

WHAT IF WE DIDN'T WAIT? CANADIAN LAW SOCIETIES AND THE PROMOTION OF EFFECTIVE ETHICAL INFRASTRUCTURE IN LAW PRACTICES*

Amy Salyzyn**

This article explores whether and how law societies might become more active in promoting effective ethical infrastructures in Canadian law practices. The case presented for expanded law society involvement is three-fold: (1) there are reasons to believe that these infrastructures could, as a general matter, be improved; (2) this improvement would, in turn, lead to improved outcomes in relation to lawyers' ethical duties; and (3) current law society regulatory efforts are not optimally situated to assist with this improvement. In addition to making the case for increased law society involvement, this article also seeks to contribute to future policy conversations by outlining and analysing various "decision points" that regulators will face when considering reforms in this area.

* This title is borrowed from a much shorter blog post written by the author on the same topic; see Amy Salyzyn, "What if We Didn't Wait? Promoting Ethical Infrastructure in Canadian Law Firms" *Slaw.ca* (July 25, 2013) online: <<http://www.slw.ca/2013/07/25/what-if-we-didnt-wait-promoting-ethical-infrastructure-in-canadian-law-firms>>.

** Assistant Professor, Faculty of Law, Common Law Section, University of Ottawa. A special thanks to the Canadian Bar Association and, in particular, to the CBA Ethics and Professional Responsibility Committee for the inspiration and support for this project. Much of underlying research took place in the context of my work as Research Director for the CBA Ethical Infrastructure Project that culminated in the development of the CBA Ethical Practices Self-Evaluation Tool that is discussed in this article. All opinions expressed, however, are solely my own and should not be attributed to the Canadian Bar Association. A number of individuals have contributed significantly to my thinking on this topic and have been extraordinarily generous in providing thoughtful feedback, including Adam Dodek, Susan Fortney, Malcolm Mercer, Darrel Pink, Victoria Rees and Laurel Terry. This article also benefited greatly from comments received during presentations at the Federation of Law Societies of Canada Semi-Annual Conference, April 2–5, 2014 (Regina, Saskatchewan); the University of Toronto Program on Ethics in Law and Business, Conference on Ethical Issues in the Law Firm Setting, January 16, 2014 (Munk Centre, University of Toronto) and the Canadian Association for Legal Ethics Annual Conference and Meeting, October 25-26, 2013 (University of Saskatchewan, Saskatoon). Last, but not least, a debt of gratitude is owed to Jena McGill for her patient and skillful editorial eye. All websites accessed on May 23, 2014 unless otherwise noted.

Cet article cherche à déterminer si – et comment – les barreaux pourraient devenir plus actifs dans la promotion d’infrastructures déontologiques efficaces pour l’exercice du droit au Canada. L’argumentation de l’auteur pour une plus grande implication des barreaux se divise en trois parties : (1) les des raisons de croire que ces infrastructures pourraient, de manière générale, être améliorées; (2) cette amélioration engendrerait à son tour une amélioration du respect des obligations déontologiques des avocats; et (3) le fait que les efforts actuels de réglementation des barreaux ne contribuent pas de manière optimale à cette amélioration.

En plus de plaider pour une participation accrue des barreaux, cet article vise également à contribuer aux futures discussions en matière de politiques publiques en présentant et en analysant divers « points de décision » auxquels les organismes de réglementation seront confrontés au moment d’envisager des réformes dans ce domaine.

1. Introduction

Canadian law societies primarily regulate lawyer behaviour by responding to complaints made against individual lawyers. Although this complaints-based regime is necessary, in particular to address cases of lawyer misfeasance or extreme incompetence, it is limited in its ability to target a significant determinant of ethical lawyer conduct: the presence of institutional policies, procedures, structures and workplace culture within a law practice that help lawyers fulfill their ethical duties. Given the importance of these formal and informal measures – referred to collectively as “ethical infrastructure” – this article explores whether and how law societies might become more active in promoting effective ethical infrastructures within Canadian law practices.

Ensuring effective ethical infrastructures within law practices seems self-evidently good; we want lawyers to work in environments that facilitate compliance with their ethical duties. It is less obvious, however, that it would be a good thing for law societies to *regulate* the ethical infrastructures of Canadian legal practices. Decisions about a practice’s ethical infrastructure, like what policies and procedures to put in place, are typically thought to fall to private ordering and the decisions of law firm managers (influenced by insurer and client demands) rather than to the domain of public regulators like law societies. Indeed, many Canadian lawyers are likely to be suspicious of proposals to add an additional layer of regulator involvement in their practices.

What justifies regulatory intervention in this area? The case presented in this article for expanded law society involvement in the ethical infrastructures of Canadian law practices is three-fold: (1) there are reasons to believe that these infrastructures could, as a general matter, be improved; (2) this improvement would, in turn, lead to improved outcomes in relation to lawyers' ethical duties; and (3) current law society regulatory efforts are not optimally situated to assist with this improvement. Stated otherwise, law societies should become more involved in the ethical infrastructures of Canadian law practices because neither the market nor current regulatory efforts are effectively addressing this important aspect of law practice.

In addition to making the case for increased law society involvement, this article also seeks to contribute to future policy conversations by outlining and analysing various "decision points" that regulators will face when considering reforms in this area. Should additional regulatory involvement be voluntary or mandatory from the perspective of Canadian lawyers? If mandatory, should reforms be discrete or part of widespread regulatory changes? What aspects of a law practice's ethical infrastructure should new regulatory efforts address? How might lawyer "buy-in" be generated? Although opinions are expressed on each of these questions, this article consciously avoids presenting a detailed prescription as to what expanded law society involvement in the ethical infrastructures of Canadian law practices should entail, recognizing the diverse regulatory environments faced by each of Canada's fourteen law societies and the need for regulatory change to be rooted in meaningful consultation and collaboration with stakeholders.

The article proceeds in three parts. Parts 2 and 3 introduce the case for expanded law society involvement by discussing, first, the concept of "ethical infrastructure" and, second, why law societies should care about it. Part 4 forms the heart of the article and discusses potential policy options for Canadian law societies going forward. The issue of promoting effective infrastructure within law practices is a vibrant topic of discussion internationally. The analysis presented here offers a uniquely Canadian-focused contribution to this international conversation, while also engaging the lively national discussion about the future of lawyer regulation in this country.

2. What is Ethical Infrastructure?

The first use of the term "ethical infrastructure" in the law practice context is widely attributed to Ted Schneyer, a University of Arizona law professor. In a 1991 article about professional discipline for law firms, Schneyer

notes that “a law firm’s organization, policies, and operating procedures constitute an ‘ethical infrastructure’ that cuts across particular lawyers and tasks [and] which may have at least as much to do with causing and avoiding unjustified harm as do the individual values and practice skills of their lawyers.”¹ Twenty years later, in a 2011 article, Schneyer provides a similar, slightly elaborated definition:

Ethical infrastructures consists of the policies, procedures, systems, and structures—in short, the “measures” that ensure lawyers in their firm comply with their ethical duties and that nonlawyers associated with the firm behave in a manner consistent with the lawyers’ duties.²

Following Schneyer, other legal ethics scholars, mostly in America and Australia, have used and developed this term in their work.³

Those who use the term ethical infrastructure often identify measures like conflicts check systems, template retainer letters, and billing policies as part of a law practice’s ethical infrastructure. As Schneyer observes, however, the diversity of law practices and the evolving nature of the legal industry make any sort of fixed master-list of everything that could be considered part of a law practice’s ethical infrastructure elusive and, indeed,

¹ Ted Schneyer, “Professional Discipline for Law Firms?” (1991) 77 Cornell L Rev 1 at 10 [Schneyer, “Professional Discipline”].

² Ted Schneyer, “On Further Reflection: How ‘Professional Self-Regulation’ Should Promote Compliance with Broad Ethical Duties of Law Firm Management” (2011) 53 Ariz L Rev 577 at 585 [Schneyer, “On Further Reflection”].

³ For further discussion of the important influence of Ted Schneyer’s work both for legal ethics scholarship and for professional regulation, see Susan Saab Fortney, “The Role of Ethics Audits in Improving Management Systems and Practices: An Empirical Examination of Management-Based Regulation of Law Firms” (2014) 4 St Mary’s LJ on Legal Malpractice and Ethics 112 [Fortney, “Role of Ethics Audits”]. For examples of work that has used and developed the term “ethical infrastructure,” see Susan Saab Fortney and Jett Hanna, “Fortifying a Firm’s Ethical Infrastructure: Avoiding Legal Malpractice Claims Based on Conflicts of Interests” (2002) 33 St Mary’s LJ 669; Elizabeth Chambliss and David B Wilkins, “Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting” (2002) 30 Hofstra L Rev 691; Christine Parker, Adrian Evans, Linda Haller, Suzanne Le Mire, and Reid Mortensen, “The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behavior” (2008) 31 UNSWLJ 158 [Parker *et al*, “Ethical Infrastructure”]; Christine Parker, Tahlia Gordon and Steve Mark “Regulating Law Firms Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales” (2010) 37(3) JL in Soc’y 446 [Parker *et al*, “Regulating Law Firms”]; Susan Fortney and Tahlia Gordon, “Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation” (2013) 10(1) U St Thomas LJ 152. An example of a Canadian scholar using this term can be found in Adam Dodek, “Regulating Law Firms in Canada” (2011) 90 Can Bar Rev 383.

undesirable.⁴ For this reason, it is helpful to consider the concept of ethical infrastructure from a functional perspective, as intended to capture “organizational policies and procedures designed to impose some regularity on how lawyers in a firm practice.”⁵

Notwithstanding this definitional flexibility, there are debates about what exactly should be included under the conceptual umbrella of “ethical infrastructure.” One such debate concerns whether or not informal aspects of workplace culture should be encompassed by the term. In a recent article, for example, Milton Regan contends that “[i]t can be useful...to keep the concepts of ethical infrastructure, ethical culture, and organizational culture distinct [as] [e]ach refers to an analytically distinct aspect of an organization’s effort to promote ethical behaviour.”⁶ In contrast, in a recent review of literature on ethical behaviour in organizations, Linda Treviño *et al* characterize “ethical climate” and “ethical culture” as aspects of an organization’s ethical infrastructure.⁷ Similarly, Christine Parker *et al* also opt for an inclusive definition, defining ethical infrastructure as including “formal and informal management policies, procedures and controls, work team cultures, and habits of interaction and practice that support and encourage ethical behaviour.”⁸ Moving beyond choice of terminology, what commentators do seem to agree on (and what is more important for the discussion in this article), is the fact that workplace culture can play a very influential role in relation to individual behaviour within organizations. Some of the research on the relation between workplace culture and ethical compliance and its consequence for regulatory engagement with ethical infrastructures in law practices will be discussed later.

A second issue of scope concerns the nature of the underlying duties that a law practice’s “ethical infrastructure” is meant to address. Although Schneyer’s definition of “ethical infrastructure” references institutional measures that promote compliance with lawyers’ ethical duties, it does not specify what these “ethical duties” are. The examples given above – conflicts check systems, template retainer letters, and billing policies – are measures largely related to ethical duties that lawyers owe to clients.⁹

⁴ Schneyer, “On Further Reflection,” *supra* note 2 at 595-96.

⁵ Milton C Regan, “Nested Ethics: A Tale of Two Cultures” (2013) 42 Hofstra L Rev 143 at 150.

⁶ *Ibid* at 147.

⁷ Linda Treviño *et al*, “(Un)Ethical Behavior in Organizations” (2013) 64 Ann Rev Psych 635 at 638.

⁸ Parker *et al*, “Ethical Infrastructure,” *supra* note 3 at 159-60.

⁹ To elaborate: conflicts check systems can help lawyers avoid breaching the prohibition against acting for a client where there is a conflict of interest; template

Although the duties that lawyers owe to clients are an important target of a law practice's ethical infrastructure, lawyers also owe broader duties to the public and to the administration of justice that should be given attention in the formulation of ethical infrastructure.¹⁰ An understanding of ethical infrastructure that encompasses measures relating to such things as fostering the rule of law and access to justice can work to capture this broader ambit of duties. What this might look like in more practical terms is discussed in Part 4.

Additionally, a law practice's ethical infrastructure is best understood not only in relation to measures that impact outcomes for external subjects (clients, the public or the justice system more generally) but also in terms of measures directed to lawyers and other employees who work within the firm. Research on behaviour within organizations suggests that "what might seem to be solely 'business' or 'human resource' decisions, which do not relate directly to lawyers' professional responsibilities, may nonetheless have a significant impact on attitudes and behaviors that do."¹¹ More specifically, research suggests that the degree to which individuals within an organization perceive that they are being treated fairly can be an important driver of ethical compliance. In a recent article that discusses his and other relevant research on this connection, Regan summarizes:

Whether the organization is perceived as treating its members fairly is an especially important consideration. This includes providing people with the rewards that they deserve, engaging in a decision-making process that is uniform and neutral, and treating people with dignity and respect. An organization that does so signals that an individual can safely derive at least part of his or her identity from connection and commitment to the organization. This sense of connection motivates an individual to cooperate with the organization on matters such as abiding by its rules on ethics and legal compliance.¹²

retainer letters can assist lawyers in ensuring that they discharge their duty of communicating effectively with their clients; and billing policies can help lawyers meet their obligation to only charge fair and reasonable fees that have been disclosed in a timely fashion. For the source of these duties see the Federation of Law Societies of Canada, *Model Code of Professional Conduct*, rules 3.4-1, 3.2-1 and 3.6-1 [FLSC Model Code].

¹⁰ Parker, Gordon, and Mark make this point in the context of their discussion of Australian regulatory reforms, discussed in further detail below, under which incorporated legal practices are required to self-evaluate whether they have "appropriate management systems" in place; see Parker *et al*, "Regulating Law Firms," *supra* note 3 at 498-99.

¹¹ Regan, *supra* note 5 at 169.

¹² *Ibid* at 168 [footnotes omitted].

