FROM COLLEAGUE TO COP TO COACH: CONTEMPORARY REGULATION OF LAWYER COMPETENCE

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Over the last several decades, Canadian law societies have significantly expanded their regulatory reach in relation to the post-entry competence of lawyers. In this article, a novel framework is proposed to trace the path to this current state of affairs: specifically, four different "waves" or models are identified. A Collegial Model of regulation is identified as existing for most of the twentieth century before being replaced with a Policing Model of regulation in the 1970s. It is submitted that contemporary regulation of post-entry lawyer competence is characterized by the emergence of a Coaching Model that supplements a continuing Policing Model. Most recently, Canadian law societies have proposed new forms of entity regulation that represent, it is argued here, an emerging Hybrid Model that encompasses the Policing Model and Coaching Model in a new relationship.

In addition to providing this novel descriptive framework, this article also has normative ambitions and offers an evaluation of existing and future proposals to regulate post-entry competence. Regulatory theory and governance scholarship are both drawn upon to conduct this analysis. It is argued that the current approach represents a positive and significant regulatory shift towards focusing on the public interest as opposed to lawyer interests, which had dominated historically. At the same time, issues of transparency, expertise and costs remain of concern. The Hybrid Model approach embodied in new entity-based regulatory initiatives now under consideration is identified as one way to address these concerns. However, both the process used to implement such a model and the model's ultimate content will be key determinants of its success in any given jurisdiction.

Au cours des dernières décennies, les différents barreaux du Canada ont nettement élargi leurs pouvoirs de réglementation en matière des compétences professionnelles des avocats après leur admission. Le présent article propose un cadre de référence inédit qui permet de suivre le cheminement qui a mené à la

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situation actuelle. Cet article signale notamment quatre « vagues » ou modèles différents de réglementation. C'est le modèle collégial qui est reconnu comme étant celui qui aura été en vigueur pendant la majeure partie du vingtième siècle, avant d'être remplacé par un modèle de surveillance dans les années 1970. L'auteure soutient que la réglementation contemporaine des compétences professionnelles des avocats après leur admission au barreau est caractérisée par l'avènement d'un modèle d'encadrement qui vient compléter un modèle de surveillance qui persiste. Récemment , les différents barreaux du Canada ont proposé de nouveaux types de réglementation qui représentent—selon ce que fait valoir l'article—l'émergence d'un modèle hybride , lequel s'inspire à la fois des modèles de surveillance et d'encadrement tout en les réaménageant en une nouvelle relation.

En plus d'offrir ce cadre de référence inédit, cet article affiche également des ambitions normatives en présentant une évaluation des différentes propositions, actuelles et futures, de réglementation en matière des compétences professionnelles des avocats après leur admission au barreau. Cette analyse s'inspire autant de théories sur la réglementation que de travaux de recherche sur la gouvernance. On y fait valoir que l'approche actuelle représente une réorientation réglementaire importante et constructive qui privilégie l'intérêt public plutôt que les intérêts des avocats, auxquels la priorité a traditionnellement été accordée. En même temps, certaines questions de transparence, de compétences techniques et de coûts demeurent préoccupantes. L'article propose que l'approche du modèle hybride, incarnée dans de nouvelles initiatives réglementaires à l'échelle organisationnelle qui sont actuellement à l'étude, serait une des façons de répondre à ces préoccupations. Toujours est-il que ce seront à la fois le processus utilisé pour la mise en œuvre d'un tel modèle et sa teneur finale qui constitueront des facteurs déterminants du succès que pourra connaître ce modèle dans une province ou un territoire donné.

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1. Introduction

Lawyers need to be competent in order to properly serve clients. This is uncontroversial. It is perhaps surprising, then, that for most of their histories, Canadian law societies did not regulate the competence of lawyers after they were admitted to the bar. Indeed, as late as the 1970s, it was an open question as to whether law societies even had the jurisdiction to regulate post-entry competence. This question was eventually answered in the affirmative and over the last several decades law societies have significantly expanded their regulatory reach in this area. The open questions now are: Are Canadian law societies doing a good job ensuring that clients are receiving competent legal services? Could they do better? This article seeks to provide some preliminary answers after first tracing the path that Canadian law societies have taken to contemporary competence regulation.

In this article, a novel framework is proposed to trace the path of contemporary competence regulation: specifically, four different "waves" or models are identified. A Collegial Model of regulation is identified as

existing for most of the twentieth century before being replaced by a Policing Model of regulation in the 1970s. It is submitted that contemporary regulation of post-entry lawyer competence is characterized by the emergence of a Coaching Model that supplements a continuing Policing Model. Most recently, Canadian law societies have proposed new forms of entity regulation that represent, it is argued here, an emerging Hybrid Model that encompasses the Policing Model and Coaching Model in a new relationship.

Tracing the last 100 years of competence regulation reveals a move away from insular lawyer-focused self-regulation towards a more publicly-minded regulatory focus. This move has occurred more recently than most might expect. During the era of the Collegial Model, law society involvement in post-entry competence was viewed primarily as a service to lawyers. Although the Policing Model brought with it some public protection by sanctioning incompetent lawyers, one of the primary motivations for introducing disciplinary mechanisms was a concern to protect the viability of malpractice insurance funds. In this regard, law society focus was arguably still on lawyers' interests rather than the public interest. The contemporary Coaching Model represents the first time that the public interest is robustly embedded within the regulatory approach. The emerging Hybrid Model holds promise of advancing the law societies' public interest mandates even further.

In addition to the above descriptive revelations, this article also has normative ambitions. In particular, both the present and potential future of law society post-entry competence regulation are evaluated using frameworks developed by regulatory theorists and governance scholars. Although regulatory and governance scholarship is an obvious source for insights about law society regulation, there is little work to date that has attempted to apply frameworks developed therein to developments in the legal profession. To be sure, these areas of study are expansive and, in some cases, the scholarship can be dense, using very detailed theories and esoteric terms to describe regulatory phenomena. For the purposes of this article, only a small portion of the work in this field will be canvassed in a relatively summary fashion.

Specifically, the Coaching Model is considered as an instance of what is termed in the literature as "new governance" and its current co-existence with the Policing Model's traditional "command-and-control" type approach is evaluated. The evaluation in this article uses the five criteria for assessing regulation set out by Robert Baldwin, Martin Cave, and Martin Lodge: (1) Is the action or regime supported by legislative authority? (2) Is there an appropriate scheme of accountability? (3) Are procedures fair, accessible,

and open? (4) Is the regulator acting with sufficient expertise? (5) Is the action or regime efficient?[1]

Following this evaluation, the emerging Hybrid Model is considered in terms of an effort to move beyond a regime wherein the Policing Model and Coaching Model operate side-by-side in a complementary manner into a single and more "transformative" integrated system.[2] Drawing on work of governance and regulatory scholars, the potential promise of this new Hybrid Model and the likely conditions for its success are explored.

Part 2 sets out the definitional framework and regulatory background that inform the analysis. Part 3 traces law society regulation (or lack thereof) of lawyer post-entry competence between the turn of the twentieth century and the 1970s. Part 4 then canvasses the emergence of a Policing Model in the 1970s in which post-entry competence became explicitly acknowledged as part of law society regulatory mandates. Part 5 takes up the Coaching Model, which has come to supplement the Policing Model. Mandatory continuing professional development, practice advisors and reviews, practice management guidance, mentoring, and personal assistance services are discussed. It is argued that these initiatives reflect a *coaching* approach (as opposed to simply a "proactive" approach) insofar as they embody three characteristics—namely, being continuous, holistic, and tailored. Motivations for adopting this regulatory approach and similar efforts taking place in other jurisdictions are also considered. Part 6 then provides a preliminary evaluation as to whether the current regulatory approach—the continuance of a Policing Model, supplemented by an emerging Coaching Model—represents "good" regulation using the five criteria noted above. Finally, Part 7 explores and evaluates proposed entity-based regulatory reforms as embodying a Hybrid Model.

2. Definitions and Background

Although the terms "regulation" and "competence" will be familiar to readers, their specific meanings in a particular context are not necessarily self-evident. As such, a brief explanation of how these two terms are used in this article is warranted. Similarly, because this article narrows in on law society regulation of post-entry competence, this introductory section

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1 Robert Baldwin, Martin Cave & Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice*, 2nd ed (New York: Oxford University Press, 2012) at 26–31 [Baldwin, Cave & Lodge, *Understanding Regulation*].

2 On this issue, this article relies primarily on the work of David Trubek, see e.g. David M Trubek & Louise G Trubek, "New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation" (2006) 13 Colum J Eur L 1 [Trubek & Trubek]. The author would like to thank Dr Steven Vaughan for suggesting that Trubek's work might be relevant to the analysis here.

will also broaden the lens for a moment to discuss the broader regulatory environment relating to lawyer competence to provide some context to the analysis.

A) Regulation

For most lawyers, thinking of law society regulation probably leads them to think of professional conduct rules and their enforcement through disciplinary mechanisms. In this article, these rules and disciplinary systems are taken to be part of law society regulation, but so too are "softer" initiatives like continuing education, mentoring, practice management advice, and practice reviews.[3] An inclusive definition of regulation is adopted, along the lines of that proposed by Julia Black, who defines regulation as "the intentional use of authority to affect behaviour of a different party according to set standards, involving instruments of information-gathering and behaviour modification."[4]

B) Competence

In order to capture the evolving and somewhat elusive nature of lawyer competence, a functional definition is used in this article. In their study of professional competence in relation to physicians and trainees, Ronald Epstein and Edward Hundert define professional competence as "the habitual and judicious use of communication, knowledge, technical skills, clinical reasoning, emotions, values, and reflection in daily practice for the benefit of the individual and community being served."[5] If "legal reasoning" is substituted for "clinical reasoning", this definition effectively reflects the understanding of lawyer competence informing this analysis.

C) The Broader Regulatory Landscape

It is possible to identify multiple actors that regulate lawyer competence.[6] At the formal end of the spectrum, courts regulate lawyer competence through civil liability mechanisms: clients can seek compensation for

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3 See Part 5, below, for further details about the specifics of such initiatives.

4 Robert Baldwin, Martin Cave & Martin Lodge, "Introduction: Regulation—The Field and the Developing Agenda" in Robert Baldwin, Martin Cave & Martin Lodge, eds, *The Oxford Handbook of Regulation* (New York: University Press, 2010) 3 at 12.

5 Ronald Epstein & Edward Hundert, "Defining and Assessing Professional Competence" (2002) 287:2 J American Medical Assoc 226 at 226 [emphasis in original].

6 For further discussion of the multiple actors and institutions who act as regulators of the legal profession, see David B Wilkins, "Who Should Regulate Lawyers?" (1992) 105:4 Harv L Rev 799; Laurel S Terry, Steve Mark & Tahlia Gordon, "Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology" (2012) 80:6 Fordham L Rev 2661 [Terry, Mark & Gordon, "Trends and Challenges"].

inadequate legal services by suing for negligence, breach of contract, or breach of fiduciary duty. On the less formal end of the spectrum, clients can make competence determinations in hiring lawyers and may also, in some cases, wield additional influence by imposing certain terms as conditions to retaining a lawyer.[7] Similarly, insurers may attempt to instill better practices in the delivery of legal services by making practice management guidance available to their insured, providing incentives (for example, the "risk management credit" offered by the mandatory malpractice insurer for Ontario lawyers), or by dictating certain conditions of insurability.[8]

With respect to law societies, specifically, it is worth emphasizing that the focus of this article is on *post-entry* competence. Canadian law societies also regulate *pre-entry* competence or, perhaps better stated, *entry* competence, through licensing requirements, such as articling and bar exams. At an earlier stage, law schools have a role in constraining entry to the profession based on performance standards measured during the admission process and during law school. In the case of admitted students, law schools shape the professional development of lawyers-in-training through the curriculum delivered to them.

3. The Collegial Model: Lawyer Competence Before the 1970s

The idea that Canadian law societies can and should regulate the post-entry competence of lawyers is now well-entrenched. However, as pointed out by legal historian Wesley Pue, "the idea that any professional body should presume to dictate to individual practitioners how they should go about

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7 One growing practice, at least with respect to large clients and large law firms, is clients increasingly imposing their own visions of competence on lawyers by dictating specific policies and procedures through outside counsel guidelines. For further discussion of this phenomenon, see Christopher J Whelan & Neta Ziv, "Privatizing Professionalism: Client Control of Lawyers' Ethics" (2012) 80:6 Fordham L Rev 2577; Claire Coe & Steven Vaughan, "Independence, Representation and Risk: An Empirical Exploration of the Management of Client Relationships by Large Law Firms" (2015), online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2679005> [Coe & Vaughan] (independent research commissioned by the Solicitors Regulation Authority).

8 See "Risk Management Credit", *LawPRO*, online: <www.lawpro.ca/RMcredit/>. In Canada, the issue of additional conditions for insurability is likely to arise only in cases of excess, rather than mandatory insurance. For discussions about the role that insurers play in the American context (where malpractice insurance is generally voluntary and only one state, Oregon, requires that lawyers carry malpractice insurance), 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) 4:1 St Mary's J on Leg Malpractice & Ethics 112; Milton C Regan, "Nested Ethics: A Tale of Two Cultures" (2013) 42:1 Hofstra L Rev 143.

their business is of recent vintage"[9] and, indeed, "[i]t was only in the first half of the [twentieth] century that law societies were actively transformed into organisations with public regulatory roles which far surpassed those of earlier guild structures."[10] In his book outlining the history of the Law Society of Upper Canada ("LSUC"), Christopher Moore confirms that "[t]he idea that a law society was or should be a policing body rooting out crooked lawyers on behalf of vulnerable clients was almost unknown for most of the nineteenth century."[11]

To some extent, the Canadian Bar Association's ("CBA") introduction of its *Canons of Legal Ethics* in 1920 that was subsequently adopted by provincial law societies marked a shift towards broader law society interest in the ethical behaviour of lawyers.[12] However, the *Canons of Legal Ethics* did not include lawyer competence as a specific ethical requirement and, until developments beginning in the 1970s discussed in Part 4, below, "virtually no lawyers [were] disciplined for incompetence *per se*."[13] Indeed, as late as the mid-1970s, it was questioned whether law societies had the legal authority to deal with the competence of their members.[14] For most of the twentieth century, law society disciplinary attention was narrowly trained on lawyers engaged in financial wrongdoing or serious criminal misconduct.[15]

During this time period, Canadian law societies largely "relied upon the individual lawyer to maintain and improve his [or her] competence after

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9 W Wesley Pue, "Becoming 'Ethical': Lawyers' Professional Ethics in Early Twentieth Century Canada" (1991) 20:1 Man LJ 227 at 230 [Pue, "Becoming Ethical"].

