an ABS

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[61] *See* Legal Services Act: Legal disciplinary practices – practical issues *at* http://www.sra.org.uk/sra/legal-services-act/faqs/abs-faqs.page and Solicitors' Code of Conduct 2007, the Management and control requirement, para. 10-21, *available at* http://www.sra.org.uk/solicitors/code-of-conduct/rule14.page.
[62] *Id.*
[63] *See* SRA Recognised Bodies Regulations 2009 at 3.3, *available at* http://www.sra.org.uk/solicitors/change-tracker/code-of-conduct/recognised-bodies-regulations.page#r3.
[64] http://www.sra.org.uk/sra/legal-services-act/faqs/abs-faqs.page
[65] *See* Legal Services Act 2007, s*upra* note 58.

[66] *See* Solicitors Regulation Authority Guidance, Preparing for Alternative Business Structures, November 2010, *http://www.sra.org.uk/solicitors/code-of-conduct/guidance/abs/preparing-for-alternative-business-structures-info.page.*
[67] *See* http://www.sra.org.uk/solicitors/freedom-in-practice/new-handbook/new-handbook-overview.page.

to meet minimum requirements such as having at least one active nonlawyer and lawyer owner/manager, and using a "suitable regulatory model" to ensure necessary client protection.[68]

Full ABSs will be accountable to the SRA through a nominated Head of Legal Practice and Head of Finance and Administration. These individuals must ensure the maintenance of appropriate ethical and financial accounting standards. Nonlawyer owners are obligated not to cause a lawyer to breach his or her professional duties. The SRA will have the power to ban a nonlawyer owner from future involvement in an ABS, to revoke the ABS's license or to fine the firm.

On the issue of confidentiality, an MDP ABS will be subject to the same requirements as other firms under the Solicitors' Code of Conduct and other applicable rules and regulations. It will not be able to disclose confidential client information to, for example, other companies within the same group.[69] The SRA also considers it inappropriate for any firm to exploit sensitive client information for marketing purposes. With regard to protecting client funds when an entity operates as an MDP ABS, the SRA has amended the trust accounting rules to ensure that monies coming from legal activities of the firm are segregated from other forms of client funds.[70]

The Law Society of England and Wales has urged the SRA to ensure that access to justice not receive short shrift as the implementation of ABSs moves forward. The Law Society has acknowledged that these new entities could improve access to justice by reducing costs and providing more services. However, it warns that regulators should take care to ensure that ABSs do not simply lead to expansion in the most profitable areas of practice while unacceptably reducing access in other areas like family or immigration law. To address these concerns, the SRA has engaged in an Equality Impact Assessment and ongoing consultation.

D. Scotland: Alternative Business Structures

On October 6, 2010, the Scottish Parliament approved the Legal Services (Scotland) Act, which permits ABS. The Act received Royal assent on November 9, 2010. Like the LSA in England and Wales, Part 1 of the Act sets forth regulatory objectives.[71] A recent consultation paper states that the "primary aim of the Act is to remove the current restrictions in the Solicitors (Scotland) Act 1980 on how solicitors can organize their businesses. It will allow solicitors to form partnerships with non-solicitors, and to seek investment from outside the profession. However, the Act is enabling rather than prescriptive, so solicitor firms that do not want to operate under the new business arrangements will be under no obligation to do so."[72] Scottish solicitors will be able to provide legal services in partnership with nonlawyers, as MDPs, and with external ownership. Solicitors can remain in traditionally structured practices. Unlike ABS

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[68] *See* FAQs: Legal Services Act and ABSs, http://www.sra.org.uk/sra/legal-services-act/faqs/abs-faqs.page In a 2010 teleconference arranged by the State Bar of Georgia, the nonlawyer head of the SRA indicated that entities seeking to become a licensed ABS would likely be required to submit to the SRA for review and approval their business plans.

[69] Solicitors Regulation Authority, Consultations, The Architecture of Change Part 2 – the new SRA Handbook, para. 29, *available at* http://www.sra.org.uk/sra/consultations/OFR-handbook-October.page.

[70] *Id.* at para. 105.

[71] Legal Services (Scotland) Act (2010) at Part I, *available at* http://www.legislation.gov.uk/asp/2010/16/pdfs/asp 20100016 en.pdf [hereafter "Legal Services (Scotland) Act 2010"].

[72] The Scottish Government, "Ownership and control of firms providing legal services under the Legal Services (Scotland) Act 2010 – A consultation paper" (2011), *available at* http://www.scotland.gov.uk/Publications/2011/02/09105855/0.

in England and Wales, Scottish ABSs must have majority ownership by solicitors; nonlawyer external investors can only own up to a 49% percent stake in the entity.[73] As in England and Wales, nonlawyer investors must pass a "fitness for involvement" test.[74] The Scottish legislation does not create a Legal Services Board to oversee regulation like the LSA did in England and Wales. The Law Society of Scotland will retain its regulatory authority over solicitors and the Scottish Ministers in Parliament may approve other regulators.

A Scottish ABS must have a Head of Legal Services and also either a Head of Practice or a Practice Committee. The same licensed solicitor may serve as Head of Legal Services and Head of Practice. The Head of Legal Practice is required to see that licensed professionals in the entity adhere to their professional obligations.[75] The legal professional privilege applies to communications made to or by licensed providers in the course of providing legal services for any of their clients, as well as to or by others employed by the licensed entity who are acting in connection with the provision of legal services or who are working at the direction or under the supervision of a solicitor.[76]

E. Other Countries with ABS

MDPs also are permitted in Germany, the Netherlands (but not with accountants), and in Brussels (only with accountants but there must be separate billing). New Zealand permits incorporated law practices, but nonlawyers may only own non-voting shares. The definition of nonlawyer is restricted to relatives (spouse, civil union partner, de facto partner, parent, grandparent, child, brother or sister) of the actively involved lawyer. Only lawyers actively involved in providing the incorporated firm's regulated services can be directors.

F. Summary – Rationale for Regulatory Reform Abroad

Regulatory reforms in Australia and the U.K. were driven in large part by competition authorities and extreme consumer dissatisfaction with the lawyer disciplinary regime. In Australia, the 1998 Report by the New South Wales Attorney General's Department, entitled *National Competition Policy Review*, concluded that the partnership model for structuring and operating law firms was anticompetitive.[77] As noted above, this resulted in New South Wales passing legislation to permit Incorporated Legal Practices (ILP), including multidisciplinary practices.[78] Legislators believed these reforms would benefit consumers by enhancing competition and efficiency and lowering costs. Others believed that the changes would help Australia become a hub for the provision of legal services in the Asia-Pacific region.[79]

In the United Kingdom, the 2001 Report of the Office of Fair Trading, entitled *Competition in Professions*, concluded that certain rules governing the legal profession were unduly restrictive. In England and Wales, organized consumer groups voiced concerns that the

[73] Legal Services (Scotland) Act 2010. at Chapter 2, para. 49.
[74] *Id.*, at sections 62-67.
[75] *Id.* at Chapter 2, para. 52.

[76] *Id.* at Chapter 3, para. 75.
[77] National Competition Policy Review, *available at* http://www.lawlink.nsw.gov.au/.
[78] All Australian states and territories permit incorporation of law firms.
[79] *See, e.g., Legal Profession Amendment (Incorporated Legal Practices) Bill Second Reading*¸ New South Wales Legislative Council, Hansard, October 12, 2000.

discipline system operated by the Law Society was confusing, inconsistent, protective of lawyers, and unresponsive. The government solicited a study by Sir David Clementi to address these issues. The Legal Services Act 2007 incorporated many of Clementi's recommendations from his 2004 Report entitled *Report of the Review of the Regulatory Framework for Legal Services in England and Wales,*[80] including alternative business structures.

The Council of the Law Society of Scotland determined that further discussion about alternative business structures was necessary because of the cross-border impact of the Legal Services Act 2007 and changes to the legal services market driven by technology and globalization.[81] The Office of Fair Trading also supported consumer claims that the restrictive nature of the legal services market in Scotland harmed consumer interests.[82] On April 4, 2008, the Council adopted a policy paper, entitled *The Public Interest: Delivering Scottish Legal Services, Policy Paper on Alternative Business Structures*.[83] The report, which endorsed alternative business structures, stated: "The business structures in which solicitors practice now reflect society, the profession and market conditions of the mid-twentieth century. They are not the conditions pertaining in Scotland now, much less in the decades to come."[84]

IV. Possible Approaches for Consideration

As the above discussion makes clear, alternative business structures can take many different forms. While there are various approaches possible, the Working Group is seeking feedback only with respect to the first three options enumerated below.

A. Limited Lawyer/Nonlawyer Partnerships with a Cap on Nonlawyer Ownership

Consistent with the Kutak Commission proposal, lawyers could be permitted to become partners with (and share fees with) nonlawyers, such as economists, social workers, architects, consultants, and financial advisors, under narrowly defined circumstances. The most modest such approach would require that: (1) the firm engage only in the practice of law, (2) the nonlawyers own no more than a certain percentage (e.g., 25%) of the firm,[85] and (3) the nonlawyers pass a "fit to own" test (such as the test that exists in the United Kingdom for all ABS, including LDPs).

B. Lawyer/Nonlawyer Partnerships with No Cap on Nonlawyers Ownership (The D.C. Approach)

The District of Columbia currently permits lawyers to engage in partnerships of the sort described in Option A, but without a cap on the nonlawyer ownership percentage. It also does not require nonlawyers to pass a "fit to own" test.

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[80] Report of the Review of the Regulatory Framework for Legal Services in England and Wales, *available at* http://www.legal-services-review.org.uk/content/report/index.htm.

[81] *See* http://www.lawscot.org.uk/members/legal-reform-and-policy/law-reform/alternative-business-structures.

[82] *Id.*

[83] The Public Interest: Delivering Scottish Legal Services, Policy Paper on Alternative Business Structures, a*vailable at* http://www.lawscot.org.uk/members/legal-reform-and-policy/law-reform/alternative-business-structures/abs-news-archive.

[84] *Id.*at p.6.

[85] For example, LDPs in the United Kingdom have capped at 25% the ownership interest that nonlawyers can have in a law practice.

As noted above, Rule 5.4 of the District of Columbia Rules of Professional Conduct provides in relevant part that:

Rule 5.4—Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that: . . . .

(4) Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b) . . .

(b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

(1) The partnership or organization has as its sole purpose providing legal services to clients;

(2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;

(3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;

(4) The foregoing conditions are set forth in writing.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

The Comment to this Rule elaborates as follows:

[4] This rule rejects an absolute prohibition against lawyers and nonlawyers joining together to provide collaborative services, but continues to impose traditional ethical requirements with respect to the organization thus created. Thus, a lawyer may practice law in an organization where nonlawyers hold a financial interest or exercise managerial authority, but only if the conditions set forth in subparagraphs (b)(1), (b)(2), and (b)(3) are satisfied, and pursuant to subparagraph (b)(4), satisfaction of these conditions is set forth in a written instrument. The requirement of a writing helps ensure that these important conditions are not overlooked in establishing the organizational structure of entities in which nonlawyers enjoy an ownership or managerial role equivalent to that of a partner in a traditional law firm.

[5] Nonlawyer participants under Rule 5.4 ought not be confused with nonlawyer assistants under Rule 5.3. Nonlawyer participants are persons having managerial authority or financial interests in organizations that provide legal services. Within such organizations, lawyers with financial interests or managerial authority are held responsible for ethical misconduct by nonlawyer participants about which the lawyers know or reasonably should know. This is the same standard of liability contemplated by Rule 5.1, regarding the responsibilities of lawyers with direct supervisory authority over other lawyers.

[6] Nonlawyer assistants under Rule 5.3 do not have managerial authority or financial interests in the organization. Lawyers having direct supervisory authority over nonlawyer assistants are held responsible only for ethical misconduct by assistants about which the lawyers actually know.

[7] As the introductory portion of paragraph (b) makes clear, the purpose of liberalizing the Rules regarding the possession of a financial interest or the exercise of management authority by

a nonlawyer is to permit nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee. For example, the rule permits economists to work in a firm with antitrust or public utility practitioners, psychologists or psychiatric social workers to work with family law practitioners to assist in counseling clients, nonlawyer lobbyists to work with lawyers who perform legislative services, certified public accountants to work in conjunction with tax lawyers or others who use accountants' services in performing legal services, and professional managers to serve as office managers, executive directors, or in similar positions. In all of these situations, the professionals may be given financial interests or managerial responsibility, so long as all of the requirements of paragraph (c) are met.

The Comment also makes clear that the Rule does not permit an individual or entity to acquire all or any part of the ownership of a law partnership or other form of law practice organization for investment or other purposes.

C. MDPs that Offer Non-Legal Services

A third option would be to permit firms of the sort described in option B and to allow those firms to offer both legal *and non-legal* services. In other words, this option would essentially be the D.C. Rule, but without the restriction contained in D.C. Rule 5.4(b)(1).

As noted above, the Commission has determined that the following two options are <u>not</u> appropriate to be recommended for the United States at this time. Both are in place in the global services marketplace in which U.S. lawyers and firms engage, however, so they may warrant additional monitoring and study.

D. Endorsing Outside Investment

The three options above assume that the nonlawyer is partnered with and is an active member of the firm. An alternative would be to permit nonlawyer passive investment in such entities, but to place caps on nonlawyer ownership in the context of passive investment.

E. The Australia Model

This approach would not only permit external passive investment and ownership in law firms, but also place no limits on the percentage of ownership that nonlawyers have in the entity.

V. Conclusion

In light of these issues and concerns, the Commission seeks input into whether amendments to the Model Rules of Professional Conduct or other action would be advisable. Any responses to the questions posed in this paper, as well as any comments on related issues, should be directed by **June 1, 2011** to:

Natalia Vera
Senior Research Paralegal, Commission on Ethics 20/20
ABA Center for Professional Responsibility
321 North Clark Street
15th Floor
Chicago, IL 60654-7598
Phone: 312/988-5328
Fax: 312/988-5280
Natalia.Vera@americanbar.org

Comments received may be posted to the Commission's website.

COMMENTS OF THE NEW YORK STATE BAR ASSOCIATION COMMITTEE ON STANDARDS OF ATTORNEY CONDUCT on ETHICS 20/20 ISSUE PAPER CONCERNING ALTERNATIVE BUSINESS STRUCTURES

The Ethics 20/20 Commission Working Group seeks comments on three possible models of alternative business structures: lawyer/nonlawyer partnerships that engage solely in the practice of law, with a cap on nonlawyer ownership; lawyer/nonlawyer partnerships that engage solely in the practice of law, with no cap on nonlawyer ownership; and lawyer/nonlawyer partnerships that offer both legal and nonlegal services. Each of these models involves lawyers and nonlawyers participating in a single legal entity that renders legal advice. New York considered such an approach in 1999-2000 and rejected it as inconsistent with the ethical standards governing lawyers and difficult to implement in light of differences between professional standards governing different professions. Instead, New York adopted an approach—not addressed in the Working Group's Issue Paper—that allows for contractual relationships between legal and nonlegal professional service firms in certain professions, to offer "legal as well as other nonlegal professional services" on a "systematic and continuous basis." None of the recent international developments in multidisciplinary practice—including the changes in Australia, England and Canada, as described in the Working Group report—have alleviated ethical concerns implicated by single-entity partnerships between lawyers and nonlawyers, nor have they altered the rationale for New York's solution.

I. BACKGROUND

Concurrent with the ABA Commission on Multidisciplinary Practice review described on pages 5-7 of the Working Group report, New York, like many states, extensively considered issues related to multidisciplinary practice ("MDP") in 1999-2000. The New York State Bar Association ("NYSBA") formed a Special Committee headed by Bob MacCrate (the "MacCrate Committee") to study multidisciplinary practice. The MacCrate Committee reviewed the history of regulation of the legal profession in the United States and elsewhere, as well as the ethical considerations raised by various MDP structures, and published a report recommending changes to the New York Disciplinary Rules, and the ABA Model Rules, in 2000 (the "MacCrate Report"). Contrary to the Working Group's conclusion about other states' efforts, however, New York's did not "lose [its] impetus" following the conclusion of the work of the ABA

Commission and publication of the MacCrate Report. Rather, as a result of the work of the MacCrate Committee, New York adopted an approach that differs from those proposed in the Working Group report. Rather than allowing lawyers to practice with nonlawyers in a single legal entity that renders legal advice, New York's model allows lawyers to enter into contractual relationships with certain nonlawyers, to provide "legal as well as other nonlegal professional services" on a "systematic and continuous basis."

II. ETHICAL IMPLICATIONS OF SINGLE-ENTITY MDP

Alternative business structure ("ABS") models that involve lawyers and nonlawyers participating in a single legal entity that renders legal advice may impair lawyers' ability to practice in a manner consistent with the ethical rules governing lawyers. In particular, a single-entity ABS model threatens a lawyer's ability to exercise independent legal judgment on behalf of clients and to protect client confidences, may undermine the legal profession's commitment to ensuring access to legal services and, more broadly presents great difficulties in attempting to reconcile, let alone enforce, the different (and sometimes conflicting) professional and ethical standards that would govern lawyers and members of other professions working within the same legal entity that renders legal advice.

A. Independent Legal Judgment

Amending the rules to allow a lawyer to practice within a single entity with nonlawyers may impair the lawyer's ability to exercise independent legal judgment on behalf of clients. The assumption that nonlawyers who are in a position to do so may impair a lawyer's freedom to exercise independent legal judgment is a central assumption in the law governing lawyers, and is the basis for the current prohibitions against fee-splitting and nonlawyer ownership of interests in law firms. Given the opportunity to influence firm decision-making, a nonlawyer not governed by the professional standards that govern lawyers and not subject to the lawyer disciplinary

structure may, for example, be more inclined to favor the interests of the firm's most profitable clients over clients who bring in more modest fees, or of clients who are both legal and non-legal clients over clients who are only legal clients. The result of proliferation of single-entity structures might therefore be to disfavor pro bono work that brings in no revenue or controversial matters that may impact a firm's reputation.

These business pressures are present in all law firms, of course, but the constraining influence of lawyers' professional responsibilities will inevitably be diluted in firms in which nonlawyers have managerial authority or ownership interests. The resulting pressures are subtle and indirect, and it may be difficult to determine whether a lawyer's professional judgment has been compromised. Alliances between lawyers and nonlawyers should therefore be permitted only under circumstances in which the practice of law would not be exposed to *de facto* or *de jure* control by nonlawyers. In light of the difficulty of detecting and preventing such influence, the rules should not be amended to allow lawyers to practice with nonlawyers in a single entity that renders legal advice.

