

March 31, 2016

VIA EMAIL: mdrent@lsuc.on.ca

Ross Earnshaw, Chair
Compliance-Based Entity Regulation Task Force
c/o Policy Secretariat
Law Society of Upper Canada
Osgoode Hall, 130 Queen Street West
Toronto, ON
M5H 2N6

Dear Mr. Earnshaw:

RE: Call for Input on Compliance-Based Entity Regulation

As you know, The Advocates' Society (the "Society") is a not-for-profit association of over 5,500 lawyers throughout Ontario and the rest of Canada. The mandate of the Society includes, amongst other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates.

The Society's Board of Directors has reviewed with interest the Compliance-Based Entity Regulation Task Force's consultation paper entitled "Promoting Better Legal Practices". The Society struck a Task Force of its own from among its membership to examine the issues arising out of compliance-based entity regulation. The membership of this Task Force is listed at the end of this letter, and reflects a mix of practitioners from varying sizes of law firms across the province. The Society also conducted a survey of its members with regard to their views on compliance-based entity regulation and potential concerns with the implementation of such a form of regulation. The results of this survey are appended to this letter.

These submissions focus on areas of consideration raised by members of the Society with regard to the implementation of compliance-based entity regulation.

Members of The Advocates' Society recognize that the protection of the public must be of paramount concern to lawyers as a self-governing profession. The Advocates' Society therefore welcomes action by the Law Society to prevent errors and omissions and thereby proactively reduce complaints by the public. Nevertheless, additional regulation can produce unintended negative consequences, both for the profession and for the public. We hope that our submissions below will be of assistance to the Law Society as it considers appropriate next steps in this important area.

Net benefit of a compliance-based entity regulation system

The Society proposes that the evaluation of whether a compliance-based entity regulatory system should be implemented be based on whether such a regulatory system would result in *net* benefits when all stakeholders – practitioners, clients, members of the public – are considered.

The Society notes from the consultation paper that other jurisdictions that have implemented similar regulatory systems have shown a resulting decrease in complaints. There may also be a resulting increase in public confidence in the provision of legal services. However, any incremental positive impacts of compliance-based entity regulation must be weighed against the incremental administrative burdens imposed on practitioners to comply with the regulatory system. The narratives of experiences in other jurisdictions canvassed in the consultation paper do not address whether there has been a *net* benefit through compliance-based entity regulation.

The Law Society of Upper Canada already sees positive benefits through the regulation of individual lawyers. The net benefit of the proposed additional layer of regulation through a compliance-based entity regulation system must be assessed in order to determine the value of such a regulatory system. The following observations, the Society proposes, should be viewed through this lens.

Membership Survey and Feedback: An Overview

The Society surveyed its members with regard to their views on compliance-based entity regulation and received 37 responses. The largest number of responses came from members at firms with 2-10 lawyers, then members at firms with more than 21 lawyers. We recognize the limitations of this survey data, but thought it might be of value to the Law Society of Upper Canada in these particular circumstances. This sample size is small relative to the Society’s membership base of around 5,200 members in Ontario. The Society nevertheless believes that the responses are worthy of your consideration, particularly as many of the respondents represent a population of advocates for whom the burden of entity regulation may be relatively greater than that imposed upon advocates practising in larger firms. That is because advocates practising in smaller firms lack the economy of scale that can allow larger firms to more easily assume additional administrative burdens.

Generally speaking, the smaller an advocate’s firm, the more time an advocate tends to spend on regulatory matters for the Law Society of Upper Canada:

Number of lawyers at firm	% of time spent on regulatory matters for the LSUC (with % of respondents for a particular category in parentheses)		
	0-5%	5-10%	10-20%
1	2 (50%)	1 (25%)	1 (25%)
2-10	12 (75%)	2 (12.5%)	2 (12.5%)
11-20	6 (100%)	0	0
21+	9 (81.8%)	2 (18.2%)	0

The Society asked its members whether they had any general questions or concerns with regard to the proposed model of compliance-based entity regulation. It is worth noting that only one respondent indicated being in favour of the proposal. No other respondent actively voiced support or indicated that they believed there would be a net benefit. That said, few concerns were raised by those whose firms have 11 or more lawyers, and most of the concerns were raised by lawyers at firms of 10 lawyers or fewer.

