MINUTES OF CONVOCATION

Thursday, 26th February 2004
9:00 a.m.

PRESENT:

The Treasurer (Frank N. Marrocco, Q.C.), Aaron, Alexander, Backhouse, Banack, Bobesich, Bourque, Boyd, Campion, Carpenter-Gunn, Caskey, Cass, Chahbar, Cherniak, Coffey, Copeland, Curtis, Dickson, Doyle, Dray, Ducharme, Eber, Feinstein, Filion, Finkelstein, Finlayson, Furlong, Gotlib, Gottlieb, Harris, Heintzman, Hunter, Krishna, Legge, MacKenzie, Manes, Millar, Murray, Pattillo, Pawlitza, Porter, Potter, Ross, Ruby, Silverstein, Simpson, Swaye, Symes, Warkentin and Wright.

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Secretary: Katherine Corrick

The reporter was sworn.

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TREASURER'S REMARKS

The Treasurer congratulated Josée Bouchard on her acceptance of the position of Equity Advisor and announced that John Matos has become Director of Information Systems at the Law Society.

The Treasurer expressed Convocation's support and warm wishes for Wendy Tysall and her family.

The Treasurer set out the process he proposed to follow when a notice of motion is received. A Notice of Motion that is in the proper form with a mover and seconder will be referred to the relevant committee for a report or advice on the matter. The Treasurer agreed to bring this matter back to Convocation before the process starts.

Gavin MacKenzie will take over as Chair of LibraryCo when Greg Mulligan's term is up at the end of March.

The Treasurer thanked everybody for their contribution to the Lieutenant Governor's book drive for Northern Ontario.

MOTION - DRAFT MINUTES OF CONVOCATION

It was moved by Ms. Ross, seconded by Ms. Potter that the January 22, 2004 Draft Minutes of Convocation be confirmed with the following amendment:

Tab 2, page 7 - that the words " School of Law, Bond University, Queensland Australia" be added after Professor John H. Farrar's name.

Not Put

MOTION – REAPPOINTMENT TO ONTARIO BAR ASSISTANCE PROGRAM

It was moved by Mr. Feinstein, seconded by Ms. Ross that Diana Miles be reappointed to the Ontario Bar Assistance Program Board of Directors for a term of one year expiring February 2005.

The motion was deferred to the March Convocation.

REPORT OF THE DIRECTOR OF PROFESSIONAL DEVELOPMENT AND COMPETENCE

It was moved by Mr. Hunter, seconded by Mr. MacKenzie that the Report of the Director of Professional Development and Competence be adopted.

Carried

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The Director of Professional Development and Competence asks leave to report:

B.

ADMINISTRATION

B.1. CALL TO THE BAR AND CERTIFICATE OF FITNESS

B.1.1. (a) Bar Admission Course

B.1.2. The following candidates have completed successfully the Bar Admission Course, filed the necessary documents, paid the required fee, and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, February 26th, 2004:

Sherry Lee Anderson	Bar Admissions Course
Thomas Christopher Elliot John Ecclestone	Bar Admissions Course
Erik Michel Grzela	Bar Admissions Course
Sherry Maureen Kerr	Bar Admissions Course
Anthony Sylvestar Lashley	Bar Admissions Course
Kirsten Lara Manley-Casimir	Bar Admissions Course
Sandra Anne Lyse Marsat	Bar Admissions Course
Cory Andrew Mills	Bar Admissions Course
Valérie Marie Naamo	Bar Admissions Course
Ladan Nassiry	Bar Admissions Course
Frances Genevieve Salvaggio	Bar Admissions Course
Samia Shams	Bar Admissions Course
Virginia Joan Shea	Bar Admissions Course
Ann Marie Stewart	Bar Admissions Course
Adam Gordon Park Stubbs	Bar Admissions Course

Karina Alexandra Knowles Thompson	Bar Admissions Course
Sonya Marie Wint-Blair	Bar Admissions Course
Vivian Wong	Bar Admissions Course

B.1.3. (b) Transfer from another Province - Section 4

B.1.4. The following candidates have filed the necessary documents, paid the required fee and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, February 26th, 2004:

Thomas Alfred Ludwig Bauer	Province of British Columbia
Simone Allys Benton	Province of Alberta
Ryan John Coughlin	Province of Alberta
Tamara Louise Howarth	Province of British Columbia
Colin James Lachance	Province of Alberta
Dean Ian Moroz	Province of Alberta
Jeffrey Hart Morris	Province of Nova Scotia

B.1.5. (c) Transfer from another Province - Section 4.1

B.1.6. The following candidate has completed successfully the Transfer Examinations or the academic phases of the Bar Admission Course, filed the necessary documents, paid the required fee and now applies to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, February 26th, 2004:

Jeffrey Bertram Cutler	Province of Nova Scotia

ALL OF WHICH is respectfully submitted

DATED this the 26th day of February, 2004

CALL TO THE BAR (Convocation Hall)

The following candidates listed in the Report of the Director of Professional Development and Competence were presented to the Treasurer and called to the Bar. Ms. Ross then presented them to Madam Justice Susan G. Himel to sign the rolls and take the necessary oaths.

Sherry Lee Anderson	Bar Admission Course
Thomas Christopher Elliott John Ecclestone	Bar Admission Course
Erik Michel Grzela	Bar Admission Course
Sherry Maureen Kerr	Bar Admission Course
Anthony Sylvestar Lashley	Bar Admission Course
Kirsten Lara Manley-Casimir	Bar Admission Course
Sandra Anne Lyse Marsat	Bar Admission Course
Cory Andrew Mills	Bar Admission Course
Valérie Marie Naamo	Bar Admission Course
Ladan Nassiry	Bar Admission Course
Frances Genevieve Salvaggio	Bar Admission Course
Samia Shams	Bar Admission Course
Virginia Joan Shea	Bar Admission Course
Ann Marie McGee-Stewart	Bar Admission Course

Adam Gordon Park Stubbs	Bar Admission Course
Karina Alexandra Knowles Thompson	Bar Admission Course
Sonya Marie Wint-Blair	Bar Admission Course
Vivian Wong	Bar Admission Course
Thomas Alfred Ludwig Bauer	Transfer, Province of British Columbia
Simone Allys Benton	Transfer, Province of Alberta
Ryan John Coughlin	Transfer, Province of Alberta
Tamara Louise Howarth	Transfer, Province of British Columbia
Colin James Lachance	Transfer, Province of Alberta
Dean Ian Moroz	Transfer, Province of Alberta
Jeffrey Hart Morris	Transfer, Province of Nova Scotia
Jeffrey Bertram Cutler	Transfer, Province of Newfoundland

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REPORT OF THE FINANCE & AUDIT COMMITTEE

Mr. Ruby presented the Report of the Finance & Audit Committee.

Finance and Audit Committee
February 5, 2004

Report to Convocation

Purpose of Report: Decision

Prepared by the Finance Department
Andrew Cawse (947-3982)

THE REPORT

1. The Finance and Audit Committee ("the Committee") met on January 8, 2004. Committee members in attendance were: Ruby C. (c), Chahbar A., (v.c.), Bourque P., Dray P., Gotlib A., Harris H., Lawrence A., Pattillo L., Pawlitza L., Silverstein A., Swaye G., Symes B., Wright B.. Staff attending were Heins M., Tysall W., Corrick K., Grady F., Andonov J., Cawse A..

2. The Committee also met on February 5, 2004 by telephone conference. Committee members in attendance were: Ruby C. (c), Chahbar A., (v.c.), Bourque P., Coffey A., Dray P., Finkelstein N., Gotlib A., Harris H., Lawrence A., Silverstein A., Swaye G., Symes B., Wright B.. Staff attending were Corrick K., Grady F., Cawse A..

3. The Committee is reporting on the following matters:

Policy – For Decision
- General Fund Long-Term Investment Policy
- Lawyers Fund for Client Compensation Long-Term Investment Policy
- 2005 budget process
- 2003 capital budget status
- North wing renovation
- Ethical investing

GENERAL FUND LONG-TERM INVESTMENT POLICY

Request to Convocation

4. Convocation is requested to approve the new Long-Term Investment Policy for the General Fund.

Background

5. Fund balances in the Law Society's General Fund have increased in recent years, primarily because of policies adopted on reserves and annual surpluses achieved on operations. The increasing fund balances led to increased cash available for investment. At December 31, 2003, cash and short-term investments totaled $26 million.

6. Despite a significant draw on cash reserves expected as a result of the proposed North Wing renovation, cash flow forecasts identify core cash holding within the Society's General Fund. Year-end is the lowest point of our cash and at December 31, 2004 cash and short-term investments are expected to total $16 million.

7. This core holding can reasonably be invested in fixed income securities with an average duration ("term to maturity") of 2.5 years rather than the current typical duration of 60 days for General Fund short-term investments. This will allow us to obtain the benefits of higher long-term yields and improved diversification. In 2003 we earned approximately 2.9% on our short-term investments whereas the Scotia Capital Markets Short-Term Index earned approximately 5% for the same period. We are contemplating allocating $10 million from the General Fund short-term investments to a new General Fund long-term

portfolio. Based on the above interest rates, the potential annual return differential equates to $180,000 on this capital amount after the investment management fee expense of approximately $20,000 per annum.

8. The contemplated General Fund Long-Term Investment Policy mirrors the Compensation Fund Long-Term Investment Policy with the only difference being the shorter duration of the General Fund's fixed income investments. Potential for a portion of these investments to be utilized to fund the Society's operations makes the shorter duration appropriate for these investments. With a duration range of 1 – 4 years, the benchmark for the General Fund portfolio is the Scotia Capital Markets Short-Term Index. Whereas the Compensation Fund with a duration range of 1 – 6 years, uses the Scotia Capital Markets Universe Index as a benchmark.

9. Foyston, Gordon & Payne Inc. who currently manage the Compensation Fund Long-Term portfolio would administer the General Fund Long-Term portfolio. This outsourcing would release Law Society staff time currently spent administering General Fund short-term investments, provide professional investment management and increase net returns to the Society.

10. A copy of the General Fund Long-Term Investment Policy is attached at page 28.

LAWYERS FUND FOR CLIENT COMPENSATION LONG TERM INVESTMENT POLICY

Request to Convocation

11. Convocation is requested to approve the amended Long-Term Investment Policy for the Lawyers Fund for Client Compensation.

12. The existing Long-Term Investment Policy for the Lawyers Fund for Client Compensation requires that it be reviewed periodically to assess whether its provisions are still appropriate. The Committee recommends only minor changes as indicated on the updated policy attached at page 35.

2005 BUDGET PROCESS

Request to Convocation

13. Convocation is requested to approve
    - the 2005 budget schedule
    - operational reviews for Professional Regulation and Policy and Legal Affairs to be completed no later than June 2004
    - the opportunities for Bencher input into the budget process and operational reviews in March and April 2004.

Budget Process

14. The Society's current budget process is consistent with the Society's existing by-laws, respecting the mandates of its various standing committees and recognizes the policy and oversight role of Convocation and the operational role of the CEO.

15. Convocation, in the course of its regular business, receives regular program reports from the Society's various standing committees as well as periodic updates from the CEO on how the policy objectives of Convocation are being implemented and the relative merits and progress of the various initiatives and programs undertaken during the course of the year.

16. A comprehensive system of operational reviews linked to the budget is also in place. As mandated by Convocation in January 2002 these reviews have been carried out for the last two years (the 2003 and 2004 budgets). The Finance & Audit Committee intends to continue the operational reviews for the 2005 budget.

17. As mandated by Convocation in January 2002, completion of actual and envisaged operational reviews for the 2003, 2004 and 2005 budgets will result in substantially all of the Society's programs being reviewed over the three years.

Existing Corporate Governance

18. By-law 9 of the Law Society dictates the mandates of the Society's various standing committees. For example, the Professional Regulation Committee is mandated to develop for Convocation's approval:

> policy options on all matters relating to regulation of the profession in the areas of professional practice and fitness to practice.

19. The Professional Development, Competence and Admissions Committee has a similar mandate relating to matters of competence. This standing committee structure develops policy options and choices by delegating the research and data collection responsibilities necessary for policy development across the Society's various standing committees with Convocation retaining ultimate decision-making authority.

20. Under By-law 9 the Finance and Audit Committee is mandated,

> to review the plans and projections of the annual budget of the Society, including the Lawyers Fund for Client Compensation, or any special or extraordinary budget required for the purpose of the Society, including the Lawyers Fund for Client Compensation, to provide comments and advice to Convocation thereon, and to recommend approval of the annual budget or any special or extraordinary budget item.

21. Section 8 of the Law Society Act provides that the CEO shall, under the direction of Convocation, manage the affairs and functions of the Society.

22. The by-laws also articulate the duties of the Chief Executive Officer. By-law 3 states:
The Chief Executive Officer shall be responsible for the management and co-ordination of all phases of the operation, administration, finances, organization, supervision and maintenance of all activities of the Society.

23. In addition By-law 3 states,
The Chief Executive Offcier shall perform all the functions and duties ordinarily associated with the office of chief executive officer including,
    (a) putting into effect all policies and procedures established by Convocation or a standing committee of Convocation;
    (b) counseling and assisting Convocation or any standing committee of Convocation in the development, adoption and implementation and advancement of the various functions of the Society.

24. The by-laws clearly separate the policymaking and operational responsibilities of Convocation and the CEO. Convocation, supported by the guidance of its standing committees, establishes the policy objectives of the Society and delegates operational responsibility for the implementation of these policies to the CEO. On an annual basis, as mandated in By-law 3, the CEO prepares a budget that is "consistent with the activities planned by Convocation for the next fiscal year." This budget is reviewed by the Finance and Audit Committee and must be approved by the Committee and by Convocation.

Budget Principles

25. The Society employs a hybrid budget process that includes some of the characteristics of the base budgeting approach as well as characteristics of a budgeting technique referred to as Zero Based Budgeting ("ZBB").

26. Base budgeting looks at the current year budget as a base or minimum starting point, and increases or decreases that base. This method of budgeting has increasingly gone out of style in favour of more active budgeting processes such as the current Law Society process.

27. Zero base budgeting is a method of budgeting that requires proponents of discretionary expenditures to continually justify every expenditure. For every planning period the starting point for each budget line item is zero. The intention is to avoid incremental budget creep, duplications and non-essentials.

28. The Law Society has applied the ZBB philosophy, but not to every activity, every year. While embracing the philosophy, the Law Society like many other organizations, has adopted a hybrid form of ZBB for a variety of reasons.

29. An assessment of activities "from scratch" is very comprehensive, detailed and therefore expensive. It takes a lot of employee time to prepare. Repetition of the exercise throughout the Law Society each year would render the budget process unproductive and expensive.

30. For-profit organizations typically apply ZBB to discretionary expenditures such as research and development, which are far more "one off" and non-repetitive than most of the Law Society's activities. Most of the Law Society's operations are intended to fulfill its mandate and do not vary much from year to year. If other circumstances are relatively stable it would be inappropriate to complete a comprehensive ZBB exercise for every activity, every year.

Operational Reviews

31. This hybrid budgeting approach is the basis for the rotational operational reviews already in place at the Law Society. A number of programs have been selected each year. The objective is to review all areas of the Law Society in a three-year cycle.

32. The reviews have included detailed presentations on the mandate and operational intent of programs and services offered by the functional areas, the human and fiscal resources employed and the descriptions of operational processes. Past expenditures are carefully reviewed. Future expenditures are carefully questioned.

33. The rotational review of activities has the benefits of:
- Restricting a sense of entitlement to cost increases
- Allowing a more meaningful, focused, analytical cost containment
- Increasing discipline in budget development
- Limiting resistance as the onerous and exhaustive examination of costs is not imposed every year in the absence of changing circumstances
- Reducing the length of the budget process
- Increasing Bencher understanding of a number of specific programs each year.
- Increasing the accountability of management for the programs underlying the financial information contained in the annual budget.

34. Communication about the operational review process for the 2004 budget was complicated by the Bencher election creating shorter timeframes for budget deliberations. For the operational reviews completed as part of the 2005 budget process, we are providing early notice of programs to be reviewed so that Convocation has an opportunity to provide guidance on the programs and methods of review.

35. The operational reviews are prepared by the relevant departments and are first examined by the Senior Management Team. The operational reviews are then presented to the relevant standing committee or the CEO in the absence of a relevant standing committee. The operational review is then presented to the Finance & Audit Committee, which reports results to Convocation. For March and April 2004 Benchers may identify, in writing, issues to be addressed within the programs being reviewed.

36. In addition to financial issues, the Finance & Audit Committee assesses compliance with the Law Society's role statement and assesses the benefit to the public and profession. It does so bearing in mind that members of the other committees have expertise that Finance & Audit Committee members may not have. The Finance & Audit Committee is respectful of this expertise, but it makes its assessments independently. These assessments are an integral part of the Finance & Audit Committee mandate and in the view of the Finance & Audit Committee are best performed as part of the budget operational review process. This results in recommendations to Convocation to fund or not to fund specific activities. In completing the operational reviews, members of the Committee frequently ask: "Why are we doing this?" If the Committee's examination indicates that an activity is inconsistent with the role statement, or priorities regarding the public or the profession, this will be brought to the attention of Convocation. During the

operational reviews in recent years the Finance & Audit Committee has not concluded that there was any breach of the organization's role statement or inadequate benefit to the public or profession. This is not to suggest that individual members of the Committee have not reached such a conclusion, however these views have not carried the day in Committee or Convocation.

History of Operational Reviews

37. Operational reviews commenced with the 2003 budget. For the 2003 budget, operational areas reviewed were:
- The Client Service Centre
- The Great Library and County Libraries combined with the business plan for LibraryCo.
- The Lawyers Fund for Client Compensation.

These three areas represent over 40% of the total budgeted expenditures of the Society.

38. For the 2004 budget operational areas reviewed were:
- Professional Development and Competence
- Communications.

These two areas represent an additional 20% of the Society's budgeted expenditures.

39. In addition:
- the Information Systems department presented the Finance & Audit Committee with an overall review of its operations, its strategic direction and anticipated resource requirements.
- as part of a continuing review of the Society's control processes our external auditors, Deloitte and Touche, undertook internal control reviews of:
- the Human Resources department
- the Finance department's payroll processes
- the purchasing and payments cycle.

40. The results of these reviews were presented to the Audit Sub-Committee and to the Finance and Audit Committee. Financial processes will continue to undergo further control reviews by Deloitte and Touche.

41. In total therefore, programs utilizing more than 70% of the Society's fiscal resources will have undergone operational reviews or systems audits over the last two years. The operational reviews have been a service to the membership as resources have been directed to the core functions of the Society while at the same time allowing annual membership fees to be reduced.

Operational Reviews for 2005 Budget

42. For the 2005 budget cycle, the Senior Management Team is recommending Professional Regulation and Policy and Legal Affairs for operational review. This will achieve our objective of subjecting virtually all areas of the Law Society to an operational review over the three-year period. Professional Regulation (with Professional Development and Competence) has been identified as the Law Society's dominant strategic area and has been in a state of transition over the last two years. Policy and Legal Affairs has also been refocused and restructured over the last two years.

43. As set out in the timetable below it is intended that the operational reviews for the 2005 budget be completed and presented to the Finance and Audit Committee no later than June 2004.

2005 Budget Timetable

DATE (2004)	PROCESS
January/ February	Finance & Audit Committee and Convocation approve a process for preparing the 2005 budget.
February, March, April	Bencher's questions and comments for operational reviews submitted in writing to the Chair of Finance & Audit Committee, Chair of the relevant standing committee and CEO. Operational reviews are presented to the Senior Management Team (SMT) and standing committees (or CEO if no relevant standing committee). The SMT commences the budget process by presenting and reviewing individual and collective budget assumptions, variables and objectives.
June	Last Convocation before summer. Last opportunity for Convocation to convey policy objectives and budget priorities to the Finance and Audit Committee prior to the development of the draft budget. After presentation to the relevant standing committee, operational reviews for selected programs are presented to the Finance and Audit Committee and any other Benchers who wish to attend. The Finance and Audit Committee reports results of the operational reviews to Convocation and operational review material is available to all Benchers. LibraryCo submits preliminary submissions on 2004 activities and 2005 projections to the Finance and Audit Committee at this time. External organizations such as CDLPA will have been requested to provide 2005 budget submissions.
July and August	2005 draft budget prepared by CEO and SMT. Facilities and Information Systems compile a capital budget with the assistance of user departments.
October	Draft operating and capital budget is presented to the Finance and Audit Committee and Convocation for approval.

2003 CAPITAL BUDGET STATUS

Request to Convocation

44. Convocation is requested to approve that projects budgeted in 2003 but not yet completed, be funded in 2004 from the accumulated year-end balance of the Capital Allocation Fund.

45. The Law Society's financial year-end is December 31 of each year. Capital expenditures for each year are approved in a similar fashion to operating expenditures, but capital projects often extend beyond the financial year-end. The schedule below of capital expenditures provides a summary of capital spending by project for the year 2003.

46. The facilities projects are divided into three categories: projects with 2003 budgets and undertaken as planned, projects undertaken during the year that were not part of the original 2003 plan and projects budgeted but not undertaken.

47. Of the projects undertaken, with the exception of the barristers' robing rooms, the Bencher wing restoration and the roof repair, all are substantially complete and total costs will be within the total spent and committed to date. Additionally, the acquisition of some furniture included in the furniture systems and alterations category, will not be received prior to the end of 2003. Therefore, approximately $160,000 of the committed amount for furniture systems will not be expended until 2004. Of the projects approved in 2003 to be completed in 2004, the barristers' robing rooms will require additional funding beyond what has currently been spent and committed. It is estimated that an additional $100,000 will be required to complete

the project. Competitive quotes for the restoration of the mosaic tile floor in the Bencher wing and the roof repair have yet to be obtained. The 2003 capital budget is under spent and adequate funding will be available to complete these projects from funds carried forward to 2004.

48. The projects that were undertaken that were not part of the original 2003 plan were projects that arose through the year either as emergencies, such as the replacement of the uninterruptible power supply system for the Society's main computer room or completion of projects approved in 2002 that had some residual work to be completed as in the case of the elevator and main lobby renovations. The funding for these projects was provided from under spending in other projects or from projects not undertaken during the year.

49. The major projects budgeted but not commenced were lecture hall seating replacement and the restoration of the library main reading room floor. The lecture hall seating was deferred pending resolution of proposals to renovate the North Wing and the library floor was deferred to coordinate with planned renovations by the province to the court side of Osgoode Hall.

50. The largest single item budgeted was the renovation of the North Wing. The budget of $4,000,000 represents the allocation to capital in 2002 in anticipation of the planned renovation of the North Wing. Funding for the full renovation of the North Wing is before Convocation for consideration. To date, money has been spent on architectural work, estimating, plans, etc. in order to provide Convocation with the information necessary for decision making on the future of the North Wing.

51. Information systems projects for 2003 are substantially completed. The final phase of the financial systems upgrade will be completed in early 2004. The over spending on 2003 budget is primarily due to the acquisition of a server late in 2003 for the library automation project budgeted in 2004. The spending on this specific project will be reduced in 2004 to offset the acquisition cost of this server in 2003.

52. The status of approved 2003 capital expenditures is set out below.

Capital Projects	Budget $	Spent & Committed $	(Over) Under $
Restoration of Perimeter Fence	310,000	245,166	64,834
Mechanical Upgrades	300,000	280,355	19,645
Furniture Systems and Alterations	200,000	256,936	(56,936)
Barristers' Robing Rooms	150,000	92,752	57,248
Restoration of Benchers' Wing	100,000	76,240	23,760
Cafeteria Renovations	100,000	25,378	74,622
Accessibility Alterations	100,000	128,409	(28,409)
Ottawa Building Restoration	95,000	62,860	32,140
Electronic Security System	80,000	78,550	1,450
Roof Repair	60,000	10,500	49,500
Signage	50,000	16,737	33,263
Contingency	25,000	11,000	14,000
Uninterruptible Power Supply	-	73,923	(73,923)
Main Floor Renovation	-	65,182	(65,182)
Elevator Renovation	-	19,336	(19,336)
Lecture Hall Seating Replacement	225,000	-	225,000
Library Main Reading Room	60,000	-	60,000
Irrigation System	10,000	-	10,000
Total Facilities Projects	1,865,000	1,443,324	421,676
North Wing Renovations	4,000,000	341,995	3,658,005

Information Systems	770,000	776,522	(6,522)
Total Capital Expenditures	6,635,000	2,561,841	4,073,159

NORTH WING RENOVATION
Request to Convocation

53. Convocation is requested to approve the proposed plan for the renovation of the North Wing.

54. The original motivation for renovating the North Wing was to bring off-site Law Society staff back to Osgoode Hall, realizing significant operating and financial benefits. This opportunity was brought about by developments in the way the Bar Admission Course is to be offered and the reduced need for classrooms.

55. In 2002, a preliminary investigation and costing for renovation of the North Wing was completed. In March 2003 Convocation approved the renovation of the 2nd, 3rd and 4th floors at an estimated cost of $4.7 million. At the direction of the Finance and Audit Committee, staff explored the possibility of including the 1st floor in the renovation plans. Subsequent considerations, including the need to extend the main elevators to the 6th floor to enhance accessibility and renovations to the Lamont Lecture Hall to make it a multi-use, multi-functional space have resulted in detailed plans being developed for a full renovation of the North Wing from the 1st to the 6th floors at an estimated cost of $9.028 million, broken down as follows:

·	Mechanical/ Electrical	$2,690
·	Architectural/Structural	2,076
·	Overhead / Contingencies	1,380
·	Furniture/Equipment/Moving/Design	2,882
	Total	$9,028

56. As noted above the renovation of floors two, three and four has already been approved. This portion of the renovation primarily converts classroom space to office space, resulting in quantifiable savings in off-site lease costs and other financial benefits. It is estimated there will be positive financial benefits within four years with savings sufficient to recover the initial investment of $4.7 million in these three floors within approximately 12 years.

57. The renovation of the 5th and 6th floors involves the optimisation of existing office space and the extension of elevator service to the 6th floor, eliminating the serious accessibility deficiency that exists at the present time. Similar quantifiable savings associated with floors two through four do not accompany the renovation of this space. However, the construction synergies, operating efficiencies and enhanced accessibility upon completion justify the renovation of the entire North Wing. The projected cost for renovating these two floors is approximately $2.9 million.

58. The renovation of the 1st floor Lamont Lecture Hall will convert it into a multi-use, multi-functional space more appropriate for the Law Society's current CLE needs now that the Hall is no longer required for the BAC program. The total projected cost for renovating the 1st floor is $1.4 million.

59. The benefits of renovating the entire North Wing will permeate all aspects of Law Society operations. The productivity gains from incorporating the top two floors into the renovations of the other floors are summarized as:

- o Comprehensive, Society wide improvements to spatial arrangements. Many areas of the Law Society have not been significantly modernized or renovated for decades. This has led to significant compromises being made in accommodating staff and is an ongoing productivity, file management and confidentiality issue. The Law Society's space needs are also expanding as we seek to optimally fulfill our core functions. For instance, in the Regulatory area the continued development of the tribunal process requires more space for meetings and staff.

- The space we are currently renting offsite is in modern commercial buildings with high space efficiency ratios. Osgoode Hall is obviously an older building with a mixed-use history leading to lower space efficiency. It is therefore important that if we are to relocate staff back to Osgoode Hall that we are able to optimise space arrangements. This cannot be done without reconfiguring the space on the 5th and 6th floors. This will allow specific space designs meeting functional requirements and allow related functions to be located an efficient distance from each other.
- Appropriate quality of accommodation
- Improved security. Security is becoming increasingly important at institutions such as the Law Society. The comprehensive reconfiguration of the building will allow an effective and systematic security system to be put in place. For instance under the existing layout, it is impossible to comprehensively restrict access to regulatory areas as they are spread throughout the building.
- Improved accessibility. North Wing renovations from the 2nd to the 6th floor will significantly improve accessibility at the Law Society, from the obvious benefit of the extension of elevator service to the sixth floor, to improved floor layouts that will reduce barriers to access. The existing layouts on all floors are based on building infrastructure that is decades old. The existing floor layouts have also been adapted over time between business and education needs resulting in a hybrid layout that is neither efficient nor accessible. Renovations on all floors will focus on open plans, work flows and practical accessibility. There will also be specific accessibility improvements such as better positioned and equipped washrooms.
- The implications of not renovating anything in the North Wing need to be incorporated into the renovation considerations, as there are significant financial consequences of maintaining the status quo. For instance
  - there are mechanical and HVAC upgrades and replacements required as part of the building's long-term maintenance plan. These changes are included in the costs of renovation if the classrooms are converted to office space but would otherwise have an annual cost of at least $300,000 for the next few years.
  - Refurbishment of the Lamont Lecture Hall and 4th floor, whether the latter is for students or employees, will have an immediate cost of at least $360,000.
  - Even if classroom space is not converted into office space the integration of the Regulatory division, improvement of office space on the second floor, and the increased provision of services will result in departmental moves and an increase in space required possibly requiring more external space. It is conceivable that we would expand into the other half of the floor we currently occupy at 393 University Ave. There would be leasehold improvements associated with this move estimated at $60 / square foot, and the costs of moving would result in an expense of at least $600,000. This is in addition to annual rental costs of $300,000 based on our current rates. All these costs would be paid to the landlord rather than invested in our own building.

60. There have been space changes on a departmental basis in recent years but these changes represented minor modifications to the space plan. The significant square footage involved in the 2nd, 3rd and 4th floor renovation (an increase of useable office space from 14,200sq. ft. to 28,700sq. ft.) is an opportunity to ensure that an updated, comprehensive space plan for the whole organization is in place. It is impossible to optimise the use of space on the 2nd, 3rd and 4th floors without incorporating changes to other floors. For instance, it is recommended that the Investigation Department move from the 6th floor to the 3rd floor, in close proximity to the Discipline Department and other Regulatory departments. The Regulatory division is currently spread over three floors, the 2nd, 5th, and 6th and the related Compensation Fund and Staff Trustee functions are offsite. This is not appropriate for efficiency, confidentiality, communications within the department and file management. However regulatory functions cannot be integrated without making changes to the 5th and 6th floors in conjunction with the education space released on floors 2 to 4.

61. Convocation recently set the future direction of the Bar Admission Course. This direction means that the primary user of the Lamont Lecture Hall will be the Continuing Legal Education program. The existing single, tiered auditorium is not appropriate for CLE programs and other Law Society users which has led to its contemplated reconfiguration as smaller, more flexible rooms.

62. The approved 2004 budget included the transfer of the 2003 Unrestricted Fund surplus (projected at $3.2 million) to the Capital Allocation Fund to support the planned renovation. The balance of the required funding (projected at $1.8 million) will be provided from the transfer of future surpluses and/or the allocation of a portion of the annual capital levy. The 2004 budget also indicated detailed plans for the project would be brought back to Convocation and these plans are attached in the form of the Schematic Design Summary Report from the Ventin Group, Architects.

63. To ensure proper costing of the project, the Architect engaged a professional quantity surveyor / cost consultant to develop elemental breakdowns of construction components based upon schematic plan layouts and existing plans. As well, a cost review will be conducted at the conclusion of the design development to ensure costing information is consistent with the original estimates. Further cost reviews will be conducted at other critical milestones of the construction phase.

64. The project will be tendered in the summer of 2004, with construction to commence in September 2004 and continue for a period of 16 to 20 months. A tight program of schedule control will be implemented to reduce the risk of construction delays.

65. The Finance and Audit Committee will be provided with a summary of tender proposals for information subsequent to the close of the tender process.

66. The Schematic Design Summary Report from the architects is separately attached.

ETHICAL / SOCIALLY RESPONSIBLE INVESTING

Request to Convocation

67. The Committee recommends to Convocation that it would be inappropriate to change the Law Society's investment policies to reflect ethical investment principles.

68. At Convocation in June 2003 a question on the application of ethical investment principles to the Law Society's investment portfolio was referred to the Finance and Audit Committee. The Committee considered the matter in September 2003 and January and February 2004. The Committee noted that Messrs Aaron and Gottlieb have also provided a notice of motion that "the Law Society adopt the ethical investment proposals contained in the attached report" which has been circulated to Benchers and the Committee considered it as well. The Aaron / Gottlieb motion is on the agenda for Convocation in March.

Background

69. An analysis of the Law Society's cash and investment balances at the end of 2003 is set out below:

	B.As & T-Bills $'000s	Fixed Income $'000s	Equities $'000s	TOTAL $'000s
General Fund Short-Term	26,225	-	-	26,225
Compensation Fund Short-Term	8,077	-	-	8,077
Compensation Fund Long-Term	1,261	15,648	2,920	19,829
TOTAL	35,563	15,648	2,920	54,131

70. As analysed above, our short-term investments are invested in Bankers Acceptances ("B.A.s") and Treasury Bills ("T-Bills") making an ethical investing policy superfluous. Bankers Acceptances are short term notes issued by a commercial bank, roughly analogous to term deposits of less than one year. Treasury Bills are debt obligations backed by the full faith and credit of the Canadian government that have maturities of one year or less. An ethical investing policy would be relevant to our long-term investments primarily comprising fixed income investments. $2.8 million of these fixed income investments are in corporate bonds with the balance of $12.8 invested in government bonds. If the new General Fund Long

Term Investment Policy is approved by Convocation a further $10 million will be allocated to the Long Term Portfolio, resulting in approximately another $2million invested in equities and approximately $8million in fixed income securities. Accordingly, the amount in Compensation Fund and General Fund fixed income instruments and equities available for ethical investing will approximate $30 million.

71. The Law Society has contemplated an ethical investment policy on three other previous occasions – when the Long Term Investment Policy was implemented in 2001, when Perigee Investments were retained as Investment Managers in 2001, and when Foyston Gordon and Payne ("Foystons") replaced Perigee as Investment Managers in 2003. For reasons similar to the current reasons an ethical investing policy was considered inappropriate. We are advised that the LawPro Investment Committee (overseeing an investment portfolio of $327 million at September 30, 2003) also considered ethical investing in 1999 and reached a similar conclusion.

Issues and Concerns

72. The Committee's discussion and conclusion that an ethical investing policy was inappropriate centered around the following concerns and issues:

Definition

a) What do we mean by ethical investing? People react differently to this issue and have differing views with respect to the application of ethical investing principles to an investment portfolio. Ethical investing as an individual investor is relatively straight forward based on an individual's issues and preferences. In the case of the Law Society, a list of investments or investment parameters would have to satisfy the majority of Convocation in order to qualify.

