Definitely Mabey

Notable developments south of the border

This month's column is focused on current awareness.

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There have been two developments from south of the border in recent months that are worth being aware of and investing some time to think about in context of the Canadian legal industry.

There is a difference between applying appropriate lenses and being blind to what is happening in other jurisdictions. You need to park your "they are different" mindset and just contemplate the concepts.

New York State Bar Association's "Report of the Task Force on the Future of the Legal Profession"

In response to the rapid changes being experienced by its members, the New York State Bar Association formed a task force to address:

- developments in the economics, structure, and billing practices of law firms;
- changes in the model of educating and training new lawyers;
- the pressures on lawyers seeking to find balance between their professional and personal lives; and
- the implications of technology on the practice of law.

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- Unprecedented changes in the practice are producing a restructuring in the way legal services are delivered, regardless of the size of the law firm, including:
    - widespread access to legal information;
    - routinization of many legal tasks;
    - demands by clients for more control of legal service delivery; and
    - the emergence of an increasingly competitive marketplace.
- Alternative fee arrangements will continue to expand over the next decade but hourly billing will not disappear as a fee model in some practice areas.
- The legal profession will not return to "business as usual" and firms will need to engage in long-term restructuring—competition for legal work will be intense.
- Technology is a driving force of many of the changes and all indications are that it will affect the way lawyers are educated and practise; the traditional skills associated with lawyering; and how lawyers interact with their clients.

Given the magnitude of the undertaking, the task force was divided into four subcommittees. Based

on both the number, quality, and innovativeness of recommendations and the amount the report dedicated to the topic, I would say it dealt in depth with the model of educating and training new lawyers and certainly noticeably less so with the other three challenges.

Many of the recommendations either defer to work being done already by the American Bar Association or other committees addressing issues facing the legal industry but there are some unique ones dealing with lawyers and preparing them for the future that have direct application to Canadian lawyers. So it's worth perusing the 120-page report.

North Carolina Senate bill 254

A second interesting development south of the border is North Carolina Senate bill 254, which passed its first reading but was referred to the senate committee on rules and operations of the senate on March 21.

Although much too early to judge whether the bill will survive the anticipated vigorous ABA and state bar lobbies, it would, if passed, allow for up to 49 per cent non-lawyer ownership of law firm professional corporations. The bill was authored by Republican state senator and lawyer Fletcher L. Hartsell Jr.

While certainly not as broad and encompassing as the **United Kingdom Legal Services Act of 2007**, it floats the concept of non-lawyer ownership to the legal community in North America at a very interesting time. In particular it may offer:

- financing of exit strategies, voluntary and involuntary, for firms with “greying” demographics;
- financing for firms facing regional/national/global competition and the high cost of launching a regional/national/global platform from which they can compete;
- financing of lawyer retention strategies;
- financing of increasingly expensive class action lawsuits; and
- financing of the debilitating education loans that young lawyers are entering the profession with today.

Now what are the odds similar insights will occur in the Great White North ...

One point that seems to have captured the attention of the bill's author is the fear that non-lawyer owners, not subject to the rigorous enforcement procedures of ethical conduct that firms have in place, may divert firms' current orientation to one about profits. It's specifically addressed in s. 3 of the bill.

While I don’t expect Las Vegas oddsmakers are running too large a line on the bill and subsequent ones in others states passing (given there are still major states like California and New York that prohibit or limit doctors from the “corporate practice of medicine”), its very existence is likely a catalyst for future changes not envisioned even a couple of years ago.

Now what are the odds similar insights will occur in the Great White North and a full and open discussion about the merits of such a change without all the rhetoric and fear mongering of the “barbarians being at the gate?” There would be heavy betting on slim and none.

The section of the proposed bill relevant to law firms reads as follows:

> “Law Firms—Any person may own up to forty-nine per cent (49 per cent) of the stock of a professional corporation rendering services under Chapter 84 of the General Statutes, subject to the following requirements:

(1) Licensees continue to own and control voting stock that represents at least fifty-one per cent (51 per cent) of the votes entitled to be cast in the election of directors of the professional corporation.

(2) All licensees who perform professional services on behalf of the corporation comply with Chapter 84 of the General Statutes and the rules adopted thereunder.

(3) The stock certificates or other written evidence of ownership of any nonlicensee shall bear the following language, in at least 12-point type:

'No nonlicensee shareholder shall interfere with the exercise of professional judgment by licensed attorneys in their representation of clients. If there is an inconsistency or conflict between the duties to the court, to clients, and to shareholders, then that conflict or inconsistency shall be resolved as follows:

1. The duty to the Court shall prevail over all other duties.
2. The duty to the client shall prevail over the duty to shareholders.

(4) Shareholders who hold or control less than five per cent (5 per cent) of the voting stock and who are not employees, directors, or officers of the professional corporation shall not, solely as the result of stock ownership, be relevant for a determination of conflict of interest under Chapter 84 of the General Statutes or the rules adopted for the regulation of the professional conduct of licensees.

(5) A qualified retirement or employee stock ownership plan is deemed to be a licensee for purposes of this section if the majority of the trustees of the plan are licensees."

Until next month, remember as Voltaire is alleged to have said:

"Those who walk on the well-trodden path always throw stones at those who are showing a new road."

Comments or Questions?

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