FEDERATION OF ONTARIO LAW ASSOCIATIONS
FÉDÉRATION DES ASSOCIATIONS DU BARREAU DE L'ONTARIO

"The Voice of the Practising Lawyer in Ontario"

Response to the Call for Input on Compliance-Based Entity Regulation

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Transmitted by e-mail to the Task Force on Compliance-Based Entity Regulation c/o mdrent@lsuc.on.ca

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Executive Summary

The Federation of Ontario Law Associations (the "Federation") supports many of the principles and objectives contained in the consultation paper for Compliance-Based Entity Regulation. It is a laudable initiative of the Law Society to seek ways to modernize our regulatory systems in a way that is designed to value flexibility and lower the cost of compliance.

The Federation also generally supports a proactive approach to competency rather than awaiting and responding to a complaint by a member of the public. We support providing guidelines to sole and small firm practitioners, particularly newly called lawyers and paralegals embarking on their legal careers, provided those guidelines are specific and achievable. Our members have long expressed strong concerns that changes in educational and training requirements combined with increased numbers of individuals entering the profession would diminish professional standards. If this initiative can help to preserve and restore the public's confidence in the legal profession, by ensuring that high standards are maintained, then we will be supportive.

Notwithstanding our support in principle, we have very substantial concerns with the specifics of what is proposed (or what we believe is being proposed) and offer some suggestions that should be considered by the Task Force and Law Society should it decide to move down this path.

Generally, our concerns are focused on four areas:

First, we do not believe this matter has received enough attention from the Bar and consultation has been inadequate given the scope and scale of the proposed change.

Second, it is clear from the consultation document that the area of greatest concern to the Law Society as a regulator is the demographic of soles and smalls. This is the area of the Bar that receives the most complaints related to practice management, according to the provided statistics. Yet, the Task Force contained no sole practitioners and there has been no focused consultation with sole practitioners to determine whether this method of regulation will help or hinder sole practitioners.

Third, we have strong doubts that an added regulatory layer on top of soles and smalls (entity regulation, on top of the regulation of the individual lawyers as is currently practiced) would net the results the Law Society is looking for.

Fourth, we find it extremely difficult to comment and provide feedback on the concept of compliance-based regulation without looking at the specific draft guidelines that are being contemplated. This is where "the devil is in the details". In concept, practice management guidelines can be a useful tool for both regulator and practitioner, but we are concerned regarding the actual text of these documents and how they are intended to be applied.

We look forward to continued engagement with the Task Force and Convocation as it deliberates on this important matter.

Commentary on the Process:

The Federation of Ontario Law Associations wishes to first make a commentary on behalf of practising lawyers across the province on the process undertaken by the Law Society on this matter.

Our first general comment with respect to the process concerns the Law Society's communication to lawyers both that this consultation was underway, and the explanation of just how far-reaching this change to the regulatory scheme could be. Certainly, the Federation has been aware generally of the work of the Task Force, and we have communicated to our members the information we received. Despite our interest, until the consultation paper was produced in January, we understood that this was a long-term initiative, and that change would be incremental and come slowly with little and generally positive impact on an average practice. We are now led to believe that these changes are contemplated more quickly with a goal of being passed by Convocation before the expiry of the Treasurer's term in June and the first phase to be implemented quickly. A closer examination of the consultation document and our own research suggests that the contemplated changes are also much more sweeping and could have a larger impact on practising lawyers than initially believed.

What has particularly troubled us, however, is that over the past few months we were consistently told by lawyers across Ontario that they had no idea that this move to compliance-based entity regulation was being contemplated. Even those that were generally aware of the consultation know little about the details. This is particularly true of the constituency that will likely be most affected by any new regulations – soles and smalls. *It is a shared failure of communications perhaps, but it is a failure nonetheless* and it has serious ramifications to the Law Society's ability to roll these changes out and receive the buy-in of the practising bar. As one of our committee stated:

> *My guess would be that most lawyers have no idea this is happening and if it does, there are going to be a lot of lawyers out there who have been operating for years with no complaints and are suddenly going to be faced with a raft of new, mandatory, practice guidelines. How else would they think other than "If it ain't broke, why do I have to fix it?"*

On a related note, we noted with considerable interest that much of the data referenced in the consultation paper points to soles and smalls as the leading practice demographic for client complaints. Given the nature of our membership, particularly the practising bar in smaller communities, we are particularly attuned to the perspective of sole and small practitioners. A large majority of the membership of local law associations are soles and smalls. We are deeply concerned, however, that not a single sole practitioner was on the Task Force. A few of the Task Force are from smaller firms (5 to 10 lawyers), but the particular perspective of firms with one or two lawyers, which we believe face challenges very different from a mid-sized firm, was not represented on the Task Force.