B. Confidentiality

The models proposed in the Working Group's issue paper may also impair the lawyer's ability to protect the confidentiality of communications with clients. Although there are confidentiality protections that apply to other professions, the confidentiality rules governing lawyers differ in important ways from the rules governing other professionals. Confidential communications to a lawyer, for instance, are protected not only against the lawyer's voluntary disclosure but also against court compulsion; by contrast, communications with other professions may not be privileged, may enjoy only a limited privilege, or may be subject to certain exceptions. Moreover, there may be differences regarding the substance of the information that must be kept confidential. Lawyers, for example, are prohibited from disclosing a client's past

crimes or frauds in which the lawyer was not involved, except in very limited circumstances. Accountants, by contrast, may be required to disclose any client fraud, past or present, that renders the client's financial statements materially misleading. This presents an obvious conflict for an entity that employs both lawyers and accountants, and provides both legal and accounting services: the accountant members of the firm would be required to disclose information that lawyer members of the same firm would be prohibited from disclosing.

C. Access to legal services

The legal profession shares a commitment to increasing access to legal services. This commitment is apparent in pro bono activities and programs such as Legal Aid, the Legal Services Corporation, and IOLTA programs. The legal profession's commitment to access to legal services is also evident in the ethical prohibition of unreasonably large fees. Other professions may not necessarily share this commitment, and single-entity ABS models may undermine the legal profession's commitment to increasing access to legal services.

III. NEW YORK APPROACH – RULE 5.8

In light of these concerns and as a result of the work of the MacCrate Committee, New York rejected ABS models involving lawyers and nonlawyers participating in a single legal entity that renders legal advice. Instead, New York adopted a rule—now enacted as Rule 5.8 of the New York Rules of Professional Conduct—that allows a lawyer or law firm to:

> enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services, notwithstanding the provisions of Rule 1.7(a).

(A copy of Rule 5.8, and the accompanying Comments adopted by the New York State Bar Association, are attached as an Appendix hereto.) Rule 5.8 places several limitations on such alliances:

- Lawyers may enter into alliances only with members of certain professions. To qualify, a profession must be composed of individuals who (i) have been awarded a bachelor's degree or an equivalent combination of educational credit and work experience, (ii) are licensed to practice by a state or federal agency, and (iii) are required to adhere to a "code of ethical conduct that is reasonably comparable to that of the legal profession." The Appellate Divisions maintains a list of approved professions, which currently includes five professions: Architecture, Certified Public Accountancy, Professional Engineering, Land Surveying, and Certified Social Work.

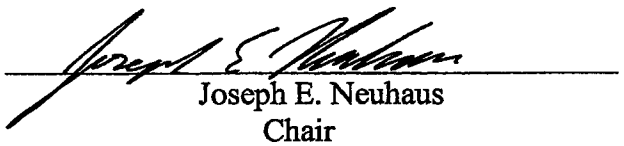
- Lawyers may not share fees with the nonlawyers, pay referral fees to the nonlawyers, allow the nonlawyers to hold any ownership or investment interest in the law firm, or allow the nonlawyers to exercise any managerial or supervisory power over the practice of law.

- Prior to referring any client to the nonlegal professional services firm or any client of the nonlegal professional services firm, lawyers must disclose the existence of the contractual relationship to the client, provide a "Statement of Client's Rights In Cooperative Business Arrangements," and obtain the informed written consent of the client.

We suggest that New York's "strategic alliance" model remains a more prudent approach than allowing lawyers to practice with nonlawyers in a single entity that renders legal advice. Like single-entity models, the strategic alliance model allows lawyers and nonlawyers to work together to offer clients a broader range of services and, potentially, to increase each professional's access to potential clients. Unlike single-entity models, however, strategic alliances allow collaboration while avoiding the significant ethical concerns raised by single-entity models. The strategic alliance model avoids the complexity of applying and enforcing different professional standards to members of different professions working in a single firm by maintaining separate and independent legal entities. New York's approach protects the integrity of the legal profession and minimizes the possibility of nonlawyer influence on a lawyer's

exercise of professional judgment by prohibiting fee-splitting, nonlawyer ownership or control, and referral fees. Finally, New York's approach provides further protection to clients by limiting strategic alliances to professions that meet certain educational and regulatory standards, and by requiring that clients provide informed written consent before being referred to a lawyer's strategic partner.

June 9, 2011



Joseph E. Neuhaus
Chair
Committee on Standards of Attorney Conduct
of the New York State Bar Association

APPENDIX
NEW YORK RULES OF PROFESSIONAL CONDUCT

RULE 5.8:
CONTRACTUAL RELATIONSHIPS BETWEEN LAWYERS AND NONLEGAL PROFESSIONALS

(a) The practice of law has an essential tradition of complete independence and uncompromised loyalty to those it serves. Recognizing this tradition, clients of lawyers practicing in New York State are guaranteed "independent professional judgment and undivided loyalty uncompromised by conflicts of interest." Indeed, these guarantees represent the very foundation of the profession and allow and foster its continued role as a protector of the system of law. Therefore, a lawyer must remain completely responsible for his or her own independent professional judgment, maintain the confidences and secrets of clients, preserve funds of clients and third parties in his or her control, and otherwise comply with the legal and ethical principles governing lawyers in New York State.

Multi-disciplinary practice between lawyers and nonlawyers is incompatible with the core values of the legal profession and therefore, a strict division between services provided by lawyers and those provided by nonlawyers is essential to protect those values. However, a lawyer or law firm may enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services, notwithstanding the provisions of Rule 1.7(a), provided that:

(1) the profession of the nonlegal professional or nonlegal professional service firm is included in a list jointly established and maintained by the Appellate Divisions pursuant to Section 1205.3 of the Joint Appellate Division Rules;

(2) the lawyer or law firm neither grants to the nonlegal professional or nonlegal professional service firm, nor permits such person or firm to obtain, hold or exercise, directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in connection with the practice of law by the lawyer or law firm, nor, as provided in Rule 7.2(a)(1), shares legal fees with a nonlawyer or receives or gives any monetary or other tangible benefit for giving or receiving a referral; and

(3) the fact that the contractual relationship exists is disclosed by the lawyer or law firm to any client of the lawyer or law firm before the client is referred to the nonlegal professional service firm, or to any client of the nonlegal professional service firm before that client receives legal services from the lawyer or law firm; and the client has given informed written consent and has been provided with a copy of the "Statement of Client's Rights In Cooperative Business Arrangements" pursuant to section 1205.4 of the Joint Appellate Divisions Rules.

(b) For purposes of paragraph (a):

(1) each profession on the list maintained pursuant to a Joint Rule of the Appellate Divisions shall have been designated sua sponte, or approved by the Appellate Divisions upon application of a member of a nonlegal profession or nonlegal professional service firm, upon a determination that the profession is composed of individuals who, with respect to their profession:

(i) have been awarded a bachelor's degree or its equivalent from an accredited college or university, or have attained an equivalent combination of educational credit from such a college or university and work experience;

(ii) are licensed to practice the profession by an agency of the State of New York or the United States Government; and

(iii) are required under penalty of suspension or revocation of license to adhere to a code of ethical conduct that is reasonably comparable to that of the legal profession;

(2) the term "ownership or investment interest" shall mean any such interest in any form of debt or equity, and shall include any interest commonly considered to be an interest accruing to or enjoyed by an owner or investor.

(c) This Rule shall not apply to relationships consisting solely of non-exclusive reciprocal referral agreements or understandings between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm.

Comment

Contractual Relationships Between Lawyers and Nonlegal Professionals

[1] Lawyers may enter into interprofessional contractual relationships for the systematic and continuing provision of legal and nonlegal professional services, provided the nonlegal professional or nonlegal professional service firm with which the lawyer or law firm is affiliated does not own, control, supervise or manage, directly or indirectly, in whole or in part, the lawyer's or law firm's practice of law. The nonlegal professional or nonlegal professional service firm may not play a role in, for example, (i) deciding whether to accept or terminate an engagement to provide legal services in a particular matter or to a particular client, (ii) determining the manner in which lawyers are hired or trained, (iii) assigning lawyers to handle particular matters or to provide legal services to particular clients, (iv) deciding whether to undertake pro bono and other public-interest legal work, (v) making financial and budgetary decisions relating to the legal practice, and (vi) determining the compensation and advancement of lawyers and of persons assisting lawyers on legal matters.

[2] The contractual relationship permitted by this Rule may include the sharing of premises, general overhead or administrative costs and services on an arm's length basis. Such

financial arrangements, in the context of an agreement between lawyers and other professionals to provide legal and other professional services on a systematic and continuing basis, are permitted subject to the requirements of paragraph (a) and Rule 7.2(a). Similarly, lawyers participating in such arrangements remain subject to general ethical principles in addition to those set forth in this Rule including, at a minimum, Rule 1.7, Rule 1.8(f), Rule 1.9, Rule 5.7(b) and Rule 7.5(a). Thus, the lawyer or law firm may not, for example, include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional, enter into formal partnerships with nonlawyers, or practice in an organization authorized to practice law for a profit in which nonlawyers own any interest. Moreover, a lawyer or law firm may not enter into an agreement or arrangement for the use of a name in respect of which a nonlegal professional or nonlegal professional service firm has or exercises a proprietary interest if, under or pursuant to the agreement or arrangement, that nonlegal professional or firm acts or is entitled to act in a manner inconsistent with paragraph (a)(2) or Comment [1]. More generally, the existence of a contractual relationship permitted by this Rule does not by itself create a conflict of interest in violation of Rule 1.8(a). Whenever a law firm represents a client in a matter in which the nonlegal professional service firm's client is also involved, the law firm's interest in maintaining an advantageous relationship with a nonlegal professional service firm might, in certain circumstances, adversely affect the professional judgment of the law firm.

[3] Each lawyer and law firm having a contractual relationship under paragraph (a) has an ethical duty to observe these Rules with respect to the lawyer's or law firm's own conduct in the context of that relationship. For example, the lawyer or law firm cannot permit the obligation to maintain client confidences, as required by Rule 1.6, to be compromised by the contractual relationship or by its implementation by or on behalf of nonlawyers involved in the relationship. In addition, the prohibition in Rule 8.4(a) against circumventing a Rule through actions of another applies generally to the lawyer or law firm in the contractual relationship.

[4] The contractual relationship permitted by paragraph (a) may provide for the reciprocal referral of clients by and between the lawyer or law firm and the nonlegal professional or nonlegal professional service firm. When in the context of such a contractual relationship a lawyer or law firm refers a client to the nonlegal professional or nonlegal professional service firm, the lawyer or law firm shall observe the ethical standards of the legal profession in verifying the competence of the nonlegal professional or nonlegal professional services firm to handle the relevant affairs and interests of the client. Referrals should be made only when requested by the client or deemed to be reasonably necessary to serve the client. Thus, even if otherwise permitted by paragraph (a), a contractual relationship may not require referrals on an exclusive basis. *See* Rule 7.2(a).

[5] To ensure that only appropriate professional services are involved, a contractual relationship for the provision of services is permitted under paragraph (a) only if the nonlegal party thereto is a professional or professional service firm meeting appropriate standards regarding ethics, education, training and licensing. The Appellate Divisions maintain a public list of eligible professions at 22 N.Y.C.R.R. § 1205.5. A member of the nonlegal profession or a professional service firm may apply for the inclusion of particular professions on the list or professions may be added to the list by the Appellate Divisions sua sponte. A lawyer or law firm not wishing to affiliate with a nonlawyer on a systematic and continuing basis, but only to engage a nonlawyer on an ad hoc basis to assist in a specific matter, is not governed by this Rule

when so dealing with the nonlawyer. Thus, a lawyer advising a client in connection with a discharge of chemical wastes may engage the services of and consult with an environmental engineer on that matter without the need to comply with this Rule. Likewise, the requirements of this Rule need not be met when a lawyer retains an expert witness in a particular litigation.

[6] Depending upon the extent and nature of the relationship between the lawyer or law firm, on the one hand, and the nonlegal professional or nonlegal professional service firm, on the other hand, it may be appropriate to treat the parties to a contractual relationship permitted by paragraph (a) as a single law firm for purposes of these Rules, as would be the case if the nonlegal professional or nonlegal professional service firm were in an "of counsel" relationship with the lawyer or law firm. If the parties to the relationship are treated as a single law firm, the principal effects would be that conflicts of interest are imputed as between them pursuant to Rule 1.10(a) and that the law firm would be required to maintain systems for determining whether such conflicts exist pursuant to Rule 1.10(f). To the extent that the rules of ethics of the nonlegal profession conflict with these Rules, the rules of the legal profession will still govern the conduct of the lawyers and the law firm participants in the relationship. A lawyer or law firm may also be subject to legal obligations arising from a relationship with nonlawyer professionals, who are themselves subject to regulation

NYSBA International Section

Task Force on Non-Lawyer Ownership

Interim Report

Introduction to the NYSBA International Section

The NYSBA International Section ("Section") supports the liberalization of the restrictions on practice with non-lawyers proposed by the ABA but, on balance, we think that the ABA's preferred proposals are unduly conservative. This report gives you some background on how we reached those conclusions and the issues that we still feel are outstanding. It also shares some of the evidence that the Section considered in reaching its conclusions.

The Section is dedicated to the promotion of the international practice of law and the support of the rule of law throughout the world. The Section was founded a little over 25 years ago. While the majority of the Section's members are admitted to the Bar of the State of New York, many members are licensed attorneys in other states of the United States or other countries.

The Section has more than 60 chapters in many of the most important legal jurisdictions of the world, which provide educational and networking opportunities for Section members abroad and foster co-operation and dialogue between the Section and legal communities abroad. The Section sponsors a three-day conference each year in an important jurisdiction outside the United States. Recent conferences have been held in London (2005), Shanghai (2006), Lima (2007), Stockholm (2008), Singapore (2009), Sydney (2010) and Panama (2011). The International Section also publishes the *New York International Law Review*, the *International Law Practicum*, and the *New York International Chapter News*.

The Preparation of this Report

To prepare this Report, four members of the Section volunteered to assist in gathering thoughts from our members, for which the Section is grateful. The members of the subcommittee were as follows:

Jonathan P. Armstrong (Chair)
Partner, Duane Morris, LLP
London

Lawrence A. Darby III
Senior Adviser, Peridot Asia Advisors, LLC
New York

James P. Duffy, III
Berg and Duffy
New York

Eberhard Rohm
Partner, Duane Morris, LLP
New York

Messrs. Darby, Duffy, and Rohm are admitted to the New York Bar. Mr. Armstrong is admitted in England and Wales. Mr. Rohm is also qualified in Germany and Mr. Duffy in Monaco.

In addition to preparing this note, the Section has assisted the NYSBA Task Force led by Stephen Younger in taking evidence from the Legal Services Board, the UK lead regulator. The International Section has arranged for the CEO and the General Counsel of the Legal Services Board to assist Mr. Younger's group in understanding the regulatory regime in the UK, which recently went through a similar, but more involved, change. The Section has also drawn on its experience of the Australian regime gathered from its joint conference with the Australian profession in 2010. In addition the thoughts of a number of the Section's international lawyers have been canvassed through the Section's dedicated LinkedIn pages and via email.

We should stress that this Report has been put together in a short timeframe to meet your schedule. It will also be discussed by the Section at its next Executive Committee meeting in Prague in March. It represents the current majority position of those who responded to our consultation, but does not necessarily represent the views of individual members or of any of the law firms or other organizations to which they belong.

The ABA's preferred approach

The ABA's preferred approach is to *"permit lawyers to become partners with (and share fees with) non-lawyers, such as economists, social workers, architects, engineers, consultants and financial advisors, under narrowly defined circumstances*".[1]

Firms would only be approved if:
(1) the firm engages only in the practice of law
(2) the non-lawyers earn no more than a fixed percentage (*e.g.* 25%)
(3) the non-lawyers pass a "fit to own test"

Background to our report

The subcommittee formed the view that, as a matter of general principle, there was value in the legal profession being just that – a profession restricted to those who had undertaken the requisite study and were bound by common professional rules. However, we took the view that fundamentally in many jurisdictions that time has now passed. While we could mourn its passing, the world had moved on.

Some large firms in advanced jurisdictions are now run on corporate lines. Given the size of their operations, it is not possible for many of them to function on the capital that the firm's partners can provide. Many firms as a result rely on bank financing, and we heard anecdotal evidence of firms being directed by their bankers as to how to run the firm. Members of the subcommittee noted the focus which some banks, including Citibank and HSBC, had developed for law firm financing. While we felt these particular banks were responsible and knew the market well, we heard anecdotally of cases where law firms had been told to

increase or decrease a particular practice area and, due to the unavailability of financing, found that they were unable to resist. We also were cognizant of the role that one bank played in the collapse of the Halliwells law firm in the UK as well as a number of reports saying that, after that firm's demise and the collapse of a number of similar sized firms in the US, banks were reluctant to provide further financing. Against this background, we felt that, while we were not in favor of non-lawyer ownership *per se,* the short term nature of other forms of financing was less palatable.

In addition, the legal profession faces very real threats from non-lawyers, including document production websites like Legal Zoom and the Google-backed Rocket Lawyer. It is estimated that Rocket Lawyer alone created 40,000 business contracts in 2010.[2]

Additionally, the legal profession is also under pressure from non-conventional providers of legal services. Firms already exist with "alternative" models, including Axiom Legal. Whilst some dismiss providers like Axiom as no more than temporary service providers, we believe that there is much more to it than this. Axiom employs significant numbers of lawyers and bills itself as a 900 person law firm. The market is finding ways to receive and to provide legal services that are significantly different than the business models envisaged by the legal profession itself, and it is right that we consider that when viewing the prospect of change. We are happy to expand on our thoughts on the threats and opportunities posed by new models.

Factors which influenced our thoughts

The subcommittee looked, in particular, at the experiences of Slater & Gordon in Australia and the UK. Slater & Gordon is a law firm founded in 1939, which "went public" in 2007. In January, Slater & Gordon announced plans to acquire the UK personal injury firm Russell, Jones & Walker. Slater & Gordon seems to be run along corporate lines, and we did not hear any evidence of shareholder pressure making them dilute their professional commitments. On the contrary, Slater & Gordon seems to recognize that the maintenance of its reputation and its more than 70 year history of looking after its client's interests was key to its future success. Slater & Gordon has merged with around 20 Australian firms immediately prior to and since its public listing which suggests the absence of concerns as to its professional reputation.

The subcommittee also looked at the experience in the UK. In England and Wales, the Legal Services Act 2007 permits both MDPs and Alternative Business Structures (ABSs) with non-lawyers in professional, management or ownership roles. ABSs are to be regulated in much the same way as a pure law firm. In Scotland, the Law Society of Scotland has a different approach with a more restrictive form of ABS, the majority of which must still be owned by qualified lawyers.

Members of the Section have followed developments in the UK for a number of years and these developments were the subject of special focus at the Section's meeting in London in 2005, where the Section heard from a number of people involved in the process including Sir Leon Brittan, Baron Brittan of Spennithorne and the then Lord Chancellor Lord Falconer. The Clementi Report which led to these changes has been the source of much study and comment from around the time of the Section's London conference and members of the Section have been active participants in many facets of those discussions going as far back as the NAFTA legal services negotiations that took place in the late 1980s and early 1990s.

