CREATIVE CONSEQUENCES P/L

LAW, BUSINESS AND REGULATION ADVISORY

TRANSFORMING REGULATION AND GOVERNANCE PROJECT

PHASE 1

26 MARCH 2014

EXECUTIVE SUMMARY & INTRODUCTION

Over the past months the Nova Scotia Barristers' Society (Society) has been engaged in an extensive review of its regulatory and governance model. The project, led by Darrel Pink, Executive Director and Victoria Rees, Director, Professional Responsibility, has seen the development of a research paper entitled, "*Transforming Regulation and Governance in the Public Interest*"[1], that comprehensively sets out key objectives for a regulatory model that is responsive to the current legal practice trends and issues facing legal practice today based on an analysis of regulatory models in jurisdictions globally.

The research paper, which was prepared for the Council of the Society, recommends that a model regulatory regime should comprise a framework that is "proactive; is principle-based and outcomes-focused; is risk-based; is able to encourage and accommodate new business models; is able to enhance access to justice and affordable legal services and involves new ways of engaging law firms to achieve outcomes"[2]. With the imprimatur of Council work has now begun on developing such a regulatory regime.

In developing a model regulatory regime Nova Scotia has identified a number of tasks that need to occur. One of these tasks includes the development and implementation of a regime to regulate entities, including a framework to embed ethical behaviour and competent practice in all law firms in Nova Scotia. In December 2012 Creative Consequences, an Australian-based international consultancy, was engaged by the Society to assist with the design and implementation of a regime to regulate entities, including a framework to embed competent practice and ethical behaviour , otherwise known as "proactive management based regulation" (PMBR) in all law firms in Nova Scotia.

The successful development and implementation of such a regime is best achieved through an iterative approach. The effective design and implementation of such a regime must include regular stakeholder engagement and consultation. This project, which comprises six phases, reflects such an approach.

The six phases of this project comprise as follows:

1. *Review of the present regulatory and ethical requirements for lawyers including an analysis of conduct complaint data and professional indemnity claims;*
2. *The design of a set of 'objectives' considered necessary to encompass the findings of Phase 1;*
3. *A consultation phase for stakeholders on the entire process but specifically on the 'objectives';*
4. *The design of a 'self-assessment' process to enable entities to address the 'objectives';*
5. *A further consultation phase; and*
6. *The implementation phase including design of an 'audit' or 'review' function.*

This report comprises phase 1 of the project. This report analyses the present regulatory framework of Nova Scotia for the purposes of introducing entity regulation and a framework to embed ethical behaviour and competent practice in law firms.

[1] http://nsbs.org/sites/default/files/ftp/RptsCouncil/2013-10-30_transformingregulation.pdf
[2] Id at p.51.

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BACKGROUND

It is an undeniable fact that the practice of law has changed dramatically over the past twenty years. Globalisation, commercialisation and new technologies have had a profound effect on the practice of law globally as well as in Canada.[3] Today, there is a worldwide market for legal services. The increasing number of transatlantic mergers provide clear evidence of this fact. Canada has recently undergone a wave of mergers involving international law firms that has dramatically changed the upper tier of the country's legal landscape.[4] These mergers are seen as a way for firms to assure clients with increasingly globalized businesses that the clients' legal needs can be satisfied in virtually any jurisdiction in the world. The ability to work transnationally has been facilitated by advancements in technology. Remote access to one's office, reliance on smart phones to share data, email and social media to communicate with clients, and other emerging technologies to conduct overseas cloud-based outsourcing or operate virtual law offices have transformed the mechanics of practicing law.

Technology is not only making it easier for lawyers to practice but is also providing a new means by which clients can obtain access to legal services. Today, clients (and potential clients) routinely use the Internet to identify cost-effective legal resources and ways to solve their legal needs. [5] With such access, technology is permitting the unbundling of legal services. The trend towards unbundling has prompted several regulators in Canada, including Nova Scotia, to implement formal rules encouraging its use.[6]

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[3] A plethora of material has been published over the last decade about the impact of globalisation, commercialisation and new technologies on legal practice and the likely impact for future legal practice. Nova Scotia's "Transforming Regulation and Governance in the Public Interest" Report provides a detailed discussion of these effects: http://nsbs.org/sites/default/files/ftp/RptsCouncil/2013-10-30_transformingregulation.pdf . For further information see for example, Laurel S. Terry, The Legal World Is Flat: Globalization and Its Effect on Lawyers Practicing in Non-Global Law Firms, 28 Nw. J. Int'l L. & Bus. 527 (2007-2008); Adam Sechooler, Globalization, Inequality, and the Legal Services Industry, 15 International Journal of the Legal Profession 231-248 (2009); Laurel S. Terry, Steve Mark, and Tahlia Gordon, Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology, 80 Fordham Law Review 2661-2684 (2012a); Daly, Mary C. and Silver, Carole, Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services (May 1, 2006). Georgetown Journal of International Law, Vol. 38, p.401, 2007; Gillers, Stephen, A Profession, If You Can Keep It: How Information Technology and Fading Borders are Reshaping the Law Marketplace and What We Should Do About It (March 19, 2012). Hastings Law Journal, Vol. 63, 2012; NYU School of Law, Public Law Research Paper No. 12-18.

[4] In 2011 and 2012 Canadian law firms Ogilvy Renault LLP and Macleod Dixon merged with the international law firm Norton Rose LLP. The move created a firm with more than 2,900 lawyers around the globe, 700 of which are part of the firm's Canadian operation known as Norton Rose Canada LLP, and ranking it as one of the largest legal practices in Canada. In February 2013, Fasken Martineau LLP completed its merger with Johannesburg-based Bell Dewar, giving it the largest international footprint of any Canadian-based law firm. Fasken Martineau is a leading international business law and litigation firm with more than 770 lawyers. The firm has offices in Vancouver, Calgary, Toronto, Ottawa, Montréal, Québec City, London, Paris and Johannesburg. In April 2013, Toronto-and-Calgary-based firm Fraser Milner Casgrain LLP (FMC) merged with U.K.-founded SNR Denton and France-founded Salans to create Dentons Vancouver. FMC is the first Canadian firm to combine with a firm that has a substantial presence in the U.S. allowing a single firm to meet the needs of clients operating on both sides of the largest trading relationship between two countries in the world. See G.Song, Globalization and the Canadian legal market, The Canadian Lawyer, http://www.cba.org/CBA/PracticeLink/2012-10-lfl/globalization.aspx

[5] For a comprehensive discussion on the impact of technology on Canadian lawyers see Nova Scotia Barristers' Society, "Transforming Regulation and Governance in the Public Interest", at p.21-23, http://nsbs.org/sites/default/files/ftp/RptsCouncil/2013-10-30_transformingregulation.pdf

[6] Nova Scotia Barristers' Society, Code of Conduct changes will increase access to legal services in Nova Scotia, http://nsbs.org/news/2013/03/code-conduct-changes-will-increase-access-legal-services-nova-scotia

In addition, legal practice has also seen changes in law firm's structures. In order for firms to survive in such a market they either have to change their structure, their service delivery or their pricing model to keep afloat. This is particularly true for sole practitioners and small firms. The impact of globalisation is often considered in relation to large and multi-national law firms. The reality is however, that globalisation in terms of regulatory trends and technological change also impacts on small law firms and sole practitioners as well. The emergence of law firms like *Resolute Legal* in the Nova Scotian legal marketplace, which has adopted a virtual law firm infrastructure and *c3 Legal*, another innovative non-traditionally structured law firm in Nova Scotia are two examples of many.

Regulators are well aware of this profound change and are responding with considerable attention realising that the changes are unavoidable. The establishment of the American Bar Association's Commission on Ethics 20/20 in 2009[7]; the Legal Futures Committee in 2012 by the Canadian Bar Association[8] as well as the work being done in the United Kingdom[9], Europe[10] and Australia[11] are evidence of this fact. Discussions taking place about the changing nature of legal practice are focusing on all aspects of practice and how regulators can and must respond. As a result of these discussions, a number of jurisdictions have already implemented fundamental regulatory changes.

[7] The Commission on Ethics 20/20 was established to conduct a comprehensive review lawyer ethics rules and regulation across the United States in the context of a global legal services marketplace. The Commission was charged with conducting a three year review of the ABA Model Rules of Professional Conduct. In particular, the Commission was instructed to examine how lawyers are regulated in the United States in light of advances in technology and the increasingly global nature of law practice. The aim of the Commission was to, with 20/20 vision, propose policy recommendations that would allow lawyers to better serve their clients, the courts and the public well into the future.

[8] The Legal Futures Committee was established to "examine the challenges facing lawyers and the legal profession, and to make recommendations about the kind of organization the CBA should be in 2015 and what it would need to offer lawyers and the legal profession in order to be relevant and vibrant." One of the primary goals of the Legal Futures Initiative is to create a framework for ideas and identify ways to help the legal profession understand the challenges ahead, and shape the direction of the future. The Legal Futures Initiative goes hand-in-hand with the Envisioning Equal Justice Project, also launched last August, which is looking at solutions for the diminishing access to justice across Canada.

[9] Like the ABA Ethics 20/20 Commission, the Federation of Law Societies of Canada and the Canadian Bar Association the LSB have been particularly interested on the effects of globalisation, commercialism and technology and the practice of law and have become the quasi thought-leadership body in England and Wales. Whilst the LSB has not established a commission or committee to look at the future of legal practice it has conducted a range of research projects and commissioned research together with other regulators that look at the effects of globalization, commercialisation and practice

[10] The Council of Bars and Law Societies of Europe (CCBE) provides thought-leadership for Europe. The work of the CCBE, which represents the bars and law societies of 32 member countries and 11 further associate and observer countries, and through them more than 1 million European lawyers, is conducted through a number of specialist committees and working groups. Each Committee and Working Group focuses on a particular topic. Such topics include for example, access to justice, competition, criminal law, European private law, free movement of lawyers, international legal services, money laundering, IT law and E-justice. The CCBE's most recent focus has been on education and training, data protection, cloud computing, the free movement of lawyers and money-laundering.

