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FOLA RESPONSE TO THE LAW SOCIETY OF ONTARIO'S COMPETENCE TASK FORCE

Submitted to: Law Society of Ontario's Competence Task Force

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A. Introduction

The Federation of Ontario Law Associations (FOLA) is the voice of the practicing lawyer, representing the members of Ontario’s 46 county and district law associations. We are pleased to provide the following submission in response to the interim report of the Competence Task Force.

B. Background

Earlier this year, the Civil Rules Committee struck a subcommittee to investigate the problem of late service of expert reports. The subcommittee is chaired by Justice Lauwers of the Court of Appeal. The subcommittee consisted of two judges of the Superior Court of Ontario, and seven senior counsel.¹

In June 2021, the subcommittee released an interim report. That report concluded with the following statement:

The Need for Education and Training

“We believe that the problems these proposals address can be partly attributed to the fact that the civil bar is vast and includes many untrained and inexperienced lawyers. The bar must be better educated about the Rules of Civil Procedure and trained in their use.”

There are two noteworthy points to come from the subcommittee’s comments:

- First, the subcommittee said, or came very close to saying, that many members of the civil bar do not meet standards of professional competence as defined as section 41 of the *Law Society Act*.
- Second, the subcommittee did not address its comments only to new or recent calls. The subcommittee referenced the entirety of the civil bar.

C. Context for the Interim Report

FOLA represents practicing members of the bar across the province, and based on the feedback from our members, we believe that the conclusions of the Competence Task Force need to be situated in context.

1. Competence and the Changing Landscape of the Profession

The subcommittee’s comments are consistent with anecdotal comments that have been made to us by judges of every level of court, including the Court of Appeal. Although the comments are often addressed towards new or more recent calls, these concerns are widespread. Due to the fact that so many civil actions result in settlement, even licensees who were called 10 to 15 years ago can have limited trial experience. On the criminal side, comments received from the judiciary do tend to be addressed towards newer calls.

¹ Justice Mark Edwards, Justice Darla Wilson, Ranjan Das, Brian Bangay, Todd McCarthy, Stephen Wojciechowski, Jim Vigmond, Tom Curry, and Barbara Legate



There has also been a trend in licensees transitioning between practices through various stages of their professional career. Whether it arises from a self-recognition that their current practice area is too stressful, unfulfilling, too demanding or that the licensee is not well suited to that practice; or an identified need to change after coming back from a leave of absence; or even the toll of the pandemic, these licensees, who tend to be litigators turning to solicitor work, rarely have identified appropriate supports (outside of friends who can mentor them) in learning a new practice area to the standard of a competent practitioner. The result is a pool of licensees who are practicing in complicated areas of solicitor work without the experience or training to do so, post-licensure accreditation. As the old adage says: you don't know what you don't know.

The legal profession is growing. The number of licensees between 2000 and 2020 has nearly doubled. Looking at the Law Society's Annual Reports from 2014 to 2020, the number of lawyer licensees is growing at the rate of about 3% per year.

Although we do not have the data on the number of articling opportunities since the onset of the COVID-19 pandemic, comments received from our members suggest that over the past year and a half, fewer firms are offering fewer articling positions. Fewer articling positions translates into fewer hire-backs upon the completion of articles. When you add to that the fact that many students have been working from home since last March, they have fewer opportunities for networking and reduced employment options if they are not hired back by their firms.

2. Pandemic-Related Change

On the other hand, the pandemic has also ushered in significant change to the practice of law and the administration of justice. Many courts are now sitting online, using videoconference technology. New investments in technology and long overdue changes to rules have enabled the execution, commissioning, filing, and service of documents of materials online. Testamentary instruments can be effected and executed remotely in guarded situations, being a material alteration to centuries of practice. Many of these changes have been embraced by newer calls, while some senior counsel have struggled to adapt their skills to this new reality.

There are competence challenges in the profession. This is not something new; it has been brewing for some time. If unaddressed, the changes we have seen during the COVID-19 months is only going to make these problems worse. Some of the adaptations we have seen during the pandemic are also going to protract these challenges. For example:

- It is unlikely that courts will go back to holding strictly in-person attendances and paper filing systems, yet we have seen no significant effort from the Law Society to enact explicit technological competency or professional development requirements.
- Counsel are increasingly practicing in multiple counties and districts across the province, which has raised new questions about the myriad (and often inconsistent) practice directions put in place by the courts. With respect to the Competence Task Force, we question whether a lack of fluency with practice directions is being conflated with a lack of fluency with the Rules of Civil Procedure.

