Submission of

The Ontario Bar Association

to the

Consultation
on
Continuing Professional Development ("CPD") Requirement

Date: January 14, 2010

Submitted to:

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ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

The Ontario Bar Association (OBA) welcomes the opportunity to make submissions on behalf of its members, in response to the Law Society of Upper Canada's *Joint Report to Convocation, Professional Development & Competence Committee and Paralegal Standing Committee*. The OBA is an autonomous provincial branch of the Canadian Bar Association (CBA). It is a voluntary, non-partisan, professional association representing over 18,000 lawyers, judges, law professors and law students across the province. As the voice of the legal profession, the OBA is the only voluntary legal association that represents lawyers from every practice area and in every community.

This submission, approved by the OBA Board of Directors following resolutions passed by the Board and by OBA Council, is the product of the CPD Working Group.

Support in Principle for the Joint Report

The OBA is a strong proponent of competence among Ontario lawyers. The OBA agrees generally with the approach taken by the Joint Report's authors in recognizing that lawyers pursue learning in different ways, and in recognizing that self-study must be enhanced by interaction with other lawyers. In the continuum of professional development activities, high quality "CLE" programs, with formal papers and lectures, are essential to the pursuit of excellence, especially among specialists and career-builders alike. Most lawyers who serve the public are generalists who require updates in a variety of practice areas through less formal programming and through mentoring activities. Time and again, the OBA has heard a common thread: CPD must be accessible, it must be relevant to local legal markets, and it must be affordable. Particularly in embattled rural and remote communities, a CPD requirement must not become an impediment to the retention of established lawyers and the recruitment of new ones. In many respects, the recommendations contained in the Joint Report address these needs. As with many aspects of lawyer regulation, the Law Society must be responsive to the function of maintaining competence among members of the profession. The purpose of regulating learning in this way is to draw hitherto non-participants into the competence-seeking stream, and not to alienate them.

Need to Include Lawyer Volunteer Activities with Substantive Law Component

Despite its support for the general approach taken in the Joint Report, the OBA is of the view that the Report does not fully appreciate the importance of bar association volunteer activities such as committee work containing a substantive law component. This is not a self-serving statement. The OBA is literally a beehive of professionalism, learning and advocacy. OBA volunteers spend countless hours developing public policy, researching and drafting submissions to government and other bodies, and formulating better methods of delivering access to justice. Much of this work involves cutting-edge law which requires participants to be up to date and often ahead of the current state of the law in a given practice area. For others, participation in the governance of the association affords the opportunity for lawyers to expand their understanding and knowledge of the law in dealing with the legal and policy issues that arise, and through dialogue with practitioners in different practice areas and fields. Finally, the most significant volunteer activity in our association is the development of peer-to-peer programming ("by lawyers for lawyers"). The OBA is a grass-roots organization whose 35 distinct practice sections are the primary engines of professional development.

The OBA urges the Law Society to work with OBA and other legal organizations in devising specific criteria for inclusion of lawyer-volunteer activities. Lawyers exercise their freedom of association through involvement in the OBA and other groups, in order to advance their competence and that of other lawyers. The interactive principle behind the approach taken by the Report's authors can best be advanced by encouraging lawyers to participate fully in their bar association, and other similar legal associations.

Responses to the Recommendations Contained in the Joint Report

The following are OBA's specific responses to the recommendations contained in the Joint Report:

(a) That the Law Society introduce a CPD requirement for lawyers and paralegals.

At its December 3, 2009, meeting, the OBA Board of Directors unanimously passed a resolution supporting in principle the expansion of mandatory continuing legal education to all practicing lawyers, subject to recommendations to be put forth by its CPD Working Group with regard to accreditation of activities, transition and administration. At its December 4, 2009, meeting, the OBA Council passed this resolution by an overwhelming majority.

These resolutions demonstrate that this threshold issue is now settled. OBA members are committed to lifelong learning as a cornerstone of lawyers' professional obligations to the public, to courts and adjudicative bodies, to colleagues and to themselves. The OBA recommends that, as part of the profession's commitment to excellence, mandatory Continuing Professional Development be implemented subject to the comments set forth below.