Sole practitioners and lawyers practising at firms of 2-10 lawyers raised concerns that chiefly related to a loss of independence in how they would run their practise, the administrative and financial burden that additional regulation would create, and the idea that compliance-based entity regulation may be redundant and duplicative of existing regulatory measures.

The Society believes that many of its members who practise in large and medium-sized firms may be in favour of additional regulation for all sizes of firms in order to enhance public confidence in legal practitioners. As discussed above, however, any additional regulation ought to result in a net overall benefit when the impact on all stakeholders is considered. No net benefit would result from a redundant or “double-regulation” system.

Flexibility of Implementation: A “One-Size-Fits-All” Model is Inadequate

It is apparent that sole practitioners and small firms would benefit from an understanding of how compliance-based entity regulation would be materially different from existing individual regulation of practitioners. Many sole practitioners and small firms are already regularly engaged in the Law Society’s Practice Management Review process, for example. It is not clear what additional burdens would be imposed by entity-based regulation as compared to these programs, or whether entity-based regulation would provide any net benefit relative to these programs.

At the same time, the pattern of responses to our member survey suggests that, if compliance-based entity regulation were to be implemented, close consideration should be given to whether it ought to apply differently depending on the size and nature of a legal practice. Larger firms are more likely to have resources and infrastructure to support an additional regulatory layer without much disruption to their existing legal practices. Sole practitioners and small firms, however, would have difficulty providing the resources required to address additional administrative and regulatory requirements. In firms where all lawyers are practising lawyers (*i.e.* no lawyer is designated as solely having managerial duties, as is often the case in large and medium-sized law firms), the implementation of regulatory requirements poses unique issues. For those firms, more time spent on administrative issues generally means less time spent running a practice and providing legal services. It is reasonable to expect that, at least in some case, increased administrative costs for law firms may be passed on to clients in the form of higher fees. To the extent that an increased regulatory burden for law firms results in increased costs to clients, it will have a negative impact upon access to justice.

To mitigate the impact of increased administrative costs on access to justice, some members of the Society have suggested that the Law Society consider whether there should be a threshold that must be reached before compliance-based entity regulation applies. This might, for example, be based on the size of a firm (e.g. smaller firms may be regulated just as

effectively through existing regulatory mechanisms) or a firm's claims history (e.g. a certain number of claims would trigger the additional layer of regulation).

The Law Society may also consider whether a sole practitioner or small firm should be provided with resources to implement the practices encompassed in compliance-based entity regulation, rather than make these practices mandatory requirements. The Law Society's Task Force recognizes in its consultation paper that Law Society support will be important if compliance-based entity regulation is imposed on sole practitioners and small firms, so that no undue burden is imposed on them. The Advocates' Society endorses this view. It is apparent that the risk of an undue burden is of concern to our members who practise in smaller firms.

Practice Management Principles

The Society understands that one of the key points of compliance-based entity regulation is to enhance the quality of legal services provided to members of the public. Members of The Advocates' Society generally agree that most of the proposed Practice Management principles are aimed at achieving this goal. The Society makes the following comments with regard to two of the proposed Practice Management principles:

- *Access to Justice.* The Society is concerned that this principle is not sufficiently well-defined to provide guidance to legal entities. For example, many sole practitioners and small firms in smaller centres across Ontario take on legal aid certificates as much as possible, and often provide services *pro bono* when legal aid funding runs out on these files. It is not clear whether such a practice would be considered an access to justice initiative for the purposes of this proposed Practice Management principle. The Society believes that firms would benefit from examples of initiatives in which a firm can engage to enhance access to justice, and suggests the following examples:
 - The acceptance of legal aid certificates;
 - The provision of legal services *pro bono*, whether through individual client files or through programs established by different organizations (including Pro Bono Law Ontario); and
 - The involvement in leadership roles in organizations dedicated to enhancing access to justice.

Any standard should provide a legal entity with options and flexibility with regard to how to achieve the goals sought by the proposed access to justice Practice Management principle, taking into account the resources and practice competencies of the legal entity.

- *Equity, Diversity and Inclusion.* The Advocates' Society strongly endorses efforts by the Law Society to promote equity, diversity and inclusion in the legal profession. This principle, however, is not sufficiently well-defined to provide guidance to legal entities. It is not clear whether this principle applies to hiring practices or the types of cases a law firm may or should accept. With regard to staffing in particular, diversity can be a difficult element to achieve in different parts of Ontario, and will have a different meaning depending on regional considerations.