In the extreme, ethical investing principles could prohibit investments in government bonds – governments receive significant revenues from smoking, alcohol and gaming, and expend considerable amounts on military and nuclear activities. Consensus needs to be obtained on applying positive (areas of support) or negative (areas of avoidance) screens such as those below:

- community involvement
- healthcare services
- socially progressive relationships
- effective corporate governance
- vegetarian foods
- job creation
- privatization
- affirmative action and diversity
- location of company assets
- social spending
- non-United States.
- alcohol
- tobacco, gambling
- military
- nuclear power
- irresponsible marketing
- oppressive regimes
- pornography
- animal rights
- the environment, particularly climate change and water quality
- governance and accountability including transparency and integrity
- core labour standards including sweatshop and living wage standards
- human rights
- bio-ethics including genetic technologies
- privacy
- global capitalism and issues of democracy.

Continuous Monitoring

b) The implementation of an ethical investing policy based on what ever principles agreed to would require constant monitoring, review and debate whether individual companies met the criteria established under our ethical investing policy.

Reduced Returns

c) The implementation of ethical investing principles may result in a decrease in investment returns. The Law Society's current investment policy is primarily designed to conserve capital and maximize investment returns. It does not attempt to classify investments as "ethical" or not. Rather, investment decisions are made on financial considerations only. The size of our equity investments is relatively small. They are currently managed externally by Foystons, in two pooled funds proprietary to Foystons. An ethical investment policy would, for all intents and purposes, exclude the use of Foyston's pooled funds.

Increased Cost

d) Changing from the current pooled funds managed by Foystons to an approved ethical mutual fund or approved individual equities would result in an increase in direct administration costs. For instance we currently pay management fees to Foystons of .45 of 1% on equity asset values. Management expenses for an ethical mutual fund are at least 2.3%. On current equity values of over $2 million this translates into a reduction in net returns of more than $40,000 annually for the equity portion of our long-term investment portfolio. In assessing individual securities, access to social investment databases will cost at least $20,000 per year, and a portfolio audit, which assesses the impact on the portfolio of imposing screens will cost at least $10,000.

The relatively small size of the Law Society's portfolio means we have piggybacked onto LawPro's investment manager arrangements to obtain the benefits of their larger pool of funds and management expense ratios. A formal ethical investing policy could sacrifice this beneficial relationship

Increased Risk

e) The adoption of a full or hybrid ethical investing policy will have the effect of increasing investment risk as the spectrum of potential investments will be limited. This is contrary to the investment policy objective of the preservation of capital. Most Canadian social investment databases are limited to companies in the TSX composite index. Ethical portfolios tend to be weighted towards the financial institution and technology categories. However proponents of ethical investing note that the increased oversight and information needs required to apply ethical investing policies may have the effect of decreasing investment risk, and that in the long run socially responsible companies may be more profitable and sustainable.

Benchmarking Complications

f) The adoption of a full or hybrid ethical investing policy will compromise the benchmarking standards we currently use to measure the performance of our investment managers. We currently use the TSX and S&P indices for equities and the Scotia Capital Markets indices for fixed income performance which are directly relevant to our portfolio, but an ethical investing factor may result in a less credible comparison to market performance leading to a less relevant and less reliable benchmark.

Scope

g) Nearly half of the long-term portfolio can be in corporate securities, and to be consistent ethical investing would have to be applied to the fixed income portfolio as well.

73. Because of the aforementioned concerns the Committee concluded that the application of ethical investing principles would be difficult for the Law Society. All of these issues have the potential to be administratively onerous, costly and provide no guarantee of a watertight ethical investment policy or increased investment returns. Beyond the administrative issues, Convocation would potentially be dealing with the issue of "what is ethical" every time investment reports are presented to Convocation. The issue

has the potential to be a constant irritant and distraction to Convocation as Benchers debate the merits of ethical investing or disagree over what is ethical.

LAW SOCIETY OF UPPER CANADA

GENERAL FUND

LONG-TERM INVESTMENT POLICY

January 2004

Purpose

1. The Law Society, acting through its Finance and Audit Committee, has adopted the following Investment Policy governing the management of the General Fund Long-Term Funds and Reserves ("the Portfolio"). The Portfolio comprises the funds and reserves not required to fund the short-term obligations of the Law Society's Unrestricted and Restricted Funds. Descriptions of these Funds can be found in the Annual Financial Statements of the General Fund.

Accountability and Responsibility

2. Convocation
Convocation shall:
- review and approve the Investment Policy
- review the Portfolio's investment returns, and the administration of the portfolio in the context of this policy. This shall be done on at least a quarterly basis.

3. Finance and Audit Committee
The Finance and Audit Committee shall:
- review and recommend approval of the Investment Policy to Convocation
- review the Portfolio and monitor its performance
- review and approve the appointment and continuing retention of the Investment Manager
- periodically report to Convocation on the investment returns of the Portfolio, and the administration of the Portfolio. This shall be done on at least a quarterly basis.

4. LSUC Management
LSUC management has overall responsibility for:
- preparing and recommending changes to the Policy
- recommending the selection of the Investment Manager, and Custodian
- monitoring the Portfolio to ensure compliance with this policy
- periodically evaluating the Investment Manager, and Custodian
- accounting for Portfolio transactions.

5. Investment Manager
The Investment Manager directs the business of Portfolio purchases and sales, has full investment discretion subject to the Investment Policy, and has responsibility for:
- Managing the Portfolio in terms of this Investment Policy, and in the best interests of the Law Society
- Providing written notification to management of the Law Society of any violations of this Investment Policy
- Adhering to the best standards of industry practice.

6. Custodian

The Custodian shall be one of the following:

- A bank list in Schedule I or II of the Bank Act (Canada)
- A trust company that is incorporated under the laws of Canada, and that has shareholders' equity of not less than $10,000,000
- A company that is incorporated under the laws of Canada, and that is an affiliate of a bank or trust company referred to above and has shareholders' equity, of not less than $10,000,000

And shall:

- Store and protect all Portfolio ownership documentation
- Execute all Portfolio transactions as directed by the Investment Manager
- Collect all income
- Provide monthly statements to LSUC.

Philosophy

7. The Finance and Audit Committee is of the belief that:
    - Superior rates of return over longer time periods will be achieved through active management of a broadly diversified portfolio of high quality securities
    - High-risk securities, which could lead to excessive volatility and the possibility of a reduction in the capital value of the Portfolio in a depressed market, are to be avoided
    - Extreme positions in either individual securities or in an asset class are to be avoided

8. In order to establish an appropriate Investment Policy for the Portfolio, the following characteristics of the Law Society, relevant to the Portfolio, are noted.
    - The Law Society is the governing body of Ontario's legal profession
    - Governance of the Law Society is regulated by The *Law Society Act*
    - The General Fund finances the operation of the Law Society with the primary exceptions of the Lawyers Fund for Client Compensation, the Errors & Omissions Insurance Fund, the Lawyers' Professional Indemnity Company and LibraryCo Inc. It includes funds restricted by Convocation primarily the Working Capital Reserve (up to two months operating expenses) and the Capital Fund (capital acquisitions and improvements).
    - The primary revenue source for the General Fund is member fees which are received in the first four months of the year
    - Total revenue for the General Fund for the year ended December 31, 2002 was $55 million
    - The Law Society is not subject to income or capital taxes.
    - Balances for General Fund Cash and Short Term Investments at 31 December 2001 and 2002 were $17.7 million and $24.9 million respectively.
    - Future withdrawals from the Portfolio will depend on operating conditions and capital requirements and therefore the Portfolio could be sensitive to short term volatility.

Objectives

9. The primary objective is to preserve and enhance the real capital base of the Portfolio.

10. The secondary objective is to generate investment returns to assist the Law Society in funding its programs.

11. The Finance and Audit Committee recognizes that even with the guidelines outlined in this Policy, the investment returns from the Portfolio will vary from year to year, reflecting market and economic conditions, levels of inflation, government policies and many other factors which are beyond the control of the Investment Manager. These outside factors should not deter the Investment Manager from exercising due diligence and using his or her best efforts to achieve the long-term primary investment objective for the Portfolio as set out above, and the following benchmarks:
    - By asset class
        - To outperform the appropriate market index return

- To obtain a total rate of return in the top 50% of a sample of funds having similar investment objectives, utilizing an independent performance measurement service on a four year moving average.

- By benchmark portfolio
  - To outperform a static benchmark portfolio consisting of the benchmark of the asset mix ranges noted below (i.e., a portfolio consisting of 87% of the Scotia Capital Markets Short Term Bond Index total return, and 13% of the total return of the S&PP/TSX Composite Index and S & P 500, equally weighted, over a four year moving average or complete market cycle.)

12. Investment Manager

To achieve these objectives the Law Society will retain the services of a firm registered as Investment Counsel and Portfolio Manager with the Ontario Securities Commission to manage the investment portfolio on a discretionary basis within the constraints outlined in this document. The Investment Manager is to be guided by the following:

Asset Mix

13. The following asset mix guidelines, based on market values, constitute the acceptable range of exposure for the various asset classes, which comprise the Portfolio:

% Of Total Fund	Minimum	Benchmark	Maximum
Cash and Short Term	0%	10%	20%
Bonds	60%	77%	95%
Total Fixed Income	80%	87%	95%
United States and Canadian Equity	5%	13%	20%
Total Equity	5%	13%	20%

Diversification

14. The investment risk of the Portfolio shall be reduced by maintaining a diversified selection of industries and companies which places primary emphasis on long term growth, and safety of capital. All percentages are based on market values, except where indicated.

15. Cash and Short Term

- Short-term investments with a maximum term to maturity at purchase of 364 days may be held in the Portfolio when appropriate as an alternative to bond and equity investments.
- Appropriate short-term investments are:
  - Government of Canada and provincial treasury bills
  - Bankers' acceptances
  - Commercial papers issued by Canadian corporations with a rating of "R1" or better as established by The Dominion Bond Rating Service or equivalent rating by another recognized bond rating service
  - No more than 5% of the total Fund may be invested in the commercial paper securities of any one single issuer.
  - Where the Investment Manager operates a pooled money market fund, which meets the requirements set out in (a), (b) and (c), this pooled money market fund may be used as an alternative in order to achieve better rates and liquidity.

16. Bonds

- Investment in any one security or issuer shall not exceed 10% of the total Bond Portfolio with the exception of Government of Canada and provincial government bonds and their guarantees
- The Bond Portfolio is not restricted to a minimum or maximum number of issues although, over time, the average number of issues in the Bond Portfolio should be between 10 and 30 individual issues
- The emphasis within the Bond Portfolio will be on quality, with a minimum rating "BBB" or better by The Dominion Bond Rating Service or equivalent rating by another recognized bond rating service. In the event of a downgrade below "BBB" the Investment Manager will advise of an appropriate course of action. No more than 10% of the market value of the Portfolio shall be invested in bonds rated "BBB"
- The bond portfolio may be invested up to a maximum of:
  - 100% in Federal government or Federal government guaranteed bonds
  - 60% in Provincial government and Provincial government guaranteed bonds
  - 10% in Municipal bonds; and
  - 50% in corporate issues.
  - Not more than 10% of the total market value of the bond portfolio will be invested in securities issued by a foreign issuer, or Canadian issuer in a foreign currency.
- Investment instruments allowed include bonds, debentures, notes, non-convertible preferred stock, term deposits and guaranteed investment certificates.
- The Duration of a portfolio is a measure of the portfolio's sensitivity to changes in the general level of interest rates (Duration multiplied by change in interest rates gives change in value of bond portfolio). The normal Duration range for the bond portfolio administered under this policy should be between 1 and 4 years.

17. Equities

- The intent is to provide a diversified selection of common stocks, also allowing convertible preferred stock and convertible debentures listed on a recognized stock exchange
- The market value of any one issuer cannot represent more than 10% of the market value of the total Portfolio, or that equity's weight in the S&P/TSX Composite Index or S & P 500 Index, whichever is greater.
- With the exception of rights and warrants, no derivative investments, venture capital financing, non-conventional or mortgage investments will be permitted without the prior written approval of the Finance and Audit Committee.

18. Other Investments

- Investments in open or closed-ended pooled or mutual funds are permitted provided that the assets of such funds are permissible investments under this Policy.
- Deposit accounts of the custodian, Investment Manager, or Schedule 1 banks can be used to invest surplus cash holdings.

Discretion

19. The Investment Manager is to have full discretion in the management of the assets of the Portfolio, selecting the appropriate asset mix, and the individual securities, within the guidelines set out herein.

Communications

20. The Communications process between the Investment Manager and the Finance and Audit Committee is flexible, but at a minimum will include the following:

- A quarterly written summary listing of all portfolio transactions from the Investment Manager
- A complete quarterly portfolio listing
- A quarterly written assessment of the North American economies and the financial markets, and impact on the Portfolio

- Semi-annual investment meetings with the Investment Manager. The agenda at these meetings would include an overview of the economy and the outlook for the financial markets, the current investment strategy, and a review of the performance results
- An annual review of the Investment Policy and Portfolio quality and diversification guidelines.

21. Any time that the Investment Manager is not in compliance with this policy, they are required to advise the Chief Financial Officer of the LSUC immediately, detailing the breach and recommending a course of action to remedy the situation.

Securities Lending

22. No lending of securities is permitted.

Conflicts of Interest – Investment Policy

23. Conflict of interest standards apply to all members of Convocation, Law Society management and the Investment Manager(s), as well as to all Agents employed by the Law Society, in the execution of their fiduciary responsibilities.

24. An 'Agent' is defined to mean a company, organization, association or individual, as well as its employees, retained by the Law Society to provide specific services with respect to the administration and management of the Law Society's investment assets.

25. In carrying out their fiduciary responsibilities, these parties must act at all times in the best interests, and for the benefit, of the Law Society. All parties must act in the manner that a "prudent person" would in matters related to the investment strategy and portfolio management.

26. No affected person shall accept a gift or gratuity or other personal favour, other than one of nominal value, from an individual with whom the person deals in the course of performance of his or her duties and responsibilities.

27. In the execution of their duties, Benchers, management and their Agents shall disclose any material conflict of interest relating to them, or any material ownership of securities, which could impair their ability to render unbiased decisions, as it relates to the administration of the investment assets.

28. Further, it is expected that no Bencher, management nor Agent shall make any personal financial gain (direct or indirect) because of their fiduciary position. However, normal and reasonable fees and expenses incurred in the discharge of their responsibilities are permitted if documented and approved by the Law Society.

29. It is incumbent on any party affected by this Statement who believes that he/she may have a conflict of interest, or who is aware of any conflict of interest, to notify the CEO or the CFO of the Law Society. Disclosure should be made promptly after the affected person becomes aware of the conflict. The CEO or CFO, in turn, will decide what action is appropriate under the circumstances but, at a minimum, will table the matter at the next regular meeting of the Finance and Audit Committee.

30. No affected person who has or is required to make a disclosure as contemplated in this Statement shall participate in any discussion, decision or vote relating to any proposed investment or transaction in respect of which he or she has made or is required to make disclosure.

Changes to Policy

31. This Investment Policy may only be changed by Convocation on the specific recommendation of the Finance and Audit Committee.

LAW SOCIETY OF UPPER CANADA

LAWYERS FUND FOR CLIENT COMPENSATION

LONG-TERM INVESTMENT POLICY

Strike outs = deletions, italics = new provisions

Purpose

1. The Law Society, acting through its Finance and Audit Committee, has adopted the following Investment Policy governing the management of the Long-Term Funds and Reserves ("the Portfolio"). The Portfolio comprises the funds and reserves not required to fund the Compensation Fund's short-term obligations. The Compensation Fund is a discretionary fund used to compensate member's clients for losses arising from a member's misconduct, ~~and the General Fund finances the Law Society's day to day operations.~~

Accountability and Responsibility

2. Convocation

Convocation shall:

- review and approve the ~~Statement of~~ Investment Policy
- review the Portfolio's investment returns, and the administration of the portfolio in the context of this policy. This shall be done on at least a quarterly basis.

3. Finance and Audit Committee

The Finance and Audit Committee shall:

- review and recommend approval of the Investment Policy to Convocation
- review the Portfolio and monitor its performance
- review and approve the appointment and continuing retention of the Investment ~~Counselor and Portfolio~~ Manager
- periodically report to Convocation on the investment returns of the Portfolio, and the administration of the Portfolio. This shall be done on at least a quarterly basis.

4. LSUC Management

LSUC management has overall responsibility for:

- preparing and recommending changes to the Policy
- recommending the selection of the Investment ~~Counselor and Portfolio~~ Manager, and Custodian
- monitoring the Portfolio to ensure compliance with this policy
- periodically evaluating the Investment ~~Counselor and Portfolio~~ Manager, and Custodian
- accounting for Portfolio transactions, ~~particularly ensuring that allocations between the two funds are appropriate~~

5. Investment ~~Counselor and Portfolio~~ Manager

The Investment ~~Counselor and Portfolio~~ Manager directs the business of Portfolio purchases and sales, has full investment discretion subject to the Investment Policy, and has responsibility for:

- Managing the Portfolio in terms of this ~~Statement of~~ Investment Policy, and in the best interests of the Law Society
- Providing written notification to management of the Law Society of any violations of this ~~Statement of~~ Investment Policy
- Adhering to the best standards of industry practice.

6. Custodian

The Custodian shall be one of the following:

- A bank listed in Schedule I or II of the Bank Act (Canada)
- A trust company that is incorporated under the laws of Canada, and that has shareholders' equity of not less than $10,000,000

- A company that is incorporated under the laws of Canada, and that is an affiliate of a bank or trust company referred to above and has shareholders' equity, of not less than $10,000,000

and shall:

- store and protect all Portfolio ownership documentation
- execute all Portfolio transactions as directed by the Investment ~~Counselor and Portfolio~~ Manager
- collect all income
- provide monthly statements to LSUC.

Philosophy

7. The Finance and Audit Committee is of the belief that:
   - superior rates of return over longer time periods will be achieved through active management of a broadly diversified portfolio of high quality securities
   - high-risk securities, which could lead to excessive volatility and the possibility of a reduction in the capital value of the Portfolio in a depressed market, are to be avoided
   - extreme positions in either individual securities or in an asset class are to be avoided.

8. In order to establish an appropriate Investment Policy for the Portfolio, the following characteristics of the Law Society, relevant to the Portfolio, are noted.
   - The Law Society is the governing body of Ontario's legal profession
   - Governance of the Law Society is regulated by *The Law Society Act*
   - The Compensation Fund is maintained to mitigate losses sustained by clients because of the dishonesty of a member of the Law Society. It is a discretionary fund, and claim payments have a maximum of $100,000
   - The primary revenue source for both the General Fund and the Compensation Fund is member fees which are primarily received in the first four months of the year
   - Total revenue for the General and Compensation Fund for the year ended ~~December 31, 1999~~ was $49.4 million *December 31, 2002 was $63.5 million*
   - The Law Society is not subject to income or capital taxes.
   - Balances for investments at 31 December 1998 and 1999 *2002 and 2001 were:*

CATEGORY	2002 ($mill)	2001 ($mill)
General Fund – Cash and Short Term Investments	24.9	17.7
Compensation Fund – Cash and Short Term Investments	12.2	9.1
Compensation Fund – Long Term Investments	14.0	13.7
TOTAL	51.1	40.7

   - It is therefore apparent that, apart from core balances which are required to meet the operating needs of the General Fund and Compensation Fund, there is a portion of the portfolio that can tolerate some short term volatility.

Objectives

9. The primary objective is to preserve and enhance the real capital base of the Portfolio. ~~This is measured by obtaining a total rate of return in excess of the Canadian Consumer Price Index plus 3% over the long term. The long term will exceed a four year moving average.~~

10. The secondary objective is to generate investment returns to assist the Law Society in funding its programs.

11. The Finance and Audit Committee recognizes that even with the guidelines outlined in this Policy, the investment returns from the Portfolio will vary from year to year, reflecting market and economic conditions, levels of inflation, government policies and many other factors which are beyond the control of

the Investment ~~Counselor and Portfolio~~ Manager ~~(defined below).~~ These outside factors should not deter the Investment ~~Counselor and Portfolio~~ Manager from exercising due diligence and using his or her best efforts to achieve the long-term primary investment objective for the Portfolio as set out above, and the following benchmarks:

- By asset class
    - To outperform the appropriate market index return
    - To obtain a total rate of return in the top 50% of a sample of funds having similar investment objectives, utilizing an independent performance measurement service on a four year moving average.
- By benchmark portfolio
    - To outperform a static benchmark portfolio consisting of a benchmark of the asset mix ranges noted below (i.e. a portfolio consisting of 87% of the Scotia Capital Markets Universe Bond Index total return, and 13% of the total return of the ~~Toronto Stock Exchange 300~~ *S&P/TSX Composite* Index and S & P 500 Index, equally weighted, over a four year moving average or complete market cycle.)

12. Investment ~~Counselor and Portfolio~~ Manager

To achieve these objectives the Law Society will retain the services of a firm registered as Investment Counsel and Portfolio Manager with the Ontario Securities Commission to manage the investment portfolio on a discretionary basis within the constraints outlined in this document. The Investment ~~Counselor and Portfolio~~ Manager is to be guided by the following:

Asset Mix

13. The following asset mix guidelines, based on market values, constitute the acceptable range of exposure for the various asset classes, which comprise the Portfolio:

% Of Total Fund	Minimum	Mid Point *Benchmark*	Maximum
Cash and Short Term	0%	10%	20%
Bonds	60%	77%	95%
Total Fixed Income	80%	87%	95%
United States and Canadian Equity	5%	13%	20%
Total Equity	5%	13%	20%

Diversification

14. The investment risk of the Portfolio shall be reduced by maintaining a diversified selection of industries and companies which places primary emphasis on long term growth, and safety of capital. All percentages are based on market values, except where indicated .

15. Cash and Short Term
    - Short-term investments with a maximum term to maturity at purchase of 364 days may be held in the Portfolio when appropriate as an alternative to bond and equity investments.
    - Appropriate short-term investments are:
        - Government of Canada and provincial treasury bills
        - Banks' acceptances
        - Commercial papers issued by Canadian corporations with a rating of "R1" or better as established by The Dominion Bond Rating Service or equivalent rating by another recognized bond rating service

- No more than 5% of the total Fund may be invested in the commercial paper securities of any one single issuer.
- Where the Investment Manager operates a pooled money market fund, which meets the requirements set out in (a), (b) and (c), this pooled money market fund may be used as an alternative in order to achieve better rates and liquidity.

16. Bonds

- Investment in any one security or issuer shall not exceed 10% of the total Bond Portfolio with the exception of Government of Canada and provincial government bonds and their guarantees
- The Bond Portfolio is not restricted to a minimum or maximum number of issues although, over time, the average number of issues in the Bond Portfolio should be between 10 and 30 individual issues
- The emphasis within the Bond Portfolio will be on quality, with a minimum rating "BBB" or better by The Dominion Bond Rating Service or equivalent rating by another recognized bond rating service. In the event of a downgrade below "BBB" the Investment Manager will advise of an appropriate course of action. No more than 10% of the market value of the Portfolio shall be invested in bonds rated "BBB"
- The bond portfolio may be invested up to a maximum of:
  - 100% in Federal government or Federal government guaranteed bonds
  - ~~50%~~ *60%* in Provincial government and Provincial government guaranteed bonds
  - 10% in Municipal bonds; and
  - 50% in corporate issues.
  - Not more than 10% of the total market value of the bond portfolio will be invested in securities issued by a foreign issuer, or Canadian issuer in a foreign currency.
- *Investment instruments allowed include bonds, debentures, notes, non-convertible preferred stock, term deposits and guaranteed investment certificates.*
- *The Duration of a portfolio is a measure of the portfolio's sensitivity to changes in the general level of interest rates (Duration multiplied by change in interest rates gives change in value of bond portfolio). The normal Duration range for the bond portfolio administered under this policy should be between 1 and 6 years.*

17. Equities

- The intent is to provide a diversified selection of common stocks, *also allowing convertible preferred stock and convertible debentures listed on a recognized stock exchange*
- The market value of any one issuer cannot represent more than 10% of the market value of the total Portfolio, or that equity's weight in the ~~TSE 300 Capped~~ S&{/TSX *Composite* Index or S & P 500 Index, whichever is greater.
- With the exception of rights and warrants, no derivative investments, venture capital financing, non-conventional or mortgage investments will be permitted without the prior written approval of the Finance and Audit Committee.

18. Other Investments

- Investments in open or closed-ended pooled or mutual funds are permitted provided that the assets of such funds are permissible investments under this Policy.
- Deposit accounts of the custodian, Investment ~~Counselor and Portfolio~~ Manager, or Schedule 1 banks can be used to invest surplus cash holdings.

Discretion

19. The Investment ~~Counselor and Portfolio~~ Manager is to have full discretion in the management of the assts of the Portfolio , selecting the appropriate asset mix, and the individual securities, within the guidelines set out herein.

Communications

20. The Communications process between the Investment Manager and the Finance and Audit Committee is flexible, but at a minimum will include the following:
    - A quarterly written summary listing of all portfolio transactions from the Investment Manager
    - A complete quarterly portfolio listing
    - A quarterly written assessment of the North American economies and the financial markets, and impact on the Portfolio
    - Semi-annual investment meetings with the Investment ~~Counselor and Portfolio~~ Manager. The agenda at these meetings would include an overview of the economy and the outlook for the financial markets, the current investment strategy, and a review of the performance results
    - An annual review of the Investment Policy and Portfolio quality and diversification guidelines.

21. Any time that the Investment Manager is not in compliance with this policy, they are required to advise the Chief Financial Officer of the LSUC immediately, detailing the breach and recommending a course of action to remedy the situation.

Securities Lending

22. No lending of securities is permitted.

Conflicts of Interest – Investment Policy

23. *Conflict of interest standards apply to all members of Convocation, Law Society management and the Investment Manager(s), as well as to all Agents employed by the Law Society, in the execution of their fiduciary responsibilities.*

24. *An 'Agent' is defined to mean a company, organization, association or individual, as well as its employees, retained by the Law Society to provide specific services with respect to the administration and management of the Law Society's investment assets.*

25. *In carrying out their fiduciary responsibilities, these parties must act at all times in the best interests, and for the benefit, of the Law Society. All parties must act in the manner that a "prudent person" would in matters related to the investment strategy and portfolio management.*

26. *No affected person shall accept a gift or gratuity or other personal favour, other than one of nominal value, from an individual with whom the person deals in the course of performance of his or her duties and responsibilities.*

27. *In the execution of their duties, Benchers, management and their Agents shall disclose any material conflict of interest relating to them, or any material ownership of securities, which could impair their ability to render unbiased decisions, as it relates to the administration of the investment assets.*

28. *Further, it is expected that no Bencher, management nor Agent shall make any personal financial gain (direct or indirect) because of their fiduciary position. However, normal and reasonable fees and expenses incurred in the discharge of their responsibilities are permitted if documented and approved by the Law Society.*

29. *It is incumbent on any party affected by this Statement who believes that he/she may have a conflict of interest, or who is aware of any conflict of interest, to notify the CEO or the CFO of the Law Society. Disclosure should be made promptly after the affected person becomes aware of the conflict. The CEO or CFO, in turn, will decide what action is appropriate under the circumstances but, at a minimum, will table the matter at the next regular meeting of the Finance and Audit Committee.*

30. *No affected person who has or is required to make a disclosure as contemplated in this Statement shall participate in any discussion, decision or vote relating to any proposed investment or transaction in respect of which he or she has made or is required to make disclosure.*

Changes to Policy

31. This Investment Policy may only be changed by Convocation on the specific recommendation of the Finance and Audit Committee.

Attached to the original Report in Convocation file, copy of:

Copy of Addendum to the 2005 Budget Process distributed to Convocation.

It was moved by Mr. Ruby, seconded by Mr. Chahbar that the Report be adopted.

Not Put

A debate followed.

It was moved by Mr. Aaron, seconded by Mr. Gottlieb that the Law Society adopt the ethical investment proposals contained in the attached Report.

ETHICAL INVESTING:
A SOCIAL RESPONSIBILITY PROPOSAL
TO THE LAW SOCIETY OF UPPER CANADA
By Bob Aaron

BACKGROUND:
At any given time, the Law Society of Upper Canada has invested millions of dollars of liquid funds invested in short term notes and commercial paper. The Lawyers Fund for Client Compensation also holds many more millions of dollars in its reserves.

THE ISSUE:
The question proposed in this motion is whether the Law Society should consider and, if appropriate, adopt any guidelines for the investment of these funds which involve the application of standards or directions which are not strictly financial in nature. Specifically, the issue is whether consideration should also be given to ethical or social responsibility in investing the funds of LSUC members.

In short, should LSUC integrate social or ethical criteria into the financial decision-making process?

REASONS FOR CONSIDERING THE ISSUE:

1. The Law Society might want to amalgamate its values with its investment strategies, finding it unconscionable to invest in companies or term paper of companies whose activities run counter to the moral values of the legal profession. LSUC could choose to avoid those companies engaging in questionable practices and reward those acting more responsibly.

2. Just as the Law Society has spoken out and set an example in its proactive programs in areas such as gender equality, relations with the aboriginal Canadians and the gay and lesbian legal communities, help for the homeless, and others, it could also make its voice heard in society and effect change to Canada's economy - by deed and by example. The companies in which the Law Society chooses to invest should be encouraged to compete not only on the basis of their financial performance, but on the basis of their social and environmental records as well.

3. Investing ethically and in a socially responsible manner can be a tool for transformation toward a socially and environmentally sustainable society.

4. Finally, an organization such as the Law Society which is committed to upholding the rule of law and the public interest should *not* be perceived as *not* investing in an ethically and socially responsible manner.

ETHICAL PRINCIPLES:
A number of organizations have adopted definitions which may be usefully looked at in an attempt to determine whether LSUC should be following any non-financial guidelines. The purpose of this proposal is *not* to recommend any specific organization - most of which, in any event, are directed to selling equities in the form of mutual funds. Their research in the field, however, has considerable merit.

The Social Investment Organization has enunciated their set of shared beliefs in this way. It believes that:

- All investment and business decisions have social and environmental implications. Consideration of those implications as part of making financial decisions will have positive impacts on our communities, our environment and our society.
- The intelligent use of capital can provide critical links in the development of a more just and sustainable society.
- Individuals, civil society, government, and the private sector share responsibility for creating economic well-being, a healthy environment, and a just world.

The trustees of Ethical Funds Inc. have defined their ethical principles. Their organization invests in companies and economies which must:

- Encourage progressive industrial and employee relations, including adherence to employment equity, labour safety practices and child labour laws.
- Operate within countries and regions that support equal opportunity and adhere to non-discriminatory employment practices.
- Derive a major portion of their income from non-tobacco related products.
- Provide products or services for civilian, non-military purposes.
- Derive their income from non-nuclear forms of energy (this applies to utility companies).
- Comply with environmental regulations and be committed to implementing environmentally conscious practices

THE TREASURER'S EQUITY ADVISORY GROUP
Since the bicentennial Convocation in May 1997, the Law Society has moved rapidly to embrace equitable principles as set out in the TEAG Terms of Reference and the Bicentennial Report on Equity Issues within the Legal Profession. It is submitted here that it would be inconsistent with the intent of the equity report for the Society to *refuse* to adopt equity proposals in its investment of millions of dollars in its reserve and operating funds. Can the Society, for example, justify placing its funds with companies which do not have equitable and non-discriminatory employment policies, which export nuclear technology to countries without adequate safeguards; or are involved with destroying rain forests, using child labour, or manufacture armaments or tobacco.

IMPACT ON CURRENT INVESTMENT PRACTICES:
It is submitted that a change to embrace social and ethical investment policies would have little, if any, actual impact on the current investment practices of the Law Society. The financial statements of the Law Society already indicate whether invested funds are in ethical investments, but no such ethical investment policy has ever been considered or approved by Convocation. Since the Society's eligible investments are so restricted in any event, and since no equities are involved, it would seem to be a fairly simple matter to identify investments which contravene the proposed policies.

THE COST FACTOR IN MEETING THE CRITERIA:
Much of the work to determine compliance with social and ethical investment criteria has already been done by organizations such as Ethical Funds Inc. and the Social Investment Organization, although their definition of ethical and social and the Society's interpretation might differ.

It is proposed that the Society adopt an investment standard which would not require it to conduct a social or ethical audit of each target company. The suggested test would be that the target investment be one which is *"generally*

known" to support social and ethical responsibilities in its endeavours (whether government or corporate) and that a violation or alleged violation of the standards "*has not been brought to the attention"* of the Law Society.

The Finance Committee and the appropriate staff of the Society would be able to make a determination of non-eligibility without bringing the matter to the attention of Convocation, and without the matter becoming one of public debate. Once an initial list is compiled, very little follow-up work would be required and it is suggested that the process would very shortly become transparent.

Even if there was a small amount of up-front staff time in aligning investment policies with this proposal, it is submitted that it would be a small price to pay when compared to the Society's other proactive programs; when compared to the benefits the Society and the profession would garner by taking this stance; and in particular the resulting optics if the Society rejects the proposal.

Law Society staff have commented that the cost of implementing equitable investment policies – despite the low threshold set out in this proposal - would be unacceptably high. This, it is submitted, should not be an excuse to permit investment in unethical corporations. The Society already devotes considerable resources to the implementation of the Equity Report, and hiring equity staff and the Discrimination and Harassment Counsel.
It is submitted that the Society cannot afford to be perceived by the public and the profession as investing in funds and corporations which do not adhere to ethical principles, however defined.

If the Society can advocate equitable principles in other areas, it can surely adopt them in its investment policies. Not to consider them, however, is unacceptable.

INFORMATION SOURCES:
The Law Society might want to consider joining the Social Investment Organization or any similar group to be kept up to date on developing trends in this area.

Considerable relevant material is available on the Internet. There are also other sources of information on ethical investments, such as:

- The First North American Conference on Social and Ethical Auditing, Accounting and Reporting - "Standards for the New Millenium", sponsored by the Vancouver City Savings Credit Union, the Institute of Social and Ethical Accountability and the Ethics Practitioners of Canada

- EthicScan Canada Limited, a Toronto-based business ethics, research and consulting clearing house that monitors the social and environmental performance of 1500 companies in Canada. These include public and private Canadian corporations in 43 activity sectors, as well as transnationals operating in Canada

- Business Ethics Quarterly

- Corporate Responsibility Reports, available from the BBB of Mainland, BC

- Ecotrust Canada, a Canadian offshoot of a US-based organization working in the coastal and temperate rainforests of the Pacific Northwest

- Peace and Environmental News

- GLOBE Resource Centre, a resource for environmental business intelligence on the Internet

- INFACT Canada - the Infant Feeding Action Coalition Canada homepage on the Internet

- Principles for Global Corporate Responsibility - drafted by three interfaith organizations from Canada, the UK and the US. Available on the Internet

- 2003 Directory for Social and Ethical Investors, Consumers and Businesses at www.goodmoney.com/directry.htm

and many others.