Although, as Regan notes, more research is required on how this observed “connection between organizational fairness and support for ethics programs”¹³ plays out in the law practice context, it does suggest that institutional measures relating to such things as promotion, supervision, and mentoring are likely to be important factors to consider in contemplating a law practice’s ethical infrastructure.

In this article, the term “ethical infrastructure” is used inclusively and is adopted here essentially as short-hand for “everything within a law practice that impacts how members of that law practice relate to, or fulfill, the duties owed to clients, the justice system and the public more generally.” Drawing from the research discussed above, this definition is understood as including “ethical culture” as well as the types of internal organizational policies and practices discussed in the prior paragraph. Given the possible normative connotations of the qualifier “ethical,” some may find it strange or uncomfortable for such a broad set of things to be described as constituting *ethical* infrastructure.¹⁴ One might, for example, ask, “What do template retainer letters or firm hiring policies have to do with *ethics*?” To be sure, it is possible to use alternative language, like the term “management systems” that has been used in the context of Australian reforms that are discussed later in this article. My view, however, is that there is value in specifically using the word “ethical” in this context. It not only acknowledges connections between underlying workplace culture and compliance with ethical duties, but it also rightly frames issues like client service and access to justice as part of, or related

¹³ *Ibid* at 170.

¹⁴ For an example of how the terms “ethics” and “ethical” can be seen as having a particular value-based implication, one can look to the following introduction to a speech on professionalism made by Justice Abella in 1999:

This speech is about values. My thesis is that there are three basic values which merge in a good lawyer: a commitment to competence, which is about skills; a commitment to ethics, which is about decency; and a commitment to professionalism, which transfuses the public interest into the two other values.

Justice Rosalie Abella, “Professionalism Revisited” (Opening Address delivered at the Law Society of Upper Canada Benchers’ Retreat, 14 October, 1999), The Law Society of Upper Canada, online: Ontario Courts <<http://www.ontariocourts.ca/coa/en/ps/speeches/professionalism.htm>>). There is also reason to think that practitioners, in addition to judges, may intuitively view things that are included under the concept of ethical infrastructures as used here – things like financial management systems or billing policies – as not dealing with or entailing ethics *per se*. A study that was conducted by Fortney and Gordon on Australian regulatory processes whereby firms must self-assess their own ethical infrastructure found, among other things, that respondents viewed the self-assessment process “as more of a tool to improve management system” rather than engaging with matters that had a connection to ethical conduct; see Fortney and Gordon, *supra* note 3 at 176-77. See also Fortney, “Role of Ethics Audits,” *supra* note 3 at 113.

to, a lawyer's role *qua* legal professional: pursuant to codes of professional conduct, lawyers owe clients duties to provide competent, courteous, thorough and prompt service¹⁵ and are required to make legal services available to the public efficiently and conveniently.¹⁶ Framing what is at stake here in terms of *ethical* infrastructure also helps to clarify why law societies should be involved in this area; although business efficiencies and risk management benefits come hand-in-hand with effective ethical infrastructures, the connection between improved ethical infrastructure and improved fulfillment of ethical duties is what underwrites regulatory intervention.¹⁷

3. *Why Should Law Societies Care About Ethical Infrastructure?*

With a definition of “ethical infrastructure” in hand, this Part will now look at the case for expanded law society involvement in the ethical infrastructures of Canadian law practices. In short, the argument presented is that there is good reason to believe that such ethical infrastructures could be improved and that additional law society regulatory efforts in this area could lead to improved outcomes in relation to lawyers' ethical duties. Because of lack of comprehensive data about the nature of the current ethical infrastructures of Canadian law practices, the case made here relies primarily on research from other jurisdictions on law firm ethical infrastructures. As discussed in more detail below, this research suggests the need for external monitoring of law firm practices. This Part also seeks

¹⁵ See FLSC Model Code, *supra* note 10, r 3.1-2 and r 3.2-1.

¹⁶ *Ibid*, r. 4.1-1. For a consideration of more theoretical arguments as to why lawyers owe a duty to foster access to justice, see Alice Woolley, “Imperfect Duty: Lawyers' Obligation to Foster Access to Justice” (2008) 45 *Alta L Rev* 107.

¹⁷ One potential limitation of operating under an inclusive definition when talking about law practice ethical infrastructure is that the broader literature on behaviour within organizations also uses the qualifier “ethical” in discussing “ethical infrastructure” and “ethical compliance.” In general, this literature refers to studies outside the law practice context and, thus, presumably uses this qualifier in a narrower sense than is used here. Although I do not think that this distinction impacts any of the arguments made here that rely on this broader literature, it is important to acknowledge that the concepts of “ethical infrastructure” and “ethical compliance” carry particular and distinct meanings within this broader body of work.

In terms of law society regulatory mandates, it is perhaps worth noting that in addition to having a mandate to regulate the practice of law, a number of Canadian law societies, like, for example, Ontario's and Nova Scotia's, have a specific mandate to protect the public interest. As detailed below, there is a strong case that pro-active regulation of law firm ethical infrastructure could improve outcomes for clients and, in so doing, advance the public interest. For a survey of regulatory mandates of Canadian law societies, see Laurel S Terry, Steve Mark, and Tahlia Gordon, “Adopting Regulatory Objectives for the Legal Profession” (2012) 80 *Fordham L Rev* 2685 at 2753-58.

to develop a more indirect justification for increased law society involvement by exploring limitations of the current complaints-based regime that is now primarily used by law societies to regulate lawyer behaviour.

The final section of this Part will also look to two other jurisdictions – England and Wales and Australia – for examples of lawyer regulators becoming more involved in regulating the ethical infrastructures of law practices. A discussion of these comparative models gives some tangible dimension to the more theoretical discussion that precedes it. The proposal for Canadian law societies to become more actively engaged in regulating the ethical infrastructures of law practices is bolstered by considering other jurisdictions where such changes have already occurred.

A) Ethical Infrastructures in Canadian Law Practices

The proposition that the Canadian legal profession requires *some* form of significant regulation is uncontroversial. One major justification for lawyer regulation is the recognition that there are important interests often at stake in the delivery of legal services, which, it is argued, cannot be fully entrusted to the market for legal services given its multiple inherent imperfections. Legal services are, for example, what economists call “a credence good,” meaning that “[b]uyers ... are unable to assess how much of the good or service they need; nor can they assess whether or not the service was performed or how well.”¹⁸ Law society regulation, including things like imposing licensing requirements and enforcing post-entry codes of professional conduct, operates to mitigate the risks that arise from the fact that clients are generally not in a good position to evaluate the quality or propriety of the legal services that they receive. The question of interest here, however, is not whether law societies should regulate lawyers at all but whether they should regulate in the particular area of ethical infrastructure. Is this an area that the market is not adequately addressing by itself?

In certain respects, this is a difficult question to answer. There do not appear to be any comprehensive empirical studies about what the current ethical infrastructures of Canadian law practices look like. As such, a detailed accounting of the ways in which these infrastructures are either adequate or inadequate is elusive. Common sense does, however, permit a few observations. Following the Supreme Court of Canada’s significant and sustained entry into the area of conflicts of interest beginning in the

¹⁸ Gillian Hadfield, “The Price of Law: How the Market for Lawyers Distorts the Justice System” (2000) 98 Mich L Rev 953 at 968. For further discussion of market imperfections, see also Woolley, *supra* note 16.

mid-1990s, it is safe to assume that many law practices now implement formalized conflicts checks systems.¹⁹ Indeed, close to 60 per cent of participants in a 2014 survey of the 30 largest Canada-based firms identified conflicts as their top risk management concern.²⁰ Additionally, the fact that Canadian law societies engage in substantial trust account regulation suggests widespread use of appropriate accounting systems that allow for the tracking of trust account funds and other monies received.²¹ Beyond these informed observations, however, it is difficult to know precisely what Canadian law practices are doing when it comes to implementing ethical infrastructures.

Some of the comparative data available suggests reason to be concerned. Empirical studies conducted in other jurisdictions – in particular, the United States – suggest that, although many firms are likely to have policies and procedures in certain areas, like conflicts, formal policies and procedures may well be lacking in other areas, like billing practices.²² At a more

¹⁹ For a discussion of the development of this jurisprudence, see Adam M Dodek, “Conflicted Identities: The Battle over the Duty of Loyalty in Canada” (2011) 14:2 *Legal Ethics* 193; and Brent Cotter and Richard Devlin “Three Strikes and You’re Out ... Or Maybe Not: A Comment on *Canadian National Railway Co v McKercher LLP*” (2013) 92 *Can Bar Rev* 123.

²⁰ Law Firm Risk Roundtable, *2014 Law Firm Risk Survey: Canadian Edition* (Intapp 2014) at 6 (on file with author) [*Risk Survey Canadian Edition*].

²¹ Among other things, this regulation includes requiring that firms submit annual reports and subject themselves to compliance audits upon request by the law society. For a discussion of some of these programs, see, for example, “Trust Assurance Program”, online: The Law Society of British Columbia, <<http://www.lawsociety.bc.ca/page.cfm?cid=19&t=Trust-Assurance-Program>>; “Spot Audit Program”, online: The Law Society of Manitoba <<http://www.lawsociety.mb.ca/member-resources/audit/spot-audit-program>>; and “Spot Audit”, online: The Law Society of Upper Canada <<http://www.lsuc.on.ca/with.aspx?id=2147490015>>.

²² For American data, see, for example, *US Law Firm Risk Survey: US Edition* (Intapp, 2014) on file with the author [*Risk Survey US Edition*]; and Chambliss and Wilkins, *supra* note 3 at 696-702. This latter article discusses Susan Fortney’s empirical research as reported in Susan Saab Fortney “Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture” (1996) 10 *Geo J Leg Ethics* 271, and Susan Saab Fortney, “Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements” (2000) 69 *U Missouri-Kansas City L Rev* 239 [Fortney, “Soul for Sale”]. It also discusses two smaller surveys reported in Lee A Pizzimenti, “Screen Verité: Do Rules about Ethical Screens Reflect the Truth About Real-Life Law Firm Practice?” (1997) 52 *U Miami L Rev* 305; and Stephen R Volk *et al*, “Law Firm Policies and Procedures in an Era of Increasing Responsibilities: Analysis of a Survey of Law Firms” (1993) 48 *Business Law* 1567. See also Elizabeth Chambliss, “The Nirvana Fallacy in Law Firm Regulation Debate” (2005) 33(1) *Fordham Urb LJ* 119 at 127-28 [Chambliss, “The Nirvana Fallacy”].

anecdotal level, in a recent consulting report, two individuals who were previously very involved in regulating the legal profession in the Australian state of New South Wales note that, in their years as regulators, they observed a number of gaps in law practice ethical infrastructure, including:

- Whilst firms tend to have systems to identify conflicts of interest, they are not foolproof but more importantly not well understood.
- Basic administrative tasks such as filing and record keeping are not generally well done.
- Job descriptions are rarely used and induction of staff is usually poor and training haphazard.
- Little attempt is made to capture operational knowledge so that when staff leave, the firm's operational knowledge is being continually degraded resulting in the need to develop new systems again and again.
- Many smaller firms have poor precedent systems and libraries and subscriptions are usually kept to a bare minimum. Further, those subscriptions that are received are poorly filed.
- Practice accounting and management systems are rarely fully utilised which results in firms continually operating without adequate financial or management information.
- It is a rare exception for a law firm to have a business plan and use it.
- Client service approaches are informal and there are rarely written standards such as client care policies.²³

Moreover, American and Australian studies indicate that “[e]ven firms that have formal procedures tend to do little to monitor compliance.”²⁴ For example, only 55 per cent of the respondents to a 2014 Law Firm Risk

²³ Creative Consequences, *Transforming Regulation and Governance Project, Phase 2* (18 March 2014), online: Nova Scotia Barristers' Society <<http://nsbs.org/transform-regulation>> at 18 [Creative Consequences *Phase 2*].

²⁴ Chambliss, “The Nirvana Fallacy,” *supra* note 22 at 128. For an Australia study, see Fortney and Gordon, *supra* note 3 at 178 (reporting one result of a study involving Australian incorporated legal practices: only 16% of respondents agreed that

Roundtable survey of the 350 largest US-based law firms indicated that they have formal internal audit processes to evaluate compliance with risk policies.²⁵ The survey of large Canadian law firms mentioned in the previous paragraph saw similar results: only 54 per cent of respondents indicated that their organization had “a defined process to audit compliance with internal policies.”²⁶ The Canadian survey noted that auditing practices in this country “differ from those in the United Kingdom (UK), where 80% of firms employ policies and technology to audit compliance.”²⁷ The observed failure of Canadian firms to monitor helps bolster the case for law society involvement as it suggests that law practices may require external encouragement or coercion to ensure that they evaluate whether their ethical infrastructures are operating effectively.

To be sure, both insurers and clients already exert external pressure on law practices to develop internal systems of checks and balances.²⁸ Although there is some information about requirements imposed by clients and insurers in the American context, there appears to be little publicly available Canadian data. What we do know about the American context, and what is likely true of the Canadian context, is that insurers focus (quite understandably) on risk management and, in particular, on measures to avoid malpractice claims.²⁹ Given this, one can reasonably predict that any requirements imposed by insurers will focus on aspects of ethical infrastructure that will lead to pleased clients and not, as a general matter, address some of the other issues discussed above such as the fairness of internal human resource policies or the fulfillment of broader duties owed to the public. In short, although insurer pressure on Canadian law practices

the mandatory self-evaluation process required by the regulator “is unnecessary because firms independently engage in self-evaluation”).

²⁵ *Risk Survey US Edition*, *supra* note 22 at 3.

²⁶ *Risk Survey Canadian Edition*, *supra* note 20.