For both of these proposed Practice Management Principles, The Advocates' Society stresses that the demographic and economic factors in different regions across Ontario should be taken

into account in order to set realistic expectations for legal entities depending on their geographical location.

Members of the Society who responded to the Society's survey indicated that guidance from the Law Society, in particular in the form of guidelines or template policies, would be helpful in implementing the Practice Management Principles. That said, template policies would need to provide for flexibility (1) to recognize the differences between law firms of different sizes and in different geographical regions across Ontario, and (2) to avoid a loss of independence in how a law firm is managed.

Disciplinary Measures

There appears to be confusion around the implementation and oversight of compliance-based entity regulation. Society members have a number of questions including: *How will it actually work? Will discipline be shifted to firms from individuals? Will all individual lawyers have additional responsibilities in the entity-based context? In instances of non-compliance with instituted controls, will the "designated practitioner" be subject to discipline as well as the individual lawyer? Or will the designated practitioner only be subject to discipline where there has been a failure to implement designated practice management principles? How will a legal entity experience the shift between the regulator's focus on proactive compliance-based initiatives to the regulator's disciplinary process for failure to meet compliance-based standards?*

The Society is seriously concerned about how this proposed model, designed to work with lawyers and firms on a cooperative basis, fits with the Law Society's disciplinary regime. Further, the Society is concerned about how the Law Society may engage disciplinary measures/powers based on information gleaned from the cooperative process. The question we are raising for the Law Society to consider is as follows: What is the relationship between the compliance and disciplinary functions within the Law Society? The Society suggests that its members would benefit from a further understanding of how the new proposed regulatory model would work to enhance cooperation without members facing the possibility of disciplinary action.

Thank you for providing The Advocates' Society with the opportunity to make these submissions. I would be pleased to discuss these submissions with you at your convenience.

Yours very truly,



Martha McCarthy
President

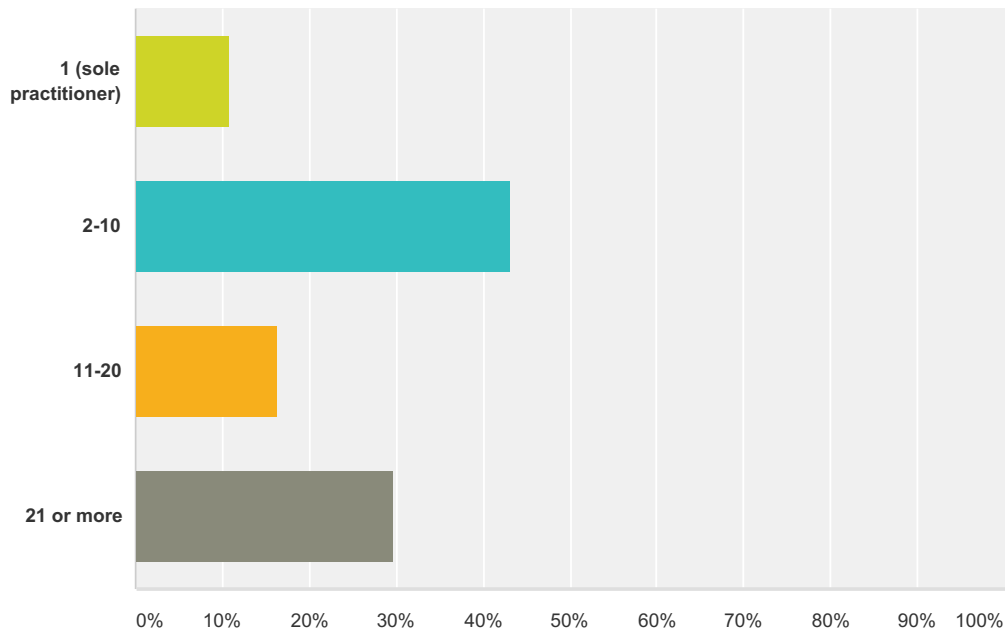
Task Force Members:

Hilary Book (*WeirFoulds LLP*, Toronto)
Shane D'Souza (*McCarthy Tétrault LLP*, Toronto)
Neena Gupta (*Gowling WLG*, Waterloo)
Scott Maidment (*McMillan LLP*, Toronto)

Ann Morgan (*Ministry of the Attorney General, Toronto*)
Daniel Naymark (*Naymark Law, Toronto*)
Lucille Shaw (*Miller Maki LLP, Sudbury*)
Steve Tenai (*Norton Rose Fulbright Canada LLP, Toronto*)
Dave Mollica (Director of Policy and Practice, *The Advocates' Society, Toronto*)

Q1 How many lawyers are employed at your firm?