[11] Like the United Kingdom, Australia has not established a body or commission to formally review legal practice. Rather individual jurisdictions within Australia have been addressing particular issues. A number of jurisdictions, for example, have been particularly focused on technology, producing a series of practice guidelines for the profession relating to cloud computing, legal process outsourcing and social media.

In Australia and the United Kingdom, for example, regulatory change has resulted in the relaxing of structural barriers allowing non-lawyer ownership of law firms and entity regulation. In conjunction with these changes, both Australia and the United Kingdom have introduced a proactive, risk-focused, and principles-based regulatory regime. The *Legal Services Act U.K.* (2007), for example, contains "principles" that set the standards by which regulated practitioners and firms need to practice. Similarly, legislation introduced in Australia contains a number of provisions, particularly in relation to incorporated legal practices (ABSs) that use principles, rather than proscription.

In Canada, several provinces are exploring new and innovative ways to regulate the legal profession. Nova Scotia's Transforming Regulation Project commenced in May 2013 with the adoption by Council of a Strategic Framework calling for action in relation to two specific strategic priorities – 'Transforming regulation and governance in the public interest and enhancing access to legal services and the justice system for all Nova Scotians.'[12] As soon as the Strategic Framework was adopted, Council approved a work plan in July 2013. The work plan, which included in-depth research about issues affecting the legal profession and new models of regulation being implemented in other jurisdictions, culminated in the publication of a report, as referred to above, "Transforming Regulation and Governance in the Public Interest". The Report provides a comprehensive discussion of the regulatory environment affecting lawyers in Nova Scotia and recommended that it was time for Nova Scotia to change its regulatory framework to embrace better methods of legal practice.

While Nova Scotia is to a large extent, at the forefront of regulatory change in Canada it is certainly not alone. Major movement is currently also occurring in Ontario and British Columbia. These provinces are actively exploring new regulatory approaches.[13] The Law Society of Upper Canada has for some time been looking at practice structures and entity regulation and on 27 February 2014 they that they had approved the launch of a consultation on alternative business structures (ABS), as well as the development of a framework for the regulation of law and paralegal firms and other business entities that provide legal services.

The move to a new regulatory framework in response to the changing environment is momentus. Changes to regulatory structures can be positive but also challenging in relation to their impact on both the profession and the community generally. This is particularly so in relation to the legal profession which is accustomed to a rich tradition and can often view regulatory change as an unnecessary burden. In order for any regulatory transformation to occur effectively, it is essential that proposed changes are (a) considered in light of the current regulatory framework; (b) communicated and explained effectively and (c) open to consultation. In addition, transformation also requires a focus on the culture of the profession, the regulators and the community within which the profession and the regulators exist.

This report is divided into two parts. The first part of this report will discuss the concepts of entity regulation and proactive management based regulation. The second part will then consider Nova Scotia's regulatory environment with a focus on structure and culture.

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[12] Nova Scotia barristers' Society, 2013-2016 Strategic Framework, http://nsbs.org/sites/default/files/cms/menu-pdf/strategicframework.pdf

[13] For example, See Law Society of Upper Canada, News Release, "Law Society to launch consultation on alternative business structures", dated February 27, 2014, at http://www.lsuc.on.ca/uploadedFiles/For_the_Public/News/News_Archive/2014/ABS-news-release-feb27-2014-FINAL.pdf

PART I

The purpose of this section of the Report is to provide information about the two paths, being entity regulation and proactive management based regulation, the Society has proposed to take. This section describes the concepts of entity regulation and proactive management based regulation and uses examples to illustrate how they operate in practice.

REGULATING ENTITIES

What is entity regulation?

The notion of regulating entities, (that is, regulating law firms as well as lawyers and other individuals operating within the firm) once a foreign concept for the legal profession is becoming increasingly familiar. This is because entity regulation of law firms is a reality today. In both the United Kingdom and Australia legislation has been enacted allowing regulators to look at the conduct of law firms as entities. In the United States two jurisdictions, New York and New Jersey allow complaints to be made against law firms. Similarly, in Nova Scotia, as will be discussed below, a framework exists for complaints to be made against law firms. Each of these jurisdictions have implemented some aspect of entity regulation.

It is important to note however that the framework in Australia for entity regulation operates in conjunction with a proactive management based framework to embed ethical behaviour and competent practice (discussed below). This is not the case in the United Kingdom, New York, New Jersey, or Nova Scotia. It could although be argued that the United Kingdom has a quasi-proactive management based framework. Nova Scotia already has some elements of entity regulation and is now on a path toward implementing a proactive management based framework to embed ethical behaviour and competent practice. Hence this report.

Canada has also recently taken its first step towards entity regulation with the development of a management tool to embed ethical practice within firms.[14] In 2012 the Canadian Bar Association (CBA) commenced a project to develop a tool that encourages law firms to implement better "ethical infrastructure" in legal practice. After considerable research and evaluation of existing ethical frameworks, the CBA developed "*The Ethical Practices Self-evaluation Tool*". The Tool is not mandatory but is suggested for adoption as best practice.

As a result of these regulatory initiatives one may like to argue that entity regulation is on its way to becoming 'the new norm' for the legal profession with a number of jurisdictions considering its appropriateness and form. In our view it is only a matter of time before entity regulation is a feature of every jurisdictions regulatory framework. Whilst a focus on individual lawyer conduct may have been appropriate for 20th century practice, it is questionable whether it is now, particularly in light of the changes to legal practice.

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[14]. See The Canadian Bar Association, The Ethical Practices Self-evaluation Tool, http://www.cba.org/CBA/activities/code/ethical.aspx; A. Salyzyn, Regulating Law Practice as Entities: Is the Whole Greater than the Sum of Its Parts?, November 29, 2013, http://www.slaw.ca/2013/11/29/regulating-law-practices-as-entities-is-the-whole-greater-than-the-sum-of-its-parts/ ; A.Salyzyn, What if We Didn't Wait? Promoting Ethical Infrastructure in Canadian Law Firms, July 25, 2013, http://www.slaw.ca/2013/07/25/what-if-we-didnt-wait-promoting-ethical-infrastructure-in-canadian-law-firms/

The following discussion of the regulatory framework in the United Kingdom illustrates how entity regulation operates in practice.

Case study: entity regulation in the United Kingdom

The United Kingdom introduced legislation based on entity regulation in 2007. The framework for entity regulation in the U.K requires law firms to appoint a person responsible for overseeing compliance as well as a person responsible for the financial administration of the firm.

Law firms in the United Kingdom are required to appoint a designated person called a Compliance Officer for Legal Practice (COLP) who is responsible for overseeing risk and compliance within their firm and be the SRA point of contact. COLPs are responsible for ensuring that the law firm complies with relevant statutory obligations that are set out in the SRA's Handbook; recording any failure(s) to comply and informing the SRA of such non-compliance. The COLP must report any material failure to the SRA as soon as reasonably practical.

In addition to appointing a COLP, law firms must also appoint a Compliance Officer for Finance and Administration (COFA). COLPs have to be senior lawyers. They can delegate duties to others but they remain ultimately responsible for the role and its obligations. COFA's are responsible for the overall financial management of the firm. COFA's are required to ensure that the law firm, including its employees and managers, comply with any obligations imposed under the SRA Handbook; keep a record of any failure to comply and make this record available to the SRA. COFA's are also required to report any material failure (either taken on its own or as part of a pattern of failures) to the SRA as soon as reasonably practical.

Individuals who are COLPs and COFAs must be fit and proper to undertake the role/s. This is assessed by taking into account the criteria in the SRA Suitability Test 2011 and any other relevant information. The assessment as to whether an individual is a fit and proper person is undertaken upon initial approval. If the COLP or the COFA is deemed unfit and improper, the SRA may withdraw its approval.

Law firms are required to comply with a range of obligations set out in the SRA's Handbook. The Handbook represents a complete re-writing of all of the SRA regulations for firms that are subject to its jurisdiction and includes a revised Code of Conduct and Accounts Rules. Chapter 7 of the SRA's Code of Conduct (set out in the SRA Handbook) and Rule 8.2 of the Authorisation Rules require firms to "have effective systems and controls in place to achieve and comply with all the principles, rules and outcomes and other requirements of the Handbook" and to "identify, monitor and manage risks to compliance". There is no explicit requirement to have a compliance plan in place. As such, it is difficult to argue that the regulatory framework in the United Kingdom is proactive.

PROACTIVE MANAGEMENT-BASED REGULATION (PMBR)

What is PMBR?

The term "proactive based management regulation" (PMBR), coined by Ted Schneyer, is characterised by the appointment of one or more lawyer–managers by the firm to take enhanced responsibility for their firm's "ethical infrastructure". The term "ethical infrastructure", again coined by Ted Schneyer and further defined by Elizabeth Chambliss and David Wilkins refers to formal and informal management policies, procedures and controls, work team cultures, and habits of interaction and practice that support and encourage ethical behaviour. PMBR is also characterised by collaboration between firms and regulators.

According to Ted Schneyer, the framework implemented in NSW is a prototype for "proactive, management based regulation. That is because the framework in NSW has given content to the term "ethical infrastructure" by "identifying ten types of recurring problems that infrastructure should be designed to prevent and mitigate."[15]

PMBR is a radical departure from the traditional regulatory approach in which certain behaviours or conduct standards are defined and lawyers are disciplined if the behaviours and standards are not met. Rather than the regulator reacting after a complaint against a lawyer, the PMBR is designed to help firm leaders detect and avoid problems by focusing on management systems and processes designed to entrench ethical behaviours. This can occur because PMBR allows firms to develop their own process and management system standards and develop internal planning and management practices designed to achieve regulatory goals.

The regulatory goals in PMBR are set by the regulator are based on principles. The goals are typically drafted at a broad level of generality, with the intention that there should be overarching requirements that can be applied flexibly. The goals as principles contain terms that are qualitative and not quantitative and are purposive, expressing the reason behind the rules. The goals represent in effect behavioural standards.

What are the benefits of PMBR?

The benefits of PMBR are many.