²⁷ *Ibid.*

²⁸ In his article on regulating law firms in Canada, Adam Dodek observes that insurers can play an important role in creating ethical infrastructures within large law firms by “requir[ing] the creation of...systems and policies as part of ‘risk management’ strategies;” see Dodek, *supra* note 3 at 435, n 205. What precisely these requirements are, however, is not clear. It is also not clear whether or not this phenomenon is mostly limited to cases where excess insurers are providing large policies to large, national (or multi-national) law firms. For a discussion of the role of insurers in the American context, see, for example, Regan, *supra* note 5 at 152; and Fortney, “Role of Ethics Audits,” *supra* note 3 at 128-29. Discussion about pressures that clients impose on lawyers has mostly been in the American context; see e.g. Christopher J Whelan and Neta Ziv, “Privatizing Professionalism: Client Control of Lawyers’ Ethics” (2012) 80 *Fordham L Rev* 2577.

²⁹ See e.g. Fortney, “Role of Ethics Audits,” *ibid* at 128-29. For an example of an American malpractice insurer see Attorneys’ Liability Assurance Society (Bermuda) Ltd. (ALAS Ltd.) (<<http://www.alas.com/public/about.aspx>>).

may have a positive effect on ethical infrastructures, its impact is likely to be limited in terms of what content is covered.

When it comes to client demands, a recent comprehensive study on the impact of Outside Counsel Guidelines (OC Guidelines) on relationships between lawyer and clients, which was conducted by Christopher Whelan and Neta Ziv, found that “corporate clients, and in particular global corporations, are gaining influence and control over lawyers’ practice at a scope significantly above and beyond what had been customary in the past” – a phenomenon which they label “privatized professionalism.”³⁰ Whelan and Ziv observe that OC Guidelines are “commonplace” but vary widely “in terms of their scope, content, and form.”³¹ Notwithstanding this diversity, both the Whelan and Ziv study and the 2014 Law Firm Risk Roundtable study identify conflicts and confidentiality/information security as major areas of client concern.³² Whelan and Ziv also note that requirements imposed in these two areas are sometimes stricter than what is required by lawyer regulators through professional codes of conduct.

Although the prospect of stricter ethics requirements may sound like a uniformly positive development, some caution is warranted. In particular, in the area of conflicts, self-interested client requirements that broadly prohibit indirect and positional conflicts have resulted in law firms having to decline to represent clients that they would otherwise be able to represent under professional codes of conduct.³³ If we take it to be an ethical good that clients have access to lawyers of their choosing (subject to publicly-minded and publicly-enacted restrictions contained in professional codes of conduct), then there is reason to be concerned about overly zealous conflicts restrictions imposed in OC Guidelines. Against this, it also bears mentioning that the Whelan and Ziv study found that, in some cases, OC Guidelines extended to issues that reached beyond protecting the “direct and immediate” interests of clients and included such things as workplace diversity requirements and general exhortations to act “ethically.”³⁴ Although others have expressed scepticism at the sincerity and effectiveness of these types of measures, Whelan and Ziv contend that

³⁰ Whelan and Ziv, *supra* note 28 at 2577, 2579-80.

³¹ *Ibid* at 2585.

³² *Ibid* at 2590-93 and *Risk Survey US Edition*, *supra* note 22 at 10.

³³ Whelan and Ziv, *ibid* at 2592 (stating that one law partner interviewed “noted that law firms have lost business not due to professional rules, but rather to clients’ stricter rules on conflicts”). See also *Risk Survey US Edition*, *ibid* at 10 (“Respondents cited conflicts provisions as their top outside counsel guidelines concern, with client expectations on conflicts exceeding what is required by jurisdictional ethics rules (business or positional conflicts) and waiver provisions hampering firm flexibility”).

³⁴ Whelan and Ziv, *ibid* at 2579.

such procedures should be seen as “more than mere rhetoric.”³⁵ Ultimately, like the impact of insurer demands, it is difficult to know exactly what the effects of OC Guidelines are in the Canadian context.³⁶ It seems likely, however, that this second type of outside pressure also primarily impacts large law firms. Additionally, given the private interests motivating client demands – take, for example, the dominant motive of “cost-effectiveness” observed in the Whelan and Ziv study³⁷ – there does seem to be good reason for law societies to resist the idea of wholesale outsourcing of the task of promoting effective ethical infrastructures in law practices.

In any event, in addition to attempting to explore directly the nature of ethical infrastructures in Canadian law practices – a task made difficult by lack of data – one can also consider indirect justifications for law society involvement in this area. Presumably, one good way to determine if ethical infrastructures in Canadian law practices are currently effective is to consider regulatory outcomes. Although we may not know with much precision what Canadian law practices are doing when it comes to developing their ethical infrastructures, we do know that there are a number of persistent and pressing problems related to the delivery of legal services in Canada. For the purposes of advancing the argument here, three representative areas of concern are discussed. From a client perspective, we know from complaints statistics that what might be called “client service issues” – things like delay or failures to communicate – have persistently been a top area of dissatisfaction.³⁸ To look beyond clients, we also know that access to justice and diversity in the legal profession remain deep and chronic problems.³⁹ The continuing problems in these three areas

³⁵ *Ibid* at 2607. For a skeptical account of diversity requirements imposed on law firms by corporate clients, see Deborah Rhode, “From Platitudes to Priorities: Diversity and Gender Equity in Law Firms” (2011) 24 *Geo J Leg Ethics* 1041 at 1063.

³⁶ Notably, the Whelan and Ziv study involved interviews of lawyers in the United States, the United Kingdom and Israel.

³⁷ Whelan and Ziv, *supra* note 28 at 2589.

³⁸ For example, in 2012, 56% of client complaints received by the Law Society of Upper Canada were classified as “client service issues”; see Law Society of Upper Canada, *LSUC’s 2012 Annual Report* (Toronto: The Law Society of Upper Canada, 2012, online: The Law Society of Upper Canada, <<http://www.lsuc.on.ca/annual-report>>). Similarly, statistics from Nova Scotia indicate that “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;” see Creative Consequences, *Transforming Regulation and Governance Project, Phase 1* (29 March 2014), online: Nova Scotia Barristers’ Society <<http://nsbs.org/transform-regulation>> at 14 [Creative Consequences *Phase 1*].

³⁹ There is a large set of literature that addresses the issues of access to justice and diversity in the legal profession, in the Canadian context. On access to justice, see e.g.

– client service, access to justice and diversity in the legal profession – suggests that the market is not “taking care of itself” and, importantly for the case being made here, that current regulatory efforts are inadequate.

For the most part, the current efforts to regulate lawyer behaviour in Canada revolve around a complaints-based model. They involve disciplinary apparatuses that tend to focus on investigating and, if deemed necessary, prosecuting “after the fact” complaints against individual lawyers about alleged breaches of codes of professional conduct. As a number of other scholars have already noted, this model has several inherent limitations including its focus on individual behaviour (rather than institutional practices) and on whether individuals are complying with minimum standards as well as its reactive nature.⁴⁰ A consideration of how this conventional approach interacts with the three areas highlighted above can help to bring some particularity to these observed limitations.

Noel Semple, “Access to Justice: Is Legal Services Regulation Blocking the Path?” (2013) 20 Int’l J Legal Profession 1; Jamie Baxter *et al*, “The Ontario Civil Legal Needs Project: A Comparative Analysis of the 2009 Survey Data” in Michael Trebilcock, Tony Duggan and Lorne Sossin, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012); Canadian Bar Association, *Reaching Equal Justice: An invitation to envision and act* (Ottawa: Canadian Bar Association, 2013, online: Canadian Bar Association <www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf>). On the issue of diversity, see e.g. Law Society of Upper Canada, *Developing Strategies for Change: Addressing Challenges Faced by Racialized Licensees* (Law Society of Upper Canada, 2014); Fiona M Kay, Stacey Alarie and Jones Adjei, *Leaving Law and Barriers to Re-entry: A Study of Departures from and Re-entries to Private Practice* (Law Society of Upper Canada: April 2013), online: Law Society of Upper Canada <<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147494539>>; Law Society of British Columbia, *Towards a More Representative Legal Profession: Better Practices, Better Workplaces and Better Results* (Law Society of British Columbia, 2012); Lisa Vogt, “Gender Diversity: Preparing for the New Legal Environment” (2011) 44 UBC L Rev 55; Law Society of British Columbia, *The Business Case for Retaining and Advancing Women in Private Practice* (British Columbia: The Law Society of British Columbia, 2009).

⁴⁰ See e.g. Laurel Terry, “Trends in Global and Canadian Lawyer Regulation” (2013) 76 Sask L Rev 145; Ted Schneyer, “The Case for Proactive Management-Based Regulation to Improve Professional Self-Regulation for US Lawyers” (2013) 42 Hofstra L Rev 233 [Schneyer, “Proactive Management-Based Regulation”]; Fortney, “Role of Ethics Audits,” *supra* note 3; Schneyer, “On Further Reflection,” *supra* note 2; John Briton and Scott McLean, “Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era” (2008) 11 Legal Ethics 241; Schneyer, “Professional Discipline,” *supra* note 1; Ted Schneyer, “A Tale of Four Systems: Reflections on How Law Influences the ‘Ethical Infrastructure’ of Law Firms” (1998) 39 S Tex L Rev 245; Dodek, *supra* note 3.

To look at client service issues first, responsibility within a law firm for things like delay and poor communication may be diffused such that no single lawyer within the law firm has acted so egregiously to warrant being sanctioned within the disciplinary system.⁴¹ There may also be underlying workplace culture issues that contribute to client service problems but which are outside the jurisdiction of the conventional approach. Studies on the impact of “bottom-line mentality” (BLM) or “one-dimensional thinking that revolves around securing bottom-line outcomes to the neglect of competing priorities,”⁴² for example, demonstrate how decision frames adopted by organizations can impact individual behaviour. In the law firm context, one might think of the potential negative impacts in cases where there is too much focus on financial bottom lines like firm profits and/or billable hour targets.⁴³ The broader research on this topic notes that adoption of a BLM frame can result in employees becoming “so focussed on meeting bottom-line productivity requirements that they cut corners without considering the quality of their work or the ethical consequences of their behaviours.”⁴⁴ The research supports what many lawyers likely intuit: making billable hours a major, if not singular, determinant of lawyer compensation and promotion can have negative ethical consequences.⁴⁵ Yet internal policies like compensation schemes do not generally attract the attention of regulators under the conventional disciplinary model, nor are they necessarily good subjects for regulation under this model which is

⁴¹ Ted Schneyer has identified the issue of diffuse responsibility as one reason why supervisory rules included in the ABA *Model Rules of Professional Conduct* are so rarely enforced; see Schneyer, “On Further Reflection,” *supra* note 2 at 592-95.

⁴² Treviño *et al*, *supra* note 7 at 649, citing Rebecca L Greenbaum *et al*, “Bottom-line Mentality as an Antecedent of Social Undermining and the Moderating Roles of Core Self-evaluations and Conscientiousness” (2012) 97 *J Applied Psychol* 343.

⁴³ As Kierstead and Abner note: “Since evaluation is tied into billing, the priority appears to be that lawyers must meet billing targets rather than connect more deeply to professional values;” see Shelley Kierstead and Erika Abner, “Learning Professionalism in Practice” Osgoode CLPE Research Paper No. 59/2013, available on ssrn: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2370085>. Speaking to the English context, Richard Moorhead notes:

[L]aw is not only increasingly seen as a business but as a business that is measured, and explicitly measured in economic terms. Profit per equity partner and other indicators of similar ilk are the basis of league tables. League tables are part of firms’ status claims and a way of encouraging lawyers to join them. These external indicators are trickled down the firm through targets and bonuses. Hourly rates are the oil that greases this engine.

Richard Moorhead, “Precarious Professionalism: Empirical and Behavioural Perspectives on Lawyers” available on ssrn: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2407370>.

⁴⁴ Greenbaum *et al*, *supra* note 42 at 344 [footnotes omitted].

⁴⁵ For a detailed discussion of consequences of billable hour requirements on the delivery of quality and ethical legal services, see Fortney, “Soul for Sale,” *supra* note 22.

built largely around a “pass-fail system [where] either the rules are found to be broken or they are not”⁴⁶ rather than promoting best practices.

Improving client service outcomes requires regulatory attention to elements of a law practice’s ethical infrastructure that impact client service in addition to using lawyer disciplinary regimes to mete out sanctions in individual cases of abject failures to serve. What measures does the practice take to ensure that clients and lawyers have the same understanding of the scope of the retainer? What is done to ensure that clients are kept regularly updated? Does the law practice have formal billing and evaluation policies? These types of questions can help get to the root of client service issues.

A brief consideration of the issues of access to justice and diversity in the legal profession demonstrates that these issues, too, are not optimally addressed by the conventional approach. To the extent that lawyer codes of professional conduct and accompanying disciplinary regimes address these topics, it is through singling out overt and especially egregious forms of lawyer behaviour such as charging unreasonable fees or engaging in discrimination.⁴⁷ Most manifestations of these issues are subtle and complex and, thus, fall outside the conventional approach (and, arguably rightly so, given its punitive nature). In these areas, regulatory efforts to promote effective ethical infrastructures and thereby encourage best practices would again seem to be better suited to achieving meaningful change rather than the “quasi-criminal” disciplinary mechanisms at the heart of the conventional approach.⁴⁸ To be sure, concerns surrounding access to justice and diversity involve systemic issues that reach beyond what happens within law practices. Nonetheless, the ethical infrastructures of law practices remain important sites to consider when contemplating solutions. For

⁴⁶ Creative Consequences *Phase 2*, *supra* note 23 at 5.

⁴⁷ For example, in Ontario, Rule 3-6.1 of the Law Society of Upper Canada, *Rules of Professional Conduct* provides that “A lawyer shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion.” Rule 6.3.1-1 provides:

A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identify, gender expression, age, record of offences (as defined in the Ontario Human Rights Code), marital status, family status, or disability with respect to professional employment of other lawyers, articulated students, or any other person or in professional dealings with other licensees or any other person.