PROPOSAL FOR CONSIDERATION BY CONVOCATION:
The following proposal is suggested for consideration by Convocation:

The Law Society of Upper Canada adopts the following guidelines for ethical and social responsibility in investing its funds in addition to all other criteria and limitations currently in place:

The Law Society of Upper Canada will use its best efforts[1] to invest in the obligations of governments, banks, and corporations which, for themselves, their parent and subsidiary organizations:

- Encourage progressive industrial and employee relations, including adherence to employment equity, labour safety practices and child labour laws.[2]
- Operate within countries and regions that support equal opportunity and adhere to non-discriminatory employment practices.
- Comply or strive to comply with environmental regulations and are committed to implementing environmentally conscious practices
- Conduct business on a regular basis in, and with, a country or countries that provide racial equality within its or their political boundaries
- Encourage equal opportunities within its business operations and environment
- Do not derive a significant portion of its income, or the income of a parent or subsidiary, from tobacco-related products.

OPTIONS FOR CONVOCATION
1. Accept the proposal
2. Amend the proposal
3. Reject the proposal

[1] The test in determining "best efforts" will be that the target investment be one which is *"generally known"* to support social and ethical responsibilities in its endeavours (whether government or corporate) and that a violation or alleged violation of the standards *"has not been brought to the attention"* of the Law Society.
[2] This list is derived from the ethical principles of Ethical Funds Inc.

An amendment to the Aaron/Gottlieb motion was accepted that Convocation direct the Finance Committee to develop an ethical investment policy to be brought back to Convocation for further consideration.

Lost

ROLL-CALL VOTE

Aaron	For	Harris	For
Alexander	Against	Heintzman	For
Backhouse	For	Hunter	Against
Banack	For	Krishna	Against
Bobesich	For	Legge	Against
Bourque	For	MacKenzie	For
Campion	Against	Manes	For
Carpenter-Gunn	Against	Murray	Against
Caskey	Against	Pattillo	Against
Chahbar	Against	Pawlitza	Against
Cherniak	Against	Porter	Against
Coffey	Against	Potter	For
Copeland	For	Ross	For
Curtis	For	Ruby	For
Dickson	Against	Silverstein	Against
Doyle	Against	Simpson	For
Dray	Against	Swaye	Against
Ducharme	For	Symes	For
Eber	For	Warkentin	For
Feinstein	For	Wright	Against
Filion	Against		
Finkelstein	Against		
Finlayson	Against		
Gotlib	Against		
Gottlieb	For		

Vote: 24 Against, 21 For

It was moved by Mr. Ruby, seconded by Mr. Chahbar that Convocation approve the new Long-Term Investment Policy for the General Fund.

An amendment was accepted that the word “material be inserted between the words “a” and “conflict” in paragraph 29, line 2 on page 34 of the Report.

The motion as amended was adopted.

Carried

ROLL-CALL VOTE

Aaron	Against	Harris	For
Alexander	For	Heintzman	For

Backhouse	For	Hunter	For
Banack	For	Krishna	For
Bobesich	For	Legge	For
Bourque	For	MacKenzie	For
Campion	For	Manes	For
Carpenter-Gunn	For	Murray	For
Caskey	For	Pattillo	For
Chahbar	For	Pawlitza	For
Cherniak	For	Porter	For
Coffey	For	Potter	Against
Copeland	For	Ross	Against
Curtis	Abstain	Ruby	For
Dickson	For	Silverstein	For
Doyle	For	Simpson	For
Dray	For	Swaye	For
Ducharme	Against	Symes	For
Eber	For	Warkentin	For
Feinstein	For	Wright	For
Filion	For		
Finkelstein	For		
Finlayson	For		
Gotlib	For		
Gottlieb	For		

Vote: 40 For, 4 Against, 1 Abstention

It was moved by Mr. Ruby, seconded by Mr. Chahbar that Convocation approve the amended Long-Term Investment Policy for the Lawyers Fund for Client Compensation.

An amendment was accepted that the word “material” be inserted between the words “a” and “conflict” in paragraph 29, line 2 on page 41 of the Report.

The motion as amended was adopted.

Carried

ROLL-CALL VOTE

Aaron	For	Harris	For
Alexander	For	Heintzman	For
Backhouse	For	Hunter	For
Banack	For	Krishna	For
Bobesich	For	Legge	For
Bourque	For	MacKenzie	For
Campion	For	Manes	For
Carpenter-Gunn	For	Murray	For
Caskey	For	Pattillo	For
Chahbar	For	Pawlitza	For
Cherniak	For	Porter	For
Coffey	For	Potter	Abstain
Copeland	For	Ross	Abstain
Dickson	For	Ruby	For
Doyle	For	Silverstein	For
Dray	For	Simpson	For

Ducharme	For	Swaye	For
Eber	For	Symes	For
Feinstein	For	Warkentin	For
Filion	For	Wright	For
Finkelstein	For		
Finlayson	For		
Gotlib	For		
Gottlieb	For		

Vote: 42 For, 2 Against

It was moved by Mr. Ruby, seconded by Mr. Chahbar that Convocation approve the 2005 budget schedule, operational reviews for Professional Regulation and Policy and Legal Affairs to be completed no later than June 2004 and the opportunities for Bencher input into the budget process and operational reviews in March and April 2004.

Carried

ROLL-CALL- VOTE

Aaron	For	Harris	For
Alexander	For	Heintzman	For
Backhouse	For	Hunter	For
Banack	Against	Krishna	For
Bobesich	For	Legge	For
Bourque	For	MacKenzie	For
Campion	For	Manes	For
Carpenter-Gunn	For	Murray	For
Caskey	For	Pattillo	For
Chahbar	For	Pawlitza	For
Cherniak	For	Porter	For
Coffey	For	Potter	Against
Copeland	For	Ross	For
Curtis	Against	Ruby	For
Dickson	For	Silverstein	For
Doyle	For	Simpson	For
Dray	For	Swaye	For
Ducharme	For	Symes	For
Eber	For	Warkentin	For
Feinstein	For	Wright	For
Filion	For		
Finkelstein	For		
Finlayson	For		
Gotlib	For		
Gottlieb	For		

Vote: 42 For, 3 Against

It was moved by Mr. Ruby, seconded by Mr. Chahbar that Convocation approve that projects budgeted in 2003 but not yet completed, be funded in 2004 from the accumulated year-end balance of the Capital Allocation Fund.

Carried

ROLL-CALL-VOTE

Aaron	For	Harris	For
Alexander	For	Heintzman	For
Backhouse	For	Hunter	For
Banack	For	Krishna	For
Bobesich	For	Legge	For
Bourque	For	MacKenzie	For
Campion	For	Manes	For
Carpenter-Gunn	For	Murray	For
Caskey	For	Pattillo	For
Chahbar	For	Pawlitza	For
Cherniak	For	Porter	For
Coffey	For	Potter	For
Copeland	For	Ross	For
Curtis	Abstain	Ruby	For
Dickson	For	Silverstein	For
Doyle	For	Simpson	For
Dray	For	Swaye	For
Ducharme	For	Symes	For
Eber	For	Warkentin	For
Feinstein	For	Wright	For
Filion	For		
Finkelstein	For		
Finlayson	For		
Gotlib	For		
Gottlieb	For		

Vote: 44 For, 1 Abstention

It was moved by Mr. Ruby, seconded by Mr. Chahbar that Convocation approve the proposed plan for the renovation of the North Wing.

Carried

ROLL-CALL VOTE

Aaron	For	Harris	For
Alexander	For	Heintzman	For
Backhouse	For	Hunter	For
Banack	Against	Krishna	For
Bobesich	For	Legge	For
Bourque	Against	MacKenzie	For
Campion	For	Manes	For
Carpenter-Gunn	For	Murray	For
Caskey	For	Pattillo	For
Chahbar	For	Pawlitza	For
Cherniak	For	Porter	For
Coffey	For	Potter	Against
Copeland	For	Ross	For
Curtis	For	Ruby	For

Dickson	For	Silverstein	For
Doyle	For	Simpson	For
Dray	For	Swaye	For
Ducharme	For	Symes	For
Eber	For	Warkentin	For
Feinstein	For	Wright	For
Filion	For		
Finkelstein	For		
Finlayson	For		
Gotlib	For		
Gottlieb	For		

Vote: 42 For, 3 Against

The request that Convocation reject a change in the Law Society's investment policies to reflect ethical investment principles was not put.

It was moved by Mr. Heintzman, seconded by Mr. Feinstein that Convocation debate and decide whether it should establish the priorities for the Law Society and Convocation itself on a periodic basis, and assuming that Convocation so decides, establish a means by which those procedures are set.

It was moved by Mr. Porter, seconded by Mr. Ducharme that the Heintzman/Feinstein Motion be tabled.

Carried

ROLL-CALL VOTE

Aaron	Against	Harris	Against
Alexander	Against	Heintzman	Against
Backhouse	For	Hunter	Against
Banack	For	Krishna	For
Bobesich	For	Legge	For
Bourque	For	MacKenzie	Against
Campion	Against	Manes	Against
Carpenter-Gunn	Against	Murray	Against
Caskey	Against	Pattillo	For
Chahbar	For	Pawlitza	Against
Cherniak	For	Porter	For
Coffey	For	Potter	Against
Copeland	For	Ross	Against
Curtis	Against	Ruby	For
Dickson	Against	Silverstein	Against
Doyle	For	Swaye	For
Dray	For	Symes	Against
Ducharme	For	Warkentin	Against
Eber	For	Wright	For
Feinstein	Against		
Filion	For		
Finkelstein	For		
Finlayson	For		
Gotlib	For		
Gottlieb	Against		

Vote: 23 For, 21 Against

It was moved by Mr. Hunter, seconded by Mr. Campion that the Committee of Chairs be mandated to consider alternative processes by which Convocation can set its priorities and report back to Convocation as soon as practicable.

It was moved by Ms. Curtis, seconded by Mr. Ducharme that the Hunter/Campion motion be tabled.

Carried

ROLL-CALL VOTE

Aaron	For	Harris	For
Alexander	Against	Heintzman	For
Backhouse	For	Hunter	Against
Banack	For	Krishna	Against
Bobesich	For	Legge	For
Bourque	For	MacKenzie	For
Campion	Against	Manes	For
Carpenter-Gunn	Against	Murray	For
Caskey	Against	Pattillo	Against
Chahbar	For	Pawlitza	Against
Cherniak	For	Porter	For
Coffey	Against	Potter	For
Copeland	Against	Ross	Against
Curtis	For	Ruby	For
Dickson	Against	Silverstein	Against
Doyle	Against	Swaye	For
Dray	Against	Symes	Against
Ducharme	For	Warkentin	Against
Eber	Against	Wright	Against
Feinstein	For		
Filion	For		
Finkelstein	For		
Finlayson	For		
Gotlib	Against		
Gottlieb	Against		

Vote: 23 For, 21 Against

REPORT FOR INFORMATION ONLY

Equity & Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones Report
- Semi-annual Report from Discrimination and Harassment Counsel
- Equity Initiatives Department Report – 2003

Comité sur l'équité et les affaires autochtones
February 26, 2004

Report to Convocation

Purpose of Report: Information

Prepared by the Equity Initiatives Department
(Josée Bouchard: 416-947-3984)

THE REPORT

Terms of Reference/Committee Process

1. The Committee met on February 12, 2004. Committee members in attendance were W.A. Derry Millar (Vice-Chair), Mary Louise Dickson, Thomas G. Heintzman and William J. Simpson. Invited members in attendance were Sylvia Davis (Alternate Discrimination and Harassment Counsel), Senka Dukovich (Chair of the Equity Advisory Group) and Cynthia Petersen (Discrimination and Harassment Counsel). Staff members in attendance were Josée Bouchard and Katherine Corrick.

2. The Committee is reporting on the following matters:

For Information

- Report of the Activities of the Discrimination and Harassment Counsel for the Law Society of Upper Canada – July 1, 2003 to December 31, 2003.

- Equity Initiatives Department Report – 2003.

REPORT OF THE ACTIVITIES OF THE DISCRIMINATION AND HARASSMENT COUNSEL FOR THE LAW SOCIETY OF UPPER CANADA – JULY 1, 2003 TO DECEMBER 31, 2003

Executive Summary

3. Subsection 5(1) (a) of by-law 36 – Discrimination and Harassment Counsel provides that the DHC shall make a report to the Committee:
   a. not later than January 31 in each year, upon the affairs of the Counsel during the period July 1 to December 31 of the immediately preceding year.

4. Subsection 5(2) of by-law 36 provides that:
   The Committee shall submit each report received from the Counsel to Convocation on the day following the deadline for the receipt of the report by the Committee on which Convocation holds a regular meeting.

5. The Committee submits the Report of the Activities of the Discrimination and Harassment Counsel for the Law Society of Upper Canada – July 1, 2003 to December 31, 2003 to Convocation, in accordance with subsection 5(2) of by-law 36 (APPENDIX 1).

6. This is the second semi-annual report from Cynthia Petersen. During the reporting period, 94 individuals contacted the DHC Program, for an average of 16 new contacts per month. This represents an increase in

the volume of new contacts relative to the first six months of 2003 (she received on average 15 new contacts per month in the first six months).

7. During the reporting period, 7 individuals communicated with the DHC in French (an increase from the first 6 months of 2003).

8. Of the 94 new contacts, 34 (36%) related to matters outside the scope of the DHC mandate. Of the 60 new contacts relating to matters within the mandate of the DHC Program, 29 (48% of contacts that were within the mandate of the DHC Program) involved general inquiries rather than complaints about incidents of discrimination or harassment. Twenty-five of twenty-nine general inquiries came from within the legal profession.

9. During the reporting period, 31 individuals contacted the DHC Program with complaints of discrimination and/or harassment against a lawyer or law firm in Ontario. A little more than half of the complaints (55%) came from members of the public, with the remaining 45% from members of the legal profession. Five of the 14 complaints from within the profession were from student members of the bar.

10. Of the 17 members of the public who contacted the DHC Program, 82% were women. The 14 complaints from members of the profession were evenly divided between men (7) and women (7).

11. Of the 17 complaints from members of the public, 3 involved individuals complaining about employers, 9 were clients complaining about their lawyer, 3 were litigants complaining about counsel representing an opposing party and 2 were litigants complaining about an adjudicator.

12. Of the 14 complaints from the profession, 7 lawyers and 3 law students complained about their employer, 1 lawyer and 1 student complained about discriminatory remarks during job interviews, 1 student complained about the Law Society and 1 member complained about another lawyer outside of an employment context.

13. Of the 17 complaints made by members of the public, sex was raised in 53% of the complaints, race in 35% of the complaints, ethnic and national origin in 12% of the complaints, disability in 12% of the complaints and religion in 6% of the complaints.

14. Of the 14 complaints made by members of the profession, sex was raised in 43% of the complaints, race in 29% of the complaints, ethnic and national origin in 14% of the complaints, disability in 14% of the complaints, religion in 7% of the complaints and age in 7% of the complaints.

15. The DHC offered complainants free mediation services. Most complainants did not opt for mediation. Two individuals initially requested mediation services, but both subsequently changed their minds. In two cases, the complainant asked the DHC to intervene in an informal fashion. In one instance, a successful resolution was achieved. In the other case, the complainant decided to abandon the process and pursue a formal complaint to the Law Society.

EQUITY INITIATIVES DEPARTMENT REPORT – 2003

16. The Committee presents, at APPENDIX 2, a report of the activities of the Equity Initiatives Department for 2003.

APPENDIX 1

REPORT OF THE ACTIVITIES OF
THE DISCRIMINATION AND HARASSMENT COUNSEL
FOR THE LAW SOCIETY OF UPPER CANADA

For the period from July 1 to December 31, 2003

Prepared by Cynthia Petersen

Overview of New Contacts with the DHC Program
(July 1 to December 31, 2003)

Number of New Contacts

1. During this reporting period, 94 individuals contacted the DHC Program. On average, there were 16 new contacts per month, distributed as follows:

(see graph in Convocation file)

2. This represents an increase in the volume of new contacts relative to the first six months of 2003, during which there were 86 new contacts with the DHC Program (on average 15 per month).

Method of Communication

3. During this reporting period, 70 individuals (74%) made their first contact with the Program by telephone, 23 individuals (25%) made their first contact with the Program by email, and 1 individual (1%) made contact with the Program by fax.

4. This represents a slight increase in the frequency of electronic access to the DHC Program relative to the first six months of 2003, when only 21% of individuals used email to contact the DHC.

Language of Communication

5. The DHC Program services are offered in English and French. During this reporting period, of the 94 new contacts with the Program, 7 individuals (7.5%) communicated with the DHC in French. This represents an increase relative to the first 6 months of 2003, when only 3 individuals out of 86 (3.5%) communicated with the DHC in French.

6. In an effort to improve access to the DHC Program, the promotional brochures for the Program have recently been translated into Cantonese. The Chinese brochures are being printed and will begin to be circulated in 2004.

Source of Referral to the DHC Program

7. Individuals who contacted the DHC Program by telephone with issues that are within the DHC mandate were asked how they heard about the Program. Callers either could not recall or advised that they had learned about the Program's existence from the following sources:

(see graph in Convocation file)

8. While I was occupying the DHC position on an interim basis, there were no advertisements for the Program in the Ontario Reports. My appointment to the position was advertised in the OR's in October 2003 and since then, there have been regular advertisements in both English and French for the Program in the OR's. These advertisements appear to be effective and should be continued, given the high percentage of individuals who identified the OR's as the source of their knowledge of the Program. Within the legal profession, 75% of callers who contacted the Program identified the ORs as their source of knowledge.

Matters Outside the DHC Mandate

9. Of the 94 new contacts during this reporting period, 34 (36%) related to matters outside the scope of the DHC mandate.

10. This represents a decrease relative to the first six months of 2003, when 35 out of 86 contacts (41%) were outside the DHC mandate.

11. One of the calls that I received, which was outside of the DHC mandate, involved a complaint of sexual harassment against a lawyer in Quebec who was not a member of the LSUC.

12. Two of the calls outside of the DHC mandate consisted of individuals seeking legal representation or a referral to a lawyer for a discrimination or harassment matter.

13. The remaining contacts that related to matters outside of the DHC Program can be grouped into two categories:

- complaints of harassment or discrimination that do not involve a lawyer or the legal profession (eg. complaints against landlords, the police, ex-spouses, non-legal employers, and correctional facilities) and

- complaints against lawyers that do not involve any equity or human rights issues (eg. billing disputes or allegations of insurance fraud, breach of solicitor-client privilege, and misrepresentation).

14. Whenever I was contacted by an individual relating to a matter outside the scope of the DHC mandate, I explained the mandate to them and, whenever possible, referred them to another organization for information and assistance, such as a union, human rights commission, the Lawyer Referral Service, or the LSUC.

15. Dealing with these "outside mandate" contacts typically does not consume much time, but they nevertheless constitute a drain on DHC Program resources. Consequently, in an effort to reduce the volume of contacts related to matters outside the DHC mandate, the promotional brochures for the Program have been revised to clarify the scope of the DHC's mandate. The revised brochures are being printed and will begin to be circulated in 2004. The DHC website will also soon be revised with a view to clarifying the scope of the mandate. When the Program posters are reprinted, a similar revision will be made.

Inquiries Within the DHC Mandate

16. Of the 60 new contacts relating to matters within the mandate of the DHC Program, 29 (48%) involved general inquiries rather than complaints about incidents of discrimination or harassment. This represents an increase relative to the first six months of 2003, when 19 out of 51 new contacts within the mandate (37%) involved general inquiries.

17. Most of the general inquiries (25 out of 29) came from within the legal profession. The inquiries included:

- calls from members of the legal profession who wanted clarification and/or information regarding their employment rights and obligations in circumstances where they thought that discrimination might occur (eg. a lawyer undergoing sex-reassignment surgery, a lawyer returning from a maternity leave, a pregnant lawyer interviewing for jobs);

- calls from members of the legal profession who had suffered discrimination and/or harassment and were seeking a referral to support resources (eg. counseling services for victims of sexual harassment, alcohol addiction counseling services, depression counseling services);

- law schools, legal clinics and law firms inquiring about educational workshops provided by the DHC;

- legal employers seeking information regarding the development of equitable recruitment practices;
- legal employers seeking information regarding the development of workplace harassment and discrimination policies;
- law students and other researchers seeking access to data collected by the DHC;
- law schools inquiring about equity guidelines for interviewing articling students;
- members of the public and of the legal profession inquiring about the LSUC Rules of Professional Conduct and issues of discrimination or harassment; and
- members of the public and of the legal profession seeking information and/or clarification of the DHC Program's mandate and services.

Discrimination and Harassment Complaints

18. During this reporting period, 31 individuals contacted the DHC Program with complaints of discrimination and/or harassment against a lawyer or law firm in Ontario.

Public / Profession Ratio

19. A little more than half of the complaints (17 or 55%) came from members of the public, with the remaining 45% (14) coming from members of the legal profession. Relative to the first six months of 2003, there was a slight decrease in the number and proportion of complaints from the public:

(see graph in Convocation file)

Profession: Lawyer / Student Ratio

20. Five (5) of the 14 complaints from within the profession were from student members of the bar. Relative to the first six months of 2003, there was a slight increase in the number and proportion of complaints from students.

(see graph in Convocation file)

Public: Male / Female Ratio

21. Of the 17 lay individuals who contacted the Program with a complaint of discrimination or harassment, the overwhelming majority was female (14 or 82%).

22. During the first six months of 2003, the 22 complaints from the public were evenly divided between men (11) and women (11).

23. There was therefore a significant increase in the proportion of public complaints from women:

(see graph in Convocation file)

Profession: Male / Female Ratio

24. The 14 complaints from within the profession were evenly divided between men (7) and women (7). Of the five student members of the bar who contacted the Program with a complaint, 3 were women and 2 were men.

25. Relative to the first six months of 2003, the overall number of complaints from within the profession remained relatively constant (13 in the first six months and 14 in the last six months), but there was a significant increase in the number and proportion of complaints from men. During the first six months of 2003, only 2 out of 13 complaints from within the profession were made by men:

(see graph in Convocation file)

Context of Public Complaints

26. Of the 17 complaints from members of the public:

- 3 involved individuals complaining about their employer;
- 9 were clients complaining about their own lawyer,
- 3 were litigants complaining about counsel representing an opposing party, and
- 2 were litigants complaining about an adjudicator.

27. This data is similar to the data collected in the first six months of 2003, during which there were 22 complaints from members of the public,

- 3 involving employment situations,
- 16 involving complaints by clients, and
- 3 involving litigant complaints against opposing counsel.

28. The following chart demonstrates the contexts in which public complaints arose during the first half and second half of 2003.

(see graph in Convocation file)

Context of Complaints from Within the Profession

29. Of the 14 complaints from within the profession,

- 7 lawyers and 3 law students complained about their employer,
- 1 lawyer and 1 law student complained about discriminatory remarks made during a job interview,
- 1 student complained against the LSUC and
- 1 complained about another lawyer outside of an employment context.

30. This data is similar to the data collected in the first six months of 2003, during which there were 13 complaints from the profession,

- 11 of which involved lawyers (8) and law students (3) complaining about their employer and

- 2 of which involved lawyers complaining about other counsel in non-employment related situations.

31. The following chart demonstrates the contexts in which complaints from within the profession arose during the first half and second half of 2003.

32. During this reporting period (July 1 to December 31, 2003), the respondents in the 10 employment-related complaints from members of the profession included 5 government employers (federal, provincial and municipal), 3 law firms, 1 sole practitioner and 1 company with an in-house legal department. The 2 complaints involving job interviews involved a government employer and a law firm as respondents.

Nature of Public Complaints

33. The 17 complaints made by members of the public were based on the following prohibited grounds of discrimination: race, ethnic origin, national origin, sex, disability and religion. A number of the complaints were based on multiple intersecting grounds, as described below.

34. Approximately half (8) of the 17 public complaints involved discrimination based on race, ethnicity or national origin, or racial harassment:

- Two litigants complained about the conduct of a lawyer representing an opposing party; one alleged race discrimination and the other discrimination based on ethnic and national origin.

- Six individuals complained about the conduct of their own counsel. Of these six clients, three alleged discrimination based on race, one alleged discrimination based on ethnic and national origin, and two alleged racial harassment. The two complaints of racial harassment also included complaints of sexual harassment, and one of these also included religious harassment. [1]

35. Approximately half (8) of the 17 public complaints involved sexual harassment (i.e., inappropriate touching, unwanted sexual overtures and sexist or sexual remarks).

- Of the 8 sexual harassment complaints, 3 were made by employees who were complaining about a coworker, their supervisor and/or their employer.

- Five of the sexual harassment complaints were made by clients of lawyers. As noted above, two of these involved racial harassment as well as sexual harassment, and one also included religious harassment.

36. Two of the 17 public complaints involved disability. One individual complained about discrimination based on disability by an adjudicator and another individual complained about harassment based on disability by a lawyer representing an opposing party in litigation.

37. One litigant complained about sex discrimination by an adjudicator.

38. As noted earlier, almost all (14) of the 17 public complaints were made by women. The 3 public complaints made by men consisted of the two above-mentioned disability-related complaints and the client complaint about discrimination based on ethnic and national origin.

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[1] For the purposes of data collection, I have adopted the jurisprudential definitions of harassment and discrimination as follows: Harassment means a course of vexatious comment or conduct, based on a prohibited ground, that is known or ought reasonably to be known to be unwelcome. Discrimination means differential treatment involving the denial of a benefit or imposition of a burden based on a prohibited ground. Failure to accommodate (eg. disability, religion, etc.) is a form of discrimination.

39. In summary, sex was raised in 9 (53%) of the 17 public complaints, race was raised in 6 (35%) of the complaints, ethnic and national origin was raised in 2 (12%) of the complaints, disability was raised in 2 (12%) of the complaints and religion was raised in 1 (6%) complaint. (As noted above, a number of the complaints involved multiple intersecting grounds of discrimination, which explains why the percentages do not add up to 100%).

40. The following chart demonstrates the number and proportion of public complaints in which each of the prohibited grounds of discrimination was raised:

41. During the first six months of 2003, sex was raised in 11 (50%) of the 22 public complaints made to the DHC, race was raised in 6 (27%) of the complaints, disability was raised in 2 (9%) of the complaints, sexual orientation was raised in 2 (9%) of the complaints, religion was raised in 2 (9%) of the complaints and age was raised in 1 (4%) complaint. (As mentioned above, the percentages do not add up to 100% because a number of the complaints involved multiple intersecting grounds of discrimination.)

42. The following chart compares the number of public complaints in which each ground was raised during the first half and second half of the 2003 year:

(see graph in Convocation file)

Nature of Complaints Within the Profession

43. The 14 complaints made by members (and student members) of the Law Society were based on the following prohibited grounds of discrimination: race, ethnic origin, national origin, sex, disability, age and religion. A number of the complaints were based on multiple intersecting grounds.

44. Of the 14 complaints made by lawyers and law students, 4 involved race discrimination:

- two male lawyers and one male law student complained about racial discrimination at work (one combined with discrimination based on ethnic and national origin) and
- one female articling student complained about racist remarks made during a job interview.

45. Two (2) of the 14 complaints from within the profession were based on ethnic and national origin. Both were made by male law students. One (as mentioned above) was combined with race discrimination and arose in an employment context. The other was a complaint about discriminatory treatment by the LSUC.

46. Three (3) of the complaints from within the profession involved sexual harassment at work (i.e., sexist remarks, inappropriate touching, sexual solicitation). Two of these complainants were female and one was a male calling on behalf of a female co-worker.

47. Three (3) of the complaints from within the profession involved sex discrimination, one of which was combined with age discrimination. All of these complainants were female. Two were employees and one was a job applicant; two were pregnant and alleged discrimination based on their pregnancy.

48. There was 1 complaint of age discrimination (combined with sex discrimination) at work.

49. Two lawyers (one male and one female) complained about discrimination and harassment based on disability. Both complaints included elements of failure to accommodate.

50. One complaint involved discrimination based on religion, in which the respondent was another counsel who was not a co-worker.

51. In summary, sex was raised in 6 (43%) of the 14 complaints made by members of the profession, race was raised in 4 (29%) of the complaints, ethnic and national origin was raised in 2 (14%) of the complaints, disability was raised in 2 (14%) of the complaints, religion was raised in 1 (7%) complaint and age was raised in 1 (7%) complaint. (As explained above, since a number of the complaints involved multiple intersecting grounds of discrimination, the percentages do not add up to 100%).

52. The following chart demonstrates the number and proportion of complaints from members of the profession in which each of the prohibited grounds of discrimination was raised:

(see graph in Convocation file)

53. During the first six months of 2003, sex was raised in 4 (31%) of the 13 complaints made by members of the profession (including one complaint based on pregnancy), disability was raised in 4 (31%) of the complaints, race was raised in 3 (23%) of the complaints, age was raised in 3 (23%) of the complaints, sexual orientation was raised in 1 (8%) complaint, and family status was raised in 1 (8%) complaint. (As explained above, since a number of the complaints involved multiple intersecting grounds of discrimination, the percentages do not add up to 100%).

54. The following chart compares the numbers of complaints from within the profession in which each ground was raised during the first half and second half of the 2003 year:

(see graph in Convocation file)

Total Complaints in 2003

55. The following chart demonstrates the total number of public (39) and professional (27) complaints in which each ground of discrimination was raised in 2003:

(see graph in Convocation file)

56. Sex was raised in 30 out of a total of 66 complaints (45%) in 2003.

57. Race was raised in 19 out of a total of 66 complaints (29%) in 2003.

58. Disability was raised in 10 out of a total of 66 complaints (15%) in 2003.

59. Ethnic and national origin were raised in 4 out of a total of 66 complaints (6%) in 2003.

60. Religion was raised in 4 out of a total of 66 complaints (6%) in 2003.

61. Age was raised in 5 out of a total of 66 complaints (7.5%) in 2003.

62. Sexual orientation was raised in 3 out of a total of 66 complaints (4.5%) in 2003.

63. Family status was raised in 1 out of a total of 66 complaints (1.5%)

Services Provided to Complainants

64. Complainants who contacted the DHC were advised of the various avenues of redress open to them, including:

- reporting to the police (where criminal conduct is involved),

- filing an internal complaint or a grievance within the workplace (including, where appropriate, contacting their union or employee association for assistance),
- filing a complaint with a human rights commission (usually the Ontario Human Rights Commission, but sometimes the Canadian Human Rights Commission),
- making a complaint to the Law Society,
- making a complaint to a judicial council, and
- contacting a lawyer for advice regarding other possible legal actions (eg. wrongful dismissal, defamation, Charter equality claim).

65. I also provided complainants with information regarding each of these options, including:

- what (if any) costs might be involved in pursuing each option,
- whether legal representation is required to pursue an option,
- how to file a complaint or make a report (eg. whether it can be done electronically on line, by telephone, or in writing; whether particular forms are required; etc.),
- the process involved in each option (eg. investigation, conciliation, hearing, etc.),
- what remedies might be available in different fora (eg. compensatory remedies in contrast to disciplinary penalties, reinstatement to employment versus monetary damages, etc.), and
- the time limits for each avenue of redress (or, in some instances, complainants were advised to immediately seek legal advice regarding the application of time limits in their case).

66. In every case, complainants were not only advised of the options available to them, but also that the options were not mutually exclusive.

67. Complainants were also given information about who to contact in the event that they decided to pursue any of their options. Sexual harassment and sexual assault complainants were provided with direct contact information for the Sexual Misconduct Unit within the Law Society's investigations department.

68. In many cases, upon request, I provided "coaching" or strategic tips on how to handle a situation without resort to a formal complaint process (eg. confronting the offender, writing a letter of complaint to the managing partner of the law firm in question).

69. In some cases, I also directed complainants to relevant resource materials available from the Law Society, the Ontario Human Rights Commission, or other sources.

70. In some cases, I referred complainants to support services, such as OBAP (the Ontario Bar Assistance Program); to specialized advocacy services, such as ARCH (a legal resource center for persons with disabilities); or to lawyer and law student associations such as BLSAC (the Black Law Students Association of Canada).

DHC Mediation Services

71. In addition to outlining the options mentioned above, I offered complainants the (free) mediation services of the DHC Program.

72. I explained the nature and purpose of mediation, including that it is a confidential and voluntary process, that it does not involve any investigation or fact finding, and that I act as a neutral facilitator to attempt to assist the parties to reach a resolution of the complaint.

73. Most complainants did not opt for mediation. Many expressed a desire to have their complaint investigated and/or a preference for an adjudicative approach to resolving their complaint. Many also expressed a belief that the respondent would not be willing to participate in mediation, though they did not authorize me to contact the respondent to inquire about their willingness.

74. During this reporting period, two individuals initially requested mediation services, but both subsequently changed their minds, notwithstanding that in each case, the respondent was willing to participate.

75. In two cases, the complainant asked me to intervene in an informal fashion, to advise the respondent of the existence and nature of their complaint and attempt to resolve it without entering into a formal mediation process. In one instance, a successful resolution was achieved through my intervention. In the other case, the complainant decided to abandon the informal process and pursue instead a formal complaint to the Law Society.

Outcomes of Complaints

76. In the overwhelming majority of cases, I provided information to complainants regarding their options, answered their questions, then had no subsequent contact with them, so it is impossible for me to report on the outcomes of their complaints.

77. Although many complainants indicated to me their intention to file an LSUC complaint or a human rights complaint, or to pursue another formal or informal resolution process, I am unable to confirm whether they actually followed through on their stated intentions.

78. While some complainants maintain ongoing contact with me and/or advise me of the ultimate outcome of their complaints, the numbers are so few as to render data collection insignificant.

79. This report therefore does not include any data regarding the outcome of complaints.

Demographic Survey of Complainants

80. Individuals who contacted the DHC by telephone with complaints of harassment or discrimination that were within the Program mandate were asked whether they would be willing to participate in a short demographic survey to enable me to record anonymous statistical data about them.