According to theorists like Cary Coglianese and David Lazer, management-based regulation is far more effective than traditional regulatory approaches.[16] This is because in a management-based regulatory framework, the role of regulation ceases to be primarily about inspectors or auditors checking compliance with rules, and becomes more about encouraging entities to put in place processes and management systems which promote ethical behaviour and are then scrutinized by regulators or corporate auditors to determine the results. In a management-based regulatory framework the responsibility of establishing and implementing systems rests with the entity. Cogilanese and Lazar argue when entities have the power to make their own decisions "managers and employers are more likely to view their own organization's rules as reasonable and as a result there may be greater compliance than with government [externally] imposed Rules in achieving regulatory objectives."[17]

[15] Ted Schneyer, On Further Reflection: How "Professional Self-Regulation" Should Promote Compliance with Broad Ethical Duties of Law Firm Management, 53 ARIZONA L. REV. 576, 585 (2011).
[16] C. Coglianese and D. Lazer, 'Management Based Regulation: Prescribing Private Management to Achieve Public Goals' (2003) 37(4) Law and Society Review 69.
[17] Ibid.

Furthermore, the use of principles in defining regulatory objectives or goals offers flexibility for both the regulated and the regulator in determining how to interpret and comply with the principles. The use of principles to articulate regulatory goals can also result in the minimisation of regulatory burden by removing "red tape", i.e., unnecessary and administratively burdensome proscriptive requirements which have little ultimate use in defining the standards of services delivered to clients. Principles can also influence both the culture within the regulator and within firms, by defining how each should behave (e.g., with integrity, with due skill and care, in the best interests of clients) and the outcomes of such behaviour.[18]

The benefits outlined above are well supported in practice. In 2008, a research study by Dr. Christine Parker of the University of Melbourne Law School in conjunction with the NSW regulator assessed the impact of ethical infrastructure and the self-assessment process in NSW to assess whether the process is effective and whether the process is leading to "better conduct" by firms required to self-assess.[19] The research focused on the number of complaints relating to incorporated legal practices. The research found that complaints rates for incorporated legal practices were two-thirds lower than non-incorporated legal practices after the incorporated legal practice completed their initial self-assessment. The research also revealed that the complaints rate for incorporated legal practices that self-assessed was one-third of the number of complaints registered against non-incorporated legal practices.

Moreover, in another recent research study conducted on incorporated legal practices in NSW, by Professor Susan Saab Fortney of Hofstra University, New York, in conjunction with the NSW regulator, revealed that a majority of law firms (71%) who completed the self-assessment process had revised their firm systems, policies, and procedures and 47% had actually adopted new systems, policies, and procedures.[20] Forty-two percent (42%) of firms indicated that they "strengthened firm management" following the completion of the first self-assessment.

The following section briefly explores the regulatory framework in Australia illustrating how entity regulation operates in conjunction with PMBR.

Case study: entity regulation and PMBR in NSW, Australia

Australia was the earliest adopter of entity based regulation for the legal profession with the introduction of legislation in NSW in 2000 mandating that all law firms who incorporate must establish and maintain a management framework, legislatively coined "appropriate management systems", to enable the provision of legal services in accordance with the professional and other obligations of lawyers. The responsibility for establishing and implementing "appropriate management systems" rests with a person nominated by the firm called a "legal-practitioner director". The legislation provided that failure to establish and maintain "appropriate management systems" is capable of being professional misconduct.

[18] See J.Black, Forms and Paradoxes of Principles Based Regulation (September 23, 2008). LSE Legal Studies Working Paper No. 13/2008. Available at SSRN: http://ssrn.com/abstract=1267722

[19] Tahlia Gordon, Steve A. Mark, and Christine E. Parker, Regulating Law Firm Ethics Management: An Empirical Assessment of the Regulation of Incorporated Legal Practices in NSW, J.L. & SOC. (Dec. 23, 2009/2010); Legal Studies Research Paper No 453, U of Melbourne.

[20] Susan Fortney & Tahlia Gordon, Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation, 10 ST. THOMAS L. J. 152 (2012).

The introduction of legislation requiring "appropriate management systems" was unique not only to legal profession regulation but to regulation generally. It was not based on any pre-existing model and the regulators were not given any guidance from the legislators as to what "appropriate management systems" or a management based system for law firm should comprise. At the time it was introduced, a framework did not even exist for regulating law firms!

Consequently the regulators in NSW were forced to think about the concept of "appropriate management systems" and what an appropriate management system for a law firm would comprise. After an extensive period of consultation with the profession and key stakeholders the regulators created the content for "appropriate management systems" for law firms. They did so by considering the types of complaints that were made against lawyers and what elements would comprise of sound legal practice. The regulators came up with ten such elements:

1. **Negligence** (providing for competent work practices).
2. **Communication** (providing for effective, timely and courteous communication).
3. **Delay** (providing for timely review, delivery and follow up of legal services).
4. **Liens/file transfers** (providing for timely resolution of document/file transfers).
5. **Cost disclosure/billing practices/termination of retainer** (providing for shared understanding and appropriate documentation on commencement and termination of retainer along with appropriate billing practices during the retainer).
6. **Conflict of interests** (providing for timely identification and resolution of "conflict of interests", including when acting for both parties or acting against previous clients as well as potential conflicts which may arise in relationships with debt collectors and mercantile agencies, or conducting another business, referral fees and commissions etc).
7. **Records management** (minimising the likelihood of loss or destruction of correspondence and documents through appropriate document retention, filing, archiving etc and providing for compliance with requirements regarding registers of files, safe custody, financial interests).
8. **Undertakings** (providing for undertakings to be given, monitoring of compliance and timely compliance with notices, orders, rulings, directions or other requirements of regulatory authorities such as the OLSC, courts, costs assessors).
9. **Supervision of practice and staff** (providing for compliance with statutory obligations covering licence and practising certificate conditions, employment of persons and providing for proper quality assurance of work outputs and performance of legal, paralegal and non-legal staff involved in the delivery of legal services).
10. **Trust account requirements** (providing for compliance with Part 3.1 Division 2 of the *Legal Profession Act 2004 (NSW)* and proper accounting procedures).

The regulators then developed a process by which law firms could assess themselves against the ten objectives. The process was based on a self-assessment. That is, the legal practitioner director of the law firm assesses the appropriateness of their management systems using a self-assessment document (developed by the regulator) that is forwarded to the regulator for review. The self-assessment document takes into account the varying size, work practices, and nature of operations of different firms. Legal practitioner directors rate firm compliance with each of the ten objectives as either 'Fully Compliant,' 'Compliant,'' 'Partially Compliant,' or 'Non-Compliant.' The self-assessment framework is supplemented by a risk-management framework.

PART II

IS NOVA SCOTIA'S EXISTING REGULATORY FRAMEWORK APPROPRIATE FOR ENTITY REGULATION & PMBR?

Entity regulation in Nova Scotia

Unlike the United Kingdom and Australia before entity-based regulation was introduced, Nova Scotia already has an existing framework to regulate law firms. The Society's authority to regulate law firms in found in Part III of the Act. Section 27 of the *Legal Profession Act 2004* ("the Act") provides that in Part III and Part IV unless otherwise indicated, "member of the Society" includes a law firm. Pursuant to section 28 of the Act, Council has broad powers to make Regulations that include, inter alia, establishing or adopting ethical standards for members of the Society and establishing or adopting professional standards for the practice of an area of law. (A discussion of the Society's regulatory powers is set out in Appendix A.)

Law firms in Nova Scotia are subject to an array of mandatory requirements that are set out in the Regulations. The regulatory framework is, inter alia, overseen by the Professional Responsibility Department at the Society. These requirements, found in Regulation 7.2.1, include as follows:

- Regulation 7.2.1(a) which provides that a law firm must appoint one practising lawyer in the firm to "receive official communications from the Nova Scotia Barristers Society, including a complaint against the firm under Part 9 of these Regulations and communications regarding an LRA Audit under Part 13 of these Regulations."
- Regulation 7.2.1(b) which provides that a law firm must, if applicable, "advise the Society of the date of its fiscal year, and as soon as practical, of any change in that date."
- Regulation 7.2.1(c) which provides that a law firm is required "to file with the Executive Director, an annual law firm report, in the prescribed form, that provides

    - the names of all members of the Society associated with the firm, and the nature of their association;
    - the location and particulars of all trust accounts and firm bank accounts maintained by the firm;
    - the names and responsibilities of employees of the firm, or others, who maintain the accounting records of the firm;
    - such other information as may be required by Council."[21]
- Regulation 7.2.1(d) which provides that any firm that has held trust money or property at any time during "in the last twelve months, within three months of the end of it fiscal year" must file with the Executive Director of the Society, an annual trust report. The trust report must contain a report on the trust accounts and books of the

[21] The annual reports submitted by firms and lawyers to the Society also includes questions about compliance with the Client Identification and Verification Regulations, found in Part 4 of the Regulations. The client identification requirements require lawyers who provide legal services to obtain and record specific information such as the client's full name; the client's business address and business telephone number ,if applicable; if the client is an individual, the client's home address and home telephone number; if the client is an organization, other than a financial institution, public body or reporting issuer the organization's incorporation or business identification number and the place of issue of its incorporation or business identification number, if applicable. The client identification requirements were introduced in November 2008.

firm and records of account of the law firm and all practising lawyers in the firm. Regulation 7.2.5 sets out the required content of the trust account report.[22]

- Regulation 7.2.1(e) which provides that if a law firm or an office of the law firm has more than one office in the Province with a principal, the law firm must designate "a practising lawyer, who individually qualifies to be a principal, to be the supervising lawyer responsible for the education plan and individual articling plans and to oversee the educational experience of article clerks pursuant to Part 3 of these Regulations."
- Regulation 7.2.1(f) which provides that a law firm must "maintain foundation documents for lawyers practising real estate in the firm pursuant to Part 8 of these regulations (sic), unless the obligation is transferred pursuant to that Part."
- Regulation 7.2.4 provides that a law firm may designate a person, who is not a member of the Society to receive communications from the Society and to deal with matters of an administrative nature.