10 W Wesley Pue, "Cultural Projects and Structural Transformation in the Canadian Legal Profession" in David Sugarman & W Wesley Pue, eds, *Lawyers & Vampires: Cultural Histories of Legal Professions* (Portland: Hart Publishing, 2003) 367 at 384.

11 Christopher Moore, *The Law Society of Upper Canada and Ontario's Lawyers, 1797-1997* (Toronto: University of Toronto Press, 1997) at 149–50 [Moore].

12 Pue, "Becoming Ethical", *supra* note 9 at 155; see also Canadian Bar Association, *Canons of Legal Ethics* (Ottawa: Canadian Bar Association, 1920) (the Canons had been adopted by British Columbia, Alberta, Saskatchewan, Manitoba, and Ontario by June 1921).

13 Harry W Arthurs, "Why Canadian Law Schools Don't Teach Legal Ethics" in Kim Economides, ed, *Ethical Challenges to Legal Education and Conduct* (Oxford: Hart Publishing, 1998) 105 at 113 [Arthurs, "Canadian Law Schools"].

14 WH Hurlburt, "The Very Model of a Modern Law Society" (1973) 11:2 Alta L Rev 310 at 325 (the Law Society of Alberta "does not supervise the competence of its members and it may have no legal power to do so" at 325).

15 See e.g. Moore, *supra* note 11 ("[f]rom the 1920s … lawyers were rarely disbarred for anything but stealing their clients' money or for being convicted of a crime" at 207); HW Arthurs, R Weisman & FH Zemans, "The Canadian Legal Profession" (1986) 11:3 American Bar Foundation Research J 447 (observing in 1986 "there is virtually no form of discipline exercised on lawyers except where the public is injured by way of fraud, perjury, or some other criminal act by a lawyer" at 489).

admission."[16] To the extent that lawyer competence was on the regulatory agenda, it took the form of collegial efforts such as providing continuing legal education programs for interested members, beginning in the mid-1940s.[17] The "burgeoning" of continuing legal education across Canada in subsequent decades no doubt had some positive influence on the competence of Canadian lawyers.[18] From a regulatory perspective, however, it is worth noting that the provision of continuing legal education during this period was usually viewed "as a service to those lawyers who want[ed] it and less as a means of maintaining and improving the competence of lawyers."[19] As explored in Part 4, below, the idea that lawyer competence was something for law societies to monitor and control did not take hold until the last quarter of the twentieth century.

4. The Policing Model: Disciplining Incompetence

The beginnings of a formal approach to regulating lawyer competence emerged in the 1970s with the introduction of legislative amendments that explicitly recognized law society jurisdiction over the post-entry competence of members and the adoption of associated professional conduct rules that explicitly recognized a lawyer's ethical duty to be competent. These developments marked a new era of law society disciplinary mandates that unambiguously included scrutiny of lawyer competence. In other words, law societies began to police lawyer incompetence.

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16 WH Hurlburt, ed, *The Legal Profession and Quality of Service: Report and Materials of the Conference on Quality of Legal Services* (Ottawa: Canadian Institute for the Administration of Justice, 1979) at 9 [Hurlburt, *The Legal Profession*].

17 Although the experience with continuing legal education programs across Canada was varied, it appears that some of the earliest programs took the form of refresher courses for veterans returning from World War II. For discussion of such programs in Ontario and British Columbia, see Moore, *supra* note 11 at 226; Alfred Watts, *History of the Legal Profession in British Columbia, 1869-1984* (Vancouver: Law Society of British Columbia, 1984) at 72 [Watts]. By the 1970s, however, continuing legal education was a much more developed feature of the Canadian landscape. In 1978, for example, the then-Director of Education for the Law Society of Manitoba reported: "Everywhere, the demand from the profession for more frequent, varied and comprehensive programs seems to have grown rapidly. The multiplicity of jurisdictions, programs and programming agencies makes it difficult, probably impossible, to provide wholly reliable statistics … but it is clear that both the number of programs and the number of total registrations has increased dramatically in the past few years." DT Anderson, "A Discussion Paper Prepared for the Conference on the Quality of Legal Services, Ottawa, Canada, October 1978" in Hurlburt ed, *The Legal Profession, supra* note 16 at 108. For further discussion of the history of continuing legal education in Canada and its status by the 1970s, see also Neil Gold, "Continuing Legal Education: A New Direction" (1975) 7:1 Ottawa L Rev 62.

18 The verb "burgeoning" as used here is borrowed from Hurlburt, *The Legal Profession*, *supra* note 16 at 9.

19 *Ibid*.

A) A Change in Regulatory Mandate

This change in regulatory mandate did not occur through a single reform adopted concurrently across the country, but instead emerged as a patchwork of initiatives in the 1970s. One important development was the CBA's inclusion, for the first time ever, in its 1974 Code of Professional Conduct, a rule on "Competence and Quality of Service" that provided:

> (a) The lawyer owes a duty to his client to be competent to perform any legal services which the lawyer undertakes on his behalf.
>
> (b) The lawyer should serve his client in a conscientious, diligent and efficient manner and he should provide a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation.[20]

Roughly around the same time, a number of provincial law societies formed committees to study the issue of lawyer competence. These committees made recommendations that lawyer competence be explicitly included within law societies' disciplinary mandates, leading to legislative change in several cases.[21]

By 1978, interest in lawyer competence was such that a three day national Conference on Quality of Legal Services was convened by the Federation of Law Societies of Canada in conjunction with the CBA, drawing together law society leaders, practitioners, academics, and judges to discuss how law societies could better discharge their responsibility for maintaining and improving the post-entry competence of their members.[22] A follow-up to this conference took place in 1980 in the form of a two and a half

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20 The Canadian Bar Association, *Code of Professional Conduct*, Ottawa: CBA, 1974.

21 As summarized by William Hurlburt:

> Two formal acts of recognition of the profession's responsibility occurred in 1973. In Quebec, the Professional Code enacted in that year provided for investigation by professional governing bodies of the competence of their members. In British Columbia, a Special Joint Committee on Competency of the Law Society and the B.C. Branch of the C.B.A. made extensive recommendations for the exerciseby the Law Society of jurisdiction over competence, which were followed by legislation … In 1975, the Law Society of Alberta formally approved a Committee report recognizing its responsibility in the field, and in 1977 a Special Committee on Competence of the Law Society of Manitoba, usually called the Matas Committee, made wide-ranging recommendations for the promotion and control of competence the substance of which has since been approved by the benchers of the Law Society.

WH Hurlburt "Incompetent Service and Professional Responsibility" (1980) 18:2 Alta L Rev 145 at 145–46 [Hurlburt, "Incompetent Service"].

22 Hurlburt, *The Legal Profession, supra* note 16.

day workshop, which drew a similarly impressive array of participants.[23] Currently, all Canadian law societies recognize lawyer competence as an ethical duty within their respective codes of professional conduct.[24]

B) Reasons for the Change

The move by Canadian law societies to enact formal competence rules in the 1970s appears to be motivated by several factors. The first apparent factor relates to an increasing number of civil claims against lawyers starting in the 1960s and the emergence of mandatory malpractice insurance. In short, law societies started to be worried about the presence of too many incompetent lawyers and the impact on the viability of malpractice insurance funds. As observed by Harry Arthurs:

> The 1974 Code—and I was one of its authors—was not the cause of a professional crisis over competence; it was an effect. Causes have to be found elsewhere. The most obvious is the profession's experience with malpractice insurance. Partly as a referred result of rising malpractice claims in the United States, malpractice insurance became pretty much universal in Ontario during the 1960s. In the early 1970s, it became mandatory; and as soon as it became mandatory, the Law Society had to step in initially to define the terms of coverage, then to negotiate premiums and finally to act as a self-insurer. Thus, the governing body for the first time acquired a direct stake in the costs and consequences of incompetence.[25]

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[23] WH Hurlburt, ed, *The Legal Profession and Quality of Service: Further Report and Proposals* (Edmonton: Federation of Law Societies of Canada, 1981).

[24] The Law Society of Alberta, *Code of Conduct*, Calgary: Law Society of Alberta, 2015, ch 2, rules 2.01(1)–2.01(2); The Law Society of British Columbia, *Code of Professional Conduct for British Columbia*, Vancouver: Law Society of British Columbia, 2015, ch 3, rules 3.1-1–3.1-2; The Law Society of Manitoba, *Code of Professional Conduct*, Winnipeg: Law Society of Manitoba, 2015, ch 3, rules 3.1-1–3.1-2; The Law Society of New Brunswick, *Code of Professional Conduct*, Fredericton: Law Society of New Brunswick, 2003, ch 2; The Law Society of Newfoundland and Labrador, *Code of Professional Conduct*, St. John's: Law Society of Newfoundland and Labrador, 2016, ch 3, rules 3.1-1–3.1-2; The Law Society of the Northwest Territories, *Code of Professional Conduct*, Yellowknife: Law Society of the Northwest Territories, 2015, part 3, rules 3(1)–3(2); Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2015, ch 3, rules 3.1-1–3.1-2; The Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: Law Society of Upper Canada, 2015, ch 3, rules 3.1-1–3.1-2; The Law Society of Prince Edward Island, *Code of Professional Conduct*, Charlottetown: Law Society of Prince Edward Island, 2014, ch 3, rules 3.1-1–3.1-2; *Professional Code*, CQLR c C-26, arts 10, 20–21, 49(3), 65(4), 88(4), 132, 134(6); The Law Society of Saskatchewan, *Code of Professional Conduct*, Regina: Law Society of Saskatchewan, 2015, ch 2, rules 2.01(1)–2.01(2); The Law Society of Yukon, *Code of Professional Conduct*, Whitehorse: Law Society of Yukon, 2015, ch 3, rules 3.1-1–3.1-2.

[25] HW Arthurs, "The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?" (1995) 33:4 Alta L Rev 800 at 807 [Arthurs, "The Dead Parrot"].

Arthurs' contention that concerns over the viability of legal malpractice insurance funds contributed to the adoption of formal competence rules finds support in other commentary and also, more directly, in contemporaneous discussions by regulators themselves.[26]

The insurance explanation, however, provides only a partial account as to why Canadian law societies came to adopt formal ethics rules regarding lawyer competence and began including lawyer competence within their disciplinary mandates. In introducing a formal competence rule as part of its overhaul of ethics rules in 1974, the CBA was undoubtedly influenced by the fact that, several years earlier, the American Bar Association ("ABA") introduced for the first time an explicit competence rule in its 1969 *Model Code of Professional Responsibility*.[27] It also bears noting that, around the same time, law societies were under a considerable amount of governmental scrutiny and it is plausible that this increased governmental scrutiny was also a motivating factor for Canadian law societies to take responsibility for the competence of their members as a means of fostering public confidence in the legal profession and warding off potential government incursions on their self-regulatory powers.[28] Indeed, a 1975 report from the Law Society of Alberta's Committee on Standards of Performance observed, "[i]f there is anything which the Law Society in the past has failed to grapple with successfully, and if there is anything which is likely to bulk large enough in the minds of the public to threaten the self-regulation of the legal

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[26] For discussion in commentary, see e.g. Moore, *supra* note 11 ("[t]he warranty against incompetence the Law Society had given to the public by its insurance program was beginning to force it to police the competence of its members more directly" at 304); Ronald B Cantlie, "General Account of the Law Society's Structure, Power and Duties" in Cameron Harvey, ed, *The Law Society of Manitoba, 1877-1977* (Winnipeg: Peguis, 1977) 54 (the pressure on the Law Society to punish lawyer incompetence was "steadily and inexorably increasing", in part due to the establishment of a mandatory malpractice insurance plan and that "the logical consequence of this is for the Society to discourage incompetence among its members by visiting it with some sort of punishment, and thus treating it as a type of misconduct" at 61). For contemporaneous discussion by regulators, see e.g. Watts, *supra* note 17 (the Treasurer of the Law Society of British Columbia in 1977 stressed the need to take jurisdiction over lawyer competence not only as a means of protecting the public but also due to the fact that "the rising rate of claims for professional negligence, many of which are unfortunately well warranted, threaten[ed] to destroy our insurance scheme" at 78).

[27] The Canadian Bar Association, Special Committee on Legal Ethics, *Code of Professional Conduct: Preliminary Report* (Ottawa: CBA, 1973) (the CBA Committee charged with reviewing the 1920 Canons and recommending the changes that would ultimately take the form of the 1974 CBA *Code of Professional Conduct* cited the 1969 ABA Code as a source of inspiration and met with the chair of the ABA committee that had drafted the ABA Code before submitting their recommendations); The American Bar Association, *Model Code of Professional Responsibility*, Chicago: ABA, 1969.

