A2J Submissions to Dialogue on Licensing

AUGUST 1, 2017

A2J: Who We Are

The A2Justice **("A2J")** Coalition was established in 2014 by volunteer law students, lawyers, and community members with a common interest in increasing access to justice and decreasing barriers to the profession faced by law students, articling students, and new lawyers. A2Justice maintains an active and ongoing interest in licensing reform and articling and, to this end, has previously made submissions to the Law Society and has participated in regional consultations relating to the Law Society's Dialogue on Licensing.

Introduction

A2J makes the present submission in accordance with the the Law Society's Dialogue on Licensing call for submissions. Our submissions do not substantively review the deficiencies of the current licensing system, as they have already been widely discussed throughout the Dialogue process. A2J believes that whatever model is adopted by the Law Society in the future must not replicate current barriers and systemic inequities. We note that the Law Society has previously indicated that that it only plays a regulatory role in licensing and should not be responsible for training. We respectfully disagree with this approach. The profession is at a crucial junction in its development where market forces have become the drivers of success, competency and assessment. In a climate in which greater numbers of licensees are required to perform with less oversight, expenditure and supervision, it is important to assess how we want

to provide for building the future of the profession and equipping new licensees to gain the skills and confidence to become competent lawyers.

We maintain that within this new landscape, the Law Society must play an active role in training students in an experiential learning environment. Given that only 10% of private firms offer articling opportunities, there is tremendous scope for the Law Society to play a role in recruiting more lawyers to act as principals and mentors and to standardize the expectations of core competencies to be developed through experiential learning. The current licensing system results in extreme inconsistencies in experiential training. In order to create better consistency and in an effort to provide training in core areas of professional competency, we propose that the Law Society should replace the current model of licensing with a training program based on a modified version of the current Lawyers' Practice Program (LPP) that incorporates practice based training and experiential learning, which would be made mandatory for all licensing candidates.

Overview of A2J's Proposed Licensing Model:

Our proposal is based on the following elements, which we describe in further detail below:

1. Elimination of the Licensing Examinations
2. A single, consistent, mandatory licensing pathway offering a "modified LPP" type program for all candidates; "modified LPP" , which has two flexible components: (a) practical training modules in key areas of competency; and (b) an experiential learning placement;
3. Candidates would have the opportunity to abridge different components of the licensing requirements (eg 1: to apply to forgo certain training modules if a licensee took a drafting course in law school, or worked in a clinic; eg 2: to apply to forgo modules, having secured a comprehensive experiential placement);
4. The cost of this program should be borne by the Law Society with the introduction of new and innovative revenue generating mechanisms and with logistical and teaching support from experiential learning partners and Ontario law schools.

1. Elimination of the Licensing Examinations

A2J proposes that licensing examinations in their current form should be eliminated. We believe that lawyers entering the profession must demonstrate core competencies to proficiently practice law. These core competencies must include a mixture of practical legal skills, knowledge and analytical thinking. Written, multiple-choice examinations are not an effective method of evaluating a licensing candidate's acquisition of these basic competencies. We also do not

believe that studying for and completing written, multiple-choice examinations is an effective method of developing these competencies either. This approach is consistent with the experience of our members who have written licensing examinations in the past two years as well as the broader experience of colleagues and recent graduates in our network and at our recent public forum on the future of legal training held in March 2017 at Ryerson University.

The licensing examinations as they currently exist do not represent a reliable measure to test the competency of new licensees to practice law in a diversity of areas. The competency of practice management for a sole-practitioner is not tested, nor do these examinations cover specific practices and directions to the profession, which may vary from one region to another or across different areas of legal practice. The current licensing examinations are designed to cater to the "generalist" but the standard of the generalist is deficient in key areas of knowledge and experience that are required for practice in any specific area of the law.

It is a misnomer to believe that all licensing candidates who have passed the licensing examinations have acquired the basic competencies of legal practice as these are primarily learned through legal practice itself. Application and interpretation of rules of procedure is not something that can measure fitness for practice through a multiple choice examination in view of the fact that the content of rules is constantly changing and evolving and the practice of consulting and learning rules is a constant requirement that is not based primarily on memorization of the rules, but requires lawyers to continuously consult and maintain familiarity with rules and their changes. The requirement of basic legal reasoning is something that can be tested and is the ongoing purview of study and teaching in law schools.