The Section also felt that the wider picture of efforts to reduce the perceived restrictive trade practices of lawyers also needed to be taken into account. Generally, it is felt that professional organizations, such as bar associations, attempt to put significant non-tariff barriers to entry into their domains. The thought, from the trade perspective, is that these organizations are trying to preserve their local monopoly rather than to serve any well grounded public purpose. There are undoubtedly parts of the world where the legal profession is run on a more restrictive basis than the US – for example the restrictions which exist on foreign participation in the practice of the law in India, China and Brazil. While the US has effective barriers to entry in its profession, its ability to influence other countries who maintain more severe restrictions is clearly limited.

Issues which remain

1. **Privilege** - The Section is increasingly concerned about moves to erode the attorney/client privilege, particularly in Europe. While the subcommittee was not able to establish the exact details of the case, we understood that there had already been cases disincentivizing the change of law firm structure; for example we heard of one case where a US firm was denied the protection of Swiss professional secrecy laws because it was an LLP rather than a conventional partnership. We believe that that position should be investigated before any change in the rules is made. It should be noted that, in the UK, the Legal Services Act 2007 specifically provided for legal professional privilege to be extended to authorized persons other than barristers and solicitors in ABSs. It may well be that similar legislation would be needed in the US to secure privilege for participants in a new structure firm.

2. **Fit and proper test** - Even if the ABA decides to recommend increasing participation in law firms, it should not be a free for all. There should be a fit and proper test which all law firm owners – whether professionally qualified or not – should have to meet in every law firm. It needs to be transparent, and details of the proposed test should be published at the earliest opportunity. We believe that Mr. Younger's committee is well placed to take detailed evidence from the Legal Services Board at the March 7th meeting on the work that the UK regulator has done in this area.

3. **Errors** - The subcommittee also identified some minor errors in the ABA report. For example the Solicitors Regulatory Authority regulates the solicitors' profession in England and Wales rather than its role being confined to England.

Findings

1. The subcommittee believes that, because of its unique membership, the Section should be consulted on a regular basis as the NYSBA's thoughts develop.

2. The ABA has previously rejected three forms of non-lawyer ownership firms.

    a. publicly traded law firms
    b. passive, outside non-lawyer investment or ownership in law firms and
    c. multi-disciplinary practices (which they define as law firms that offer both legal and non-legal services separately in a single entity).

The subcommittee believes these rejections should be revisited. The Slater & Gordon experience is at least *prima facie* evidence that an ABS-type structure can be used for law firms, and we believe that the ABA's preferred model is too conservative and too restrictive. We feel that, for example, permitting external investment (perhaps on a controlled basis initially, following the Scottish model) was likely to be no more harmful to the profession than the sharing of fees with economists, social workers, architects, engineers, consultants and financial advisors.

3. The subcommittee feels that the proposed treatment of the imposition of ethical duties on non-lawyers needs clarity. We also feel that the paragraph (a) exception to the rule restricting practice with non-lawyers also lacks clarity, especially in its attempts to require non-lawyers to agree to ethical rules applicable to lawyers and to impose on lawyer partners the responsibility to ensure compliance by non-lawyers with those requirements. For example, what is meant by "power" to direct the professional judgment of non-lawyers? In addition, if non-lawyers sign the requested statement of compliance with ethical rules, what more must a lawyer partner do to meet his "reasonable efforts" obligation in respect of enforcement? It is important that there is clarity and certainty in these proposals as responsible partners will wish to speak to their insurers to arrange appropriate professional indemnity and D & O insurance. It also important to have clarity so that members of the public know exactly the professional requirements of those they engage.

4. The subcommittee would like clarity on the possibility that the relevant non-professionals may be foreign lawyers. Our members have had experience with the way in which other jurisdictions have handled this, for example, in the Hong Kong Legal Practitioners Ordinance. Given, as we have said, that the legal profession is global in nature, we feel this is an important issue to address.

5. The subcommittee feels that the ABA's discussion paper itself could be improved. These are critical issues to the legal profession and the 20 page close-typed document is hard to read given the everyday pressures of running a practice. The ABA should work on a simple one page executive summary to engage busy lawyers and members of the public.

6. The subcommittee was interested in the ABA's findings that three US law firms have already registered[3] with the SRA in the UK as Legal Disciplinary Practices (LDPs). We saw that as evidence that the regulatory regime in England and Wales had modernized whereas the US system had not. Our Section fears that ground will be lost to more open jurisdictions if the US did not modernize as well.

7. The subcommittee also noted the popularity of LDPs according to the ABA report given that the SRA had already approved 490 LDPs in the UK. We also noted with interest the fact that to date no disciplinary problems with LDPs have been reported. As LDPs tend to be smaller practices, and, as, in England and Wales, anecdotally at least, smaller practices seem to have proportionately more disciplinary issues, we thought that that was especially noteworthy. We concluded that, as yet, there was no evidence that LDPs diminished professional responsibility. In fact, the opposite may be true with ABSs who will have greater obligations to publish financial accounts than conventional partnerships.

Conclusions

The Section would like to see the ABA widen its consultations and include those models of law firm ownership which it has previously excluded. We believe that, if this is not done, US law firms will lose ground and some may, therefore, choose to locate overseas. The profession must also be able to respond to the threats posed by non-lawyers. In addition we believe that the US legal profession needs to be seen to be a modernizing profession so that it can effectively advocate modernization overseas.

NYSBA International Section
24th February 2012

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1 See page 5 of the discussion paper.
2 Law and New Order, The Lawyer November 7th 2011
3 Page 8 of the discussion paper

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

1440 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-2111

TEL: (202) 371-7000
FAX: (202) 393-5760
www.skadden.com

DIRECT DIAL
202-371-7410
DIRECT FAX
202-661-8301
EMAIL ADDRESS
JOHN.BEISNER@SKADDEN.COM

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SHANGHAI
SINGAPORE
SYDNEY
TOKYO
TORONTO
VIENNA

June 1, 2011

By Electronic Mail and First Class Mail

Natalia Vera
Senior Research Paralegal, Commission on
Ethics 20/20
ABA Center for Professional Responsibility
321 North Clark Street, 15th Floor
Chicago, IL 60654-7598

RE: *Comments of the U.S. Chamber Institute for Legal Reform on the Issues Paper Concerning Alternative Business Structures*

Dear Commission Members:

I am writing to offer comments on behalf of the U.S. Chamber Institute for Legal Reform ("ILR") on the Issues Paper Concerning Alternative Business Structures of the American Bar Association Commission on Ethics 20/20 Working Group on Alternative Business Structures (the "Issues Paper").

I. INTRODUCTION

ILR is a not-for-profit public advocacy organization affiliated with the U.S. Chamber of Commerce, the world's largest business federation, representing the interests of more than three million businesses of all sizes and sectors, as well as state and local chambers and industry associations. ILR's mission is to ensure a simple, efficient and fair legal system. Since ILR's founding in 1998, it has worked diligently to limit the incidence of litigation abuse in U.S. courts and has participated actively in legal reform efforts in the United States and abroad.

ILR writes to express its strong opposition to any loosening of Model Rule 5.4's restrictions on non-attorney investments in law firms. As set forth below, nobody has identified a distinct problem that would be solved by revisiting the restrictions in Rule 5.4. Moreover, allowing alternative business structures (even with the limitations proposed in the Issues Paper) would undermine core values of the U.S. legal system, transforming law from a profession into a business, and threaten to compromise the attorney-client relationship.

II. MODEL RULE 5.4 SHOULD NOT BE LOOSENED.

A. There Is No Public-Policy Rationale For Relaxing The Rules Against Alternative Business Structures.

Model Rule 5.4 serves important public-policy interests. Most importantly, the rule ensures that law firms are organized and managed in a manner that will protect client interests and uphold the principles of the profession.[1] These core values, which are critical to the functioning of our legal system, are already threatened by the prospect that attorneys will put their own pecuniary interests ahead of their clients' legal interests. Loosening Rule 5.4's restraints on lawyer-nonlawyer partnerships would enhance that risk and thereby undermine the fundamental goals of the Model Rules.

There is no legitimate reason to take that dangerous step. The Issues Paper suggests that alternative business structures "might serve to enhance access to legal services for those otherwise unable to afford them, and to provide new and varied opportunities for lawyers and firms domestically to better serve clients." But the Paper never explains why that would be the case. Nor does it offer any evidence that U.S. law firms are hampered in serving their clients because they are prohibited from organizing as alternative business structures.

Law firms already are able to employ (as non-partners) diverse professional service providers, including jury consultants, accountants and physicians. Thus, the only reason to permit any of these professionals to partner with lawyers is to increase the partnership's capital. But notwithstanding some firms' complaints about their

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[1] Notably, the House of Delegates "overwhelmingly" rejected the Kutak Commission's recommended changes to Model Rule 5.4 on a number of grounds, including that the existing Model Rules strike the appropriate balance among protecting clients' interests, ensuring that lawyers comply with their ethical obligations, and permitting law firms to experiment with different methods of delivering legal services. *See* Matthew Bish, *Revising Model Rule 5.4: Adopting a Regulatory Scheme that Permits Nonlawyer Ownership and Management of Law Firms*, 48 Washburn L.J. 669, 675, 679 (Spring 2009).

ability to raise money,[2] there is no evidence that U.S. law firms lack sufficient capital to serve their clients.

In reality, alternative business structures would likely hurt client interests – not help them – because lawyers would be focused on attracting and retaining nonlawyer investors, rather than providing top-notch legal services. This threatens to harm clients in at least three ways:

- First, there is a substantial risk that nonlawyer investors will focus only on their own profit and not on client interests or the advancement of the legal profession (of which they are not a part).

- Second, for similar reasons, nonlawyer involvement in law firm management would threaten to further dilute the already-diminishing role of the client in the U.S. legal system because lawyers may feel pulled by the interests of influential investors more so than the interests of their clients.

- Third, alternative business structures are likely to ***increase*** the cost of legal services and ***diminish*** access to justice because investors will expect substantial profits without adding much, if any, value to the quality (or efficiency) of the legal services being provided.

In this respect, alternative business structures are similar to third-party litigation financing and present the same dangers.[3] Both practices increase the amount of money in the litigation system, and both serve to convert lawsuits from a mechanism to vindicate clients' rights into investment vehicles for non-lawyers with disposable capital.[4] Moreover, other countries' experiences with third-party litigation financing have demonstrated that once the genie is let out of the bottle, it is

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2 *See Jacoby & Meyers Law Offices, LLP v. The Presiding Justices of the First, Second, Third and Fourth Departments, Appellate Division of the Supreme Court of the State of New York*, Civil Action No. 11-CV-3387 (S.D.N.Y. May 18, 2011).

3 "Third-party litigation financing" is the practice of providing financing to a person who is or may become involved in a civil action in return for an interest in any positive recovery or settlement in the case. ILR has previously submitted comments to the Commission on the inherent ethical problems with third-party litigation financing. *See* J. Beisner to ABA Comm'n on Ethics 20/20, Feb. 15, 2011.

4 *Cf.* Paul Rubin, *On Increasing the Efficiency of Litigation*, paper presented to the Public Policy Roundtable on Third Party Financing of Litigation, Searle Center on Law, Regulation and Economic Growth (September 2009).

difficult to put back, and there is no reason to believe that alternative business structures would have dissimilar consequences.

Particularly instructive is Australia's experience with third-party financing. Third-party funding was initially adopted in Australia for limited use in insolvency litigation.[5] In the two decades since its introduction, third-party financing has spread throughout Australia's civil-litigation system to the point where the line between law as a profession and as an investment-generating business is completely blurred.[6] A recent legal challenge to this state of affairs led to a High Court decision affirming that law in Australia is a business like any other – and that there is no public-policy basis for limiting the spread or influence of third-party funders. The same dangers exist in the United States with respect to alternative business structures for law firms: once the bright-line rule against such partnerships is crossed, passive equity interests in law firms could become the norm – and the principles underlying Rule 5.4 would be permanently compromised.

B. All Three Proposals Set Forth In The Issues Paper Threaten To Hurt The Practice Of Law In The U.S.

ILR applauds the Commission for recognizing that nonlawyer passive investment in law firms "would ***not*** be appropriate to recommend for implementation in the United States at this time."[7] ILR is concerned, however, that the three "potential approaches for consideration" set forth in the Issues Paper would put the U.S. on a direct path to such passive investments. The Issues Paper states that the three posited options "assume that the nonlawyer is partnered with and is an active member of the firm." But as proposed in the Issues Paper, there is no standard for

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5 In addition to third-party financing, Australia also permits law firms to raise capital by organizing as alternative business structures, as the Issues Paper notes. *See* Issues Paper at 7–10.

6 Third-party financing companies are allowed to recruit claimants and to instruct those claimants' attorneys in all matters. *See Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd.*, [2006] 229 CLR 386. Australia has even debated recently whether third-party funded class actions must be registered as investments with the country's securities commission. *See Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147. *See* Slater & Gordon, *Commercial Litigation Funding in Australia* (December 2009), *available at* http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(9A5D88DBA63D32A661E6369859739356)~52+-+Commercial+Litigation+Funding+in+Australia+Andrew+Gretch+Slater+&+Gordon+-+Dec+2009.PDF/$file/52+-+Commercial+Litigation+Funding+in+Australia+Andrew+Gretch+Slater+&+Gordon+-+Dec+2009.PDF; Vicki Waye, *Conflicts of Interest between Claimholders, Lawyers and Litigation Entrepreneurs*, 19 Bond L. Rev. 223, 268 (2007).

7 Issues Paper at 2 (emphasis added).

defining an "active member of the firm" under any of the three options; nor is there any means of ensuring that the real intent of such partnerships would be to participate actively in the firm – rather than simply to provide more capital sources for law firms (the very result that the Commission seeks to avoid).

ILR is thus opposed to all three options.

1. Option 1: Limited Lawyer/Nonlawyer Partnerships With A Cap On Nonlawyer Ownership

Under Option 1, lawyers would be permitted to partner (and share fees) with nonlawyers subject to certain, specified limitations. In particular: (1) the firm could engage only in the practice of law; (2) the nonlawyers could not own more than a certain percentage (e.g., 25%) of the firm; and (3) the nonlawyers would be required to pass a "fit to own" test. ILR commends the Commission for proposing these safeguards but nevertheless urges the Commission to reject Option 1.

As a threshold matter – and as noted above – ILR does not believe there is any demonstrated need for vitiating Rule 5.4's protections. But even if some changes were called for, Option 1 does not adequately protect against the dangers of passive investment in law firms by nonlawyers. In particular, ILR believes that any rule that permits a law firm to organize as an alternative business structure must also require that the non-lawyer partners ***actively*** and ***materially*** assist the lawyers in providing legal services to clients ***by bringing some valuable non-legal professional service to the table***, not merely by raising capital or assessing the likely profitability of any case for the partnership. Such direct professional involvement is critical to ensure that non-lawyer partners do not simply become involved in the law firm as a conduit for a passive equity investment. Such involvement also must encompass more than merely assessing the firm's likely return on a case, because such a service does nothing to benefit the client. Indeed, without "active participant" and "benefit to the client" requirements, this option poses all the same risks as allowing passive investments. And even if investments were capped at 25 percent, that is a sufficiently large share to give a non-lawyer considerable influence over the law firm's operations.

ILR appreciates that the District of Columbia's Rule of Professional Conduct 5.4 permits alternative business structures without this suggested safeguard. ILR believes, however, that Washington, DC, is a unique legal environment – and its experience cannot serve as a model for other states. First, the District of Columbia's rule primarily allows local law firms to provide legal services that involve lobbying the United States government. Washington, DC, is, of course, the seat of the federal government, the location of all foreign nations' embassies to the United States, and

the location of numerous non-governmental organizations. Thus, any benefits that are realized from permitting lobbyists to partner with lawyers are unique to the practice of law in Washington, DC, and would not be exported to other states adopting similar rules. Indeed, ILR is hard-pressed to think of any other professional service that is so tied to any particular location in the United States. Second, because Washington, DC, is the only U.S. jurisdiction that permits alternative business structures, any law firms that wish to partner with nonlawyers may only practice in Washington, DC, and cannot export their services to other states. This provides a natural check against law firms abusing the District of Columbia's rule as a means to generate capital. If other states adopted similar rules, however, this natural check would disappear.

2. Option 2: Limited Lawyer/Nonlawyer Partnerships With No Cap On Nonlawyer Ownership

Like Option 1, Option 2 would allow lawyer-nonlawyer partnerships; the key difference is that Option 2 would not place a cap on nonlawyer ownership. In this respect, Option 2 is more like the District of Columbia rule, which also does not cap nonlawyer ownership.

To the extent any changes are made to Rule 5.4's restrictions on lawyer-nonlawyer partnerships – and ILR believes that none are needed – Option 2 is even more problematic than Option 1. After all, absent a cap on nonlawyer ownership, lawyers could find themselves in the minority of their own law firm management structure. This would mean that nonlawyers would have the power to make strategic and other decisions for the firm – without the experience and professional responsibility of attorneys.

3. Option 3: Permitting Alternative Business Structures To Offer Both Legal And Non-Legal Services

Option 3 is the most radical – and dangerous – of the three options set forth in the Issues Paper because it would allow alternative business structures to offer both legal and non-legal services, and thus turning the practice of law from a profession into a business. If a law firm that is organized as an alternative business structure were permitted to engage in businesses other than the practice of law, there is a distinct risk that it would sacrifice its clients' interest for the sake of other business interests. This is particularly true because the firm's non-lawyer partners would not have fiduciary obligations to the firm's legal clients – or the professional duties that come with being a lawyer. As such, if a legal representation were going poorly, they would likely pressure the lawyer partners to support other, more successful business lines. This is exactly the risk that Model Rule 5.4 seeks to

avoid.[8]

In addition, permitting alternative business structures to provide non-legal business services threatens to undermine the traditional role of an attorney as a confidential, trusted advisor. It is well settled, after all, that a lawyer's advice to a client is privileged only when the lawyer provides ***legal*** advice, not ***business*** advice.[9] If a law firm were permitted to engage in business outside the legal practice, it is unclear that communications between the firm and its clients would be privileged. This would threaten to chill the provision of candid legal advice, as attorneys at such firms would hesitate to provide advice, knowing that it might not be protected in light of the firm's business endeavors. As one commentator has suggested:

> A new Model Rule authorizing law firms to partner with non-lawyer professionals might be taken as a concession that much of the transactional work of outside counsel is also "business" rather than "legal" in nature. This might lead courts to reexamine and narrow the privilege, particularly in the context of corporate representations, where the privilege . . . is already controversial and perceived to be imperiled.[10]

In addition, firms that offer non-legal professional services in addition to professional services likely will be rife with intra-firm conflicts as the non-lawyers compete with the lawyers for firm resources, thus further diminishing access to justice for clients. Moreover, in such circumstances, the lawyers would be forced to choose between their duties to their clients, and their duties to their non-lawyer partners and to the firm as a whole.[11]

For these reasons, ILR believes that, if law firms are permitted to organize as alternative business structures (a change that ILR generally opposes), they must be restricted to providing legal advice, and not be permitted to engage in any other

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[8] *See* Model Rule of Prof'l Conduct 5.4(d)(3). ("A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if . . . a nonlawyer has the right to direct or control the professional judgment of a lawyer.").