[28] For further discussion of this scrutiny, see e.g. Amy Salyzyn, "The Judicial Regulation of Lawyers in Canada" (2014) 37:2 Dal LJ 481.

profession, it is the area of neglect and delay."[29] These concerns about self-regulation, coupled with the above-mentioned concerns about the viability of malpractice insurance funds, paint a general picture of the adoption of the Policing Model being significantly motivated by lawyers' interests as opposed to public or client protection.[30]

C) Limitations of the Policing Model

The Policing Model proved to be limited in several respects. In the 1970s and 1980s, critiques relating to secrecy and delays, along with allegations that law societies unduly favoured lawyers' interests over those of the public, resulted in a general lack of confidence in the disciplinary system.[31] Although reforms have addressed these issues to a significant extent, the Policing Model of regulating lawyer competence has a number of other, seemingly intractable, structural limitations.[32] As a number of commentators have written about elsewhere, regulating the behaviour of lawyers through formal professional conduct rules enforced by a disciplinary system fails to address many important ethical problems due to: (1) its primary reliance on complaints to trigger regulatory attention; (2) its reactive nature; (3) its focus on individual behaviour (rather than institutional practices); and (4) its use of minimum standards.[33]

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[29] The Law Society of Alberta, *Report of the Committee on Standards of Performance, 1975*, cited in Hurlburt, *The Legal Profession*, *supra* note 16 at 363–69.

[30] That said, and as helpfully pointed out by one reviewer of this article, the concern with the viability of malpractice insurance funds can also be seen as implicating the public interest—if a negligent lawyer is not insured and does not have sufficient financial resources to pay a damage award awarded by a court, his or her clients will not be able to receive compensation in a civil action as a practical matter.

[31] For further discussion, see e.g. Moore, *supra* note 11 at 301–02; see also Joan Brockman & Colin McEwen, "Self-Regulation in the Legal Profession: Funnel In, Funnel Out, or Funnel Away?" (1990 5:1 CJLS 1.

[32] Beginning in the mid-1980s, a significant number of reforms were made to the disciplinary processes of Canadian law societies, including increased transparency and independence through providing for public disciplinary hearings and the inclusion of laypersons on disciplinary panels. For further discussion, see Richard Devlin & Albert Cheng, "Re-Calibrating, Re-Visioning and Re-Thinking Self-Regulation in Canada" (2010) 17:3 Intl J Leg Profession 233 at 237–39 [Devlin & Cheng].

[33] For further discussion, see e.g. Amy Salyzyn, "What If We Didn't Wait? Canadian Law Societies and the Promotion of Effective Ethical Infrastructure in Law Practices" (2015) 92:3 Can Bar Rev 507 [Salyzyn, "What If We Didn't Wait?"]; Laurel S Terry, "Trends in Global and Canadian Lawyer Regulation" (2013) 76:1 Sask L Rev 145 [Terry, "Trends in Global"]; Ted Schneyer, "The Case for Proactive Management-Based Regulation to Improve Professional Self-Regulation for US Lawyers" (2013) 42:1 Hofstra L Rev 233; 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) 4:1 St Mary's LJ Symposium on Leg Ethics & Malpractice 112 [Fortney, "Ethics Audits"]; Ted Schneyer, "On

These four limitations are particularly acute when it comes to regulating competence. Complaints are a very imperfect method for capturing lawyer incompetence for two major reasons. First, many clients may not be able to determine if they have received incompetent service.[34] Second, even if a client believes that they have received incompetent service, they have little incentive to complain to the law society given that lawyer disciplinary systems are not focused on compensating clients but rather on punishing or rehabilitating the lawyers who have performed incompetently.[35] Moreover, even when complaints are received, the reactive nature of the disciplinary system means that it is exclusively concerned with incompetence that has already taken place and does not proactively seek to prevent problems.[36]

Further Reflection: How 'Professional Self-Regulation' Should Promote Compliance with Broad Ethical Duties of Law Firm Management" (2011) 53:2 Ariz L Rev 577; John Briton & Scott McLean, "Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era" (2008) 11:2 Leg Ethics 241; Ted Schneyer, "Professional Discipline for Law Firms?" (1991) 77:1 Cornell L Rev 1; Ted Schneyer, "A Tale of Four Systems: Reflections on How Law Influences the 'Ethical Infrastructure' of Law Firms" (1998) 39:2 S Tex L Rev 245; Adam M Dodek, "Regulating Law Firms in Canada" (2011) 90:2 Can Bar Rev 383.

34 Gillian K Hadfield, "The Price of Law: How the Market for Lawyers Distorts the Justice System" (2000) 98:4 Mich L Rev 953 at 968. It is well recognized that legal services are what economists call "credence goods"—a category of goods whose buyers "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" (at 968). As Hadfield points out, the fact that the law is often complex, highly ambiguous, and unpredictable makes it very difficult for clients to judge the service that they have received (at 968–69).

35 The webpages of several Canadian law societies explicitly direct members of the public to civil remedies in relation to concerns or complaints about lawyer negligence. Although this is helpful information to the extent that it directs clients to the legal process in which they have the opportunity to receive compensation (i.e. the civil justice system), statements on several of these websites indicating that the law societies do not investigate complaints of negligence are likely to dissuade at least some clients from making complaints about lawyer incompetence. See e.g. "Fee Disputes and Negligence", *Nova Scotia Barristers' Society*, online: <nsbs.org/fee-disputes-and-negligence> (stating, in part, "The Society's Professional Responsibility department does not investigate complaints of lawyer negligence because professional negligence (e.g., errors and omissions) is not generally considered a disciplinary matter"); "For the Public: Common Concerns: Quality of Service", *Law Society of Saskatchewan*, online: <www.lawsociety.sk.ca/for-the-public/do-i-have-a-complaint/common-concerns/quality-of-service/negligence.aspx> (stating, in part, "If you believe your lawyer has committed an error/omission or was negligent in the conduct of your legal matter, your recourse is to commence legal proceedings against the lawyer for compensation"); "Negligence", *The Law Society of Prince Edward Island*, online: <lawsocietypei.ca/negligence> (stating, in part, "The Society does not investigate complaints of lawyer negligence because professional negligence (e.g., errors and omissions) is not generally considered a disciplinary matter").

36 For further discussion, see Fortney, "Ethics Audits", *supra* note 33 at 138; Terry, Mark & Gordon, "Trends and Challenges", *supra* note 6; Salyzyn, "What If We Didn't Wait?", *supra* note 33 at 524–25.

The overwhelming focus of disciplinary regimes on the conduct of individual lawyers also means that certain problems may go un-redressed if the underlying source of the incompetence is systemic, such as a lack of appropriate systems of delegation, supervision, and other office management systems rather than a specific individual's lack of knowledge or skill.[37]

Finally, when disciplining incompetence, it can be difficult to discern which cases involve breaches of minimum standards such that sanctions are warranted. Although law society codes of conduct have evolved from the simple mandate that "the lawyer owes a duty to his client to be competent to perform any legal services which the lawyer undertakes on his behalf," found in the 1974 CBA *Code of Professional Conduct*, to multi-part definitions of competence found in current provisions,[38] the current provisions remain vague and open-ended insofar as they are rooted in the concept of a lawyer

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[37] See e.g. WH Hurlburt, "Workshop Paper No. 1: Causes of and Remedies for Inadequate Services" in WH Hurlburt, ed, *The Legal Profession and Quality of Service: Further Report and Proposals* (Edmonton: Federation of Law Societies of Canada, 1981) (citing, "the lawyer's lack of proper support systems (e.g. the lack of systems of delegation, systems of supervision, and office systems generally)" as one cause of inadequate services).

[38] See e.g. the definition of lawyer competence found in Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: FLSC, 2017, ch 3.1-1:

> "Competent lawyer" means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer's engagement, including:
>
> (a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises;
>
> (b) investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action;
>
> (c) implementing as each matter requires, the chosen course of action through the application of appropriate skills, including:
>
> (i) legal research;
> (ii) analysis;
> (iii) application of the law to the relevant facts;
> (iv) writing and drafting;
> (v) negotiation;
> (vi) alternative dispute resolution;
> (vii) advocacy; and
> (viii) problem solving;
>
> (d) communicating at all relevant stages of a matter in a timely and effective manner;
>
> (e) performing all functions conscientiously, diligently and in a timely and cost-effective manner;
>
> (f) applying intellectual capacity, judgment and deliberation to all functions;
>
> (g) complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers;

having and using "relevant knowledge, skills and attributes."[39] Determining what is or is not "relevant" in the delivery of legal services in order to decide if a lawyer should be punished for incompetence can be a tricky exercise. As observed in a 2008 British Columbia disciplinary case, "[i]t is a fine point whether conduct that betrays an effective lack of any 'lawyering' or judgment constitutes professional misconduct or incompetence."[40]

Difficulties in determining the line between permissible mistakes and punishable incompetence appears to have led to a lack of disciplinary enforcement in this area. In the 1980s and 1990s, Harry Arthurs wrote about what he called the "ethical economy" of lawyer regulation whereby law societies focus their disciplinary efforts on uncontroversial cases of lawyer misconduct involving either "clear dishonesty (especially in regards to clients' funds)" or "subversion of the profession's regulatory processes."[41] Based on a review of several studies, Arthurs observed that more ambiguous lawyer misconduct, such as incompetence, failed to attract much disciplinary attention.[42] More recently, in a 2011 article, Alice Woolley examined the continuing relevance of Arthurs' ethical economy theory and confirmed that lawyer incompetence was much less often the subject of allegations in disciplinary proceedings as opposed to matters such as misappropriation or mishandling of trust funds or deception of third parties, other lawyers, courts, or the law society.[43]

Moving forward to 2016, it is difficult to get a clear picture of how Canadian law societies are currently dealing with lawyer competence in their disciplinary systems. On the one hand, it appears that lawyer competence still makes up a relatively small proportion of the issues considered in law society discipline hearings. Statistics derived from reported discipline decisions in Alberta, British Columbia, and Ontario (i.e. the three provinces, outside of

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(h) recognizing limitations in one's ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;

(i) managing one's practice effectively;

(j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and

(k) otherwise adapting to changing professional requirements, standards, techniques and practices.

39 *Ibid.*

40 *Re Nielsen*, 2009 LSBC 8 at para 23, [2008] LSSD No 149 (QL).

41 Arthurs, "Canadian Law Schools", *supra* note 13 at 112; see also Arthurs, "The Dead Parrot", *supra* note 25.

42 Arthurs, "Canadian Law Schools", *supra* note 13 at 113–14.

43 *Ibid.*

Quebec, where the vast majority of Canadian lawyers practice[44]) reveal that, of 264 reported cases in 2015, only 18 (6.8%) dealt with allegations relating to a violation of the competence rule contained in the relevant professional code of conduct, and this number drops to ten cases (3.8%) if the eight mortgage fraud related cases that were before Ontario's Law Society Tribunal are excluded from consideration.[45] In terms of the nature of these cases, only two dealt with a standalone allegation of incompetence and the allegations

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[44] Federation of Law Societies of Canada, Membership (2013 Statistical Report), (Ottawa: Federation of Law Societies of Canada, 2013) online: <docs.flsc.ca/STATS2013ReportFINAL.pdf>.

[45] These statistics were generated as follows:

Alberta

The cited information relates to a CanLII search conducted of 2015 Law Society of Alberta Hearing Committee cases that indicated that 14 decisions were published that year. A further search of these cases, using the search terms "competence" OR "competent", brought up three cases, only one of which dealt with incompetence allegations (*Law Society of Alberta v Bright*, 2015 ABLS 5 (CanLII) [*Bright*]). This case involved a standalone allegation of incompetence.

British Columbia

The cited information relates to a CanLII search conducted of 2015 Law Society of British Columbia Hearing Committee cases that indicated that 50 decisions were published that year. A further search of these cases, using the search terms "competence" OR "competent", brought up 22 cases, only two of which dealt with incompetence allegations (excluding any sentencing decisions) (*Re Reith*, 2015 LSBC 50, [2015] LSDD No 243 [*Re Reith*]; *Re Wesley*, 2015 LSBC 5 (CanLII) [*Re Wesley*]). Only one of the cases (*Re Wesley*) dealt with a standalone allegation of competence.

Ontario

The cited information relates to a CanLII search conducted of 2015 Law Society Tribunal cases, which indicated that 200 decisions were published that year. A further search of these cases, using the search terms "competence" OR "competent", brought up 67 cases, only 15 of which dealt with incompetence allegations (excluding appeals, sentencing or procedural decisions or decisions involving paralegals). The 15 cases are *Law Society of Upper Canada v Hohots*, 2015 ONLSTH 72, [2015] LSDD No 83 [*Hohots*]; *Law Society of Upper Canada v Jaszi*, 2015 ONLSTH 132, [2015] LSDD No 164 [*Jaszi* 132]; *Law Society of Upper Canada v Jaszi*, 2015 ONLSTH 149, [2015] LSDD No 190 [*Jaszi* 149]; *Law Society of Upper Canada v Munro*, 2015 ONLSTH 45, [2015] LSDD No 39; *Law Society of Upper Canada v Talarico*, 2015 ONLSTH 222, [2015] LSDD No 268 [*Talarico*]; *Law Society of Upper Canada v Willoughby*, 2015 ONLSTH 129, [2015] LSDD No 151 [*Willoughby*]; *Law Society of Upper Canada v Vakili*, 2015 ONLSTH 219, [2015] LSDD No 270 [*Vakili*]; *Law Society of Upper Canada v Chin*, 2015 ONLSTH 91, [2015] LSDD No 107 [*Chin*]; *Law Society of Upper Canada v Sriskanda*, 2015 ONLSTH 188, [2015] LSDD No 230 [*Sriskanda*]; *Law Society of Upper Canada v Scott*, 2015 ONLSTH 135, [2015] LSDD No 172; *Law Society of Upper Canada v Abrahams*, 2015 ONLSTH 107, [2015] LSDD No 184 [*Abrahams*]; *Law Society of Upper Canada v Durno*, 2015 ONLSTH 122, [2015] LSDD No 138 [*Durno*]; *Law Society of Upper Canada v Nicholson*, 2015 ONLSTH 110, [2015] LSDD No 123 [*Nicholson*]; *Law Society of Upper Canada v Botnick*, 2015 ONLSTH 90, [2015] LSDD No 106 [*Botnick*]; *Law Society of Upper Canada v Burtt*, 2015 ONLSTH 165, [2015] LSDD No 213 [*Burtt*]. None of these cases involve standalone allegations of incompetence.

at issue tended to involve very clear failures on the part of the lawyer. More specifically, the allegations in the 18 cases can be categorized as follows:

- Failing to take a very important step in a file /not doing an important step properly to the significant detriment of a client;[46]

- Failing to follow a client's specific instructions/taking actions contrary to the client's express instructions in relation to a significant issue;[47]

- Doing nothing or close to nothing on a file;[48]

It bears noting that the percentages cited are likely to be overstated somewhat given that the total subset of 264 cases includes disciplinary decisions at the first instance and also procedural, sentencing, costs decisions, and appeals.