Unlike the testing of anatomy and physiology for medical students seeking to be licensed as doctors, testing in the review of substantive knowledge areas in the law is not intrinsic to the practical tools required to become a lawyer. In this sense, the current licensing examinations are predicated on an inapposite model of legal practice. The metric that is being applied does not measure practical skills or competency, but rather, it provides a test of skills that expand knowledge based testing in law school but offers little in the way of standard, practice-based skills assessment relevant for new lawyers commencing the practice of law. We propose that the focus of licensing must prioritize practice-based learning and testing of applied legal skills in a practical context rather than the academic exercise of learning rules. To this end, the current model of bar examination testing must give way to practical learning, training and evaluation.

2. One Single Consistent, Mandatory Licensing Pathway

A2Justice proposes that a single mandatory licensing process which includes modules and experiential training (based on the model of the current LPP) is a more effective method of ensuring candidates have the requisite competencies to practice law. We propose a single

pathway as opposed to a bifurcated or tiered approach in the interest of developing a consistent and robust approach focusing on practical skills development. In this regard, it is important to take stock of the current status of the LPP pilot study, which represents a benchmark or guide for how training should be approached. In the first year of the LPP, we spoke with students who were graduates of the program, students who started in the program, some who opted not to take the LPP and others who dropped out. From our various discussions with these new candidates, we found that the LPP was initially perceived as a second tier program both by students and employers. This perception held significant ramifications for the experience of students and their employability. After more than two years, however, the track record, experience and rigour of the LPP has resolved some of the initial angst experienced by its participants. Arguably, the LPP has not only proven its professional competency, but it has also staved off elimination by the Law Society itself in the fall of 2016.

As we noted in our submissions to the Law Society in April 2016, we believe that it would have been premature to abandon the LPP prior to the completion of the pilot study; moreover, as we and other concerned stakeholders previously noted, the necessity of the LPP was also undergirded by virtue of its ability to address underlying systemic barriers for racialized and other disadvantaged licensees in the articling/ licensing process. Although not a perfect and fully formed program, the LPP has emerged as an important response to systemic problems encountered by candidates in the articling process. To move forward with a more structurally responsible and coherent licensing process, the Law Society must acknowledge the structural barriers that the LPP was meant to address and avoid the propagation of a two-tiered system. By implementing a modified LPP program, involving both: (a) a practical training component and, (b) an experience-based learning component, we believe the current licensing regime can be significantly improved. Here, it is critically important that the Law Society change its mindset in recognition of the demands of the profession and based upon the public interest. The current model of licensing, which is primarily driven by market forces of supply and demand, must be actively reshaped to ensure fairness, transparency and access for all candidates.

2A. The Proposed Practical Component of the Licensing Process

The current bar examination process focuses upon testing the candidate's recollection of facts, policies, procedures and standards. We propose that this testing approach be replaced by a more practically oriented evaluation process centered around modules or exercises relating to drafting, analyzing, reporting, pleading and client interaction as covered in the LPP. We believe that the LPP's approach of teaching practically oriented modules in a classroom setting is conducive along with the use of actors, hypothetical scenarios and the carriage of a hypothetical legal file throughout the duration of the program. The standard duration of the in-class training component (as per the current LPP standard) would be four months, subject to a candidate's

application for abridgement, discussed further below. We propose that the candidate must have the option and flexibility to allow them to work on a full or part time basis while concurrently completing the in-class training.

While the modules may not touch upon every area of legal practice in Ontario, they would cover standard forms of reporting, recording and analyzing legal problems based on hypothetical scenarios. The purpose of the training modules would be to teach and assess minimum competencies in respect of routine functions that are part of legal practice, including, for example: 1) reporting letters to clients; 2) written advocacy or pleadings to the Court; 3) mediation/ alternative dispute resolution analysis; 4) communications with other counsel, administrative tribunals and/or third parties; and 5) demonstrating skills in practice management, recording dockets and complying with internal filing procedures. By completing these modules, candidates would have an opportunity to conduct work relevant to legal cases "in action" through face-to-face scenarios with instructing lawyers and online courses. A similar approach has been adopted in Alberta through the CPLED program, which can serve as a guide or comparator for how training modules can form part of a hands-on testing regime. In addition to running candidates through standard areas of legal practice, a specific module on the business and administration of a legal practice is of tremendous importance. Whether a candidate intends to work in a large firm, as in-house counsel, government counsel or a sole practitioner, understanding the nuts and bolts of how a practice is administered and financially maintained will provide important logistical information that may serve to demystify legal practice.