⁴⁸ In using the term “quasi-criminal” to describe the conventional approach, I borrow from Ted Schneyer; see Schneyer, “Proactive Management-Based Regulation,” *supra* note 40 at 260.

example, ensuring that there are appropriate parental leave policies in place and making evaluation and promotions systems free of bias (both conscious and unconscious) are important steps in eliminating structural barriers faced by women and racialized lawyers in the legal workplace. For access to justice, firm facilitation of *pro bono* work (through, for example, billable hour credits) and support for creative delivery of legal services (like, perhaps, unbundling) could be helpful institutional level initiatives. Here, again, there is reason to believe that regulator attention to ethical infrastructure might lead to improved outcomes.

Beyond the above three examples, even when it comes to areas of ethical concern that might be considered more amenable to resolution under the conventional disciplinary approach, such as conflicts or confidentiality, there are still good reasons that one might want to supplement the current approach with a focus on ethical infrastructure.⁴⁹ The fact that the conventional approach uses complaints as a trigger mechanism is a particularly significant constraint.⁵⁰ Many clients who receive inadequate or improper service will not make a complaint to the law society. A number of these clients may simply decide that complaining is not worth the effort – this would seem to be an especially salient risk given that law society disciplinary regimes are focused on disciplining the lawyer rather than providing meaningful compensation to clients. This concern is exacerbated by the fact that, as noted above, consumers of legal services are often ill-placed to even identify when they have received inadequate service, given the status of legal services as a “credence good.” The reliance on complaints also means that the conventional model is primarily reactive, relying on “after the fact” complaints to activate regulatory scrutiny. One obvious limitation of proceeding in this fashion is that the problem has already occurred before the regulator takes action; it would be better for both the client and the lawyer if the problem never occurred in the first place.⁵¹ As Fortney has observed in the American

⁴⁹ As noted above, a number of other scholars have previously noted the types of shortcomings detailed in this paragraph; see *supra* note 40.

⁵⁰ In discussing issues in the American context with disciplining law firm partners or firms themselves for violations of “second-order” managerial duties, Ted Schneyer also points out an additional limitation of relying on complaints: “Disciplinary authorities receive many complaints each year. Most are filed by unsophisticated clients against sole practitioners and small firm lawyers, complainants who are unlikely to specify any ethics rules as the basis for their allegations. Instead, disciplinary counsel must consider which rules, if any, are pertinent when deciding whether and how to investigate and whether to file charges;” see Schneyer, “Proactive Management-Based Regulation,” *supra* note 40 at 258-59.

⁵¹ See, e.g. Fortney, “Role of Ethics Audits,” *supra* note 3 at 138. See also Amy Salyzyn, “What if We Didn’t Wait? Promoting Ethical Infrastructure in Canadian Law Firms” *Slaw Online* (23 July 2013), online: [Slaw.ca](http://www.slaw.ca) <www.slaw.ca>.

context, “Rather than relying on a reactive system that processes complaints after misconduct occurs, clients and the public will fare much better if regulators and insurers work with firm and bar leaders to create programs that help lawyers improve their practices by avoiding problems before they happen.”⁵²

To summarize, there are a number of pressing and persistent problems – like client service issues, access to justice and diversity – that are not well-suited to be addressed by the conventional model through which Canadian law societies primarily regulate lawyer behaviour. Moreover, the conventional model also has major limitations in addressing areas like conflicts and confidentiality that more naturally fall within its jurisdiction. To the extent that attending to ethical infrastructure involves a proactive focus on formal and informal institutional measures, it holds promise in overcoming these limitations and generating better outcomes in a variety of areas of ethical concern.

B) Overseas Examples: Regulating Ethical Infrastructure in England and Australia

The idea that law societies could take meaningful steps to regulate the ethical infrastructures of Canadian law practices is bolstered by reforms in England and Wales and Australia that have empowered lawyer regulators to become significantly involved in the ethical infrastructures of law practices within their respective jurisdictions. Indeed, current discussions in North America about reforming lawyer regulation are very much taking place in the shadow of such reforms.⁵³ Reforms in both of these jurisdictions have been extensive and only a snapshot account will be given here, with a focus on providing high-level detail about the nature of regulator interaction with law practice ethical infrastructure.

In England and Wales, the introduction of the *Legal Services Act 2007* was a watershed event, bringing the “effective end of self-regulation”⁵⁴ and paving the way for legal services to be delivered by new, alternative business structures. A specific development of importance to the discussion

⁵² Fortney, *ibid.*

⁵³ For examples of recent Canadian and American discussions about reform in lawyer regulation that draw on the Australian and/or English experiences, see e.g. Dodek, *supra* note 3; Fortney, “Role of Ethics Audits,” *supra* note 3; Schneyer, “Proactive Management-Based Regulation,” *supra* note 40; and Schneyer, “On Further Reflection,” *supra* note 2.

⁵⁴ Paul Paton, “Cooperation, Co-Option or Coercion? The FATF Lawyer Guidance and Regulation of the Legal Profession” (2010) *J Professional Lawyer* 165 at 165; *Legal Services Act 2007*(UK), c 29.

here is the subsequent implementation by the Solicitors Regulation Authority (SRA) of “outcomes-focused regulation” in 2011. As described by the SRA, “outcomes-focused regulation focuses on the high-level principles and outcomes that should drive the provision of legal services for consumers [and] replaces a detailed and prescriptive rulebook with a targeted, risk-based approach.”⁵⁵ As part of this approach, a law firm’s ethical infrastructure is regulated in a variety of ways. Before a firm is allowed to engage in practice, it is required to go through an authorization process in which the firm completes an extensive application form that asks for, among many other things, the firm’s approach to the possibility of ineffective systems and controls (including “inadequate business contingency planning/quality monitoring/information security policy/management information/staff training and development”).⁵⁶ Following authorization, firms are subject to supervision on an event-basis (i.e. in response to a complaint or changes in a firm’s structures or financials) and on a thematic-basis (for example, in 2012, the SRA did on-site visits with 100 firms that provided conveyancing services).⁵⁷ The SRA describes its approach to supervision as involving constructive engagement with the “aim throughout [being] to assist firms in tackling their own risks and help[ing] them to improve their standards, thus ensuring they provide the right outcomes for clients.”⁵⁸ This is not, however, an exclusively “soft-touch” approach; the SRA’s supervisory function is backed up with sanctions (including the possibility of the SRA intervening to shut down a firm), where there is serious misconduct and/or risks that cannot be mitigated.⁵⁹ To summarize, in exercising what it identifies as its “three key operational functions” – authorization, supervision and enforcement – the SRA is significantly engaged with the ethical infrastructures of law practices.⁶⁰

⁵⁵ “Outcomes-Focused Regulation”, online: Solicitors Regulation Authority <<http://www.sra.org.uk/solicitors/freedom-in-practice/outcomesfocused-regulation.page>>.

⁵⁶ A copy of the applicant form can be found here: “New Firm Application”, online: Solicitors Regulation Authority <<http://www.sra.org.uk/solicitors/firm-based-authorisation/authorisation-recognition.page>>.

⁵⁷ “Supervision: Firm and thematic”, online: Solicitors Regulation Authority <<http://www.sra.org.uk/supervision/>>.

⁵⁸ *Ibid.*

⁵⁹ See, “Supervision: Firm and thematic”, online: Solicitors Regulation Authority <<http://www.sra.org.uk/supervision/>> and “Intervention into a Practice” Solicitors Regulation Authority, online: <<http://www.sra.org.uk/solicitors/enforcement/intervention-tribunal/intervention-reasons-costs.page>>.

⁶⁰ “Delivering outcomes-focused regulation”, online” Solicitors Regulation Authority <<http://www.sra.org.uk/solicitors/freedom-in-practice/ofr/delivering-ofr-policy-statement.page>>. It should be noted that this paragraph only addresses how solicitors are regulated and that there are a number of other professions in England and Wales that are

In Australia, lawyer regulators have also become more engaged in the ethical infrastructures of entities delivering legal services. The state of New South Wales has, in particular, gained international attention for its introduction of a self-assessment process for “incorporated legal practices” (ILPs). As the name suggests, ILPs are corporations that engage in the practice of law (possibly along with other lines of business) and may be partially or fully owned by non-lawyers.⁶¹ The focus of the ILP self-assessment process is to allow for an evaluation of whether or not ILPs meet their legislative obligation to have “appropriate management systems” in place.⁶² Due to the fact that the governing legislation does not define “appropriate management systems,” the regulator – the Office of the Legal Services Commissioner (OLSC)⁶³ – consulted with various stakeholder groups to define the criteria to be used in evaluating whether

entitled to deliver legal services, including barristers, notaries and licensed conveyancers. Each profession is governed by a separate independent regulatory body.

⁶¹ Incorporated legal practices are a form of alternative business structure. For more information, see Law Society of New South Wales, “Practice Structures”, online: Law Society of New South Wales <<http://www.lawsociety.com.au/ForSolicitors/practisinglawinnsw/practicestructures/index.htm>>; see also discussion in Fortney and Gordon, *supra* note 3.

⁶² *Legal Profession Act 2004*, (NSW), s 140.

⁶³ For complete accuracy, it should be noted that in New South Wales, the OLSC co-regulates with the professional bodies for solicitors and barristers (the Law Society of New South Wales and the New South Wales Bar Association, respectively). As explained by Steve Mark:

The OLSC receives all complaints about solicitors and barristers in NSW in the first instance. If a complaint raises a question of misconduct on the part of the practitioner, the complaint will be investigated. The OLSC may investigate the complaint or refer the complaint to the Law Society of NSW or the NSW Bar Association for investigation. The OLSC can review decisions by the Law Society or the Bar Association. In our co-regulatory structure, the OLSC acts as independent statutory body and its decisions can only be challenged through the normal process of administrative law. This co-regulatory system has been in place since 1994 [footnotes omitted].

Steve Mark, “The Regulatory Framework in Australia” (Materials prepared for ABA Center for Professional Responsibility 40th National Conference on Professional Responsibility, *Regulatory Innovation in England and Wales and Australia: What's in it for us?* Long Beach, California, May 29, 2014) online: <http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2014/05/40th-aba-national-conference-on-professional-responsibility/session1_02_mark_the_regulatory_framework_in_australia_final.authcheckdam.pdf> [Mark, “The Regulatory Framework in Australia”].

or not an ILP has appropriate management systems.⁶⁴ Ten areas of concern were identified:

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).
7. *Records management* (minimizing the likelihood of loss or destruction of correspondence and documents through appropriate document retention, filing, archiving and so on, 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,

⁶⁴ For further discussion of this process, see Steve Mark, “Views from an Australian Regulator” (2009) 1 J Professional Lawyer 45; Fortney and Gordon, *supra* note 3 at 160-61; and Mark, “The Regulatory Framework in Australia,” *ibid.*

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).⁶⁵

The self-assessment process requires ILPs to evaluate themselves as “non-compliant,” “partially compliant,” “compliant,” “fully compliant” or “fully compliant plus” in each of these areas using a standardized form.⁶⁶ The self-assessment form itself is not overly lengthy: it is only fifteen pages long and addresses the ten areas of concern at a relatively high level. For example, the following excerpt from the form addresses the third concern of “delay”:

Objective	Key concepts to consider when addressing the Objective	Examples of possible evidence or systems most likely to lead to compliance	Action to be taken by ILP (if needed)
Timely delivery, review and follow up of legal services to avoid instances of DELAY	The client is regularly kept informed at each stage of the matter and is provided with periodic billing	A system for ensuring that the working plan in each matter (see above) is adhered to and that the file contains all appropriate file notes or time records or other evidence that the plan has been adhered to.	
	The file contains a complete record of all aspects of the transaction or matter	Copies of all letters notes, emails, records of telephone calls, statements, calculations and tax invoices are on file.	

continued ...

⁶⁵ “Appropriate Management Systems to Achieve Compliance”, Office of the Legal Services Commissioner, online: <http://www.olsc.nsw.gov.au/olsc/lsc_incorp/olsc_appropriate_management_systems.html>.

⁶⁶ A copy of the form can be found here: “Self-Assessment Form”, Office of the Legal Services Commissioner, online: <http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/self_assessment_form_january2014.pdf>.

... continued from previous page

Objective	Key concepts to consider when addressing the Objective	Examples of possible evidence or systems most likely to lead to compliance	Action to be taken by ILP (if needed)
Timely delivery, review and follow up of legal services to avoid instances of DELAY (continued)	Critical dates are recorded, monitored and complied with	Procedures for regular review of files, checklists and a firm wide diary system, which may or may not be computer based.	
	Procedures for locating files and documents and for monitoring activity in all open files	Documented procedures effective in: (a) locating files and tracing documents, correspondence and other items relating to any matter that is open or has been closed but the file is still retained by the ILP (b) monitoring files for inactivity at pre-determined times	
	Overall rating for Objective (Please circle one rating) NC PC C FC FC Plus		

The fact that the form addresses the issue of appropriate management systems at a fairly general level reflects the regulator’s intention to implement a “light touch ‘education towards compliance’ strategy”⁶⁷ and “to encourage ILPs to build up ethical behaviours and systems that suit their own practices, rather than imposing complex management structures on practices regardless of what actually makes sense for them.”⁶⁸ In terms of OLSC’s response to the self-assessment forms that ILPs complete, Parker, Gordon and Mark explain:

In most cases where an ILP rates themselves as not compliant or only partially compliant, the process of self-assessment results in a dialogue between the OLSC and the ILP — sometimes conducted in letters and sometimes in phone calls and face-to-face meetings — about what management systems are appropriate for that particular ILP and agreement is ultimately reached. In the (very rare cases) where there is no

⁶⁷ Parker *et al*, “Regulating Law Firms,” *supra* note 3 at 468.