[46] Including:

• Failing to prepare and enter an order relating to child support, such that the client subsequently had difficulties obtaining the assistance of the Family Maintenance Enforcement Program to compel her husband to make the child support payment (*Re Wesley*, *supra* note 45).

• Failure to complete the work for which he had been retained (i.e. failing to file the Statement of Claim within 30 days of issuance of the Notice of Action) and failing to advise the client of this failure (*Burtt*, *supra* note 45).

• Failure to serve approximately 20 refugee claimants competently by failing to prepare adequate Personal Information Forms in all cases ("the most important document in a refugee claim"), and also failing to adequately prepare several of the same clients for their refugee hearings (*Hohots*, *supra* note 45). Similar allegations in relation to a different lawyer serving refugee claimants were made in the companion cases, *Jaszi* 132, *supra* note 45; *Jaszi* 149, *supra* note 45.

Numerous failures in relation to citizenship applications: (a) failed to have the original applications signed and failing to submit them; (b) delayed in submitting the second applications so that they were returned stale-dated; (c) failed to monitor the filing and processing of the applications; and (d) failed to advise the client of the progress of the applications (*Willoughby*, *supra* note 45).

[47] For example: making an application for sale and partition of a property and seeking a costs award when explicitly told not to (*Bright*, *supra* note 45).

[48] Including:

• Failing to serve two clients competently—in one case, after issuing an originating notice in a lawsuit, the lawyer failed to complete documentary productions, failed to negotiate a discovery plan, failed to respond or attend in respect of a motion concerning discovery, and failed to advise his client of the motion and of the Order made in respect of that motion; in the other case, the lawyer was retained in May 2010 "but did no work whatsoever" on the file and in September 2013, the client was forced to retain another lawyer in order to obtain his inheritance (*Law Society of Upper Canada v Munro*, 2015 ONLSTH 45).

• Failure to perform any work in relation to an estate file including failing to file an Application for the Appointment of an Estate Trustee with a Will, failing to obtain the required Certificate of Appointment, and failing to file a defence to a challenge of the fill,

- Being a "dupe" or knowing participant in mortgage fraud;[49] and

- Failure to properly consider, determine or understand who the lawyer's clients were and failure to take reasonable steps regarding determining who had the authority to sign certain documents and provide instructions.[50]

This information seems to reinforce the "ethical economy" theory insofar as it suggests that law societies are reluctant to pursue anything but the clearest cases of incompetence in their disciplinary systems and that competence cases form a small part of disciplinary dockets.

That said, there are a few good reasons to take the raw numbers cited above with a grain of salt. It bears observing, for example, that there are a significant number of disciplinary cases that deal with issues most people would consider involve lawyer competence but that are dealt with under rules other than the competence rule, such as the closely related "quality of service" rule.[51] Moreover, and perhaps most importantly, information available from the law societies indicates that only a very small percentage of complaints received get addressed in a formal public disciplinary hearing.[52] It is much more common for a case to either be privately closed as unmeritorious with results only known to the subject lawyer and the

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all of which the lawyer had undertaken to do (*Law Society of Upper Canada v Scott*, 2015 ONLSTH 135)

49 See *Talarico*, *supra* note 45; *Vakili*, *supra* note 45; *Chin*, *supra* note 45; *Sriskanda*, *supra* note 45; *Abrahams*, *supra* note 45; *Durno*, *supra* note 45; *Nicholson*, *supra* note 45; *Botnick*, *supra* note 45.

50 *Re Reith*, *supra* note 45.

51 An example of the latter issue can be found in *Re Mclean*, 2015 LSBC 47, [2015] LSDD No 227 wherein the allegation against the lawyer involved a failure to respond promptly to communications that required a response and were received from a client's former counsel. In this case, the allegation was that there was a breach of the professional conduct rule that requires lawyers to "reply reasonably promptly to any communication from another lawyer that requires a response", rather than an allegation of a breach of the competence rule. More broadly on this point, The Law Society of Upper Canada's 2014 Annual Report states that 53% of issues referred to the disciplinary tribunal for that year involved "Client Service Issues", which include "fail to account, fail to communicate and fail to serve" (no statistics are available that separate out matters involving the competence rule) ("2014 Annual Report: Discipline", *The Law Society of Upper Canada*, online: <www.annualreport.lsuc.on.ca/2014/en/operational-trends/discipline.html> [LSUC, "2014 Report: Discipline"]).

52 See e.g. "Quick Facts: Complaints and Discipline", *The Law Society of British Columbia*, online: <www.lawsociety.bc.ca/page.cfm?cid=468&t=Quick-Facts-about-Complaints-and-Discipline> (noting that 88% of complaints result in investigation and 16% of investigated complaints result in a referral to the discipline committee who might recommend a variety of things short of a formal public hearing, such as no further action, a conduct letter, a conduct meeting, or a conduct review); "2014 Annual Report: Complaints and Investigations", *The*

complainant or to be informally resolved with the lawyer receiving private counselling or a reprimand from the law society, which may or may not be publicized.[53] For these reasons, merely tracking reported disciplinary decisions on the topic of lawyer competence does not capture the full extent of regulatory activity in this area.

However, notwithstanding the above qualifications, there is no dispute that the Policing Model remains inherently limited due to its reliance on complaints to trigger its use and its reactive nature. Part 5, below, explores the ways in which Canadian law societies have recognized these limitations of the Policing Model and have attempted to more ambitiously address post-entry competence through a supplementary Coaching Model.

5. The Coaching Model and Contemporary Competence Regulation

In recent decades, the Policing Model, as discussed above in Part 4, has been supplemented with additional law society initiatives that scrutinize and facilitate the post-entry competence of members. Although much of the current discussion about reforms in regulating post-entry lawyer competence focuses on existing and emerging "pro-active" regulatory initiatives,[54] this article refers to the emergence of a Coaching Model in order to focus on a broader set of features: namely, the extent to which such new initiatives are continuous, holistic, and tailored.[55] Following a review of

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Law Society of Upper Canada, online: www.annualreport.lsuc.on.ca/2014/en/operational-trends/complaints.html [LSUC, "2014 Report: Complaints"] (noting that in 2014, 6,155 new complaints were received and of those complaints "2,640 cases were closed on the basis of jurisdiction, early resolution or, lack of sufficient information to commence an investigation. 1,863 cases were investigated and closed with a staff caution, advice to the licensee on best practices, or the conclusion that the allegation was not established").

53 LSUC, "2014 Report: Complaints", *supra* note 52. Increasingly, it appears that competence related issues are being diverted to alternative programs aimed at addressing incompetence, such as practice advisor or practice review programs that are discussed in more detail in Part 5, below.

54 See e.g. Jim Glass, "Developing a Proactive Approach to Continuing Competence", *The Advisory* 9:3 (December 2011) 15, online: <lsa-beta.developmentwebsite.ca/files/newsletters/Advisory_Volume_9_Issue_3_Dec2011.pdf>; Compliance-Based Entity Regulation Task Force, *Call for Input Consultation Paper: Promoting Better Legal Practices* (Toronto: The Law Society of Upper Canada, 2016), online: <www.lsuc.on.ca/uploadedFiles/compliance-based-entity-regulation-consultation-paper.pdf> [LSUC, "Promoting Better Legal Practices"]; The Law Society of Alberta, Law Society of Saskatchewan & The Law Society of Manitoba, "Innovating Regulation" (2015), online: <www.lawsociety.sk.ca/media/127107/INNOVATINGREGULATION.pdf> [Prairie Law Societies, "Innovating Regulation"].

55 Although it has been observed that the concept of coaching is "slippery" (see e.g. Atul Gawande, "Personal Best", *The New Yorker* (3 October 2011), online: <www.newyorker.com>), the concept is used here insofar as the observed features of the contemporary

the Coaching Model, this Part considers potential motivations for this new regulatory approach. These domestic developments are also situated as part of broader trends in lawyer regulation internationally.

A) The Coaching Model

Several different types of law society initiatives embodying a continuous, holistic, and tailored approach to regulating post-entry competence can be identified, including:

- **Mandatory Continuing Professional Development:** Currently, all 14 of the provincial and territorial law societies now mandate that their members participate in continuing professional development ("CPD").

- **Practice Reviews:** The existence of law society audit programs to monitor compliance with trust account requirements has a long lineage.[56] More recently, however, broader practice review and audit programs have been instituted by Canadian law societies.[57]

- **Practice Management Guidance:** Although law societies have been providing members with guides and other tools for some time, the practice guidance currently available on the websites of Canadian law societies appears to be more extensive than what was available in the past and more accessible to members given its electronic format.[58]

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regulation of lawyer competence share some of the features that are said to be common to coaching, including: an individualised, tailor-made approach, a systematic process designed to facilitate development, and a focus on awareness and responsibility (see Yossi Ives, "What is 'Coaching'? An Exploration of Conflicting Paradigms" (2008) 6:2 Intl J Evidence Based Coaching & Mentoring 100).

[56] For example, in his history of the legal profession in British Columbia, Alfred Watts notes that in 1958, a spot audit system was put into effect to monitor the trust accounts of British Columbia lawyers. See Watts, *supra* note 17 at 127.

[57] See e.g. "Practice Review Program", *Law Society of Saskatchewan*, online: <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); "Lawyer Practice Management Review" (25 May 2017), *The Law Society of Upper Canada*, online: <www.lsuc.on.ca/lawyer-practice-management-review/> [LSUC, "Lawyer Practice Management Review"] (targeting "[l]awyers one to eight years from the call to the Bar and in private practice").

[58] See e.g. "Support and Resources for Lawyers", *The Law Society of British Columbia*, online: <www.lawsociety.bc.ca/support-and-resources-for-lawyers/>; "Practice Advisors", *The Law Society of Alberta*, online: <www.lawsociety.ab.ca/lawyers-and-students/practice-advisors/>.

- **Mentoring:** Formal mentoring programs are another type of facilitative initiative now in place at many Canadian law societies.[59]

- **Personal Assistance Services:** In recognition of the importance of lawyer wellness, a significant number of Canadian law societies operate and/or fund confidential personal assistance services for their members.[60]

B) Continuous Engagement with Post-Entry Competence

Under the (un-supplemented) Policing Model, law society regulation of lawyer competence was largely scrutinized in the context of two types of discrete events: applications for entrance and receipt of complaints.[61] In contrast, contemporary law society engagement with lawyer post-entry competence has become considerably more continuous through the types of initiatives listed in the above subsection. For example, due to the institution of mandatory CPD requirements, all Canadian lawyers must report regularly to regulators regarding their educational endeavours. Detailed scrutiny of lawyers' post-entry competence also takes place through practice review programs. Practice management guidance on law society websites and

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59 See e.g. "Mentor Connect", *Law Society of Alberta*, online: <www.lawsociety.ab.ca/resource-centre/programs/mentor-connect/>; "Mentoring Programs for Ontario Lawyers" ", *The Law Society of Upper Canada*, online: <www.lsuc.on.ca/with.aspx?id=2147486616>

60 "Lawyers Assistance Programs", *The Law Society of British Columbia*, online: <www.lawsociety.bc.ca/support-and-resources-for-lawyers/lawyer-wellness-personal-support/lawyers-assistance-program/>; "Lawyers Health and Wellness Program", *The Law Society of Manitoba*, online: <www.lawsociety.mb.ca/member-resources/lawyers-health-wellness-program>; "Member Assistance Program", *The Law Society of Upper Canada*, online: <www.lsuc.on.ca/map/>; "Nova Scotia Lawyers Assistance Program", *NSLAP*, online: <www.nslap.ca>; "Yukon Lawyers Assistance Program", *The Law Society of Yukon*, online: <www.lawsocietyyukon.com/lawyersassistanceprogram.php>. More recently, Canadian law societies have developed more extensive programs that address wellness issues, see e.g. "Fitness to Practise Program", *Nova Scotia Barristers' Society*, online: <nsbs.org/for_lawyers/complaint_resolution_process/fitness_to_practise_program> [NSBS, "Fitness to Practise"].

61 For another way of looking at this issue, see Laurel Terry's account that provides a framework of lawyer regulation through the lens of three different stages:

1. the *beginning* stage of lawyer regulation, which includes admissions issues and entry into the profession;
2. the *middle* stage of lawyer regulation, which includes regulation of lawyers' day-to-day activities, including conduct rules; and
3. the *end* stage of lawyer regulation, which includes lawyer discipline and exclusion (or "striking off") from the profession.

Laurel S Terry, "The Power of Lawyer Regulators to Increase Client & Public Protection through Adoption of a Proactive Regulation System" (2016) 20:3 Lewis & Clark L Rev 717 at 754–55 [Terry, "The Power of Lawyer Regulators"] [emphasis in original].

mentoring programs, while voluntary, also offer continuous opportunities for regulatory engagement in relation to post-entry competence.

C) A Holistic View of Lawyer Competence

In addition to providing more continuous scrutiny and facilitation of lawyer competence, contemporary law society initiatives relating to lawyer competence also take a broader view of what it means to be a competent lawyer. While early conceptions of lawyer competence focused on "traditional" lawyerly skills and knowledge (for example, legal drafting or awareness of limitation periods), contemporary initiatives delve into a wider range of areas.[62] Initiatives relating to wellness as well as cultural and technological competence provide good examples of this new broader conception of lawyer competence.