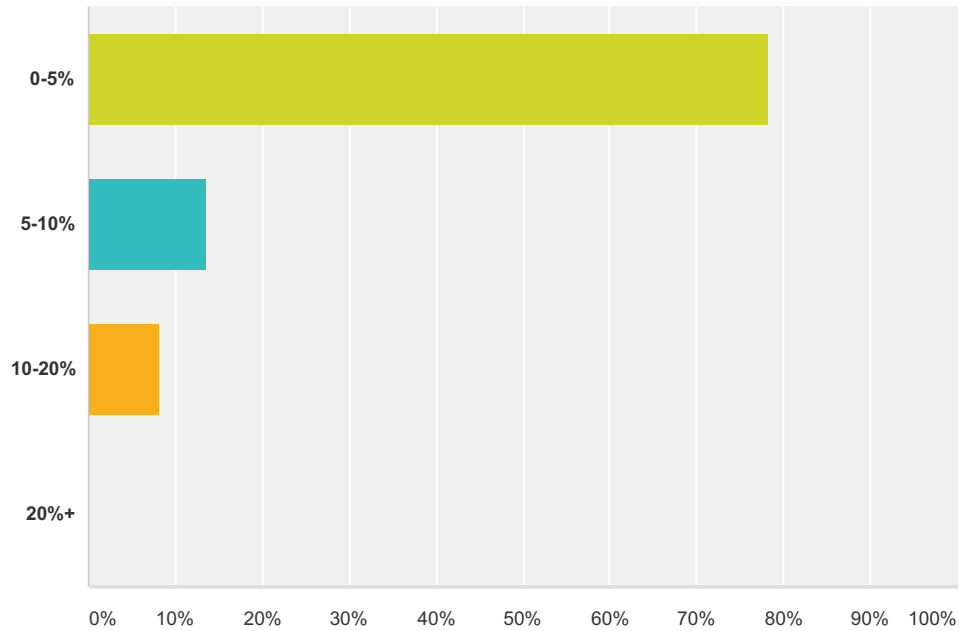
Answered: 37 Skipped: 0



Answer Choices	Responses
1 (sole practitioner)	10.81% 4
2-10	43.24% 16
11-20	16.22% 6
21 or more	29.73% 11
Total	37

Q2 What percentage of your time do you currently estimate spending on regulatory matters for the Law Society of Upper Canada (e.g. reporting, audits, etc.)?