[9] Bruce Green, *ABA Ethics Reform from "MDP" to "20/20": Some Cautionary Reflections*, 2009 Prof. Law 1, 10; *see also United States v. Frederick*, 182 F.3d 496 (7th Cir. 1999) (documents prepared by a lawyer for non-legal purposes are not privileged); Michael Kelly, *Comment: Ethical Issues Associated with Multidisciplinary Practices in Texas*, 41 St. Mary's L.J. 741, 766-767.

[10] Green, *ABA Ethics Reform*, at 11.

[11] *See* Kelly, *Comment*, at 762–763; Bish, *Revising Model Rule 5.4*, at 694.

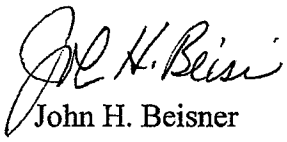
business lines.

III. CONCLUSION

In the Issues Paper, the Commission notes that "[t]he principles guiding the Commission's work are protection of the public; preservation of core professional values; and maintenance of a strong, independent and self-regulated profession." ILR respectfully submits that those principles would be best served by maintaining Model Rule 5.4 as is.

At the very least, any loosening of Rule 5.4 must provide that an alternative business structure involving lawyers who practice law may ***only*** engage in the practice of law and that any nonlawyer partners must ***actively*** and ***materially*** assist the lawyer partners in ***providing legal services to clients***. Such a rule should also cap the interest that nonlawyer(s) may have in an alternative business structure in order to prevent the nonlawyer(s) from having inordinate influence over the practice of law and strategic decision making.

Very truly yours,



John H. Beisner

ABA Commission on Ethics 20-20: Initial Draft Proposal for Comment
Choice of Law-Alternative Law Practice Structures
December 2, 2011

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

REPORT

The American Bar Association Commission on Ethics 20/20 has examined the choice of law problems that arise when ethics issues implicate multiple jurisdictions with inconsistent rules of professional conduct. This Report describes the Commission's proposals to address the particular problems that arise as a result of jurisdictional inconsistencies, both domestically and abroad, concerning nonlawyer ownership interests in law firms. These inconsistencies exist because, although most domestic jurisdictions do not currently permit nonlawyer ownership interests in law firms, the District of Columbia, England, Australia, Canada and other countries where U.S. lawyers and law firms regularly practice now permit some form of nonlawyer ownership or partnership in law firms.[1] The Commission has learned that U.S.-licensed lawyers want more guidance as to their ethical obligations when they are asked to work with or within firms that have nonlawyer owners or partners.

To develop appropriate recommendations in this area, the Commission's Uniformity, Choice of Law, and Conflicts of Interest Working Group included participants from the Standing Committee on Ethics and Professional Responsibility, the Standing Committee on Client Protection, the Standing Committee on Professional Discipline, and the National Organization of Bar Counsel. They made important contributions to the Working Group's understanding of the issues and the development of the Resolutions accompanying this Report. Moreover, the Commission released an Issues Paper identifying a wide range of choice of law problems and received numerous responses. The Commission also heard testimony from lawyers in various practicing settings and organizations regarding these issues. Based on responses to the Issues Paper and other comments received, it became clear to the Commission that additional guidance to lawyers regarding this subject is needed. As a result, the Commission is proposing two amendments to the Model Rules of Professional Conduct.

First, the Commission is proposing to amend Model Rule 1.5(e) (Fees) as well as its Comment [8]. Rule 1.5(e) provides that, under certain circumstances, two or more law firms may divide a legal fee that is generated from a particular legal matter. A choice of law problem arises if the fee-dividing firms are governed by different rules regarding the permissibility of nonlawyer ownership. In particular, one firm might be governed by a version of Model Rule 5.4 (Professional Independence of a Lawyer) that does not permit nonlawyer partners or owners, and

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[1] *See, e.g.*, D.C. RULES OF PROF'L CONDUCT R. 5.4 (2007); Legal Profession Act 2004, http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/, (hereinafter "LPA 2004"); Legal Profession Regulation 2005, http://www.austlii.edu.au/au/legis/nsw/consol_reg/lpr2005270/; Law Society of British Columbia, Law Society Rules, Multi-Disciplinary practice, Section 2-23.3(2)(a)(i), *available at* http://www.lawsociety.bc.ca/publications_forms/rules/rules_part02.html#2-23-3; http://www.sra.org.uk/sra/legal-services-act/faqs/ABS-faqs.page; *and* http://www.sra.org.uk/sra/legal-services-act/lsa-glossary.page.
For additional detail, see ABA Commission on Ethics 20/20, Issues Paper Concerning Alternative Business Structures, April 5, 2011, at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf.

the other firm might be permitted to have nonlawyer partners or owners under its applicable Rules of Professional Conduct. The question is whether the law firm that is not permitted to have nonlawyer owners or partners can ethically divide a legal fee with a law firm that has such nonlawyer partners or owners. Based upon the realities of interstate and international law practice, and for the reasons explained in this Report, the Commission concluded that the fee division should be permissible.

Second, the Commission is proposing to amend Model Rule 5.4 to address a conceptually similar problem. A law firm may have offices in multiple jurisdictions, and only some of those jurisdictions may permit lawyers to share fees with nonlawyers within the same firm (i.e., intra-firm fee sharing). The question is whether the lawyers who are practicing in an office where nonlawyer fee sharing is impermissible can share fees with nonlawyers in the same firm who are located in a different jurisdiction where such fee sharing is permissible. The Commission concluded that a lawyer should be permitted to share fees with nonlawyers under these circumstances, but only if the nonlawyer performs professional services that assist the firm in providing legal services to its clients and that form of fee sharing is permitted by the jurisdiction whose rules apply to the permissibility of fee sharing with the nonlawyer.

The Commission believes that both of these amendments will help lawyers navigate the difficult choice of law problems that are arising due to increasingly inconsistent rules worldwide regarding the sharing of fees with nonlawyers, particularly due to developments abroad. The Commission concluded that these types of choice of law problems will persist, regardless of whether the ABA amends Model Rule 5.4 to permit some form of nonlawyer ownership.[2] Even with such an amendment to the Model Rules to permit some form of nonlawyer ownership in law firms, some jurisdictions will not adopt the Model Rule or will do so only with modifications. Moreover, even if every U.S. jurisdiction prohibited sharing legal fees with nonlawyers (this is currently not the case, as noted above), many law firms with offices in the U.S. have offices in other countries that permit fee sharing with nonlawyers, thus raising the same issue. For these reasons, the Commission believes that these choice of law problems need to be addressed.

I. Rule 1.5 Proposal to Address Choice of Law Issues Associated with Inter-Firm Fee Divisions

Rule 1.5(e) provides that two or more law firms may divide a legal fee that is generated from a particular legal matter, assuming certain requirements are satisfied. The Commission's proposal is designed to address a particular choice of law problem that has arisen due to inconsistencies among jurisdictions with regard to nonlawyer ownership.

The problem can be understood through the following example. A law firm located in the District of Columbia may have nonlawyer owners, as is permitted under Rule 5.4 of the District of Columbia Rules of Professional Conduct. In accordance with the best interests of the client, that firm may refer a legal matter to a second law firm, which is located in a jurisdiction (e.g., New York) that does not currently permit nonlawyer fee sharing. Under current Model

[2] ABA Commission on Ethics 20/20, Discussion Draft on Alternative Law Practice Structures, December 2, 2011, at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.pdf.

Rule 1.5, the New York and District of Columbia firms may divide the legal fees that result from the District of Columbia firm's referral, assuming the District of Columbia firm retains joint responsibility for the matter, the client agrees in writing to the arrangement, and the overall fee is reasonable. The question is whether the New York firm violates New York's version of Rule 5.4, which prohibits fee sharing with nonlawyers, if the firm divides the fee with the District of Columbia firm, given that the District of Columbia firm has nonlawyer owners.

The Commission concluded that the New York firm should be permitted to divide fees with the District of Columbia firm under these circumstances, because the concerns underlying the prohibition in Rule 5.4 are not implicated in this context. In particular, Model Rule 5.4 is designed to insulate lawyers from the influence of nonlawyers,[3] but there is no plausible reason to believe that the nonlawyers in the District of Columbia firm are in a position to influence the New York lawyers, who not only are in a different jurisdiction, but also practice in an entirely different firm. Thus, the Commission proposes to clarify in Comment [8] to Rule 1.5 that one law firm can divide a fee with another law firm that has nonlawyer partners or owners.[4]

The proposed new sentence to Comment [8] ends with a cross-reference to Rule 8.4(a), which prohibits lawyers from "knowingly assist[ing]" another lawyer or firm in violating the Rules of Professional Conduct. This cross-reference is intended to remind lawyers that they cannot divide fees with another firm under circumstances that would constitute "knowingly assist[ing]" the other firm in violating the rules that apply to the permissibility of that firm's fee sharing.

II. Rule 5.4 Proposal to Address Choice of Law Issues Associated with Intra-Firm Fee Sharing

The second choice of law problem concerns *intra*-firm fee *sharing*. A law firm may have offices in multiple jurisdictions within the U.S. or within the U.S. and internationally, and only some of those jurisdictions may permit lawyers to share fees with nonlawyers within the same firm. The question is whether the lawyers who are practicing in an office where nonlawyer fee sharing is impermissible can share fees with nonlawyers in the same firm who are governed by the rules of a jurisdiction that permits such fee sharing.

The ABA Standing Committee on Ethics and Professional Responsibility addressed this issue twenty years ago in ABA Formal Opinion 91-360, just after the District of Columbia authorized nonlawyer ownership in law firms.[5] Formal Opinion 91-360 concluded that a lawyer licensed in both the District of Columbia and in a jurisdiction that does not permit nonlawyer fee sharing can share fees with District of Columbia-based nonlawyers, but only if the lawyer practices exclusively in the District of Columbia.[6] If, however, the lawyer practices in a jurisdiction that prohibits intra-firm fee sharing (or is licensed solely in that jurisdiction), the

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[3] *See* MODEL RULES PROF'L CONDUCT ANN. 456 (2011).
[4] The Commission's proposed solution to this choice of law problem is consistent with the only available authority on this issue – a 2010 ethics opinion by the Philadelphia Bar Association. Phila. Bar Ass'n Prof'l Guidance Comm., Advisory Op., 2010-7 (2010).
[5] D.C. RULES OF PROF'L CONDUCT R. 5.4 (2007).
[6] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-360 (1991), at 2.

Opinion concluded that the lawyer cannot share fees with the firm's nonlawyers.[7] (For reasons that appear below, Opinion 91-360 is outdated. It relied on a version of Rule 8.5(b) that is no longer part of the Model Rules.)

Despite this limitation on fee sharing, the Opinion recognized that law firms often have offices in multiple jurisdictions and that those firms might want to take advantage of nonlawyer fee sharing in jurisdictions (like the District of Columbia) that allow it. The Opinion suggested that a firm can have nonlawyer partners or owners in those jurisdictions, but that the office has to be "fiscally and managerially separate from and independent of" any offices located in jurisdictions that prohibit nonlawyer partners and owners.[8] In sum, while the firm can operate under a single name, it has to operate separately fiscally and managerially.

The Commission concluded that this attempt to segregate the firm's finances is essentially cosmetic. First, the entire firm can have a profit-sharing arrangement that includes nonlawyers whose compensation can be based "in whole or in part" on the plan (Rule 5.4(a)(3)).[9] The interests of a nonlawyer partner (or a nonlawyer owner in District of Columbia) in the plan can then easily be adjusted based on factors similar to those that define compensation schemes for lawyer partners.

Second, the nonlawyer's participation in the District of Columbia-based profits can be adjusted to compensate the nonlawyer, who cannot directly participate in the profits generated elsewhere. For example, in dividing up the income earned solely in the District of Columbia, no rule prevents the District of Columbia office of a multistate firm from recognizing the inability of the District of Columbia nonlawyer partners to participate in the income earned in other jurisdictions and thus to increase the District of Columbia nonlawyer's share in the District of Columbia-only income accordingly. In this sense, the Opinion's approach produces accounting gymnastics, but it does not actually prevent fee sharing with nonlawyers.

Rather than have firms continue to engage in separate bookkeeping, the Commission believes that the realities of 21st century legal practice require a more candid approach to this issue. That is to allow explicitly what Formal Opinion 91-360 has essentially permitted in practice for more than twenty years: the firm-wide sharing of fees, including with the firm's office that has nonlawyer partners and owners, but only if the nonlawyer performs professional services that assist the firm in providing legal services to its clients and that form of fee sharing is permitted by the jurisdiction whose rules apply to the permissibility of fee sharing with the nonlawyer. (The phrase "assist the firm in providing legal services to its clients" is intended to preclude lawyers from engaging in intra-firm fee sharing where one office of the firm has nonlawyer passive equity investors.[10])

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[7] *Id.*

[8] *Id.* at 12.

[9] *See, e.g.,* Phila. Bar Ass'n Prof'l Guidance Comm., Advisory Op., 04-03 (2004); Utah State Bar Ethics Advisory Opinion Comm., Advisory Op. 02-07 (2002).

[10] The Commission is not proposing a similar restriction on *inter*-firm fee divisions under Rule 1.5, because the Commission concluded that there is no risk to professional independence when a lawyer divides fees with a different law firm that has passive equity investors. In particular, there is no plausible basis to believe that the nonlawyer equity investors of a law firm will be in a position to influence lawyers who not only are in a different jurisdiction, but also practice in an entirely different firm.

The Commission also took issue with the assertion in Formal Opinion 91-360 that a jurisdiction that prohibits nonlawyer fee sharing has a "substantial and legitimate interest" in prohibiting nonlawyer fee sharing in another jurisdiction.[11] Relying on Rule 8.5, the Opinion explained that a jurisdiction might be legitimately concerned that nonlawyers in another jurisdiction might interfere with the professional independence of all of the lawyers in the firm, wherever they might be.[12] The Commission concluded that the Opinion's analysis in this regard may be outdated for two reasons.

First, the Opinion was written at a time when the choice of law provisions in Rule 8.5 were very different from, and considerably less helpful than, the provisions that exist today. In 1991, when Opinion 91-360 was published, Rule 8.5 provided only that "[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere."[13] Comment [3] to the 1991 version of the Rule provided little additional guidance: "Where a lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation."[14]

On the recommendation of the Standing Committee on Ethics and Professional Responsibility, Rule 8.5 was amended in 1993, to provide that for conduct not in connection with a matter pending before a tribunal, "(i) if the lawyer is licensed to practice only in this jurisdiction the rules to be applied shall be the rules of this jurisdiction, and (ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct."[15]

Significantly, in 2002, on the recommendation of the Commission on Multijurisdictional Practice, Rule 8.5 was amended again. This amendment eliminated the focus on the place of licensure or practice and now provides that, as to conduct not in connection with a matter pending before a tribunal, "the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct."[16] Thus, as amended in 2002, Rule 8.5(b)(2) prescribes a very different choice of law analysis for determining which rules govern conduct not connected to any matter pending before a tribunal. Today, Rule 8.5(b)(2) makes it clear that licensure and practice are not controlling for choice of law purposes; rather, the focus is on the rules of the jurisdiction in which the "conduct occurred" or in which the "predominant effect" of the conduct is felt.

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[11] *Supra* note 6, at 2-3.
[12] *Id.*
[13] MODEL RULES PROF'L CONDUCT ANN. 639 (2011).
[14] *Id.*
[15] *See* A LEGISLATIVE HISTORY, THE DEVELOPMENT OF THE ABA MODEL RULES OF PROF'L CONDUCT 825 (2006).
[16] *See* MODEL RULES OF PROF'L CONDUCT R. 8.5 (2011).

For these reasons, the Commission concluded that the analysis in the Opinion is now outdated. In particular, as to "a matter of firm organization,"[17] the "conduct occur[s]" or has its "predominant effect" in the jurisdiction in which the nonlawyer is admitted to the partnership or the office from which the nonlawyer principally works. For example, if a nonlawyer is admitted to partnership in the District of Columbia office of a firm and works principally with lawyers and serves clients in the District of Columbia office, Rule 8.5(b)(2) would permit the firm's lawyers located outside the District of Columbia to share fees with the nonlawyer, even if those lawyers were licensed in jurisdictions that do not permit such partnerships or ownership interests, because the "predominant effect" of the fee sharing is in the District of Columbia.

Second, the Commission found no empirical basis for the Opinion's assumption that nonlawyer partners and owners might assert inappropriate influence over lawyers who are located in another jurisdiction. Today, there exists empirical information that the Standing Committee did not have. Specifically, the District of Columbia, although prohibiting multidisciplinary practices and outside nonlawyer ownership interests in law firms, has permitted limited forms of nonlawyer ownership in law firms. The lawyers working in such District of Columbia firms have been permitted to share legal fees with those nonlawyers for more than two decades, and the Commission's research has uncovered no evidence that nonlawyers have exercised inappropriate influence over lawyers in the same firm, even when they are in the same physical office.[18] Thus, there is no reason to think nonlawyers located primarily in one jurisdiction, subject to its rules, will be able or inclined to attempt to interfere with the exercise of independent judgment by lawyers practicing in another jurisdiction. To be clear, if there were evidence that those lawyers permitted nonlawyers to exercise inappropriate influence over the lawyers' exercise of independent judgment in the representation of clients, disciplinary action against those lawyers would be appropriate, whether the nonlawyers were located in the same office as the lawyers or in different offices.

One concern expressed during the Commission's deliberations was that the Commission's proposal would allow a law firm to accomplish through the "back door" what it cannot accomplish through the "front door." That is, the proposal would allow a lawyer who cannot otherwise share fees with nonlawyers to engage in such fee sharing simply by becoming associated with a firm that has an office in a jurisdiction that permits nonlawyer fee sharing.

In fact, the Commission's proposal is intended to recognize that a jurisdiction can simultaneously conclude that some forms of nonlawyer fee sharing create undue risks to professional independence, while at the same time conclude that those risks are substantially mitigated if the nonlawyers are located in a different jurisdiction where nonlawyer ownership is permissible and appropriately regulated. The Commission's proposal rests on the idea that these two views are compatible and that nonlawyer fee sharing should therefore be permissible when the nonlawyer performs professional services that assist the firm in providing legal services to its clients and when that form of fee sharing is permitted by the jurisdiction whose rules apply to the permissibility of fee sharing with the nonlawyer.