The purpose of Regulations 4.2.1 and 7.2.1 appear to be twofold. Firstly, the information required by law firms to provide to the Society clearly assists the Society to compile information about law firms. Secondly, the information can also be used for compliance purposes. That is, a failure to submit an annual law firm report or a Trust Account Report may trigger a response such as an audit or an investigation.

In addition to these requirements, Regulation 7.2.4 provides that a law firm may designate a person, who is not a member of the Society to receive communications from the Society and to deal with matters of an administrative nature.

Nova Scotia also has a framework for complaints against law firms. Regulation 7.2.1(a), as is noted above, provides that a law firm is required to designate one of its practising lawyers to receive official communications from the Society. Regulation 9.2.7 provides that where a complaint is made against a law firm, the Executive Director must communicate with the person designated under Regulation 7.2.1. The person designated to communicate with the Society must "fully cooperate" with the Society by providing a full and substantial response to the complaint; adhering to time limits and responding to all requests during the investigation process.[23]

In relation to disciplinary sanctions, the legislation proscribes two sanctions available to the Society in disciplining law firms. Firstly, a law firm that is found guilty of professional misconduct may be ordered to pay a penalty of up to $50,000.00 to the Lawyers' Fund for Client Compensation. Secondly, a disciplinary panel may order "any other action the panel thinks is appropriate in the circumstances including an order to retain jurisdiction to monitor the enforcement of its order."[24]

Whilst a framework for entity regulation exists however, it has not been utilised in the same manner that other jurisdictions like Australia and the U.K. That is, although the Society has powers noted above to deal with aspects of regulating law firms, the power to address the "conduct" of law firms vis-à-vis the Code of Conduct, Standards and Guidelines appears to be structurally and culturally absent. This is most likely because the professional requirements set by the Society for the legal profession are geared towards individual

[22] Note that the requirement to submit a trust account report is also found in Regulation 4.2.1.
[23] Regulation 9.2.5 of the Regulations made pursuant to the Legal Profession Act, S.N.S. 2004, c.28
[24] Section 45(5), Legal Profession Act, S.N.S. 2004, c.28, as amended by S.N.S. 2010.

conduct. Interestingly however, the complaints formally made about lawyers in Nova Scotia and calls to the Intake Line which are discussed in the following section and the most recent complaint statistics discussed in Appendix B, indicate that the conduct the subject of the complaint or inquiry is more closely related to firm management rather than anything else.

In our view many of the complaints received by the Society could be addressed or eliminated through the adoption of PMBR.

Complaints about lawyers in Nova Scotia

Society statistics, over the past few years, provide several interesting trends in relation to complaints made against lawyers in Nova Scotia. The areas of professional misconduct, conduct unbecoming, professional incompetence and professional incapacity precipitating referral to formal hearing most often cited are criminal conduct; incapacity and misappropriation of funds; incompetence and conflict of interest between lawyers and between lawyer and client.

As to the practice area in which complaints are most often made family law, criminal law and real estate law top the list. For example, in 2011/2012, 61 complaints related to family law practice in separation/divorce; 34 complaints related to criminal defence practice and 24 complaints related to family law practice in custody and access. In the following year, the order was the same although the numbers were lower (15 complaints related to family law practice in separation/divorce; 13 complaints related to criminal defence practice and 10 complaints related to family law practice in custody and access).

In relation to the Intake Call Line, delay in moving a file forward; client unhappy/surprised with outcome of case, and poor communications by lawyer were the most-oft complained about issues in 2012/2013. The most oft complained about practice area in complaint intake calls for 2012/2013, concerned Family (separation/divorce); Civil litigation; Criminal defence; Family (custody/access); Real estate (purchase and sale); Wills and estates; Real estate (other); and Personal injury.

IS NOVA SCOTIA CULTURALLY READY FOR ENTITY REGULATION & PMBR?

One of the greatest impediments to successful regulatory change is culture. A confused or weak cultural environment in which the role of the regulator or the regulatory framework is not understood or accepted can create havoc for change. So too can a cultural environment where there is little or no interaction and communication between the regulated and regulates.

This next section will consider the cultural environment within which the proposed change to entity regulation and PMBR is to take place.

The current cultural environment in Nova Scotia today

The Society's role as the regulator of the legal profession and the regulatory framework it administers appears well accepted by the profession. The regulatory framework, which is designed to both protect the public and promote increased professionalism within the profession is, we understand, uncontested.[25] The legal profession in Nova Scotia is accustomed to and accepts the variety of different forms of regulation as well as standards

[25] Telephone call with the Society on 27 February 2014.

and guidance. The Society standing and acceptance as the regulator of the legal profession is further enhanced by the role it plays in providing educational programs to assist the profession in understanding the regulatory framework and achieving high ethical standards in their practice of law.

It is clear that the Society is acutely aware that transformation cannot occur without the involvement of the profession and the community. The Society is deeply aware that to succeed it is essential that a "conversation" occurs where the intentions, objectives and purpose of regulatory change is shared and understood. In our view, a primary role of the regulator must be to regularly engage with the profession and consumers of legal services to ensure that they are aware of and understand the culture and paradigm within which lawyers practise.[26] That conversation is presently occurring in Nova Scotia, and appears to have been occurring for some time.

The Society appears to have forged a good relationship with the profession and maintains an open dialogue. Since the publication of Nova Scotia's Transformation Report, the Society has communicated widely with the profession and key stakeholders about its Strategic Framework and plan to introduce a range of new regulatory tools. In February 2014, the Society invited lawyers to review the background document and answer an online survey.[27] According to the Society, the response rate to the survey has been slight but constant.[28]

The regulatory framework that has been established in Nova Scotia contains a mix of principles and proscription. This approach is most evident in the way complaints are categorised and handled. (A discussion of the complaints process is found in Appendix C) That is, the categories of complaint in relation to practice areas are based on appropriate behaviour, rather than prescribing the details of inappropriate conduct. For example, "service delivery" complaints or communication "complaints" can capture a wide variety of conduct without defining prescriptive "do's" and "don'ts". This approach is supported by a Code of Conduct, Professional Standards and Guidelines that supports minimum standards rather than creating lengthy lists of prescribed behaviours. (A discussion of the Code of Conduct and other professional obligations is set out in Appendix D).

Another interesting element of Nova Scotia regulatory culture, is the acceptance of the Society's role in regulating entities. As stated above, Nova Scotia has a sophisticated framework for entity regulation - complaints can be taken against firms; firms must identify a person to communicate with the Society; and, a designated lawyer to be appointed for dealing with conduct related issues. The Society also has the power to conduct practice reviews as well as trust account investigations, both of which are directly associated with the concept of entity regulation. This appears well accepted by the profession.

[26] We are also of the view that such conversations must also occur with a range of organisational stakeholders, including the professional associations, legal profession indemnity insurers and other legal regulators on a regular basis about a wide range of issues including complaints, discipline, education, policies and procedures. Such conversations allow regulators to better understand the dynamics of the legal services marketplace and to be kept abreast of practice developments and behaviour.

[27] Nova Scotia Barristers' Society, *Transforming Regulation: Lawyer input invited*, http://nsbs.org/news/2014/02/transforming-regulation-lawyer-input-invited

[28] Telephone call with the Society on 27 February 2014.

Barriers to entity regulation and PMBR in Nova Scotia

However, whilst the current system appears amenable to entity regulation and PMBR, there are a number of potential barriers exist. These barriers are both practical and cultural.

In our view, one of the primary challenges to entity regulation and PMBR is the fact that whilst entity regulation is accepted in Nova Scotia it is not well understood. The Society advises that they rarely receive complaints against law firms and no law firm has ever been found guilty of professional misconduct.[29] According to the Society the lack of complaints against law firms is likely due to a poor understanding by the general public of the option to lodge a complaint against a firm rather than an individual lawyer.[30]

We note that another reason may be because of the way the complaint form is structured. That is, the complaint form does not provide an option for the complainant to make a complaint about a law firm. Rather, the complaint form asks complainants to provide information about the lawyer they are complaining about – not the law firm.[31] Notwithstanding the lack of complaints about law firms, if a complaint has been made about an individual lawyer the Executive Director does have the power to re-classify the complaint to that against a law firm, if and where appropriate. On several occasions that power has been exercised particularly if the complaint is more of a "management issue" than an individual lawyer conduct issue. According to the Society however, there is a need to promote a greater culture for dealing with complaints against law firms.[32]

Law firms are not immune from the complaints framework altogether. It is the practice of the Society to always inform the designated person, (the person appointed by a law firm to communicate with the Society) where a complaint has been made about an individual lawyer employed in the firm. On occasion the designated lawyer plays an integral role in the complaints process and will raise the complaint with the lawyer concerned and work with the Society to resolve the issue. On other occasions, designated lawyers choose not to be involved at all. Recently the Society has observed a trend, particularly in larger firms, of appointing a General Counsel to the role of designated lawyer.

Entity regulation and PMBR will require cultural change in both the regulator and regulated as well as educating the general public. The Society may need to prescribe new procedures as well as alter its existing forms and procedures to embrace complaints against firms. The Society may also need to explore new ways of categorising complaints such as failure to supervise staff; delay occasioned by different lawyers handling a matter; failure to communicate caused by lack of understanding who was handling a matter etc.

A second possible barrier to entity regulation and PMBR, in our view, relates to the demographics of the profession in Nova Scotia. While the profession in Nova Scotia is not large in terms of number and that is indeed a benefit, it comprises all the variations of practice and service delivery models that exist in much larger jurisdictions but with

[29] Email to the authors from the Society dated 19 February 2014. On file with the authors.
[30] Ibid.
[31] See section 2 of the Complaints Form – "Information about the lawyer you are complaining about
If you are complaining about more than one lawyer, a separate complaint form must be submitted for each lawyer." See http://nsbs.org/sites/default/files/cms/menu-pdf/complaintform.pdf
[32] Email to the authors from the Society dated 19 February 2014. On file with the authors.

variations. (A brief discussion of Nova Scotia's legal profession demographics is found in Appendix E).