We strongly recommend that the Task Force reach out to sole practitioners and small firms with a focused consultation, perhaps in the form of a series of focus groups or surveys. The Federation would be pleased to help facilitate that work in the coming months, should the Task Force take up this recommendation.

Commentary on the lack of specificity

Another common critique expressed by our members concerns the lack of detail about just what the proposed "practice management principles" might look like. Almost every meeting or conversation that we have had with members who have examined this consultation paper use the words *"the devil will be in the details … but we don't see any details here"*. The consultation paper is, bluntly, too vague to give much comfort to lawyers who are being asked to contemplate a fundamental change to the regulatory system that they have always worked in. Lawyers feel that they are being asked to endorse or comment on changes with blind faith that the Law Society will come up with "practice management principles" and broader, compliance-based regulatory systems that are an improvement and not simply an additional layer of regulation.

One cannot dispute "practice management guidelines" would be beneficial to all lawyers provided these guidelines are achievable in a real-world environment and do not require additional time and financial resources. In addition, the Federation believes it is important to target the problem areas within the profession without penalizing those practitioners who have established their own processes and systems which have proven to serve them well. To achieve a fair balance, the The Law Society could stage the implementation of these new guidelines as will be discussed further below.

Commentary on the "culture shift" that is required

Another general observation we have is that perhaps the greatest change that needs to take place in the implementation of a compliance-based system would be to the culture of the Law Society itself, rather than to the practices of the profession. Over the history of the Law Society's regulation of lawyers the word of law society investigators and auditors was "the final word". Their "suggestions" were taken as gospel. In a "compliance-based" system the practice-management guidelines are being contemplated as suggestions and it is assumed that greater flexibility would be given to lawyers in how they might go about complying with these regulations. In concept, this is welcome, but our fear is that old habits at the Law Society will die hard and the "guidelines" will quickly become their own hard and fast rules.

Among some practising lawyers, having hard-and-fast rules to work by is comforting. Having a black and white answer assures them that they are on-side. For others, the lack of flexibility is limiting, both to their own operations and to innovations in the way they practice.

For the Federation, we believe the biggest challenge facing the Law Society is to implement the laudable principles of compliance-based and entity regulation in this environment, while at the same time maintaining flexibility. The lack of clarity and specifics concerning how the Law Society proposes to do this has created concern among our membership.

Response to consultation questions

Question – Does the Federation have any comments about the proposed principles for the effective management of a legal practice as set out in Part A of the Consultation Paper?

Practice Management

Requiring all firms to complete a Basic Management Checklist similar to the document tool utilized by the Law Society in a Practice Audit could provide law firms throughout Ontario with simple steps to improve the management of the firm; however, the Law Society should not ask firms to recreate the proverbial wheel. Sample policies, acceptable wording and other precedents that can be easily implemented must be made available. In addition, entities should be allowed to opt out of a policy if it can demonstrate that such a policy has no application to its business structure or area of practice. Additional questions in annual reporting can ensure an entity provides thorough reporting on any changes to its structure that may create the need for further policies to be developed or implemented in that practice.

We also suggest that a practice management template could be helpful provided it is offered in two flavours: one for soles and smalls and one for larger firms. The list of principles to be covered could be better tailored to meet the different environments embodied in the range of firm sizes and types of firms found across Ontario. Making such a template printable and designed in such a way that it can be understood by lay staff, and not just lawyers, would also be very helpful. Incorporating the contents of the Practice Manual into a CPD might also ease the process, as would making some training (perhaps on-line) available to law clerks and staff that might work for a sole or small practitioner. It is also critical that these practice management guidelines are developed through extensive consultation with practitioners. To be candid, there are too many examples of suggestions and practice resources provided by the Law Society that have not proven to be effective or useful because they lacked the input of the practising bar.