(b) That the definition of CPD for the purposes of the Law Society's requirement be, Continuing professional development is the maintenance and enhancement of a lawyer or paralegal's professional knowledge, skills, attitudes and ethics throughout the individual's career.

In general, the OBA agrees with the definition of CPD. However, the OBA is very concerned about the erosion of distinctions between lawyers and paralegals, and the reflection of this erosion in the above statement. While the OBA embraces the principle of the maintenance and enhancement of the knowledge, skills, attitudes and ethics of both lawyers and paralegals, the requirements for accreditation of programs for lawyers and those for paralegals must be specified. For the most part, those requirements will be different. The educational and licensure requirements of lawyers are very different from those for paralegals. The OBA is of the view that some programs accredited for lawyers may also be suitable for paralegals, but the converse will generally not be true. Lawyers should not be able to obtain mandatory learning credits by attending courses developed specifically for paralegals. Unless lawyers are obtaining training in an adjunct area outside of the law (eg., medicine or forensic sciences), lawyers should receive training from lawyers. There should be a specified distinction between those courses accredited for lawyers and those for paralegals.

(c) That all lawyers and paralegals in the 100% fee-paying category be required to meet an annual CPD requirement, subject to exemptions to accommodate special needs and circumstances.

The OBA agrees.

There may, nevertheless, be some confusion among the LSUC membership as to what the "100% fee-paying category" is. It must be clear that this refers to the LSUC levy and not to the LawPro premium.

The OBA also recommends that, in the Law Society's communications to members who are not in the 100% fee-paying category, steps be taken to dispel any perception that mandatory CPD could be an additional barrier to re-entry. For example, lawyers who are mediators can choose to change their status to the 50% fee paying category if they are not providing opinions or advice. If the mediator were to decide to return to full time practice after a five-year period or more, he or she would be subject to the Re-Entry Review provisions. This process exists already.

The OBA recommends that it be clarified to such members that the proposed CPD requirement will not require them to "catch up." The member should only be required to "catch up" if the LSUC reviewer found the member to be inappropriate for re-entry by reason of lack of recent education. In such a case, the reviewer could require the member to obtain a specified number of hours of education to improve competence.

(The example of the mediator is offered only because it is representative of a substantial number of lawyers who have in recent years chosen to step away from direct provision of legal services or advice. Other examples include lawyers who seek re-entry from non-legal roles in business, government, the family, the clergy or the not-for-profit sector.)

(d) That the activities described in paragraph 61 of this Report be considered "eligible" activities for the CPD requirement. That the activities described in paragraph 62 be considered "ineligible" activities for the CPD requirement.

The OBA agrees with the exclusions set out in paragraph 62, clauses (a), (c), (d), (e), (f), (g) and (k).

With respect to clause (b), it is important that it not conflict with the accredited activity in clause 61(d). The exclusion should only be for activities which do not have a substantive legal component. For example, OBA members prepare newsletters, internet blogs and magazine articles, the ultimate purpose of which is to inform clients and attract new business. In order to prepare these written materials, lawyers must read the most recent developments in the law relevant to the substantive subject area, including the relevant case law before the courts or tribunals, and/or statutory developments. Such substantive learning should be included as eligible activities.

The OBA makes no comment on clause (h), relating to Law Society meetings, although some of the principles below relating to law associations may apply.

The OBA objects to the exclusion of activities related to law association meetings of boards or committees, where such meetings have a substantive law or law practice component. The purpose of mandatory CPD is to foster professionalism and competence. Most OBA committee meetings contain substantive and practical components. Such committees plan, debate and draft submissions to government, to the Law Society, to the Law Reform Commission, and to other regulatory and adjudicative bodies. In doing so, our volunteers must study and debate legislative and law reform issues and topics, including subjects which are at the cutting edge of the law. This invariably results in the acquisition of additional knowledge or an improved understanding of recent changes in the law, by those who participate, leading to improved competence and professionalism.

These substantive legal components of committee meetings should be considered 'eligible' activities, and accorded credits.