The demographics are extremely interesting. The number of sole practitioners in Nova Scotia is significantly lower than in other practice types. This is atypical. That is, in many jurisdictions around the world and indeed in some provinces in Canada, sole practitioners comprise the largest practice group. In Ontario, for example, sole practitioners comprise 77% of the legal services marketplace.[33] According to the Society, there has been a decline in the number of sole practitioners over the last decade. Nova Scotia is a small province with a declining economic base especially outside of the main urban centre of Halifax. This economic climate has not encouraged people to practice law on their own. Rather, new lawyers are tending to seek employment within large firms or in the Government or Public Sector.[34] This anomaly will present unique challenges in developing a new regulatory framework for entity regulation and PMBR. Supervision and the management of non-legal staff may present a greater focus for the Society than for jurisdictions where there are a higher percentage of sole practitioners.

An associated issue is the number of partners in Nova Scotia as compared to the number of employed lawyers and associates. The number of employed solicitors and associates is relatively low compared to the number of partners. It is unclear why this is so. In other jurisdictions, where the percentage of employed lawyers and associates is much higher, partners tend to leverage off the work of employed lawyers and associates. This relationship has historically been integral to law firm profitability, particularly in large firms. While this model is under stress internationally, and firms are using different pricing regimes to maintain profit, the fact that Nova Scotia has in a sense already reached a reduction in employed lawyers than firms in other jurisdictions are presently attempting appears unique. While this can have positive implications for Nova Scotia, it brings into focus the need for creative pricing and costing regimes to be explored for the province.[35] In addition, similar to the comments made above in relation to sole practitioners, a different regulatory approach may be required in relation to concerns about failure to supervise as have already been experienced in other jurisdictions who have entity regulation.

Another challenge for the Society in regulating the profession in Nova Scotia, particularly while extending to entity based regulating PMBR is the difficulties in incorporating the needs and roles of lawyers who do not provide legal services to the public work such as government lawyers, in-house counsel and quasi-government NGO's. These challenges have also been experienced in other jurisdictions including those that have embraced entity-based PMBR and have not been completely successfully resolved. Various suggestions have been made concerning such approaches such as requiring all such lawyers to hold practising certificates with appropriate conditions on them to deal with the needs of their specific sector; the creation of "captured law firms" within organisations (for example a General Counsel who practices within a large organisation); and an expanded view of addressing the scope of "related-entities" in discussing in-house counsel or lawyers working within organisations tasked with duties to provide legal advice to others outside the organisation. These issues are

[33] Law Society of Upper Canada Annual Report 2012, at page 7.
[34] Telephone call with the Society on 27 February 2014.
[35] This envisages not only an exploration of alternatives to the billable hour, but a more sophisticated method of costing the work performed by law firms to enable a more effective price to be placed on the work to give greater certainty to prospective clients.

beyond the scope of this paper but would benefit from additional exploration once the framework for entity based PMBR has been established in Nova Scotia.

A third barrier, in our view, is the lack of self-reporting by practitioners of regulatory breaches by themselves or others in Nova Scotia. The Legal Profession Act and regulations, as well as the Code of Professional Conduct, also create obligations for lawyers to self-report certain matters, or to report serious concerns of professional misconduct by another lawyer.

The lack of self-reporting, which is also a problem in other jurisdictions, is an issue that must be addressed particularly when shifting to management based framework that contains regulatory objectives stated as principles. If lawyers are not reporting in the present system where there are prescriptive elements to report against, a principles-based framework could further inhibit self-reporting. This is because a principle-based regulatory framework can suffer from being overly vague and uncertain and requires extreme care in identifying those aspects that do require more prescription such as trust account regulation. In our view, this challenge can be overcome as long as sufficient education and guidance is provided and law firms are encouraged to establish PMBR which makes cultural and behavioural statements about what is expected from lawyers, and a structure within which appropriate behaviour is encouraged.

Fourthly, while the Society presently has effective processes for trust account reviews and investigations and practice reviews generally, these processes, in our view, will not be sufficient to meet the needs of true entity regulation and PMBR. Trust account reviews and investigations as presently constituted are primarily instituted through complaints or the Society reacting to information from other sources. Practice reviews occur in Nova Scotia infrequently and are based on criteria that is largely reactive in nature. In our view, the Society could benefit from more sophisticated risk profiling of firms as well as increasing the focus on preventative measures. A change to a more proactive system will perhaps necessitate a change in culture for the regulator as well as those regulated. One measure to address this change may be a closer integration of trust account reviews and practice reviews. Again, this will require significant educational measures for the profession.

In addition, the number of firms holding trust moneys has diminished over the years and the future of trust money itself is under question. Interestingly, we understand a large number of lawyers do not hold trust accounts in Nova Scotia because of the nature of their practices.[36] For example, a trust account may not be required for certain practices such as in mediation or arbitration but is definitely required for practice in real estate. Anecdotal information and experience in other jurisdictions suggest that the use of trust accounts by law firms is also diminishing. Law firms are developing other means of engaging in financial transactions, particularly outside the areas of real estate and family law where they will either enter into fixed fee retainers, periodic payments or progress payments rather than holding money on trust. In jurisdictions where this has occurred, it can result in "creative" financial arrangement or management which, without proper regulatory oversight may cross the line into unethical or unprofessional behaviour.

Lastly, the above observations must of course be considered in terms of resources and budgetary impact. The observations and suggestions we have made above such as increased

[36] Telephone call with the Society on 27 February 2014.

education and new processes may require additional funding which itself can become a barrier.

Notwithstanding these challenges, we believe that entity regulation and PMBR within a principles-based framework can be established and implemented effectively both in terms of reducing regulatory burden and conserving resources, provided a tested approach is taken. We submit that a requirement that law firms establish and implement PMBR is central to this approach.

The combination of entity regulation and PMBR provides the opportunity for the regulator, particularly when coupled with risk-profiling to focus on improving systems where they need to be improved and not applying the regulatory burden on firms which are travelling well. This has the double benefit of lifting regulatory burden from firms where it is not required while focusing and thereby making more efficient the use of the resources of the regulator. In NSW, for example, the adoption of this approach by the regulator resulted in the limitation of the staff to 30 personnel to regulate (in conjunction with the Law Society and the Bar) a profession of 30,000 lawyers and 5,000 law firms of which 1,300 of those firms have become incorporated. Dealing with regulation of the appropriate management systems of those 1,300 firms utilised only 2.5 staff members through effective risk profiling and the adoption of the self-assessment process which required the firms to develop their own management systems rather than have one imposed and which was not only relevant to their firm but "owned" by them.

CONCLUSION

The purpose of this paper has been to analyse the present regulatory framework of Nova Scotia for the purposes of introducing entity regulation and a framework to embed ethical behaviour and competent practice in law firms which we refer to throughout as PMBR.

In our view, based on the analysis above, the stage is set in Nova Scotia for such a framework. We make this statement based on the following facts:

1. Nova Scotia has a strong relationship with the profession and is well accepted as the regulator.
2. The profession appears to accept the regulatory framework currently in place in Nova Scotia.
3. Nova Scotia already has a framework for entity regulation.
4. Nova Scotia has been engaging in discussions with the profession about its plans and is continuing to engage.
5. The Society is prepared to assist and support the profession through the transformation.

The ground work done by the Society in its 2013 Report, "*Transforming Regulation and Governance in the Public Interest*"[37] together with survey work currently being undertaken and interaction with regulators in other jurisdictions can ensure the effective and successful development of a world's best practice framework for entity regulation in Nova Scotia which will provide client protection as well as benefits to the profession and the community at large.

[37] http://nsbs.org/sites/default/files/ftp/RptsCouncil/2013-10-30_transformingregulation.pdf

APPENDIX A

THE REGULATORY ROLE OF THE NOVA SCOTIA BARRISTERS' SOCIETY

The *Legal Profession Act 2004* ("the Act") is the primary source of legal profession legislation in Nova Scotia.[38] The Act sets out the functions and purpose of the Nova Scotia Barristers' Society as well as, inter alia, the extent of the Society's regulatory powers (PART I); who is entitled to practice law (PART II); protection of the public (PART III); lawyers fund for client compensation (PART IV); lawyers insurance (PART V): legal fees (PART VI); the Law Foundation of Nova Scotia (PART VII) and general issues.

At present there are no regulatory objectives in the Act but it is our understanding that regulatory objectives are in the process of being developed.[39] Notwithstanding the absence of regulatory objectives, the Act clearly sets out a purpose.

Part 1, section 4 of the Act, provides that the purpose of the Act is to "to uphold and protect the public interest in the practice of law." The purpose is clearly articulated in the Society's Vision and Values Statement.[40] In pursuing this stated purpose, the Act provides that the Society **shall** undertake the following functions (emphasis added):

(a) establish standards for the qualifications of those seeking the privilege of membership in the Society;
(b) establish standards for the professional responsibility and competence of members in the Society;
(c) regulate the practice of law in the Province. 2004, c. 28, s. 4; and
(d) seek to improve the administration of justice in the Province by

(i) regularly consulting with organizations and communities in the Province having an interest in the Society's purpose, including, but not limited to, organizations and communities reflecting the economic, ethnic, racial, sexual and linguistic diversity of the Province, and
(ii) engaging in such other relevant activities as approved by the Council.[41]

The functions of the Society are further articulated in section 8 of the Act. Section 8 states that the Council of the Society, as the governing body of the Society[42], may make regulations:

(a) establishing categories of membership in the Society and prescribing the rights, privileges, restrictions and obligations that apply to those categories;
(b) establishing requirements to be met by members, including educational, good character and other requirements, and procedures for admitting or reinstating persons as members of the Society in each of the categories of membership;
(c) governing the educational program for articled clerks;

[38] Legal Profession Act, S.N.S. 2004, c.28, as amended by S.N.S. 2010. See http://nsbs.org/sites/default/files/cms/menu-pdf/legalprofessionact.pdf
[39] Email from the Director of Professional Responsibility to the authors dated December 4, 2013. On file with authors.
[40] See http://nsbs.org/sites/default/files/cms/menu-pdf/nsbsvisionvalues.pdf
[41] Section 4, Legal Profession Act, S.N.S. 2004, c.28, as amended by S.N.S. 2010.
[42] Section 6(1) of the Act. Note section 6(2) of the Act provides that the Council, as the governing body of the Society also has the power to manage the affairs of the Society and my take any action consistent with the Act that it considers necessary "for the promotion, protection, interest or welfare of the Society."