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[17] *Supra* note 6, at 3 n.3.
[18] *Supra* note 2, at 4.

Conclusion

The Commission's proposals are intended to help lawyers and law firms resolve choice of law problems that have arisen due to inconsistencies among jurisdictions with regard to the question of dividing and sharing fees with firms that are permitted to have nonlawyer owners. The Commission believes that its proposals protect a lawyer's professional independence while giving appropriate deference to jurisdictions that have decided to permit some form of nonlawyer partnership or ownership in law firms. Accordingly, the Commission respectfully requests that the House of Delegates adopt the proposed amendments set forth in the accompanying Resolutions.

ABA

Ethics 20/20 Commission Suspends Campaign to Draft a Proposal on Nonlawyer Ownership of Law Firms

Posted Apr 16, 2012 1:06 PM CDT
By James Podgers

The ABA Commission on Ethics 20/20 has decided that it will not develop a proposal for consideration by the association's policy-making House of Delegates on whether nonlawyers should be allowed to have some form of limited ownership interest in U.S. law firms.

In a joint statement released today, co-chairs Jamie S. Gorelick and Michael Traynor confirmed that the commission agreed at its meeting last week in Washington, D.C., to shelve plans to submit a proposal on nonlawyer ownership for consideration by the House in when it convenes during February's 2013 ABA Midyear Meeting in Dallas. Gorelick and Traynor indicated that feedback received from other bar associations and individual members of the profession did not suggest a groundswell of support for revising the ABA Model Rules of Professional Conduct to permit a limited form of nonlawyer ownership. The Model Rules, which are the direct basis for professional conduct rules in all states except California, currently do not permit nonlawyer ownership.

"Since its creation in 2009, the commission has undertaken a careful study of alternative law practice structures," Gorelick and Traynor said in their statement. "Based on the commission's extensive outreach, research, consultation, and the response of the profession, there does not appear to be a sufficient basis for recommending a change to ABA policy on nonlawyer ownership of law firms."

Gorelick is a partner at Wilmer Cutler Pickering Hale and Dorr in Washington, D.C. Traynor, of Berkeley, Calif., is a past president of the American Law Institute.

Alternative law practice structures are prohibited in every U.S. jurisdiction except the District of Columbia, which permits a limited form of nonlawyer ownership of law firms. Nonlawyer ownership is becoming more common, however, in foreign jurisdictions, notably the United Kingdom, Canada and Australia. American law firms doing business overseas are in a quandary over how to balance the more permissive rules on business structures in other countries and the more restrictive regulations in U.S. jurisdictions.

Those concerns have been expressed by members of the Ethics 20/20 Commission during its deliberations as well, and the commission never reached a consensus on whether to recommend some form of nonlawyer ownership. In December, the commission released for comment a discussion draft (PDF), which described a limited form of court-regulated, nonlawyer ownership of law firms that largely followed the District of Columbia model. But the draft went beyond the D.C. model by requiring that lawyers in a firm retain controlling voting rights and financial interests in the firm; and by requiring lawyers to make reasonable efforts to establish a nonlawyer's professional integrity before that person may gain a financial interest in the firm. But the commission never went further than that before making its decision last week to pull the plug.

"The commission considered the pros and cons, including thoughtful comments that the changes recommended in the discussion draft were both too modest and too expansive, 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," Gorelick and Traynor said in their statement.

The commission's decision forestalls the possibility of a tough debate in the House on nonlawyer ownership. At previous meetings of the commission, some opponents expressed concern that a proposal to allow nonlawyer ownership would amount to a replay of the House debate in 2000 over a proposal to allow multidisciplinary practice at law firms. The House rejected that proposal. In March, the Illinois State Bar Association's board of governors adopted a resolution that would call on the ABA House to reaffirm its position on MDP and to reject any future proposals that would allow nonlawyer ownership of law firms, Illinois Lawyer Now reported at the time.

In their statement, Gorelick and Traynor confirmed that the Ethics 20/20 Commission will continue working on draft proposals that would address choice of law issues that might occur in the context of fee-sharing arrangements between lawyers and nonlawyers in jurisdictions, including the District of Columbia, that do permit nonlawyers to

have ownership interests in law firms. "The commission previously released draft proposals on these issues and will decide at its October 2012 meeting whether to submit formal proposals on to the ABA House of Delegates for consideration in February 2013," Gorelick and Traynor said. "Meanwhile, the commission welcomes additional comments on the previously released drafts."

Updated at 2:27 p.m. to add link to ABA statement and clarify Traynor's title.

The Law Gazette

IBA 2012: former president of American bar dismisses 'risky' ABS model

by **Paul Rogerson, in Dublin**
Created *04/10/2012 - 10:04*

The immediate past-president of the American Bar Association has strongly denounced alternative business structures, arguing that non-lawyer investment in law firms compromises the client's best interests and undermines professional independence.

William T (Bill) Robinson III gave the strongest indication yet that the US will not bend soon to pressure for liberalisation, pointing to the jurisdiction's Model Rules of Professional Conduct to underpin his arguments.

Robinson was speaking at a panel session on ABSs at this year's International Bar Association conference. Also on the panel were Solicitors Regulation Authority chief executive Antony Townsend, former Law Society president Bob Heslett and Christina Blacklaws, director at Co-operative Legal Services.

Though stressing that he was not speaking on behalf of the ABA, Robinson said his views broadly reflect the consensus among US lawyers. 'What you need to understand is that from the US perspective, the Model Rules start and end with a focus on the interests of the client,' he said. 'There is a strong sense that in the ABS approach there is an inherent conflict of interest. Investors invest to make money and, as we say, "he or she who has the gold makes the golden rule". They don't bring a higher quality of practice or integrity.'

He added: 'If there is one investor in a firm and that investor is Walmart, it is not unrealistic to expect that investor to communicate what is to be done and that will be in the investor's best interests. That is why we are not stepping up to this.

'Another concern we have is the continuing attack on the legal profession and its independence across the world in the name of consumerism and bringing the price down. The reality is that specialised training and years of extra education are necessary to impute the required discipline and time to protect the client. Profit as an influencer of human choices under pressure is just too much of a risk.'

Robinson acknowledged the potential benefits of ABS status to lawyers and law firms, but said he had 'yet to hear how the interests of the clients are enhanced'. He also raised the spectre of government interference in the profession to protect shareholder interests, 'just as the Securities and Exchange Commission has intervened to protect corporations'.

He added: 'They will come in behind the investors and tell us what to do; we will have become not a profession, but commerce'.

In the US, ABSs would also have to clear other practical hurdles [1]. 'What about exit strategies? In the US lawyers cannot be required to sign non-compete agreements, it is up to the client to decide whether to waive privileged, confidential information.'

Robinson also dismissed the claim that liberalising ownership will enhance access to justice, an argument made by Co-operative Legal Services. He said: 'In the US there is no money in access to justice and pro bono; it's an overhead that derives from commitment and professionalism. I am perplexed as to how having investors involved enhances access to justice. Too much pro bono inhibits return on investment.'

Responding, Christina Blacklaws described it as an 'insult' to suppose other professionals who might co-own firms adhere to lower professional standards. However, an inquisitor from the German bar questioned using the Co-op as an exemplar of ABS status, pointing out: 'The Co-operative is more analogous to a trade union owning a law firm that will provide services to its members. That is very different from a third-party investor seeking a return on their money.'

In her address, Blacklaws pointed to the rigour of the SRA's ABS licensing process and joked: 'We have seen very little evidence of the mafia or al-Qaida applying.' Co-operative Legal Services now has 48 licensed managers and expects annual turnover this year of £45m, placing it among the top 75 legal firms.

Townsend meanwhile, expects the number of ABSs approved, which recently hit 30, to double by the end of the year. There are about 100 more applications 'in the wings', some of which may come to nothing. 'We are beginning to see the evolution of a more dynamic market,' he said.

Heslett, meanwhile, was notably more muted about ABSs, saying: 'I think the changes are extremely limited. The Co-op may raise standards on the high street but I don't think the major firms [in England and Wales] will ever get involved.'

International interest in following the UK and Australia's lead on ABSs is clearly limited. Fewer than 50 of the 5,000 delegates registered at this year's conference attended the session.

The Law Society

Source URL: http://www.lawgazette.co.uk/news/iba-2012-former-president-american-bar-dismisses-abss

Links:
[1] http://www.lawgazette.co.uk/news/american-bar-closes-door-abss-now

BUNDESRECHTSANWALTSKAMMER

Position
of the Bundesrechtsanwaltskammer
(The German Federal Bar)

on the Issues Papers of the ABA Commission of Ethics 20/20

concerning Multijurisdictional Practice of Law

and Alternative Business Structures

drafted by The German Federal Bar's
European Affairs Committee

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Rechtsanwalt JR Heinz **Weil**, Paris (Chair)
Rechtsanwalt Dr. Martin **Abend**, Dresden
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Rechtsanwältin Hanna **Petersen** LL.M, Bundesrechtsanwaltskammer, Brüssel

July 2011
BRAK Position no. 47/2011

The German Federal Bar (Bundesrechtsanwaltskammer) is the statutory umbrella organisation of the 27 regional Bars and the Bar at the Federal Court of Justice. The Bars represent a total of currently approximately 155,000 lawyers admitted to the profession in Germany. The German Federal Bar represents the economic and legal interests of the German legal profession.

The German Federal Bar would like to comment on the ABA Commission of Ethics 20/20 issues papers concerning *Multijurisdictional Practice of Law* and *Alternative Business Structures.*

1. Multijurisdictional Practice

We will of course not address the liberalization of US interstate practice and limit our comments to international cross-border practice.

We are sharing the Issues Paper's conclusion that the practice of law has become increasingly transnational and that this fact of life has not yet been taken totally into account by our practice rules. Under the German legal system, the right to practice law is not an issue of rules of conduct but of statute to be adopted by the federal parliament, so that ultimately it is up to the legislator to make the necessary amendments.

We would be in favour of a scheme allowing the rendering of occasional services in a host state by a lawyer fully admitted to practice in a foreign jurisdiction, provided such incoming lawyer is bound by the rules of conduct and of disciplinary control applicable in the host state. As far as judicial or administrative proceedings are concerned, the incoming lawyer should be obliged to work in conjunction with a lawyer admitted in the host state whose active participation in the proceedings would be required.

The transposition of the liberal rules governing the free movement of lawyers within the European Union to lawyers from outside the EU is not an appropriate solution, in the same way as the transposition of liberal US interstate rules to lawyers from abroad would not be feasible. The reason is that in both cases lawyers practice within an area in which the law is to a certain extent unified or at least harmonized, justifying thereby a larger degree of liberalization for lawyers qualified to practice within a territory of that area.

The rules on the practice of law are not the only restriction to transnational practice. Immigration laws can be a substantial obstacle. Until now, it has been admitted in the relations between the US and Germany that no visa is required for the entry of a lawyer providing occasional services. It has been brought to our attention that US immigration authorities think about putting an end to that liberal practice. This would be a severe restriction to the fast free movement which is looked for by our clients and the ABA's support would be appreciated in preventing this to happen.

2. Alternative Business Structures

We have closely monitored, as the ABA did, the substantial changes undertaken in England and Wales which finally led to the adoption of the Legal Services Act. Alternative Business Structures as they will be admitted soon in this jurisdiction are a major concern for us. Under German law it is prohibited for non lawyers to own law firms, subject to very limited exceptions for certain multidisciplinary partnerships. Under the English regime, banks, insurance companies, supermarket chains and others can be the shareholders and shares may even be listed on the stock exchange. We believe this to be a serious threat to the independent professional judgement of the lawyer employed by such a firm. Those firms will not be able to practice in Germany, a point which we made clear in the course of the consultation launched by the English parliament. The European Lawyers Establishment Directive allows a Member State not to admit on its territory such types of firms from another Member State which are unlawful under its national law.

Multidisciplinary partnerships are allowed under German law with a very limited number of professions (chartered accountants, tax advisors, patent attorneys) because those professions are subject to rules of conduct which are very similar to the rules governing our profession, in particular as far as the core values are concerned. This is totally different from what will be allowed in England and Wales.

We were very satisfied in learning from the ABA's Issues Paper that the introduction of Alternative Business Structures along the English or Australian model is not contemplated in the US and we think our bars should join forces in order to express our common stand on the international scene.

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The Law Society's approach to Alternative Business Structures (ABS)

1. Introduction

The Law Society believes that it should be possible for solicitors to provide legal services to the public through any entity, provided that the public and consumer safeguards associated with existing solicitors' practices were maintained. The Law Society accepts the introduction of Alternative Business Structures (ABS) into the English and Welsh jurisdiction as long as this overarching principle is met.

Public and consumer protections are best secured by ensuring that ABS are treated in the same way as other comparable law firms. ABS should thus in principle be subject to all the conduct of business rules concerning matters such as confidentiality and conflict of interest as other law firms. Any rules which are thought to be unduly burdensome should be removed or relaxed for all firms, not just for ABS. ABS should have indemnity insurance arrangements and compensation fund arrangements which provide the same protection for consumers as the arrangements operated by other law firms.

2. Background

The Law Society has been a very major player in the discussions about liberalisation of the framework through which legal services can be provided. The Society believes the way in which ABS are introduced is crucial in terms of maximising public access to justice; ensuring an independent, strong, diverse, and effective legal profession; and securing the reputation of English legal services internationally.

Until the late 1980's, it was almost universally accepted that regulated legal services should be provided to the public only through firms comprised entirely of lawyers, with no external owners .

During the late 90s the Law Society considered the restrictions on the entities through which Legal Services should be provided to the public. In October 1999, the Law Society Council adopted the policy that "solicitors should be free to provide services to the public through any entity, provided that the necessary consumer protections could be maintained." At the time, this was regarded as paving the way for to what has become known as Legal Disciplinary Practice – in which lawyers work together with non lawyers, but where the practice is owned by the managers of the practice, rather than by an external body.

The Law Society considered the question of external ownership of law firms in March 2002, when considering the restrictions the Practice Rules imposed on the work which solicitors employed by a non solicitor organisation could do for customers of their employers. In that context, the Law Society Council resolved that solicitors employed by such organisation should be able to provide services to their employer's clients provided that:-

- The employers themselves were fit and proper persons to own a law firm.
- The provision of services was governed by the same practice rules, and the same consumer protection arrangements, as ordinary law firms.
- The law firm business was ring fenced from the rest of the employer's activities.

This became colloquially known as "TescoLaw".

The Law Society aimed to introduce these changes through liberalisation of its existing rules. However, it transpired that the statutory powers under which the Law Society regulated solicitors did not at that time enable it to regulate non-solicitors even with their consent. It was thus necessary for changes to primary legislation to be made before the Law Society could implement these proposals.

The matter was thus left to the Legal Services Act (2007), which has established a structure under which the Legal Services Board will authorise approved regulators to become licensing

authorities for what are now known as Alternative Business Structures – i.e. firms in which there are non lawyer managers, or external owners.

3. Current situation

The Legal Services Board (LSB) and frontline regulators, such as the Solicitors Regulation Authority (SRA), are working on the structure within which these new business models will operate. The Law Society is using its 'key stakeholder' status to ensure that appropriate client protections are maintained and that professional standards are adhered too by all.

4. Allowing opportunities, but not at the expense of allowing reckless risks

It is of crucial importance to the reputation of ABS firms (and legal regulation generally) that ABS are introduced successfully, and do not immediately give rise to serious regulatory issues. If that is not achieved, the likelihood of ABS firms being respected at home or accepted internationally will be serious undermined for many years to come. It is far more important to ensure that ABSs are introduced on a sound regulatory footing than to meet some arbitrary deadline for their introduction. The LSB wants the first ABS to be licensed in October 2001. The Society is not opposed to this date in principle but we believe it is more important to get the system right, rather than obsessing about meeting an arbitrary deadline.

ABS will only be acceptable if they are treated as simply another variety of law firm, subject to all the same rules and requirements as other law firms, rather than an entirely separate breed, exempt from the requirements on ordinary law firms. That is one reason why the Act requires that only approved regulators can become licensing authorities.

In the Law Society's view, it is essential that ABS firms regulated by the Solicitors Regulation Authority are subject to the same rules as all other firms regulated by the SRA. ABS firms must be subject to the same conduct of business rules on matters such as confidentiality and conflict of interests as other firms regulated by their particular regulator .

The Law Society believes that it is imperative that the public protections – in terms of indemnity insurance and compensation fund cover – enjoyed by consumers who choose ABS firms are the same as those provided by other law firms. It could not be acceptable for the level of protection to differ depending on the nature of the firm. There cannot be any assumption that ABS firms will necessarily be large – it is perfectly possible for an ABS firm to be in the nature of a corner shop, rather than a supermarket.

5. Maintaining Professional Standards

At the time of the Legal Services Act ,some commentators were concerned that it would be difficult to permit ABS to operate without undermining the professional values which currently underpin the provision of regulated legal services. To avoid compromising professional standards, the Law Society (and SRA) believes that non-lawyers who manage ABSs should be subject to the same standards that are imposed on lawyers. For instance, the SRA should use the same criteria to assess the character and suitability of non-lawyer as managers it uses to assess solicitors.

Others were concerned that, even if the new entities operated ethically, they would be likely to damage access to justice by cherry-picking legal work which could relatively easily be dealt with in a standardised way, leaving members of the public unable to find sources of representation in more diverse, complex and less profitable matters.

The Law Society recognised all those concerns, and worked with Parliamentarians to ensure that the Act provided effective safeguards against them. The key safeguards were:-

- Strict requirements concerning the fitness to own of potential external owners, and the fitness to manage of potential non-lawyer managers.

- A requirement that ABS would be regulated by the same regulators as existing law firms.

- Arrangements to ensure that ABS could be subject to the same conduct of business rules, and the same public and consumer protections, as other law firms.

- Arrangements to ensure that the potential impact on access to justice was taken into account in licensing decisions.

Both lawyers and non-lawyers will need to be clear about the new regulatory framework and their responsibilities within the framework. There are special roles for the Head of Legal Practice and Head of Finance and Administration. The people fulfilling these roles will need to be trained on their duties under the Act and how to fulfil them.

6. Access to justice

ABSs provide a potential means for widening access to legal services. ABS could provide consumers with a single point of convenient and potentially complementary services with banks, retailers and others.

But the Law Society considers that there is also a potential risk from some forms of ABS in some areas of the country. In the Society's view, there is a particular risk if large new providers, concentrating on easily commoditisable work, provide a limited range of legal services in some less heavily populated parts of the country. The impact of that could be to render unviable existing suppliers, who provide services in more complex areas of law. This does not imply that the new ABS providers would necessarily be acting improperly. It simply reflects a foreseeable risk from particular forms of ABS operation. This could potentially result in fewer sources of this type of advice, particularly in rural communities. It is essential that the impact of ABSs on these less profitable areas of work is carefully considered so that there is not further erosion of services in these areas and a consequential reduction in access to justice.