2B. Experiential Training Component of the Licensing Process

The current licensing process already includes an experience-based component under the umbrella of "articling"; however, there are no measures of standardization or control in respect of what kind of experience is produced through a given articling job. Whereas one position may involve day to day appearances in a criminal court for routine scheduling matters, another position may never involve court appearances or client interaction. No two positions are the same and the same position may vary from one year to the next. This variance is a normal reflection of the diversity of legal establishments that exist in Ontario, serving different clients and different areas of the law as well as the variable nature of litigation itself.

However, rather than allowing the market to dictate the shape and content of experience-based opportunities for articling candidates, it is imperative that the Law Society play an active role in identifying legal establishments that will provide specific opportunities for students that will allow them to learn basic skills of practice. We propose a six month minimum experiential placement, subject to a candidate's application for abridgement (discussed below).

In this context, the Law Society will need to vet and audit legal establishments to accurately identify the range of experience and work that a licensing candidate may receive. However, all experience-based learning environments are not equal. The Law Society must be selective in vetting and approving environments to ensure that candidates will be given hands-on training in core areas of skills development including: client interaction, written and/or oral advocacy, reporting to clients and preparing legal pleadings. Further, we propose that the Law Society must create a roster of available experience-based firms and ensure that the number of the available positions match that of the anticipated cohort of licensees for a given year. As noted previously, with only 10% of law firms in Ontario offering articling jobs, there exists a large untapped source of legal experience. To be clear, the Law Society would not be responsible for ensuring that each candidate secures an experiential position, but it would ensure that the available cadre of experiential placements can accommodate the size of each licensing cohort. Although the number of candidates may vary due to transfers, foreign graduates and other factors, the Law Society must involve itself directly in vetting and identifying approved experience-based legal opportunities for all candidates. By taking an active role in approving and identifying the kinds of legal work that candidates can expect in a given legal environment, the Law Society would be ensuring a certain level of standardization in experiential training that is currently lacking.

And finally, all experience-based learning opportunities must be paid positions. The Law Society must move to counteract the market driven nature of the articling system as it exists currently where positions are being advertised as being without pay (even, in some cases, by the government of Ontario) and where licensing candidates are routinely offering to work for free. The Law Society must identify, encourage and oversee the implementation of a fair and sustainable wage for all experience-based work programs for licensing candidates.

3. Abridgement of Experiential Learning Component of Licensing

In order to create a standardized approach to the experiential learning component of articling, we propose that the Law Society identify key areas of practical competency that a candidate must develop in order to become licensed. As discussed above, we suggest that these areas may include developing skills in the following areas: 1) reporting letters to clients; 2) written advocacy or pleadings to the Court; 3) mediation/ alternative dispute resolution analysis; 4) communications with other counsel, administrative tribunals and/or third parties; and 5) demonstrating skills in practice management, recording dockets and complying with internal filing procedures. However, it is vital to acknowledge that the experiential learning environment is not limited to the licensing process itself and that students may choose to acquire practical competencies during the course of their three year JD program by working or volunteering at

public interest law clinics or by engaging in special projects that relate to their areas of interest. The University of Ottawa for example has specialized legal clinics dealing with environmental law, technology law, poverty law and other areas. Queen's University, for example has a clinic that focuses upon prison law. Likewise, Windsor Law school has its own specialty clinic focusing upon an intensive experience in poverty law.