81. During this reporting period (July 1 to December 31, 2003), 19 surveys were conducted. Ten (10) public complainants and 9 members (or student members) of the Law Society were surveyed, with the following results:

	Profession	Public
Gender/Sex:	4 female	7 female
	4 male	3 male
	1 transgender	
Race / Ethnicity:	1 Black	2 Black
	1 Latin American	1 Iranian
	1 South Asian	1 Southeast Asian
	6 White/Caucasian	6 White/Caucasian

Sexual Orientation:	8 Heterosexual 1 Bisexual	10 Heterosexual
First Language:	7 English 1 French 1 Spanish	6 English 2 French 1 Khmer 1 Persian
Disability:	1 disabled	3 disabled
Age:	1 was 18-24 years old 2 were 25-34 years old 6 were 35-49 years old	3 were 25-49 years old 5 were 35-49 years old 2 were 50-64 years old
Region of Residence:	4 Greater Toronto Area 1 National Capital Region 1 Central Ontario	5 Greater Toronto Area 1 National Capital Region 4 Southwestern Ontario

82. During the first six months of 2003, 28 surveys were conducted; 21 members of the public and 7 members of the profession were surveyed. The combined results of all the surveys conducted in 2003 are as follows:

	Profession	Public
Gender/Sex:	9 female 6male 1 transgender	18 female 13 male
Race / Ethnicity:	2 Black 1 Latin American 1 South Asian 12 White/Caucasian	1 Aboriginal 1 Arab 3 Black 1 Chinese 1 Iranian 1 Korean 1 South Asian 2 Southeast Asian 20 White/Caucasian
Sexual Orientation:	15 Heterosexual 1 Bisexual	29 Heterosexual 2 Lesbian/Gay
First Language:	13 English 2 French 1 Spanish	21 English 4 French 1 Cantonese 1 Hindi 1 Khmer 1 Korean 1 Malay 1 Persian
Disability:	6 disabled	7 disabled
Age:	3 were 18-24 years old 6 were 25-34 years old 7 were 35-49 years old	1 was 18-24 years old 8 were 25-34 years old 12 were 35-49 years old 6 were 50-64 years old

Region of Residence:	5 Greater Toronto Area	15 Greater Toronto Area
	4 National Capital Region	2 National Capital Region
	1 Central Ontario	7 Southwestern Ontario
		4 Central Ontario
		2 Eastern Ontario
		1 Northern Ontario

Promotional Activities

83. During this reporting period, a number of promotional activities were undertaking to enhance the visibility of the Discrimination and Harassment Counsel Program.

84. First, my appointment as DHC in September was announced in the Ontario Reports, as well as various other legal publications, such as the Lawyer's Weekly and Ontario Gazette.

85. Second, since my appointment in September, regular bi-weekly advertisements for the Program have been placed (alternating in English and French) in the Ontario Reports.

86. The French and English brochures for the Program were revised to more accurately reflect the scope of the mandate of the DHC. The brochure was also translated to Chinese. The new brochures will be in circulation in 2004.

87. I was also invited to speak about the DHC Program to students in a class on Anti-discrimination Law in the Faculty of Law at York University (Osgoode Hall Law School).

Educational Activities

88. I continued to conduct workshops on harassment and discrimination with the Director of Equity for the Law Society, Josee Bouchard. We respond to requests from law firms and legal clinics to meet with their staff and/or lawyers, law students and partners. Our workshops are tailored to their specific needs. We provide information on recent developments in the law and training with respect to their internal complaints policies and other avenues of redress. We assist them in learning to identify and respond appropriately to incidents of discrimination or harassment in their workplaces.

89. In addition to their educational function, these workshops also serve to promote the DHC Program, because attendees are provided with information about the Program and the resources that it offers.

Networking

90. I continue to cooperate with my counterparts in other provinces by sharing resources, data and ideas.

91. During this reporting period, I also met with the staff of the Ontario Bar Assistance Plan (OBAP) to share information and determine how we might be able to assist one another in fulfilling our respective mandates.

Program Improvements

92. I provided the Director of Equity with a list of suggestions regarding improvements that could be made to the DHC Program, such as the appointment of an Alternate DHC to assume my responsibilities in the event that I am temporarily unable to perform them. My suggestions are being considered and some have begun to be implemented.

Budget

93. There were a number of expenses incurred relating to the promotional activities described above (eg. printing of new brochures, translation of brochure). In addition, letterhead, envelops and business cards

were designed and printed for the Program. All of these expenses were paid directly by the Law Society out of the DHC Program budget.

94. During this reporting period, I billed the LSUC a total of $29,287.00 for fees in connection with the DHC services, $1,342.01 for disbursements, and $2,138.75 in GST.

Appendix 2

Equity Initiatives Department Report – 2003

January 2004
Prepared by Josée Bouchard, Equity Advisor

Introduction

The following information is provided to the Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones to update activities in the Equity Initiatives Department (the Department) for 2003.

Goals of the Department
The goals, objectives and service standards of the Equity Initiatives Department have been developed to implement Convocation policy on equity and diversity within the legal profession, the Law Society's departments and within the legal profession's relationship to the public.

The Department's goals are:

Goal 1 - Policy development:

To develop policies that promote equality and diversity and to ensure that equality principles inform all Law Society policies.

Goal 2 - Internal:

To embed equality and diversity principles within the operations of the Law Society so as to ensure equality of participation and representation of Aboriginal, Francophone and equality-seeking communities.

Goal 3 - External - Profession:

To develop policies and programs to promote diversity and awareness of equality throughout the legal profession.

Goal 4 - External - Public:

To increase the public's awareness of:
a. Law Society policies, programs and services; and
b. Equality and diversity principles within law and the legal profession.

Goal 5 - External Dialogue:

To facilitate an inclusive dialogue on equality and diversity principles between the public, the Law Society and the legal profession.

Background:

Since 1997, the Law Society has established the Equity Initiatives Department, a department that has grown from a unit of two employees (the Equity Advisor and the Program Administrator) to five permanent full-time positions: the Equity Advisor, the Aboriginal Issues Coordinator, the Community and Policy Advisor, the Counsel and the Program Administrator. In 2003, the Department became part of the Policy Secretariat, increasing its influence and the quality of its work. It is now fully included within the operations of the Law Society and is part of an influential department. It has the same status and approximately the same number of staff as Legal Affairs, another highly respected unit of the Policy Secretariat.

Activities

Goal 1 – Policy Development
To develop policies that promote equality and diversity and to ensure that equality principles inform all Law Society policies.

In 2003, the Department undertook the following policy-related activities to promote equality and diversity in the legal profession:

- With the financial support of the Department of Canadian Heritage, it published the *Report on Equity Initiatives and Resources in the Legal Profession* that outlines equity and diversity initiatives undertaken by legal organizations and identifies measures to foster access to the legal profession. The report is published in French and English and has been widely distributed. The Canadian Bar Association has undertaken a follow-up project to develop model equity audit processes for the legal profession. The Department is a member of the advisory committee to develop the model equity audit process.
- Updated two model policies, the *Guide to Developing a Policy Regarding Workplace Equity in Law Firms* and the *Guide to Developing a Policy Regarding Flexible Work Arrangements.*
- Prepared, in cooperation with the Aboriginal Community and other stakeholders, Guidelines for Lawyers Acting in Aboriginal Residential School Litigation Cases. Convocation adopted the guidelines in 2003. The Department is developing resources and education/communication strategies related to the guidelines.
- Prepared reports on the impact of tuition fee increases on law students and legal careers. The Department monitors the work of the five law schools involved in the accessibility study related to tuition fee increases.
- Prepared reports on Bencher remuneration for consideration by the Equity and Aboriginal Issues Committee (EAIC) and Convocation. In 2003, Convocation approved in principle that it would remunerate Benchers.
- Drafted the staff report entitled *Bicentennial Implementation Status Report* for consideration by the Bicentennial Report Working Group.
- Drafted the Bicentennial Report Working Group's *Bicentennial Implementation Status Report and Strategy*. The report provides a blueprint for the work of the Equity and Aboriginal Issues Committee (EAIC) for 2004-2005.
- Began drafting, with the Equity Advisory Group, the model policy on same-sex benefits, to be presented to EAIC in 2004.
- Began drafting the model policy on maternity leave benefits to be presented to EAG and EAIC in 2004.
- Provided support to EAG, including coordinating its first retreat and developing policy options for appointment of EAG members and other issues relevant to its terms of reference.
- Developed submissions for EAIC and EAG regarding the Task Force on the Continuum of Legal Education Report, adopted by Convocation on December 5, 2003.
- Provided administrative support to Professor Fiona Kay in undertaking two surveys of the legal profession. Monitored the progress of Professor Kay's research. The reports are due in 2004 and will assist EAIC in developing policy options for Convocation's consideration.
- Retained Professor Ornstein to undertake a comparative study of Census data between 1971 and 2001. The Department monitors the progress of the study. The study will be presented to EAG and EAIC in May 2004.
- Provided support to EAIC in the development of its action plan for 2003-2005.

- Provided support to the following working groups of EAIC: the quality of life working group, the disability working group and the Aboriginal working group.
- Coordinated the recruitment process of the Discrimination & Harassment Counsel (DHC). Developed reports relating to the DHC for EAIC and Convocation's consideration.
- Prepared policy options for EAIC and Convocation for the creation of an Alternate DHC position.
- Provided support to Rotiio>taties Aboriginal Advisory Group in the development of policy issues and submissions to the Law Society. In 2003, Rotiio> taties made submissions to the Law Society on the residential school guidelines, law school tuition fee increases, the report of the bicentennial working group, the regulation of paralegals and the Task Force on the Continuum of Legal Education report.

The Department participates in monthly Policy Secretariat debriefs to ensure that equity and diversity principles inform all Law Society policy development. The Department is developing a definition of equality and diversity for the Law Society and an equity template to assist in the policy-development process. The purpose of the template is to inform and guide the Law Society in policy-development, decision-making and program delivery.

Goal 2 - Internal
To embed equality and diversity principles within the operations of the Law Society so as to ensure equality of participation and representation of Aboriginal, Francophone and equality-seeking communities.

The activities undertaken by the Department in 2003 include working with all departments of the Law Society to develop policies and initiatives that promote equality and diversity at the Law Society. The Equity Advisor participates on the Senior Management Team. The following provides a list of activities undertaken in 2003:

Education programs:

All employees attend a workshop designed by the Department on preventing and addressing issues of harassment and discrimination. The workshop was also offered to all managers of the Law Society.

The Department makes presentations about its programs to all new employees of the Law Society as part of the orientation sessions for new employees.

All instructors in the BAC attend a training program, developed and delivered by the Department, on inclusive pedagogy.

The Department organizes the Elders' Program (Toronto), open to all Law Society staff and BAC students, providing a forum to discuss various issues, and to meet regularly with Elders and members of the local Aboriginal and non-Aboriginal bars .

The Department launched its staff educational programs. Topics have included:
- A forum for discussion for International Women's Day.
- A workshop for National Remembrance Day.

In light of the success of the staff education programs and of the fact that the Department is now fully staffed, the Department will hold staff events on a more regular basis.

Advisors appointed under the harassment and discrimination policy

The Department worked in cooperation with the Human Resources Department to appoint advisors under its policy on addressing harassment and discrimination. The Department organized and delivered a 3 day training program for the Law Society's advisors appointed under the Preventing and Addressing Harassment and discrimination policy. The Department also organized advisors' meetings held every two months. Regular meetings have allowed advisors to discuss confidential issues of harassment and discrimination and recent legal developments.

Cooperation with other Law Society units

The Department works closely with most units of the Law Society. Therefore, employees of the Law Society are increasingly aware of equality principles and how to implement equality programs and initiatives. For example, the Communications Department has developed communication strategies for the mentoring program, public education events and other initiatives and has dedicated a number of Ontario Lawyers Gazette issues to equality initiatives.

The Department works closely with the Professional Development and Competence Department (PD & C Department) in the development of strategies to assist students in the BAC, including articling students, to increase equality content of the BAC and the diversity of CLE faculty. For example, the Department wrote an article on barriers to equality in the legal profession for the BAC materials and assisted in drafting the Professional Responsibility exams. The Department developed support initiatives for Aboriginal students.

The Department participates in the work of committees, including the Lunch and Learn Committee and the Repayable Allowance Program Committee.

Internal policies

All Human Resources policies have been reviewed to ensure that they are consistent with equality principles. The Department developed, with the Human Resources Department, a policy to designate bilingual positions which is to be considered by the Senior Management Team in 2004.

Goal 3 – External Profession
To develop policies and programs to promote diversity and awareness of equality throughout the legal profession.

In 2003, the Department developed processes and communication strategies to ensure the effectiveness of its core initiatives, including the Equity and Diversity Training Program, continuing legal education programs, Aboriginal programs and the mentoring program. The Department undertook the following activities:

Equity and Diversity Training Program

The Department, with the Discrimination and Harassment Counsel, delivered training programs to two large Toronto based law firms and three legal clinics (in Halton, Ottawa and Thunder Bay).
The Department visited all law schools to make presentations to students about equality and diversity in the legal profession. Specific outreach initiatives were undertaken with Aboriginal law students.

Training Program for Benchers

The Department participated in the planning of an education program for benchers who sit on discipline panels. The program, to be delivered in March 2004, is half-day and will address issues of equality and diversity. The program includes topics such as: Aboriginal rights, language rights and understanding harassment and discrimination.

Continuing Legal Education Programs

The Department offered, in partnership with other organizations, the following continuing legal education programs:

- "Do Anti-Discrimination Laws Address the Needs of aboriginal People", with Professor Patricia Monture Angus, Mohawk scholar and author, January 2003.
- Disability Law Primer, developed by the Advocacy Resource Centre for Persons with disabilities, with the cooperation of Pro Bono Law Ontario and the Department.
- Legal developments on same-sex marriages.

- Experiences in the Gladue (Aboriginal Persons) Court: Innovations in Implementing *R. v. Gladue*, in partnership with the Aboriginal Legal services of Toronto, the City of Toronto's Aboriginal City Celebration Committee, and Rotiio> taties Aboriginal Advisory Group, June 2003.
- Métis Victory at the Supreme Court of Canada : What does *R. v. Powley* Mean?, commemorating Louis Riel Day 2003, in partnership with the Métis National Council, the Métis Nation of Ontario, the City of Toronto and Rotiio> taties Aboriginal Advisory Group, November 2003.

The PD & C Department, in cooperation with the Department and AJEFO conducted a survey of members who offer legal services in French to identify their needs for future CLE programming. As a result, the PD & C Department and the Department developed, with AJEFO and the Office of Francophone Affairs of the Ministry of the Attorney General, CLE programming in the French language. The launch of this initiative is scheduled for March 2004.

The Department also partnered with organizations such as the South Asian Legal Clinic of Ontario (SALCO), Pro Bono Law Ontario (PBLO) and the South Asian Law Students Association (SALSA) to support the development of CLE programs. The following programs were developed in 2003 and will be offered in 2004:

- Responding to Harassment and Discrimination in the Workplace.
- Training in Child Protection and Children's Aid Society (in partnership with SALCO and PBLO).
- The Role of Specialty Legal Clinics in Meeting the Needs of Ethnically Diverse Communities.

The Department delivered presentations on topics such as gender and race in the legal profession (delivered to the Regional Office of the Department of Justice) and social context in law (delivered at a symposium to honour the Honourable Justice L'Heureux-Dubé).

Mentoring Program

Established in 2000, the Equity and Diversity Mentorship Initiative reflects the Law Society's mandate to govern the legal profession in the public interest. The initiative is designed to help make the legal profession more representative of the communities it serves, and to achieve a legal system that is truly accessible to all.

The Department promotes law as a career at schools, universities and public events. Volunteer lawyers attend events at various schools throughout the year to share their knowledge about the legal system and the profession with students.

- In 2003, presentations were made to nine high schools in the Greater Toronto area. Presentations were made to students in Grades 9 to 12, with average class sizes of 30 students.
- More than 20 high schools have invited the Law Society to make a presentation to their students in 2004. Requests have come from various communities including: Peterborough, Walkerton, Niagara, Hamilton, Ottawa, Guelph, London, Leamington, Brantford, Fergus, Mississauga, Markham, Bowmanville, Oshawa, Sudbury, Timmins, and Toronto.
- Outreach activities at universities (with law schools) are planned throughout 2004.

The Law Society mentorship coordinator matches mentors with high school, university and law school students, students-at-law, and lawyers recently called to the bar. The mentors help their mentees gain a better understanding of the profession. In 2003, eight matches have been made and are in an ongoing mentoring relationship. Of the eight mentees that have been matched with a mentor, three are new lawyers, two are students-at-law, one is a 2nd year university student, and two are high school students. One of the students is in a co-op placement at the Department of Justice Canada Ontario Regional Office.

There are currently about a dozen individuals who are in the process of being matched with a mentor.

Since the initiative was established by the Equity Initiatives Department in 2000, over 150 lawyers have volunteered as mentors. Mentors come from various backgrounds, different areas of practice, and numerous firms and organizations.

Currently, there are over 80 volunteer mentors who are officially registered as Law Society mentors. Thirty lawyers have joined the program in 2003.

Mentors come from small and large firms, and from provincial and federal governments. Some are employed as in-house counsel in organizations and companies, and a handful are sole practitioners.

Mentors have indicated their experiences in the following areas of practice:

- Aboriginal issues
- Administrative law
- Civil litigation
- Constitutional law
- Corporate/commercial law
- Criminal law
- Employment law
- Family law
- Human rights
- Real estate law
- Securities law
- Tax law

Approximately one-third have self-identified as members of equity-seeking communities and members of lawyers' associations that promote equity and diversity in the legal profession.

The initiative began with participants in the Toronto area and has expanded to Ottawa. There are efforts underway to promote the initiative in other parts of Ontario (Kingston, London, Windsor, northern communities). Efforts include targeted mailing to high schools, universities, and district school boards. Information will also be sent to all county law associations.

The initiative is being promoted to over 300 high schools across Ontario, with a potential reach of over 245,000 students. In addition, close to 1,500 teachers who are guidance/career counselors have been informed about the initiative.

The Focus Section in the Ontario Lawyers Gazette for the Fall 2003 edition featured the Law Society Mentorship Program, reaching out to all members and stakeholders in the legal profession. This has resulted in an increased participation of lawyers to become mentors.

A feature article on the Law Society's Equity and Diversity Mentorship Initiative has been submitted to the Ontario Community Newspapers Association (OCNA). The OCNA has over 250 member newspapers reaching every community in Ontario.

Registration forms in English and French are now available on the Law Society website, in addition to background information about the Law Society's mentorship initiatives.

The Equity and Diversity Mentorship information brochure is in production, and will be ready for distribution in February 2004.

A set PowerPoint presentation has been developed that is being used for school visits.

Partnership and Support of the Legal Profession

The Department continued to support initiatives undertaken by its stakeholders. For example, the Department sponsored and attended the following events:

- Professional Women's Symposium: Networking – Women in Untraditional Fields.
- Conference on legal aid issues.

- Celebration of South African Women's Day.
- Women Legal Education and Action Fund (LEAF) Persons Day Breakfast.
- Black Law Students Association of Canada: support for annual conference.
- Canadian Association of Black Lawyers celebration Scholarship Dinner in honour of the Honourable Julius Alexander Isaac.
- South Asian Legal Clinic of Ontario Annual Fundraiser Gala for South Asian Heritage Month.
- Equality for Gays and Lesbians Everywhere (EGALE) Annual Gala Dinner.
- Ontario Black History Society – Law Society website promotion of International Emancipation Day.
- Women's Law Association of Ontario (WLAO) table: President's Award Gala.
- Harmony Movement Award Banquet.
- Sexual Orientation and Gender Identity Committee (SOGIC) Annual Pride Barbecue.
- City of Toronto's Aboriginal City Celebrations (National Aboriginal Day), June 2003.
- Official Languages Committee of the Ontario Bar Association (OBA) breakfast 2003, presentation by Jack Layton.
- Feminist Legal Analysis of the OBA, reception for female benchers.
- Ontario Bar Association symposium in honour of Justice L'Heureux Dubé.
- Mishkaonijiwan Native Canadian Centre Foundation.

GOAL 4 – External – Public

To increase the public's awareness of Law Society policies, programs and services; and equality and diversity principles within law and the legal profession.

The Department continued the tradition of holding public education events around months or days of significance. In 2003, it organized the following public education events:

- Workshop and reception on providing support for Black Youth in Toronto. The event was organized with the Canadian Association of Black Lawyers and Pro Bono Law Ontario.
- A CLE program and reception to celebrate National Aboriginal Day.
- A CLE program and reception to celebrate Louis Riel Day.
- A reception for the launch of the French legal web site of the Fédération des associations de juristes d'expression française de common law.
- A reception to celebrate Pride week. Organized with the Sexual Orientation and Gender Identity Committee of the OBA.
- A Tribute reception for the Honourable Mr. Justice Irving W. André.
- Reception for the Ontario Justice Education Network (OJEN) during Law Week.

GOAL 5 – External Dialogue

To facilitate an inclusive dialogue on equality and diversity principles between the public, the Law Society and the legal profession.

A key aspect of the Department's work in this area is our Public Education Program detailed above under goals 3, 4 and 5. In addition, the Department facilitates an inclusive dialogue on equality and diversity principles between the public, the Law Society and the legal profession by participating in the work of various community organizations and inviting these organizations to work with the Department. The Department has been involved in the work of the following organizations, to name a few:

- Association des juristes d'expression française de l'Ontario (member of Board of Director and member of committees).
- Rotiio> taties Aboriginal Advisory Group (provides support to the group).

- Official Languages Committee of the OBA (member)
- National Association of Women and the Law (editorial board of Jurisfemmes)
- Women's Legal Education and Action Fund (member of the National Legal Committee)
- OJEN
- SALCO
- Indigenous Bar Association in Canada
- Aboriginal Legal Services of Toronto
- Canadian Bar Association Racial Equality Implementation Committee

The Department also partners with:
- The Feminist Legal Analysis Committee of the Ontario Bar Association (OBA)
- Advocacy Resource Centre for Persons With Disabilities (ARCH)
- Canadian Association of Black Lawyers
- EGALE
- Black Law Students' Association of Canada
- City of Toronto
- Native Canadian Centre of Toronto
- PBLO
- Metis Nation of Ontario
- Barbara Schliffer Clinic.

REPORTS NOT REACHED

Professional Regulation Committee Report
- Role of Lawyers in Corporate Governance-Amendments to the Rules of Professional Conduct

Professional Regulation Committee
February 26, 2004

Report to Convocation

Purposes of Report: Decision

Prepared by the Policy Secretariat
(Jim Varro – 416-947-3434)

OVERVIEW OF POLICY ISSUES

PROPOSED AMENDMENT TO POLICY ON CONFIDENTIALITY OF PRIOR INVITATIONS TO ATTEND IN INFORMATION TO THE PROCEEDINGS AUTHORIZATION COMMITTEE[1]

Request to Convocation

1. Convocation is requested to approve an amendment to the confidentiality policy with respect to information to the Proceedings Authorization Committee ("PAC") about prior Invitations to Attend ("ITAs") of members that would permit disclosure of a member's history of ITAs, if any, in material submitted by staff or other investigators to the PAC

Summary of the Issue

[1] Deferred from January 2004 Convocation

2. The ITA is a procedure that may be ordered by PAC at its discretion upon its review of a matter, pursuant to PAC's authority in section 9 of By-law 21. ITAs are conducted by PAC.

3. The ITA is not a disciplinary proceeding. It does not form part of a member's discipline record and will not be disclosed to Hearing Panels or the public. However, Law Society regulatory staff keep a record of a member's history of ITAs.

4. On January 23, 1998, Convocation determined that reference to a member's history of ITAs should not be included in material submitted by staff or other investigators to the PAC. The Committee, based on a request from PAC, is recommending that this policy be amended to permit Law Society staff or other investigators to advise PAC of a member's history of ITAs.

5. The Committee agreed with PAC that the inability to receive information about past ITAs in material submitted to PAC or in material submitted to Benchers conducting an ITA impedes the ability to use the remedy of the ITA most effectively. The concern is that a member could attend a number of ITAs based upon similar complaints, demonstrating multiple situations in which the member used poor judgment. In these circumstances it is questionable whether an additional ITA is the most appropriate remedy for this member. Under the current policy, PAC may not be advised of this history when considering whether to issue an ITA, rather than taking some other action.

6. As the Law Society has a responsibility to respond appropriately to the conduct of members who repeatedly breach the Rules of Professional Conduct, even where the breaches are of a more minor nature, the Committee is requesting that the policy be amended.

PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT RELATED TO THE LAWYER'S ROLE IN CORPORATE GOVERNANCE

Request to Convocation

7. Convocation is requested to approve new and amended rules and commentary arising from a review of the lawyer's role in corporate governance. The amendments include the following:
   a. new rules on "up the ladder" reporting (page 27)
   b. new commentary to rule 2.04 on conflicts of interest on the lawyer's roles as counsel for and director of an organizational client (page 36)
   c. amendments to rules 2.04 and 2.06 on equity interests in clients (page 43)

Summary of the Issue

8. A working group of the Emerging Issues Committee was struck to review issues related to the lawyer's role in corporate governance.

9. The working group focused on three issues. The first was the obligations of a lawyer representing an organizational client to address wrongdoing by the organization. This study was prompted by developments in the United States in response to the Sarbanes-Oxley Act of 2002 and discussion between the Law Society and the Ontario Securities Commission on the impact of this legislation in Canada. The second issue related to the conflicts arising from a lawyer's dual role as counsel to and director of an organizational client. The third matter involved a review of the existing rules that permit a lawyer to accept an equity interest in client, to determine if any change should be made in light of the recent focus on lawyer's responsibilities for organizational clients.

10. The Emerging Issues Committee received a report from its working group recommending a number of amendments to the Rules and commentaries, which would have the following effect:

a. a lawyer would be required to report corporate wrongdoing "up the ladder", if necessary to the highest authority in the organization, and must resign representation of the client in the matter if the wrongdoing is not stopped;
b. a lawyer would not be prohibited from acting as a director for and counsel to an organization, but should be aware of and discuss with the client the conflicts arising from acting in these dual roles; and
c. a lawyer may continue to accept shares of a corporate client in lieu of fees, and may maintain small, non-material shareholdings in a corporate client.

11. The Emerging Issues Committee approved the working group's report and referred the recommendations to the Professional Regulation Committee, which agreed with the proposals.

12. The proposed amendments in this report were prepared by Paul Perell, the principal drafter of the Rules adopted by the Society in 2000, to whom the Committee extends its sincere thanks.

THE REPORT

Terms of Reference/Committee Process

13. The Committee met on February 12, 2004. Committee members in attendance were Todd Ducharme (Chair), Mary Louise Dickson, Sy Eber, Gordon Finlayson, Patrick Furlong, Allan Gotlib, Allan Lawrence and Laurie Pattillo. Staff attending were Naomi Bussin, Malcolm Heins, Terry Knott, Dulce Mitchell, Zeynep Onen, Elliot Spears, Jim Varro and Andrea Waltman.

14. The Committee is reporting on the following matters:

For Decision
- Proposed amendment to the policy on confidentiality of prior invitations to attend in information to the proceedings authorization committee (deferred from January 22, 2004 Convocation)
- Proposed Amendments to the Rules of Professional Conduct relating to the lawyer's role in corporate governance

PROPOSED AMENDMENT TO POLICY ON CONFIDENTIALITY OF PRIOR INVITATIONS TO ATTEND IN INFORMATION TO THE PROCEEDINGS AUTHORIZATION COMMITTEE

A. INTRODUCTION

15. The Proceedings Authorization Committee ("PAC") identified a concern about the current invitation to attend ("ITA") process that it believes requires a change in policy. This concern has also been identified by Law Society staff.

16. The Convocation policy on ITAs imposes a strict blanket of confidentiality surrounding the ITA process, in that no reference to past ITAs may be made in materials submitted to PAC or in materials submitted to Benchers conducting an ITA. PAC's view, with which the Committee agrees, is that this impedes the ability to use the remedy of the ITA most effectively.

17. PAC will authorize ITAs in situations where a Conduct Application (based on a breach of s. 33 of the *Law Society Act*) is not warranted[2] but the member has used poor judgment, resulting in a minor breach of appropriate conduct. The ITA process has been a useful tool in addressing conduct this type of conduct.

[2] Conduct applications may be authorized by PAC based on s. 6() of By-Law 21 (Proceedings Authorization Committee):

> The Committee shall not authorize the Society to apply to the Hearing Panel for a determination of whether a member or student member has contravened section 33 of the Act unless the Committee is satisfied that

18. The concern, however, is that some members could attend a number of ITAs based upon similar complaints, demonstrating multiple situations in which the member used poor judgment. In these circumstances it is questionable whether an additional ITA is the most appropriate remedy for this member. Although this pattern of behaviour would be known to Law Society staff, PAC cannot be advised of this history pursuant to the current policy when considering whether to authorize an ITA, rather than taking some other action.

19. The Law Society must respond appropriately to the conduct of members who repeatedly breach the *Rules of Professional Conduct*, even where the breaches are of a more minor nature. For this reason, the Committee is requesting that the policy be amended.

B. THE JURISDICTION FOR AND POLICIES RELATED TO AN ITA AND THE ITA PROCESS

Legislative Authority

20. Section 36 of the Law Society Act sets out the authority for an ITA that is conducted by a Hearing Panel in the context of a Conduct Application, as follows:

(1) If an application has been made under section 34 [Conduct Application], the Hearing Panel may invite the member or student member in respect of whom the application was made to attend before the Panel for the purpose of receiving advice from the Panel concerning his or her conduct.

(2) The Hearing Panel shall dismiss the application if the member or student member attends before the Panel in accordance with the invitation.

21. ITAs outside of the hearing context, such as those conducted by PAC, are authorized by By-law 21 – Proceedings Authorization Committee, Section 9, which reads as follows:

Review of matters

9. (1) After reviewing a matter, the Committee may determine that no action should be taken in respect of the matter or, subject to subsections (2) to (4), the Committee may take one or more of the following actions:

1. Approve, or give directions for, the informal resolution of the matter.
2. Authorize the Society to apply to the Hearing Panel for a determination of whether,
   i. a member or student member has contravened section 33 of the Act,
   ii. a member or student is or has been incapacitated, or
   iii. a member is failing or has failed to meet standards of professional competence.

3. Invite a member or student member to attend before a panel of benchers to receive advice concerning his or her conduct.

3.1 Invite a member to attend before a panel of benchers to receive advice concerning his or her professional competence.

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there are reasonable grounds for believing that the member or student member has contravened section 33 of the Act.

Section 33 of the *Law Society Act* reads:

Prohibited conduct: members

33. (1)A member shall not engage in professional misconduct or conduct unbecoming a barrister or solicitor.

Prohibited conduct: student members

(2)A student member shall not engage in conduct unbecoming a student member.

4. Send to a member or student member a letter of advice concerning his or her conduct.

4.1 Send to a member a letter of advice concerning his or her professional competence.

5. Authorize the Society to move in an intended proceeding or in a proceeding, if the Hearing Panel has not commenced a hearing to determine the merits of the proceeding, for an interlocutory order suspending the rights and privileges of a member or student member or restricting the manner in which a member may practise law.

6. Any other action that the Committee considers appropriate.

[Emphasis added]

Restriction on authorization of conduct proceedings

(2) The Committee shall not authorize the Society to apply to the Hearing Panel for a determination of whether a member or student member has contravened section 33 of the Act unless the Committee is satisfied that there are reasonable grounds for believing that the member or student member has contravened section 33 of the Act.

Restriction on authorization of capacity proceedings

(3) The Committee shall not authorize the Society to apply to the Hearing Panel for a determination of whether a member or student member is or has been incapacitated unless the Committee is satisfied that there are reasonable grounds for believing that the member or student member is or has been incapacitated.

Restriction on authorization of professional competence proceedings

(4) The Committee shall not authorize the Society to apply to the Hearing Panel for a determination of whether a member is failing or has failed to meet standards of professional competence unless the Committee is satisfied that there are reasonable grounds for believing that the member is failing or has failed to meet standards of professional competence.

22. Prior the amendments to the Law Society Act, effective February 1999, the authority for the ITA was included in Regulation 708 under the Act, the relevant part of which read as follows:

> 10. Where there comes to the notice of the Society, as a result of a preliminary investigation by the Secretary or otherwise, information that indicates that a member may have been guilty of a minor breach of discipline or that indicates that there is a possibility that conduct may result in a breach of discipline, the Committee or the chair or vice-chair may direct the Secretary, without any formal complaint being completed and filed, to invite the member to appear before the Committee to enable it to make an informal investigation of the matter, and the Committee, in addition to any of its other powers, may after such informal investigation advise the member with respect to the matter.

Reference to the Committee in s. 10 above is to the Discipline Committee.

Relevant Convocation Policies on ITA Confidentiality

23. Convocation has determined on a number of occasions that ITAs are strictly confidential. In summary, Convocation has determined that no reference to ITAs may be made
   a. in the reasons of hearing panels,
   b. by Discipline Counsel,
   c. in material submitted to PAC, or
   d. in material submitted to the Benchers conducting the ITA.

24. Convocation discussed the confidentiality issue on three different occasions. From the transcripts of the debates at Convocation, it is clear that there were differing views on this issue:

a. On June 6, 1997, Convocation (sitting as a Discipline Convocation) determined that no reference to an ITA should be made in the reasons of hearing panels or by Discipline Counsel;
b. On June 27, 1997, Convocation debated whether the fact of an ITA should be included in the reasons of hearing panels in current discipline matters based on relevance of the issue(s) in the ITA to the current matter, in the limited case where the ITA arose from the withdrawal of a formal discipline charge at the hearing. Convocation answered the question in the negative.
c. On January 23, 1998, Convocation determined that reference to a previous ITA should not be included anywhere in material submitted by staff or other investigators to the discipline authorization committee (now PAC). This would also apply to materials prepared for an ITA itself. However, the current practice of staff recording the occurrence of an ITA was to be continued. Otherwise, no change was made to the June 1997 policy of Convocation respecting information about ITAs at the hearing level. At that time, Convocation rejected a suggestion that the test for including information to PAC about a prior ITA be the relevance of the issue in the prior ITA to the conduct being reviewed.

The ITA Process

25. The Hearing Panel conducts ITAs under s. 36 of the *Law Society Act*, referred to above, upon the member's acceptance of the invitation to attend. The conduct application is then dismissed. The fact of the ITA is a matter of public record as the Hearing Panel will record that the conduct application is dismissed as a result of the member's acceptance of the ITA.

26. When an ITA is authorized by PAC pursuant to By-Law 21, the following is the usual procedure:
- The member is notified in writing of the ITA, and is invited to attend on a specific date before PAC
- The complainant is notified in writing that the member has been invited to attend at the Law Society with respect to the issue arising from the complaint that led to the ITA, and that this will conclude the matter
- If the member accepts the invitation, the ITA is conducted by PAC and the matter is concluded
- A letter is sent to the member confirming that matter is concluded by the ITA.
- The fact of the ITA is noted on the member's record with the Society, but does not form part of the member's discipline record and is not disclosed if an inquiry is made about the member's past discipline.
- The fact of the ITA is recorded, with particulars, in a record maintained by the Regulatory Division in a designated ITA file.

27. Appendix 1 contains additional information relating to the above process, including sample letters to members and complainants advising them of the process.

C. DISCLOSURE OF ITAS TO PAC – PROS AND CONS

28. As indicated above, the Committee's view is that in order to address concerns about the conduct of members who attend multiple ITAs, PAC needs to know about them. Disclosure of this information to PAC would require a change in Convocation policy.