(d) establishing the procedures and the oath or affirmation of office for calling lawyers to the Bar;
(e) establishing requirements and procedures for the reinstatement of former members of the Society;
(f) governing practising certificates;
(g) governing the resumption of practice by non-practising members of the Society;
(h) governing the requirements to change categories of membership in the Society;
(ha) authorizing members of the Hearing Committee to sit as a credential appeal panel and to hold hearings and make orders, including orders as to costs, concerning the admission or re-instatement of persons as members of the Society in each of the categories of membership;
(hb) establishing the powers of a credentials appeal panel including some or all of the powers, privileges and immunities enumerated in Sections 42 and 44;
(i) governing the resignation of lawyers from membership in the Society and their obligations with regard to client files, trust funds, property of clients and the accounting therefor, and other matters that must be dealt with before a lawyer is permitted to resign. 2004, c. 28, s. 5[43].

In addition to the above, the Council is also empowered to make regulations relating to the conduct and practice of members of the Society. Such powers are set out in PART III of the Act. Section 28(2) of the Act provides that the Council of the Society may make regulations:

(a) establishing or adopting ethical standards for members of the Society;
(b) establishing or adopting professional standards for the practice of an area of law;
(c) establishing and maintaining, or otherwise supporting, a system of post law school legal education, including
i. a bar admission program, and
ii. courses for lawyers from foreign jurisdictions seeking the right to practise law in the Province;
(d) respecting the promotion of standards for the practice of law, including regulations setting mandatory requirements for some or all members of the Society for attendance and successful completion of programs of continuing legal education and professional development and prescribing the sanctions or restrictions that apply where a member fails to successfully complete the requirements[44].

In addition, pursuant to section 28(3), the Council by resolution may:

(a) establish a
i. continuing legal education and professional development program,
ii. remedial legal education program,
iii. loss prevention program;
(b) provide library services;
(c) publish or support the publication of legal materials, including court and other legal decisions;
(d) provide support for legal education, research, public legal information or other matters considered by the Council to be in the interest of the legal profession or the public;
(e) establish and maintain programs to assist lawyers in handling or avoiding personal, emotional, medical or substance abuse problems;
(f) establish and maintain programs to assist lawyers with issues arising from the practice of law.[45]

[43] Section 8, Legal Profession Act, S.N.S. 2004, c.28, as amended by S.N.S. 2010.
[44] Section 28(2), Legal Profession Act, S.N.S. 2004, c.28, as amended by S.N.S. 2010.
[45] Section 28(3), Legal Profession Act, S.N.S. 2004, c.28, as amended by S.N.S. 2010.

The Act also provides that the Council may make regulations relating to trust money or property[46]; and may make regulations in relation to the Lawyers' Insurance Association of Nova Scotia (LIANS) and the amount of liability insurance to be carried by members of the Society.[47] In relation to the latter, the Act further empowers the Council to make regulations establishing programs "to assist lawyers and other persons designated in the policy direction of the Council in handling or avoiding personal, emotional, medical or substance abuse problems" and programs "to assist lawyers with issues arising in the practice of law as part of the mandatory professional liability program of the Association".[48]

The Regulations reinforce the role and function of the Society and the Council. Regulation 8, for example, provides as follows:

8.3.1 In order to promote high standards for the practice of law, the Society shall support programs that enhance the competence of lawyers, which programs may include

(a) continuing professional development offerings,
(b) library and information services,
(c) such other programs which Council determines are for this purpose.[49]

[46] Section 32, Legal Profession Act, S.N.S. 2004, c.28, as amended by S.N.S. 2010.
[47] Section 63, Legal Profession Act, S.N.S. 2004, c.28, as amended by S.N.S. 2010.
[48] Section 63(da), Legal Profession Act, S.N.S. 2004, c.28, as amended by S.N.S. 2010.
[49] Regulations made pursuant to the Legal Profession Act, S.N.S. 2004, c.28, http://nsbs.org/sites/default/files/cms/menu-pdf/currentregs.pdf

APPENDIX B

CURRENT COMPLAINT STATISTICS

According to statistics from the Society during the period January 1 2013 to December 31 2013, 196 complaints were received.[50] During this period staff at the Society (Intake Officers) took 476 calls on their complaints inquiry line. Of the 196 written complaints, the Intake Officers spoke with only 60 (31%) of those complainants. The remaining complainants did not contact the Society before sending a complaint.

The complaints received during this period concerned a variety of allegations concerning conduct.[51] Of the 196 complaints, 33 concerned 'delay/inactivity'[52]; 24 concerned 'negligence'[53]; 22 concerned 'undertakings'; 21 complaints concerned 'lawyer's attitudes'; 17 concerned 'poor communication'; 13 complaints concerned 'incompetence'; 12 complaints concerned 'poor advice'; 11 complaints concerned 'quality of service issues'[54] and 10 complaints concerned 'fees'[55]. In addition, 15 complaints concerned 'miscellaneous issues' that could not be categorised by the Society. Of the 196 complaints, 30 were lodged by complainants unhappy with the outcome of their case.

In relation to practice areas, family law and real estate law were the most oft-complained about practice area with 40 complaints recorded against both. These two were followed by 'criminal defence' (18 complaints); 'wills/estates' (9 complaints); 'criminal prosecution' (6 complaints); 'administrative law' (4 complaints) and 'corporate/commercial', 'personal injury' and 'trust account' all with 3 complaints each.

As to the source of complaints, interestingly, the greatest number of complaints were by 'non-clients.' Non-clients are classified by the Society as including, inter alia, complaints by spouses or complaints by lawyers. Over the years the Society has seen an increase in the number of lawyers making complaints against colleagues. Former clients lodged 33 complaints and current clients lodged 20 of the complaints. The remaining complainants included financial institutions (16 complaints); opposing counsel (7 complaints); the Society (5 complaints) and one complaint was lodged by the opposing client.

Of the complaints received, the greatest number were against lawyers in firms with two to five members. Forty-nine (49) complaints were lodged against sole practitioners; 10

[50] Statistics on file with the authors.

[51] It is important to note that the Society can use up to 5 categories to classify conduct in any one complaint.

[52] An example of delay/inactivity could be a lawyer failing to action a file in a timely manner.

[53] In relation to complaints about negligence, it is often the case that a formal complaint will be made to the Society and a claim will be lodged with the Lawyers Insurance Association of Nova Scotia for compensation as the Society does not have the power to compensate complainants.

[54] "Quality of service issues" is used as a "catch-all" by the Society to capture a range of allegations about conduct. For example, this category may include a complaint about communication, delay, attitude and incompetence.

[55] The Society does not deal with complaints about fees per se. Where a complaint in relation to a fee dispute cannot be resolved it is referred to the Small Claims Court for adjudication. The Small Claims Court provides a quick, informal and cost-effective process for dealing with claims up to $25,000 (not including interest). Lawyer representation is not required in the Small Claims Court. The Society does however deal with fee related issues raised in complaints. For example, they have disciplined lawyers for overworking files and have discipline lawyers in the face of no actual complaint but where fee related conduct was raised in a practice review.

complaints were lodged against lawyers in firms with six to ten lawyers; nine complaints were lodged against lawyers in firms with 11-20 lawyers; seven complaints were lodged against lawyers in firms with 21-40 lawyers; 29 complaints were lodged against lawyers in firms with 41-100 lawyers; and finally, 15 complaints were lodged against lawyers in firms with 101 or more lawyers.

Of the 196 complaints opened, 142 complaints were closed. Society staff resolved 31 files either through mediation, phone calls, dispute resolution/mediation and having complaints withdrawn by the complainants. Thirty-one (31) complaints were determined, by the Society, pursuant to Regulation 9.2.2(a)(i) to contain subject matter outside the jurisdiction of the (Society); 13 complaints were determined to have been made, pursuant to Regulation 9.2.2(a)(ii) for an extraneous or improper purpose; 18 complaints were closed because the complaints did not allege facts, which, if proven, would constitute professional misconduct, conduct unbecoming, or professional incompetence, or would merit counselling; 33 complaints were dismissed on the basis that the Executive Director formed the view, pursuant to Regulation 9.2.10(a) that the evidence that might reasonably be believed could not support a finding of professional misconduct, conduct unbecoming, professional incompetence or incapacity, or would not merit counselling, a caution or both; and, 17 complaints were dismissed and a letter was sent to the member reminding that members of their obligations under the Act, the Code of Conduct and the Practice Standards.

Claims by lawyers of the Society reported to the Lawyers Insurance Association of Nova Scotia (LIANS) provide another perspective on legal practice in Nova Scotia. In 2012 the number of new claims reported was 239, compared to 243 in 2011.[56] Most of the claims are made by larger firms. According to LIANS' 2012 Annual Report, the number of claims reported in 2012 did not change significantly but the value of the claims did. Claims costs increased because of the increased complexity of the claims as well as inflation.[57]

Notwithstanding the number of claims it is important to note that the vast majority of the claims reported are without merit or are solved by the lawyer, or LIANS. According to LIANS, most claims either do not get pursued by the client, otherwise go away or are successfully defended. For example, of 252 claims closed in 2009, they paid no damages on 71%; in 2010, they closed 237 claims and paid no damages on 82%; in 2011, they closed 257 claims and paid no damages on 86%; in 2012, they closed 239 claims and paid no damages on 85%; and, in 2013, they closed 233 claims and paid no damages on 91%.[58]

As to the practice areas in which claims are made, LIANS reported in their latest Annual Report that real estate and civil litigation account for the highest number of claims.[59] Real estate claims continued to be the largest proportion of claims comprising 51% of all claims during 2011/2012. The conduct that gave rise to these claims included failure to record documents resulting in errors in security priorities. According to LIANS, claims relate most often to the failure of an existing system.[60] That is, whilst a law firm may have a system in place and has trained an assistant / paralegal who uses a checklist, for some unknown reasons

[56] Lawyers Insurance Association of Nova Scotia, Annual Report 2012, at p.6 , http://www.lians.ca/documents/00028702.PDF
[57] Ibid.
[58] Email from LIANS to the authors dated February, 26 2014.
[59] Lawyers Insurance Association of Nova Scotia, Annual Report 2012, at p.7, http://www.lians.ca/documents/00028702.PDF
[60] Email from LIANS to the authors dated February, 26 2014.

the assistant or paralegal doesn't take a step or the supervising lawyer himself/herself fails to recognize when the assistant / paralegal didn't take a step and a claim is made.