3. Support for New Calls and Junior Counsel

The fact that newly licensed lawyers and paralegals have a lower risk of complaint claims than other groups does not necessarily mean that their legal work is perfect. It may well mean that they have lower



complaints in claims because they have fewer clients or that they are taking on less complex legal matters. The existing efforts of the Law Society to provide early practice management audits to new calls in sole practice is helpful, and we encourage the Law Society to continue to develop this service from a lens of development and support, rather than sanction and fault-finding. The Law Society needs to enhance those reviews and audits by directing those to additional supports, courses or guidance.

Based on what we have heard from all levels of the judiciary and various other sources, newly licensed lawyers, and particularly those in a sole practice or with a small firm are in need of support in the early years of their practice. On October 25, 2021, the Court of Appeal called for senior counsel to do more to share advocacy opportunities with their juniors.² But this type of learning opportunity can only exist where there is a relationship between junior and senior counsel, whether as part of the same firm or otherwise. The Task Force’s finding that, on average, 12% of newly licensed lawyers and 20% of newly licensed paralegals enter into sole practice within three years of being licensed is concerning if these new licensees are not provided with meaningful mentorship relationships or opportunities for guidance. These mentoring relationships can last a professional career and result in ‘paying it forward’ for mentees to later become mentors.

4. Information Needed About Complaints About Senior Lawyers

Identifying why there are more complaints against more seasoned lawyers needs to be further explored and common problems identified.

Why are so many complaints related to failure to communicate, failure to account, failure to serve one’s client? The problems could be multifactorial, including time management, technological, or arising from challenges with practicing law with school aged children at home, elder parent care, financial concerns, burnout, etc. All of these stressors and challenges can lead to health problems, both physical and mental. For lawyers in a small or sole practice, the pressures may become overwhelming. Law has become a fast-paced, technologically challenging, competitive, and high-stress profession. There are struggling ‘soles and smalls’ who need to feel supported. However, support cannot be extended without first identifying the reasons behind service-related issues.

Reviewing additional data on complaints and claims against licensees will help the Law Society to identify patterns or badges of complaint-driven incompetence. Who are making these complaints? Against whom? At what stage in their career? What are the facts and context in making the claim? While it is truly helpful to look at complaints to try and identify areas of concern, responding to complaint generated data is not enough because it is reactive. Comments from the judiciary, such as the Rules subcommittee, have to be taken seriously and further inquiries made. In our experience, many judges of all levels in Ontario are quite willing to help address the competence problem.³

Solicitors do not readily have access to an objective standard to meaningfully address competency standards, like the judiciary to litigation counsel. Solicitors do not routinely appear before boards, commissions, arbitrators or adjudicators who can provide constructive comment on competency. Concerns about solicitors’ competency, therefore, tend to flow from comments by other solicitors who

² <https://www.ontariocourts.ca/coa/how-to-proceed-court/statement-regarding-submissions-from-counsel/>

³ In 2019, Justice Brown of the Court of Appeal approached FOLA to help facilitate his travel to various regions in the province to discuss best practices in conducting a civil appeal, due to his concern over the standards of civil appellant advocacy.



are on the other side of the transaction or clients who have suffered a loss at the hands of an incompetent licensee. Although the instances of complaints to the Law Society or claims to LawPRO are representatively low, the assessment of these complaints or claims will outline additional data on incompetency that can be measured and regulated by the Law Society.

We agree that the policing model regulating competence is not enough and that more emphasis ought to be placed on the coaching model to actively promote competence. To that end, we believe that more can be done on the coaching side, but we believe that the Law Society alone cannot provide that model. Rather, it will take consultation and cooperation from key justice stakeholders and, perhaps most importantly, will require consultation with all levels of court in both the criminal and civil fields.

D. The Questions Asked

Questions 1 and 2: We have no disagreement with either the working definition of competence or the five principles for an effective competence regime.

Questions 3 and 4: Components of Continuing Competence Framework and Renewing the Law Society's Continuing Confidence Framework

For these two question areas, we see two issues: (a) how to best identify competence problems and (b) how to best address those problems.