The issue of lawyer wellness is entrenched as an important part of contemporary law society mandates. The need for such resources is clear, as a number of studies have confirmed what many lawyers know anecdotally: members of the legal profession disproportionately experience mental health and addiction related challenges.[63] Moreover, there is an established connection between such challenges and lawyer incompetence.[64] In addition to the personal assistance services mentioned above, many Canadian law societies have added practice management resources on their webpages

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62 For example, in a paper prepared for a 1980 workshop on the quality of legal services, the author writes:

> An analysis of incompetence into its constituents results in the following classification of causes:
>
> 1. The lawyer's lack of specific knowledge (e.g., of law or procedure).
> 2. The lawyer's lack of judgment (i.e. his inability to arrive at a proper decision upon the information which he has obtained, including the inability to arrive at a proper decision as to what information he should obtain).
> 3. The lawyer's lack of skill (e.g., the lack of the skills of research, the skills of drafting, the skills of negotiation or the skills of advocacy).
> 4. The lawyer's lack of proper support systems (e.g., the lack of systems of delegation, systems of supervision, and office systems generally).
> 5. The lawyer's lack of diligence.

Hurlburt, *The Legal Profession*, *supra* note 16 at 66–67.

63 For further discussion, see e.g. Megan Seto, "Killing Ourselves: Depression as an Institutional, Workplace and Professionalism Problem" (2012) 2:2 Western J Leg Studies art. 5; Patrick J Schiltz, "On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession" (1999) 52:4 Vand L Rev 871.

64 For example, in 2014, one law society executive estimated that more than 60% of lawyers involved in law society disciplinary processes have a mental health or addiction issue (Donalee Moulton, "Nova Scotia Stresses Rehabilitation Over Discipline For Troubled Lawyers", *Lawyers Weekly* (28 March 2014), online: <nsbs.org/nsbs-news-14>).

on the topic of lawyer wellness.[65] In Ontario, the issue of wellness is also addressed, albeit somewhat briefly, in the context of practice management reviews wherein questions are asked about topics such as work satisfaction, amount of work hours, and amount of vacation taken.[66] Nationally, one program that stands out is the Nova Scotia Barristers' Society's Fitness to Practise Program that aims to provide a voluntary, alternative process to lawyers with "capacity-related conduct issue[s] who ha[ve] come into contact with the Society either as a result of self-reporting, reporting by someone else or a complaint."[67] It is clear that Canadian law societies now devote significant resources to lawyer wellness and see this issue as an important part of their mandates.

Emerging law society interest in cultural and technological competence also reflects a broader understanding of lawyer competence on the part of regulators. With respect to cultural competence, the Nova Scotia Barristers' Society is again a national leader in providing programming to members on cultural competence, including presentations through the Society's YouTube channel,[68] in person continuing education events,[69] and in-person training.[70] In Ontario, discussions of potential new initiatives on cultural competence have taken place. For example, in a recent consultation report, the LSUC canvassed members on the question of how "the Law Society [could] enhance the profession's cultural competence through its Continuing Professional Development Programs."[71]

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65 See e.g. "Resources", Alberta Lawyers' Assistance Society, online: <albertalawyersassist.ca/resources/>; "Personal Management Practice Management Guideline", *The Law Society of Upper Canada*, online: <www.lsuc.on.ca/For-Lawyers/Improve-Your-Practice/Personal-Management-Practice-Management-Guideline/>.

66 LSUC, "Lawyer Practice Management Review", *supra* note 57; "April 2016 Convocation", *The Law Society of Upper Canada*, online: <www.lsuc.on.ca/with.aspx?id=2147502412> (in April 2016, the Law Society of Upper Canada approved the development of a "long-term mental health strategy … [that would build] on the Law Society's existing mental health initiatives and [lay] the groundwork to explore additional supports or programs that fall within the organization's mandate").

67 NSBS, "Fitness to Practise", *supra* note 60.

68 Nova Scotia Barristers' Society, "NS BarristersSociety", *YouTube*, online: <www.youtube.com/user/nsbarristerssociety/videos>.

69 "Sessions@Schulich—'Cultural Competence 101'", *Nova Scotia Barristers' Society*, online: <nsbs.org/event/2015/05/sessionsschulich-cultural-competence-101>.

70 "Resources for Lawyers and Law Students", *Nova Scotia Barristers' Society*, online: <nsbs.org/resources-lawyers-and-law-students> [NSBS, "Resources"].

71 Equity Initiative Department Working Group, Developing Strategies for Change: Addressing Challenges Faced by Racialized Licensees (Consultation Paper) (Toronto: The Law Society of Upper Canada, 2014) at 35, online: <www.lsuc.on.ca/uploadedFiles/Equity_and_Diversity/Members/Challenges_for_Racialized_Licensees/Consultation_Paper_Offical(12).pdf>.

In the area of technological competence, a number of Canadian law societies have begun to publish targeted resources for members. For example, the Law Society of British Columbia received considerable attention in relation to a checklist and guidelines that it issued in 2012 on the topic of cloud computing.[72] The LSUC has published a large number of Technology Practice Tips podcasts on its website dealing with topics such email encryption and writing apps[73] and has also published Technology Practice Management Guidelines that recognize, among other things, that "[l]awyers should have a reasonable understanding of the technologies used in their practice or should have access to someone who has such understanding."[74]

D) Tailor-Made Regulation

A third distinguishing element of contemporary lawyer competence initiatives is the extent to which such initiatives are tailored to suit individual lawyer needs. Under the Policing Model, the main guidance lawyers receive regarding competence consists of general rules contained in the professional conduct codes.[75] In contrast to these general efforts, the contemporary law society initiatives discussed above are much more tailored.

With respect to mandatory CPD in most jurisdictions, for example, lawyers are required to complete a minimum number of hours of CPD but are open to choose which programs best suit their individual needs.[76] In

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72 "Practice Resource: Cloud Computing Checklist v. 2.0" (May 2017), *The Law Society of British Columbia*, online: <www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/checklist-cloud.pdf>; Cloud Computing Working Group, "Practice Resource: Cloud Computing Due Diligence Guidelines" (27 January 2012), *The Law Society of British Columbia*, online: <www.lawsociety.bc.ca/docs/practice/resources/guidelines-cloud.pdf>.

73 "Technology Practice Tips—Podcasts", *The Law Society of Upper Canada*, online: <lsuc.on.ca/technology-practice-tips-podcasts-list/>.

74 "Technology Practice Management Guideline", *The Law Society of Upper Canada*, online: <www.lsuc.on.ca/with.aspx?id=2147491197>.

75 See e.g. the discussion in Watts, *supra* note 17 at 74.

76 While details vary, the majority of jurisdictions require members to complete 12 hours of CPD annually. See e.g. "Mandatory Continuing Professional Development (MCPD) Information", *The Law Society of Manitoba*, online: <www.lawsociety.mb.ca/education/CPD-requirements> (one hour of CPD "for each month or part of a month in a calendar year during which the lawyer maintained active practi[c]ing status"); "Continuing Professional Development (CPD)", *Law Society of the Northwest Territories*, online: <www.lawsociety.nt.ca/lawyers/continuing-professional-development-cpd> (12 hours of CPD each membership year); "Compulsory Professional Development" (January 2013), *Law Society of Nunavut*, online: <lawsociety.nu.ca/compulsory-professional-development/> (12 hours of CPD each year); "Continuing Professional Development", *The Law Society of Prince Edward Island*, online: <lawsocietypei.ca/continuing-professional-development> (24 hours of CPD every two years); "Information Law Society of Yukon Compulsory Profession Development",

some cases, the range of choices is considerable.[77] In Alberta, lawyers are provided even more latitude in that they are simply required to prepare, record, and declare a plan for their CPD on an annual basis.[78]

The available practice management guidance on law society websites can also be quite individualized in the sense that such guidance can be very specific to certain types of practices and tasks. The website for the Law Society of British Columbia, for example, has a far-reaching Practice Checklist Manual containing 41 distinct checklists in a number of practice areas, including corporate and commercial, criminal, family, litigation, real estate, wills and estates, and human rights and immigration.[79] By way of another example, the website for the LSUC provides significant written advice to lawyers on a wide range of topics, including bookkeeping and dealing with self-represented litigants.[80] The website also contains specific practice area advice for practitioners in administrative law, business law, civil litigation, criminal law, estates and trusts, family law, and real estate law.[81]

Law Society of Yukon, online: <www.lawsocietyyukon.com/pdf/Information%20-%20Compulsory%20Profession%20Development.pdf> (12 hours of CPD each year); "Continuing Professional Development Requirement", *The Law Society of Upper Canada*, online: <www.lsuc.on.ca/CPD-Requirement/> (12 hours of CPD each year); "Continuing Professional Development", *Law Society of New Brunswick*, online: <lawsociety-barreau.nb.ca/en/for-lawyers/continuing-professional-development/> (12 hours of CPD each year); "Continuing Professional Development (CPD)", *The Law Society of British Columbia*, online: <www.lawsociety.bc.ca/support-and-resources-for-lawyers/continuing-professional-development/> (12 hours of CPD each year); "Continuing Professional Development", *Law Society of Alberta*, online: <lsa-beta.developmentwebsite.ca/lawyers/cpd.aspx> [LSA, "Continuing Professional Development"] (the Law Society of Alberta is an outlier insofar as it does not prescribe a "mandatory minimum hourly requirement" for participating in CPD but instead requires that all active lawyers participate in "the annual planning, declaration and implementation of a CPD Plan").

77 See e.g. "Continuing Professional Development—Eligible Educational Activities", *The Law Society of Upper Canada*, online: <www.lsuc.on.ca/with.aspx?id=2147499738>. In Ontario, lawyers can meet their CPD requirements in a number of ways, including: (1) participating in CPD programs or courses offered by the Law Society, bar associations, private third party providers, or in-house within a law firm or government; (2) participating as a student in a college, university, or other designated educational program; (3) teaching; (4) acting as an articling principal; (5) writing or editing books or articles, or (6) participating in study groups.

78 LSA, "Continuing Professional Development", *supra* note 76.

79 "Practice Checklists Manual", *The Law Society of British Columbia*, online: <www.lawsociety.bc.ca/support-and-resources-for-lawyers/practice-checklists/>.

80 "Practice Management Topics", *The Law Society of Upper Canada*, online: <www.lsuc.on.ca/with.aspx?id=2147491211>.

81 "Lawyer Practice Area Resources", *The Law Society of Upper Canada*, online: <www.lsuc.on.ca/For-Lawyers/Manage-Your-Practice/Practice-Area/Lawyer-Practice-Area-Resources/>.

In cases of practice reviews (and the more extensive proposed initiatives in the area of entity regulation, discussed below) and mentoring, guidance is highly individualized as it is offered to lawyers on a one-on-one basis. In conducting its practice management reviews, for example, the LSUC sends a reviewer to attend in person at a lawyer's practice and then produce a tailored report containing an assessment of the practice and recommendations for improvement.[82]

Additionally, in January 2016, the LSUC approved the creation and funding of a new law practice coaching and advisory initiative for lawyers and paralegals, which includes among its stated goals to "provide coherent and systematic opportunities for the enhancement of competence" and to "ensure coach and advisor assistance also addresses unique and special needs."[83] The reference to "unique and special needs" reflects another important aspect of the tailoring of contemporary law society competence regulation. Increasingly, the needs of members of equity-seeking groups have become the focus of specific initiatives. In British Columbia, for example, the law society has established an Aboriginal Lawyers Mentorship program, one of the goals of which is to "support the development of the knowledge, skills and attributes needed by Aboriginal lawyers to be successful in their legal careers."[84] Other examples of specialized programming include the Nova Scotia Barristers' Society's Pride Mentorship Program that provides a forum for discussion, strategy, and support designed to improve the practice experience for LGBT lawyers[85] and the LSUC's Equity and Diversity Mentorship Program.[86]

E) Why Coaching?

As was the case in the context of the Policing Model, there is no single event that marks the emergence of the Coaching Model or one specific motivation that led to the adoption of this supplementary regulatory approach. Early forms of practice review, advisor programs, practice management guidance,

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82 LSUC, "Lawyer Practice Management Review", *supra* note 57.

83 "January 2016 Convocation", *The Law Society of Upper Canada*, online: <www.lsuc.on.ca/with.aspx?id=2147502150>.

84 "Aboriginal Lawyers Mentorship Program", *The Law Society of British Columbia*, online: <www.lawsociety.bc.ca/our-initiatives/equity-and-diversity/supporting-indigenous-and-diverse-lawyers/indigenous-lawyers-mentorship-program/>.

85 NSBS, "Resources", *supra* note 70.

86 "Equity and Diversity Mentorship Program", *The Law Society of Upper Canada*, online: <www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=9071>.

and mentoring, and personal assistance programs emerged in some provinces as early as the 1970s and 1980s but are still being expanded and refined.[87]

One important motivation for adopting these initiatives appears to be recognition of the limitations of the Policing Model, as discussed above. For example, in a 2000 consultation document regarding its regulatory role in relation to post-entry competence, the LSUC observed that, as early as the 1980s, the effectiveness of disciplinary proceedings dealing with lawyer incompetence was questioned given the reactive nature of discipline and the limited remedies available in the disciplinary process.[88] The same document frames the introduction of practice advisory services, practice review programs, and practice checklists in the 1980s as a response to such limitations.[89]

Law societies embracing a Coaching Model over several decades also maps onto a move by law societies away from conceptualizing themselves as service organizations advancing the members' interests towards a vision that places the public interest at the center of the regulatory mandate. Although the proposition that law societies ought to give primacy to the public interest when regulating is now uncontroversial, it is only recently that this has become an explicit part of law society mandates.[90]

Relatedly, from a more cynical perspective, this change can also be understood in relation to attacks on self-regulation and a corresponding desire on the part of law societies to put in place new initiatives to give the impression that they are modern, effective regulators that do not need to be replaced by governmental actors. In their examination of contemporary

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87 For an account of these early programs, see e.g. William Hulburt, "The Law Societies and the Provision of Advice and Assistance" in Hurlburt, *The Legal Profession*, *supra* note 16.