The Law Soceity has commissioned economic analysis and research to tease out the circumstances in which this risk is likely to arise; and to advise on appropriate safeguards.

7. ABS – LDPS & MDPS

Partnerships involving non-lawyers are relatively straight forward. In the context of solicitors firms, the Solicitors Regulation Authority have already made arrangements to regulate LDP's under the powers acquired in the Legal Services Act. External ownership clearly raises additional issues, particularly around fitness to own and the relationship between ABS owners and between the law firm and the remainder of the ABS owners business, but these issues appear to the Society to be manageable.

<u>Legal Disciplinary Practices</u>

An LDP is a form of recognised body providing legal services where partners are not exclusively qualified lawyers. Up to 25% of the partners can be non-lawyers. The advantage of LDPs is that equity can be raised from a broader base of potential partners, for example barristers, other professionals and non-solicitor employees. Non-solicitor employees can also be rewarded by being given partner status. This can help to retain high-performing non-solicitor employees and attract outside legal talent. A non-lawyer manager must be approved as suitable by SRA and the person concerned must play an active role in the firm. They can not be merely on owner or investor.

There can be no corporate non-lawyer ownership of or investment in an LDP. There is a 25% limit on the number of non-lawyer managers of an LDP, and a 25% limit on the level of ownership and control that non-lawyer managers can have.

The SRA have been regulating LDPs for around a year now, with no known difficulties.

<u>Multi Disciplinary Practices</u>

MDPs providing through a single entity both lawyers services and services which lawyers are not generally permitted to provide raise additional complications. These other services may be categorised as falling into one or more of the following categories:-

- Services which are subject to exclusive mandatory regulation by another regulator (such as some financial services work).
- Services where there is a potential conflict of duties in providing alongside Legal Services (such as audit services).
- Services which are otherwise regarded as inappropriate to provide alongside legal services.

There are cases where potential conflicts of interests within an ABS are so great that they should not be licensed. For instance the duty of an auditor to report information directly conflicts with a solicitor's duty of confidentiality. It is unlikely that an MDP proposing to offer auditing services alongside legal advice would be able to overcome this conflict of duties. Indeed , it is not yet clear that the regulatory issues concerning MDPs have been sufficiently well worked out to make it safe to permit them. The Society is in dialogue with SRA about that issue.

Wherever firms are owned by businesses with other interests, it will be essential to ensure that the ABS is ring-fenced from other parts of the business and that information about clients is not improperly transferred outside the ABS.

It must be for prospective owners to demonstrate to the satisfaction of the regulator that their business structures are acceptable . Where they cannot do so, their applications should be refused.

The Law Society

July 2010

Solicitors Regulation Authority

What the authorisation process looks like and what you can expect

Updated 29 June 2012

Overview of the application process

The SRA, as a licensing authority for Licensable and Licensed Bodies ("alternative business structures" or "ABSs") must work to ensure that its approach promotes and adheres to the regulatory objectives as set out in the Legal Services Act 2007.

Therefore, when we license ABSs we aim to achieve the following outcomes:

- clients and the general public remain confident that legal services provided by our regulated community will be delivered to the required standard and in a principled manner;
- firms and individuals provide the SRA with sufficient information to enable the SRA to make appropriate judgements concerning whether to authorise any firm or person;
- only those individuals and firms who/that meet the SRA's criteria for authorisation are authorised. This includes the requirement that owners and managers are fit and proper to be involved in owning and / or running a regulated firm, and that the regulated firm is capable of providing ethical and competent legal services;
- firms are and will be managed in such a way, and with appropriate systems and controls, so as to protect the public and safeguard the reputation of the legal profession;
- all information we seek from firms, and the requirements we judge as necessary for a successful application, are no more than is necessary and proportionate in the circumstances of a given application;
- the SRA's authorisation process is fair and transparent.

Some applicants, particularly those with complex business models, financing structures and ownership models, will find that the licensing process requires a great deal of work on their part. This is because we need to ask questions which help us to understand those structures and models so as to understand and assess the risks associated with the application. Applicants who have considered those risks and are able to articulate them early on in the process, along with proposals for mitigating any potential risks, will be better positioned to move smoothly through the process.

We can help applicants in this process by talking through issues at an early stage, discuss potential options and explain the application of the relevant rules. Complex and innovative applications, as well as applications from those currently outside of the SRA's regulatory remit, are very welcome. We appreciate the potential they bring to increase choice and innovation in the legal services market. Where these applications are being led by individuals who are new to legal services and the regulation of those services, we would particularly encourage early engagement with us to support building a good understanding of what is required for a successful application.

The application process

The application process comprises three stages. To commence the process you will need to nominate an "organisation contact", an "authorised signatory", a COLP and a COFA. We recommend that the organisation contact should be someone who has access to all information pertinent to the application and who has a good understanding of the SRA Handbook.

Stage 1: High-level summary application

The Stage 1 application is held on the SRA website. The applicant body will be asked for details of the organisation contact, authorised signatory, prospective COLP and COFA.

At this stage, we will also ask you to decide whether you want the organisation contact or authorised signatory to be the main SRA contact.

The applicant will also be asked for information regarding the number of managers and shareholders (who have a material interest) related to the application. If the body has a particularly complex structure or model and/or is operating under time scales or other constraints that may impact on the application, it is best to make this clear both in the Stage 1 application and by contacting us directly for an overview discussion of the application.

The information provided to us at Stage 1 will enable us to provide you with the appropriate Stage 2 application form, together with the correct number and type of basic disclosure or CRB request forms.

Stage 2: Preparing the detailed application

The purpose of this stage is to work with applicants on the preparation of their detailed application prior to formal submission at Stage 3. The advantage of this stage is the flexibility it affords to applicants to work with us to highlight and consider amendments to their application which make it more likely to result in a positive licensing decision. We can help with the completion of the application and talk through the rationale for the statutory and regulatory requirements and the questions we ask of applicants.

Applicants will receive the Stage 2 application form within two days of us receiving a completed Stage 1 form. The Stage 2 application comprises an applicant body information form, and separate forms for all the named managers and shareholders with a material interest (including any corporate managers and shareholders) named in the Stage 1 form.

The application will be sent to you in an editable PDF format, and once completed; you will be requested to upload the documents to a secure website. You will receive guidance on how to upload your application when completed (including a username and password).

As part of the Stage 2 application, you will be asked to provide some corporate documents such as shareholder agreements, articles of association, memorandum of association, financial documents such as cash flow statements and profit and loss accounts. We are very aware of the confidential nature of some or all of these documents and applicants can be assured that we have processes in place to protect and maintain the security of these documents.

Following receipt of the Stage 2 application form, you will also receive, by post, the basic disclosure and CRB request forms for each of the relevant managers or shareholders with a material interest. These cannot be sent by email due to the nature of the forms themselves.

Lawyer managers and shareholders who cannot be deemed approved (please see rule 13.2 of the SRA authorisation Rules) must complete the Basic Disclosure form. All non-lawyer shareholders and the proposed COLP and COFA must complete the CRB form. The difference between a basic disclosure and a CRB is that the latter will reveal any spent convictions whereas the former will not.

At this stage the applicant must have confirmed details of proposed managers and shareholders together with their interest holdings. This information is critical when assessing your application.

We usually ask applicants to submit their Stage 2 application within 60 days of receipt of the forms in order to ensure the application remains up to date with any wider developments. Particularly in these early days of licensing ABSs, we are still fine tuning aspects of the application process in response to feedback we receive from applicants and/or changes made to the SRA's regulatory arrangements. A deadline also helps to maintain momentum. However, we understand that some applicants

may need a little longer for a variety of reasons and we are happy to provide extensions to this deadline.

Your application will be assigned to a member of the Authorisation's ABS team who will manage the application until a decision has been made. This individual will be your point of contact throughout the application and decision-making process. They will engage with you at the earliest opportunity to understand the nature of the application and explain the process being followed as well as seeking to ensure any additional information is identified and requested.

Once your application is submitted, we will check your application for completeness and you will be contacted by the person who is responsible for your application to talk through any missing information and any obvious apparent barriers to a positive licensing decision. Where the additional information and changes to the application are very significant, our experience is that it is often more straightforward to prepare a fresh Stage 2 application. We will let applicants know as soon as possible when this is necessary.

When we have all the information we need to determine the application, we will issue an invoice for the application fee. The fee is determined both in accordance with the number of managers or shareholders in the proposed ABS, and in accordance with the time in which we project it will take to consider the application formally. It is only when this fee has been paid that the application is considered complete, that the statutory six (plus three) months time limit to make a decision begins.

At this point it is difficult to consider substantial changes to the application. You may be asked to submit a revised application if you wish to make significant changes.

Stage 3: Reaching a decision

During this stage, we will assess the application, identify matters for further investigation, undertake those investigations and prepare a report and recommendation for the person who will make the formal decision on whether or not to grant the licence and any conditions and waivers that will run alongside that licence. Each report is subject to peer review before being submitted to the person making the decision. Both the peer review and the formal decision use individuals who have not been involved in the application and can take an objective view of the application. The formal decision maker is a senior SRA officer.

We aim to process most applications well within the statutory standards which are set out in the Legal Services Act 2007. Where applicants are applying with their own timelines in mind, sometimes due to funding arrangements, it is important to have engaged with us early on in the process so we can advise on whether the time frames are likely to be realistic. Even then, we cannot guarantee to meet particular deadlines for a decision that are tighter than the statutory deadlines, although we will do what we can, as for all applicants, to make sure we are responsive and timely during the application process.

Applicants will have the opportunity to make representations on the report before it is submitted for a formal decision, and we expect that the engagement with the applicant to that point means that the substantive content of the report is already well understood. The senior decision maker usually works within a two week timeframe. However, some decisions will not take this long and some, occasionally, may take longer. Once a decision has been made, it is immediately communicated to the applicant.

What applicants can expect from us

- We are committed to ensuring that we keep applicants updated on the progress of their application.
- A dedicated Authorisation team member from Stage 2 of the application process until a decision is made on the application: This individual will be committed to working with the applicant right through to the decision-making stage.
- Engagement and assistance at all stages of the application to complete the application
- Complete confidentiality for all applicants: We will not discuss applications with third parties or confirm whether applications have been received.
- Advice and guidance about how and when to make an application

- A team that appreciates the benefit to consumers of a strong and vibrant legal services market: We appreciate the potential contribution of ABSs to that market, and it is our job to make sure that the ABSs we regulate can sustain the delivery of ethical and competent legal services.
- A team that is sufficiently resourced to provide a timely and responsive consideration of applications, and committed to ensuring fairness and transparency in our processes

What applicant bodies can do to make the process as smooth and effective as possible

- Provide a fully completed application with all accompanying documents at the earliest opportunity
- Early clarity on the applicant body's structure and business plan: It is helpful if the applicant has a fully articulated business plan and commercial purpose.
- It is helpful if the SRA's first point of contact has a good understanding of the SRA rules, in particular the separate business rule and an understanding who are the material interest holders
- Applicants who have ensured that all managers and shareholders fully appreciate the SRA's regulatory framework and the obligations inherent in being a regulated entity and regulated persons

Additional guidance on specific aspects of the application process

Suitability Test

The SRA has a responsibility under the Legal Services Act 2007 to ensure that persons who hold certain roles (i.e. managers, owners, COLPs and COFAs, known as authorised role holder) within ABSs are *fit and proper*. In order to assess whether persons are fit and proper we take into account the criteria set out in the Suitability Test. The test is the same for all legally and non-legally qualified applicants for roles in authorised bodies.

The Suitability Test sets out a series of behaviours, both personal and professional, which we consider would call into question whether someone was fit and proper to become an authorised role holder. Examples of some of issues which would cause concern include

- criminal offences, especially those which involve dishonesty, discrimination, terrorism and those which have resulted in a custodial sentence, or offences under the Companies Act 2006;
- plagiarism or cheating in an education establishment;
- failure to manage personal finances properly, including County Court Judgments and IVAs;
- regulatory or disciplinary findings (whether by the SRA or another regulator);
- removal from the office of trustee for a charity or company director;
- having been a manager or owner of a body corporate that has been subject to a winding up order, receivership, liquidation or administration.

This list is not exhaustive and we recommend that all prospective applicants read the Suitability Test in full in preparation for making an application. Applicants are also advised to consider the published decision-making criteria in respect of the Suitability Test which explains how we reach decisions about whether individuals are fit and proper. Our decisions are taken on a proportionate basis and focused on risk.

Applicants are required to disclose whether there is anything in their background which could call into question their fitness and propriety. We will seek to validate this information and applicants will only be approved if they meet the requirements set out in the Suitability Test. Validation checks may include basic disclosure checks, CRB checks, a Credit Reference Agency check, a bankruptcy search, a passport check, a check of the voters roll, a check of Companies House, searches of OFAC, PEP, HM

Treasury, FATF and OECD sanctions lists. For overseas applicants we will undertake similar home jurisdiction checks where possible.

If an applicant declares something to us in their responses to the Suitability Test, or if our verification checks identify information which may call into question the applicant's fitness and propriety to hold the position, we will investigate with a view to understanding all relevant details in order to assess whether the event calls into question the candidate's suitability to own and / or manage a legal services firm. Where relevant, this may include applicants being required to provide evidence of suitable rehabilitation.

Legal disciplinary practices with non-lawyer managers (LDPs)

Under the SRA Practice Framework Rules 2011, LDPs with non-lawyer managers can elect to become an ABS at any time until the end of the transition period set out in the Legal Services Act 2007. When the transition period ends, all remaining LDPs with non-lawyer managers will need to have transitioned to ABS status. The Legal Services Board are currently consulting on the end date for the transition period, which is not likely to be before April 2014.

LDP firms must complete Stage 1 and Stage 2 of the application. This is to ensure we hold equivalent data about all ABSs. The LDP must also nominate a COLP and a COFA (where they have not already done so) and finally they must tell us if they propose to make significant changes to the structure of the currently recognised firm. By significant changes, we mean the following:

- Change or increase in non-lawyer management (i.e., above 25 per cent)
- New external owners introduced to the LDP
- Change to business model
- Significant expansion of staff
- Change of legal entity conducting regulated activities
- Firms that are dual-authorised with other regulators

Where significant changes are proposed, the application process will be treated in the same way as other ABS applications, and not as a straightforward transition. Those transitioning to ABS status that are not making significant changes will not be charged an application fee. However, we will need to authorise the COLP and COFA applicants and make a formal decision in respect of these two roles.

Waivers

Where empowered to do so by our regulatory arrangements we will consider applications for waivers of specific SRA Handbook rules. We will discuss with applicants their wish for any such waiver as part of the process of discussing their overall licence application and make any formal waiver decision as a part of the overall licence application decision. The single criterion on which a waiver application may be granted is "exceptional circumstances" but there are a range of factors that will be considered in reaching the decision as to whether this criterion is met depending on the rule under consideration and the circumstances put forward by the applicant. We have published a policy statement on our approach to waivers which sets out further information. This can be found at www.sra.org.uk/waivers. Waivers may only be granted against certain of our regulatory requirements as provided for in the SRA Handbook. We are, of course, unable to waive statutory requirements. We have committed to publishing waiver decisions and have recently begun to do this in respect of newly authorised ABS firms.

The publication of details of waivers that have been granted should be helpful to new applicants in considering how to proceed with their applications. However, waiver decisions are, necessarily, fact specific and, therefore, the fact that a waiver of a particular requirement has been granted to one applicant does not mean that such a waiver would meet the necessary criteria to be granted to another applicant with a different set of circumstances. If an applicant considers that they will wish to seek a

waiver as a part of their licence application they should raise the issue at the earliest possible point in the process.

Solicitors Regulation Authority

Register of licensed bodies (ABS)

As required by the Legal Services Board's Registers of licensed bodies: Section 87(4) rules (PDF 2 pages, 44K) *[link: http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/registers_of_licensed_bodies_rules.pdf]*, we publish and maintain a register of alternative business structures (ABS) licensed by the SRA.

Summary information for each licensed body listed is below. Please click **View full details** for more information.

Abbiss Cadres LLP (registered name)

Registered office

25 Hosier Lane
London
EC1A 9LQ

Practising address

25 Hosier Lane
London
EC1A 9LQ

Licence details

Licence number: 571596
Granted on 17 September 2012
Effective from 1 October 2012

View full details ***[link: /solicitors/freedom-in-practice/alt-bs/register/571596.page]***

Accident Advice Solicitors Limited (registered name)

Registered office

150 London Road
Northwich
Cheshire
CW9 5HH

Practising address

150 London Road,
Northwich
Cheshire
CW9 5HH

Licence details

Licence number: 571053
Granted on 3 September 2012
Effective from
10 September 2012

View full details ***[link: /solicitors/freedom-in-practice/alt-bs/register/571053.page]***

Amelans (trading name , plus two others)

Registered office

Not a registered company or LLP

Practising address

Barlow House
708-710 Wilmslow Road
Greater Manchester
M20 2FW

Licence details

Licence number: 570220
Granted on 31 July 2012
Effective from 31 July 2012

View full details ***[link: /solicitors/freedom-in-practice/alt-bs/register/570220.page]***

Ascent Collections Ltd (trading name)

Registered office

Riverside East
2 Millsands
Sheffield
S3 8DT

Practising address

Riverside East
2 Millsands
Sheffield
S3 8DT
(plus one other)

Licence details

Licence number: 570670
Granted on 17 August 2012
Effective from 20 August 2012

View full details ***[link: /solicitors/freedom-in-practice/alt-bs/register/570670.page]***

Bott and Co (trading name)

Registered office

St Anns House
Parsonage Green
Wilmslow
SK9 1HG

Practising address

St Anns House
Parsonage Green
Wilmslow
SK9 1HG

Licence details

Licence number: 571852
Granted on 20 September 2012
Effective from
24 September 2012

View full details ***[link: /solicitors/freedom-in-practice/alt-bs/register/571852.page]***

1 ***[link: /absregister/?pg=1]*** 2 *[link: /absregister/?pg=2]* 3 *[link: /absregister/?pg=3]* 4 *[link: /absregister/?pg=4]* 5 *[link: /absregister/?pg=5]* 6 *[link: /absregister/?pg=6]* 7 *[link: /absregister/?pg=7]* Next *[link: /absregister/?pg=2]*

Recent developments in England and Wales and their implications for the future

Posted: 23 May 2012

Conference on the Future of the Legal Profession and the Bar
St Petersburg, 16 May 2012
John Wotton, president, Law Society of England and Wales

Good afternoon. President Semenyako, I congratulate you on this jubilee conference in the beautiful and iconic city of St Petersburg. Thank you for inviting me to lay out some of my thoughts on the future of the legal profession in England and Wales.