(e) That the annual credit hours for the CPD requirement be 12 hours for each lawyer and paralegal to whom the requirement applies.

The OBA agrees.

(f) That a minimum of 25% of the annual 12 hour CPD requirement for lawyers and paralegals be taken in ethics, professionalism and/or practice management.

The OBA agrees. The Law Society must clarify the types of subject matter which fall into this category.

(g) That as part of the CPD system,

a. CPD providers may apply for "provider approval" for all their programs based on meeting certain criteria, including the integration in all their programs of a minimum of 25% of the content in ethics, professionalism and/or practice management; and

b. the Law Society will adopt criteria for individual program approval where the provider does not qualify for, or does not seek, provider approval status.

The OBA supports this initiative. The OBA, together with its national partner, the CBA, produce enough professional education that accreditation on a program-by-program basis would be extremely time-consuming and expensive, for staff in both organizations. Time would be better spent on the development and presentation of programming and additional expenses would have to be reflected in the cost to program participants.

The Quebec MCLE model involves a fee for accreditation services. The OBA would be opposed to any model where the regulator's enforcement of competence is subject to an additional fee, ultimately imposed on the members of the profession engaged in meeting their regulatory requirements. Since some methods of meeting the proposed CPD requirement involve less formal educational activities, which would, presumably, not be subject to an accreditation fee, it could be seen as somewhat discriminatory to require some providers to pay a fee when others will avoid such costs. The unfairness would be most evident in the case of the Law Society, which would be (and is) both the regulator accrediting programming and a provider.

(h) That to ensure compliance with the CPD requirement each lawyer and paralegal subject to it be required to report annually to the Law Society that he or she has fulfilled the requirement. In the normal course, if at the completion of the reporting period a lawyer or

paralegal has not completed the required 12 hours, a minimum of 25% of which is in professionalism, ethics, and/or practice management he or she will be subject to administrative suspension.

The OBA supports the principle that CPD should be enforced by administrative suspension instead of discipline. The OBA would also support a clear and simple procedure for the termination of an administrative suspension when a lawyer, suspended for non-compliance with the CPD requirement, has taken steps to comply. The lifting of such an administrative suspension should be immediate after satisfying the annual requirement, as lawyers' livelihoods are affected. Lawyers should not have to wait for more than one day for an administrative suspension to be lifted, once they have met the requirements. It would also be appropriate to establish a grace period, preceded by notification, prior to the commencement of any administrative suspension due to non-compliance with the mandatory CPD requirements. Many members do not have broadband internet access, and, therefore, notification must be by mail and not simply through an online portal.

(i) That each year, the Law Society verify compliance with the CPD requirement by random selection of lawyers and paralegals for an audit, to be conducted the year following the completion of the full 12 hours through,

a. the Practice Management Review program and the Paralegal Practice Audit program; and

b. random "paper" CPD audits.

The OBA supports these proposed initiatives. However, it is important that members be informed about what is expected during a "paper" audit. Members must be provided a clear set of criteria of the type of documentation which should be kept and produced to Law Society agents for purposes of satisfying such an audit.

(j) That the Law Society reserve the right to audit approved providers to ensure that they continue to comply with the objectives of the requirement on which their provider approval is based.

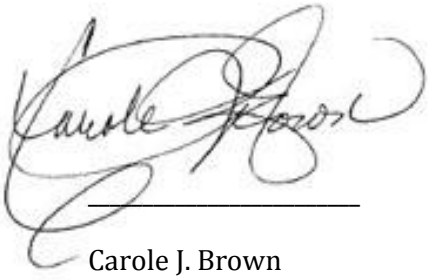
The OBA agrees, provided there shall be no intrusion into confidential information pertaining to CPD product development, costing or pricing. The Law Society does not regulate providers or law associations.

(k) That upon approval of a CPD requirement the Law Society implement a communication as set out in paragraph 116.

The OBA agrees.

If Convocation approves in principle the requirement of mandatory CPD, the OBA requests further engagement and consultation with respect to implementation, accreditation and administration of the program.

Yours very truly,



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