88 The Law Society of Upper Canada, *Implementing the Law Society's Competence Mandate: A Consultation Document* (Toronto: Law Society of Upper Canada, 30 March 2000) at 6.

89 *Ibid* at 8.

90 In Ontario, for example, it was only in 2007 that the Law Society of Upper Canada's duty to protect the public interest was explicitly incorporated into its governing legislation (*Access to Justice Act*, SO 2006, c 21, Schedule C, s 7). Although this duty was recognized in an earlier non-statutory Role Statement adopted by the Law Society of Upper Canada in 1994, the legitimacy of recognizing such a duty was contested at the time by the province's legal profession: when the Role Statement was circulated to members before its adoption, a third of respondents did not agree that the Law Society should subordinate members' interests to the public interest and almost half did not agree that the Law Society did not exist to advance members' interests (Moore, *supra* note 11 at 337). In British Columbia, amendments in 2012 removed from the list of objects of the province's Law Society the objective to "uphold and protect the interests of its members" (for further discussion of this amendment, see Terry, "Trends in Global", *supra* note 33 at 177, n 156).

Canadian law societies in 2010, Richard Devlin and Albert Cheng coined the term "defensive self-regulation" in describing what they saw as "a significant increase in the regulatory vigour of law societies" that was driven, at least in part, "by the fear of losing self-regulation" due to "global regime change" and the abandonment of self-regulation in England and Australia.[91]

Finally, the emergence in Canada of a Coaching Model for regulating lawyer competence is consistent with a broader trend seen in other common law jurisdictions. In Australia, for example, there are many examples of lawyer regulators providing practice management guidance that is similar to the Canadian examples mentioned above. The Legal Services Commission for Queensland, for example, has developed what it describes as:

> [A] varied and ever-expanding suite of short, sharp on-line surveys which allow law firms to review (or 'audit') aspects of their 'ethical infra-structure'—both their formal policies and procedures and management arrangements and also and in particular the unwritten rules and customs and behaviours that determine what actually happens in practice.[92]

In England and Wales, the frontline regulator for solicitors—the Solicitors Regulation Authority ("SRA")—approved a new approach for continuing competence in 2014 "to ensure solicitors remain competent throughout their working lives."[93] As part of this new approach, the SRA released a "Competence Statement" for solicitors as well as a toolkit designed to support solicitors in using the competence statement as a tool for continuing competence.[94] The new approach also requires solicitors to make an annual declaration that they have reflected on their practice and undertook regular learning and development so that their skills and knowledge remained up to date.[95]

In the United States, lawyer competence regulation varies from state-to-state. There are numerous examples, however, of state bar associations engaging in the types of programming discussed above. Examples include the following:

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91 Devlin & Cheng, *supra* note 32 at 256–57.

92 "Ethics Checks for Law Firms", *Legal Services Commission of Queensland*, online: <www.lsc.qld.gov.au/projects/ethics-checks>.

93 "SRA Board Announces New Approach to Ensure Solicitors Remain Competent" (21 May 2014), *Solicitors Regulation Authority*, online: <www.sra.org.uk/sra/news/press/sra-board-announces-new-approach-to-ensure-solicitors-remain-competent.page>.

94 "Statement of Solicitor Competence", *Solicitors Regulation Authority*, online: <www.sra.org.uk/solicitors/competence-statement.page>.

95 "Annual Declaration", *Solicitors Regulation Authority*, online: <www.sra.org.uk/solicitors/cpd/tool-kit/resources/annual-declaration.page>.

- The Massachusetts Bar Association has offered "Mentoring Circles" that "offer a unique spin on conventional mentoring by combining varying professional levels together and providing all members, senior and junior level, with the resources they need to develop and improve their management and leadership skills and grow within their profession."[96]

- The Wyoming State Bar has developed a law office self-audit checklist.[97]

- The State Bar of Georgia offers (for a fee) consultations that aim to identify and assess law office practice management processes that might be ineffective.[98]

In a recent article, American law professor Laurel Terry provides a helpful inventory of additional proactive initiatives provided by state lawyer regulators and notes that such initiatives include, among other things: ethics hotlines; law practice management assistance; continuing legal education requirements; mentoring; and practice standards.[99]

6. Evaluating the Current Approach: Is it "Good Regulation"?

As discussed above, the current approach to regulating post-entry competence can be understood as encompassing a continuing Policing Model supplemented by an emerging Coaching Model. Having described how law societies now regulate post-entry competence and the historical path to this approach, the important question remains: is this good regulation? Stated otherwise, what are the strengths and weaknesses of the current approach? Answering this question will be the focus of this Part, after first taking a brief foray into governance scholarship to reframe the discussion somewhat for the purposes of the evaluations offered in this Part and in Part 7 that follows.

A) Coaching as "New Governance"

In the language of governance scholars, one way to frame the current regulatory model is as a "new governance" approach (i.e. the Coaching Model) emerging to complement a traditional form of regulation (i.e. the

96 "Mentoring Circles", *Massachusetts Bar Association*, online: <www.massbar.org/publications/e-journal/2014/january/01-09/member-benefit>.

97 "Law Office Self-Audit Checklist", *Wyoming State Bar*, online: <www.wyomingbar.org/law-office-self-audit-checklist/>.

98 "Consultations", *State Bar of Georgia*, online: <www.gabar.org/committeesprogramssections/programs/lpm/consultations.cfm>.

99 Terry, "The Power of Lawyer Regulators", *supra* note 61.

Policing Model).[100] A variety of definitions exist as to what constitutes a new governance approach to regulation.[101] In large part, new governance is understood in terms of contrast to what it is not: traditional top-down command-and-control regulation. In explaining their use of the term, David Trubek and Louise Trubek write "[w]e contrast systems that rely on top-down control using fixed statutes, detailed rules, and judicial enforcement on the one hand, with a wide range of alternative methods to solve problems and affect behavior, on the other."[102]

New governance approaches have also been defined in terms of certain shared, emphasized features including: (1) greater collaboration between the regulator and the regulated; (2) more flexibility granted to regulated parties to meet defined regulatory outcomes; (3) ongoing review of regulatory approaches and experimentation with new methods; and (4) broader stakeholder participation.[103] On review, one can see these features reflected in the Coaching Model. Instead of enforcing specific set rules against lawyers, the Coaching Model employs a variety of methods—some voluntary and others mandatory—to help lawyers gain the competence that they need to practice effectively and in the public interest.

Trubek and Trubek have observed that "new governance" and traditional regulation can co-exist in several different ways.[104] They contend that, at one of end of the spectrum, *rivalry* can occur where the two approaches compete with each other to perform the same tasks better and, thus, frame the regulatory reality as "a necessary choice between systems."[105] At the other end of the spectrum, they argue that *transformation* can occur where the two approaches become "integrated into a single system in which the functioning of each element is necessary for the successful operation of

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100 Trubek & Trubek, *supra* note 2.

101 Gráinne de Búrca & Joanne Scott, "Introduction: New Governance, Law and Constitutionalism" in Gráinne de Búrca & Joanne Scott, eds, *Law and New Governance in the EU and the US* (Portland: Hart Publishing, 2006) 1 ("[t]he concept of new governance is by no means a settled one" at 2) [Búrca & Scott].

102 Trubek & Trubek, *supra* note 2 at 5.

103 Cristie Ford & Mary Condon, "Introduction to 'New Governance and the Business Organization'" (2011) 33:4 Law & Pol'y 449 at 450. The use of Ford and Condon's article to highlight shared features of the new governance approach is taken from Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (New York: Routledge, 2014) at 13. For other discussions of shared features in new governance approaches, see e.g. Búrca & Scott, *supra* note 101 at 2–3; Joanne Scott & David M Trubek, "Mind the Gap: Law and New Approaches to Governance in the European Union" (2002) 8:1 Eur LJ 1 at 5–6 [Scott & Trubek].

104 Trubek & Trubek, *supra* note 2 at 5.

105 *Ibid.*

the other."[106] In the middle, they identify a situation of *complementary* coexistence where "each is operating at the same time and contributing to a common objective but the two have not merged."[107]

Currently, in relation to law society regulation of post-entry competence, there appears to be this middle-ground complementary co-existence between the Policing Model and the Coaching Model. The initiatives comprising both models have the shared objective of ensuring that lawyers meet their ethical obligations to be competent, but take different and parallel routes to get there.

B) Evaluating the Current Model

Having classified the current approach, we can now consider whether it represents "good regulation". In their text, *Understanding Regulation*, Robert Baldwin, Martin Cave, and Martin Lodge discuss the following five criteria for assessing regulation:

1. Is the action or regime supported by legislative authority?
2. Is there an appropriate scheme of accountability?
3. Are procedures fair, accessible, and open?
4. Is the regulator acting with sufficient expertise?
5. Is the action or regime efficient?[108]

A preliminary assessment of the current approach using these five criteria is provided below.

1) Is the Action or Regime Supported by Legislative Authority?

None of the initiatives discussed above as being part of the current approach amount to *ultra vires* or otherwise illegal activity on the part of the law societies.[109] One of reasons for this is that in a number of instances when instituting new "coaching" initiatives, Canadian law societies have first

106 *Ibid.*

107 *Ibid.*

108 Baldwin, Cave & Lodge, *Understanding Regulation*, *supra* note 1 at 26–31.

109 One caveat to this statement is that in Manitoba a lawyer is currently challenging the institution of a mandatory CPD requirement in the province on the basis, *inter alia*, that there is no statutory authority in Manitoba's constituent statute, *The Legal Profession Act*, CCSM 2002, c L107 for this requirement (*Green v Law Society of Manitoba*, 2015 MBCA 67, 386 DLR (4th) 511). The lawyer in this case, Sidney Green, was unsuccessful in making this

sought any necessary legislative amendments before commencing such initiatives.[110] This observation is important insofar as it underscores the reality that, although the Canadian legal profession is often described to be self-regulating, the law societies are still dependent on the approval of their respective legislatures if they wish to embark on significant regulatory reforms. To this extent, the evolution of post-entry competence regulation is dependent on government will.

Looking at this criterion more broadly—in terms of whether law societies are fulfilling their legislative mandates in the current approach (as opposed to the narrow question of whether they are acting illegally)—invites a more complex analysis. As observed by Robert Baldwin, Martin Cave, and Martin Lodge, "it is seldom easy to state in precise terms what this [analysis] should involve … [as] [m]ost regulatory statutes give regulators broad discretion and implementing the mandate thus involves interpretation."[111] Indeed, as a general matter, the constituent statutes for Canadian law societies do provide broad mandates, which often include specific references to protecting the public interest, establishing competence standards, and regulating the practice of law.[112]

To be sure, the question of whether the current approach advances the public interest mandate of law societies implicates the remaining four criteria listed above and, thus, is necessarily embedded in the remainder of the analysis in this Part. For the purposes of the analysis of this particular criterion, it is perhaps worth highlighting that the Coaching Model, in its embrace of a new governance approach, offers a broader array of tools to "attack" the issue of post-entry competence than is offered by the Policing

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argument at first instance and on appeal. However, leave to appeal to the Supreme Court of Canada was granted in December 2015, so it is possible that Mr. Green will ultimately prevail.

110 See e.g. Nova Scotia Barristers' Society, "Fitness to Practise Program", *Nova Scotia Barristers' Society*, online: <nsbs.org/for_lawyers/complaint_resolution_process/fitness_to_practise_program> (noting that "[i]n December 2010, amendments to the Legal Profession Act enabled the creation of the Society's Fitness to Practise Program" at para 1) and LSUC, "Lawyer Practice Management Review", *supra* note 57 (stating, "Practice Review is legislated as part of the 1999 amendments to the Law Society Act, ss.41–49 together with By–Law 11 on Professional Competence and Rule 3 of the Rules of Professional Conduct" at para 1).

111 Baldwin, Cave & Lodge, *Understanding Regulation*, *supra* note 1 at 27. For an interesting discussion of the under-explored relationship between governance, law, and legality in the environmental context, see Jocelyn Stacey, *The Constitution of the Environmental Emergency* (DCL Thesis, McGill University Faculty of Law, 2016) [unpublished].

112 See e.g. *Legal Profession Act*, SBC 1998, c 9, ss 2–3; *The Legal Profession Act*, 1990, SS 1990–91, c L-10.1, s 3.1; *Law Society Act*, RSO 1990, c L.8, ss 4.1–4.2; *Legal Profession Act*, SNS 2004, c 28, ss 4.1–4.2, as amended by SNS 2010, c 56. For a larger list of statutory objectives of Canadian law societies and other law societies internationally, see Laurel S Terry, Steve Mark & Tahlia Gordon, "Adopting Regulatory Objectives for the Legal Profession" (2012) 80:6 Fordham L Rev 2685.

Model alone. As observed by Joanne Scott and David Trubek, in "rely[ing] less on formal rules and 'hard law' … [new governance] mechanisms can adapt to diversity, tolerate alternative approaches to problem solving, and make it easier to revise strategies and standards in light of evolving knowledge."[113]

As discussed in Part 4, above, to only use a Policing Model to address post-entry competence results in a form of regulatory failure insofar as there is *under-regulation* and, in particular, *under-inclusiveness* in detection that allows misconduct to escape constraint: complaints do not capture all or even most of lawyer incompetence that occurs.[114] One potential value of the initiatives that constitute the Coaching Model is that they allow law societies to address competence proactively, instead of merely reactively, by: (1) preventing incompetence problems (this may be true with respect, in particular, to mandatory CPD, practice management guidance, and mentoring) or (2) detecting incompetence problems (this may be true with respect to practice review initiatives). Insofar as the Coaching Model has these preventative and detection outcomes, it compensates for the limitations of the Policing Model discussed above. At the same time, the continuing presence of a Policing Model advances the public interest insofar as it provides a necessary tool to address those instances of incompetence that cannot be or are not proactively prevented through the Coaching Model. Stated otherwise, the complementary embrace of these two models offers law societies the opportunity to advance their public interest mandates vis-à-vis lawyer competence on both an *ex-ante* and *ex-post* basis. Together, these models offer a more robust response to the regulatory issue of ensuring competent lawyers than would be possible through using one of the models to the exclusion of the other.