1. Identifying the Problems

We see two ways to identify competence problems. The first is the risk-based approach that is already in use – referring to data generated from complaints to focus on the problem areas and the licensee demographic most subject to those complaints (see section 8 of the Committee's report). It would seem that service issues are particularly problematic and risk of complaints increase with years of licensure and age.

But focusing entirely on complaints for diagnostics is not enough. It can take a lot for a member of the public to go to the trouble of making a complaint. Further, just because the public does not complain does not mean that lawyers and paralegals are practicing to the standard of competence referenced in section 41 of the *Law Society Act*.

The report from the Rules subcommittee identifies a different sort of problem. Judges and senior counsel have identified that “the civil bar is vast and includes many untrained and inexperienced lawyers”. This observation is not helpful without further context or detail. What are they seeing in or outside of courtrooms that leads them to this conclusion? What of other practitioners who experience incompetent licensees? This leads to a second means through which to identify competence concerns: through a consultative process.

In our view, the consultative process can start with the judiciary and the leaders of the primary practice area associations, including The Advocates' Society, the Criminal Lawyers Association, the Family Lawyers Association, and the Ontario Trial Lawyers Association (OTLA). This can be expanded to the Ontario Bar Association and Federation of Ontario Law Associations who have various committees, sections and task forces for solicitors who generally do not have practice-focused advocacy organizations. Specifically, what is going on in the practice world that is problematic and needs



addressing? In our experience, many members of the judiciary and these associations/organizations would welcome the opportunity to be consulted and take part in addressing the solutions.

Likewise, as much of the Task Force report references newer lawyers, we strongly encourage further consultation with stakeholders reflecting junior or aspiring members of the bar (which is also a resource to licensees transitioning from one practice area to another mid-career), including the Ontario Bar Association’s Young Lawyers’ Division, the Law Students’ Society of Ontario, and the Law Society’s Equity Advisory Group.

2. How to Address the Problem Areas Once Identified

While recognizing that this is an interim report and there is likely more work to be done, FOLA sees 3 ways the professional community can address the competence problems discussed by the Task Force: improved continuing professional development (CPD), better coaching and mentoring for all stages of practice, and by respecting the critical role of county and district law libraries.

i. CPD

CPD programs are a relatively straight forward way to address competence issues. Section 41 of the *Law Society Act* references a licensee’s knowledge, skill, or judgment. Most often, CPD programs address matters of knowledge but not so much matters of skill or judgment. How do we address skill and judgment deficiencies? As our practices incorporate more technology and our courts embrace more online tools, the need for availability and recognition of skills-based CPD is rising.

To be sure, there is no shortage of CPD. Rarely does a week go by when there is not some CPD program offered to licensees. But we question how much of that programming is directed to matters of skill or judgment or even best practices. We question how much of this programming is directed toward matters of “how to” – for example, how to prepare a client for examination for discovery, how to cross examine a police officer on the contents of their notebook, how to make an objection in court, the “dos” and “don’ts” of examination in chief, how to conduct an asset sale or a real estate purchase, etc. CPD programming directed towards issues of practice could be interactive, demonstrative, or a combination of both.

Relative to the practice challenges experienced by licensees with 10 years or more experience, there must be an understanding as to why these members of the bar are facing the complaints they do, particularly, complaints related to service. It is only through an understanding of the “why” that CPD programming can be tailored to address the identified problems.

We agree that the Law Society should provide enhanced support to sole practitioners and small firms with courses that include the business of law, law firm management, and financial record-keeping. However, it is essential to understand what is behind the complaints that are laid against soles and smalls in order to formulate CPD programming that will address the problems. Such programs may need to be directed toward matters such as time management, better use of technology, stress management, etc.

CPD could be categorized much like they are now between substantive and professional CPD, but in a way that can also focus or credentialize skills-based CPD. This may be a much larger discussion point, but we can harken back to the professional, substantive and skills-based approach of the former Bar Admission Course and the equivalent goals of articling and the Law Practice Program as meeting a



professional and regulatory standard of competence in the ‘know how’ of practice. The availability of courses, not just prior to licensure, at a ‘beginner, intermediary and advanced’ level would enable continuation of standards and exposure to best practices throughout one’s career and could also be remedial after a finding of incompetence by the regulator or the courts. It may be prudent to consider who could make these available, such as law schools (outside of the JD/LLB programs, akin to a certification course) or the Law Practice Program itself. This is an area worthy of additional consultation.

ii. Coaching and Mentorship

The other way to address identified problem areas is through an enhanced coach and mentorship program. Respectfully, we do not believe that the LSO’s Coach and Advisor Network (CAN) addresses the degree of mentorship that is required, particularly for newer calls. It is axiomatic that no licensee can reach his or her potential in this profession without help. Have you ever attended a judicial swearing in or an awards ceremony where the appointee/recipient has not thanked all those who provided valued mentorship?