29. The Committee noted a number of pros and cons that informed its discussion of this issue. The pros and cons identify the competing interests of protection of the public and procedural fairness. The issue is whether PAC's need to have the information outweighs the issues of fairness involved in disclosure.

Pros

30. The pros relate to the key regulatory role of the Law Society, and its public interest governance mandate. They include the following:
a. PAC is analogous to the complaints committees found in the structures of other regulatory bodies, and should receive all relevant information about a member before making a decision on a matter referred to it.

b. From the perspective of protection of the public, the fact of a prior ITA, if relevant to a subsequent fact situation involving an issue of alleged professional misconduct, is something PAC should know, before deciding if (another) ITA is the appropriate disposition.
c. It is reasonable and relevant to draw inferences respecting the conduct of a lawyer from the fact of prior ITAs when combined with the conduct that preceded them.
d. If the policy is changed, members will understand that PAC will have knowledge of prior ITAs should a matter arise in the future. This will eliminate the fairness concerns for ITAs conducted from this point forward.

Cons

31. The cons relate primarily to what may be considered issues of procedural fairness in the Law Society's administration of its discipline process. They include the following:
a. PAC may be likened to a Justice of the Peace before whom an information based on criminal conduct is sworn. If so, it should base a decision on the merits of the case presented in the authorization memo without knowledge of the member's prior "record";
b. Fairness issues arise if decisions made by PAC that trigger the discipline process are based on information that is different from the information reviewed by Hearing Panels and from the information on which their decisions are based;
c. Fairness issues also arise as a result of the impact of the change in policy on members who have an ITA history and members who do not. The presumption is that members with an ITA history understood that this history will not form part of the information reviewed by PAC on a subsequent occasion, unlike members with no ITA history who are subject to an ITA after the change in policy, who would have notice that prior ITAs will be considered by PAC on a new matter before it.
d. It can be argued that no clear inferences respecting the conduct of a lawyer can be drawn from the fact of an ITA;
e. ITAs are not penal in nature;
f. ITAs are not part of the discipline process and should not be regarded as prior discipline; and
g. Each case must be weighed on its own merits. Previous ITAs are not evidence of a new offence. PAC may know about previous ITAs and authorize a Conduct Application rather than another ITA, but Discipline Counsel would not be permitted to advise the Hearing Panel of any previous ITAs. This has implications for the prosecutions of these more minor cases.

D. WEIGHING OF PROS AND CONS AND THE COMMITTEE'S POSITION

32. In the Committee's view, the cons are outweighed by the Society's obligation to fulfill its regulatory role by effectively addressing conduct issues of its members. The Committee believes that fairness will not be breached by amending the confidentiality policy and allowing disclosure to PAC of a member's prior ITAs, for the following reasons:
a. PAC is engaged in regulatory activities that are distinct from the criminal proceedings in which a Justice of the Peace swears an information. Law Society proceedings are administrative rather than criminal or quasi-criminal proceedings.
b. A pattern of behaviour is important information for PAC to know, given its specific responsibilities in the regulatory process.
c. The fact that PAC knows of previous ITAs will not change their nature. The ITA will remain a remedy that is not penal or disciplinary. PAC will not consider past ITAs to be past discipline, but rather an indication of a pattern of behaviour that is important for PAC to know in its regulatory role.
d. PAC must apply s. 9(2) of By-Law 21 when deciding whether to authorize a Conduct Application in respect of a member (i.e. it must be "satisfied that there are reasonable grounds for believing that the member or student member has contravened section 33 of the Act"), including a matter involving a member who has a history of ITAs.

<u>Summary</u>

33. If prior ITAs are disclosed to PAC, PAC's ability to make a determination on whether a Conduct Application or some other action should be authorized based upon a pattern of similar behaviour will be enhanced, as the information may illustrate a pattern of conduct that resulted in a number of ITAs.

34. The amendment to the policy will not affect the prosecution of subsequent offences (i.e. matters authorized as Conduct Applications) and the concurrent discipline history that will be established, as Hearing Panels cannot be advised of prior ITAs even if PAC is aware of them.

35. The ITA will continue to be a final disposition of the complaint against the member, and will not appear on a member's disciplinary record that is available to the public.

PROPOSED AMENDMENTS TO THE *RULES OF PROFESSIONAL CONDUCT* RELATED TO THE LAWYER'S ROLE IN CORPORATE GOVERNANCE

INTRODUCTION

36. In the fall of 2002, a working group of the Emerging Issues Committee[3] was formed in response to a priority issue identified by that Committee. The working group's mandate reflects this priority in the following language:

> To identify for the Committee the issues of corporate governance that relate to the lawyer's professional and ethical responsibilities as professional advisors to corporate clients, to determine if a gap exists in the Society's guidance to such members in light of the identified issues, and to develop means to address such gaps through specific solutions that fall within the Society's jurisdiction. Part of this work will involve monitoring developments in the area of corporate governance that impact on the legal profession and framing responses, as appropriate, for review by the Committee, in consultation with or with the assistance of other relevant Law Society committees.

37. The broad questions examined by the working group included:
- what specific standards of conduct are expected of lawyers who advise corporate clients?
- what do the *Rules of Professional Conduct* say about lawyers in these roles?
- are there gaps in the Society's regulatory scheme in this area?

38. As a first task, the working group reviewed the Society's Rules to determine the extent of the guidance to lawyers as advisors to corporate clients and what if anything should be done to enhance the Rules in this respect.

39. The working group's first report to the Emerging Issues Committee, which formed the basis of an information report to June 2003 Convocation, proposed amendments to the Rules to deal with reporting corporate wrongdoing "up the ladder" within an organization. The working group also examined certain conflicts that arise from other relationships that lawyer for an organization client may have in addition to that of counsel.

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[3] The original members of the working group were Allan Lawrence (chair), Vern Krishna, Seymour Epstein, Gavin MacKenzie, Harvey Strosberg, David S. Brennan (GE Canada), H. Garfield Emerson (Fasken Martineau& DuMoulin LLP), David A. Jackson (Blake, Cassels & Graydon LLP), John B. Laskin (Torys LLP), Jonathan A. Levin (Fasken Martineau DuMoulin LLP), Richard A. Lococo (Manulife Financial), Jane Ratchford (Market Regulation Services Inc.), Philippe Tardif (Lang Michener), Edward Waitzer (Stikeman Elliott LLP), David A. Ward. (Davies Ward Phillips & Vineberg LLP) and Susan Wolburgh-Jenah (Ontario Securities Commission). As of September 2003, the working group also included Anne Marie Doyle, Abe Feinstein, George Hunter, Laurie Patillo, Sy Eber, Tom Heintzman and Todd Ducharme.

40. As the Professional Regulation Committee ("the Committee") has responsibility for the Rules, the Emerging Issues Committee referred the matter to the Committee for review. The Committee agreed with the proposals and is requesting Convocation's consideration of the amendments.

I. PROPOSED NEW RULES ON "UP THE LADDER" REPORTING

A. THE SCOPE OF THE REVIEW

41. The context within which this review took place was set by the dialogue in the fall of 2002 between the Society and the Ontario Securities Commission ("OSC") on regulation of lawyers, prompted by developments in the United States relating to the SEC's rule-making initiative.

42. In brief, the OSC requested the views of the Society on the need for the same type of rules on lawyer conduct that were mandated for the SEC by the *Sarbanes-Oxley Act* of 2002. The SEC's proposals, now formalized in a rule adopted on January 29, 2003, require an attorney to report evidence of a material violation of securities laws or breach of fiduciary duty or similar violation by the issuer "up-the-ladder" within the company to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof). If they do not respond appropriately to the evidence, the attorney must report the evidence to the audit committee, another committee of independent directors, or the full board of directors. Although certain definitions in the rule limit the scope of its application insofar as Ontario lawyers are concerned, the rule will apply to foreign attorneys who provide legal advice regarding United States securities law, other than in consultation with United States counsel, if they conduct activities that constitute appearing and practicing before the SEC. [4]

43. The Society's response to the OSC appears at Appendix 2. The response noted that the Society's rules include guidance on an "up-the-ladder" report. The view of the Society was that the regulation of Ontario lawyers by the Society was comprehensive, but that if stricter rules were required, the Society would deal with that matter.

44. This view was affirmed in the Society's response to the SEC on its proposed rules. The Society expressed confidence to the SEC that the Society's rules of conduct impose rigorous standards on the profession and that any enhancements to the regulatory regime for lawyers should be left to the Society.

45. Against this background, the working group of the Emerging Issues Committee began a review of the rules. The working group also reviewed other law society and bar association rules and codes to determine how they dealt with lawyer's duties as advisors for corporations.

46. Relevant rules from the Society's Rules (rules 2.02, 2.03, 2.04 and 2.09), the American Bar Association Model Rules of Professional Conduct, and rules from the Law Society of Alberta, the Nova Scotia Barristers' Society and the U.S. Securities and Exchange Commission (including the proposed alternative to the "noisy withdrawal" provisions) appear at Appendix 3.

47. The Committee, in agreement with Emerging Issues Committee, determined that meaningful changes should be made to the Rules to clarify certain duties and obligations that are unique to lawyers as professional advisors to corporations, both privately retained and in-house. But the changes should be minimal, for the following reasons:
    a. The Society's Rules are intended to be a document of general application for all lawyers. While some rules deal with specific areas of practice, necessitated by the breadth of lawyers' activities, the extent to which specific areas require detailed rules should be limited so that the guidance is clear and interpretation easily achieved.
    b. Generally, the expectations of lawyers as professional advisors are already appropriately reflected in the Rules. While some refinements are desirable to reinforce certain aspects of a lawyer's

[4] Other proposals on a required withdrawal by the lawyer if the violation is not addressed, with disclosure by the lawyer of the withdrawal to the SEC ("the noisy withdrawal") and an alternative to noisy withdrawal, where the client makes the disclosure, are pending.

responsibility and to demonstrate the responsiveness of the legal profession to concerns with the influence of professional advisors on corporate conduct, the obligations of the lawyer should not change.

48. The primary focus was on the following:
- whether the "up-the-ladder" guidance, currently in commentary to rule 2.03(3), should be in a rule,
- whether the circumstances in which a lawyer in an "up-the-ladder" situation is required to withdraw should be clarified, and
- whether there is a more appropriate place in the Rules for the "up-the-ladder" guidance.

B. THE PROPOSALS

49. The current "up-the-ladder" commentary following rule 2.03(3) reads as follows:

> A lawyer employed or retained to act for an organization, including a corporation, confronts a difficult problem about confidentiality when he or she becomes aware that the organization may commit a dishonest, fraudulent, criminal, or illegal act. This problem is sometimes described as the problem of whether the lawyer should "blow the whistle" on his or her employer or client. Although the Rules of Professional Conduct make it clear that the lawyer shall not knowingly assist or encourage any dishonesty, fraud, crime, or illegal conduct (rule 2.02 (5)), it does not follow that the lawyer should disclose to the appropriate authorities an employer's or client's proposed misconduct. Rather, the general rule, as set out above, is that the lawyer shall hold the client's information in strict confidence, and this general rule is subject to only a few exceptions. Assuming the exceptions do not apply, there are, however, several steps that a lawyer should take when confronted with the difficult problem of proposed misconduct by an organization. The lawyer should recognise that his or her duties are owed to the organization and not to the officers, employees, or agents of the organization. The lawyer should therefore ask that the matter be reconsidered, and the lawyer should, if necessary, bring the proposed misconduct to the attention of a higher (and ultimately the highest) authority in the organization despite any directions from anyone in the organization to the contrary. If these measures fail, it may be appropriate for the lawyer to resign in accordance with the rules for withdrawal from representation (rule 2.09).

50. In its letter to the OSC noted above, the Society said:

> The Law Society is considering whether amendments to the Rule and the Commentary are needed to make them more specific. If the S.E.C enacts more stringent regulatory over-sight for lawyers who appear before it, we will review these rules and consider whether conditions in Canada might require us to make changes in our rules.

51. In 2000, the Society recognized the importance of adding guidance on "up-the-ladder" reporting. The developments noted earlier in this report prompted a consideration of the merits of moving that guidance from a commentary to a rule.

52. The Committee concluded that a rule (with revised commentary) would be appropriate. It would not only provide more definitive guidance to lawyers, but affirm the message already sent to the securities regulators that the Society takes its governance responsibilities seriously and is offering clearer guidance to lawyers on these issues.

Particulars of the Rule

53. The language in the existing commentary, the ABA Model Rules' treatment of the organization as client, and the SEC's new and proposed rules[5] helped to frame the concepts in the proposed rules and commentaries.

54. The "up-the-ladder" requirement would operate in the situation where the lawyer is not confident that his or her advice on organizational wrongdoing is being received by a person who appreciates all of the implications of a particular course of conduct. In that case, the lawyer must provide the advice "up the ladder" until the lawyer is satisfied that it is being appropriately considered. Where advice has been received and considered and the directing minds of the corporation nevertheless decide to proceed on a path that the lawyer considers, for example, illegal, the lawyer must resign. If the conduct contemplated is dishonest, fraudulent, criminal or illegal, rule 2.02(5) would prohibit the lawyer from knowingly assisting in or encouraging this conduct.

55. Accordingly, the proposed rule, which appears at page 27, deals with the following issues:
    a. The lawyer's obligation to an organizational client, whether as retained counsel or in-house counsel, is to act for the organization. The lawyer's professional and ethical duties are owed to the organization and not to the officers, directors, employees or agents of the organization.
    a. The lawyer must address with the corporation a serious matter of which he or she becomes aware that affects the wellbeing of the client or may cause harm to the organization. Such a matter may be defined as conduct of a dishonest or fraudulent nature or other serious illegal conduct that is proposed, has occurred, or is current or continuing, committed by the corporation or by an officer, director, employee, or agent of the corporation.
    b. The lawyer, upon becoming aware of the conduct, must advise the appropriate individual or individuals to reconsider their actions and address the situation. If the individual or individuals refuse to do so, the lawyer must report evidence of the conduct to the corporation's chief legal officer. The lawyer may also wish to advise the chief executive officer.
    c. If the chief legal officer or the chief executive officer has not provided an appropriate response within a reasonable time, the lawyer must report evidence of the conduct to a higher, and ultimately, the highest, authority in the corporation (e.g. the board of directors).
    d. If the lawyer believes that it would be futile to report the conduct to the chief legal officer and chief executive officer, the lawyer must report the conduct directly to the highest authority.
    e. If the lawyer's report does not result in an appropriate response or appropriate action being taken by the client, the lawyer may be required to resign as lawyer for the corporation in that particular retainer.

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[5] The revisions to ABA rule 1.13 adopted in August 2003 were also noted. The revisions emanated from the report of the ABA Task Force on Corporate Responsibility. Amended Rule 1.13 permits a lawyer representing an organizational client to report up the corporate ladder violations by corporate officers of laws or legal duties that would harm the organization, but also permits a lawyer to report the matter beyond the organization. A redline version of the amended rule is included at Appendix 3. The Task Force report included the following general statement on the lawyer's role in corporate governance, the theme of which has been incorporated in the new commentary to the Society's proposed rules:

While the recommendations of the Task Force focus on ways that lawyers for a corporation can be more effective in their counseling role to encourage compliance with legal obligations, the Task Force believes that lawyers who represent a corporation have a duty, whenever the situation may present itself, to strongly advise senior executive officers that actions they may be contemplating which violate the law, including the perpetration of a fraud, should not be taken and are always contrary to the legitimate interests of the corporation. Moreover, lawyers representing a corporation are encouraged whenever appropriate to bring a "public" perspective into their counseling which takes into account not merely specific legal obligations or requirements, but likely reactions of persons outside the corporation such as government officials and even the public at large, especially when those reactions may create legislative, regulatory or litigation risks. Indeed, lawyers for a corporation, particularly in-house counsel, are frequently expected to provide an ethical, as well as a legal, perspective in their advice to senior executive officers. The Task Force endorses this expectation and urges boards of directors and senior executive officers to invite their counsel to provide such perspective as being in the best interest of the corporation and related to the goal of instilling a culture of legal compliance and corporate responsibility.

f. More specifically, where there is evidence of dishonest, fraudulent or other serious illegal conduct of the corporation that is ongoing or is about to occur and the corporation insists on following this course of action and instructs the lawyer accordingly, the lawyer must withdraw in accordance with rule 2.09. This may occur, for example, where the lawyer cannot implement the instructions of the client without breaching the Rules (e.g. rule 2.02(5)).

56. As the above illustrates, the circumstances in which a lawyer withdraws as counsel for a corporation are given specific treatment. It is clear from the rule that withdrawal is not always discretionary. Rule 2.09(7)(d) indicates that a lawyer must withdraw if the lawyer's continued employment will lead to a breach of the Rules. Notwithstanding the lawyer's advice (or report "up-the-ladder" if circumstances required it), if fraudulent conduct is continuing, or past conduct has occurred and is effectively continuing, the view was that the lawyer must withdraw, or face breach of the Rules. As noted above, this type of response is contemplated in rule 2.09.

57. The Committee discussed whether, in the circumstances described in 55 f. above, the lawyer is required to withdraw as lawyer for the corporation, or alternatively resign in the particular retainer in which the issue prompting the "up-the-ladder" report arises. The SEC's proposed alternative rule to the earlier proposed "noisy withdrawal" provides as follows:

> An attorney retained by the issuer shall withdraw from representing the issuer, and shall notify the issuer, in writing, that the withdrawal is based on professional considerations.
> An attorney employed by the issuer shall cease forthwith any participation or assistance in any matter concerning the violation and shall notify the issuer, in writing, that he or she believes that the issuer has not provided an appropriate response in a reasonable time to his or her report of evidence of a material violation...

58. The view was that requiring a lawyer to withdraw in all circumstances may be a disincentive to report the conduct, and affect the integrity and desired result of the rule. In particular, the view was that for in-house counsel, who would be subject to the rule, the disincentive to report could be significant, as the retainer is their livelihood. Thus, the rule requires the lawyer to "withdraw from acting in the matter". However, the commentary notes that the circumstances may be such that the lawyer must withdraw to ensure compliance with rule 2.09.

59. No changes are proposed to rule 2.03(1), which requires lawyers to maintain the confidentiality of all information concerning the business and affairs of the client acquired in the course of the professional relationship. This would preclude, except in very narrow circumstances, the lawyer disclosing corporate wrongdoing to authorities outside the organization. The commentary to rule 2.03(1) explains why confidentiality is so important:

> … a lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

60. In the Committee's view, the confidentiality standard is central to the integrity of the "up-the-ladder" reporting regime. If the openness and candour of the lawyer and client relationship is compromised, the lawyer is much less likely to become aware of improper conduct and therefore to be in a position to counsel the client against it or take appropriate steps to address it.

61. The only changes to rule 2.03 are to the commentary following rule 2.03(3) which currently reflects the up-the-ladder report.

Location of a New Rule

62. The current location of the "up-the-ladder" commentary is in rule 2.03 (Confidentiality). It was placed within this rule in 2000 because it was an application of the requirement not only to not disclose

confidential information outside of the client, but to deal appropriately with circumstances in which the client's conduct was problematic for the lawyer and ultimately the organization.

63. The events of the past year have caused a shift in focus. While the treatment of confidential information forms part of the instruction, the broader and, arguably, more crucial aspect is the lawyer's actions as professional advisor when he or she learns of corporate wrongdoing.

64. Three options for the location of the new rule were considered:
    a. Rule 2.01 on competence, in the context of advice to a client in response to particular issues in the retainer,
    b. Rule 2.02 on quality of service, which includes a lawyer not assisting a client in criminal, etc. activity, and
    c. Rule 2.09 on withdrawal from representation.

65. The conclusion was that the instruction in the rule was most closely related to that now provided in rule 2.02, and the Committee proposes that the rule be located in rule 2.02.

Comments on the Draft Rules

66. The above proposals have been incorporated in proposed amendments prepared by Paul Perell. The following explains the main features of the new rules and commentaries:
    a. New rule 2.02 (1.1) addresses the point that a lawyer's duty is to the organization independent of its officers and directors.
    b. The commentary following subrule (1.1) elaborates on this point and also highlights the potential for conflict of interest when a lawyer acts for the organization and for a person associated with the organization in an individual matter.
    c. New rule 2.02 (5.1) prescribes the lawyer's response to *proposed* wrongful conduct by an organization. It includes an "up the ladder" report to the highest person or group in the organization (i.e. the board of directors).
    d. New rule 2.02 (5.2) prescribes the lawyer's response to *ongoing* wrongful conduct by an organization, including past conduct that has a continuing effect. Subrule 2.02 (5.2) differs from subrule (5.1) in that the lawyer must always report to the chief legal officer under subrule (5.2) but not always under subrule (5.1). The reason is that under subrule (5.1) the misconduct is only proposed and if the proposed conduct is abandoned there may be no reason to report the matter "up the ladder." The situation, however, is different under subrule (5.2) when a lawyer discovers of existing illegal conduct. The lawyer has a fiduciary obligation to disclose this conduct internally even if it the conduct is stopped.
    e. The commentary following subrule (5.2) provides additional explanation for the new rules and also indicates that the conduct may be an act of omission or commission, and is conduct that is likely to cause substantial harm to the organization.
    f. The commentary to rule 2.03 (the blowing the whistle commentary) has been revised, given the shift of the "up the ladder" report to the new rules.
    g. Subule 2.09 (7) has been revised to refer to new subrules 2.02 (5.1) and (5.2).

2.02 QUALITY OF SERVICE *(new rules and commentary following rules 2.02(1) and (5))*

<u>When Client an Organization</u>

<u>(1.1) Notwithstanding that the instructions may be received from an officer, employee, agent, or representative, when a lawyer is employed or retained by an organization, including a corporation, in exercising his or her duties and in providing professional services, the lawyer shall act for the organization.</u>

<u>Commentary</u>

A lawyer acting for an organization should keep in mind that the organization, as such, is a client and that a corporate client has a legal personality distinct from its shareholders, officers, directors, and employees. While the organization or corporation will act and give instructions through its officers, directors, employees, members, agents, or representatives, the lawyer should ensure that it is the interests of the organization that are to be served and protected. Further, given that an organization depends upon persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority.

In addition to acting for the organization, the lawyer may also accept a joint retainer and act for a person associated with the organization. An example might be a lawyer advising about liability insurance for an officer of an organization. In such cases the lawyer acting for an organization should be alert to the prospects of conflicts of interest and should comply with the rules about the avoidance of conflicts of interest (rule 2.04).

Dishonesty, ~~or~~ Fraud etc. by Client

(5) When advising a client, a lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct, or instruct the client on how to violate the law and avoid punishment.

Dishonesty, Fraud, etc. when Client an Organization

(5.1) When a lawyer is employed or retained by an organization to act in a matter and the lawyer knows that the organization intends to act dishonestly, fraudulently, criminally, or illegally with respect to that matter, then in addition to his or her obligations under subrule (5), the lawyer for the organization shall

(a) advise the person from whom the lawyer takes instructions that the proposed conduct would be dishonest, fraudulent, criminal, or illegal,

(b) if necessary because the person from whom the lawyer takes instructions refuses to cause the proposed wrongful conduct to be abandoned, advise the organization's chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct would be dishonest, fraudulent, criminal or illegal,

(c) if necessary because the chief legal officer or the chief executive officer of the organization refuses to cause the proposed conduct to be abandoned, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct would be dishonest, fraudulent, criminal, or illegal, and

(d) if the organization, despite the lawyer's advice, intends to pursue the proposed course of conduct, withdraw from acting in the matter in accordance with rule 2.09.

(5.2) When a lawyer is employed or retained by an organization to act in a matter and the lawyer knows that the organization has acted or is acting dishonestly, fraudulently, criminally, or illegally with respect to that matter, then in addition to his or her obligations under subrule (5), the lawyer for the organization shall

(a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the conduct was or is dishonest, fraudulent, criminal, or illegal and should be stopped,

(b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer, or the chief executive officer refuses to cause the wrongful conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the conduct was or is dishonest, fraudulent, criminal, or illegal and should be stopped, and

(c) if the organization, despite the lawyer's advice, continues with the wrongful conduct, withdraw from acting in the matter in accordance with rule 2.09.

Commentary

The past, present, or proposed misconduct of an organization may have harmful and serious consequences for not only the organization and its constituency but also for the public, who relies on organizations to provide a variety of goods and services

In particular, the misconduct of publicly-traded commercial and financial corporations may have serious consequences to the public at large. Rules 2.02 (5.1) and (5.2) address some of the professional responsibilities of a lawyer acting for an organization, which includes a corporation, when he or she learns that the organization has acted, is acting, or proposes to act in a way that is dishonest, fraudulent, criminal or illegal. In addition to these rules, the lawyer may need to consider, for example, the rules and commentary about confidentiality (rule 2.03).

Rules 2.02 (5.1) and (5.2) speak of conduct that is dishonest, fraudulent, criminal or illegal, and this conduct would include acts of omission as well as acts of commission. Indeed, often it is the omissions of an organization, for example, to make required disclosure or to correct inaccurate disclosures that would constitute the wrongful conduct to which these rules relate. Conduct likely to result in substantial harm to the organization, as opposed to genuinely trivial misconduct by an organization, would invoke these rules.

Once a lawyer acting for an organization learns that the organization has acted, is acting, or intends to act in a wrongful manner, then the lawyer may advise the chief executive officer and shall advise the chief legal officer of the misconduct. If the wrongful conduct is not abandoned or stopped, then the lawyer reports the matter "up the ladder" of responsibility within the organization until the matter is dealt with appropriately. If the organization, despite the lawyer's advice, continues with the wrongful conduct, then the lawyer shall withdraw from acting in the particular matter in accordance with rule 2.09. In some but not all cases, withdrawal would mean resigning from his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter.

These rules recognize that lawyers as the legal advisers to organizations are in a central position to encourage organizations to comply with the law and to advise that it is in the organizations' and the public's interest that organizations do not violate the law. Lawyers acting for organizations are often in a position to advise the executive officers of the organization not only about the technicalities of the law but about the public relations and public policy concerns that motivated the government or regulator to enact the law. Moreover, lawyers for organizations, particularly in-house counsel, may guide organizations to act in ways that are legal, ethical, reputable, and consistent with the organization's responsibilities to its constituents and to the public.

2.03 CONFIDENTIALITY
Justified or Permitted Disclosure *(amended commentary following rule 2.03(3))*

Commentary

A lawyer employed or retained to act for an organization, including a corporation, confronts a difficult problem about confidentiality when he or she becomes aware that the organization may commit a dishonest, fraudulent, criminal, or illegal act. This problem is sometimes described as the problem of whether the lawyer should "blow the whistle" on his or her employer or client. Although the *Rules of Professional Conduct* make it clear that the lawyer shall not knowingly assist or encourage any dishonesty, fraud, crime, or illegal conduct (rule 2.02 (5)) and provide a rule for how a lawyer should respond to conduct by an organization that was, is or may be dishonest, fraudulent, criminal, or illegal (rules 2.02 (5.1) and (5.2), it does not follow that the lawyer should disclose to the appropriate authorities an employer's or client's proposed misconduct. Rather, the general rule, as set out above, is that the lawyer shall hold the client's information in strict confidence, and this general rule is subject to only a few exceptions. Assuming the exceptions do not apply, there are, however, several steps that a lawyer should take when confronted with the difficult problem of proposed misconduct by an organization. The lawyer should recognise that his or her duties are owed to the organization and not to the officers, employees, or agents of the organization (rule 2.02 (1.1)) and the lawyer should comply with subrules 2.02 (5.1) and (5.2), which set out the steps the lawyer should take in response to proposed, past or continuing misconduct by the organization. ~~The lawyer should therefore ask that the matter be reconsidered, and the lawyer should, if necessary, bring the proposed misconduct to the attention of a higher (and ultimately the highest) authority in the organization despite any directions from anyone in~~

~~the organization to the contrary. If these measures fail, it may be appropriate for the lawyer to resign in accordance with the rules for withdrawal from representation (rule 2.09).~~

2.09 WITHDRAWAL FROM REPRESENTATION

Mandatory Withdrawal

(7) Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if

(a) discharged by the client,

(b) the lawyer is instructed by the client to do something inconsistent with the lawyer's duty to the tribunal and, following explanation, the client persists in such instructions,

(c) the client is guilty of dishonourable conduct in the proceedings or is taking a position solely to harass or maliciously injure another,

(d) it becomes clear that the lawyer's continued employment will lead to a breach of these rules, ~~or~~

(d.1) the lawyer is required to do so pursuant to subrules 2.02 (5.1) or (5.2) (dishonesty, fraud etc. when client an organization), or

(e) the lawyer is not competent to handle the matter.

II. PROPOSED NEW COMMENTARY TO RULE 2.04 ON CONFLICTS OF INTEREST ON THE LAWYER'S ROLES AS COUNSEL FOR AND DIRECTOR OF AN ORGANIZATIONAL CLIENT

A. INTRODUCTION

67. A second question that the Emerging Issues Committee working group considered was whether there was a need to provide additional guidance to lawyers who serve as both counsel to a corporate client and on its board of directors.

68. The Committee, in agreement with the Emerging Issues Committee, concluded that guidance in the form of new commentary under rule 2.04 on conflicts of interest would be appropriate.

B. BACKGROUND AND EXPLANATORY INFORMATION

69. In light of the business environment that has focussed attention on lawyers as key advisors to corporations, the working group considered whether a corporation's lawyer's activities or roles beyond that of counsel create conflicts that will affect the lawyer's ability to independently serve the client. One such role is the lawyer serving as a director of his or her corporate client.

Current Rules

70. The Society's rules and the rules of other law societies do not specifically address the issue of a lawyer's position on the board of a corporate client. American jurisdictions, noted below, provide advisory commentary on the issue that focuses on how the roles of board member and counsel may conflict, but none prohibit the lawyer from sitting on the board.

71. The Law Society's Rule 2.04 (1) on conflicts of interest defines a conflicting interest as including an interest "that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client". Commentary to the rule indicates that conflicting interests include the financial interest of a lawyer, and advises that "there would be a conflict of interest if a lawyer had a personal financial interest in the client's affairs or in the matter in which the lawyer is requested to act for the client, such as a partnership interest in some joint business venture with the client."

72. Beyond the general guidance provided in rule 2.04, rule 6.04 discusses the lawyer's outside interests and their effect on the practice of law. The rule and commentary read:

Maintaining Professional Integrity and Judgment

6.04 (1) A lawyer who engages in another profession, business, or occupation concurrently with the practice of law shall not allow such outside interest to jeopardize the lawyer's professional integrity, independence, or competence.

(2) A lawyer shall not allow involvement in an outside interest to impair the exercise of the lawyer's independent judgment on behalf of a client.

Commentary

The term "outside interest" covers the widest possible range of activities and includes activities that may overlap or be connected with the practice of law such as engaging in the mortgage business, acting as a director of a client corporation, or writing on legal subjects, as well as activities not so connected such as, for example, a career in business, politics, broadcasting or the performing arts. In each case the question of whether and to what extent the lawyer may be permitted to engage in the outside interest will be subject to any applicable law or rule of the Society.

Where the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer's conduct might bring the lawyer or the profession into disrepute or impair the lawyer's competence as, for example, where the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.

(Emphasis added)

73. The American Bar Association provides specific guidance on conflicts arising from lawyers in board positions. The ABA Model Rules include Comment [35] to Model Rule 1.7[6] , which reads:

> A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of

[6] Rule 1.7 reads:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  (1) the representation of one client will be directly adverse to another client; or
  (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), the lawyer may represent a client if:
  (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  (2) the representation is not prohibited by law;
  (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
  (4) each affected client gives informed consent, confirmed in writing.

director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

74. The ABA and a number of states have published ethics opinions dealing in detail with this subject.

75. The Law Society of England and Wales in its Guide To The Professional Conduct Of Solicitors, provides the following in rule 15.04 on solicitor's interests conflicting with those of a client.

A solicitor must not act where his or her own interests conflict with the interests of a client or a potential client.
…

8. A solicitor must also consider whether any personal relationship, office or appointment inhibits his or her ability to advise the client properly and impartially (see 15.06, p.319).
…

10. A solicitor who is a director or shareholder of a company for which the solicitor also acts must consider whether he or she is in a position of conflict when asked to advise the company upon steps it has taken or should take. It may be necessary for the solicitor to resign from the board or for another solicitor to advise the company in that particular matter. A solicitor acting for a company in which he or she has a personal interest should always ensure that his or her ability to give independent and impartial advice is not thereby impaired.

C. THE COMMITTEE'S PROPOSAL

76. The Committee concluded that, as is currently the case, it is not ethically improper for a corporate client's lawyer to serve on the client's board of directors.

77. The Committee also acknowledged that whether or not a solicitor and client relationship formally exits, lawyers who on boards of directors know that when legal questions arise at the board level, the expectation is that the lawyer will provide the board with the benefit of his or her knowledge and experience. That in itself, if it involves legal advice, creates a solicitor and client relationship even though the lawyer is not paid specifically for that legal advice.

78. While the potential for conflict between a lawyer's duties as director and his or duties as counsel to a corporation is real, there is no compelling argument for prohibiting lawyers from engaging in these dual roles, or imposing standards through rules of conduct relating to the roles.

79. In the Committee's view, the Law Society's current conflict of interest rules provide sufficient guidance in this respect. The Committee, however, believes that a commentary that highlights some of the issues of conflict would be appropriate.

Text of the New Commentary

80. The content of the new commentary, appearing below, is based on the text of a number of existing documents including LawPRO's PracticePRO material and the American Bar Association and New York State Bar Association ethics opinions.

Commentary

A conflict of interest may arise when a lawyer acts not only as a legal advisor but in another role for the client. For example, there is a dual role when a lawyer or his or her law firm acts for a public or private corporation and the lawyer serves as a director of the corporation. Lawyers may also serve these dual roles for partnerships, trusts, and other organizations. A dual role may raise a conflict of interest because it may affect the lawyer's independent judgment and fiduciary obligations in either or both roles, it may obscure legal advice from business and practical advice, it may invalidate the protection of lawyer and client

privilege, and it has the potential of disqualifying the lawyer or the law firm from acting for the organization. Before accepting a dual role, a lawyer should consider these factors and discuss them with the client.

The lawyer should also consider rule 6.04 (Outside Interests and Practice of Law).

81. It is proposed that this commentary follow the existing commentary that follows rule 2.04(3) (see Appendix 3).

III. PROPOSED AMENDMENTS TO RULES 2.04 AND 2.06 ON EQUITY INTERESTS IN CLIENTS

A. INTRODUCTION

82. The Committee reviewed the issue of equity interests in a client, whether through a purchase of shares offered by the client or the client's proposal that shares be issued in lieu of fees for the lawyer's professional services.