2) Is there an Appropriate Scheme of Accountability?

This criterion, as described in *Understanding Regulation*, relates to the question of whether the regulator is properly accountable and controlled such that it is democratically responsive.[115] The authors further identify the sub-issues of whether the body holding the regulator to account is representative and whether the trade-off of accountability and efficiency is acceptable.[116]

Applied here, this criterion raises broad questions about the propriety of self-regulation. For the purposes of this article, these questions will not

113 Scott & Trubek, *supra* note 103 at 6.

114 Baldwin, Cave & Lodge, *Understanding Regulation*, *supra* note 1 at 69 (discussing under-regulation as regulatory failure).

115 *Ibid* at 28.

116 *Ibid* at 39.

be explored at any length other than to note that self-regulation appears to be currently firmly entrenched in Canada.[117] In addition to these broad questions, however, this criterion offers the helpful reminder that underlying institutional features and bureaucratic choices are relevant to the legitimacy of any specific regulatory mechanism. In other words, specific questions regarding the "goodness" of law society regulation of post-entry competence cannot be divorced from broad questions of: (1) who is making decisions about the form of this regulation; (2) who is administering this regulation; and (3) the processes through which both of these groups are held accountable.

Criticisms of the representativeness and accountability of law society decision-makers—generally referred to as "Benchers" in each jurisdiction—have been long-standing and some progress has been made. For example, historical efforts have led to the greater inclusion of non-legally trained individuals on governing bodies.[118] More recently, attention has been given to the demographic make-up of such bodies (for example, how many younger lawyers, women, or racialized individuals are on governing bodies).[119]

Much less attention, however, has been given to accountability mechanisms in relation to the considerable discretion exercised by law society staff in administering both the Policing Model and aspects of the Coaching Model. These mechanisms also deserve scrutiny. In the case of disciplinary hearings on issues of lawyer competence, law societies would appear to be doing well on the issue of accountability. A number of recognized "accountability mechanisms" are deployed, such as reason-giving, information disclosure, and the use of (generally public) hearing processes.[120] As noted above, however, disciplinary hearings represent only a very small part of law society regulatory activity on the issue of post-entry competence. The question of whether there are appropriate accountability mechanisms with respect to this remaining activity is substantially murkier. For example, as a general matter, little public information is available regarding staff determinations that influence whether a complaint against a lawyer should proceed all the way to a public disciplinary hearing. Although some law societies, like the LSUC, regularly publish statistics regarding their

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117 Moore, *supra* note 11; Yamri Taddese, "Diversity Push for 2015 Elections", *Law Times* (9 March 2015), online: <www.lawtimesnews.com> [Taddese].

118 See, for example, discussion of the introduction of lay benchers in 1974 as full voting members of Convocation (The Law Society of Upper Canada's governing body) in Moore, *supra* note 11 at 285–86 (as Moore notably observes, two of the four lay benchers appointed "were the first women ever to participate in governing the Law Society" at 285).

119 For discussion of more contemporary issues of representativeness, see e.g. Taddese, *supra* note 117.

120 Baldwin, Cave & Lodge, *Understanding Regulation*, *supra* note 1 at 340–42.

complaints, investigations, and disciplinary processes, these statistics tend to reveal only "macro" trends (for example, how many complaints were received and what categories of issues they raised) and do not provide the level of detail that would permit an assessment of whether an exercise of discretion was appropriate in any individual case or any specific set of cases.[121] Similarly, staff decisions regarding aspects of the Coaching Model—for example, practice management reviews—are not subject to much public scrutiny.

With respect to the exercise of discretion by law societies and the deployment of non-public sanctions, there may be good reasons that the accountability mechanisms used in relation to disciplinary processes are not a good fit and should not be used. For example, the privacy interests of individual lawyers and complainants may outweigh publicizing the details of informal resolutions of complaints about incompetence in certain cases. By way of another example, lawyers would surely be dissuaded from using mentoring or personal assistance services if these processes were subject to the information disclosure requirements applied to disciplinary hearings. These realities, however, do not mean that the question of appropriate accountability mechanisms is irrelevant for non-disciplinary hearing activities. Different types of accountability mechanisms must be considered, whether it be the existence of detailed internal guidance to law society bureaucrats regarding the handling of complaints and investigations, or the development of best practices in personalized coaching environments such as mentoring and practice management review. No doubt, mechanisms like these are already being deployed in some Canadian law societies. The Federation of Law Societies' development of National Discipline Standards, for example, is a laudatory first step.[122] More should be done, however, to publicize and regularize such processes.

3) Are Procedures Fair, Accessible, and Open?

The third criterion of whether procedures are fair, accessible, and open is intended to direct the evaluation to issues of "equality, fairness, and consistency of treatment, but also to the levels of participation that regulatory decisions and policy processes allow to the public, to consumers, and to other affected parties."[123]

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121 For examples of some of these statistics, see LSUC, "2014 Report: Discipline", *supra* note 51.

122 "National Discipline Standards", *Federation of Law Societies of Canada*, online: <flsc.ca/national-initiatives/national-discipline-standards/> [FLSC, "National Discipline Standards"].

123 Baldwin, Cave & Lodge, *Understanding Regulation*, *supra* note 1 at 29.

Issues of fairness would appear to be more relevant to the Policing Model than the Coaching Model. With respect to the latter, equality of treatment is suggested, for example, by the fact that all members must engage in continuing professional development, are able to openly review practice management guidance on law society websites, and have access to personal assistance programs. Special attention to issues of substantive equality of treatment and access have been given in the mentorship context to the extent that dedicated mentorship programs have been established by law societies to assist members of equity-seeking groups.

With regard to fairness in the Policing Model, law societies should be lauded for making considerable efforts in recent years to professionalize and regularize the disciplinary processes. Again, the Federation of Law Societies of Canada's development of National Discipline Standards that aim "to ensure that members of the public are treated promptly, fairly and openly wherever in Canada they have used the services of members of the legal profession" is a great example of meaningful effort in this direction.[124] The LSUC's move in 2014 to create a new tribunal led by an independent chair and the creation of new appointment and evaluation criteria for adjudicators should also be seen as a positive measure.[125]

Under this criterion, the most pressing questions would appear to relate to issues of accessibility and openness, as opposed to fairness. As noted above, while current law society disciplinary proceedings are much more open than they have been in the past, the vast majority of complaints received by law societies are resolved through private measures and not subject to broad scrutiny. With respect to the Coaching Model, there may be similar concerns regarding transparency. Although initiatives like CPD programming and practice management advice published on law society websites are, for the most part, open (exceptions include in-house CPD programs and practice management advice kept on password protected websites available only to members), interactions that take place in the practice review or mentoring context are not, as a general matter, public.

This lack of transparency means that the public and the governing bodies that lead the law societies do not have a full picture of the competence issues that members of the legal profession are experiencing and the feedback that lawyers receive about how to improve their competence. As referenced above, issues of information disclosure in this context clearly run against valid privacy interests. Full disclosure is also likely to be impossible in the face of law society scarce resources. However, these regulatory realities do

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124 FLSC, "National Discipline Standards", *supra* note 122.

125 Amy Salyzyn, "Magic Bullet or Band-Aid?: LSUC's 'Enhanced' Tribunals Model", *Slaw* (22 November 2013), online: <www.slaw.ca>.

not lead to the inevitable conclusion that nothing more should be done to improve transparency. Law societies should strive to find creative solutions to providing the public and their members with more information about what they do. As I have written about elsewhere, one simple measure could be for law societies "to publish anonymized narrative accounts of complaints received and their resolutions in order to provide a better picture of what happens to cases that do not proceed to formal discipline."[126] The Legal Ombudsman for England and Wales already does this in relation to complaints it receives against lawyers in that jurisdiction.[127] In Canada, the Canadian Judicial Council now posts a sample of anonymized complaints on its publicly accessible website.[128] No doubt, there are a variety of other simple measures that law societies could start taking to be more transparent about what they are doing and why.

4) Is the Regulator Acting with Sufficient Expertise?

The authors of *Understanding Regulation* observe that the criterion of expertise is most pertinent in cases in which the public is asked to defer to the regulator's expertise "because a judgement has to be made on the basis of a number of factors and variables and specialized knowledge skills and experiences have to be applied."[129] Claims of expertise are at the heart of law society regulatory regimes and, in particular, their self-regulatory nature. The question of expertise in relation to law societies regulating lawyer competence in the contemporary legal services market, however, raises some unique questions.

Current practice environments vary considerably both in the type of law practiced and in the size of law firms. Although significant numbers of lawyers now practice in solo or small firm environments, the top five largest law firms in Canada all have more than 500 lawyers.[130] While some skills and practices may be common across practice environments (such as promptly returning client calls or emails), what competence means for a solo practitioner practicing real estate in a small town is very different than what is means for a lawyer practicing in the area of cybersecurity litigation within

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126 Amy Salyzyn, "Law Society Complaints: What We Don't Know and Why This Is a Problem", *Slaw* (10 June 2015), online: <www.slaw.ca>.

127 See e.g. "Summary 6", *Legal Ombudsman*, online: <www.legalombudsman.org.uk/?portfolio=summary-6-7>.

128 "Sample of Complaints Received During 2010-2011", Canadian Judicial Council, online: <www.cjc-ccm.gc.ca/english/complaint/conduct_c_en.asp?selMenu=conduct_complaint_2010-2011_en.asp>.

129 Baldwin, Cave & Lodge, *Understanding Regulation*, *supra* note 1 at 39.

130 "Canada's Largest Law Firms", *Lexpert*, online: <www.lexpert.ca/500/canadas-largest-law-firms/>.

a large, national firm. Providing meaningful written practice management guidance and practice reviews for all types of lawyers may be challenging.

Moreover, in emerging areas, like technological competence, it may be difficult for law societies, particularly small ones, to have sufficient expertise. While law societies might previously have been comfortable with, for example, recommending certain types of filing systems, contemporary questions of what level of email encryption or information barriers and ethical walls software is required to competently protect client information may be outside the comfort zone of some lawyer regulators. Similarly, areas such as wellness and cultural competence, in which significant non-legal knowledge and skills are implicated, may require law societies to reach outside their current bureaucracies to ensure that relevant experts are engaged.

The complexity of the modern legal services environment requires law societies to take the issue of expertise more seriously than they have in the past. For example, while traditionally those involved in adjudicating disciplinary complaints regarding lawyer competence—law society benchers, for the most part—did not require any particular expertise or training in adjudicating, this approach is no longer sustainable. LSUC's move to an independent tribunal, with included measures for adjudicator training and evaluation, provides a good model for other law societies. Moreover, the Coaching Model offers many opportunities to bring in outside experts to assist with things like continuing education and one-on-one mentoring. The collaboration possible in new governance approaches can assist law societies in ensuring they have the necessary expertise in the current complex regulatory environment.

5) Is the Action or Regime Efficient?

The authors of the *Understanding Regulation* text note that "a regulator may claim support on the basis of acting efficiently and, in doing so, make two kind of claims": (1) "that the legislative mandate is being implemented at the least possible level of input or costs"; or (2) "the regulation at issue leads to results that are efficient."[131]

In terms of efficiency claims in relation to regulating lawyer competence through a Coaching Model, it could be argued that the regulator should not expend considerable resources in this regard because lawyer competence is already managed through the market (i.e. clients) and civil liability mechanisms (i.e. negligence suits). On reflection, however, it is apparent

131 Baldwin, Cave & Lodge, *Understanding Regulation*, *supra* note 1 at 30–31.

that there are significant gaps or limitations with the market or civil liability mechanisms regulating lawyer competence.

There is a real concern, as noted above, that many clients will not be able to adequately assess competence either on a prospective basis when considering what lawyer to hire or on a retrospective basis after obtaining legal services. To the extent that sophisticated clients might impose their own vision of competence on the lawyers they hire by dictating specific policies and procedures through outside counsel guidelines, it bears noting that this type of regulation is focused on client desires and is not likely to be aligned with the public interest in all cases.[132]

Negligence lawsuits similarly only provide an imperfect form of regulation of post-entry competence. Like disciplinary procedures, civil actions require that clients first identify that they have received incompetent legal services and then, if initiated, only respond to problems after they occur. Further, although negligence lawsuits are focused on providing compensation to clients (as opposed to disciplinary procedures which are focused on sanctioning the lawyer), it is expensive to initiate litigation and a client is likely to recover only a portion of their costs for pursuing litigation, given that Canadian courts only provide full indemnity for legal fees to successful litigants in very rare circumstances.[133]

Having noted the limitations of client and court-based options for regulating post-entry competence, it is also worth noting that a precise cost-benefit analysis of the current law society regulatory initiatives is elusive. The specific costs of individual initiatives is not easily discernable in publicly available information, and even if these costs were discerned, it would be difficult to measure the purported benefits of these initiatives in a way that could be concretely measured against their financial price tags.

Notwithstanding the above-noted difficulties in conducting precise cost-benefit analyses, it is reasonable to observe that some coaching initiatives can be conducted at a reasonably low cost while others could be expensive. Volunteer mentoring programs are examples of low cost initiatives. Practice reviews are higher cost and, indeed, a significant expansion of practice review programs may be too costly. For example, in order to subject every lawyer to a practice review on a yearly basis to assess and provide feedback on their competence, it would presumably be necessary to substantially

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132 For further discussion, see Salyzyn, "What If We Didn't Wait?", *supra* note 33 at 519–20.