In order to explain my views, I will first examine what the legal services market in England and Wales looks like today, offering a range of diverse services to domestic and international clients, and then consider the implications of the Legal Services Act (2007), which was an important piece of legislation that created new structures for the delivery and provision of legal services. The Act, in combination with a range of market forces is likely to have a significant impact on the future shape of the profession and the legal market within our jurisdiction.

A brief (it has to be brief) look at the current legal services market in England and Wales shows us 120,000-odd practising solicitors, all of whom are members of the Law Society, providing 80-90% of legal services in our jurisdiction, not to mention a substantial proportion of international legal services provided to global business. We also have over 10,000 practising barristers, most of whom are self-employed and operate on a referral basis. Solicitors and barristers together form the legal profession.

Three quarters of those solicitors work to serve consumers and business through over 10,000 regulated practices, with the remainder working in-house ensuring that legislation and regulation is applied. Our market has space for the business models of larger international, national and regional firms undertaking a wider range of corporate work and specialised boutique firms attracting both high net worth private clients, both domestically and from overseas. 25% of the market is represented by in-house legal departments, serving their employers in the public, corporate and third sectors.

The largest corporate practices with their international office networks and client base are headquartered in the City, which now extends over a considerably wider area than the traditional Square Mile. A number of them now generate most of their revenues abroad.

Our legal services market is diverse in its location, size, composition and services offered, but it is bound by the professionalism, specialised skills, cove of ethics and business acumen of our members.

The Legal Services Act (2007) introduced many changes to our profession, but it did not change that fact that there is a rigorous regulatory environment for solicitors in England and Wales or undermine their commitment to high standards, professionalism and a focus on clients and their needs.

The chief innovations of the Legal Services Act are in the structure of regulation of the legal profession and in the ownership and management of law firms. Non-lawyers were for the first time allowed to own, invest in, or manage law firms, allowing for corporate ownership or for law firms to seek equity investors. Multi-disciplinary practices are also now possible. This change is designed to enable a much wider range of legal and non-legal services to be provided to consumers by the same business. We call these two newly-permitted types of practice Alternative Business Structures, or ABS.

It is important to remember that no change in the individuals who can actually provide legal advice and representation flows directly from the choice of practice structure. Things which, in a law firm, must be done by a qualified lawyer, must also be done by a lawyer in an ABS.

ABS are unquestionably a significant innovation in legal practice, not just in this jurisdiction, but also when viewed from an international perspective. The degree of liberalisation of ownership of legal practices which has been permitted under the Legal Services Act goes way beyond what is allowed in almost any other country.

In my opinion, the introduction of ABS is not axiomatically either a good thing or a bad thing for our profession - they bring with them both opportunities and risks. The owners and managers of legal practices and those who wish to invest in them, will identify and pursue the opportunities which have been created by these new structures. In other words, the market will decide which structures are efficiency-enhancing and which are not.

The Law Society as a representative professional body, will do its best to ensure that the profession in England and Wales is fully aware of the options now available and the potential implications of change, so that solicitors can take the most rational decisions concerning the future of their practices and careers. We will also seek to ensure that other interested parties (both at home and abroad) continue to retain confidence in the exceptional legal services market that England and Wales offers.

It would be disingenuous of me to deny that there are no risks inherent in external ownership. Strict measures have been adopted by our regulatory body, the Solicitors Regulation Authority (SRA) to minimise and manage these risks. ABS are held to the same rigorous and robust high -professional standards as existing law firms and there are stringent fitness to own tests for the non-lawyers involved. Individuals are appointed within each law firm to ensure the firm's legal and financial compliance, and the penalties for not complying, are significant, quite apart from the risk to the reputation of the profession.

Coming as I do from one of the largest and most international City practices, which has during my career gone through all stages of evolution from a conventional, single office partnership to a global, professionally managed business, with several thousand employees, I find surprising any suggestion that there is a necessary conflict between running a firm as a business, for profit and the ethics and values of the legal profession.

On the contrary, I think lawyers owe it to themselves, their employees and their clients to run their practices in a thoroughly professional, businesslike way. Lawyers, as managers and owners of a business, are not in my experience less demanding of performance than any other executives or providers of capital. Lawyers have no monopoly over professional and business ethics; many other professional activities are carried on in England and Wales under a variety of types of external ownership without convincing evidence of compromised standards.

Lawyers are not a caste apart. They are providers of professional services, in common with many other groups in society. Their role in our democracy demands that their independence from the state be secured, as Genry Resnick said earlier, but that does not prevent their association in business with other professionals or capitalists in the organisation of the businesses which provide those services.

Compliance with professional standards and prevention of fraud are matters to be addressed by regulation and monitoring. At this stage I can say that all the foreseeable risks inherent in ABS have been identified and measures taken by the SRA to ameliorate and manage them. The principles underlying these measures are all sound; a common code of practice, a single disciplinary system, a single compensation fund to protect consumers and careful review of non-lawyer participants backed by regular reporting.

Some domestic and international colleagues have expressed concerns that the introduction of ABS will have a negative impact on competition and access to justice in our market, with large new corporate players driving out existing firms. I think these fears are exaggerated, for ABS have no magic bullet in competitive terms. I do not, for example, think that predatory pricing is feasible in our legal markets. Whatever competitive advantages new entrants may have, it will not be worth their while pricing legal services below cost; costs of entry are sufficiently low that any subsequent attempt to recoup by raising prices above competitive levels will be thwarted by new entrants coming into the market.

Some potential ABS entrants have the advantage of a well-known brand or existing, nationwide customer connection, but they will have to invest to establish their reputation in the legal market and recoup that investment.

Large scale and low cost do not always march hand-in-hand. Small businesses can frequently offer consumer services at lower cost and respond faster to changes in the market, and ABS may offer an attractive option to many of our solicitors.

We are already seeing some variety in the ABS models coming forward, which supports what I have said. Of the first five ABS licences granted by the SRA under the new rules, the Co-operative Group is a well known retail brand on high streets and already employs over 300 staff in its legal

practice, many of whom are qualified lawyers. Two others are, however, smaller existing legal firms. One has seven fee earners and another has just one solicitor/fee earner whose wife is currently the practice manager and will become a director of the firm with a significant shareholding. Another ABS licensee is an enterprising and fast-growing firm in Wales and the last is Slater & Gordon, a large practice from New South Wales, which is listed on the Sydney Stock Exchange and has acquired a London litigation firm as a subsidiary.

We also know that an Italian firm has applied for an ABS licence to allow accountants and lawyers in its London partnership to share revenues and profits, meaning that it is set to become one of the first non-UK law firms to convert to an ABS.

It should not be assumed that ABS practices will confine their activities to consumer legal services such as conveyancing and will writing, delivered at high volume and low unit cost. ABS are likely to provide some of the legal services which are vital in ensuring individuals can assert and defend their rights against the State or organisations which are bigger than they. The Co-operative, for example, intends to undertake some publicly-funded legal aid work.

Consumer litigation is likely to be an attractive area for ABS. In contentious areas of practice, both civil and criminal, a multiplicity of providers must remain in the market in every locality to provide representation to all parties. This is very important, in terms of access to justice for all citizens, at a time when public funding for legal aid is being reduced in England & Wales.

In fact, whatever the eventual consequences of ABS (and they have, of course, yet to play out) I have no doubt that well-managed firms in England and Wales will continue to thrive in the more competitive legal markets of the future, and it will be no mean feat for any new ABS entrant to displace them.

It is imperative that the Legal Services Act reforms are successful, so that the profession can continue to serve society effectively and maintain its international standing (on which many economic benefits to the UK depend). We cannot, in the final analysis, expect the rest of the world to take our innovative approach to legal services on trust and will over the course of time have to demonstrate that the changes are benign, and perhaps beneficial.

I do not underestimate the significance of the changes that have been made under the Legal Services Act to the traditional structures and organisation of the legal profession in England and Wales or the potential for market forces to do the same. Neither do I underestimate or dismiss the concerns that many of my colleagues have.

However peering into the crystal ball I do not expect regulatory changes or the liberalisation of ownership rules to transform the profession immediately. Rather, I think that the new modes of practice will increasingly challenge the norms under which lawyers practise (although that is a speech for another time!

The effects of introducing external capital and management into legal practices will emerge over a number of years, as existing practices explore the new commercial freedoms in different ways and new entrants invest in establishing their reputation. I believe that the effects of these changes will chiefly be felt in the consumer market in England and Wales, but there will inevitably be knock-on effects for law firms serving corporate clients and for mixed practices. Some firms who advise businesses are reported to be among the initial group of ABS applicants, though it is unclear at this stage whether their plans are potentially transformative, rather than merely technical, in order to retain non-lawyer partners.

The number of independent practices may reduce, but the best will compete successfully in the new environment

Overall, the public's demand for legal services will be met and to equally high standards. It would be surprising indeed if the legal sector did not continue to grow, as it has consistently in the past. If the sector becomes more efficient, it certainly will grow, as there is undoubtedly unmet demand for accessibly-priced legal services.

The scope for such growth will continue overseas and the continued international success of our corporate law firms will remain as vital as ever for our economy.

The threat that ABS, as implemented under the LSA, may impact on the international recognition and standing of our profession cannot be ignored. Most recently, the New York State Bar's Committee on Professional Ethics determined that a lawyer who primarily practices in New York cannot be an employee of an out-of-state or foreign firm owned or managed by non-lawyers, even if non-lawyer ownership is permitted where the firm is established. The Ethics 20:20 Commission of the ABA has recently withdrawn, for lack of support, a modest proposal to liberalise the ownership of law firms.

Although I fully understand the commitment of the ABA and State Bars to protecting the independence of the legal profession (I feel the same way) decisions like these set back the progress of firms to operate internationally to meet the need of their global clients.

Restrictive approaches like this will not encourage international firms to expand their operations, and may deny some lawyers the opportunity to participate fully in the world's leading law firms.

Nevertheless, because the foreseeable risks have all been properly addressed, and there is a regulator in place with the resources and expertise to manage those risks, I am confident that the scepticism of our critics at home and abroad will in time be overcome. I therefore share President Semenyako's confidence in the future of the legal profession and I would be surprised if 'full' ABS, along the lines we are following, remains for long an innovation confined to England and Wales.

Thank you

The Law Society of British Columbia

Memo

To: The Benchers

From: The Executive Committee

Date: October 17, 2012

Subject: Rules Concerning Trust and Other Client Property – Lawyers Acting as Attorneys and Executors

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Attached is a memorandum that has been prepared by Ms. Berge and Mr. Lucas following a direction by the Executive Committee to address issues that had been raised concerning the application of the current trust rules to lawyers handling trust funds in their capacity as a personal representative where the appointment had been derived from a solicitor-client relationship.

The Executive Committee considered this issue at its meeting of October 16, 2012. The Committee directed the matter be referred back to staff to develop a recommended solution to address the underlying policy issues that the Committee agreed warranted consideration.

The matter will be returned to the Executive Committee at a later date, with the expectation that the matter will be referred to the Benchers for policy consideration and review shortly thereafter.

This information is provided for information only, in order to advise the Benchers of the status of the matter.

MDL/al

Attachment

Memo

The Law Society of British Columbia

14001

To The Executive Committee

From Kathryn Berge Q.C. and Michael Lucas

Date September 30, 2012

Subject **Rules Concerning Trust and Other Client Property – Lawyers Acting as Attorneys and Executors**

I. Identification of the Problem Under Examination

Lawyers who act as a personal representative of a person where the appointment is derived from a solicitor-client relationship (such as an executor under a will, an attorney under a power of attorney, or as a trustee), have identified concerns about the current trust rules and how they can adversely affect such representations. These concerns have been raised directly with Law Society trust auditors, and have been of particular concern to a segment of the Victoria Bar. This matter was raised by Ms. Berge with the Executive Committee. The Committee suggested that further exploration of the underlying policy issues be examined.

The Trust Department, when conducting audits of law firms, has also noted a tension arising amongst those members practicing in the wills and estates area who are often asked to act as such fiduciaries, and who, quite properly, strive to practice within the Rules while endeavouring to meet their full fiduciary relationship to their clients. The Trust Department has also noticed that the Trust Rules are not always complied with where a lawyer-fiduciary is acting other than in a traditional solicitor-client role.

When handling trust funds, lawyers must operate under specific obligations set out in Division 7, Part 3 of the Law Society Rules (the "Trust Rules"). "Trust Funds" are defined in Rule 1 to include

> ...funds received in trust by a lawyer acting
>
> (b) as a personal representative of a person or at the request of a person, or as a trustee under a trust established by a person, if the lawyer's appointment derived from a solicitor-client relationship;

Even if a lawyer is acting *qua* "personal representative in circumstances where his or her appointment is derived from a solicitor-client relationship" rather than *qua* lawyer, the funds received are "trust funds" and must be dealt with under the Trust Rules. This result raises difficulties in the administration of the responsibilities assumed by the lawyer. These are explained below.

This memorandum examines policy considerations surrounding the Trust Rules insofar as they relate to relationships where the lawyer is not acting as a lawyer but does have fiduciary responsibilities. It will consider whether the handling of trust funds and other client valuables in those situations may allow for some different considerations from those currently set out in the Trust Rules, which really address considerations where the lawyer is acting as a lawyer only and not in a general fiduciary capacity.

The possibility of a new rule governing the handling of funds and client property where the lawyer is not acting as a lawyer but is a fiduciary/personal representative arising from a solicitor-client relationship will be considered.

The matter is now returned to the Executive Committee. The Committee is asked to consider recommending that the Benchers approve in principle a direction to amend the Law Society Rules on the basis of the policy considerations set out below. The Benchers would then be asked to refer the matter to the Act and Rules Subcommittee to draft a rule.

II. Background

When reviewing and considering the trust rules in the early 2000s, the Trust Assurance Reform Task Force recognized that, in order to protect the public interest, it was important that it be clear that lawyers must properly handle and account for funds and valuables handled by them in circumstances where the lawyer was acting as a "personal representative" (such as a trustee or a fiduciary) even if the relationship was not that of lawyer-client – and especially so where the relationship arose from the lawyer having acted for a client.

Therefore, where a lawyer was (for example) appointed executor over a client's estate arising from circumstances where the lawyer had advised the client on legal matters and the client trusted the lawyer as a professional advisor, the Task Force considered it was important that the lawyer account for the funds of the estate as "trust funds" even though the lawyer was now acting *qua* executor rather than *qua* lawyer. Equally, where a client appointed a lawyer as his or her attorney under a power of attorney to handle part or all of the client's assets either permanently or temporarily, the Task Force concluded that lawyers must account for these assets in accordance with the Trust Rules. Moreover, such appointments must be disclosed on the lawyer's Trust Report and be subject to audit, as required.

In large part, the Task Force believed such reporting and handling of the funds and client property was necessary because, should the lawyer ever abscond with the funds, the Special Compensation Fund (now Part B Insurance) could be liable. Ensuring that an audit trail existed was therefore a prudent and necessary consideration to protect the public interest.

To be clear, the Trust Rules only apply where the trustee or fiduciary relationship arises from a solicitor-client relationship. Lawyers acting as a personal representative are not governed by the Trust Rules if the underlying relationship did not arise from a solicitor-client relationship, but instead arose from, for example, familial responsibilities or where

the lawyer was appointed because he or she was a long-standing friend of the testator or donor. Nor is the lawyer, in those circumstances, required to disclose that relationship on his or her Trust Report. However, even in these situations lawyers, like all fiduciaries, are still required to account for the property handled in accordance with other legislation (such as the *Trustee Act*, the *Power of Attorney Act* or the *Estate Administration Act*) or pursuant to the laws of equity.

It is unknown exactly how widespread problems arising from the operation of the current Trust Rules are for lawyers acting as personal representatives, because the current rules have been in place for almost a decade and until recently no real concerns had been raised. However, concerns, as discussed below, have been identified, and it would be wise to give some policy consideration to them.

III. Issues

The current requirements under the Trust Rules set out very specific obligations on how "trust funds" must be handled. Specifically, for example, such funds must be deposited in designated savings institutions. Funds may only be paid out by cheque. No automatic withdrawals are permitted. Therefore, if a lawyer is acting as a personal representative with fiduciary responsibilities where the appointment was derived from a solicitor-client relationship, the lawyer may be obligated, in accordance with the Trust Rules, to redesignate the accounts as trust accounts in the lawyer's name, which may not be what the beneficiary desires nor may it be in the beneficiary's best interests. In some cases, if the accounts are held in unusual ways (perhaps in off-shore accounts), the lawyer may be required to cash in all the accounts and re-deposit them in accounts that accord with those permitted by the Rules. This could have significant consequences. For example, if the lawyer is acting as a temporary Attorney for a client during a client's absence from the country, it is doubtful that the client will want the lawyer to have to cash in all existing securities accounts, although this could be required on a strict reading of the current rules.

Equally, acting as an executor, it may be advantageous from an estate's point of view to leave the funds of the estate in the accounts of the testator pre-existing death. For example, the executor may find it as easy to allow automatic withdrawals to continue to pay utility bills than to change account instructions and have to write cheques, as the Trust Rules would require. Alternatively, for the estate's accounting purposes, it may be advantageous to pay estate expenses directly through the bank or maintain lucrative investments in an investment account that provides the possibility of much greater income than that which can be earned from a pooled trust account or an interest-bearing investment account.

If a lawyer is appointed as an attorney for his or her client and the client later becomes incapacitated, the standard approach is that the lawyer proceeds to administer the client's assets in more or less the same, or similar, form as the investments were in at the time that the lawyer-attorney assumes his or her responsibilities: Investments and bank accounts are left intact, mortgages and other obligations paid from them and the funds are not liquidated and placed in the lawyer's pooled trust. In many instances the client is a minor or disabled person and is expected to live many years into the future or the estate

may take some years to administer; liquidation of all assets to convert into pooled trust, or interest-bearing trust, is not necessarily considered a prudent investment. Maintenance of the security of the client's assets and income for the benefit of the client him or herself, or heirs, is considered the first responsibility of the lawyer-fiduciary acting as a personal representative.

Further, a lawyer acting under a power of attorney or as an executor may, directly or indirectly, maintain control of the client's real estate investments in order to allow the estate to earn income, the client's children to benefit from the use of the real estate assets, or to plan for development or other investment in the land. Real estate is not a permitted investment in a pooled trust account under the Trust Rules.

All these examples raise issues with the application of the current Trust Rules to situations where a lawyer is acting as a fiduciary from an appointment arising out of a solicitor–client relationship.

IV. Policy Considerations

1. General considerations

When lawyers are handling funds or property where the lawyer has been appointed as personal representative deriving from a solicitor-client relationship, the Law Society Rules ought to address how the funds and property are handled and accounted for. Lawyers are respected professionals and the public places a high level of trust in them. The assets should be handled and accounted for with the integrity expected of a lawyer, even if the lawyer is not performing solicitor-client functions in connection with the appointment. Lawyers handling property or trust funds in these circumstances should still be expected to be subject to audit by the Law Society with respect to their handling of the trust funds or property in the course of discharging obligations as a personal representative. Simply put, the lawyer has been appointed because of a past relationship that the lawyer and person making the appointment have had. It is reasonable to view the lawyer as a member of a regulated profession, and expect that the lawyer is handling the assets as a member of a regulated profession, even though the lawyer's principle function is as some other type of fiduciary.