⁶⁸ *Ibid* at 473.

response to the self-assessment process, or the response is inadequate or raises questions about whether appropriate management systems have been established and maintained, the OLSC conducts a practice review of the ILP and its appropriate management systems [or] may also initiate a complaint against the ILP which could lead on to further investigation and professional discipline.⁶⁹

As Schneyer has observed, one major feature of this process is “non-adversarial *collaboration*” between regulators and law practices whereby “the regulators play a role akin to that of consultants advising on how to manage ethical risks.”⁷⁰

The innovative nature of the self-assessment process used in NSW has attracted significant international attention, which has further intensified following the release of studies that suggest that the model has been very effective. A study conducted by Parker in 2008 found that, among other things, on average the complaint rate for each incorporated legal practice after self-assessment was one-third the complaint rate of the same practices before self-assessment.⁷¹ A subsequent mixed method empirical study conducted by Susan Fortney bolstered this positive assessment.⁷² Among other things, this study found:

- a vast majority of firms (84 per cent) reported that they revised firm policies or procedures as a result of engaging in the self-assessment;
- a majority (62 per cent) agreed that the self-assessment process was “a learning exercise that helped their firm improve client service”; and
- a majority (65 per cent) also agreed that the self-assessment process assisted the firm in addressing problems.⁷³

Following the initial adoption of a self-assessment model by NSW, regulators in other Australian states have implemented similar processes in their jurisdictions.⁷⁴ In March 2014, new legislation was passed in NSW –

⁶⁹ *Ibid.*

⁷⁰ Schneyer, “Proactive Management-Based Regulation,” *supra* note 40 at 237, citing Parker *et al.*, “Regulating Law Firms,” *supra* note 3 at 473

⁷¹ Parker *et al.*, *ibid.*

⁷² Fortney and Gordon, *supra* note 3.

⁷³ *Ibid.* at 172, 175 and 178.

⁷⁴ See e.g. Laurel S Terry, Steve Mark and Tahlia Gordon, “Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology” (2012) 80 *Fordham L Rev* 2685 (discussing legislative changes and adoption of self-assessment

the *Legal Profession Uniform Law* – which is intended to eventually apply in all of Australia and which will require appropriate management systems only if a law firm receives a direction from the regulator.⁷⁵

The reforms in Australia and England and Wales provide tangible examples of what regulator involvement in regulating the ethical infrastructures of legal practices might look like and have helped to provide momentum to North American conversations about pursuing similar regulatory reforms. In the US, Fortney, Schneyer and Terry have drawn on the Australian experiences to advocate for the adoption of more proactive management-based regulation in their jurisdictions.⁷⁶ In Canada, Dodek has argued that the Australian experience has “demonstrated the value of creating compliance requirements for law firms.”⁷⁷ Canadian law societies are also beginning to take an active interest. The Law Society of Upper Canada has, for example, recently approved a recommendation of its Working Group on Alternative Business Structures “to give further consideration to the implementation of compliance oriented regulation” – a recommendation which cited English and Australian reforms in support.⁷⁸ By way of another example, the Nova Scotia Barristers’ Society is currently engaging in a comprehensive review of its regulatory and governance model, which includes a consideration of moving towards “a proactive, risk-focused, principles-based regulatory regime” which would include “education and engagement with firms, development of appropriate management systems for firms, and the provision of tools and training to help firms of all sizes achieve regulatory objectives, and to

processes in Australian Capital Territory, Northern Territory, Queensland, Tasmania, Victoria and Western Australia).

⁷⁵ For more details, see Mark, “The Regulatory Framework in Australia,” *supra* note 63 at 11-12.

⁷⁶ Fortney, “Role of Ethics Audits,” *supra* note 3; Schneyer, “Proactive Management-Based Regulation,” *supra* note 40; Schneyer, “On Further Reflection,” *supra* note 3; Laurel Terry, “A Modest Proposal? Should NOBC Members Use Rule 5.1 More Proactively?” (PowerPoint presentation for National Organization of Bar Counsel Annual Meeting, New York, Aug. 9, 2008), online: <<http://www.personal.psu.edu/faculty/l/s/lst3/presentations.htm>>; and Laurel Terry, Introduction to Recent Global Developments, The Future is Here: Globalization and the Regulation of the Legal Profession, Conference for the Conference of Chief Justices, Chicago, May 27, 2009, online: <<http://www.personal.psu.edu/faculty/l/s/lst3/presentations.htm>>).

⁷⁷ Dodek, *supra* note 3.

⁷⁸ Ontario, The Law Society of Upper Canada, *Report to Convocation*, (Toronto: The Law Society of Upper Canada, 2014), online: The Law Society of Upper Canada <[http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/convfeb2014_PRC\(1\).pdf](http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/convfeb2014_PRC(1).pdf)>.

practise ethically and competently in the public interest.”⁷⁹ With a view to contributing to this ongoing policy conversation, Part 4 below considers the challenges and options for developing a made-in-Canada, made-for-Canada model when it comes to regulating the ethical infrastructures of Canadian legal practices.

4. Options Going Forward

A) *An Initial Observation: Law Societies are Already Involved*

Before discussing various policy options, it bears mentioning that the argument here that law societies be involved in promoting effective ethical infrastructures in Canadian law practices does not reflect anything radically new. Law societies are already engaged in a number of initiatives that examine and evaluate lawyer conduct at an institutional level, in addition to their efforts to regulate individual lawyers. One of the longest standing interventions is law society regulation of firm trust accounts, including imposing requirements that firms submit annual reports and subject themselves to compliance audits upon request by the law society.⁸⁰ The involvement of Canadian law societies in regulating institutional practices also includes more comprehensive practice reviews. Depending on the province or territory, practice reviews can be initiated after a complaint about an individual lawyer has been received by a law society⁸¹

⁷⁹ Nova Scotia Barristers' Society, *Transforming Regulation – Consultation Document* (Nova Scotia), online: <http://nsbs.org/sites/default/files/ftp/InForumPDFs/2014-02-03_TransformingRegulation_Consultation.pdf>.

⁸⁰ For a discussion of some of these programs, see e.g. “Trust Assurance Program”, online: Law Society of British Columbia <<http://www.lawsociety.bc.ca/page.cfm?cid=19&t=Trust-Assurance-Program>>; “Spot Audit Program”, The Law Society of Manitoba <<http://www.lawsociety.mb.ca/member-resources/audit/spot-audit-program>>; and “Spot Audit”, The Law Society of Upper Canada <<http://www.lsuc.on.ca/with.aspx?id=2147490015>>.

⁸¹ For example, in Nova Scotia, Section 9.7.1 of the Regulations made pursuant to the *Legal Profession Act*, SNS 2004, c 28, provides:

9.7.1 Where the Complaints Investigation Committee has reasonable and probable grounds to believe that a practicing lawyer is practicing law in a manner contrary to the public interest, the Committee may direct the Executive Director to appoint a reviewer to conduct a review of all of or a portion of the member's practice.

See, also, Law Society of Manitoba, *Law Society Rules*, rule 5-82(1): “When the [Complaints Investigation Committee] decides there are reasonable grounds to believe that a member is practicing law in an incompetent manner, the [Complaints Investigation Committee] may order a practice review of the member's practice or the member may consent to the review.”

or, in some cases, on a more pro-active basis in relation to certain groups of lawyers, including new lawyers and new sole practitioners.⁸²

In addition to trust account regulation and practice reviews, Canadian law societies engage in a number of facilitative measures that lawyers can use on a voluntary basis to help develop best practices. Tools such as checklists and model documents can be found on a number of law society websites.⁸³ Descriptive guidance is also provided by the law societies in

⁸² More pro-active practice review programs include Saskatchewan's "Practice Review Program;" see "Practice Review Program", online: Law Society of Saskatchewan <<http://www.lawsociety.sk.ca/about-us/how-we-accomplish-our-purpose/committees/professional-standards/practice-review-program.aspx>> (targeting "new sole practitioners" among other groups); and Ontario's "Practice Management Review" program (see "Practice Management Review", online: Law Society of Upper Canada <<http://www.lsuc.on.ca/lawyer-practice-management-review/>>) (targeting lawyers one to eight years from the call to the bar and in private practice). As Malcolm Mercer helpfully pointed out in conversation, although such practice reviews are initiated and conducted in respect of individual lawyers, they may be understood as effectively amounting to institutional regulation insofar as they involve investigation of practice management systems in the office in which the lawyer works. Statistics on how often practice reviews are conducted are not readily available, but some sense of frequency can be gleaned from the Law Society of Upper Canada's 2013 Annual Report which indicates that 549 practice management reviews were conducted that year (out of a total of roughly 46,000 lawyers working within 11,375 law firms). These data can be found at Ontario, Law Society of Upper Canada, *Annual Report*, (Law Society of Upper Canada: 2013), online: Law Society of Upper Canada <<http://www.annualreport.lsuc.on.ca/2013/en/operational-trends/law-firms-paralegal-firms.html>> and Ontario, Law Society of Upper Canada, *Annual Report*, (Law Society of Upper Canada: 2013), online: Law Society of Upper Canada <<http://www.annualreport.lsuc.on.ca/2013/en/annual-report-data.html#size-lawfirm-licensee>> at "2013 Data Tables." It should be noted that the Law Society of Upper Canada also conducts "Focused Practice Reviews" (targeting lawyers who have complaints history or have otherwise been flagged as requiring personal or professional assistance) and "Re-Entry Reviews" (targeting lawyers who are returning to private practice as sole practitioners, or in a firm of five or fewer lawyers, after an absence of 48 months over the past five years). See "Lawyer Practice Management Review, online: Law Society of Upper Canada <<http://lsuc.on.ca/lawyer-practice-management-review/>>.

⁸³ Most Canadian law societies have developed checklists and model documents for members to use. The resources available are too vast to list comprehensively here. Below are a few examples representing a small subset of the total resources available:

Checklists

The Law Society of British Columbia, for example, has developed and made available a Practice Checklists Manual that contains an impressive array of very specific checklists, primarily organized by practice type; see "Practice Checklists Manual", online: Law Society of British Columbia <<http://www.lawsociety.bc.ca/page.cfm?cid=359>>.

The Law Society of Alberta also makes checklists available to members, including a Critical Illness Practice Checklist and Checklists for Succession Planning;

various formats, including articles on practice management issues posted on law society webpages, continuing education programs delivered by law societies and regular newsletters or journals distributed to members.⁸⁴ A number of law societies have also developed “practice standards” or “professional standards” that aim to provide lawyers with additional guidance as to how to meet their professional obligations.⁸⁵

The work of law societies in promoting better institutional practices is constantly evolving. For example, in 2012, the Law Society of British Columbia released Cloud Computing Guidelines and a Cloud Computing Checklist to assist the province’s lawyers in navigating recent technological

see “Practice Management”, online: Law Society of Alberta <http://www.lawsociety.ab.ca/lawyers/practice_advisors/practice_management.aspx>.

Model Documents

Found among the model documents made available by the Law Society of Upper Canada are: a sample continuing power of attorney, sample last will and testament clauses, a sample non-engagement letter, a sample form joint retainer, a sample billing policy, and model retainer agreements (<www.lsuc.on.ca>).

The Law Society of Manitoba has available on its website, among other things, model policies in the areas of accommodation, alternative work schedules, maternity and parental leave and also a model policy “for a respectful workplace;” see “Equity”, online: Law Society of Manitoba <<http://www.lawsociety.mb.ca/equity>>.

⁸⁴ As with checklists and model documents, a large set of resources could be potentially cited here. Some examples include the practice management guidelines that the Law Society of Upper Canada provides in the areas of client service and communication, file management, financial management, technology, professional management, time management, personal management and closing down one’s practice; see “Practice Management Guidelines Executive Summary”, online: Law Society of Upper Canada <<http://www.lsuc.on.ca/with.aspx?id=2147490535>>. By way of another example, the Law Society of British Columbia has an Online Learning Centre; see “Online Learning Centre, online: Law Society of British Columbia <<http://www.learnlbc.ca>>, which contains a number of “courses” including: a Small Firm Practice Course, a Practice Refresher Course, a Communication Toolkit and a course on Legal Research Essentials.

⁸⁵ For example, the Nova Scotia Barristers’ Society has developed “Professional Standards” in three areas: Family Law, Real Estate, and Law Office Management. As described in a news release discussing the Family Law Standards on the website:

The Standards, together with the included reference materials, are an important new tool that will clarify lawyers’ obligations when practicing in this area. Adherence to these standards will assist lawyers in their dealings with clients, other lawyers and the courts as they bring together the jurisprudence, statutory and regulatory requirements that govern lawyers’ obligations and thus act as the foundation for the expected standards.

See <<https://nsbs.org/news/2013/01/professional-standards-practice-family-law-now-effect-nova-scotia>>.

tools that they may want to use to support their practices.⁸⁶ By way of another example, in 2011, the Law Society of Alberta implemented a new Trust Safety program, requiring that every law firm obtain prior approval from the Law Society before opening, maintaining, or operating a trust account and that a member of the firm be designated as the Responsible Lawyer.⁸⁷

Notwithstanding these features of the Canadian regulatory environment, it is clear that there is still room for more robust regulatory engagement with the promotion of ethical infrastructures in Canadian law practices. The reforms in Australia and England provide two models as to what this might look like. The remainder of this Part expands the consideration of options and discusses in more detail the various policy considerations relevant to increased law society involvement in this area. As noted in the Introduction, the intention here is not to provide a specific policy prescription for Canadian law societies but rather to highlight the key questions going forward and discuss some of the relevant considerations. The following four questions will be considered in turn:

- (1) Should additional regulatory involvement be voluntary or mandatory from the perspective of Canadian lawyers?
 - a. If new regulation is mandatory, Should reforms be discrete or part of widespread regulatory changes?
 - b. What aspects of a law practice's ethical infrastructure should new regulatory efforts address?
 - c. How might lawyer "buy-in" be generated?

1) Should Additional Regulatory Involvement be Voluntary or Mandatory from the Perspective of Canadian Lawyers?

One fundamental issue is whether additional regulatory involvement will be voluntary or mandatory from the perspective of Canadian lawyers. The English and Australian models provide two different examples of mandatory involvement. We can also step back from these models and consider how

⁸⁶ The Cloud Computing Guidelines and Checklist can be found, respectively, at: "Cloud computing due diligence guidelines", online: Law Society of British Columbia <<http://www.lawsociety.bc.ca/docs/practice/resources/guidelines-cloud.pdf>>; and "Cloud Computing", online: Law Society of British Columbia <<http://www.lawsociety.bc.ca/docs/practice/resources/checklist-cloud>>.