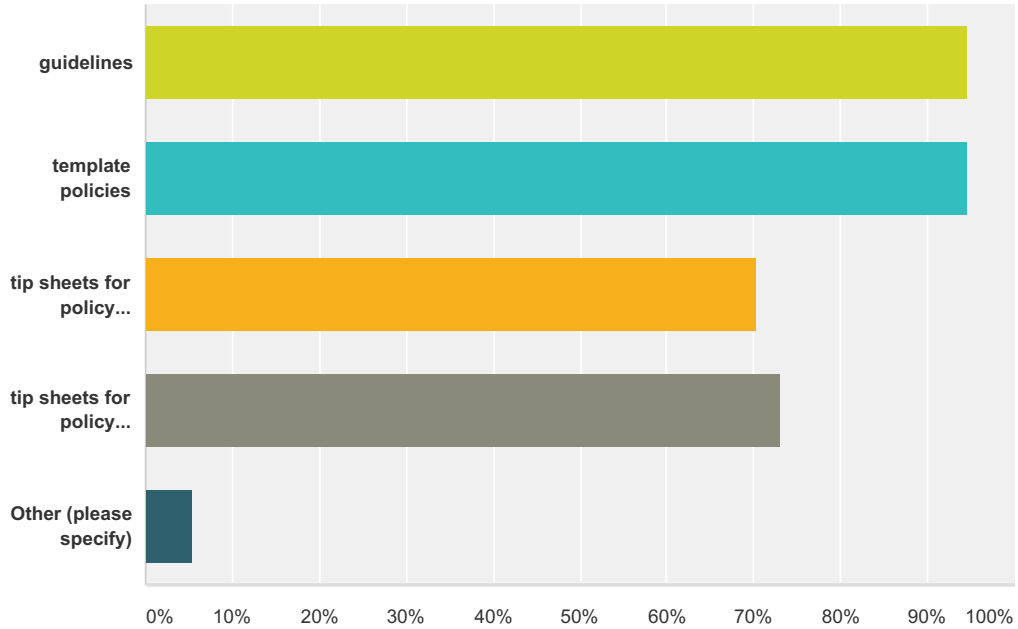
Answered: 37 Skipped: 0



Answer Choices	Responses	Count
0-5%	78.38%	29
5-10%	13.51%	5
10-20%	8.11%	3
20%+	0.00%	0
Total		37

Q3 If a model of compliance-based entity regulation were implemented, what resources would be helpful to you? Please select all that apply.

Answered: 37 Skipped: 0



Answer Choices	Responses
guidelines	94.59% 35
template policies	94.59% 35
tip sheets for policy development	70.27% 26
tip sheets for policy implementation	72.97% 27
Other (please specify)	5.41% 2
Total Respondents: 37	

Q4 The Law Society of Upper Canada has enumerated seven potential principles for practice management that would be the basis for the policies each firm would develop in order to ensure proactive compliance. The seven principles are: Practice Management Client Management File Management Financial Management and Sustainability Professional Management Equity, Diversity and Inclusion Access to Justice Are there additional practice management principles which you think should be added to this list? Should any be removed?

Answered: 16 Skipped: 21

#	Responses	Date
1	none	3/7/2016 8:31 AM
2	remove Practice Management <input type="checkbox"/> Client Management <input type="checkbox"/> File Management <input type="checkbox"/> Financial Management and Sustainability <input type="checkbox"/> Professional Management <input type="checkbox"/> Equity, Diversity and Inclusion <input type="checkbox"/> Access to Justice	3/4/2016 5:25 PM
3	Practice Management, File Management, Financial Management and Sustainability, and Professional Management should be removed.	3/4/2016 12:19 PM
4	Remove them all. These are business decisions and the success or failure of these decisions will be taken care of by the market. Regulate lawyers as professionals—like they do now. Otherwise get the bored bureaucrats out of our way.	3/4/2016 11:35 AM
5	With the greatest of respect, I would not include "equity, diversity and inclusion" as that is a matter that is addressed in human rights legislation. I believe that the Law Society should continue to promote equity, diversity and inclusion, but it should not engage in its regulation. Also, I would not include "access to justice" as that is a wide ranging and difficult "political" issue as opposed to a regulatory issue. Again, I believe that the Law Society should continue to promote access to justice issues but I do not understand how this can form part of a regulatory scheme.	3/4/2016 10:20 AM
6	Employee well-being	3/4/2016 10:19 AM
7	Mentorship	3/4/2016 10:17 AM
8	Risk Management, Lawyer Professional Development and Competence (we do this already)	3/1/2016 1:30 PM
9	Remove: Equity, Diversity and Inclusion Remove: Access to Justice	2/29/2016 9:20 AM
10	Access to justice is a laudable goal but should not be imposed on private law firms.	2/28/2016 2:35 PM
11	Access to justice, equity, diversity and inclusion are not practice management principles. They are certainly relevant to the type of cases you take on and the individuals to whom you offer legal services but are not, in my view, factors to consider in the quality of services you provide.	2/26/2016 9:43 PM
12	Equity, Diversity and Inclusion and Access to Justice	2/26/2016 4:53 PM
13	I would remove Access to Justice and Equity, Diversity and Inclusion. These may be lofty goals, but I do not think the Law Society should be regulating law firms for compliance in these areas.	2/26/2016 4:53 PM
14	What about CLE? Is it covered under professional management? It can't be left out of the principles just because it is covered by another LSUC requirement.	2/26/2016 4:52 PM
15	N/A	2/26/2016 4:40 PM

Proposed Compliance-Based Entity Regulation Model

16	No.	2/26/2016 4:40 PM
----	-----	-------------------

Proposed Compliance-Based Entity Regulation Model

Q5 Do you have any questions or concerns with regard to the Law Society of Upper Canada's proposed model of compliance-based entity regulation?

