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Time for firms to have a rethink on lawyer competence

Law firms need to start considering the competence of their lawyers in a way that goes beyond mere technical skills to include equally important factors such as their wellbeing and stability at home, writes Jordan Furlong.

Suppose that a person has obtained a law degree from a recognized and accredited law school. Suppose further that this person has successfully completed the Bar admission process in their jurisdiction and has been admitted to practice by the relevant authority. Are you satisfied, all other things being equal, that this lawyer is competent to practise law? I'd imagine you are.

Now, let's start making other things less equal — but more realistic. Let's say this lawyer has been hired by a very small law firm where the staff consists of a part-time administrator and a legal secretary, subscriptions to major research databases have lapsed, and there is no centralized system for case management or deadline reminders. The lawyer is quickly buried under extensive drafting and research work on short timelines by impatient partners whose feedback is rarely constructive.

Let's say further that this lawyer owes more than \$150,000 in student loans, must commute (in non-pandemic times) 45 minutes each way to the office every day, has had to assume responsibility for a chronically ill parent who requires frequent trips to the hospital, and is increasingly dependent on painkillers to relieve crippling headaches and backaches at the end of each day.

Do you still think this lawyer is competent? You might say that technically, yes they are — the knowledge and skills they possessed upon their call to the Bar are all still there. But here's a different question: Would you feel confident about hiring this lawyer to solve your problems or carry out your important tasks? Would you be comfortable — given their circumstances — that the lawyer could *effectively apply* their knowledge and skills to get the job done cleanly and correctly?

You might be less sure. I know I would be. And that's why I think we need to start re-conceptualizing what we mean by "lawyer competence".

Knowledge gap

I spent much of last year researching and writing [a report on lawyer licensing and competence for the Law Society of Alberta](#). One of the things that struck me during that process was that we define lawyer competence solely in intellectual terms — as the possession of minimum levels of knowledge and skill sufficient to satisfy regulatory requirements.

Possessing that knowledge and skill is obviously important — but it's also incomplete, because it fails to appreciate that what matters to the client and to the public is not what the lawyer knows, but *what the lawyer actually does* with their knowledge.

The public is not protected by a lawyer who merely possesses knowledge and skill in a passive, static sense; the public is protected by a lawyer who applies that knowledge and skill correctly and effectively in the real world. The first understanding of competence is technical; the second is practical. I think the second one is better. Lawyer "competence" concerns clients much less than does lawyer "performance."

I need to be careful here, because [when I first discussed these ideas on Twitter](#), some people thought "performance" referred to the outcomes lawyers obtained for their clients or the experience they delivered. Client outcomes and experiences are super-important, but that's not what I mean here by "performance" — I mean, can the lawyer actually deliver and implement the knowledge and skills they possess to solve client problems?

Can they carry out the work? Can they perform it? That's where the rubber hits the road — lawyer qualifications meet the public interest at the point of implementation and execution.

If a lawyer possesses what we consider the complete toolkit of competence — all the required knowledge and skills — but is unable to use those tools effectively because of various circumstances, is that lawyer competent to practise law? Our current regulatory model says yes. Clients who are inadequately served by lawyers who cannot apply their knowledge and skills would say no.

Raise the bar

Let's go back to our unhappy hypothetical lawyer at the start of this post. They're grinding every day in a sketchy workplace with few quality controls or professional standards, and they're afflicted at home with financial, family, and addiction issues.

It doesn't matter whether this lawyer got a perfect score on their Bar exam — they are not in a position to apply their competence qualifications effectively, and that will ultimately be to the detriment of themselves, their clients, and the public in general.

I think regulators should strive to ensure an ongoing level of lawyer competence that encompasses not just the possession of baseline legal knowledge and skills, but also two additional factors that crucially affect the lawyer's ability to apply their competence: the lawyer's *workplace environment*, and the lawyer's *personal well-being*. Regulators obviously cannot control these other two factors in lawyers' lives. But they can take steps to strengthen and reinforce them.

- **Workplace environment.** Does the lawyer's workplace help to promote, or at the very least support, their ability to apply their knowledge and skills to client matters? Is the lawyer given adequate technological and staff resources? Does the workplace maintain systems and standards in client intake, matter management, client communication, conflicts checking, and trust accounting? How sound is the firm's "[ethical infrastructure](#)", its systems and culture of professional conduct? The degree to which these questions have positive answers will affect the ability of lawyers within this workplace to provide competent service to clients.

How can regulators oversee the workplace environments of the lawyers whose conduct they govern? Jurisdictions such as Australia and England & Wales have provided us with one good answer: [entity regulation](#), whereby the individual lawyer is not the sole focus of regulatory oversight. [An entity that provides legal services to the public](#) should feature structural standards to ensure and enable the effective delivery of those services. In essence, you regulate not just lawyer competence, but also *law firm competence*.

- **Personal well-being.** Nobody pretends that practising law is a stress-free career. But there's a difference between doing hard work for high stakes (the lot of every lawyer) and suffering from debilitating levels of pressure and anxiety. The latter description fits too many lawyers today: deep in debt, either trying to keep a practice afloat in a pandemic or constantly in fear of being laid off or "de-equitized," unable to get or remain healthy, and so on. The results, as we already know, can include [burnout](#), [depression](#), [addiction](#), and [suicide](#).

How can regulators improve the well-being of the lawyers they regulate? [The Path To Lawyer Well-Being: Practical Recommendations for Positive Change](#), the under-appreciated 2017 report of the National Task Force on Lawyer Well-Being, delivers on its title with 44 recommendations (and [88 tips in a separate mini-toolkit](#)) to improve lawyers' mental, emotional, and physical health. Regulators could implement the four

recommendations targeted to them and strongly encourage all other stakeholders to do the same for theirs. They could make well-being not merely one component of competence, as many regulators are now doing, but consider well-being a critical catalyst without which a lawyer's knowledge and skills cannot be effectively applied.

To be competent means that you can *do* something. Lawyer competence is functional, not abstract. It has three dimensions: knowledge and skills, workplace environment, and personal well-being. Regulators should start thinking about how they can ensure not just that lawyers possess the knowledge dimension of competence, but also that their personal and workplace circumstances allow them to effectively deploy that knowledge in service to clients. That's the next step in the ongoing effort to continually enhance the competence of lawyers.

This article has been republished with the approval of Jordan Furlong. Jordan is a leading analyst of the global legal market and forecaster of its future development. Law firms and legal organisations consult him to better understand why the legal services environment is undergoing radical change. He is a Fellow of the College of Law Practice Management and can be contacted at jordan@law21.ca.