⁸⁷ "Trust Safety", online: The Law Society of Alberta <http://www.lawsociety.ab.ca/about_us/initiatives/initiatives_safety.aspx>.

Canadian law societies might increase their current involvement with the ethical infrastructures of law practices without going as far as imposing new mandatory obligations like the tri-partite English authorization, supervision and enforcement process or the Australian self-assessment process. The advantages and disadvantages to introducing voluntary initiatives are discussed below, following a consideration of several specific new voluntary initiatives that Canadian law societies could pursue.

a) Enhanced Practice Advisory Services

One example of what additional voluntary regulation might look like can be found in England and Wales. The Law Society of England and Wales⁸⁸ has developed what it calls an “enhanced advisory service” to help solicitors better navigate their obligations under the new SRA frame of “outcomes-focused regulation.”⁸⁹ This service, called Law Society Consulting, is available to English solicitors on a for-fee basis and provides guidance in three areas: risk and compliance; finance and accounting; and strategic support.⁹⁰ The means of delivering this guidance can vary from “a quick snapshot assessment” of compliance status following a 30 minute telephone interview⁹¹ to a more extensive “diagnostic” on-site risk evaluation followed by a “bespoke consultancy service” in which Law Society Consulting provides assistance in “drafting and embedding new policies, procedures and competences, and ... [in] provid[ing] relevant training.”⁹² Ongoing monitoring is also available, whereby Law Society Consulting will visit a practice on a regular schedule to provide continuing support and to update recommendations as needed.⁹³ In certain respects, the services that Law Society Consulting performs are currently performed by practice advisory services offered by Canadian law societies that

⁸⁸ The Law Society of England and Wales acts as the advocacy body for solicitors in contrast to the SRA, which acts as the regulator. For more information, see Law Society of England and Wales, “Who we are”, online: Law Society of UK <<http://www.lawsociety.org.uk/about-us/who-we-are/>>.

⁸⁹ “Law Society Consulting”, online: Law Society of England and Wales <<http://www.lawsociety.org.uk/advice/risk-compliance/law-society-consulting/>>.

⁹⁰ *Ibid.*

⁹¹ “Risk and Compliance: Telephone Assessment”, online: Law Society of England and Wales, <<http://www.lawsociety.org.uk/Advice/Law-Society-consulting/Risk-compliance-consulting/Risk-and-compliance-telephone-assessment/>>.

⁹² Risk and Compliance: Diagnostic Visit”, online: Law Society of England and Wales, <<http://www.lawsociety.org.uk/Advice/Law-Society-consulting/Risk-compliance-consulting/Risk-and-compliance-diagnostic-visit/>>

⁹³ “Risk and Compliance: Ongoing Support”, online: Law Society of England and Wales <<http://www.lawsociety.org.uk/Advice/Law-Society-consulting/Risk-compliance-consulting/risk-and-compliance-ongoing-support/>>.

provide free advice to lawyers on a request basis.⁹⁴ However, the services that Law Society Consulting offers, including detailed diagnostic visits and tailored policy drafting and training, do appear to be much more extensive and would presumably be more effective in helping law practices improve their ethical infrastructures.⁹⁵

b) Quality Management Accreditation

A different type of for-fee, opt-in model involves firm certification under approved quality management standards. As Fortney has noted in her study of the Australian self-assessment process, some of the law practices that have gone through the regulator-mandated process in NSW have taken additional measures to become certified under quality management standards developed by the International Organization for Standardization (ISO).⁹⁶ As a general matter, the ISO 9001 standard, part of the ISO 9000 “family” and which “sets out the criteria for a quality management system,”⁹⁷ has widespread use and is reportedly “implemented by over one million companies and organizations in over 170 countries.”⁹⁸ Entities that meet the criteria set out in the ISO 9001 standard can apply to external certification bodies to become certified under the standard.⁹⁹ The process

⁹⁴ For examples of such programs, see: “Practice Advisors”, online: Law Society of British Columbia <http://www.lawsociety.ab.ca/lawyers/practice_advisors.aspx> and “Practice Advisors”, online: Law Society of Alberta <http://www.lawsociety.ab.ca/lawyers/practice_advisors.aspx>.

⁹⁵ See, for example, the potential items covered on a diagnostic visits as described on the Law Society’s website. For a diagnostic visit in the area of finance and accounting, the website indicates:

The diagnostic visit starts with an introductory meeting. We will discuss, in detail, your financial systems, procedures, processes and policies. The areas we will discuss may include: financial documents and reports; work in progress (WIP); billing; aged debtors; divisional income statements; budgets; management accounts; staffing; training; expenses; accounting packages; bookkeeping; mergers and acquisitions; change management; banking arrangements.

“Finance and Accounting: One-Day Diagnostic Visit”, online: The Law Society of England and Wales, <<http://www.lawsociety.org.uk/Advice/Law-Society-consulting/Finance-accounting-consulting/finance-and-accounting-one-day-diagnostic-visit/>>

⁹⁶ Fortney, “Role of Ethics Audits,” *supra* note 3 at 115; see also Fortney and Gordon, *supra* note 3 at 182.

⁹⁷ “ISO 9000 – Quality management”, International Organization for Standardization (ISO), online: <http://www.iso.org/iso/home/standards/management-standards/iso_9000.htm>.

⁹⁸ “ISO 9000 – Quality management”, online: International Organization for Standardization (ISO) <http://www.iso.org/iso/home/standards/management-standards/iso_9000.htm>.

⁹⁹ “Certification ...”, online: International Organization for Standardization (ISO), <<http://www.iso.org/iso/home/standards/certification.htm>>.

of being certified is quite extensive and can involve a number of costly and time-consuming steps including: buying the ISO 9001 standard and possibly taking a course to better understand the standard; performing a “gap assessment” (assessing where the organization is deficient vis-à-vis the standard); implementing the necessary changes (including possibly engaging a consultant to assist in this process); conducting several internal audits accompanied by revisions in policies and procedures; participating in a “registration audit” with a third party certification agency which involves an on-site review of facilities, records and possibly interviews.¹⁰⁰ Following initial ISO 9001 certification, additional surveillance and re-registration audits are conducted to ensure continuing conformity with the standard.¹⁰¹

As evidenced by Fortney’s findings, the ISO 9001 standard is available for use by legal practices and there has been some law firm uptake. A quick internet search reveals that at least two law firms in Canada have become ISO 9001 certified.¹⁰² Overall, however, there does not appear to be extensive use of this standard by law practices globally. In his study of the use of the ISO 9001 among Australian law firms, Prajogo suggests that the slow adoption can be attributed to the fact that the ISO 9001 standard originated from the manufacturing sector and, in certain respects, ill-fits the professional service sector.¹⁰³ He observes that reasons rooted in the notion of professional identity may also contribute to some resistance:

The difficulties in implementing ISO 9000 in professional service sectors have been mainly attributed to the intangible nature of the outputs, which creates difficulty in controlling quality (Harte & Dale, 1995). However, more important is the resistance from professional practitioners who generally work with autonomy and independence (Peters & Sandison, 1998).¹⁰⁴

There have been efforts to create quality management standards more suited to the legal profession. In Australia, the College of Law, in conjunction with two private companies, launched the LAW 9000 standard in 2004, which is based on the ISO standard but is specifically tailored to

¹⁰⁰ These steps are derived from an ISO 9001 implementation checklist published by one third party certification agency; see “ISO 9001 Implementation Checklist” SAI Global, online: <<http://www.saiglobal.com/assurance/resource-library/quality/>>.

¹⁰¹ *Ibid.*

¹⁰² According to their websites, Carranza LLP, a personal injury firm in Toronto (<<http://www.carranza.on.ca>>) and Filmore Riley, a full-service law firm based in Winnipeg (<<http://www.fillmoreriley.com>>), are ISO 9001 certified.

¹⁰³ Daniel I Prajogo, “The Sustainability of ISO 9001 in a Legal Service Organization” (2008) 28 *The Service Industries Journal* 603 at 606.

¹⁰⁴ *Ibid.*

legal practice.¹⁰⁵ According to the College of Law website, “Currently, around 40 practices, ranging from national top tier firms to sole practitioners, have achieved or are in the process of certification.”¹⁰⁶ The Law Society of England and Wales has also developed its own management standard – Lexcel – which it describes as “a scheme for any type of practice to certify that certain standards have been met following independent assessment” and as “only awarded to solicitors who meet the highest management and customer care standards.”¹⁰⁷ A July 2012 report indicates that over 1,000 UK law firms have Lexcel certification.¹⁰⁸ Interestingly, the same report also indicates “a growing number of firms are choosing to obtain the international quality management systems standard ISO 9001 instead.”¹⁰⁹ Reasons cited for this preference include the desire to be certified under standard that is likely to be more familiar to clients, and the fact that the ISO 9001 standard provides more flexibility because its criteria “broadly reflect[s] current practice, rather than new ways of doing things.”¹¹⁰ The Bar Council – the representative body for barristers in England and Wales – houses what appears to be a comparable program for barristers called BarMark.¹¹¹

c) Voluntary Self-Assessments

A third potential voluntary model could be for law societies to develop a self-assessment tool similar to what is used in Australia, but not make its use mandatory. In the United States, the Washington and Wyoming State Bars, for example, have developed self-audit tools that they make freely available to their members.¹¹² In the Canadian context, the Canadian Bar Association Ethics and Responsibility Committee has recently developed

¹⁰⁵ “LAW 9000”, online: The College of Law <<http://www.collaw.edu.au/what-we-offer/lawyers-other-professionals/law9000/>>.

¹⁰⁶ *Ibid.*

¹⁰⁷ “Lexcel practice management standard”, online: Law Society of England and Wales <<http://www.lawsociety.org.uk/accreditation/lexcel/>>.

¹⁰⁸ “ISO 9001 battles Lexcel as the must-have quality standard in UK law firms” *Managing Partner* (30 July 2012) online: *Managing Partner* <<http://www.managingpartner.com/news/business-strategy/iso-9001-battles-lexcel-must-have-quality-standard-uk-law-firms>>.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ “BARMARK”, online: The Bar Council <<http://www.barcouncil.org.uk/for-the-bar/introduction-to-member-services/barmark/>>.

¹¹² These self-audit tools are available, respectively at “Self Audit Checklist”, online: Washington State Bar Association <http://www.wsba.org/~media/Files/Resources_Services/LOMAP/Self-Audit%20Checklist.ashx> and at “Self Audit Checklist”, online: Wyoming Bar Association <http://www.wyomingbar.org/pdf/Wyoming_Self_Audit_Checklist.pdf>.

an Ethical Practices Self-Evaluation Tool – modelled after the NSW self-assessment tool – that can be voluntarily used by Canadian law practices to help them improve their ethical infrastructures.¹¹³ Law societies could use the CBA Tool as a template for the development of their own tools or, alternatively, could encourage their members to use the CBA Tool “as is” given that it was developed for national use.¹¹⁴

d) Advantages and Disadvantages of Voluntary Measures

There are several readily apparent advantages and disadvantages to using voluntary measures like the three discussed above. One significant advantage of all three examples is cost. To be sure, the actual cost of any new mandatory initiative will obviously depend on the nature and scope of the particular initiative. Although the extensive entity regulation that the SRA engages in is supported by significant annual net expenditures of approximately 57 million pounds (over 100 million Canadian dollars),¹¹⁵ the cost of the NSW reforms appears to be comparatively minimal. Regarding the NSW reforms, a consultants’ report prepared for the Nova Scotia Barristers’ Society states:

Dealing with regulation of the appropriate management systems of those 1,300 firms [that had become incorporated] 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.¹¹⁶

Acknowledging that cost will vary depending on the reform undertaken, it would seem that new mandatory initiatives would require *some* additional money that would have to be obtained through increases in members’ fees.

¹¹³ A copy of the CBA Ethical Practices Self-Evaluation Tool can be found at: “Ethical Practices Self Evaluation Tool”, online: Canadian Bar Association <<http://www.cba.org/CBA/activities/code/ethical.aspx>>. As noted at the outset of this paper, I served as Research Director in the development of this tool.

¹¹⁴ I note that in her recent article, Susan Fortney suggests that bar groups in the United States “could follow the lead of the Canadian Bar Association in developing an on-line tool for lawyers to voluntarily examine their practices and systems;” see Fortney, “Role of Ethics Audits,” *supra* note 3 at 127.

¹¹⁵ This number is taken from the SRA 2012 Annual Report, which reported that “SRA net expenditure in 2012 was £56.8 million”, “Annual report 2012: Moving forward”, online: Solicitor’s Regulation Authority <<http://www.sra.org.uk/sra/how-we-work/reports/moving-forward.page>>.

¹¹⁶ Creative Consequences, *Transforming Regulation and Governance Project, Phase 1*, *supra* note 38 at 14 at 19. See also Schneyer, “On Further Reflection,” *supra* note 3 at 625-26 (discussing the “manageable costs” of the proactive management-based regulation implemented in NSW).

Although there may be longer-term savings if this new regulation takes a preventive focus, these savings could take some time to materialize and there is no guarantee that such savings would offset the upfront cost of the new mandatory regulation. In contrast, new voluntary measures are cheap. In the case of a voluntary self-assessment tool, there would presumably be certain start-up costs to develop the tool and then, after that, only minor ongoing costs to ensure that the instrument stays relevant and current. Assuming that fees are charged, enhanced practice advisory services and quality management standard accreditation could be run on a cost recovery basis.