Answered: 21 Skipped: 16

#	Responses	Date
1	No.	3/5/2016 11:22 AM
2	Will the LSUC assist, at its expense , lawyers will navigation of this onerous proposal. The LSUC will be micro managing Ontario firms -not needed .if they want to do this, they should put up funds to assist	3/4/2016 5:25 PM
3	While the anticipated outcome is laudable, I question whether regulating the outcome is the answer.	3/4/2016 12:19 PM
4	Yes as a sole practitioner I have enough trouble trying to make a living and meet my professional obligations- just more interference with out a purpose . The regulatory issues with soles stem from no work and no money to pay off debts . This will not address that situation just make it worse and there will a larger discipline problem	3/4/2016 12:10 PM
5	Too much regulation adding to the expense of maintaining a law practice. Makes providing services more expensive. The guiding mantra should be to regulate and interfere as little as possible.	3/4/2016 11:35 AM
6	I don't know what it means or how it would be different from what we do now.	3/4/2016 10:53 AM
7	could be quite time consuming for a very small firm.	3/4/2016 10:39 AM
8	Concerned about the resource impact on sole practitioners and small firm lawyers who already spend a much greater percentage of their time on unbillable administrative matters. Also concerned about having my business 'micromanaged' by the Law Society. This has the feel of Big Brother. Would much prefer for the Law Society to make resources available optionally than to mandate regular reviews and practices.	3/4/2016 10:29 AM
9	Yes - need more information about implementation and oversight	3/4/2016 10:18 AM
10	I am concerned that Entity based regulation will not diminish the administrative burden on small firms (less than 20 lawyers), and may well increase it. There should be some differentiation on regulatory burden for smaller firms, but I am not sure how practically this is best achieved. The burden is not currently unmanageable. My concern is that Entity based regulation adds to the burden on small firms. Eg. Access to Justice. - we have a fee for service model and our practice area does not readily allow for pro bono services, which we provide in other areas on a case by case basis. What does it mean to regulate compliance for "equity, diversity and inclusion"? Does it mean having policies that prohibit discrimination, or does it mean obliging the regulated entity to hire lawyers/staff so as to promote "equity, diversity and inclusion". If the latter, then the LSUC may need to offset compliance costs on sole practitioners and smaller firms with increased fee support from larger firms. At present, we already function as an entity with written policies on the 7 practice management areas listed above (plus the two mentioned by me). These are just preliminary thoughts since how this actually is to be implemented in practice is the key issue, and there is not a lot of information on the practical "how" effects or even the objectives.	3/1/2016 1:30 PM
11	The problem I see is the possibility of duplication of work - now I have to self-regulate as an individual lawyer and do the same thing again as a firm? To what end?	2/29/2016 9:20 AM
12	I am concerned that this will be intrusive, time consuming and bureaucratic. We are trying to run a progressive, efficient law practice. I am concerned that the Law Society will try to compel us to run our firm in an old fashioned unbusiness like manner.	2/28/2016 2:35 PM
13	That it will just add another layer of bureaucratic burden to already stressed practices, especially for smaller firms, without achieving any substantive benefit.	2/28/2016 11:33 AM
14	As a partner at a small firm, my concern is the amount of my time that will be spent. Most small firms do not have lawyers/office managers who can deal with regulatory issues. Most of us have to practice full time. I am also concerned with a lose of independence. As always, there is the issue that what works and what needs to be done in Toronto is totally different than elsewhere in the Province.	2/28/2016 11:05 AM
15	See #4 above.	2/26/2016 9:43 PM
16	Very confused what this means practically.	2/26/2016 7:49 PM

Proposed Compliance-Based Entity Regulation Model

17	Is the regulation intended to shift discipline onto the entity rather than the individual or is it an additional lawyer of regulation to ensure firms have appropriate policies and practices	2/26/2016 4:53 PM
18	Yes. I think that there is a risk that the Law Society will establish "template policies" that will dictate in too much detail how law firms ought to operate. Given the diversity of firms in the profession, this would be highly problematic.	2/26/2016 4:53 PM
19	I am basically in favour, because the law firm is at present under regulated. I would like to see this approach cover legal sweat shops too, like the places that hire lawyers to review masses of documents. These are not firms, because they offer little of the professional development that firms might be expected to offer, but they consume vast amounts of the time and lives of early calls.	2/26/2016 4:52 PM
20	Would the change in compliance entail additional reporting obligations at the associate level, with respect to large national firms?	2/26/2016 4:40 PM
21	Why is it necessary? Why are small firms being put to additional expense?	2/26/2016 4:40 PM