With the growth in the profession and the number of licensees who are in the early stages of their careers or going it alone or in small firms, mentorship is becoming critical. Likewise, with the rapid change in the profession and the practice of law owing to technology, senior lawyers can also benefit from skills-based coaching on some elements of practice.

We do not believe that any one entity, whether it be the Law Society, the Advocates’ Society, the Criminal Lawyers Association or any local law association can adequately, on its own, address the mentorship challenge. Rather, we believe that a truly effective mentorship program can only be achieved through a collaborative process that includes the regulator, key stakeholders and the judiciary.

In our experience, many within the judiciary do not want to simply shine a light on a competence problem. Rather, many within the judiciary are prepared to be part of the solution. We do not profess to have the blueprint for the perfect mentorship program. What we do believe, is that a starting point for litigation mentorship should involve open minded and frank discussions to identify the competence concerns and then try to come up with a collaborative approach as to how to best address those concerns. These consultations would involve, at a minimum, the Law Society of Ontario, the Chief Justices of the Court of Appeal, the Superior Court, the Family Court, the Ontario Court of Justice, a senior Associate Judge (former Master) and the leaders within the primary practice associations including the Advocates’ Society, the Criminal Lawyers Association, the Family Lawyers Association, Ontario Bar Association, FOLA and OTLA. We also strongly encourage consultation with organizations and bodies that represent newer calls and equity-seeking groups. We believe that it is only through this collaborative and cooperative approach that a truly effective mentorship program will emerge.

Therefore, to summarize, we believe that the current competence framework could be improved upon in the following ways:

1. Continue to utilize Law Society and LawPRO data to identify areas of competence concerns through the complaints or claims process;



2. Hold a meeting(s) between the LSO, the judiciary and representatives of the primary practice associations to:
 - (a) Identify areas of competence concern, and
 - (b) Formulate the best way to address those concerns, whether it be done through CPD, coaching/mentorship or a combination of both.

iii. County and District Law Libraries

Finally, we would be remiss without mentioning the critical role Ontario's network of county and district law libraries play in addressing professional development and competence, including hubs to co-locate and collide for mentoring, coaching and communicating.

Competency requires access to high-quality library and legal information services. The link between law libraries and competency was recently affirmed by the LSO's Professional Development & Competence Committee:

High-quality library and legal information services are components of the Law Society's supports to licensees, and are an element of the Law Society's competence platform. Competence has been identified as a priority for the 2019-2023 bench term.

Yet, as FOLA's white paper titled "County and District Law Libraries: Ensuring Competency in the Profession and Access to Justice"⁴ points out, legal texts and databases are very expensive and their proper navigation is critical to ensuring the identification of relevant law. Sole practitioners and professionals from smaller and medium sized law firms often do not have the resources to support this required bank of knowledge.

By way of example, a Westlaw subscription can cost \$400 a month. The same service can be accessed through one's local law library for the cost of the licensee library fee which was \$182 in 2020 (since reduced to \$159 for 2021). The economies of scale cannot be overstated. Not only are the County Law Libraries a vital legal and regional research hub for lawyers, paralegals, and licensing candidates, they are also an invaluable partner for the Courts when distributing practice information, and ensuring that our judiciary has access to legal resources. We have been advised that members of the judiciary consult the material in many of the County Law Libraries that is not otherwise available to them in their offices or judicial library, including rare books that are only otherwise available at the Great Library in Toronto.

Ongoing, sustainable funding for Ontario's county and district law libraries must continue to be recognized as a fundamental priority for the Law Society to ensure there is equal and equitable access to resources for lawyers.

E. Conclusion

We thank the LSO for inviting FOLA to participate in this very important subject area and would welcome any opportunity to discuss these matters further.

⁴ <https://img1.wsimg.com/blobby/go/63f6349d-d85d-4511-bc5f-4314d54b45d0/downloads/Federation%20of%20Ontario%20Law%20Associations%20White%20P.pdf?ver=1626444624877>