Client Management

The Federation identifies two areas of concern in the Law Society's attempt to regulate client management practices.

The first is redundancy. All of Section 3 of the *Rules of Professional Conduct* already outline client management principles and Section 3.2 specifically requires lawyers to provide service that is competent, timely, conscientious, diligent, efficient and civil. In addition, the Law Society already has established guidelines for a conflict checking system within any size of firm. The Federation agrees that ensuring entities have some manner in which to verify conflicts is important and should be easily achieved through the firm reporting the nature of their system in an annual report.

Our second concern is the subjective nature of client management. "Timely communication" is impossible to measure especially in today's world of instantaneous modes of communication. In addition, the ability to manage a client's expectations is something that is often developed through experience and mentorship. It is difficult to conceive of a guideline that can be imposed on entities of various sizes that would enhance a practitioner's ability to manage client's expectations without requiring the entity to micromanage the day to day practice of that practitioner.

File Management

The Law Society has developed a file management practice guideline that deals with many of the topics within this area of the consultation paper including opening and closing of files and the managing of documentation. At the beginning of this guideline, the Law Society states:

> *The Guideline is not intended to replace a lawyer's professional judgment or to establish a one-size-fits-all approach to the practice of law.*

The Federation hopes that the Law Society's intention to respect a lawyer's professional judgment remains. How an entity handles internal matters such as opening and closing files and managing documentation should not be regulated. There does not appear to be statistical evidence demonstrating that public complaints relate to document or file management.

Financial management

FOLA agrees with regulations to ensure law firms are compliant with Law Society By-Law 9; however, this is where regulation on financial matters for any entity should begin and end. The Law Society has no place in regulating firm budgets, business plans, insurance needs (assuming the reference to insurance is above and beyond LawPRO liability insurance). While many entities may appreciate further guidelines to assist in business planning and budgeting, the Law Society has already established checklists and guidelines for firm's business considerations and these products are well received by members.

Billing practices are often dictated by the client or the nature of the matter. A guideline to "establish consistent billing practices to ensure that both firm and client needs are met" could interfere with the confidential nature of a retainer agreement. If there are specific concerns that have been raised regarding lawyer billing practices that the Law Society wishes to address, these concerns should be detailed so that a proper response can be prepared. It may be that the Law Society's specific concerns in relation to billing practices are shared with the Federation and other organizations; however, we cannot support such a broad principle that could impact the privacy of a client's retainer agreement.

Professional Management

The Law Society rightly requires annual CPD credits as a way of ensuring that every licensee remains up-to-date and competent. We are supportive of a further requirement that CPD credits be restricted, in whole or in part, to the specific practice areas of the practitioner or an area of interest for expansion of a practitioner's practice. In fact, we have made this very suggestion through the Real Estate Working Group, but have been disappointed by the resistance the idea received from staff and some Benchers.

The Federation is concerned, however, with the Law Society's attempt to regulate an "entity's support of its practitioner's ongoing legal training". This could be interpreted as a requirement that each entity fund the ongoing legal education requirements of its lawyers and paralegals. While many firms have the financial ability to pay for ongoing legal education, many do not. This could affect the number of positions available within firms and could also interfere with employment contracts that have been negotiated between a firm and its employees which address this issue.

If an entity pays for CPD, there could be an unintentional restriction in a lawyer's ability to undertake legal training outside of their current area of focus, which may restrict their mobility in the future. If the entity is responsible for the CPD cost, the entity may, logically, restrict the training to the current area of business rather than areas that may be of interest to the individual. In economically marginal practices, this is too restrictive.

Diversity and Access to Justice

While diversity, inclusion and promoting access to justice are very important principles, we are unable to link these concepts with the Law Society's attempt to improve practice management and the delivery of legal services to avoid claims and complaints.