83. The Committee, in agreement with the Emerging Issues Committee, determined that no new rules or commentary were required on this subject. However, two proposals are being made for amendments to an existing commentary and rule, as follows:
   a. An amendment to the commentary following rule 2.04(1) to address financial interests of a lawyer that may not amount to a conflicting interest as defined in rule 2.04(1) (i.e. an interest *likely* to affect adversely the lawyer's judgment).
   b. An amendment to rule 2.06(2.1), which speaks to a lawyer's receipt of shares for fees, to address the issue of recommended independent legal advice.

B. BACKGROUND AND EXPLANATORY INFORMATION

84. Two questions framed the review of this issue:
   · Is there a need to revisit the policy around rule 2.06(2.1)?
   · What potential conflicts generally arise when a lawyer invests in a client?

85. The working group, in preparing its report, reviewed a variety of information on the subject, including:
   · Law Society Advisory Material on Shares for Fees (January 2001)
   · American Bar Association and Association of the Bar of the City of New York Ethics Opinions on Acquiring Ownership in a Client in Connection with Performing Legal Services
   · Excerpt from the 2001 ABA Section of Litigation report entitled "Lawyers Doing Business With Their Clients: Identifying and Avoiding Legal and Ethical Dangers" (A Report of the Task Force on the Independent Lawyer)
   · Article from the Texas Law Review (Vol. 81:405, 2002) entitled "The Decline in Lawyer Independence: Lawyer Equity Investments in Clients"
   · Various articles in legal publications or mainstream media on lawyers' equity investments in clients (most dating from 2000)

Current Treatment of the Issue in the Law Society's Rules

86. Specific treatment of a lawyer's equity interest in a corporate client in the Society's Rules is only in the context of shares for fees. Rules 2.06(2) and (2.1)[7] acknowledge that a lawyer accepting shares in a client

[7] Investment by Client where Lawyer has an Interest
(2) Subject to subrule (2.1), where a client intends to enter into a transaction with his or her lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, the lawyer, before accepting any retainer

corporation as payment for legal services is a form of doing business with the client, but that the lawyer need not fulfil the requirements in rule 2.06(2) before accepting the retainer.

87. The Law Society adopted rule 2.06(2.1) in May 2001 following work completed by a working group of the Committee. The following excerpt from the Committee's May 2001 report to Convocation illustrates the working group's thinking:

> The existing Rules, although sufficient in their general guidance [on fees and conflicts of interest], do not specifically deal with this issue. Staff in Advisory Services drafted guidelines for lawyers on the professional conduct aspects of taking shares for fees….
>
> The primary question was whether the requirement for independent legal advice in the rule should apply to lawyers' arrangements to accept shares as fees. This led to discussion of whether these arrangements fall within the ambit of doing business with a client.
>
> The working group concluded that rule 2.06(2) as currently worded may be interpreted to apply to these situations, and that accordingly a lawyer may be required to recommend independent legal representation in every such case. The Committee, based on the working group's views, determined that a modified requirement should be created. A new subrule within rule 2.06 has been drafted for this purpose, with a revision to rule 2.06(2) to make it subject to the new subrule (2.1).

88. Generally, rule 2.04 on conflicts of interest and rule 2.06 on lawyers doing business with clients are the rules to which lawyers would look for guidance on equity interests in clients.

Other Jurisdictions

89. Most Canadian law societies have conflicts rules similar to those of the Law Society. The following are examples of other jurisdictions' treatment of some of the ethical issues arising within the lawyer/corporate client relationship.

<u>British Columbia</u>

90. Chapter 7 of B.C.'s rules on conflict of interest between lawyer and client includes guidance on a lawyer's duties when the lawyer has a financial or membership interest in or with the client. The rules reads:

> 2. A lawyer shall not perform any legal services for a client with whom or in which the lawyer or anyone, including a relative, partner, employer, employee, business associate or friend of the lawyer, has a financial or membership interest which would reasonably be expected to affect the lawyer's professional judgement.1
>
> FOOTNOTE:

(a) shall disclose and explain the nature of the conflicting interest to the client or, in the case of potential conflict, how and why it might develop later,

(b)shall recommend independent legal representation and shall require that the client receive independent legal advice, and

(c)where the client requests the lawyer to act, the lawyer shall obtain the client's written consent.

[*Amended – May 2001]*

(2.1) Where a client intends to pay for legal services by transferring corporate shares or securities to his or her lawyer, the lawyer need not require that the client receive independent legal advice before accepting a retainer.

[New – May 2001]

> 1. Lawyers should be aware that, apart from the ethical duty imposed by Rule 2, they may also be uninsured in such circumstances because of the business exclusion provision in the Lawyers' Compulsory Professional Liability Insurance Policy. The policy does not apply to any claim by, against, arising out of or in connection with any organization in which the insured, the insured's spouse, children, parents, siblings or law firm partners or associates individually or collectively, directly or indirectly, have effective management control or beneficial ownership in an amount greater than 10% (Exclusion 6).
>
> Lawyers practising securities law should refer to the B.C. Securities Commission's Local Policy Statement 3-41 ("Lawyer's Conflict of Interest"), dated February 1, 1987, which imposes duties of disclosure concerning lawyers' shareholding on reporting issuers for which they act as solicitors and provide legal opinions

Law Society of England and Wales

91. In its Guide To The Professional Conduct Of Solicitors, the Law Society provides the following in rule 15.04 on solicitor's interests conflicting with those of a client.

> A solicitor must not act where his or her own interests conflict with the interests of a client or a potential client.
> …
>
> 8. A solicitor must also consider whether any personal relationship, office or appointment inhibits his or her ability to advise the client properly and impartially (see 15.06, p.319).
> …
>
> 10. A solicitor who is a director or shareholder of a company for which the solicitor also acts must consider whether he or she is in a position of conflict when asked to advise the company upon steps it has taken or should take. It may be necessary for the solicitor to resign from the board or for another solicitor to advise the company in that particular matter. A solicitor acting for a company in which he or she has a personal interest should always ensure that his or her ability to give independent and impartial advice is not thereby impaired.

American Bar Association

92. The ABA published a Formal Opinion in 2000 on the issue of equity interests in clients. The headnote reads as follows:

> Formal Opinion 00-418
>
> Acquiring Ownership in a Client in Connection with Performing Legal Services
>
> The Model Rules of Professional Conduct do not prohibit a lawyer from acquiring an ownership interest in a client, either in lieu of a cash fee for providing legal services or as an investment opportunity in connection with such services, as long as the lawyer complies with Rule 1.8(a) governing business transactions with clients, and, when applicable, with Rule 1.5 requiring that a fee for legal services be reasonable. To comply with Rule 1.8(a), the transaction by which the lawyer acquires the interest and its terms must be fair and reasonable to the client, and fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client. The client also must be given a reasonable opportunity to seek the advice of independent counsel in the transaction and must consent to the transaction in writing. In providing legal services to the client's business while owning its stock, the lawyer must take care to avoid conflicts between the client's interests and the lawyer's personal economic interests as an owner, as required by Rule 1.7(b), and must exercise independent professional judgment in advising the client concerning legal matters as required by Rule 2.1.

93. In 2001, the ABA published a report on the independent lawyer. It notes the opinion above and states that where regulators have addressed the issue of lawyers accepting shares for fees, no prohibition has resulted. Rather, the focus is on ensuring that lawyers understand the conflicts and fee-related (i.e. fair and

reasonable) issues inherent in such arrangements. The same conclusions were reached in the report with respect to equity interests of in-house counsel.

C. THE COMMITTEE'S PROPOSAL

94. The Committee, based on the Emerging Issues Committee recommendation, concluded that lawyers must be cognizant of the professional conduct standards that apply in these situations, and in this respect, reliance is placed on rules 2.04 and 2.06. It also concluded that this type of activity for lawyers does not call for the creation of any new standards. However, the Committee agreed that clarifying amendments to these rules should be made with respect to this issue.

95. An amendment to rule 2.04 commentary is proposed to address the situation of lawyers' small shareholdings in publicly traded client corporations. In the view of the Committee, this should not automatically create a conflict of interest.

96. An amendment to rule 2.06(2.1) is also proposed to incorporate exclusionary language similar to that appearing in rule 2.06(2), for the sake of consistency, and to clarify that independent legal advice should be recommended (but as the rule currently provides, not required).

97. These two amendments are reflected below.

Commentary (following rule 2.04(1))

Conflicting interests include, but are not limited to, the financial interest of a lawyer or an associate of a lawyer, including that which may exist where lawyers have a financial interest in a firm of non-lawyers in an affiliation, and the duties and loyalties of a lawyer to any other client, including the obligation to communicate information. For example, there ~~would~~ could be a conflict of interest if a lawyer, or a family member, or a law partner had a personal financial interest in the client's affairs or in the matter in which the lawyer is requested to act for the client, such as a partnership interest in some joint business venture with the client. The definition of conflict of interest, however, does not capture financial interests that do not compromise a lawyer's duties to the client. For example, a lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest, because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client.

Rule 2.06(2.1)

(2.1) Where a client intends to pay for legal services by transferring corporate shares or securities, other than a non-material interest in corporation whose securities are publicly traded, to his or her lawyer, the lawyer shall recommend but need not require that the client receive independent legal advice before accepting a retainer.

APPENDIX 1

INFORMATION ON INVITATIONS TO ATTEND

INITIAL LETTER TO MEMBER

PRIVATE AND CONFIDENTIAL

[date]

[Member or Counsel]

Dear [Member or Counsel]:

Re: Complainant:
Member:

I am writing to confirm that this matter was considered by the Proceedings Authorization Committee at its meeting on [date].

The Committee determined that you should be invited to attend in accordance with section 9 of By-law 21 of The Law Society of Upper Canada By-laws.

I wish to confirm that [date] has been set for your personal attendance. The Invitation will be conducted at offices of the Law Society, 130 Queen Street West, Toronto, in the Convocation Room at [time] or so soon thereafter as the matter can be heard.

The Invitation is not a formal disciplinary process and therefore will not form part of your disciplinary record. It takes place in camera before a Committee of Benchers. There is no reporter present and no publication of these proceedings is made. Witnesses are not present and the Society does not require that you attend with counsel.

Enclosed please find a summary of the Society's investigation which contains a discussion of the issues to be addressed at your meeting with the Committee.

Yours truly,

Law Society Counsel
Encl.

LETTER TO COMPLAINANT

PRIVATE AND CONFIDENTIAL

[date]

[Complainant or Counsel]
Toronto, ON

Dear [Complainant or Counsel]:

Re: Complainant:
Member:

I refer to your complaint against [the Member].

This matter was considered at the meeting of the Proceedings Authorization Committee on [date]. The Committee authorized an Invitation to Attend pursuant to section 9 of By-law 21 of The Law Society of Upper Canada By-laws. The Invitation to Attend is a process whereby [the Member] attends before a panel of Law Society Benchers to

discuss the circumstances that led to your complaint. Once [the Member] has attended the Invitation to Attend, the matter is concluded and I will close my file.

The decision of the Committee is final and there is no further review or proceeding available with respect to this matter.

Thank you for bringing your concerns to the attention of the Law Society.

Yours truly,

[Law Society Counsel]

CLOSING LETTER TO MEMBER

PRIVATE AND CONFIDENTIAL

[date]

[Member or Counsel]
Barrister & Solicitor
Toronto, ON

Dear [Member or Counsel]:

Re: Complainant:
Member:

I wish to confirm your attendance at an Invitation to Attend held on [date] before Benchers [list Benchers].

Having discussed the matter with you, the Committee instructed me to close the file.

I also wish to confirm that the Invitation is not a formal disciplinary process and therefore is not part of your disciplinary record.

Thank you for your cooperation.

Yours truly,

Law Society Counsel

APPENDIX 2

Law Society Letter to the Ontario Securities Commission

October 31, 2002

Sent by "fax" to (416) 593-8122 and hand delivered

David A. Brown, Q.C.
Chair
Ontario Securities Commission
20 Queen Street West
Suite 1903
Toronto, Ontario
M5H 3S8

Dear Mr. Brown:

On behalf of Convocation, I welcome the opportunity to respond to your August 26, 2002 letter.

You asked for the Law Society's input on whether there is a need in Ontario for rules, including a "whistle blowing" rule, for lawyers appearing before your Commission, similar to those mandated by the *Sarbanes-Oxley Act of 2002* for lawyers appearing before the Securities & Exchange Commission (S.E.C.) in the United States.

As you are aware, the regulation of lawyers in the U.S. is different from that in Canada. The American courts and other judicial or quasi-judicial bodies regulate the conduct of those who appear before them. Canadian lawyers are held strictly accountable to provincial law societies created by statute. These societies undertake the full scope of regulation, including admitting members to practice, setting professional standards (including rules of conduct) and disciplining members. In Ontario this body is the Law Society of Upper Canada, which for many years has enforced *Rules of Professional Conduct* governing the conduct of all lawyers, including those who represent public and private corporations. The relatively small number of lawyers who appear before your Commission and the great number of lawyers who do not are already required to meet the standards set by the Rules. These Rules, including those in respect of "whistle blowing", either meet or exceed the existing standards of professional conduct for American lawyers appearing before the S.E.C.

Rule 2 of the Law Society's *Rules of Professional Conduct* deals with a lawyer's relationship with his client. A Commentary forming part of this rule deals specifically with "whistle blowing":

A lawyer employed or retained to act for an organization, including a corporation, confronts a difficult problem about confidentiality when he or she becomes aware that the organization may commit a dishonest, fraudulent, criminal, or illegal act. This problem is sometimes described as the problem of whether the lawyer should "blow the whistle" on his or her employer or client. Although the *Rules of Professional Conduct* make it clear that the lawyer shall not knowingly assist or encourage any dishonesty, fraud, crime, or illegal conduct (rule 2.02 (5)), it does not follow that the lawyer should disclose to the appropriate authorities an employer's or client's proposed misconduct. Rather, the general rule, as set out above, is that the lawyer shall hold the client's information in strict confidence, and this general rule is subject to only a few exceptions. Assuming the exceptions do not apply, there are, however, several steps that a lawyer should take when confronted with the difficult problem of proposed misconduct by an organization. The lawyer should recognise that his or her duties are owed to the organization and not to the officers, employees, or agents of the organization. The lawyer should therefore ask that the matter be reconsidered, and the lawyer should, if necessary, bring the proposed misconduct to the attention of a higher (and ultimately the highest) authority in the organization despite any directions from anyone in the organization to the contrary. If these measures fail, it may be appropriate for the lawyer to resign in accordance with the rules for withdrawal from representation (rule 2.09).

This commentary was approved by Convocation in June 2000 and came into force November 2000.

The Law Society is considering whether amendments to the Rule and the Commentary are needed to make them more specific. If the S.E.C enacts more stringent regulatory over-sight for lawyers who appear before it, we will review these rules and consider whether conditions in Canada might require us to make changes in our rules.

Because of our statutory jurisdiction over all lawyers acting in any corporate setting, not only those representing public corporations who may be "issuers" under Ontario Securities Commission rules, we believe that our

regulation is more comprehensive and will be more stringent than the American rules or any parallel regulation that the Ontario Securities Commission might consider.

Although the Law Society has already addressed the "whistle blowing" issue in its rules of conduct, it is prepared to consider any suggestions the Ontario Securities Commission may have to improve the rules. This would include specific concerns the Commission has that might require consideration for rule amendment, or views that would be useful to us in our on-going development of standards and Rules.

While adequate regulation of those involved in the capital markets is necessary to maintain the public's confidence in the markets, the public must also be assured that lawyers are regulated in a way that protects the fundamental values of the legal profession for the sake of the public interest. Our *Rules of Professional Conduct* are informed by this principle. Our intent is that there be clear Rules for all lawyers practicing in Ontario, or Ontario lawyers practicing elsewhere, on conduct involving corporate misfeasance. If there is a need to further address this subject in the Rules, the Law Society will undertake that initiative. The Law Society trusts that the Ontario Securities Commission will agree that there is no need for parallel rules.

I look forward to further dialogue with you on this important issue.

Yours very truly,

Professor Vern Krishna, Q.C.
Treasurer

APPENDIX 3

SELECTED RULES FROM

LAW SOCIETY OF UPPER CANADA

AMERICAN BAR ASSOCIATION

LAW SOCIETY OF ALBERTA

NOVA SCOTIA BARRISTERS' SOCIETY

U.S. SECURITIES AND EXCHANGE COMMISSION

2.02 QUALITY OF SERVICE

Honesty and Candour

2.02 (1) When advising clients, a lawyer shall be honest and candid.

Commentary
The lawyer's duty to the client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law, and the lawyer's own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.

Encouraging Compromise or Settlement

(2) A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing useless legal proceedings.

(3) The lawyer shall consider the use of alternative dispute resolution (ADR) for every dispute, and, if appropriate, the lawyer shall inform the client of ADR options and, if so instructed, take steps to pursue those options.

Threatening Criminal Proceedings

(4) A lawyer shall not advise, threaten, or bring a criminal or quasi criminal prosecution in order to secure a civil advantage for the client.

Dishonesty or Fraud by Client

(5) When advising a client, a lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct, or instruct the client on how to violate the law and avoid punishment.

Commentary

A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client or persons associated with such a client.

A bona fide test case is not necessarily precluded by subrule 2.02(5) and, so long as no injury to the person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case.

Client Under a Disability

(6) When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary

A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions, however, depends on such factors as his or her age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client's ability to make decisions may change, for better or worse, over time. When a client is or comes to be under a disability that impairs his or her ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. Recognizing these factors, the purpose of this rule is to direct a lawyer with a client under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.

A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage his or her legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.

Medical-Legal Reports

(7) A lawyer who receives a medical legal report from a physician or health professional that is accompanied by a proviso that it not be shown to the client shall return the report immediately to the physician or health professional unless the lawyer has received specific instructions to accept the report on this basis.

Commentary

The lawyer can avoid some of the problems anticipated by the rule by having a full and frank discussion with the physician or health professional, preferably in advance of the preparation of a medical legal report, which discussion will serve to inform the physician or health professional of the lawyer's obligation respecting disclosure of medical legal reports to the client.

(8) A lawyer who receives a medical legal report from a physician or health professional containing opinions or findings that if disclosed might cause harm or injury to the client shall attempt to dissuade the client from seeing the report but, if the client insists, the lawyer shall produce the report.

(9) Where a client insists on seeing a medical legal report about which the lawyer has reservations for the reasons noted in subrule (8), the lawyer shall suggest that the client attend at the office of the physician or health professional to see the report in order that the client will have the benefit of the expertise of the physician or health professional in understanding the significance of the conclusion contained in the medical legal report.

Title Insurance in Real Estate Conveyancing

(10) A lawyer shall assess all reasonable options to assure title when advising a client about a real estate conveyance and shall advise the client that title insurance is not mandatory and is not the only option available to protect the client's interests in a real estate transaction.

Commentary

A lawyer should advise the client of the options available to protect the client's interests and minimize the client's risks in a real estate transaction. The lawyer should be cognizant of when title insurance may be an appropriate option. Although title insurance is intended to protect the client against title risks, it is not a substitute for a lawyer's services in a real estate transaction.

The lawyer should be knowledgeable about title insurance and discuss with the client the advantages, conditions, and limitations of the various options and coverages generally available to the client through title insurance. Before recommending a specific title insurance product, the lawyer should be knowledgeable about the product and take such training as may be necessary in order to acquire the knowledge.

(11) A lawyer shall not receive any compensation, whether directly or indirectly, from a title insurer, agent or intermediary for recommending a specific title insurance product to his or her client.

(12) A lawyer shall disclose to the client that no commission or fee is being furnished by any insurer, agent, or intermediary to the lawyer with respect to any title insurance coverage.

Commentary

The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance of any hidden fees by the lawyer, including the lawyer’s law firm, any employee or associate of the firm, or any related entity.

(13) If discussing TitlePlus insurance with the client, a lawyer shall fully disclose the relationship between the legal profession, the Society, and the Lawyers' Professional Indemnity Company (LPIC).

2.03 CONFIDENTIALITY

Confidential Information

2.03 (1) A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.

Commentary

A lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

This rule must be distinguished from the evidentiary rule of lawyer and client privilege concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.

Generally, the lawyer should not disclose having been consulted or retained by a particular person about a particular matter unless the nature of the matter requires such disclosure.

A lawyer should take care to avoid disclosure to one client of confidential information concerning or received from another client and should decline employment that might require such disclosure.

A lawyer should avoid indiscreet conversations, even with the lawyer's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified. Similarly, a lawyer should not repeat any gossip or information about the client's business or affairs that is overheard or recounted to the lawyer. Apart altogether from ethical considerations or questions of good taste, indiscreet shop talk between lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the client. Moreover, the respect of the listener for lawyers and the legal profession will probably be lessened.

Although the rule may not apply to facts that are public knowledge, nevertheless, the lawyer should guard against participating in or commenting on speculation concerning the client's affairs or business.

In some situations, the authority of the client to disclose may be implied. For example, some disclosure may be necessary in court proceedings, in a pleading or other court document. Also, it is implied that a lawyer may, unless the client directs otherwise, disclose the client's affairs to partners and associates in the law firm and, to the extent necessary, to non legal staff, such as secretaries and filing clerks. But this implied authority to disclose places the lawyer under a duty to impress upon associates, employees, and students the importance of non disclosure (both during their employment and afterwards) and requires the lawyer to take reasonable care to prevent their disclosing or using any information that the lawyer is bound to keep in confidence.

A lawyer may have an obligation to disclose information under subrule 4.06(3)(Security of Court Facilities). If client information is involved in those situations, the lawyer should be guided by the provisions of rule 2.03.

The rule prohibits disclosure of confidential information because confidentiality and loyalty are fundamental to the relationship between a lawyer and client and legal advice cannot be given and justice cannot be done unless clients have a large measure of freedom to discuss their affairs with their lawyers. However, there are some very exceptional situations identified in the following subrules where disclosure without the client’s permission might be warranted because the lawyer is satisfied that truly serious harm of the types identified is imminent and cannot

otherwise be prevented. These situations will be extremely rare, and, even in these situations, the lawyer should not disclose more information than is required.

Justified or Permitted Disclosure

(2) When required by law or by order of a tribunal of competent jurisdiction, a lawyer shall disclose confidential information, but the lawyer shall not disclose more information than is required.

(3) Where a lawyer believes upon reasonable grounds that there is an imminent risk to an identifiable person or group of death or serious bodily harm, including serious psychological harm that substantially interferes with health or well-being, the lawyer may disclose, pursuant to judicial order where practicable, confidential information where it is necessary to do so in order to prevent the death or harm, but shall not disclose more information than is required.

Commentary

A lawyer employed or retained to act for an organization, including a corporation, confronts a difficult problem about confidentiality when he or she becomes aware that the organization may commit a dishonest, fraudulent, criminal, or illegal act. This problem is sometimes described as the problem of whether the lawyer should "blow the whistle" on his or her employer or client. Although the Rules of Professional Conduct make it clear that the lawyer shall not knowingly assist or encourage any dishonesty, fraud, crime, or illegal conduct (rule 2.02 (5)), it does not follow that the lawyer should disclose to the appropriate authorities an employer's or client's proposed misconduct. Rather, the general rule, as set out above, is that the lawyer shall hold the client's information in strict confidence, and this general rule is subject to only a few exceptions. Assuming the exceptions do not apply, there are, however, several steps that a lawyer should take when confronted with the difficult problem of proposed misconduct by an organization. The lawyer should recognise that his or her duties are owed to the organization and not to the officers, employees, or agents of the organization. The lawyer should therefore ask that the matter be reconsidered, and the lawyer should, if necessary, bring the proposed misconduct to the attention of a higher (and ultimately the highest) authority in the organization despite any directions from anyone in the organization to the contrary. If these measures fail, it may be appropriate for the lawyer to resign in accordance with the rules for withdrawal from representation (rule 2.09).

(4) Where it is alleged that a lawyer or the lawyer's associates or employees are

(a) guilty of a criminal offence involving a client's affairs,

(b) civilly liable with respect to a matter involving a client's affairs, or

(c) guilty of malpractice or misconduct,

a lawyer may disclose confidential information in order to defend against the allegations, but the lawyer shall not disclose more information than is required.

(5) A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but the lawyer shall not disclose more information than is required.

Literary Works

(6) If a lawyer engages in literary works, such as a memoir or an autobiography, the lawyer shall not disclose confidential information without the client's or former client's consent.

Commentary

The fiduciary relationship between lawyer and client forbids the lawyer from using any confidential information covered by the ethical rule for the benefit of the lawyer or a third person or to the disadvantage of the client.

2.04 AVOIDANCE OF CONFLICTS OF INTEREST

Definition

2.04 (1) In this rule

a "conflict of interest" or a "conflicting interest" means an interest

(a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or

(b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.

Commentary

Conflicting interests include, but are not limited to, the financial interest of a lawyer or an associate of a lawyer, including that which may exist where lawyers have a financial interest in a firm of non-lawyers in an affiliation, and the duties and loyalties of a lawyer to any other client, including the obligation to communicate information. For example, there would be a conflict of interest if a lawyer, or a family member, or a law partner had a personal financial interest in the client's affairs or in the matter in which the lawyer is requested to act for the client, such as a partnership interest in some joint business venture with the client.

[Amended - May 2001]

Avoidance of Conflicts of Interest

(2) A lawyer shall not advise or represent more than one side of a dispute.

(3) A lawyer shall not act or continue to act in a matter when there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents.

Commentary

A client or the client's affairs may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflict of interest.

A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest.

As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf should not be subject to other interests, duties, or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs. In some instances, each client's case may gather strength from joint representation. In the result, the client's interests may sometimes be better served by not engaging another lawyer, for example, when the client and another party to a commercial transaction are continuing clients of the same law firm but are regularly represented by different lawyers in that firm.

While this subrule does not require that a lawyer advise the client to obtain independent legal advice about the conflicting interest, in some cases, especially those in which the client is not sophisticated or is vulnerable, the lawyer should recommend such advice to ensure that the client's consent is informed, genuine, and uncoerced.

Acting Against Client

(4) A lawyer who has acted for a client in a matter shall not thereafter act against the client or against persons who were involved in or associated with the client in that matter

(a) in the same matter,

(b) in any related matter, or

(c) save as provided by subrule (5), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information

unless the client and those involved in or associated with the client consent.

Commentary

It is not improper for the lawyer to act against a client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person and where previously obtained confidential information is irrelevant to that matter.

(5) Where a lawyer has acted for a former client and obtained confidential information relevant to a new matter, the lawyer's partner or associate may act in the new matter against the former client if

(a) the former client consents to the lawyer's partner or associate acting, or

(b) the law firm establishes that it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances, including

(i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur,
(ii) the extent of prejudice to any party,
(iii) the good faith of the parties,
(iv) the availability of suitable alternative counsel, and
(v) issues affecting the public interest.

Commentary

The term "client" is defined in rule 1.02 to include a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work. Therefore, if a member of a law firm has obtained from a former client confidential information that is relevant to a new matter, no member of the law firm may act against the former client in the new matter unless the requirements of subrule (5) have been satisfied. In its effect, subrule (5) extends with necessary modifications the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rule 2.05) to the situation of a law firm acting against a former client.

Joint Retainer

(6) Before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that

(a) the lawyer has been asked to act for both or all of them,

(b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

Although this subrule does not require that, before accepting a joint retainer, a lawyer advise the client to obtain independent legal advice about the joint retainer, in some cases, especially those in which one of the clients is less sophisticated or more vulnerable than the other, the lawyer should recommend such advice to ensure that the client's consent to the joint retainer is informed, genuine, and uncoerced.

(2) Where a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

Commentary

Although all the parties concerned may consent, a lawyer should avoid acting for more than one client when it is likely that an issue contentious between them will arise or their interests, rights, or obligations will diverge as the matter progresses.

(8) Where a lawyer has advised the clients as provided under subrules (6) and (7) and the parties are content that the lawyer act, the lawyer shall obtain their consent.

(9) Save as provided by subrule (10), where clients have consented to a joint retainer and an issue contentious between them or some of them arises, the lawyer shall

(a) not advise them on the contentious issue, and
(b) refer the clients to other lawyers, unless

(i) no legal advice is required, and
(ii) the clients are sophisticated,

in which case, the clients may settle the contentious issue by direct negotiation in which the lawyer does not participate.

Commentary

The rule does not prevent a lawyer from arbitrating or settling or attempting to arbitrate or settle, a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer.

Where, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

(10) Where clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them and a contentious issue does arise, the lawyer may advise the one client about the contentious matter and shall refer the other or others to another lawyer.

Affiliations Between Lawyers and Affiliated Entities

(10.1) Where there is an affiliation, before accepting a retainer to provide legal services to a client jointly with non-legal services of an affiliated entity, a lawyer shall disclose to the client

(a) any possible loss of solicitor and client privilege because of the involvement of the affiliated entity, including circumstances where a non-lawyer or non-lawyer staff of the affiliated entity provide services, including support services, in the lawyer' office,

(b) the lawyer' role in providing legal services and in providing non-legal services or in providing both legal and non-legal services, as the case may be,

(c) any financial, economic or other arrangements between the lawyer and the affiliated entity that may affect the independence of the lawyer's representation of the client, including whether the lawyer shares in the revenues, profits or cash flows of the affiliated entity; and

(d) agreements between the lawyer and the affiliated entity, such as agreements with respect to referral of clients between the lawyer and the affiliated entity, that may affect the independence of the lawyer's representation of the client.

(10.2) Where there is an affiliation, after making the disclosure as required by subrule (10.1), a lawyer shall obtain the client's consent before accepting a retainer under subrule (10.1).

(10.3) Where there is an affiliation, a lawyer shall establish a system to search for conflicts of interest of the affiliation.

Commentary

Lawyers practising in an affiliation are required to control the practice through which they deliver legal services to the public. They are also required to address conflicts of interest in respect of a proposed retainer by a client as if the lawyer's practice and the practice of the affiliated entity were one where the lawyers accept a retainer to provide legal services to that client jointly with non-legal services of the affiliated entity. The affiliation is subject to the same conflict of interest rules as apply to lawyers and law firms. This obligation may extend to inquiries of offices of affiliated entities outside of Ontario where those offices are treated economically as part of a single affiliated entity.

In reference to clause (a) of subrule (10.1), see also subrule 5.01(6) on supervision and delegation.

[New - May 2001]

Prohibition Against Acting for Borrower and Lender

(11) Subject to subrule (12), a lawyer or two or more lawyers practising in partnership or association shall not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

(12) Provided that there is no violation of this rule, a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction if

(a) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction,

(b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price,

(c) the lender is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business,

(d) the consideration for the mortgage or loan does not exceed $50,000, or

(e) the lender and borrower are not at "arm's length" as defined in the *Income Tax Act (Canada).*

[Amended - May 2001]

Multi-discipline Practice

(13) A lawyer in a multi-discipline practice shall ensure that non-lawyer partners and associates observe this rule for the legal practice and for any other business or professional undertaking carried on by them outside the legal practice.

Unrepresented Persons

(14) When a lawyer is dealing on a client's behalf with an unrepresented person, the lawyer shall

(a) urge the unrepresented person to obtain independent legal representation,

(b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer, and

(c) make clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client and accordingly his or her comments may be partisan.

Commentary

If an unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in this rule about joint retainers.

2.09 WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

2.09 (1) A lawyer shall not withdraw from representation of a client except for good cause and upon notice to the client appropriate in the circumstances.

Commentary

Although the client has the right to terminate the lawyer client relationship at will, the lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship.

No hard and fast rules can be laid down about what will constitute reasonable notice before withdrawal. Where the matter is covered by statutory provisions or rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril.

Optional Withdrawal

(2) Subject to the rules about criminal proceedings and the direction of the tribunal, where there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Commentary

A lawyer who is deceived by the client will have justifiable cause for withdrawal, and the refusal of the client to accept and act upon the lawyer's advice on a significant point might indicate a loss of confidence justifying withdrawal. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

Non payment of Fees

(3) Subject to the rules about criminal proceedings and the direction of the tribunal, where, after reasonable notice, the client fails to provide funds on account of disbursements or fees, a lawyer may withdraw unless serious prejudice to the client would result.

Withdrawal from Criminal Proceedings

(4) Where a lawyer has agreed to act in a criminal case and where the interval between a withdrawal and the trial of the case is sufficient to enable the client to obtain another lawyer and to allow such other lawyer adequate time for preparation, the lawyer who has agreed to act may withdraw because the client has not paid the agreed fee or for other adequate cause provided that the lawyer

(a) notifies the client, preferably in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause,

(b) accounts to the client for any monies received on account of fees and disbursements,

(c) notifies Crown counsel in writing that the lawyer is no longer acting,

(d) in a case when the lawyer's name appears on the records of the court as acting for the accused, notifies the clerk or registrar of the appropriate court in writing that the lawyer is no longer acting.

Commentary

A lawyer who has withdrawn because of conflict with the client should not indicate in the notice addressed to the court or Crown counsel the cause of the conflict or make reference to any matter that would violate the privilege that exists between lawyer and client. The notice should merely state that the lawyer is no longer acting and has withdrawn.

(5) Where a lawyer has agreed to act in a criminal case and where the date set for trial is not far enough removed to enable the client to obtain another lawyer or to enable another lawyer to prepare adequately for trial and

an adjournment of the trial date cannot be obtained without adversely affecting the client's interests, the lawyer who agreed to act may not withdraw because of non payment of fees.

(6) Where the lawyer is justified in withdrawing from a criminal case for reasons other than non payment of fees and there is not a sufficient interval between a notice to the client of the lawyer's intention to withdraw and the date when the case is to be tried to enable the client to obtain another lawyer and to enable such lawyer to prepare adequately for trial, the first lawyer, unless instructed otherwise by the client, should attempt to have the trial date adjourned and may withdraw from the case only with the permission of the court before which the case is to be tried.

Commentary

Where circumstances arise that in the opinion of the lawyer require an application to the court for leave to withdraw, the lawyer should promptly inform Crown counsel and the court of the intention to apply for leave in order to avoid or minimize any inconvenience to the court and witnesses.

Mandatory Withdrawal

(7) Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if

(a) discharged by the client,

(b) the lawyer is instructed by the client to do something inconsistent with the lawyer's duty to the tribunal and, following explanation, the client persists in such instructions,

(c) the client is guilty of dishonourable conduct in the proceedings or is taking a position solely to harass or maliciously injure another,

(d) it becomes clear that the lawyer's continued employment will lead to a breach of these rules, or

(e) the lawyer is not competent to handle the matter.