In view of the existence of valuable experiential learning available as part of the three year JD program, we propose that the Law Society permit licensing candidates who have availed of experiential learning during their JD to apply for abridgement of the in-class and/or the experiential learning component of licensing. Here, the Law Society must consider the nature of the training and/or activity undertaken by the candidate and, in collaboration with the concerned law school, identify a suitable measure of accreditation that may be afforded to the licensee in order to apply the appropriate abridgement factor. This kind of a collaborative approach also serves to reinforce the linkages between the JD and the licensing process, so that experiential learning is not siloed or separated from the legal education environment. In turn, we believe that the collaborative efforts between the Law Society and law schools will create incentives for students, who are interested in becoming licensed, to enhance their experiential learning skills at an earlier stage in their legal education. In turn, this would also have reciprocal benefits in decreasing the burden on the Law Society for the administration of experiential learning and will create more coherent and sustainable linkages between law school and licensing.

4. Financing the New Licensing Program

The current model of licensing places the funding burden for licensing changes upon the new cohort of licensees. Such an approach effectively further marginalizes an already extremely burdened population, which is under the pressure of a heavy burden of debt from law school tuition and is seeking to finish the licensing process in order to start repaying debt. By placing the financial burden for licensing innovations upon new licensees, the Law Society risks aggravating challenges faced by licensees in an already saturated job market. There is a professional and moral responsibility that the Law Society bears to new licensees, as future members and, quite literally, the future of the profession. We propose that the cost of the proposed licensing reforms be borne by the Law Society in conjunction with law firms and other legal establishments involved in experiential learning training.

We note that the Law Foundation has a direct role to play in assisting with defraying costs through its revenue stream built upon a collection of client trust fund interest. There are several other mechanisms for funding that can be employed to defray costs, with little or no impact upon members themselves. For example, the Law Society's continuing education programs can devote any surplus towards funding licensing innovations while an additional innovation fee of 1

to 2% can be added to all Law Society products for sale. Additionally, the Law Society should consider a one time fee levy (of perhaps 3-4% on annual LSUC fees) specifically targeting innovation in licensing. Whereas the one-time levy on annual fees would not have a significant impact on members, it would have the potential to generate significant revenue. As with similar levies that have been run at post-secondary educational institutions in Ontario to finance Public Interest Research Groups, the levy could be based on a popular referendum of all LSUC members.

In order to ensure greater accessibility of the licensing process to all candidates, we also propose that licensing fees themselves be reduced to their pre 2015 level (prior to the LPP), so that the cost of the program is made affordable to all candidates. In the event that candidates are not able to pay licensing fees, they may also be eligible to apply for an exemption or grant to subsidy their fees.

As a measure to encourage the involvement and recruitment of new articling principals, we also propose that prospective of articling principals be entitled to apply to the Law Society for a grant or subsidy to assist with the hiring of a licensing candidate for a six month experiential learning placement. This in turn may also address the problem of the short supply of articling positions overall. Particular preference may be given to sole practitioners, small firms, legal clinics, etc that may not otherwise be able to accommodate a licensing candidate.

Conclusion

The state of our licensing program in Ontario is afflicted beyond crisis. The condition from which we must emerge is not only one of problems facing jobs, employability and market supply and demand - it is a fundamental problem of identity and definition of the profession through its standards of training and competency. The licensing examination remains an anachronistic and dull tool that does not address the core competencies of legal practice in Ontario. Urgent, workable and responsive solutions are required. Whereas in the past, the Law Society has engaged in well-intentioned initiatives and studies over the years to analyze and strategize about responses to the problems with articling, structural barriers facing marginalized groups and other licensing challenges, it is clear that the current model of articling must change. We propose that articling be eliminated in favour of experience-based learning administered by the Law Society in conjunction with Ontario law schools based on a “scaled-up”, modified version of the current LPP, which must be made mandatory for all licensees. The emphasis on experiential learning as a key driver in licensing training cannot be overemphasized. The advent of the LPP offers an innovative opportunity for scaling up the LPP into one flexible single pathway for all licensees. As discussed above, the prospect of abridgement of experiential and training components of licensing also offers important and reciprocal strategies for linkages that may serve to break down the entrenched siloed distinction between law school education and licensing training. The

current proposal also introduces some creative solutions for revenue generation by the Law Society. These proposed funding solutions are consistent with the Law Society's public interest stature and its commitment to the values and outcomes of licensing as well as its unique role of stewardship that is indispensable in the process of transforming and modernizing the licensing process.