Moreover, the Compulsory Professional Liability Insurance Policy, through Part B, now covers dishonest appropriation of money or other property that was entrusted and received by a lawyer in his or her capacity as a barrister and solicitor and in relation to the provision of professional services in certain circumstances. Dishonest appropriation by a lawyer acting as a personal representative deriving from a solicitor-client relationship may be covered through Part B. In order to be able to properly address claims under Part B, it is important for the Law Society to ensure that funds that may be the subject of a claim are accounted for as "trust funds." This protects both the public and the Law Society itself.

2. Specific considerations

The current Trust Rules, insofar as they relate to "trust funds" focus on "funds" that are received by a lawyer as a retainer or in the course of the retainer, such as settlement funds, or sale proceeds. These are particular funds that come into existence arising from a specific, or a series of specific, matters. While they may be held by the lawyer for a period of time, the lawyer's principle function is in *holding* the funds, rather than *managing* them.

When acting as a personal representative, though, the trust funds (or other property) may be of a significantly different nature than those received for the purposes of a matter on which a lawyer is acting for a client. Rather than receiving funds in connection with a particular matter, the lawyer may in fact be taking over the *management* of pre-existing assets, such as securities or brokerage accounts.

Recognizing the differing functions that a lawyer has compared to a personal representative, an application of the Trust Rules to funds being held as a personal representative may raise the following considerations:

a. Trust Funds must be deposited to a pooled account and interest must be paid to the Law Foundation.

These requirements may be negated by specific instructions, and therefore should presumably be dealt with by the lawyer before agreeing to the appointment as personal representative. However, it is often likely that this will not be possible. In many situations, many years elapse between the appointment of the lawyer-fiduciary and the date upon which that lawyer takes control of the assets. At the time of the appointment, no detailed discussion may have been undertaken about the Trust Rules and their effect upon income and the overall assets should the lawyer-fiduciary be required to assume control of the client's estate at some later date. Although anecdotal, most appointments of lawyers as attorneys and executors never are acted upon. To obtain detailed instructions regarding an unlikely eventuality is seen to be speculative and uncertain given that the Trust Rules may have changed by the time the attorney or executor controls the client's estate.

Even if such detailed instructions were, however, obtained from each client where such a nomination is made, they are not binding in the event of the client's subsequent loss of capacity, unless provided irrevocably. Obtaining such irrevocable instructions would be unwise due to the likelihood that there will be significant changes in the underlying circumstances of the client in the years that intervene between the appointment and the assumption of responsibilities by the lawyer-fiduciary.

If instructions cannot or have not been received, the Trust Rules prescribe that any funds that the lawyer receives would have to be deposited to a pooled trust account rather than be deposited into an already existing account of the

estate that the lawyer is to manage. The interest would accrue to a body external to the trust, which would be contrary to the personal representative's (lawyer's) obligations as a fiduciary.

b. Trust Accounts must be kept in the name of the lawyer or the lawyer's firm and designated as a "trust account."

Where the lawyer is acting as, for example, a temporary attorney under a limited power of attorney, it may make no sense and in fact be contrary to the intention of the donor for the accounts to be renamed and designated "in trust" for any funds that the lawyer was to receive while acting as personal representative (such as where the lawyer is acting under a limited power of attorney to collect rents). All of the concerns identified above apply here; in most instances of longer-term lawyer-fiduciary appointments, these investments are not being held in such accounts.

c. Funds must be held in a designated savings institution.

Unless instructions to the contrary can be received from the client (which in some cases may no longer be possible) some or all of the accounts of the estate handled by the lawyer may have to be converted to a designated savings institution. It may well be prudent for the lawyer, acting as a fiduciary, to make such a change in any event. However, there may be circumstances where the holding of the funds in a non-designated savings institution has been done for a reason, and it would be imprudent to have to cash in the account and re-deposit the funds. The issue should perhaps be addressed on the basis of prudent asset management, rather than adherence to prescribed formulas set out in the Trust Rules.

Even with specific instructions to hold funds in a non-designated savings institution, Rule 3-53 requires a trust account to be in a "savings institution" which is defined in the *Interpretation Act* to mean:

(a) a bank,

(b) a credit union,

(c) an extraprovincial trust corporation authorized to carry on deposit business under the *Financial Institutions Act*,

(d) a corporation that is a subsidiary of a bank and is a loan company to which the *Trust and Loan Companies Act* (Canada) applies, or

(e) the B.C. Community Financial Services Corporation established under the *Community Financial Services Act*;

It is at least conceivable that funds could be held in something that was not a "savings institution" – cash in certain brokerage accounts, for example – in

which case even with client instructions a lawyer acting as a personal representative managing assets as a fiduciary could be required under the Trust Rules to deal with the assets in a way not contemplated by his or her appointment.

It is worth noting that "funds" is defined to include coin or bank notes bills of exchange, cheques, drafts, money orders, etc. "Securities" are included in the definition of "valuables" in Rule 3-47 and therefore are not "trust funds." They would have to be accounted for as valuables, but accounts in which securities are held probably escape the application of the rules to "trust accounts" (not defined) which seem to address the holding of "trust funds."

d. Payments or Withdrawals out of a Trust Account

Rule 3-56 permits withdrawals to be made from a trust account only by certain methods and for specific reasons. It is likely that Rule 3-56(a) would cover most situations for payment of funds out of the trust, *provided that* "client" included the donor of the power of attorney, the settlor of the trust, or the testator of an estate, for example. However, if a situation arose where for some reason a payment of funds out of trust by a lawyer acting as a personal representative or executor did not fall within Rule 3-56, the Trust Rules would create problems for the lawyer.

Equally, funds may only be withdrawn from a trust account by cheque, electronic transfer as permitted by the Rules, by instruction to a savings institution (but only to pay funds to the Law Foundation), or by cash (but only in very specific and unusual circumstances that are not relevant to a normal trust). It may be advantageous for the lawyer, acting as fiduciary, to maintain the donor's previously authorized withdrawals or payments from the account.

What is it that Law Society needs to establish in these sorts of relationships to ensure that it can regulate and, if need be, audit how the lawyer has dealt with the assets? Do the requirements of accounting for trust funds set out in Trust Rules need to be discharged, or is it enough that the lawyer discharges (and is able to show he or she has discharged) general requirements that may be less prescriptive than the specific provisions of the existing Trust Rules, thereby permitting more flexible management of assets but still allowing a proper accounting and, if necessary, audit of the lawyer's activities?

3. Public interest

The public interest is to ensure that when a lawyer is acting either as a lawyer or as a personal representative, where the appointment derives from a solicitor-client relationship, the lawyer will hold trust assets properly and that the client or party appointing the lawyer can be assured that the lawyer's conduct is regulated or at least supervised by the Law Society. A finding of professional misconduct would be expected should a lawyer fail to hold trust funds properly when acting as a lawyer. A finding of

conduct unbecoming a lawyer would be available should a lawyer not hold trust funds properly when acting in a capacity other than as a lawyer.

However, if the lawyer, acting as a personal representative where the appointment was derived from a solicitor-client relationship, were required to deal with trust property in a way not contemplated by the appointing party (the client or former client of the lawyer), it is likely that second thoughts would be given to the appointment of a lawyer as a fiduciary. This may not be generally in the public interest, because it may result in the client appointing someone else whose responsibilities are not regulated, or a trust company whose fees (we understand) may be higher.

Moreover, a trust company representative may not be generally expected to have all the same skills or experience as a lawyer, and certainly would not have the same comprehension and familiarity with a client's affairs as would a lawyer appointed as executor or other fiduciary arising out of the solicitor-client relationship. The client would not be expected to have the same degree of trust and confidence in what would, essentially, amount to a stranger assuming an important fiduciary role in connection with the client's affairs. Ensuring therefore that lawyers remain able to undertake these responsibilities is in the public interest.

On the other hand, public confidence in the legal profession requires that lawyers abide strictly by Law Society regulations concerning the handling of funds entrusted to a lawyer. If the current rules allow the Law Society to best protect the public, then amending the rules to provide different standards for the handling of such funds depending on whether the lawyer was acting *qua* lawyer or *qua* personal representative could be counter-productive to effective regulation. The fact that the rules have been in place a considerable period of time and yet concerns have only been raised in the recent past suggests that lawyers have been able to work with the rules.

4. Member relations

Lawyers should obviously give serious consideration before accepting an appointment as a personal representative, trustee or executor. However, given a lawyer's professional expertise and a general level of trust that may have developed with specific individual clients or former clients, it is to be expected that such appointments will occur and perhaps even be necessary. If so, it would be advisable to ensure that the Trust Rules do not interfere with the fiduciary obligations that a lawyer has undertaken in order that the lawyer is not caught between his or her responsibilities as a fiduciary and his or her obligations to the Law Society.

V. Options

1. Amend the Rules

A rule amendment to permit a different manner of holding or dealing with funds by a lawyer acting *qua* personal representative could be considered.

Such a rule would not necessarily be designed to set up a different overall standard for trust accounting, as a lawyer acting as a personal representative would still need to account for the funds and be audited to a strict standard by the Law Society. Many of the current Trust Rules could still be made to apply. An amended rule could, however, result in a less prescriptive manner for dealing with the funds, which would allow strict accounting but still permit the lawyer to manage the funds in a manner contemplated by the appointment.

Recent changes arising from the *Adult Guardianship and Planning Statutes Amendment Act* have resulted in a new Power of Attorney Regulation (B.C. Reg 20/2011, effective September 1, 2011) for enduring powers of attorney under the *Power of Attorney Act*. It creates specific obligations on Attorneys concerning the efforts that Attorneys must undertake to establish the property and liabilities of the estate and to maintain a list accordingly. Moreover, it provides for specific records that must be kept. The relevant provisions are found in s. 2 as follows:

> **2** (1) An attorney must make a reasonable effort to determine the adult's property and liabilities as of the date on which the attorney first exercises authority on the adult's behalf, and maintain a list of that property and those liabilities.
>
> (2) An attorney must keep the following records in relation to the period for which the attorney is acting:
>
> (a) a current list of the adult's property and liabilities, including an estimate of their value if it is reasonable to do so;
>
> (b) accounts and other records respecting the exercise of the attorney's authority under the enduring power of attorney;
>
> (c) all invoices, bank statements and other records necessary to create full accounts respecting the receipt or disbursement, on behalf of the adult, of capital or income.

Rather than the prescriptive requirements set out under the Trust Rules, perhaps the requirements under the Power of Attorney Regulation would suffice as a *general* basis for the purpose of lawyers handling trust funds and other property in situations where they are not acting as a lawyer but are acting in a fiduciary capacity, if the appointment derived from a solicitor-client relationship.

If so, there should still be additional requirements that would be placed on a lawyer acting as a personal representative from the current rules. For example, it would be prudent to ensure that at least the following provisions apply:

- Rule 3-65 requiring monthly reconciliations (although as discussed above, some consideration may be given to whether the reconciliation needs to be monthly in circumstances where the lawyer is not acting as a lawyer but as a fiduciary where the appointment is derived from a solicitor-client relationship);

- Rule 3-68 concerning the retention and security of records;

- Rule 3-66 concerning trust shortages;

- Rules 3-72 to 3-78 addressing the Trust Report to ensure that funds, property or valuables held by the lawyer in these fiduciary capacities remain in the Trust Report;

- Rules 3-79 to 3-80 concerning compliance audits and disposition of trust money and valuables; and

- Rules 3-81 to 3-86 concerning unclaimed trust funds. The application of Rule 3-87 (payment to the Law Foundation where the owner of funds cannot be found) should perhaps be excluded, leaving the disposition of assets in such circumstances to be addressed in accordance to the principles of trust law.

2. Leave the Rules in their Current State

The other option is to leave the Rules as they currently read, and to leave it to lawyers to use their good sense in interpreting them insofar as they apply to their handling of trust funds and property where the lawyer is not acting as a lawyer but is acting as a personal representative where the appointment is derived from a solicitor-client relationship. The current rules have been in place for many years and while they do not seen to generate many complaints, the issue appears to be one that is of concern to the wills and estates bar. It has been reported to us that a considerable number of lawyers are appointed as trustees, executors, or attorneys arising out of a solicitor-client relationship.

However, given that concerns have been raised by lawyers engaged in this activity and that an examination as described above identifies that there are some policy considerations that suggest some problems could arise from the application of the current rules to these situations, leaving the Trust Rules as they are currently drafted may not be a viable option. Providing clarity concerning how funds and property should be handled when acting as a fiduciary but not as a lawyer could be of valuable assistance to lawyers in the Province.

VI. Key Comparisons

The Rules of some other law societies do address this issue to some greater extent than do the rules in British Columbia.

In particular, the Rules of the Law Society of Alberta create a category of lawyer acting "in a representative capacity." Lawyers acting in a representative capacity are exempted from the application of the rule that sets out what a lawyer must do on the receipt of trust money.

VII. Consultations

The Trust Accounting Department, the Professional Conduct Department and the Lawyers Insurance Fund have been consulted and each has provided information and feedback to the content of this memorandum.

The issue itself was brought to the attention of the Law Society by members practicing in areas of law where a lawyer may be, on occasion, expected to act in a representative capacity as an executor, attorney, or trustee where the appointment has arisen as a result of a solicitor-client relationship. The problems that the current rules are said to create have been identified by those lawyers and expanded on in this memorandum, and this group of lawyers is awaiting a response from the Law Society in connection with the concerns it has raised.

VIII. Recommendation and Request of the Committee

The concerns and issues that have been identified by lawyers practising in areas of law where there is some real likelihood that the lawyer will act in a representative capacity are not speculative and could be problematic, putting lawyers acting in representative fiduciary capacities in conflict with their obligations as a lawyer in handling "trust funds" as defined in the Rules. A solution could lie in a rule amendment, perhaps by separating out from the definition of "trust funds" a category of "trust property" being valuables other than "trust funds" that a lawyer receives as a personal representative of a person where the appointment is derived from a solicitor-client relationship. A separate rule could then be created to set out the obligations that a lawyer has in dealing with such "trust property."

The Executive Committee is asked to review the material and recommendation contained in this memorandum and to consider referring the matter to the Benchers for approval in principle to amend the rules on the basis of the policy considerations set out above. The Benchers would then be asked to refer the matter to the Act and Rules Subcommittee to draft a rule. After a draft rule is completed, focused consultation with affected portions of the bar should be considered.

MDL/al

The Law Society of British Columbia

Memo

To: Benchers
From: Paralegal Pilot Project Working Group
Date: October 19, 2012
Subject: Law Society Evaluation of Paralegal Pilot Project

The purpose of this memorandum is to provide the Benchers an information update regarding the proposed approach for how the Law Society will evaluate the paralegal initiative arising from the Delivery of Legal Services Task Force report.

When the Delivery of Legal Services Task Force was disbanded, certain groups within the Law Society were tasked with implementing the recommendations. The Paralegal Pilot Project Working Group is responsible for liaising with the Supreme Court of British Columbia and the Provincial Court of British Columbia. During its consultations with the courts it discussed how to evaluate the family law pilot projects in each court. These discussions led to the recognition that the courts will collect certain information with which to evaluate the pilot project from their perspective and the Law Society will evaluate the pilot project from its perspective.

The Working Group determined that there are two types of evaluations the Law Society should perform.

- Evaluation #1 would seek to measure the uptake of the paralegal initiative and attempt to collect some information regarding potential cost savings and client satisfaction. The purpose would be to better determine whether the project has met a goal of improving access to justice benefits. Evaluation #1 would need to be considered along-side the court-based evaluations to determine the overall access to justice efficacy of the model and would be expected to assist the court in assessing whether to expand the pilot to permit additional types of appearances.

- Evaluation #2 would seek to track certain key information within the Law Society's regulatory processes in order to ensure that problems do not arise through the complaints process. The purpose of Evaluation #2 would have more of a public protection focus than access to justice focus. It would be focused on the goal of assessing the level of competency with which the paralegal services were provided.

While the exact wording might change, the substantive content of what is intended to be captured is set out below.

Evaluation #1:

This evaluation would include some questions, preferably through the Annual Practice Declaration and some other questions by way of survey. The exact mechanism for the survey will have to be worked out by staff, but would likely be web-based. A possible process is to identify lawyers who have indicated on the Annual Practice Declaration that they used designated paralegals in court and then encourage them to participate in the survey. The survey might be analyzed twice over the two year family court pilot project (the end of 2013 and the end of the pilot).

The Annual Practice Declaration would track the following:

- Do you supervise "designated paralegals"[1]
    - If yes, how many : [1 or 2]
    - If yes: do your designated paralegals give legal advice? [y/n]
    - If yes: do your designated paralegals appear in court under the family law paralegal pilot project? [y/n]

The pilot project survey would track the following:

- How many of your clients used designated paralegals to appear in court? [enter data]
- Do you estimate that using designated paralegals to appear in court saved your clients money? [yes/no/uncertain]
- Did using designated paralegals allow you to increase the amount of legal services you were able to provide? [yes/no/uncertain]
- What percentage of your clients were satisfied with the services of your designated paralegal appearing in court? [%]
- How many designated paralegals do you feel you could competently supervise? [<2/3-5/5+]

[1] A definition would be included.

- Comments [is there any feedback you wish to provide to assist the Law Society in determining whether to modify the existing rules regarding the use of designated paralegals?]

Because of the timing around the Annual Practice Declaration, staff will determine when is the best time operationally to put that information in the system (it would likely not be until mid-2013).

Evaluation #2

In order to track and analyze complaints arising from how a lawyer used designated paralegals a process will be developed for staff to track the following information in the complaints information system. This data would be a sub-file within the complaint file about the lawyer and would allow for some consideration as to whether any regulatory concerns arise. The information may also prove useful as the Benchers consider the broader question of who should the Law Society regulate.

- Name of the designated paralegal;
- Was the designated paralegal appearing in court;
- Was the designated paralegal giving legal advice;
- How many designated paralegals was the lawyer supervising (1 or 2);
- Was the designated paralegal being remotely supervised, or supervised on site;
- What area or areas of law was the paralegal providing service;
- Size of firm (number of lawyers);
- Disposition (or status) of complaint.

Conclusion

At the end of the two year family law pilot project an evaluation will occur. The Working Group believes the approach for Evaluation #1 will assist in that overall evaluation process. In addition, the information collected in Evaluation #1, and potentially in Evaluation #2, will assist the Benchers in determining whether to modify the cap of two designated paralegals under Law Society Rules, rule 2-9.2. The evaluation methods may also provide additional valuable

information in order to balance the potential increase in access to justice with the Law Society's responsibility to regulate in the public interest.

/DM