One major potential disadvantage associated with voluntary measures is efficacy. In particular, one might wonder how effective it would be for law societies to simply encourage Canadian law practices to undertake voluntary self-assessments without following up by offering the law practices any regulator feedback about possible means of improvement. It seems incontestable that such feedback would be useful. At the same time, it is helpful to note the Australian research suggesting that the activity of self-reflection, in and of itself, can result in improved outcomes in the area of ethics. In their study of the process implemented in NSW, Parker *et al* found a lack of connection between how firms self-assessed their management systems (that is, whether they were “compliant” or “non-compliant” in various areas) and the number of complaints made to the regulator about the firms.¹¹⁷ This finding led the authors to conclude that:

If self-assessment makes a difference, it must be the learning and changes prompted by the process of self-assessment that does so, not the actual (self-assessed) level of implementation of management systems.¹¹⁸

This finding is consistent with the broader literature about ethical behaviour in organizations that suggests that merely talking about ethics, and thereby making ethics salient, can help to attenuate unethical behaviour.¹¹⁹ Given how important the *process* of self-assessment seems to be, it may be that law societies can facilitate meaningfully improved outcomes by simply making a self-assessment instrument available to law practices and providing training on its use.

Another issue related to efficacy is the fact that lawyers must opt-in to using voluntary processes. There is a real concern that many lawyers will be reluctant to participate. Indeed, Fortney notes, in relation to her study of the NSW self-assessment process, “a number of the respondents questioned

¹¹⁷ Parker *et al*, “Regulating Law Firms,” *supra* note 3 at 493.

¹¹⁸ *Ibid.*

¹¹⁹ Treviño *et al*, *supra* note 7 at 643.

or even opposed being required to complete a [self-assessment form].”¹²⁰ There is also a risk that the legal practices most inclined to use this service may be those that already have relatively strong ethical infrastructures and that the dysfunction present in firms with weak ethical infrastructures may make them less inclined to seek self-improvement through the use of voluntary tools. To the extent that enhanced advisory services or quality management accreditation are offered on a for-fee basis, this may also preclude or dissuade many firms from using it.

Although selective use is unavoidable when it comes to voluntary measures, a possible mitigating strategy is to incentivize their use. Building from her findings about Australian resistance to self-assessment, Fortney notes, “This experience points to the importance of taking steps to encourage lawyers to examine their practices as part of a risk management and practice improvement program.”¹²¹ One simple way to do this is to frame the issue of effective ethical infrastructure not only in terms of ethical duties but also in terms of risk management. As the research on the NSW model demonstrates, reflecting and engaging with the ethical infrastructure of one’s firm can yield possibly dramatic risk management benefits in terms of reduced regulatory complaints and malpractice suits. Reductions of these sorts are clearly in lawyers’ self-interest, even narrowly understood. This type of abstract incentive may not, as Fortney notes, be sufficient and “most practitioners may need additional incentives or a push to get them to devote the time to seriously examining firm processes.”¹²² In recognition of this, she considers the possibility of additional marketing and financial incentives, such as firms using quality management standard accreditation, as a marketing tool¹²³ and having insurers provide “premium discounts for lawyers who systematically examine firm policies, procedures, controls, and systems.”¹²⁴ These incentives would appear to be equally possible to deploy in a Canadian context. Law societies could choose to attach certain certification labels to the use of enhanced advisory services or self-assessment tools that could, in turn, be used by law practices for marketing purposes.¹²⁵ Because of the

¹²⁰ Fortney, “Role of Ethics Audits,” *supra* note 3 at 116.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ See, Fortney and Gordon, *supra* note 3 at 182 (noting that “lawyers may use such certification to retain clients and impress prospective clients”); see also Fortney, “Role of Ethics Audits,” *supra* note 3 at 115 (noting “firms might use such certifications to distinguish themselves for business development purposes”).

¹²⁴ Fortney, *ibid.* at 130.

¹²⁵ *Ibid.* Fortney notes that “lawyers may use such certification to retain clients and impress prospective clients”); see also *ibid.* at 115 (noting “firms might use such certifications to distinguish themselves for business development purposes”).

close connection between Canadian law societies and mandatory professional indemnity insurers, providing insurance discounts is also a viable option,¹²⁶ as is the possibility of law societies offering licensing fee discounts to lawyers who work in law practices that use the types of voluntary measures discussed above.

2) If New Regulation is Mandatory, Should Reforms be Discrete or Part of Widespread Regulatory Changes?

In the event that additional mandatory regulation is pursued, decisions around scope, content and process will need to be made. On scope, one initial question is whether new law society regulation promoting effective ethical infrastructures would be a discrete reform or part of widespread regulatory changes. For example, should additional regulation of ethical infrastructures be a standalone measure or should it be introduced in conjunction with (1) alternative business structures and/or (2) entity regulation?

The overseas reforms discussed above have not simply generated North American interest in the potential regulation of ethical infrastructure in law practices, but have also ignited discussion about the possibility of initiating other reforms, like the introduction of alternative business structures (ABS). In the Canadian context, Ontario particularly stands out given the work of the Law Society of Upper Canada's Alternative Business Structures Working Group and the recent approval by Convocation to launch a consultation on ABS.¹²⁷ Currently under consideration in Ontario is the possibility of allowing for non-lawyer ownership of law firms (either up to 49% or, alternatively, removing all restrictions) and allowing law firms to provide both legal and non-legal services.¹²⁸ Notable for the discussion here is the fact that the Working Group, in setting out various

¹²⁶ Indeed, LawPro, the mandatory insurer for Ontario lawyers, already provides a "risk management credit" to lawyers who participate in continuing professional development programs that include risk management content; see "Risk Management Credit", LawPro, <<http://www.lawpro.ca/RMcredit/>>.

¹²⁷ Law Society of Upper Canada (News Release) "Law Society to launch consultation on alternative business structures" (February 27, 2014), online: Law Society of Upper Canada <http://www.lsuc.on.ca/uploadedFiles/For_the_Public/News/News_Archive/2014/ABS-news-release-feb27-2014-FINAL.pdf>.

¹²⁸ To be precise, the Working Group identified the following four structural and services models as options for consideration as permissible regulatory structures, and for consultation:

- (a) entities that provide legal services only, and in which non-licensee owners are permitted an ownership share of up to 49 per cent;
- (b) entities that provide legal services only, and in which there are no restrictions on non- licensee ownership;

ABS options for consideration, has also taken the position “that firm or entity based regulation is advisable whether or not ABS liberalization occurs” and, as noted above, has advocated for “compliance based regulation” in relation to existing firms to supplement the current conventional disciplinary model in place in the province.¹²⁹ If ABS is introduced in Canada, this will require regulatory change, which may in turn provide a “disruptive” moment that will open the door to introducing forms of regulation that better promote effective ethical infrastructures within Canadian law firms.¹³⁰ This, indeed, is what happened in Australia – the introduction of ILPs as an available practice structure was the direct precursor to the introduction of the self-assessment process discussed above. That said, it also bears taking to heart the comments of the ABS Working Group that proceeding towards more institutionally-focused and proactive regulatory orientations should not be considered *contingent* on the introduction of ABS and that there are good reasons to reform the current regulatory approach in relation to existing practice structures. The current discussions taking place about regulatory reform in Nova Scotia, for example, are largely taking place in the absence of discussion about introducing ABS.

Building on the above, it should also be noted that, for the purposes of this discussion, the issues of entity regulation and the regulation of the ethical infrastructures of law practices are treated as distinct, albeit related, issues. For clarity, the term “entity regulation” is used here to reference direct regulatory control over legal practices, in addition to over individuals. The English requirement that firms go through an authorization process before delivering any legal services would, for example, fall under this understanding of entity regulation. Although the topic of regulator

-
- (c) entities which may provide both legal services and non-legal services (except those identified by the Law Society as posing a regulatory risk), and in which non- licensee owners are permitted an ownership share of up to 49 per cent; and
 - (d) entities which may provide legal services as well as non-legal services (except those identified by the Law Society as posing a regulatory risk), and in which there are no restrictions on non- licensee ownership.

Ontario, The Law Society of Upper Canada, *Report to Convocation*, (Toronto: The Law Society of Upper Canada, 2014), online: The Law Society of Upper Canada <[http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/convfeb2014_PRC\(1\).pdf](http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/convfeb2014_PRC(1).pdf)>.

¹²⁹ *Ibid* at 1444-45.

¹³⁰ Susan Fortney has made a similar point in speaking to the American context, noting that if the ABA and state regulators follow the lead taken in other jurisdictions to allow for non-lawyer ownership, this may lead to increased regulatory attention to ethical infrastructure as a means of allaying concerns that non-lawyer ownership will “undermine core values of the legal profession and public protection;” see Fortney, “Role of Ethics Audits,” *supra* note 3 at 117.

involvement in promoting effective ethical infrastructures is often discussed hand-in-hand with entity regulation, there is nothing that *requires* entity regulation in order to regulate the ethical infrastructures of law practices.¹³¹ Indeed, the NSW model discussed above provides one example of ethical infrastructure regulation without explicit entity regulation: the obligation for ILPs to maintain and implement appropriate management systems does not directly reside with the ILPs. Instead, the governing legislation mandates that each ILP have a “legal practitioner director” who is responsible for, *inter alia*, ensuring that appropriate management systems are implemented and maintained.¹³² In the event that a legal practice fails to implement and maintain appropriate management systems, it is the individual legal practitioner director, and not the legal practice as an entity, who is disciplined.¹³³

To be sure, there are good reasons to include a pro-active focus on ethical infrastructures in the context of entity regulation. American experiments in New York and New Jersey with engaging in entity regulation by simply including law firms as potential targets for reactive discipline within the conventional model have not yielded meaningful results: although these powers have been in place since the 1990s, very little enforcement has taken place.¹³⁴ In Canada, Nova Scotia is highlighted as standing out as being “the only jurisdiction in Canada with clear statutory authority to discipline law firms.”¹³⁵ British Columbia has

¹³¹ See e.g. Dodek, *supra* note 3; Schneyer, “On Further Reflection,” *supra* note 3.

¹³² *Legal Profession Act 2004*, (NSW), s 140.

¹³³ *Ibid.*

¹³⁴ For further discussion, see Dodek, *supra* note 3; Schneyer, “On Further Reflection,” *supra* note 3 (although, notably, Schneyer also observes that “New York’s firm-directed ethics rules have been a catalyst for the production of valuable guidance from New York bar associations on matters of law firm infrastructure and careful thinking about how to coordinate the ethical accountability of law firms and individual lawyers in the area of conflicts of interest”).

¹³⁵ Dodek, *ibid* at 413. Dodek also notes:

Although the Nova Scotia Barristers’ Society appears to be the only law society with an expressed intent to regulate law firms as entities, statutes delegating regulatory authority to the Law Society of Alberta and the Law Society of Newfoundland and Labrador contain language that would appear to provide for law firm regulation. Alberta’s *Legal Profession Act* explicitly grants the Society’s benchers the ability to “make rules respecting the rights and duties of law firms.” In practice, neither Law Society appears to exercise the available statutory powers to discipline law firms at this time.

Further, “the Barreau [du Québec] also has the power to discipline law firms, but in practice it does not,” see Dodek, *ibid* at 411.

For further discussion of the Nova Scotia Barristers’ Society authority to regulate law firms, see Creative Consequences *Phase 2*, *supra* note 23 at 12-13.

followed suit with legislative amendments introducing the authority to regulate law firms.¹³⁶ Although it is too soon to provide any sort of thorough assessment of these initiatives, they do not appear, to date, to have generated significant regulatory outcomes.¹³⁷

The point here is simply that the question of more law society involvement in promoting effective ethical infrastructures within Canadian law practices need not necessarily await direct regulation of law firms. Treating these issues as distinct also helps to ensure that the issue of effective ethical infrastructures is not inadvertently seen as a matter relevant to only large law firms. Although the emergence of large law firms and the complexity of their legal practices and governance structures make an attention to ethical infrastructure important, ethical infrastructure is, fundamentally, no less important in smaller firms or in the practices of sole practitioners. Indeed, Schneyer contends that the “regulatory gap” appears particularly pronounced when it comes to sole practitioners and small law firms given that they are the subjects of the disproportionately high percentage of disciplinary complaints.¹³⁸ In terms of possible effectiveness of regulatory intervention and firm size, the Fortney study revealed that firm size yielded no statistically significant difference in how respondents perceived the learning value of the self-assessment process that ILPs have to complete in NSW.¹³⁹ Sole practitioners and small practices need to be part of the conversation about the promotion of effective ethical infrastructure.¹⁴⁰ Framing the issue primarily through the lens of entity regulation risks obscuring this reality.

In Canadian jurisdictions where issues of ABS and/or proactive entity regulation are already on the policy agenda, it would seem to make sense to integrate strategies of increased regulator involvement in the ethical infrastructure of law practices within a broader reform scheme. However, for jurisdictions where broader reforms are not on the immediate to short-

¹³⁶ “Changes to Legal Profession Act include authority to regulate law firms”, online: Law Society of British Columbia, <<http://www.lawsociety.bc.ca/page.cfm?cid=2514>>).

¹³⁷ The Nova Scotia Barristers’ Society has recently advised, for example, “that they rarely receive complaints against law firms and no law firm has ever been found guilty of professional misconduct;” see *Creative Consequences Phase 1*, *supra* note 38.

¹³⁸ Schneyer, “On Further Reflection,” *supra* note 3 at 627.

¹³⁹ Fortney and Gordon, *supra* note 3 at 175.

