

FALCONERS LLP

BARRISTERS AT LAW

JULIAN N. FALCONER, B.A., LL.B., LL.D. (Hon.)
JULIAN K. ROY, B.A., LL.B.
ASHA JAMES, B.A., LL.B., J.D.
MEAGHAN T. DANIEL, B.A., LL.B.
MARC E. GIBSON, B.A., M.A., J.D.
AKOSUA MATTHEWS, B.A., MPhil (OXON), J.D.

10 ALCORN AVENUE, SUITE 204
TORONTO, ONTARIO
CANADA
M4V 3A9
TELEPHONE: (416) 964-0495
FACSIMILE: (416) 929-8179

FROM: JULIAN N. FALCONER, BENCHER

**TO: TREASURER LAURIE PAWLITZA
THOMAS CONWAY, CHAIR, PROFESSIONAL DEVELOPMENT AND COMPETENCE
CARL FLECK, Q.C., CHAIR, PROFESSIONAL REGULATION
JANET MINOR, CHAIR, EQUITY AND ABORIGINAL ISSUES COMMITTEE**

DATE: FEBRUARY 17, 2011

RE: MENTORING PANEL

Preamble

I have been asked to articulate in writing the mentoring concept that I have been discussing with you and others. I have also had the opportunity to discuss this concept with Benchers Avvy Go, Susan Hare and Jack Braithwaite. These benchers support the concept generally as well as this specific written proposal. Bencher James Caskey, Q.C., is also supportive of the concept being proposed though I have not yet had an opportunity to share this written proposal with him.

While the contents of this memo are my words and sole responsibility, I was also fortunate to benefit from the helpful advice of our Director of Professional Development and Competence, Diana Miles.

This proposal finds its genesis in long chats I was delighted to have with James Caskey whose stewardship and experience in relation to LawPro matters, gave me insight into how a business case can be made for doing the right thing. Following these discussions, I met with Treasurer Pawlitza who provided to me (the neophyte Bencher) guidance on key Law Society process questions that will best enable a full and fair consideration of this proposal. Perhaps most importantly, I was provided access to key staff supports, particularly Diana Miles, to assist in reducing this proposal to written form.

Finally, I am fortunate that my work by definition includes interaction with leadership in various communities including First Nations and African Canadian communities. My role as Bencher does not include a formal Committee role on equity issues and thus the fact that I have no authority in this regard was conveyed to all from the outset. However, I have canvassed the CABL and Indigenous Bar Association leadership with very positive results in terms of this proposal. Ongoing meetings are contemplated to continue to receive input and guidance.

I would ask that this specific proposal be brought forward to the appropriate Committees including the Priority and Planning Committee for consideration. If the support is present for this proposal, I believe a compelling business and equity case can be made for launching a pilot panel of mentors within six months.

Context

LawPRO has identified that certain groups of lawyers are at high risk for claims. It is understood that many if not most of these lawyers are found in sole and small firm practices where they lack support systems that would include colleagues capable of assisting with practice and substantive law issues. Between 2001 and 2009, firms between one to five members represented 62% of all claims to LawPRO. Of that 62%, sole firms made up 37% of the total claims.¹

Consistent with the April 2010 Ornstein Report², a disproportionate number of lawyers within sole and small firms are those who face systemic barriers based on race and/or gender. Thus the Report concludes that many of these lawyers end up in small or sole firms out of necessity³. This cycle of disadvantage is compounded as these same lawyers face professional challenges with no one to turn to for support and guidance. It follows that any initiatives aimed at creating seriously funded mentoring for the sole and small firm legal community will have the important salutary benefit of also addressing (not solving) some of the ongoing systemic challenges faced by both racialized and women lawyers.

¹ LawPRO Report to Convocation (September 2010), **Chart of Distribution Claims by Firm Size (2001-2009)** at pg. 44
By way of context for these percentages, in recent years over 3,100 insurance claims have been open at any one time. The gross value of open claims was estimated at \$384 million as at December 31, 2009.

² *Racialization and Gender of Lawyers in Ontario*, A Report for the Law Society of Upper Canada, Michael Ornstein, April 2010 (Ornstein Report)

³ Ornstein Report, *supra* note 2 at pg. 36

On the other hand, this proposal must not be interpreted as being geared to target certain communities of lawyers - to the contrary, this is a proposal of general application such that the mentoring panel would be available to practitioners of all backgrounds within the sole and small firm setting.

Panel Member Selection

In order to assist these individuals to establish and maintain viable practices, I am proposing the establishment of a formal Mentoring Panel with the objective of providing support and guidance to these identified lawyers. Because the activity of providing such advice can require extensive commitment of time and expertise, I would also propose that the panelists be paid for their time in recognition of that commitment and to reinforce the importance of the mentoring assistance provided. A fundamental premise to this plan is that it is essential to create professional obligations (on the part of the mentor) and therefore professional expectations that would attach to the mentoring relationship.

A number of key ingredients would make their way into the creation of this panel of mentors. Firstly, the panel would offer mentoring on both the claims side and the regulatory side. Thus whether the lawyer was grappling with competence issues in relation to file steps or was the subject of discipline issues; advice and guidance would be available upstream such that the hugely expensive claims machine or regulatory machine may never have to be fully engaged downstream.