In relation to litigation, LIANS sees an increasing number of claims related to allegations of ineffective trial counsel.[61] In civil litigation claims arise due to missed limitation periods (if the claim is unusual, if it is governed by the law of a different province etc) and is most often caused by the failure of the lawyer to know the law in those unusual circumstances. If it is not unusual the missed limitation period can have a variety of causes – lawyer was sick, the file was transferred, the diary date entered was wrong, the lawyer forgot to enter it in the diary at all, the lawyer counted the days incorrectly, or the lawyer thought they had 90 days when they had 60 days.[62]

[61] Lawyers Insurance Association of Nova Scotia, Annual Report 2012, at p.7 , http://www.lians.ca/documents/00028702.PDF

[62] Email from LIANS to the authors dated February, 26 2014.

APPENDIX C

THE COMPLAINTS PROCESS

Lawyers that are alleged to have breached the Society's ethical rules, can be subject to a complaint, investigation and disciplinary action, or a referral to the Fitness to Practise program.

The complaints and investigations process are set out in Part III of the Act and Part 9 of the Regulations. According to section 33 of the Act, the purpose of the complaints regime is to protect the public and preserve the integrity of the legal profession by;

> "(a) promoting the competent and ethical practice of law by the members of the Society;
> (b) resolving complaints of professional misconduct, conduct unbecoming a lawyer, professional incompetence and incapacity;
> (c) providing for the protection of clients' interests through the appointment of receivers and custodians in appropriate circumstances;
> (d) addressing the circumstances of members of the Society requiring assistance in the practice of law, and in handling or avoiding personal, emotional, medical or substance abuse problems; and
> (e) providing relief to individual clients of members of the Society and promoting the rehabilitation of members."[63]

"Professional misconduct" is defined in Regulation 9.1.3(c) as "conduct in a lawyer's professional capacity that tends to bring discredit upon the legal profession." Such conduct can include "(i) violating or attempting to violate one of the provisions in the Code of Professional Conduct or a requirement of the Act or the regulations; (ii) knowingly assisting or inducing another lawyer to violate or attempt to violate the provisions in the Code of Professional Conduct or a requirement of the Act or the Regulations; (iii) misappropriating or otherwise dealing dishonestly with a client's or a third party's money or property; or (iv) knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law."

"Conduct unbecoming of a lawyer" is defined in Regulation 9.1.3(a) as "conduct in a member's personal or private capacity that tends to bring discredit upon the legal profession." Such conduct includes (i) committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or competence as a member of the Society; (ii) taking improper advantage of the youth, inexperience, lack of education, lack of sophistication, or ill health of a person; (iii) engaging in conduct involving dishonesty."

"Professional incompetence" is defined in Regulation 9.1.3(b) as conduct "if the lawyer fails to apply relevant knowledge, skills and attributes in a manner appropriate to matters undertaken on behalf of a client, and within the reasonable parameters of the lawyers experience and the nature and terms of the lawyer's engagement."

[63] Section 33, Legal Profession Act, S.N.S. 2004, c.28, as amended by S.N.S. 2010.

"Capacity" is defined in section 2 of the Act as "member's ability to practise law with reasonable skill and judgement that is not substantially impaired by a physical, mental or emotional condition, disorder or addiction."

Complaints are usually received at the Society in writing. Inquiries that may result in a complaint can be received by telephone. Telephone inquiries are handled by Complaints Officers of the Society. It is the Society's policy to encourage complainants to contact the Society by telephone in the first instance before making a written complaint. The process of encouraging people to contact an intake line, where a recorded message can be left results in many of the inquiries received by phone being resolved.[64] According to the Society, the Intake Line is very effective at weeding out inquiries that do not involve conduct.[65] Inquiries received on the Intake Line are not ordinarily conveyed to lawyers the subject of the complaint unless the inquiry cannot be resolved over the phone and is formalised into a written complaint.[66] The Society has a system whereby they can track inquiries made to the Intake Line with written complaints provided there is sufficient information to do so.

The complaint form drafted by the Society is comprehensive. The form can be obtained on the Society's website but it cannot be filed electronically.[67] We understand however that this situation is being reviewed by the Society.[68] In our experience, permitting the electronic filing of complaints can create a resource challenge for the Society unless methods are adopted to ensure that potential complaints are encouraged to contact the Society by telephone prior to lodging a written complaint.

The contents of the complaint form are standard but for one question. In addition to the usual questions asked of complainants such as demographical questions and information about the nature of the complaint, the complaint form asks applicants to detail what they hope to accomplish by submitting the complaint. The significance of asking this question is in our view, immense. If this question is answered by the complainant, it can provide both the Society and the lawyer the subject of the complaint an understanding of the reason behind the complaint and the desired outcome. In effect this information can mitigate a lengthy investigation process if the parties and the complainant are amenable to mediation.

The Society, where appropriate, will attempt to mediate complaints. The Society will not, for example, mediate a complaint where the lawyer/client relationship has already broken down. Where the complaint alleges delay/inactivity or communication, the Society will try to assist to resolve the complaint. The Society will always attempt to mediate a lawyer/lawyer complaint in the first instance.

When the Society receives a complaint it is assessed by the Director of Professional Responsibility to determine if it sets out valid concerns in relation to a lawyer's conduct, and whether the subject of the complaint is within the Society's jurisdiction to resolve. Following the initial assessment various actions can occur – (a) the complaint may be dismissed with or

[64] According to the Society's website, the Society dismisses an average of 85% of all complaints received. This was confirmed in a recent telephone conversation between the authors and staff at the Society.
[65] Telephone call with the Society on 27 February 2014.
[66] On at least one occasion, a lawyer has complained about not being informed that someone had complained about him to the Intake Line. Generally however, lawyers are happy not to know that they have been complained about in a telephone call.
[67] Nova Scotia Barristers' Society, *Filing a complaint*, http://nsbs.org/filing-complaint
[68] Telephone call with the Society on 27 February 2014.

without a letter of advice to the lawyer; (b) the complaint may be dismissed with or without a written response from the lawyer; or, (c) the complaint may be informally resolved or investigated. Pursuant to Regulation 9.4.1, at any time after a complaint is received, it may be referred to the Complaints Investigation Committee to provide direction or assist with an investigation.

If the Director of Professional Responsibility determines that a complaint warrants investigation, a copy of the complaint will be sent to the member who is the subject of the complaint with a request to provide a written response within 10 business days. The response from the member is assessed and where necessary, a further response may be sought. The response is then forwarded to the complainant for comment, and such comments are in turn provided to the member. Once this process has been completed, where appropriate, an interview(s) with the complainant, the lawyer and any relevant third parties may then be conducted, or further information may be obtained in writing. If it is determined that there is evidence of one or more possible violations of the rules of ethics and professional conduct and an investigation warrants referral to the Complaints Investigation Committee, a member of that committee is assigned to the file to assist staff with completion of the investigation.

The powers of the Complaints Investigation Committee are set out primarily in section 36(2) of the Act in relation to process and in section 37 of the Act in relation to discipline. Section 36(2) of the Act allows the Committee to do any of the following in relation to a complaint:

> "(a) require a member of the Society to attend before it for purposes of assisting with the investigation or for any other purpose consistent with the objects of the professional responsibility process;
> (b) dispose of a complaint in a manner prescribed by the regulations;
> (c) issue a reprimand with the consent of the member of the Society[69];
> (d) authorize the Executive Director to lay a charge against a member of the Society;
> (e) recommend approval of a settlement agreement to a hearing panel;
> (f) order a financial audit of the practice of a member of the Society to be carried out by a person or persons qualified to do so;
> (g) order a review of the practice of a member of the Society to be carried out by any person or persons;[70]
> (h) where a review conducted pursuant to clause (g) identifies inadequacies in the member's practice or conduct that pose a substantial risk that the member will face disciplinary action in the future, assist the member to remedy those inadequacies;
> (i) require a member of the Society to submit to an assessment or examination, or both, to determine whether the member is professionally competent;
> (ia) require a member of the Society to submit to a medical assessment;
> (j) receive reports from the audit, review, examination or assessment referred to in clauses (f), (g), (h), (i) or (ia);
> (k) after providing a member of the Society with an opportunity to be heard, and where it is in the public interest to do so, direct the member to comply with any reasonable requirements specified by the Complaints Investigation Committee as a result of its

[69] The Society must obtain the consent of the lawyer before a reprimand can be imposed because of administrative law principles. The Society advises that in relation to the issuing of reprimands lawyers generally consent. On one occasion a lawyer did object to the reprimand and the matter went to adjudication. The Court found the lawyer guilty of professional misconduct and imposed a reprimand.

[70] Practice reviews are often conducted where there is a pattern of complaints alleging similar conduct. The purpose of the practice review is investigative as well as educative. That is, the practice review is designed to assess the culture and behaviour of the firm and improve the culture. A practice review can include a trust account audit review.

consideration of the audit, review, examination or assessment referred to in clauses (f), (g), (h) or (i);
(l) direct that there be an application pursuant to Section 50 regarding the trust account of a practising lawyer;
(m) by resolution, appoint a receiver pursuant to Section 51;
(n) by resolution, direct that the Society apply to the court for the appointment of a custodian pursuant to Section 53;
(o) in addition to the other powers conferred by this subsection, where the member of the Society complained against is a law firm, require the law firm to do what the Complaints Investigation Committee reasonably requires to assist in an investigation."[71]

Pursuant to section 37(1), the Committee may "(a) suspend a practising certificate; or (b) impose restrictions or conditions on a practising certificate, during or following an investigation until the suspension, restrictions or conditions are rescinded or amended by the Complaints Investigation Committee or a hearing panel."