¹⁴⁰ Statistically speaking, this is a significant group. To take, for example, recent Ontario statistics, in 2013, 34% of the province’s lawyers worked as sole practitioners and another 30% worked in firms with 10 or less lawyers; see Ontario, The Law Society of Upper Canada, LSUC’s 2013 *Annual Report* (Toronto: The Law Society of Upper Canada, 2013), online: The Law Society of Upper Canada <<http://www.annualreport.lsuc.on.ca/2013/en/annual-report-data.html#size-lawfirm-licensee>>.

term policy agenda, there is no reason that increased regulatory attention to promoting effective ethical infrastructures cannot also be considered as stand-alone reforms. While inclusion of this issue within broader reforms would presumably allow for certain synergies, there are also benefits attached to more discrete reform. The cost outlay for a law society to adopt a mandatory self-assessment process like that used in Australia would be significantly less than undertaking a whole-scale package of reforms that involves bringing entities within the regulatory fold and/or liberalizing the business structures in which lawyers can practice. The Australian experience also suggests an additional danger of “packaging” regulatory reform: when the self-assessment process was introduced there, it was introduced in conjunction the advent of ABS entities and its application was limited to ILPs. This initial coupling is only now on the cusp of being transcended with the introduction of the *Legal Profession Uniform Legislation* which will allow regulators to direct all practice entities to adopt appropriate management systems. In other words, the details of regulatory packaging can create inertia that is difficult to overcome.¹⁴¹

In short, regulating ethical infrastructure does not have to be part of, or await, a comprehensive regulatory overhaul, but it can be usefully part of one. A potentially helpful way to think about this is in terms of notion of responsive regulation as described by Braithwaite and Ayres who observe that “for the responsive regulator, there are no optimal or best regulatory solutions, just solutions that respond better than others to plural configurations of support and opposition that exist at any particular moment in history.”¹⁴² The following comments found in a consultant’s report to the Nova Scotia Barristers’ Society that was commissioned in the context of their current exploration of regulatory reform also bear consideration:

¹⁴¹ It should be noted that in Ontario, the LSUC Working Group on ABS has appeared to take this type of “danger” into account. As mentioned in Part 3, the Working Group has taken the position “that firm or entity based regulation is advisable whether or not ABS liberalization occurs” and “compliance based regulation” in relation to existing firms should also be considered to supplement the current conventional disciplinary model in place in the province; see Ontario, The Law Society of Upper Canada, *Report to Convocation*, (Toronto: The Law Society of Upper Canada, 2014), online: The Law Society of Upper Canada <[http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/convfeb2014_PRC\(1\).pdf](http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/convfeb2014_PRC(1).pdf)>.

¹⁴² Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992) 5. For further discussion of responsive regulation, see Malcolm Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Washington, DC: Brookings Institution, 2000).

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.¹⁴³

The issue of consultation, in particular, will be considered in the final section of this Part discussing the issue of lawyer “buy-in.”

3) If New Regulation is Mandatory, What Aspects of a Law Practice's Ethical Infrastructure Should New Regulatory Efforts Address?

As discussed in Part 2, the concept of ethical infrastructure can be helpfully conceptualized not only in terms of the ethical duties that lawyers owe to their clients but also in relation to broader duties owed to the public and in relation to “human resources” practices relevant to internal firm members that might also impact ethical compliance. Taking this broad conceptualization to heart can help to carve out a uniquely made-in-Canada, made-for-Canada regulatory solution in the area of ethical infrastructure. One critique of the Australian model is that the ten objectives against which firm’s management systems are assessed are “primarily consumer focused.”¹⁴⁴ At a more general level, the English reforms were also very influenced by a consumerist agenda and, indeed, consumers remain a major focus of the current regulatory scheme.¹⁴⁵

One example of how attention to broader duties could be tangibly incorporated into practical measures to encourage more effective ethical infrastructures is the CBA Ethical Practices Self-Evaluation Tool. Included within the CBA Tool are discussions of best practices in relation to internal firm matters like diversity in hiring and lawyer wellbeing as well as in relation to access to justice and the rule of law. Under the heading of “Hiring,” for example, the Tool identifies an objective of the firm engaging in “careful, fair and equitable hiring practices” and lists a number of potential systems and practices to ensure objective is met, such as:

- Interviewers and lawyers who make hiring decisions receive training on gender and racial stereotypes as well the potential role of unconscious bias in hiring decisions.
- Written interviewing guidelines are used.

¹⁴³ Creative Consequences *Phase I*, *supra* note 38.

¹⁴⁴ Parker *et al.*, “Regulating Law Firms,” *supra* note 3 at 499.

¹⁴⁵ For further discussion, see e.g. John Flood, “Will There Be Fallout from Clementi? The Repercussions for the Legal Profession after the Legal Services Act 2007” (2012) Mich St L Rev 537.

- An employment equity and diversity hiring policy is in place.
- Diversity performance within the firm is measured regularly.

In addition to looking at the CBA Tool, one can also find a manifestation of broader understandings of ethical infrastructure in a “Draft NSBS Self-Assessment Tool” released by the Nova Scotia Barristers’ Society in November 2014.¹⁴⁶ For example, Element 10 of this Tool addresses “Achieving Access to Justice.”¹⁴⁷

The question of content also highlights the need for more empirical research about the nature of ethical infrastructures currently in place in Canadian legal practices. In a 2002 article, Elizabeth Chambliss and David Wilkins made this recommendation in relation to American law firms, suggesting, among other things, that the “the bar could require firms to report on their ethical infrastructure and publish the aggregated results” and that “the bar should support academic research on law firms’ ethical infrastructure.”¹⁴⁸ Such measures would be equally valuable in the Canadian context. Additional areas of research could include studies aimed at providing a better understanding of the conditions that promote good behaviour or optimal service delivery within law firms. There is a significant set of organizational behaviour literature on this topic generally, but more targeted research is necessary to understand how the observations made and conclusions reached in this literature play out in the legal services context.¹⁴⁹ While Milton Regan’s current work on law firm culture, funded by the Law School Admission Council, will no doubt produce important data on this topic,¹⁵⁰ targeted Canadian studies would also be worthwhile.

Finally, robust risk monitoring is also key to optimizing any regulatory involvement in law practice ethical infrastructure. To realize the preventive benefits of regulatory engagement with the ethical infrastructures of legal practices, it is necessary to know what we are trying to prevent. With a view to operating under a more inclusive understanding of risk monitoring, this should involve study of not only client complaints but also more

¹⁴⁶ Nova Scotia Barristers’ Society, “Draft NSBS Self-Assessment Tool” (November 10, 2014), online: <<http://nsbs.org/transform-regulation>>.

¹⁴⁷ *Ibid.*

¹⁴⁸ Chambliss and Wilkins, *supra* note 3 at 716; see also Regan, *supra* note 5 at 153-54 (also calling for additional research).

¹⁴⁹ For a review of some of this literature see, for example, Treviño *et al*, *supra* note 7.

¹⁵⁰ This work is referenced in Regan, *supra* note 5.

systemic concerns in the legal services sector, like those related to access and diversity.

4) *If New Regulation is Mandatory, How Might Lawyer “Buy-in” Be Generated?*

A final set of issues concerns process. As discussed above, the idea of additional regulation is likely to be met with suspicion and/or resistance by Canadian lawyers. Although the nature of regulation is such that the regulated “often does not want it, and will not be pleased by it,”¹⁵¹ there are reasons why the issue of “buy-in” may be particularly important to initiatives that seek to engage with law practice ethical infrastructure. In their discussion of Australian self-assessment process, Parker *et al* note, among other things, Sommerlad’s work studying the implementation of “quality initiatives” in the English legal aid sector and Sommerlad’s findings that many solicitors found the requirements implemented by the initiatives “too prescriptive and controlling,” leading many practitioners to either leave the legal aid field or to “respond to the regulation with ritualistic efforts to comply with processes that do not necessarily achieve the access to justice and rule of law outcomes we might hope for from legal aid.”¹⁵² There are, no doubt, a variety of reasons for these negative outcomes in the particular circumstance that Sommerlad studied. This example does, however, highlight the risk that regulatory efforts in the area of ethical infrastructure could potentially result in “ritualistic and ineffective ‘box-ticking’” rather than meaningful efforts to report and improve.¹⁵³ Research also strongly suggests that, in order for ethical infrastructures to be optimally effective, it is important that firm leaders signal and model a commitment to the area.¹⁵⁴ A certain degree of lawyer “buy-in” does seem to be important here.

To be sure, the challenges in obtaining lawyer support for a new regulatory initiative that would involve more external oversight into their daily practice should not be understated. Empirical studies record lawyers, generally, as having “an especially strong desire for autonomy ... tend[ing]

¹⁵¹ Sparrow, *supra* note 142 at 62.

¹⁵² Parker *et al*, “Regulating Law Firms,” *supra* note 3 (discussing Sommerlad’s research as reported in Hilary Sommerlad, “The Implementation of Quality Initiatives and New Public Management in the Legal Aid Sector in England and Wales: Bureaucratisation, Stratification and Surveillance” (1999) 6 *Int’l J Legal Profession* 311; and Hilary Sommerlad, “Reflections on the Reconfiguration of Access to Justice (2008) 15 *Int’l J Legal Profession* 179).

¹⁵³ The phrase “ritualistic and ineffective ‘box-ticking’” is taken from Parker *et al*, “Regulating Law Firms,” *ibid*.

¹⁵⁴ See e.g. Prajogo, *supra* note 90 (discussing “top management commitment” as an important factor in implementing ISO 9001 within a law firm).

to score at close to the ninetieth percentile”¹⁵⁵ This desire for autonomy ought to be seriously taken into account. The Sommerlad study about the introduction of “quality initiatives” in the English legal aid sector provides an example of the demoralizing effects of an overbearing regime. In his recent article, Regan observes that “[r]esearch on corporate compliance initiatives indicates that a program can trigger [an] instrumental orientation if it fails credibly to emphasize the substantive values that the program is designed to vindicate [and in so doing] will elicit only provisional and contingent compliance, and may even undercut its basic objective on encouraging ethical behavior.”¹⁵⁶

On a more helpful note, however, recognizing the potential importance of autonomy and professional identity to lawyers can assist in guiding regulatory developments. Within the Australian model, and to a lesser extent within the English model, one can see that lawyer autonomy is given a prominent role. As discussed above, the regulator’s expressed intention with NSW self-assessment process is to implement a “light touch ‘education towards compliance’ strategy”¹⁵⁷ and “to encourage ILPs to build up ethical behaviours and systems that suit their own practices rather than imposing complex management structures on practices regardless of what actually makes sense for them.”¹⁵⁸ Significant control remains in the lawyers’ hands. In thinking about the issue of buy-in, law societies may also want to take to heart research that concludes that “[v]iews about authority are strongly connected to judgements of the fairness of the procedures through which authorities make decisions” and that “one important element in feeling that procedures are fair is a belief on the part of those involved that they had an opportunity to take part in the decision-making process.”¹⁵⁹ Such observations suggest that, if there is going to be a move towards increased regulator involvement in the ethical infrastructures of Canadian law practices, involving stakeholders early and throughout the process is key.¹⁶⁰ The NSW experience of involving stakeholders early on to define the content of “appropriate management systems” is one example of how this could be done. Tied to above

¹⁵⁵ Regan, *supra* note 5 at 172, citing Larry Richard, “Herding Cats: The Lawyer Personality Revealed” in *Report to Legal Management*, (August 2002), online: <<http://www.managingpartnerforum.org/tasks/sites/mpf/assets/image/MPF%20-%20WEBSITE%20-%20ARTICLE%20-%20Herding%20Cats%20-%20Richards1.pdf>>.

¹⁵⁶ Regan, *supra* note 5 at 156.

¹⁵⁷ Parker *et al.*, “Regulating Law Firms,” *supra* note 3 at 468.

¹⁵⁸ *Ibid* at 473.

¹⁵⁹ Tom Tyler, *Why People Obey the Law* (Princeton: Princeton University Press, 2006) at 162, 163; Regan, *supra* note 5 at 166.

¹⁶⁰ I note that following a review of the development of the NSW process and the CBA Tool, the authors of *Creative Consequences Phase 2*, *supra* note 23, observe: “The process that both jurisdictions engaged in is, in our view critical.”

discussion about autonomy, participants in the NSW consultative process had a clearly expressed preference that the process to evaluate management systems be flexible and give firms “the autonomy to implement systems ‘appropriate’ for their circumstances and that ‘a one size fits all’ approach requiring management systems would neither be desirable nor feasible.”¹⁶¹ The fact that this preference was taken into account in the eventual policy adopted may be one reason for the observed success of the Australian model. Another example of significant consultation is the Nova Scotia Barristers’ Society’s consultation on regulatory reform following the publication of its *Transformation Report* in October 2013. The consultation has included, among other things, soliciting feedback on a background document and inviting lawyers to answer an online survey¹⁶² as well as conducting workshops with lawyers working in various environments (e.g. sole practitioners, partners in firms of various sizes, in-house counsel and government lawyers).¹⁶³

Finally, the issue of *incentives* should also be considered in the context of new mandatory regulation. Although the ability in a mandatory process to conduct audits and impose sanctions provides powerful “stick-like” incentives to participate,¹⁶⁴ it is also worthwhile to consider the use of “carrots” including the possibility of using a risk management frame to discuss the reforms. Providing financial and marketing benefits in relation to a mandatory process may be more difficult, but are still presumably possible: licensing fee deductions could be given, for example, for those who comply in a timely fashion.

5. Conclusion

Improving ethical outcomes in the delivery of legal services requires attention to what happens, both formally and informally, at an institutional level in law practices. Canadian law societies have already recognized this insofar as they do such things as regulate trust firm accounts, engage in practice reviews and develop practice management materials. If one looks

¹⁶¹ Fortney and Gordon, *supra* note 3 at 161.

¹⁶² Creative Consequences *Phase 1*, *supra* note 38.

¹⁶³ Creative Consequences, *Transforming Regulation and Governance Project, Phase 3* (June 2014), online: Nova Scotia Barristers’ Society <<http://nsbs.org/transform-regulation>>.

¹⁶⁴ Fortney and Gordon note in their study, for example, that:

The risk of a regulatory audit may serve as a disincentive for directors to simply check boxes or misrepresent firm practices. Of the persons who noted their agreement or disagreement, the largest percentage of respondents (43%) agreed with the following statement: “The possibility of a Practice Audit by the OLSC contributes to candor when directors completed the SAP.”

Fortney and Gordon, *supra* note 3 at 180.

to what is happening in other jurisdictions, however, it is clear that law societies could do more when it comes to promoting effective ethical infrastructures in Canadian law practices. This article has sought to make out the case for enhanced law society involvement in the ethical infrastructures of Canadian law practices and to outline some of the policy considerations that law societies should take into account if they decide to become more robustly engaged.