Commentary

When a law firm is dissolved it will usually result in the termination of the lawyer client relationship as between a particular client and one or more of the lawyers involved. In such cases, most clients will prefer to retain the services of the lawyer whom they regarded as being in charge of their business before the dissolution. However, the final decision rests with the client, and the lawyers who are no longer retained by that client should act in accordance with the principles here set out, and, in particular, should try to minimize expense and avoid prejudice to the client.

Manner of Withdrawal

(8) When a lawyer withdraws, the lawyer shall try to minimize expense and avoid prejudice to the client and shall do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor lawyer.

(9) Upon discharge or withdrawal, a lawyer shall

(a) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled,

(b) give the client all information that may be required in connection with the case or matter,

(c) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation,

(d) promptly render an account for outstanding fees and disbursements, and

(e) co operate with the successor lawyer so as to minimize expense and avoid prejudice to the client.

Commentary

The obligation to deliver papers and property is subject to a lawyer's right of lien. In the event of conflicting claims to such papers or property, the lawyer should make every effort to have the claimants settle the dispute.

A lawyer acting for several clients in a case or matter who ceases to act for one or more of them should co operate with the successor lawyer or lawyers to the extent required by the rules and should seek to avoid any unseemly rivalry, whether real or apparent.

Where upon the discharge or withdrawal of the lawyer, the question of a right of lien for unpaid fees and disbursements arises, the lawyer should have due regard to the effect of its enforcement upon the client's position. Generally speaking, the lawyer should not enforce the lien if to do so would prejudice materially the client's position in any uncompleted matter.

Duty of Successor Lawyer

(10) Before agreeing to represent a client, a successor lawyer shall be satisfied that the former lawyer approves, has withdrawn, or has been discharged by the client.

Commentary

It is quite proper for the successor lawyer to urge the client to settle or take reasonable steps towards settling or securing any outstanding account of the former lawyer, especially if the latter withdrew for good cause or was capriciously discharged. But if a trial or hearing is in progress or imminent or if the client would otherwise be prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor lawyer acting for the client.

ABA Model Rules of Professional Conduct

CLIENT-LAWYER RELATIONSHIP
RULE 1.13 ORGANIZATION AS CLIENT
(pre-August 2003)

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;
(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

[4] The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[5] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

Government Agency

[6] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[7] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[8] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[9] Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[10] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[11] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

RULE 1.13: ORGANIZATION AS CLIENT

(as amended August 2003)

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that ~~which~~ reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. ~~In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:~~
~~(1) asking for reconsideration of the matter;~~
~~(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and~~
~~(3) referring~~
Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, ~~seriousness of the matter, referral~~ to the highest authority that can act on behalf of the organization as determined by applicable law.
(c) Except as provided in paragraph (d), if,
(1) despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law ~~and is likely to result in substantial injury to the organization,~~ and
(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,
then the lawyer may ~~resign in accordance with Rule 1.16~~ reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.
(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.
~~(d)~~ (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
~~(e)~~ (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. ~~However, different considerations arise~~ Paragraph (b) makes clear, however, that when the lawyer knows that the organization ~~may~~ is likely to be substantially injured by action of ~~a~~ an officer or other constituent that violates a legal obligation to the organization or is in violation of law. ~~In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion~~. that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. The terms “reasonable” and “reasonably” imply a range within which the lawyer’s conduct will satisfy the requirements of Rule 1.13. In determining what is reasonable in the best interest of the organization, the circumstances at the time of determination are relevant. Such circumstances may include, among others, the lawyer’s area of expertise, the time constraints under which the lawyer is acting, and the lawyer’s previous experience and familiarity with the client. For example, the facts suggesting a violation may be part of a large volume of information that the lawyer has insufficient time to comprehend fully. Or the facts known to the lawyer may be sufficient to signal the likely existence of a violation to an expert in a particular field of law but not to a lawyer who works in another specialty. Under such circumstances the lawyer would not have an obligation to proceed under paragraph (b).

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations.

Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent’s innocent misunderstanding of law and subsequent acceptance of the lawyer’s advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer’s advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

~~[4]~~[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law.

The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

~~[5]~~[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) – (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) ~~can~~ may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

~~[6]~~ [9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

~~[7]~~ [10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

~~[8]~~ [11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

~~[9]~~ [12] Paragraph (~~e~~)(g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

~~[10]~~[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

~~[11]~~ [14]The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

ALBERTA

Chapter 12

THE LAWYER IN CORPORATE AND GOVERNMENT SERVICE

STATEMENT OF PRINCIPLE

A lawyer in corporate or government service has a duty to act in the best interests of the corporation or government, as they are perceived by the corporation or government, subject to limitations imposed by law or professional ethics.

RULES

1. A lawyer in corporate or government service must consider the corporation or government to be the lawyer's client.
2. A lawyer may act in a matter for another employee of a corporation or government only if the requirements of Rule #2 of Chapter 6, *Conflicts of Interest*, are satisfied.
3. If a lawyer while acting for a corporation or government receives information material to the interests of the corporation or government, the lawyer must disclose the information to an appropriate authority in the corporation or government.
4. A lawyer must not implement instructions of a corporation or government that would involve a breach of professional ethics or the commission of a crime or fraud.

COMMENTARY

General

G.1 *Definitions and application*: For the purposes of this chapter, "corporation" is to be interpreted broadly and includes a sole proprietor, partnership, joint venture, society and unincorporated association. Similarly, "government" is to be understood in its broadest sense. A lawyer working in a division, department or agency of the government or in a corporation ultimately controlled by the Crown is considered to be working for the government as a whole as opposed to that division, department, agency or corporation. See Commentary 1 for a more detailed discussion of client identification.

G.2 While the ethical standards that apply to lawyers in corporations and government are the same as those applying to other lawyers, the existence of an employment relationship may generate issues that do not normally arise in private practice. The rules and commentary of this chapter are intended to assist such counsel in identifying and resolving some of these concerns.

Lawyers in corporations and government may perform functions other than acting as lawyers. In this regard, see Chapter 15, *The Lawyer in Activities Other Than the Practice of Law.*

G.3 *Termination of employment*: A lawyer who leaves the employ of a corporation or government is governed by Rule #3 of Chapter 6, *Conflicts of Interest*, with respect to ability to subsequently act against the former employer. In addition, Rule #4 of that chapter applies if a lawyer moves during the currency of a matter to a firm representing another party to the matter. See also Chapter 7, *Confidentiality*, respecting a lawyer's obligations of confidentiality.

R.1 A lawyer in corporate or government service must consider the corporation or government to be the lawyer's client.

C.1 The client of a lawyer employed by a corporation is the corporation itself and not the board of directors, a shareholder, an officer or employee, or another component of the corporation. Likewise, the client of a lawyer employed by the government is the government itself and not a board, agency, minister or Crown corporation.

As an internal matter, a corporate or government client usually provides specific instructions regarding the lawyer's duties and responsibilities. These instructions may include a direction to accept instructions from and report to a particular person or group within the client; to keep certain information confidential from other persons or groups within the client; or to act for more than one of its components, in circumstances that would constitute a multiple representation if the corporation or government as a whole were not the client. A corporate or government lawyer is entitled to act in accordance with such instructions until they are countermanded or rescinded by the client.

Since a corporation or government must act through human agents, however, counsel must be satisfied that those purporting to speak for the client have the authority to do so and that the instructions they convey are in the best interests of the client, as perceived by the client based on considerations including legal advice. Independent inquiry or verification is seldom necessary when instructions have been received through normal channels and contain no unusual or questionable elements. The risk of inaccurate or unauthorized instructions may also lessen as organizational size and complexity decrease since the interests of the person instructing the lawyer may be more closely identified with those of the client itself.

R.2 A lawyer may act in a matter for another employee of a corporation or government only if the requirements of Rule #2 of Chapter 6, *Conflicts of Interest*, are satisfied.

C.2 A corporate or government lawyer may be requested to perform legal services in circumstances in which another employee of the corporation or government expects that the lawyer will be protecting that person's interests. In some situations, it may appear that the corporation or government has no substantial interest in the matter, such as the purchase of a house by an employee. In other situations, such as the preparation of an employment contract, the corporation or government clearly has an interest that differs from that of the employee. In still others, such as the defence of both parties on a criminal or quasi criminal charge, the corporation or government and the employee may seem to have a common interest. In any of these cases, however, the lawyer may acquire information from one party that could be significant to the other.

Before the lawyer undertakes the representation, therefore, the parties must agree that there will be a mutual sharing of material information. The other requirements of Rule #2 of Chapter 6, *Conflicts of Interest*, must also be satisfied. For example, the lawyer must:

- determine that the representation is in the best interests of both parties after consideration of all relevant factors;
- stipulate that the lawyer will be compelled to cease to act in the matter if a dispute develops, unless at that time both parties consent to the lawyer's continuing to represent the corporation or government in the matter;
- obtain the consent of the parties based on full and fair disclosure of the advantages and disadvantages of the lawyer's acting versus the engagement of outside counsel. If the employee involved is (for example) the president of a corporate client, the consent of the corporation required by Rule #2 of Chapter 6, *Conflicts of Interest*, must issue from someone other than the president, such as the board of directors.

If the lawyer considers the risk of divergence of interests to be high, or if one of the parties is unwilling to agree to the mutual sharing of material information, the employee must retain independent counsel.

Rule #2 and this commentary also apply in principle when a corporate or government lawyer is requested to represent a third party, such as an affiliated corporation or joint venturer, having an association with the corporation or government but not forming part of it.

R.3 If a lawyer while acting for a corporation or government receives information material to the interests of the corporation or government, the lawyer must disclose the information to an appropriate authority in the corporation or government.

C.3 It is usual to convey material information respecting the interests of a corporate or government client to the person to whom the lawyer normally reports. However, there may be circumstances in which reporting information to that individual would be ineffective or inappropriate. For example, the information may relate to misconduct by that person, or the person may have a history of refusing or failing to deal with similar information in a proper manner. In such a situation, the lawyer should report the information to other, usually more senior, authorities within the client until satisfied that the information has been conveyed to someone who will give it appropriate consideration.

If a lawyer, after taking all reasonable steps to protect the client's interests, receives instructions that would involve a breach of professional ethics or the commission of a crime or fraud, the lawyer may be compelled to withdraw from the representation. (see Commentary 4)

With respect to reporting a matter to authorities outside the client, see Rule #8(c) of Chapter 7, *Confidentiality*.

R.4 A lawyer must not implement instructions of a corporation or government that would involve a breach of professional ethics or the commission of a crime or fraud.

C.4 Like other lawyers, corporate and government counsel must refuse to engage in conduct that violates professional ethics. The fact that such a stand may create conflict with the client or jeopardize one's position or opportunity for advancement is not relevant from an ethical perspective.

Rule #10 of Chapter 9, *The Lawyer as Advisor*, and Rule #2(a) of Chapter 14, *Withdrawal and Dismissal*, provides that withdrawal is mandatory when a client persists in instructions constituting a breach of ethics. In private practice, withdrawal is understood to mean ceasing to act in a particular matter and does not necessarily preclude a lawyer's continuing to act in other matters for the same client. Similarly, a corporate or government lawyer may "withdraw" from a given matter by refusing to implement the client's instructions in that matter, while continuing to advise the corporation or government in other respects.

In the case of a profound and fundamental disagreement between lawyer and client or a pervasive institutional policy of illegality, withdrawal may also entail resignation. In most cases, however, a preferable approach is to refer the contentious matter to outside counsel, seek alternative instructions from other levels of authority in the corporation or government, or take similar action that falls short of resignation.
….

With respect to instructions of a corporation or government that would involve the commission of a crime or fraud, see Commentary 11 of Chapter 9, *The Lawyer as Advisor*.

NOVA SCOTIA

Chapter 4. Honesty and Candour When Advising Clients

A lawyer has a duty to be both honest and candid when advising a client.[1]

A lawyer has a duty to a client who seeks legal advice to give the client a competent opinion that is

(a) open and undisguised, clearly disclosing what the lawyer honestly thinks about the merits and probable results; and
(b) based on sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise.

Dishonesty or fraud by client organization
4.21 A lawyer, acting for an organization, who learns that the organization, or an employee or agent on behalf of the organization, is engaging in or contemplating dishonesty, fraud or illegal conduct, should take appropriate action. This may include

a. following a procedure prescribed by the organization;
b. explaining the nature of the activity to
   (i) the employees or agents involved, and
   (ii) the person with whom the lawyer normally deals advising of the reasons why the lawyer recommends the activity should not be pursued, and outlining the consequences to the organization, the employees or agents, and to the lawyer which could result from the activity; and
c. If the issue is not resolved after the lawyer takes the action suggested in (a) and (b), then, depending upon the circumstances, it may be appropriate for the lawyer to

   (i) provide in writing the same advice which was given orally,
   (ii) advise as to the steps to be taken by the lawyer if this conduct is not stopped or suitably abated,
   (iii) inform the person's immediate superior, describing the nature of conduct, its potential consequences, and the action already taken by the lawyer, and
   (iv) provide advice in writing to a senior member of management, and thereafter, if necessary, to the chair and an outside member of the Board of Directors, or the Minister in case of a lawyer working in government, and include with such advice the information and correspondence already provided.

4.22 If a lawyer, after taking reasonable action to discourage such activity receives instructions that would involve breaching the duties in this Handbook, dishonesty, fraud or illegal conduct, the lawyer is under a duty to withdraw from the representation of the organization in the particular matter. [12]

12. In private practice, withdrawal is understood to mean ceasing to act in a particular matter and does not necessarily preclude a lawyer's continuing to act in other matters for the same client. Similarly, a lawyer employed by a client may "withdraw" from a given matter by refusing to implement the client's instructions in that matter, while continuing to advise the client in other respects.

In the case of a profound and fundamental disagreement between lawyer and client or a pervasive institutional policy of illegality, withdrawal may also entail resignation. In most cases, however, a preferable approach is to seek alternative instructions from other levels of authority in the organization, have the matter referred to outside counsel, or take similar action that falls short of resignation.

Cf. *Handbook*, Chapter 11, "Withdrawal," below, which addresses the lawyer's duties with respect to withdrawal, primarily in the private practice context.

<u>Chapter 6. Impartiality and Conflict of Interest Between Clients</u>

Rule
A lawyer has a duty not to:

(a) advise or represent both sides of a dispute; or
(b) act or continue to act in a matter where there is or is likely to be a conflicting interest, unless the lawyer has the informed consent of each client or prospective client for whom the lawyer proposes to act.

What is a conflicting interest?
1. A conflicting interest is one that would be likely to affect adversely the lawyer's judgment or advice on behalf of, or loyalty to a client or prospective client.2 Conflicting interests include, but are not limited to, the duties and loyalties of the lawyer or a partner or professional associate of the lawyer to any other client, whether involved in the particular transaction or not, including the obligation to communicate information.
…

Acting for organizations[8]
10. A lawyer acting for an organization in circumstances described in Guiding Principle 11 has a duty to make it clear to any person with whom the lawyer is dealing, such as a director, officer, employee, shareholder or member of that organization or related organization (the "individual"), that

(a) the organization is the lawyer's client;
(b) the individual is not the lawyer's client; and
(c) the lawyer may be obliged to provide to the organization any information acquired by the lawyer and the information may be used or disclosed by the organization.

11. The duty in Guiding Principle 10 arises when

(a) the lawyer perceives that the individual believes, or
(b) a reasonably informed member of the public could reasonably believe that the lawyer owes a duty to the individual not to pass information about the affairs of the individual to the organization.

12. Where a lawyer ought to have provided, but did not provide the clarification described in Guiding Principle 10 and the individual discloses information about the individual's affairs to the lawyer, the lawyer shall not disclose the information to the organization and shall not act for either the organization or the individual in a matter to which the information pertains if there is an issue contentious between them, if their interests, rights or obligations diverge, or if it is reasonably obvious that an issue contentious between them may arise or that their interests, rights or obligations will diverge as the matter progresses.

13. If the lawyer discloses information to the organization, the lawyer has a duty to tell the individual that the information has been disclosed to the organization if the circumstances described in Guiding Principle 12 exist or subsequently arise, unless telling the individual would provide an opportunity to conceal actions that are contrary to law.

Commentary
…

Acting for organizations
6.9 What a reasonably informed member of the public could reasonably believe is a question of fact. Relevant factors for determining when the duty referred to in Guiding Principle 10 arises include

(a) the organizational context such as
  (i) legislation, policies, procedures and practices of the organization,
  (ii) physical indicators such as proximity of offices, security systems, filing systems, sharing of secretarial support,
  (iii) visible indicators such as job titles, letterhead, organizational charts;

(b) prior statements and actions by the lawyer or the individual such as whether the lawyer routinely performs legal services for individuals in the organization in their individual capacity;

(c) the individual context such as
  (i) the experience, rank, or position of the individual in the organization or related organizations,
  (ii) statements by the lawyer or the individual at the time of the disclosure of information.

6.10 For the purposes of Guiding Principles 10 to 13

(a) "organization" includes a body corporate, sole proprietorship, partnership, joint venture, society or unincorporated association, union, employers group, and a government;

(b) a lawyer working in a division, department or agency of an organization is considered to be working for the organization as a whole except as explicitly provided by the organization.

6.11 As an internal matter, an organization may provide specific instructions or follow practices governing the performance of a lawyer's obligations to the organization. These instructions or practices may include a direction to accept instructions from and report to a particular individual or a group of individuals within the organization; to keep certain information confidential from other individuals or groups within the organization; or to act for more than one component of the organization in circumstances that would constitute a multiple representation if the organization as a whole were not the client. A lawyer is entitled to act in accordance with such instructions or practices.

8.For clarification on the role of in-house counsel, which may be governed by Guiding Principles 10 to 13, see Commentaries 6.9 to 6.11; G. MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, 1993), Chapter 20, "The Corporate Counsel" and Chapter 21, "Government Lawyers"; and Smith, *supra*, note 1, Chapter 10, "The Lawyer as In-House Counsel.."

U.S. SECURITIES AND EXCHANGE COMMISSION – ADOPTED RULE

JANUARY 2003

PART 205 - STANDARDS OF PROFESSIONAL CONDUCT FOR ATTORNEYS APPEARING AND PRACTICING BEFORE THE COMMISSION IN THE REPRESENTATION OF AN ISSUER

Sec.

205.1 Purpose and scope.

205.2 Definitions.

205.3 Issuer as client.

205.4 Responsibilities of supervisory attorneys.

205.5 Responsibilities of a subordinate attorney.

205.6 Sanctions and discipline.

205.7 No private right of action.

Authority: 15 U.S.C. 77s, 78d-3, 78w, 80a-37, 80a-38, 80b-11, 7202, 7245, and 7262.

§205.1 Purpose and scope.

This part sets forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of an issuer. These standards supplement applicable standards of any jurisdiction where an attorney is admitted or practices and are not intended to limit the ability of any jurisdiction to impose additional obligations on an attorney not inconsistent with the application of this part. Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern.

§205.2 Definitions.

For purposes of this part, the following definitions apply:

(a) Appearing and practicing before the Commission:

(1) Means:

(i) Transacting any business with the Commission, including communications in any form;

(ii) Representing an issuer in a Commission administrative proceeding or in connection with any Commission investigation, inquiry, information request, or subpoena;

(iii) Providing advice in respect of the United States securities laws or the Commission's rules or regulations thereunder regarding any document that the attorney has notice will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission, including the provision of such advice in the context of preparing, or participating in the preparation of, any such document; or

(iv) Advising an issuer as to whether information or a statement, opinion, or other writing is required under the United States securities laws or the Commission's rules or regulations thereunder to be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission; but

(2) Does not include an attorney who:

(i) Conducts the activities in paragraphs (a)(1)(i) through (a)(1)(iv) of this section other than in the context of providing legal services to an issuer with whom the attorney has an attorney-client relationship; or

(ii) Is a non-appearing foreign attorney.

(b) Appropriate response means a response to an attorney regarding reported evidence of a material violation as a result of which the attorney reasonably believes:

(1) That no material violation, as defined in paragraph (i) of this section, has occurred, is ongoing, or is about to occur;

(2) That the issuer has, as necessary, adopted appropriate remedial measures, including appropriate steps or sanctions to stop any material violations that are ongoing, to prevent any material violation that has yet to occur, and to remedy or otherwise appropriately address any material violation that has already occurred and to minimize the likelihood of its recurrence; or

(3) That the issuer, with the consent of the issuer's board of directors, a committee thereof to whom a report could be made pursuant to §205.3(b)(3), or a qualified legal compliance committee, has retained or directed an attorney to review the reported evidence of a material violation and either:

(i) Has substantially implemented any remedial recommendations made by such attorney after a reasonable investigation and evaluation of the reported evidence; or

(ii) Has been advised that such attorney may, consistent with his or her professional obligations, assert a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to the reported evidence of a material violation.

(c) Attorney means any person who is admitted, licensed, or otherwise qualified to practice law in any jurisdiction, domestic or foreign, or who holds himself or herself out as admitted, licensed, or otherwise qualified to practice law.

(d) Breach of fiduciary duty refers to any breach of fiduciary or similar duty to the issuer recognized under an applicable federal or state statute or at common law, including but not limited to misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions.

(e) Evidence of a material violation means credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.

(f) Foreign government issuer means a foreign issuer as defined in 17 CFR 230.405 eligible to register securities on Schedule B of the Securities Act of 1933 (15 U.S.C. 77a et seq., Schedule B).

(g) In the representation of an issuer means providing legal services as an attorney for an issuer, regardless of whether the attorney is employed or retained by the issuer.

(h) Issuer means an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)), the securities of which are registered under section 12 of that Act (15 U.S.C. 78l), or that is required to file reports under section 15(d) of that Act (15 U.S.C. 78o(d)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn, but does not include a foreign government issuer. For purposes of paragraphs (a) and (g) of this section, the term "issuer" includes any person controlled by an issuer, where an attorney provides legal services to such person on behalf of, or at the behest, or for the benefit of the issuer, regardless of whether the attorney is employed or retained by the issuer.

(i) Material violation means a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law.

(j) Non-appearing foreign attorney means an attorney:

(1) Who is admitted to practice law in a jurisdiction outside the United States;

(2) Who does not hold himself or herself out as practicing, and does not give legal advice regarding, United States federal or state securities or other laws (except as provided in paragraph (j)(3)(ii) of this section); and

(3) Who:

(i) Conducts activities that would constitute appearing and practicing before the Commission only incidentally to, and in the ordinary course of, the practice of law in a jurisdiction outside the United States; or

(ii) Is appearing and practicing before the Commission only in consultation with counsel, other than a non-appearing foreign attorney, admitted or licensed to practice in a state or other United States jurisdiction.

(k) Qualified legal compliance committee means a committee of an issuer (which also may be an audit or other committee of the issuer) that:

(1) Consists of at least one member of the issuer's audit committee (or, if the issuer has no audit committee, one member from an equivalent committee of independent directors) and two or more members of the issuer's board of directors who are not employed, directly or indirectly, by the issuer and who are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19));

(2) Has adopted written procedures for the confidential receipt, retention, and consideration of any report of evidence of a material violation under §205.3;

(3) Has been duly established by the issuer's board of directors, with the authority and responsibility:

(i) To inform the issuer's chief legal officer and chief executive officer (or the equivalents thereof) of any report of evidence of a material violation (except in the circumstances described in §205.3(b)(4));

(ii) To determine whether an investigation is necessary regarding any report of evidence of a material violation by the issuer, its officers, directors, employees or agents and, if it determines an investigation is necessary or appropriate, to:

(A) Notify the audit committee or the full board of directors;

(B) Initiate an investigation, which may be conducted either by the chief legal officer (or the equivalent thereof) or by outside attorneys; and

(C) Retain such additional expert personnel as the committee deems necessary; and

(iii) At the conclusion of any such investigation, to:

(A) Recommend, by majority vote, that the issuer implement an appropriate response to evidence of a material violation; and

(B) Inform the chief legal officer and the chief executive officer (or the equivalents thereof) and the board of directors of the results of any such investigation under this section and the appropriate remedial measures to be adopted; and

(4) Has the authority and responsibility, acting by majority vote, to take all other appropriate action, including the authority to notify the Commission in the event that the issuer fails in any material respect to implement an appropriate response that the qualified legal compliance committee has recommended the issuer to take.

(l) Reasonable or reasonably denotes, with respect to the actions of an attorney, conduct that would not be unreasonable for a prudent and competent attorney.

(m) Reasonably believes means that an attorney believes the matter in question and that the circumstances are such that the belief is not unreasonable.

(n) Report means to make known to directly, either in person, by telephone, by e-mail, electronically, or in writing.

§205.3 Issuer as client.

(a) Representing an issuer. An attorney appearing and practicing before the Commission in the representation of an issuer owes his or her professional and ethical duties to the issuer as an organization. That the attorney may work with and advise the issuer's officers, directors, or employees in the course of representing the issuer does not make such individuals the attorney's clients.

(b) Duty to report evidence of a material violation. (1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report such evidence to the issuer's chief legal officer (or the equivalent thereof) or to both the issuer's chief legal officer and its chief executive officer (or the equivalents thereof) forthwith. By communicating such information to the issuer's officers or directors, an attorney does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of an issuer.

(2) The chief legal officer (or the equivalent thereof) shall cause such inquiry into the evidence of a material violation as he or she reasonably believes is appropriate to determine whether the material violation described in the report has occurred, is ongoing, or is about to occur. If the chief legal officer (or the equivalent thereof) determines no material violation has occurred, is ongoing, or is about to occur, he or she shall notify the reporting attorney and advise the reporting attorney of the basis for such determination. Unless the chief legal officer (or the equivalent thereof) reasonably believes that no material violation has occurred, is ongoing, or is about to occur, he or she shall take all reasonable steps to cause the issuer to adopt an appropriate response, and shall advise the reporting attorney thereof. In lieu of causing an inquiry under this paragraph (b), a chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a qualified legal compliance committee under paragraph (c)(2) of

this section if the issuer has duly established a qualified legal compliance committee prior to the report of evidence of a material violation.

(3) Unless an attorney who has made a report under paragraph (b)(1) of this section reasonably believes that the chief legal officer or the chief executive officer of the issuer (or the equivalent thereof) has provided an appropriate response within a reasonable time, the attorney shall report the evidence of a material violation to:

(i) The audit committee of the issuer's board of directors;

(ii) Another committee of the issuer's board of directors consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19)) (if the issuer's board of directors has no audit committee); or

(iii) The issuer's board of directors (if the issuer's board of directors has no committee consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19))).

(4) If an attorney reasonably believes that it would be futile to report evidence of a material violation to the issuer's chief legal officer and chief executive officer (or the equivalents thereof) under paragraph (b)(1) of this section, the attorney may report such evidence as provided under paragraph (b)(3) of this section.

(5) An attorney retained or directed by an issuer to investigate evidence of a material violation reported under paragraph (b)(1), (b)(3), or (b)(4) of this section shall be deemed to be appearing and practicing before the Commission. Directing or retaining an attorney to investigate reported evidence of a material violation does not relieve an officer or director of the issuer to whom such evidence has been reported under paragraph (b)(1), (b)(3), or (b)(4) of this section from a duty to respond to the reporting attorney.

(6) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if:

(i) The attorney was retained or directed by the issuer's chief legal officer (or the equivalent thereof) to investigate such evidence of a material violation and:

(A) The attorney reports the results of such investigation to the chief legal officer (or the equivalent thereof); and

(B) Except where the attorney and the chief legal officer (or the equivalent thereof) each reasonably believes that no material violation has occurred, is ongoing, or is about to occur, the chief legal officer (or the equivalent thereof) reports the results of the investigation to the issuer's board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee; or

(ii) The attorney was retained or directed by the chief legal officer (or the equivalent thereof) to assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation, and the chief legal officer (or the equivalent thereof) provides reasonable and timely reports on the progress and outcome of such proceeding to the issuer's board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee.

(7) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if such attorney was retained or directed by a qualified legal compliance committee:

(i) To investigate such evidence of a material violation; or

(ii) To assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation.

(8) An attorney who receives what he or she reasonably believes is an appropriate and timely response to a report he or she has made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section need do nothing more under this section with respect to his or her report.

(9) An attorney who does not reasonably believe that the issuer has made an appropriate response within a reasonable time to the report or reports made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section shall explain his or her reasons therefor to the chief legal officer (or the equivalent thereof), the chief executive officer (or the equivalent thereof), and directors to whom the attorney reported the evidence of a material violation pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section.

(10) An attorney formerly employed or retained by an issuer who has reported evidence of a material violation under this part and reasonably believes that he or she has been discharged for so doing may notify the issuer's board of directors or any committee thereof that he or she believes that he or she has been discharged for reporting evidence of a material violation under this section.

(c) Alternative reporting procedures for attorneys retained or employed by an issuer that has established a qualified legal compliance committee. (1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney may, as an alternative to the reporting requirements of paragraph (b) of this section, report such evidence to a qualified legal compliance committee, if the issuer has previously formed such a committee. An attorney who reports evidence of a material violation to such a qualified legal compliance committee has satisfied his or her obligation to report such evidence and is not required to assess the issuer's response to the reported evidence of a material violation.

(2) A chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a previously established qualified legal compliance committee in lieu of causing an inquiry to be conducted under paragraph (b)(2) of this section. The chief legal officer (or the equivalent thereof) shall inform the reporting attorney that the report has been referred to a qualified legal compliance committee. Thereafter, pursuant to the requirements under §205.2(k), the qualified legal compliance committee shall be responsible for responding to the evidence of a material violation reported to it under this paragraph (c).

(d) Issuer confidences. (1) Any report under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof) may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this part is in issue.

(2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

(i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;

(ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1621; suborning perjury, proscribed in 18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or

(iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

§205.4 Responsibilities of supervisory attorneys.

(a) An attorney supervising or directing another attorney who is appearing and practicing before the Commission in the representation of an issuer is a supervisory attorney. An issuer's chief legal officer (or the equivalent thereof) is a supervisory attorney under this section.

(b) A supervisory attorney shall make reasonable efforts to ensure that a subordinate attorney, as defined in §205.5(a), that he or she supervises or directs conforms to this part. To the extent a subordinate attorney appears and practices before the Commission in the representation of an issuer, that subordinate attorney's supervisory attorneys also appear and practice before the Commission.

(c) A supervisory attorney is responsible for complying with the reporting requirements in §205.3 when a subordinate attorney has reported to the supervisory attorney evidence of a material violation.

(d) A supervisory attorney who has received a report of evidence of a material violation from a subordinate attorney under §205.3 may report such evidence to the issuer's qualified legal compliance committee if the issuer has duly formed such a committee.

§205.5 Responsibilities of a subordinate attorney.

(a) An attorney who appears and practices before the Commission in the representation of an issuer on a matter under the supervision or direction of another attorney (other than under the direct supervision or direction of the issuer's chief legal officer (or the equivalent thereof)) is a subordinate attorney.

(b) A subordinate attorney shall comply with this part notwithstanding that the subordinate attorney acted at the direction of or under the supervision of another person.

(c) A subordinate attorney complies with §205.3 if the subordinate attorney reports to his or her supervising attorney under §205.3(b) evidence of a material violation of which the subordinate attorney has become aware in appearing and practicing before the Commission.

(d) A subordinate attorney may take the steps permitted or required by §205.3(b) or (c) if the subordinate attorney reasonably believes that a supervisory attorney to whom he or she has reported evidence of a material violation under §205.3(b) has failed to comply with §205.3.

§205.6 Sanctions and discipline.

(a) A violation of this part by any attorney appearing and practicing before the Commission in the representation of an issuer shall subject such attorney to the civil penalties and remedies for a violation of the federal securities laws available to the Commission in an action brought by the Commission thereunder.

(b) An attorney appearing and practicing before the Commission who violates any provision of this part is subject to the disciplinary authority of the Commission, regardless of whether the attorney may also be subject to discipline for the same conduct in a jurisdiction where the attorney is admitted or practices. An administrative disciplinary proceeding initiated by the Commission for violation of this part may result in an attorney being censured, or being temporarily or permanently denied the privilege of appearing or practicing before the Commission.

(c) An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices.

(d) An attorney practicing outside the United States shall not be required to comply with the requirements of this part to the extent that such compliance is prohibited by applicable foreign law.

§205.7 No private right of action.

(a) Nothing in this part is intended to, or does, create a private right of action against any attorney, law firm, or issuer based upon compliance or noncompliance with its provisions.

(b) Authority to enforce compliance with this part is vested exclusively in the Commission.

By the Commission.

Jill M. Peterson
Assistant Secretary

Date: January 29, 2003

U.S. SECURITIES AND EXCHANGE COMMISSION – ORIGINAL PROPOSED RULE (INCLUDING "NOISY WITHDRAWAL")

NOVEMBER, 2002

PART 205 - STANDARDS OF PROFESSIONAL CONDUCT FOR ATTORNEYS APPEARING AND PRACTICING BEFORE THE COMMISSION IN THE REPRESENTATION OF AN ISSUER

Sec.

205.1 Purpose and scope.

205.2 Definitions.

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205.4 Responsibilities of supervisory attorneys.

205.5 Responsibilities of a subordinate attorney.

205.6 Sanctions.

Authority: 15 U.S.C. 77s, 78d-3, 78w, 80a-37, 80a-38, 80b-11, 7202, 7245, and 7262.

§205.1 Purpose and scope.

Consistent with Section 307 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7245, the Commission is adopting rules setting forth minimum standards of professional conduct for attorneys appearing and practicing before it in any way in the representation of an issuer. Where the standards of a state where an attorney is admitted or practices conflict with this part, this part shall govern.

§205.2 Definitions.

For purposes of this part, the following definitions apply:

(a) Appearing and practicing before the Commission includes, but is not limited to, an attorney's:

(1) Transacting any business with the Commission, including communication with Commissioners, the Commission, or its staff;

(2) Representing any party to, or the subject of, or a witness in a Commission administrative proceeding;

(3) Representing any person in connection with any Commission investigation, inquiry, information request, or subpoena;

(4) Preparing, or participating in the process of preparing, any statement, opinion, or other writing which the attorney has reason to believe will be filed with or incorporated into any registration statement, notification, application, report, communication or other document filed with or submitted to the Commissioners, the Commission, or its staff; or

(5) Advising any party that:

(i) A statement, opinion, or other writing need not or should not be filed with or incorporated into any registration statement, notification, application, report, communication orother document filed with or submitted to the Commissioners, the Commission, or its staff; or

(ii) The party is not obligated to submit or file a registration statement, notification, application, report, communication or other document with the Commission or its staff.

(b) Appropriate response means a response to evidence of a material violation reported to appropriate officers or directors of an issuer that provides a basis for an attorney reasonably to believe:

(1) That no material violation, as defined in paragraph (i) of this section, is occurring, has occurred, or is about to occur; or

(2) That the issuer has, as necessary, adopted remedial measures, including appropriate disclosures, and/or imposed sanctions that can be expected to stop any material violation that is occurring, prevent any material violation that has yet to occur, and/or rectify any material violation that has already occurred.