As stated above, there are issues of gender and race that we must tackle head on. A culturally sensitive and diverse mentoring panel focused on addressing issues for sole and small firm practitioners will have the positive effect of ameliorating issues for racialized groups by virtue of the fact that those lawyers are over-represented in the sole and small firm demographic of lawyers. Thus it is essential that the members of the panel must be both professionally and culturally competent.

I believe that there is a significant role for the leadership in the communities. I would actually go further - without their partnership and endorsement, I believe that this initiative would fail. I envisage partnering with key leadership to choose the membership on the mentoring panels. My informal chats have led me to the view that there is consensus that no single community can generate the number and quality of mentors necessary to accomplish this important work. The key is not that the mentors

be specifically from only one background - but that they be both professionally and culturally competent. In addition to the selection process being the result of key partnerships between the Law Society and community leadership, it is expected that the panels will be a wonderful blend of diverse counsel that exude credibility.

Of course, if partnerships with community leadership were successfully forged to accomplish the above, it is gainsaid that these same organizations would be in an optimal position to endorse the mentoring panels to their communities. In addition, there are numerous non-coercive avenues available to the Law Society and LawPro that would permit the constructive promotion of the mentoring panel.

In addition, I believe that it is imperative that the panel also be representative of the regional differences faced by sole and small firms in the province. Mentees should be confident that they will have access to mentors that understand the nuances of practicing in some of the smaller legal communities within the province.

There are a number of issues that will need to be discussed prior to this type of program being established. These should not be viewed as barriers to this proposal but rather as issues to be solved.

Issues List

1) Political Viability

If this type of program is perceived to be just about certain identified groups of lawyers, this would be problematic. This should be avoided.

To combat this perception, the mentoring panel would be made up of skill sets across practice areas and issues, and not based on community affiliations. Legal community groups would partner in the selection process. The involvement of representatives from various legal communities in the designation of mentors would ensure that they endorse the concept for their members and will promote it to their members.

2) Liability

The potential of a solicitor-client relationship being established as between the mentor and the mentee's client(s) resulting in the potential of mentor liability

could be an issue. This has the potential of occurring whenever the mentor provides advice or opinions on specific files of the mentee.

However, this position must be countered by the realities of providing mentoring. In my opinion, generalized mentoring does not work. It must include reference to specific client issues/file matters if it is going to be useful. We should not aim to eliminate this, but instead the goal should be to build in safeguards for both the mentor (exempted from liability) and for the mentee (that the mentor has no obligation to/is not working on behalf of the Law Society).

If LawPRO were to declare this client-specific exchange of information to be allowed, this would provide the safeguard for mentors to want to act to assist the mentee to be most productive. Furthermore, if the interactions between mentor and mentee are appropriately undertaken, the client should not be aware of the mentor and therefore a solicitor-client relationship is not established.

I would advocate the concept of “sheltered support” for both parties. The mentor and mentee should know that they are able to either shelter under the *Law Society Act* privilege (provision of file information held confidential) or a Law Society or LawPRO exemption.

Currently LawPRO allows that a mentoring relationship can exist if the mentor does not have any contact with the mentee’s client(s). This liability exemption for mentors should be formally extended to acknowledge that it would cover the situation where client specific advice and opinion is given by the mentor, as long as the client cannot in any way be said to have become the client of the mentor (no contact of any kind).

3) Process Issue

What avenue should the implementation of this program take?

It should not go through the Law Foundation of Ontario for funding as numerous other groups are seeking the same monies for various projects.

LawPRO is the logical choice because it will financially benefit from the results of the mentoring program – the goal is to reduce claims in the identified lawyer groups – in this case the sole and small firm demographic and as an ancillary

result, identified groups by virtue of their disproportionate representation in sole and small environments.

4) Mandate

Is this a Law Society or a LawPRO program?

It is preferable to have this type of program endorsed by the Law Society but operated by LawPRO. LawPRO is in the best position to manage the relationship between mentors and mentees and to assess issues if they arise later.

Potential Barriers to Implementation

I have identified the following matters that stand as barriers to the implementation of this mentoring panel proposal:

1. There is an upcoming election and leadership may be reluctant to support this initiative;
2. Addressing the needs of disadvantaged communities of lawyers without targeting or being perceived to target these communities;
3. The initiative is premised on the ability of the mentee to provide confidential information to the mentor;
4. The initiative requires funding to permit adequate administration and compensation for mentors;
5. Balancing the accommodation of the Law Society's process requirements while achieving an early implementation date for the pilot panel;
6. Identifying a successful formula and criteria for the selection of the panel;
7. Addressing the exceptional nature of the proposed concurrency between Law Society and LawPRO tracks;

8. Key feature of the program: achieving the Law Society endorsement as the lead organization acting in the public interest while operating the mentoring panel under the LawPRO brand.

Making the Profession Stronger

The objectives and benefits of the mentoring panel proposal include:

1. The culturally neutral nature of the initiative that is borne of a need;
2. Instituting change to help our weakest link but the change is meant to be accessible to all in need;
3. Across the board benefit that strengthens the profession. It not only involves the obvious assistance to those receiving guidance but has the benefit of enriching the professional experience of the mentors while also fostering and enhancing the Law Society's reputation as protecting the public interest.

I would appreciate the opportunity to discuss this with you once you have reviewed this memorandum and in advance of its presentation through the Committee process.

Yours respectfully,



Julian Falconer