The Federation has no difficulty with ensuring each legal entity within Ontario establish policies in relation to respect within the workplace in order to comply with human rights legislation. Requiring entities to comply with established legislation is appropriate. However, what is the outcome of an allegation of the breach of this guideline? Does the lawyer or paralegal have the ability to raise a complaint with the Law Society? Does a staff member? What remedies does the Law Society foresee it could impose against an entity found to have violated this policy? At the risk of repetitiveness, the lack of details makes it impossible for us to provide a thoughtful response, and the vagueness of the words in the consultation give us concern.

The Federation also questions what guidelines could be imposed by the Law Society to be fairly implemented across a broad spectrum of legal service providers to ensure greater "access to justice" for the public. Would this require entities to keep statistics on their clients' backgrounds or income brackets to demonstrate to the Law Society the entity is providing services to individuals who are not able to financially afford the ordinary billable rate? What statistics have been relied upon to suggest that there is any correlation between practice management issues and access to justice? Our members have suggested that many of the complaints against soles and smalls can be attributed to efforts within those entities to take on more clients than can be properly handled in an attempt to keep fees to a minimum and provide legal services to those who cannot otherwise afford it. There are, quite frankly, many members of the public who cannot afford the Cadillac level of service and lawyers in rural areas often attempt to provide some help to many in exchange for modest compensation and the volume becomes overwhelming for some.

Question – Does The Federation have any comment about the size of firm to which compliance-based entity regulation may apply

Without further detail provided on the types of guidelines to be imposed, it is difficult to respond on the appropriate size of firm for these regulations. National and large firms have office managers and/or managing partners with the capacity to administer and implement new requirements on a proactive basis yet the statistics regarding complaints suggest it is the sole and small firm that generates the majority of the issues to be addressed. It is therefore difficult, in the face of those statistics, to argue for an outright exemption to a sole practitioner or small firm.

Nevertheless, we feel that great danger exists that "entity" regulation will simply become another layer of regulatory burden on top of the already burdensome regulatory structures in place today on an average, practising lawyer working to scratch out a living. Unless some of the current burden is removed before being replaced by "entity" regulation, we fear the inevitable result will be more burdensome, rather than less. Anecdotal tales we have heard from the world of professional accounting, which has recently moved to compliance-based entity regulation, indicates this is a very real threat for sole and small practitioners.

For some of our members who practice in larger partnerships, the question has been raised about the potential liability of that firm for any breach by any practitioner within that law firm. Would a partner of Gowlings practicing in Ottawa, for example, be responsible for a breach of these new guidelines by an associate practicing in the Waterloo office? What type of responsibility is foreseen? When the guidelines suggested include day to day practice management such as responding to clients in a "timely" manner, it is difficult to understand how a partner of a medium or large law firm could protect him or herself from a potential regulatory intervention.

We also have a question about the extent of entity regulation on business structures that some of our sole and small members might participate in when they engage in franchise or marketing relationships with other firms. Should a sole practitioner real estate lawyer that participates in the marketing/franchising partnership of realestatelawyers.ca, for example, be subject to the strictures around "entity" regulation? Should one of the ever-growing number of personal-injury law brokers who position themselves to the public as a "law firm", be subject to entity regulation? Would all lawyers in the broader "entity" of the marketing partnership or brokerage be subject to regulation of that "entity" and receive sanctions should one member fall out of compliance? Our guess (our hope) is that entity regulation would not be defined to extend this far, but there are no assurances in the consultation document. A related question arises when considering that a law firm could organize themselves in such a way that the "inter-office" liability is limited by structures that limit partnership to smaller geographic areas or areas of practice, (i.e. could a large multi-office law-firm organize themselves as a series of independent franchises?) thus defeating the purpose of entity regulation.

Question: To ensure compliance-based entity regulation does not create an additional regulatory burden, what considerations should be kept in mind particularly applicable to a sole practitioner or small firm?

First and foremost, the Law Society must ensure that a prior track record of success is sufficiently rewarded. A sole practitioner or legal entity which has practiced without complaint for over 10 years, should not suddenly be compelled to implement new systems and guidelines. The Law Society should consider rolling out this new regulation with new legal entities, small firms with newly called professionals and any firm with members who have already demonstrated a failure to maintain appropriate systems. A model for this type of regulatory implementation exists within many industries. In Ontario, the trucking industry, for example, rewards those trucking companies that have a clean safety record with fewer audits and a less onerous regulatory filing burden, which allows the regulator to focus on new operators that do not have a record or on operators who have failed time and again. It is worth noting that Ontario's trucking industry is known as among the safest in North America.