133 See e.g. Tracey Tyler, "A 3-Day Trial Likely to Cost You $60,000", *The Star* (3 March 2007), online: <www.thestar.com> (a study conducted in 2007 concluded that "[a] three-day civil trial [was] likely to cost at least $60,738").

increase law society fees. The size of the different Canadian law societies is also relevant; developing and implementing coaching resources yields a different cost-benefit analysis for small law societies, like Nunavut, that govern under 500 members, as opposed to large law societies like Ontario, which govern over 50,000 members with a staff of approximately 550 full-time employees and annual fee revenues of roughly $75 million.[134]

7. Future Directions: Promises of Proposed Entity-Based Regulatory Reforms and Conditions of Success

Part 6, above, suggests that the current regulatory approach to lawyer competence, involving a continuing Policing Model supplemented by a Coaching Model, offers an improvement on its predecessor approach comprised of an un-supplemented Policing Model. One major identified benefit is that the Coaching Model is likely to mitigate the under-regulation of competence by proactively addressing a broader array of issues that impact lawyer competence. At the same time, the above analysis suggests that there remain potential issues with the current approach in terms of accountability, transparency, expertise, and costs. In this Part, it is argued that some promise to addressing these concerns lies in new regulatory reforms now under consideration. More specifically, several Canadian law societies have recently considered regularizing proactive engagement of lawyers' practices by instituting new regimes that would regulate legal service entities, such as law firms. These reforms and their potential success in addressing remaining concerns with the regulation of lawyer post-entry competence are considered below.

A) New Forms of Entity Regulation Under Consideration

In Ontario, LSUC has appointed a taskforce to study the potential of moving towards compliance-based entity regulation and, in May 2016, it approved the taskforce's final report recommending that LSUC seek a legislative amendment permitting it to regulate entities and the further development of a compliance-based regulatory framework.[135] As described by LSUC, a compliance-based entity regulation approach "emphasizes a proactive approach in which the regulator identifies practice management

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134 "Membership (2014 Statistical Report)", *Federation of Law Societies of Canada*, online: <docs.flsc.ca/2014-Statistics.pdf> (for the membership numbers); "2015 Annual Report", *The Law Society of Upper Canada*, online: <www.annualreport.lsuc.on.ca/2015/en/index.html> (for the annual budget figure); Email from The Law Society of Upper Canada on file with author (for employee numbers).

135 Compliance-Based Entity Regulation Task Force, *Report to Convocation* (The Law Society of Upper Canada, 2016), online: <www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2016/convocation_may_2016_cber.pdf>. See also LSUC, "Promoting Better Legal Practices", *supra* note 54.

principles and establishes goals, expectations and tools to assist lawyers and paralegals in demonstrating compliance with these principles in practice."[136] Additionally, the Law Societies of Alberta, Saskatchewan, and Manitoba have collectively issued a discussion paper entitled "Innovating Regulation" that addresses, among other things, the issue of compliance-based regulation.[137] The idea of regulating law firms is also currently under discussion in British Columbia.[138]

Currently, the Nova Scotia Barristers' Society is the most advanced in terms of implementing a form of entity-based regulation. In early 2016, the Barristers' Society sought feedback on a draft Self-Assessment Tool that can be used to evaluate a legal practice's current policies, procedures, and systems "against a benchmark [titled] the Management System for Ethical Legal Practice (MSELP)."[139] Notably, "[d]eveloping competent practices" is one of the ten specific elements that has been identified as a principle for legal entities to reference in relation to creating and maintaining appropriate management systems.[140] The Barristers' Society is now embarking on a pilot project to test and further refine its self-assessment tool.[141]

B) Potential Promise and Pitfalls in New Directions

Although no Canadian jurisdiction has implemented any of the above reforms, and details as to how such reforms would operate in practice remain open, it is possible to identify several respects in which novel forms of entity regulation might address some of the shortcomings identified with the current approach.

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136 LSUC, "Promoting Better Legal Practices", *supra* note 54.

137 Prairie Law Societies, "Innovating Regulation", *supra* note 54. These provinces have also set up an online forum with the aim of providing information and soliciting feedback about potential reforms: "Innovating Regulation", *Law Society of Alberta*, online: <www.lawsocietylistens.ca>.

138 "Highlights of Amendments to the Law Society Rules", *Law Society of British Columbia*, online: <www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/law-society-rules/highlights-of-amendments-to-the-law-society-rules/>; see also British Columbia, Law Firm Regulation Task Force, *Law Firm Regulation Consultation Brief* (Vancouver: The Law Society of British Columbia, 2015) online: <www.lawsociety.bc.ca/docs/newsroom/highlights/FirmRegulation-brief.pdf>.

139 "Society Consultation on Proposed Self-Assessment Process for Legal Entities: Input Requested by Jan. 31", *Nova Scotia Barristers' Society*, online: <nsbs.org/news/2016/01/society-consultation-proposed-self-assessment-process-legal-entities-input-requested>.

140 "Management Systems for Ethical Legal Practice (MSELP)", *Nova Scotia Barristers' Society*, online: <nsbs.org/management-systems-ethical-legal-practice-mselp> [NSBS, "MSELP"].

141 "Transforming Regulation: Will You Volunteer For Pilot Project?", *Nova Scotia Barristers' Society*, online: <nsbs.org/news/2016/04/transforming-regulation-will-you-volunteer-pilot-project>.

A key feature that distinguishes the compliance-based approaches currently being considered by the LSUC and the Prairie provinces, and the MSELP approach now being piloted by the Nova Scotia Barristers' Society, is the provision of considerable lawyer autonomy to develop ethical practices that are suitable for their legal practice. It is intended that lawyers maintain "flexibility in deciding which policies and procedures should be adopted in order to achieve effective and compliant practice management."[142] In granting considerable autonomy to legal professionals, novel forms of entity regulation may be able to address some of the concerns with expertise identified above. One way to think about compliance-based regulation is by situating the regulator as the expert in identifying principles lawyers should adhere to and what outcomes they must achieve, while simultaneously positioning the lawyer as the expert in choosing the means of adhering to the principles and achieving the goals.

With respect to issues of cost, new forms of entity regulation might also hold promise. The cost of such regulatory initiatives will, of course, depend on their content and form. That said, the information that we have about the cost-benefit of the compliance-based regulatory initiative taken in New South Wales is promising: it has been reported that only 2.5 staff members were required to regulate 1,300 firms that fell within the regulatory regime as a result of "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."[143] The experience in New South Wales also suggests that new forms of compliance-based regulation may hold promise in terms of effectiveness. One study, for example, showed that this regulatory regime corresponded with complaint rates against involved firms falling by two-thirds.[144] Indeed, this positive result and the attention it has received appear to have directly inspired Canadian regulators to discuss implementing compliance-based regulation.

One area in which some concerns might remain with new forms of entity regulation is transparency. Studies suggest that lawyers will be reluctant to fully and candidly participate in regulatory regimes requiring them to self-assess their own practices if the information they reveal in

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142 LSUC, "Promoting Better Legal Practices", *supra* note 54 at 4. See also NSBS, "MSELP", *supra* note 140.

143 "Transform Regulation", *Nova Scotia Barristers' Society*, online: <nsbs.org/transform-regulation>.

144 Christine Parker, Tahlia Gordon & Steve Mark "Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales" (2010) 37:3 JL & Soc'y 446. For more qualitative evidence suggesting success, see Susan Fortney & Tahlia Gordon, "Adopting Law Firm Management System to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation" (2012) 10:1 U St Thomas LJ 152.

the process is shared with disciplinary authorities or more broadly made public.[145] Given these legitimate concerns, law societies should give serious thought to setting a clear, high threshold for the transfer of information from compliance-based processes to disciplinary arms of regulators.[146] Susan Fortney, for example, has suggested that "provided that the lawyer is attempting to address deficiencies and there is no imminent risk of harm to clients or others, lawyers can be provided a safe harbor in which no information disclosed during the [self-assessment process] will form the basis of a complaint."[147] Given that such protection may be necessary in order to ensure full and candid participation, additional thought should also be given to how some level of transparency can be infused into the processes. Mechanisms including publishing anonymized quantitative information about the frequency and nature of the issues that arise or anonymized narratives about issues arising in self-assessment processes should be considered.

C) Conditions of Success

Although the details of the new proposed forms of entity regulation are not entirely clear, they do appear to represent a move away from law societies operating their Policing Models and Coaching Models in separate streams and towards something more of a Hybrid Model that sees both models as part of one system. To use the terms introduced in Part 6, above, there seems to be a move away from the two models simply *complementing* each other towards a *transformative* integrative approach where both models are treated as part of one system. Presumably, under this new fusion, proposed self-evaluative procedures would aim to assist in creating the conditions under which lawyers can competently deliver legal services as measured against their regulatory obligations, with traditional disciplinary mechanisms remaining in place to ensure that there is a safety net to address recalcitrant or otherwise hopeless cases.[148]

The success of any Hybrid Model adopted by Canadian law societies will depend on both the process used to implement the model as well as the model's actual content. Trubek and Trubek observe that successful hybrid models are characterized by: (a) "[i]nclusion of [k]ey [s]takeholders

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145 See e.g. Susan Saab Fortney, "Designing and Improving a System of Proactive Management-Based Regulation to Help Lawyers and Protect the Public" (2016) J Professional Lawyer 91.

146 *Ibid*. This transfer of information from compliance-based processes to disciplinary arms of regulators is exactly what Susan Fortney recommended following her study of the New South Wales regime.

147 *Ibid* at 13.

148 Trubek & Trubek, *supra* note 2 ("[a] second situation [of transformation] exists when new governance solves problems and law provides a safety net" at 11).

in [n]ew [p]articipatory [m]echanisms"; (b) "[g]enuine and [e]ffective [c]ommitment to [s]ocial [o]bjectives"; and (c) "[m]aintenance of [l]egal [r]emedies as a [d]efault [p]osition".[149] On the flip side, Trubek and Trubek observe that failure of integrated systems often occurs because of (a) "[l]ow [c]ost-effectiveness of [o]ne [s]ystem [c]ompared to the [o]ther" and/or (b) "[r]esistance of [k]ey [a]ctors to [c]hange".[150] With respect to the issue of resistance, they write:

> When new governance is put forward, whether as part of an integrated system or as an alternative to legal regulation, key actors may sabotage the effort either because they fail to understand the new processes or think they will lose if they are introduced. Such "foot-dragging" may come from bureaucracies that play a central role in legal regulation or from interest groups convinced that the governance innovations are disguised efforts to weaken their position.[151]

A full analysis of the factors that might influence the success or failure of a transformative model of regulation is outside the scope of this article. It is worth noting, however, that the above factors emphasize the importance of consultation but also the need to have strategies to effectively engage with resistance born of self-interest or confusion.

Moreover, the work of Baldwin and Black provides some helpful insights for law societies insofar as it suggests that a successful hybrid approach requires attention to "the cultures and understandings that operate within regulated organisations" and the "broader institutional environment of the regulatory regime."[152] Among other things, this observation implies that modern law society regulation should: (1) look not only to what individual lawyers are doing but also take into account internal firm management practices and (2) accommodate or otherwise recognize a diversity of firm cultures, whether due to different practice environments or regional norms.[153]

Further, to the extent that the "broader institutional environment" is relevant to effective regulation, this suggests that law societies need to be attuned to how other institutional actors influence lawyer behaviour when designing their own regulatory responses. In order to have this awareness, Canadian law societies ought to consider following the lead of the Solicitors'

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149 *Ibid* at 24–25.

150 *Ibid* at 25.

151 *Ibid.*

152 Robert Baldwin & Julia Black, "Really Responsive Regulation" (2008) 71:1 Mod L Rev 59 at 70, 61 [Baldwin & Black].

153 On this issue, it is promising that the Nova Scotia Barristers' Society draft self-assessment instrument incorporates an assessment of internal firm management practices ("MSELP Self-Assessment Pilot Project", *Nova Scotia Barristers' Society*, online: <nsbs.org/mselp-self-assessment-pilot-project>).

Regulation Authority in England and Wales and commission research to understand the growing influence that clients have on lawyers, particularly in the large law firm context. For example, one recent SRA-commissioned study suggests that there is reason for concern: interviewees discussed "a shift in the balance of power from law firms to clients, represented by the way in which major corporates and financial institutions seek to impose their own terms of engagement on law firms."[154] To optimally help law firms adopt effective policy and procedures to ensure competent work practices, Canadian law societies need to understand if similar pressures and power dynamics exist in the Canadian context.

Finally, the important issue of assessing regulatory performance must be considered. As Baldwin and Black note, "[i]n the context of enforcement, such performance sensitivity requires that the regulator is capable of measuring whether the enforcement tools and strategies in current use are proving successful in achieving desired objectives."[155] They further observe that such sensitivity "rests on the regime's ability both to *assess* its performance in the light of its objectives and to *modify* its tools and strategies accordingly."[156] Although developing this type of performance assessment is "a notoriously difficult task," it is something that Canadian law societies ought to make a top priority when considering new forms of entity regulation.[157] If new systems are implemented with the goal of better addressing post-entry competence, we require some means of assessing whether this goal is actually being achieved. Law societies must also remain nimble to allow them to change course if and when necessary.

8. Conclusion

This article canvasses various approaches to regulating lawyer competence that Canadian law societies have undertaken over the last hundred years. The Coaching Model, which has come to supplement continuing disciplinary approaches, holds promise in better preventing and detecting competence problems faced by lawyers. However, as the above preliminary assessment of this model indicates, there may be issues with transparency, expertise, and costs that regulators need to be attentive to. The Hybrid Model approach embodied in new entity-based regulatory initiatives now under consideration is identified as one way to address these concerns. As noted above, both the process used to implement such a model and the model's ultimate content will be key determinants of its success in any given jurisdiction.

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154 Coe & Vaughan, *supra* note 7 at 1.

155 Baldwin & Black, *supra* note 152 at 72.

156 *Ibid* [emphasis in original].

157 *Ibid* at 73.