In cases where the Society receives a complaint that concerns a lawyer's capacity; where a person raises concerns about a lawyer's capacity to the Society, other than through a complaint, or if a lawyer self-reports to the Society, the Executive Director may refer a lawyer to the Fitness to Practise Program. [72] The Complaints Investigation Committee also has the authority to refer a matter to the Fitness to Practise Program at any stage of the investigation process if there are concerns about capacity.

An appeal lies to the Nova Scotia Court of Appeal from the decision of the Society, on any question of law raised in disciplinary proceedings. [73]

Compensation

People who have sustained pecuniary losses due to misappropriation or wrongful conversion of their money or property by a member of the Society or by a law corporation may be able to seek compensation from *The Lawyers' Fund for Client Compensation* (the "Fund").

The Fund, established under Part IV of the Legal Profession Act, is in effect a 'first resort' for clients. The payments made out of it are made on an ex gratia basis. The monies in the Lawyers' Fund for Client Compensation consist of annual contributions from every practising lawyer in Nova Scotia. Payments out of the Fund are limited to the amount available to the Society through insurance for all claims made in any claims year.

The Fund is administered by a Committee who have authority under the Regulations to approve claims less than $5,000, and make recommendations to the Council in relation to payment or denial of claims over $5,000. In reviewing a claim for compensation, the Committee will consider, among other things, whether the client's money or property was entrusted to or received by the lawyer while acting in the capacity of a lawyer.

According to the 2012/2013 Annual Report, the majority of the claims approved over the past three years have involved:

[71] Section 36(2), Legal Profession Act, S.N.S. 2004, c.28, as amended by S.N.S. 2010.
[72] In December 2010, amendments to the Legal Profession Act enabled the creation of the Society's Fitness to Practise Program. The program is completely voluntary on the part of the member involved. See http://nsbs.org/for_lawyers/complaint_resolution_process/fitness_to_practise_program
[73] Section 49, Legal Profession Act, S.N.S. 2004, c.28, as amended by S.N.S. 2010.

- unearned retainers – where a lawyer receives and applies for his/her own use retainers for legal work which is either never completed or has no value;
- misappropriation of client funds arising from lawyer impecuniosity;
- misappropriation of funds entrusted to a lawyer for purposes of investment with another client; and
- misappropriation arising from participation in mortgage fraud.[74]

[74] Nova Scotia Barristers' Society, Annual Report 2013, at p. 28, http://nsbs.org/sites/default/files/cms/publications/annual-reports/nsbsannrpt2013_0.pdf

APPENDIX D

THE CONDUCT OF MEMBERS OF THE SOCIETY

"Lawyers and other "members" of the Society must comply with an array of rules and regulations including the *Legal Profession Act* and the Society's *Regulations*; the *Code of Professional Conduct*; and, where applicable, the *Land Registration Act*, the *Real Property Practice Standards* and the *Family Law Practice Standards*. Compliance is monitored and enforced, inter alia, by the Society's Professional Responsibility Department (to be discussed later).

The *Code of Professional Conduct* ("the Code") came into force on 1 January 2012.[75] It was drafted as a National Code for all Canadian jurisdictions by the Federation of Law Societies of Canada as a Model Code of Conduct.[76] It sets the ethical standards for lawyers of the Society.[77]

The Code defines and illustrates the responsibility of lawyers as members of the legal profession, "in terms of a lawyer's professional relationships with clients, the Justice system and the profession."[78] In achieving this end, the Code sets out statements of principle followed by exemplary rules and commentaries, which contextualize the principles enunciated. The principles are important statements of the expected standards of ethical conduct for lawyers. It is important to note that the Code is nothing more than a "reliable and instructive guide for lawyers that establishes only the **minimum standards** of professional conduct expected of members of the profession."[79] (Emphasis added).

The Code is divided into 7 chapters. These chapters include as follows:

- **Interpretation and definitions**;
- **Standards of the legal profession** – integrity;
- **Relationship to clients** – competence; quality of service; confidentiality; conflicts; preservation of client's property; fees and disbursements; withdrawal from representation;
- **Marketing of legal services** – making legal services available; marketing; advertising nature of practice;
- **Relationship to the administration of justice** – the lawyer as advocate; the lawyer as witness; interviewing witnesses; communication with witness giving evidence; relations with jurors; the lawyer and the administration of justice; lawyers and mediators;
- **Relationship to students, employee and others** – supervision; students; equality, harassment and discrimination; and
- **Relationship to the Society and to the profession generally** – responsibility to the Society and to the profession generally; responsibility to lawyers and others; outside

[75] The Code came into effect on January 1, 2012 and replaced the Legal Ethics Handbook, which guided lawyers in the province since 1990. The ethical obligations of the lawyers remain much the same in the Code.
[76] See Federation of Law Societies of Canada, *Rules of Professional Conduct*, http://www.flsc.ca/en/conduct-of-the-profession/
[77] See Nova Scotia Barristers' Society CODE OF PROFESSIONAL CONDUCT, http://nsbs.org/sites/default/files/cms/menu-pdf/2013-04-22_codeofconduct.pdf
[78] Id at 6.
[79] Ibid.

interests and the practice of law; the lawyer in public office; public appearances and public statements; preventing unauthorised practice; retired judges returning to practice; and, errors and omissions.

In addition to the Code, lawyers in Nova Scotia are also required to comply with a number of Practice Standards and Guidelines. The Standards are intended to be an articulation of the existing statutory and regulatory obligations for lawyers and have been drafted to provide guidance with respect to how a Standard might be met. They call for lawyers, to, in certain circumstances, exercise professional judgment.

In addition, lawyers and law firms in Nova Scotia are subject to strict trust account regulations. The Act clearly sets out the obligations of a lawyer in relation to holding money and property of clients and others in a trust account. Section 30(1) provides that "every member of the Society shall hold in trust money or property received in trust for a client or another person" and section 30(2) provides that such money held in trust shall be deposited to an interest-bearing account at a financial institution approved by the Council and at an interest rate approved by the Law Foundation.[80] Regulation 10 additionally sets out the obligations of lawyers and law firms dealing with trust money and trust property in relation to record-keeping, withdrawals and deposits.[81] Amended trust account regulations came into effect on January 1, 2013.

All practising lawyers are required to report on their involvement with trust accounts on an annual basis. This reporting takes the form of either a *Declaration in the Matter of Trust Funds* or a *Trust Account Report*.[82] The Society operates a primarily risk-based Trust Account Audit Program, in which audits of the trust accounts of selected lawyers and law firms are conducted by an accountant retained by the Society throughout the year. According to the latest Annual Report of the Society, for the 2012 reporting period, 344 lawyers and firms filed annual trust account reports[83], of which 79% (271) reported violations of the trust account regulations.[84] The number of violations is considerable, however, according to the Society, the number comprises both major and minor trust account violations, with the majority being minor violations.[85]

The Legal Profession Act and regulations, as well as the Code of Professional Conduct, also create obligations for lawyers to self-report certain matters, or to report serious concerns of professional misconduct by another lawyer. Regulation 4.2.8 requires that a member report to the Society judgments, proposals to creditors, assignments in bankruptcy and situations where an order for costs is made against a member personally. Regulation 4.2.8 also requires, among other things, that a member report any matter where the member has been charged with, pled guilty to or been found guilty of an offence under such legislation as the Criminal

[80] Legal Profession Act, S.N.S. 2004, c.28, as amended by S.N.S. 2010.
[81] Regulations made pursuant to the Legal Profession Act, S.N.S. 2004, c.28
[82] For a copy of the Trust Account Report see http://nsbs.org/sites/default/files/cms/forms/trustaccountreportdec2013_working_copy.pdf
[83] At the time the statistics were prepared there were 344 law firms with trust accounts in Nova Scotia.
[84] Nova Scotia Barristers' Society, *Annual Report 2013,* at p. 28. See http://nsbs.org/sites/default/files/cms/publications/annual-reports/nsbsannrpt2013_0.pdf
[85] It is important to note that at the time the data was complied, a trust account regime was in place that was onerously prescriptive. As a result, the number of breaches were high. A new trust account regime came into effect on January 1, 2013. The new regulations are principles-based and are less focused on prescriptive compliance. It is envisaged that as a result of the new regime, violations will significantly decrease.

Code (Canada), or has been charged with and/or found guilty of any disciplinary offence by another jurisdiction.

Furthermore, Rule 7.1-3 of the Code of Professional Conduct requires that a member report to the Society serious violations of the rules of ethics, including inter alia, misappropriation of trust funds; abandonment of a law practice, and conduct that raises a substantial question as to another lawyer's honesty, trustworthiness or competence as a lawyer. Notwithstanding this Regulation, we understand that the experience in Nova Scotia is that few reports other than of abandonment or misappropriation have been received by the Society.[86] We also understand that reports have been received about mental health issues or capacity to practice. This trend has been noticed in other jurisdictions worldwide and could be seen as a cultural issue and possible barrier to successful regulation (to be discussed later).

[86] Telephone call with the Society on 27 February 2014.

APPENDIX E

DEMOGRAPHICAL INFORMATION OF LAWYERS IN NOVA SCOTIA

As at autumn 2013, there were 2,855 members (individual lawyers) of the Society. Of the 2,855 lawyers, 1,905 were practising lawyers, 13 have been practising for more than 50 years, 829 are non-practising lawyers, 38 are life lawyers and 70 are articling clerks.[87]

In relation to practice types and lawyers, 460 lawyers (24.6%) are partners of law firms; 493 lawyers (26.3%) are employed in the Government or Public Sector; 308 lawyers (16.5%) are Associates; 288 lawyers (15.4%) are sole practitioners; 126 lawyers (6.7%) are employed lawyers and 196 (10.5%) comprise all other types of practice.[88]

[87] Statistics provided to the authors by the Society. On file with the authors.
[88] Ibid.