Second, the Law Society must be flexible when it reviews an entity's existing systems for compliance. Many firms, of all sizes, already have policies and procedures in place that would likely satisfy much of the intended Law Society regulation. Allowing a firm to provide evidence of its current systems should be made streamlined so that those firms which have already spent the time and resources developing these systems are not required to redo or duplicate those efforts.

Third, the Law Society must provide a streamlined approach for a firm to opt out of any regulation that would not apply to its current structure. This is particularly important for a sole practitioner. Adding questions to the Annual Report should ensure any changes in the firm's structure are reported, without adding an undue paper-burden. It must be remembered that, for sole practitioners, every new regulatory structure or process is a direct economic cost in an industry which is still focussed on hourly billing.

If entity-based regulation is intended for all sizes of firms including sole and small firm practitioners, there should be a staged approach to implementation to avoid overwhelming an already busy practitioner and to ensure larger firms can put in place whatever further systems are necessary to protect them from liability. The Federation suggests the Law Society consider prioritizing those aspects that specifically relate to protection of the public first.

Role and Responsibilities of a Designated Practitioner

The Task Force poses three questions in this section. With respect, we submit that there should be a first question, which is missing. The first question should be: should a lawyer be designated by each entity to have particular regulatory responsibilities, that is, to be a designated practitioner? To that end, the Federation has some concerns, particularly if entity regulation is to apply to medium or larger size firms.

Our concern largely relates to not knowing what practice management principles the Task Force may have in mind when considering entity regulation. The consultation paper identifies potential issues around communication, missed deadline/procrastination and conflicts of interest (see page 6). It might have been helpful to have some specific examples of what practice management principles the Task Force had in mind that addresses these three specific areas of client claims and complaints.

Our concern is that appointing a designated practitioner for each entity could prove overly burdensome for that individual. This would be the case for small firms of two to five lawyers and for mid-sized and large firms alike, but for different reasons. If the designated practitioner has the responsibility to report the law firm's implementation of various practice management principles and had the responsibility to ensure that the individual lawyers within the law firm complied with those principles, this could be a responsibility that could overwhelm the designated practitioner, who is also trying to run his/her individual law practice. In a smaller firm, the designated practitioner could be put into the uncomfortable position of policing the work practices of partners and set up conflicts and confrontation. As one of our committee noted: *"No one can really be his partner's keeper, no matter what size of partnership it is."*

Another area of concern we have relates to sanction or discipline should an individual(s) within a law firm not completely adhere to the practice management principles. The consultation paper states:

> *"It may be necessary to develop rules of conduct for entities to provide that an entity's lack of compliance with a principle could lead to investigation and discipline. An entity's failure to comply with these requirements could lead to a more serious response, including disciplinary action. These consequences might be warranted, for example, where the professional misconduct of a lawyer or paralegal was the result of the entity's flawed policies, a lack of policies or procedures, or an entity's failure to adhere to them." (pg. 12)*

We are concerned that the Task Force has given no specifics as to discipline should an individual lawyer within a law firm not adequately comply with a certain practice management principle(s). For example, relative to client communication, if a practice management principle is to respond to a client inquiry, whether by telephone call, letter or e-mail, within a certain period of time (say 72 hours), a firm may adopt that principle but the fact remains that some lawyers are better than others at responding to client communication. In the context of a law firm with multiple lawyers, it is next to impossible for the law firm or for the designated practitioner to monitor whether each individual lawyer within the firm is complying with the timelines to respond to a client. If the client complains to the Law Society about a lack of communication, we are left to wonder who would be

subject to discipline. Would it be the individual lawyer who has failed to comply with the practice management principle, the law firm, the partners of the law firm or the designated practitioner? All of the above?

It is one thing to have a lawyer responsible with respect to trust accounting and accuracy of financial reporting. That is not an overly burdensome task, considering that law firms have accountants who have the skills to prepare the necessary financial documents. However, it is a completely different thing to designate an individual to be responsible for the implementation and compliance with hypothetical practice management principles, none of which have been specifically identified in the consultation paper, and many of which may be outside the individual's ability to monitor or control.

In our submission, if compliance-based entity regulation is to be the way of the future, and if practice management principles are going to be put into place, the Law Society must allow flexibility for how law firms are going to implement and comply with those practice management principles. This should not be a "one size fits all" process. Each law firm should be allowed to develop its own way of ensuring that practice management principles are implemented and complied with. For small firms with only a handful of lawyers, it might be best that they decide to designate one lawyer to this task. However, for medium and large firms with dozens of lawyers, it may very well be much better for them to have a committee of lawyers to ensure implementation and compliance with practice management principles, with no one individual lawyer having the burden of being the designated practitioner.

Therefore, the Federation submits that the first question under this section should be whether a lawyer should be designated by each entity to have particular regulatory responsibilities, that is, to be a designated practitioner? Our response to that question would be no, each entity should be allowed the flexibility to come up with its own way to implement and comply with practice management principles.

Entity Registration

The Federation is supportive of a public registry of law firms which is searchable on the Law Society website. However, the Federation has some concerns over some of the information the Task Force seems to be contemplating to be included on the registry. Specifically, pending disciplinary proceedings against the firm or its members should not be required on a publicly accessible law firm registry. This would be the equivalent of assuming guilt before proving innocence and allow frivolous claims to impact the reputation of a lawyer. The Task Force also mentions, as an example, that the location and particulars of all trust accounts and firm bank accounts be included on the registry. We cannot imagine why such information should be publicly available. Similarly, the names and responsibilities of all employees of the firm should not be publicly available. The consultation paper, on this topic, also mentions a firm "ethics counsel". We have no understanding of what an "ethics counsel" is since this is not a concept that is discussed within the consultation paper.

In answer to the specific questions posed, the Federation agrees that entities should be required to be registered on the Law Society website. We see no reason why registration requirements for sole practitioners and small firms should be different from any other firm, but we also fail to understand how or why the information on these firms needs to differ, except in the "tombstone data" provided, from the current registry of lawyers and paralegals that can be found on the Law Society web-site. Providing this type of information is not onerous to the sole or small practitioner, and would not be substantially different than the reporting done today.

A model the Law Society might consider emulating to register both the entity and the individual is the Professional Engineers of Ontario directory where the individual licensee and their employer is noted on the same page. (http://forum.peo.on.ca/cgi-bin/EPIM_Search/EPIM_Form_Search.do) All the pertinent information related to the licensee, including the status of any past disciplinary action and their current employment or practice status, are noted in one place. It is an efficient system and provides sufficient information to the public.

Our Views on Compliance-Based Entity Regulation

Overall, the Federation supports the concept of a series of practice management principles that are meant to be pro-active in identifying potential client/lawyer problems before they come up. However, if there is to be meaningful input from the bar the details must be included in the consultation process. The consultation report identifies that the majority of complaints concern sole practitioners and small firms of between two and five lawyers. If that is a practice demographic that is in need of help, then help should be provided. However, any practice management principles should be put in place with a view to assisting lawyers, especially sole practitioners and lawyers in small firms. This practice demographic faces challenges that are not well appreciated by lawyers who practice in medium and large size firms. If the three main areas of concern are communication, missed deadline/ procrastination and conflicts of interest, there are no doubt practice management principles that can be applied that will help some lawyers to become more effective communicators and time managers. Properly introduced and supported, fair, logical and consistent practice management principles can enhance a lawyer's service to his/her client and improve the public perception of lawyers.

The implementation of entity-based regulation and practice management principles is going to have some challenges. Particularly with older sole practitioners or practitioners in small firms, leopards do not easily change their spots. The implementation of such a program for the Law Society must reflect a spirit of fairness and helpfulness and not appear burdensome and punitive. If done fairly and in a spirit of being flexible and open-minded, this initiative could well, in time, see positive results by way of fewer complaints and better service to the public.

We urge the Law Society to move slowly in this initiative, and ensure that the bar has an opportunity to provide input regarding specific regulatory changes prior to implementing any new regulatory scheme.