(c) Attorney refers to any person who is admitted, licensed, or otherwise qualified to practice law in any jurisdiction, domestic or foreign, or who holds himself or herself out as admitted, licensed, or otherwise qualified to practice law.

(d) Breach of fiduciary duty refers to any breach of fiduciary duty recognized at common law, including, but not limited to, misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions.

(e) Evidence of a material violation means information that would lead an attorney reasonably to believe that a material violation has occurred, is occurring, or is about to occur.

(f) In the representation of an issuer means acting in any way on behalf, at the behest, or for the benefit of an issuer, whether or not employed or retained by the issuer.

(g) Issuer means an issuer (as defined in Section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)), the securities of which are registered under Section 12 of that Act (15 U.S.C. 78l), or that is required to file reports under Section 15(d) of that Act (15 U.S.C. 78o(d)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn.

(h) Material refers to conduct or information about which a reasonable investor would want to be informed before making an investment decision.

(i) Material violation means a material violation of the securities laws, a material breach of fiduciary duty, or a similar material violation.

(j) Qualified legal compliance committee means a committee of an issuer that:

(1) Consists of at least one member of the issuer's audit committee and two or more members of the issuer's board of directors who are not employed, directly or indirectly, by the issuer and who are not, in the case of a registered investment company, "interested persons" as defined in Section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19));

(2) Has been duly established by the issuer's board of directors and authorized to investigate any report of evidence of a material violation by the issuer, its officers, directors, employees or agents;

(3) Has established written procedures for the confidential receipt, retention, and consideration of any report of evidence of a material violation under §205.3(c);

(4) Has the authority and responsibility:

(i) To inform the issuer's chief legal officer and chief executive officer (or the equivalents thereof) of any report of evidence of a material violation (except in the circumstances described in §205.3(b)(5));

(ii) To decide whether an investigation is necessary to determine whether the material violation described in the report has occurred, is occurring, or is about to occur and, if so, to:

(A) Notify the audit committee or the full board of directors;

(B) Initiate an investigation, which may be conducted either by the chief legal officer (or the equivalent thereof) or by outside attorneys; and

(C) Retain such additional expert personnel as the committee deems necessary; and

(iii) At the conclusion of any such investigation under paragraph (j)(4)(ii) of this section, to:

(A) Direct the issuer to adopt appropriate remedial measures, including appropriate disclosures, and/or to impose appropriate sanctions to stop any material violation that is occurring, prevent any material violation that is about to occur, and/or to rectify any material violation that has already occurred; and

(B) Inform the chief legal officer and the chief executive officer (or the equivalents thereof) and the board of directors of the results of any such investigation under paragraph (j)(4)(ii) of this section and the appropriate remedial measures to be adopted; and

(5) Each member of which individually, together with the issuer's chief legal officer and chief executive officer (or the equivalents thereof) individually, has the authority and responsibility, in the event the issuer fails in any material respect to take any of the remedial measures that the qualified legal compliance committee has directed the issuer to take, to notify the Commission that a material violation has occurred, is occurring or is about to occur and to disaffirm in writing any document submitted to or filed with the Commission by the issuer that the individual member of the qualified legal compliance committee or the chief legal officer or the chief executive officer reasonably believes is false or materially misleading.

(k) Reasonable or reasonably denotes the conduct of a reasonably prudent and competent attorney.

(l) Reasonably believes means that an attorney, acting reasonably, would believe the matter in question.

(m) Report means to make known to directly, either in person, by telephone, by e-mail, electronically, or in writing.

§205.3 Issuer as client.

(a) Representing an issuer. An attorney appearing and practicing before the Commission in the representation of an issuer represents the issuer as an organization and shall act in the best interest of the issuer and its shareholders. That the attorney may work with and advise the issuer's officers, directors, or employees in the course of representing the issuer does not make such individuals the attorney's clients.

(b) Duty to report evidence of a material violation. (1) If, in appearing and practicing before the Commission in the representation of an issuer, an attorney becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report any evidence of a material violation to the issuer's chief legal officer (or the equivalent thereof) or to both the issuer's chief legal officer and its chief executive officer (or to the equivalents thereof) forthwith (unless the issuer has a qualified legal compliance committee and the attorney chooses instead to report the evidence of a material violation to that committee under paragraph (c) of this

section). An attorney does not reveal client confidences or secrets or privileged or otherwise protected information by communicating such information related to the attorney's representation of an issuer to the issuer's officers or directors.

(2) The attorney reporting evidence of a material violation shall take steps reasonable under the circumstances to document the report and the response thereto and shall retain such documentation for a reasonable time.

(3) The chief legal officer (or the equivalent thereof) shall cause such inquiry into the evidence of a material violation as he or she reasonably believes is necessary to determine whether the material violation described in the report has occurred, is occurring, or is about to occur. If the chief legal officer reasonably believes no material violation has occurred, is occurring, or is about to occur, he or she shall so advise the reporting attorney. If the chief legal officer reasonably believes that a material violation has occurred, is occurring, or is about to occur, he or she shall take any necessary steps to ensure that the issuer adopts appropriate remedial measures, including appropriate disclosures, and/or imposes appropriate sanctions to stop any material violation that is occurring, prevent any material violation that is about to occur, and/or to rectify any material violation that has already occurred. The chief legal officer shall promptly report the remedial measures adopted and/or sanctions imposed to the chief executive officer, to the audit committee of the issuer's board of directors, or to the issuer's board of directors, and to the reporting attorney. The chief legal officer shall take reasonable steps to document his or her inquiry and to retain such documentation for a reasonable time. In lieu of causing an inquiry under this paragraph (b), a chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a qualified legal compliance committee under paragraph (c)(2) of this section. If the issuer fails in any material respect to take any remedial measure that the qualified legal compliance committee directs the issuer to take in order to stop any material violation that is occurring, prevent any material violation that is about to occur, and/or to rectify any material violation that has already occurred, the chief legal officer shall notify the Commission that a material violation has occurred, is occurring or is about to occur and shall disaffirm in writing any documents submitted to or filed with the Commission by the issuer that the chief legal officer reasonably believes are false or materially misleading.

(4) If an attorney who has made a report under paragraph (b)(1) of this section reasonably believes that the chief legal officer or the chief executive officer of the issuer (or the equivalent thereof) has not provided an appropriate response, or has not responded within a reasonable time, the attorney shall report the evidence of a material violation to:

(i) The audit committee of the issuer's board of directors;

(ii) Another committee of the issuer's board of directors consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19)) (if the issuer's board of directors has no audit committee); or

(iii) The issuer's board of directors (if the issuer's board of directors has no committee consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19))).

(5) If an attorney reasonably believes that it would be futile to report evidence of a material violation to the issuer's chief legal officer and chief executive officer (or the equivalents thereof) under paragraph (b)(1) of this section, the attorney may report the evidence of a material violation as provided under paragraph (b)(4) of this section.

(6) An attorney retained or directed by an issuer to investigate evidence of a material violation reported under paragraph (b)(1), (b)(4), or (b)(5) of this section shall be deemed to be appearing and practicing before the Commission. Directing or retaining an attorney to investigate reported evidence of a material violation does not relieve the officers or directors of the issuer to whom the evidence of a material violation has been reported under paragraph (b)(1), (b)(4), or (b)(5) of this section of the duty to respond to the reporting attorney.

(7) An attorney who receives what he or she reasonably believes is an appropriate and timely response to a report he or she has made pursuant to paragraph (b)(1), (b)(4), or (b)(5) of this section and who has taken reasonable steps to

document his or her report and the response thereto under paragraph (b)(2) of this section need do nothing more under this section regarding the evidence of a material violation.

(8) If the attorney reasonably believes that the issuer has not made an appropriate response to the report or reports made pursuant to paragraph (b)(1), (b)(4), or (b)(5) of this section, or the attorney has not received a response in a reasonable time, the attorney shall:

(i) Explain his or her reasons for so believing to the chief legal officer, chief executive officer, or directors to whom the attorney reported the evidence of a material violation pursuant to paragraph (b)(1), (b)(4), or (b)(5) of this section; and

(ii) Take reasonable steps to document the response, or absence thereof, and to retain such documentation for a reasonable time.

(c) Alternative reporting procedures for attorneys retained or employed by an issuer with a qualified legal compliance committee. (1) If, in appearing and practicing before the Commission in the representation of an issuer, an attorney becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney may, as an alternative to the reporting requirements of paragraph (b) of this section, report such evidence of a material violation to a qualified legal compliance committee, if the issuer has duly formed such a committee. Except as provided in paragraph (b)(3) of this section, an attorney who reports evidence of a material violation to a qualified legal compliance committee has satisfied his or her obligation to report evidence of a material violation within the issuer, is not required to assess the issuer's response to the reported evidence of a material violation, and is not required to take any action under paragraph (d) of this section regarding the evidence of a material violation.

(2) A chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a qualified legal compliance committee in lieu of causing an inquiry to be conducted under paragraph (b)(3) of this section. Thereafter, pursuant to the requirements under §205.2(j), the qualified legal compliance committee shall be responsible for responding to the evidence of a material violation reported to it under this paragraph (c) of this section.

(d) Notice to the Commission where there is no appropriate response within a reasonable time. (1) Where an attorney who has reported evidence of a material violation under paragraph 3(b) of this section rather than paragraph 3(c) of this section does not receive an appropriate response, or has not received a response in a reasonable time, to his or her report, and the attorney reasonably believes that a material violation is ongoing or is about to occur and is likely to result in substantial injury to the financial interest or property of the issuer or of investors:

(i) An attorney retained by the issuer shall:

(A) Withdraw forthwith from representing the issuer, indicating that the withdrawal is based on professional considerations;

(B) Within one business day of withdrawing, give written notice to the Commission of the attorney's withdrawal, indicating that the withdrawal was based on professional considerations; and

(C) Promptly disaffirm to the Commission any opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading;

(ii) An attorney employed by the issuer shall:

(A) Within one business day, notify the Commission in writing that he or she intends to disaffirm some opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading; and

(B) Promptly disaffirm to the Commission, in writing, any such opinion, document, affirmation, representation, characterization, or the like; and

(iii) The issuer's chief legal officer (or the equivalent) shall inform any attorney retained or employed to replace the attorney who has so withdrawn that the previous attorney's withdrawal was based on professional considerations.

(2) Where an attorney who has reported evidence of a material violation under paragraph (b) rather than paragraph (c) of this section does not receive an appropriate response, or has not received a response in a reasonable time, to his or her report under paragraph (b) of this section, and the attorney reasonably believes that a material violation has occurred and is likely to have resulted in substantial injury to the financial interest or property of the issuer or of investors but is not ongoing:

(i) An attorney retained by the issuer may:

(A) Withdraw forthwith from representing the issuer, indicating that the withdrawal is based on professional considerations;

(B) Give written notice to the Commission of the attorney's withdrawal,
indicating that the withdrawal was based on professional considerations; and

(C) Disaffirm to the Commission, in writing, any opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading;

(ii) An attorney employed by the issuer may:

(A) Notify the Commission in writing that he or she intends to disaffirm some opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading; and

(B) Disaffirm to the Commission, in writing, any such opinion, document, affirmation, representation, characterization, or the like; and

(iii) The issuer's chief legal officer (or the equivalent) shall inform any attorney retained or employed to replace the attorney who has so withdrawn that the previous attorney's withdrawal was based on professional considerations.

(3) The notification to the Commission prescribed by this paragraph (d) does not breach the attorney-client privilege.

(4) An attorney formerly employed or retained by an issuer who has reported evidence of a material violation under this section and reasonably believes that he or she has been discharged for so doing may notify the Commission that he or she believes that he or she has been discharged for reporting evidence of a material violation under this section and may disaffirm in writing to the Commission any opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading.

(e) Issuer confidences. (1) Any report under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof), may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this part is in issue.

(2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

(i) To prevent the issuer from committing an illegal act that the attorney reasonably believes is likely to result in substantial injury to the financial interest or property of the issuer or investors;

(ii) To prevent the issuer from committing an illegal act that the attorney reasonably believes is likely to perpetrate a fraud upon the Commission; or

(iii) To rectify the consequences of the issuer's illegal act in the furtherance of which the attorney's services had been used.

(3) Where an issuer, through its attorney, shares with the Commission information related to a material violation, pursuant to a confidentiality agreement, such sharing of information shall not constitute a waiver of any otherwise applicable privilege or protection as to other persons.

§205.4 Responsibilities of supervisory attorneys.

(a) An attorney supervising, directing, or having supervisory authority over another attorney is a supervisory attorney. An issuer's chief legal officer (or the equivalent) is a supervisory attorney under this section.

(b) A supervisory attorney shall make reasonable efforts to ensure that a subordinate attorney, as defined in §205.5(a), that he or she supervises, directs, or has supervisory authority over is appearing and practicing before the Commission conforms to this part and complies with the statutes and other rules administered by the Commission. To the extent a subordinate attorney appears and practices before the Commission on behalf of an issuer, that subordinate attorney's supervisory attorneys also appear and practice before the Commission.

(c) A supervisory attorney is responsible for complying with the reporting requirements in §205.3 when a subordinate attorney has reported to the supervisory attorney evidence of a material violation.

(d) A supervisory attorney who reasonably believes that information reported to him or her by a subordinate attorney under §205.5(c) is not evidence of a material violation shall take reasonable steps to document the basis for the supervisory attorney's belief.

§205.5 Responsibilities of a subordinate attorney.

(a) An attorney under the supervision, direction, or supervisory authority of another attorney is a subordinate attorney.

(b) A subordinate attorney is bound by this part notwithstanding that the subordinate attorney acted at the direction of or under the supervision of another person.

(c) A subordinate attorney complies with §205.3 if the subordinate attorney reports to his or her supervising attorney under §205.3(b) evidence of a material violation that the subordinate attorney becomes aware of in the course of appearing and practicing before the Commission.

(d) A subordinate attorney may take the steps permitted or required by §205.3(b), (c), and (d) if the subordinate attorney reasonably believes that a supervisory attorney to whom he or she has reported evidence of a material violation under §205.3(b) has failed to comply with §205.3.

§205.6 Sanctions.

(a) A violation of this part by any attorney appearing and practicing before the Commission in the representation of an issuer shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), and any such attorney shall be subject to the same penalties and remedies, and to the same extent, as for a violation of that Act.

(b) With respect to attorneys appearing and practicing before the Commission on behalf of an issuer, "improper professional conduct" under section 4C(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78d-3(a)) includes:

(1) Intentional or knowing conduct, including reckless conduct, that results in a violation of any provision of this part; and

(2) Negligent conduct in the form of:

(i) A single instance of highly unreasonable conduct that results in a violation of any provision of this part; or

(ii) Repeated instances of unreasonable conduct, each resulting in a violation of a provision of this part.

(c) An attorney appearing and practicing before the Commission who violates any provision of this part is subject to the disciplinary authority of the Commission, regardless of whether the attorney may also be subject to discipline for the same conduct in a jurisdiction where the attorney is admitted or practices.

By the Commission.

Margaret H. McFarland
Deputy Secretary

Date: November 21, 2002

U.S. SECURITIES AND EXCHANGE COMMISSION – PROPOSED ALTERNATIVE TO "NOISY WITHDRAWAL" RULE

JANUARY 2003

PART 205 STANDARDS OF PROFESSIONAL CONDUCT FOR ATTORNEYS
APPEARING AND PRACTICING BEFORE THE COMMISSION IN THE REPRESENTATION OF AN ISSUER

1. The authority citation for Part 205 continues to read as follows:

Authority: 15 U.S.C. 77s, 78d-3, 78w, 80a-37, 80a-38, 80b-11, 7202, 7245, and 7262.

2. Amend §205.3 by:

a. Redesignating paragraph (d) as paragraph (g); and

b. Adding paragraphs (d), (e) and (f).

The additions read as follows:

§205.3 Issuer as client.

* * * * *

(d) Actions required where there is no appropriate response within a reasonable time.

(1) Where an attorney who has reported evidence of a material violation under paragraph (b) of this section rather than paragraph (c) of this section:

(i) Does not receive an appropriate response, or has not received a response in a reasonable time,

(ii) Has followed the procedures set forth in paragraph (b)(3) of this section, and

(iii) Reasonably concludes that there is substantial evidence of a material violation that is ongoing or is about to occur and is likely to cause substantial injury to the financial interest or property of the issuer or of investors:

(A) An attorney retained by the issuer shall withdraw from representing the issuer, and shall notify the issuer, in writing, that the withdrawal is based on professional considerations.

(B) An attorney employed by the issuer shall cease forthwith any participation or assistance in any matter concerning the violation and shall notify the issuer, in writing, that he or she believes that the issuer has not provided an appropriate response in a reasonable time to his or her report of evidence of a material violation under paragraph (b) of this section.

(2) An attorney shall not be required to take any action pursuant to paragraph (d)(1) of this section if the attorney would be prohibited from doing so by order or rule of any court, administrative body or other authority with jurisdiction over the attorney, after having sought leave to withdraw from representation or to cease participation or assistance in a matter. An attorney shall give notice to the issuer that, but for such prohibition, he or she would have taken such action pursuant to paragraph (d)(1) or (d)(2), and such notice shall be deemed the equivalent of such action for purposes of this part.

(3) An attorney employed or retained by an issuer who has reported evidence of a material violation under this part and reasonably believes that he or she has been discharged for so doing shall notify the issuer's chief legal officer (or the equivalent thereof) forthwith.

(4) The issuer's chief legal officer (or the equivalent thereof) shall notify any attorney retained or employed to replace an attorney who has given notice to an issuer pursuant to paragraph (d)(1), (d)(2) or (d)(3) of this section that the previous attorney has withdrawn, ceased to participate or assist or has been discharged, as the case may be, pursuant to the provisions of this paragraph.

(e) Duties of an issuer where an attorney has given notice pursuant to paragraph (d). Where an attorney has provided an issuer with a written notice pursuant to paragraph (d)(1), (d)(2) or (d)(3) of this section, the issuer shall, within two business days of receipt of such written notice, report such notice and the circumstances related thereto on Form 8-K, 20-F, or 40-F (§§ 249.308, 220f or 240f of this chapter), as applicable.

(f) Additional actions by an attorney. An attorney retained or employed by the issuer may, if an issuer does not comply with paragraph (e) of this section, inform the Commission that the attorney has provided the issuer with notice pursuant to paragraph (d)(1), (d)(2), or (d)(3) of this section, indicating that such action was based on professional considerations.

* * * * *

PART 240 - GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

3. The authority citation for Part 240 is amended by adding the following citations in numerical order to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 79q, 79t, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4 and 80b-11, unless otherwise noted.

* * * * *

Section 240.13a-11 is also issued under Secs. 3(a) and 307, Pub. L. No. 107-204, 116 Stat. 745.

* * * * *

Section 240.13a-17 is also issued under Secs. 3(a) and 307, Pub. L. No. 107-204, 116 Stat. 745.

* * * * *

Section 240.15d-11 is also issued under Secs. 3(a) and 307, Pub. L. No. 107-204, 116 Stat. 745.

* * * * *

Section 240.15d-17 is also issued under Secs. 3(a) and 307, Pub. L. No. 107-204, 116 Stat. 745.

* * * * *

4. Section 240.13a-11 is amended by revising paragraph (b) to read as follows:

§240.13a-11 Current reports on Form 8-K (§249.308 of this chapter).

* * * * *

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on Form 6-K (17 CFR 249.306) pursuant to §240.13a-16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file reports pursuant to §270.30b1-1 of this chapter under the Investment Company Act of 1940, except where such investment companies are required to file:

(1) Notice of a blackout period pursuant to §245.104 of this chapter, or

(2) A notice regarding an attorney withdrawal pursuant to §205.3(e) of this chapter.

5. Add §240.13a-17 to read as follows:

§240.13a-17 Reports of foreign private issuers pursuant to §205.3(e) of this chapter.

Every foreign private issuer which is subject to §240.13a-1 shall make reports pursuant to §205.3(e) of this chapter. If a foreign private issuer is filing a report on Form 20-F (§249.220f of this chapter) or Form 40-F (§249.240f of this chapter) solely to provide information pursuant to §205.3(e) of this chapter, the foreign private issuer is not required to include the certifications required by §240.13a-14 in such report.

6. Section 240.15d-11 is amended by revising paragraph (b) to read as follows: §240.15d-11 Current reports on Form 8-K (§249.308 of this chapter).

* * * * *

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on Form 6-K (17 CFR 249.306) pursuant to §240.15d-16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file periodic reports pursuant to §270.30b1-1 of this chapter under the Investment Company Act of 1940, except where such investment companies are required to file:

(1) Notice of a blackout period pursuant to §245.104 of this chapter, or

(2) A notice regarding an attorney withdrawal pursuant to §205.3(e) of this chapter.

7. Add §240.15d-17 to read as follows:

§240.15d-17 Reports of foreign private issuers pursuant to §205.3(e) of this chapter.

Every foreign private issuer which is subject to §240.15d-1 shall make reports pursuant to §205.3(e) of this chapter. If a foreign private issuer is filing a report on Form 20-F (§249.220f of this chapter) or Form 40-F (§249.240f of this chapter) solely to provide information pursuant to §205.3(e) of this chapter, the foreign private issuer is not required to include the certifications required by §240.15d-14 in such report.

PART 249 - FORMS, SECURITIES EXCHANGE ACT OF 1934

8. The authority citation for Part 249 is amended by revising the sectional authority for §§249.220f, 249.240f and 249.308 to read as follows:

Authority: 15 U.S.C. 78a, et seq., unless otherwise noted.

* * * * *

Section 249.220f is also issued under secs. 3(a), 202, 208, 301, 302, 306(a), 307, 401(a), 401(b), 406 and 407, Pub. L. No. 107-204, 116 Stat. 745.

Section 249.240f is also issued under secs. 3(a), 202, 208, 301, 302, 306(a), 307, 401(a), 406 and 407, Pub. L. No. 107-204, 116 Stat. 745.

Section 249.308 is also issued under 15 U.S.C. 80a-29, 80a-37 and secs. 3(a), 306(a), 307 401(b) and 406, Pub. L. No. 107-204, 116 Stat. 745.

* * * * *

9. Amend Form 20-F (referenced in §249.220f) by:

a. Adding a paragraph on the cover page before the line beginning with the phrase "Commission file number";

b. Adding paragraph (d) to General Instruction A;

c. Removing the word "annual" in each place where it appears in paragraphs (a) and (b) of General Instruction D;

d. Adding Item 16E; and

e. Removing the phrase "[annual report]" in the paragraph after "Signatures" and adding in its place "[report]".

The additions read as follows:

Note: The text of Form 20-F does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 20-F

* * * * *

OR

[ ] REPORT PURSUANT TO RULES 13a-17 AND 15d-17 UNDER THE SECURITIES EXCHANGE ACT OF 1934

Commission file number * * *

* * * * *

GENERAL INSTRUCTIONS

A. Who May Use Form 20-F and When It Must be Filed.

* * * * *

(d) A foreign private issuer must file a report on this Form within two business days after receipt of an attorney's written notice pursuant to 17 CFR 205.3(d)(1), (d)(2) or (d)(3). Such filing may consist only of the following: the facing page, the information required by Item 16E of this Form and the signature page. If such filing is made solely to provide information pursuant to 17 CFR 205.3(e), the foreign private issuer is not required to include the certifications required by 17 CFR 240.13a-14 or 17 CFR 240.15d-14 in the report.

* * * * *

Item 16E. Receipt of an Attorney's Written Notice Pursuant to 17 CFR 205.3(d).

Upon receipt of written notice from an attorney (as defined in 17 CFR 205.3(d)), provide the information specified in 17 CFR 205.3(e). You do not need to provide the information called for by this Item 16E unless you are using this form pursuant to General Instruction A.(d).

* * * * *

10. Amend Form 40-F (referenced in §249.240f) by:

a. Revising the line on the cover page that begins with the phrase "For the fiscal year ended";

b. Adding paragraph (5) to General Instruction A;

c. Adding paragraph (15) to General Instruction B;

d. Removing the word "annual" in each place where it appears in paragraphs (7) and (8) of General Instruction D;

e. Removing the phrase "[annual report]" in the paragraph after "Signatures" and in its place adding "[report]"; and

f. Removing the word "annual" in the first sentence of Instruction A to "Signatures."

The revisions and additions read as follows:

Note: The text of Form 40-F does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 40-F

* * * * *

For the fiscal year ended.....

OR

[ ] REPORT PURSUANT TO RULES 13a-17 AND 15d-17 UNDER THE SECURITIES EXCHANGE ACT OF 1934

Commission file number.....

* * * * *

GENERAL INSTRUCTIONS

A. Rules As To Use of Form 40-F

* * * * *

(5) If the Registrant uses Form 40-F to file reports with the Commission pursuant to Section 13(a) of the Exchange Act (15 U.S.C. 78m(a)) and Rule 13a-3 thereunder (17 CFR 240.13a-3) or pursuant to Section 15(d) of the Exchange Act (15 U.S.C. 78o(d)) and Rule 15d-4 thereunder (17 CFR 240.15d-4), the Registrant must file a report on this Form 40-F within two business days after receipt of an attorney's written notice pursuant to 17 CFR 205.3(d)(1), (d)(2) or (d)(3). Such filing may consist only of the following: the facing page, the information required by General Instruction B.(15) of this Form 40-F and the signature page. If such filing is made solely to provide information pursuant to 17 CFR 205.3(e), the Registrant is not required to include the certifications required by 17 CFR 240.13a-14 or 17 CFR 240.15d-14 in the report.

* * * * *

B. Information To Be Filed on this Form

* * * * *

(15) Receipt of an Attorney's Written Notice Pursuant to 17 CFR 205.3(d). Upon receipt of written notice from an attorney (as defined in 17 CFR 205.3(d)), provide the information specified in 17 CFR 205.3(e). You do not need to provide the information called for by this General Instruction B.(15) unless you are using this form pursuant to General Instruction A.(5).

* * * * *

11. Form 8-K (referenced in §249.308) is amended by:

a. Removing the word "and" after the phrase "Rule 15d-11" and in its place adding a comma and adding the phrase "and for reports of an attorney's written notice required to be disclosed by 17 CFR 205.3(e)" before the period at the end of General Instruction A;

b. Adding a sentence to the end of General Instruction B(1); and

c. Adding Item 13 under "Information to be Included in the Report."

The additions read as follows:

Note: The text of Form 8-K does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 8-K
* * * * *
General Instructions
* * * * *

B. Events to be Reported and Time for Filing of Reports

1. * * * A report on this form pursuant to Item 13 is required to be filed within two business days after receipt of an attorney's written notice pursuant to 17 CFR 205.3(d)(1), (d)(2) or (d)(3).

* * * * *
Information to be Included in the Report
* * * * *

Item 13. Receipt of an Attorney's Written Notice Pursuant to 17 CFR 205.3(d).

Upon receipt of written notice from an attorney (as defined in 17 CFR 205.3(d)) provide the information specified in 17 CFR 205.3(e).

By the Commission.

Jill M. Peterson
Assistant Secretary

Dated: January 29, 2003

Professional Development, Competence & Admissions Committee Report
- Practice Review Program – Proposed Amendments to By-Law 24

For information
- Information and Library Services at the LSUC: A qualitative research study

Professional Development, Competence & Admissions Committee
February 26, 2004

Report to Convocation

Purpose of Report: Decision
Information

Policy Secretariat
(Sophia Sperdakos 416-947-5209)

OVERVIEW OF POLICY ISSUES

PRACTICE REVIEW PROGRAM – PROPOSED AMENDMENTS TO BY-LAW 24

Request to Convocation

1. That Convocation approves proposed amendments to By-law 24, set out at Appendix 2.

Summary of the Issue

2. Section 42 of the Law Society Act provides that the Law Society may conduct a review of a member's practice in accordance with by-laws for the purpose of determining whether a member is meeting standards of professional competence. Such a review may be ordered if required in a conduct proceeding, if the member consents, or if the Chair or Vice-chair of the Professional Development and Competence Committee directs. The Chair or Vice-chair shall direct a review if the circumstances prescribed by the by-laws exist.

3. By-law 24 (Professional Competence), set out at Appendix 1, provides that the Chair or Vice-chair will order a practice review where "there are reasonable grounds for believing that the member may be failing or may have failed to meet standards of professional competence".

4. The Committee proposes amendments to By-law 24 to set out considerations that may be taken into account in determining whether reasonable grounds to direct a practice review exist. Appendix 2 contains the proposed amendments to By-law 24, which Convocation is requested to approve.

5. Appendix 3, provided to Convocation for information, contains a guide that will be available to members, describing those considerations relevant in determining whether there are reasonable grounds to direct a practice review.

THE REPORT

Terms Of Reference/Committee Process

6. The Committee met on November 10, 2003 and January 8, 2004. Committee members George Hunter (Chair), Gavin MacKenzie (Vice-Chair), Bill Simpson (Vice-Chair), Peter Bourque, Kim Carpenter-Gunn, Gary Gottlieb, and Laura Legge and staff members Mirka Adamsky-Rackova, Diana Miles, Dulce Mitchell, and Leslie Greenfield attended the November meeting. Bill Simpson (Vice-Chair), Peter Bourque, Gary Gottlieb, and Bonnie Warkentin and staff members Caterina Galati, Leslie Greenfield, Diana Miles, Dulce Mitchell, Elliot Spears and Sophia Sperdakos attended the January meeting.

7. The Committee is reporting on the following matters:

Policy – For Decision

- Amendment to By-law 24 (Professional Competence)

Information

- Delivery of Legal Information to Ontario Lawyers

PRACTICE REVIEW PROGRAM – PROPOSED AMENDMENTS TO BY-LAW 24

Background

8. Section 42 of the Law Society Act provides that the Law Society may conduct a review of a member's practice in accordance with by-laws for the purpose of determining whether a member is meeting standards of professional competence if,
   a. the Chair or Vice-Chair of the Committee directs it pursuant to section 49.4;
   b. the member is required pursuant to a conduct proceeding under section 35 of the Act to cooperate in a review; or
   c. the member consents.

9. Section 49.4 provides that,

> …the chair or vice-chair of the standing committee of Convocation responsible for professional competence shall direct that a review of a member's practice be conducted under section 42 if the circumstances prescribed by the by-laws exist.

10. By-law 24 (Professional Competence) currently provides that the Chair or Vice-chair of the Committee will order a practice review where "there are reasonable grounds for believing that the member may be failing or may have failed to meet standards of professional competence." By-law 24 is set out at Appendix 1.

11. Section 41 of the Law Society Act provides that a member fails to meet standards of professional competence for the purposes of the Act if,
    a. there are deficiencies in,
        i. the member's knowledge, skill or judgment,
        ii. the member's attention to the interests of clients,
        iii. the records, systems or procedures of the member's practice, or
        iv. other aspects of the member's practice; and

    b. the deficiencies give rise to a reasonable apprehension that the quality of service to clients may be adversely affected.

12. Without further direction in the Act or By-law 24, staff relies primarily on complaints made against a member as the main criteria for considering whether a practice review may be warranted and examines the nature, source and frequency of those complaints. Staff also relies upon referrals from other departments within the Law Society that suggest a failure to meet standards of professional competence.

13. Currently, staff in the practice review program will consider whether the complaints or referrals point to reasonable grounds to believe that a member may be failing or may have failed to meet standards of professional competence. The Director of Professional Development and Competence reviews the staff assessment. If the Director is satisfied that there are reasonable grounds she will then send an Authorization Memorandum to the Chair of the Committee for his consideration. The Chair decides whether or not to direct the review. No assumption is made at any stage of the assessment that the existence of complaints or referrals necessarily means that a practice review is warranted. Each case is weighed to determine whether the facts of the case point to reasonable grounds to recommend a practice review. This flexibility is important.

14. By-law 24 provides little information on what should be taken into account in determining the existence of "reasonable grounds". Members have complained that the By-law is vague and that there is little guidance on the considerations that will be applied in determining whether to direct a review. In November the Committee considered possible amendments to By-law 24 to provide that in considering "reasonable grounds" a Chair or Vice-chair might take into account a number of specific considerations. In January the Committee considered the draft by-law amendments and now recommends their approval to Convocation. The proposed amendments are set out at Appendix 2.

15. To further assist members a guide will be available describing those considerations relevant to determining whether there are reasonable grounds to direct a practice review. A copy of the guide is set out for Convocation's information at Appendix 3.

Request to Convocation

16. That Convocation approves proposed amendments to By-law 24, set out at Appendix 2.

INFORMATION

DELIVERY OF LEGAL INFORMATION TO ONTARIO LAWYERS

17. The Law Society continues to work on the development of a strategy for the delivery of legal information to lawyers. Consultants were retained to conduct a qualitative survey on lawyer information needs and the

potential means to address those needs. Appendix 4 contains the qualitative research study on information and library services.

18. Questions about the study and next steps should be directed to Malcolm Heins or Diana Miles.

APPENDIX 1

BY-LAW 24

Made: March 26, 1999
Amended:
May 28, 1999
April 26, 2001
January 24, 2002
October 31, 2002
April 25, 2003

PROFESSIONAL COMPETENCE

Exercise of powers by committee

1. The performance of any duty, or the exercise of any power, given to the standing committee of Convocation responsible for professional competence matters under this By-Law is not subject to the approval of Convocation.

Delegation of powers and duties of Secretary: Director, Professional Development and Competence

2. (1) An officer or employee of the Society who holds the office of Director, Professional Development and Competence may exercise the powers and perform the duties of the Secretary under,

(a) subsections 42 (3), (4), (5), (6) and (8) of the Act;

(a.1) section 44 of the Act;

(b) section 45 of the Act, as it relates to an order made for failure to comply with a professional competence order;

(c) section 49.2 of the Act;

(d) By-Law 21, as it relates to a referral to the Proceedings Authorization Committee of a matter respecting the professional competence of a member, a request to the Committee to withdraw an application for a professional competence order and an application to the Committee for a determination as to whether the Society should apply for an order under section 49.13 of the Act in respect of information that comes to the knowledge of a bencher, officer, employee, agent or representative of the Society as the result of a review, a search or seizure related to a review or a professional competence proceeding; and

(e) this By-Law.

Delegation of powers and duties of Secretary: Chief Executive Officer

(2) An officer or employee of the Society who holds the office of Chief Executive Officer may, in the absence of the Director, Professional Development and Competence and the Secretary, exercise the powers and perform the duties of the Secretary under,

(a) subsections 42 (3), (4), (5), (6) and (8) of the Act;

(a.1) section 44 of the Act;

(b) section 45 of the Act, as it relates to an order made for failure to comply with a professional competence order;

(c) section 49.2 of the Act;

(d) By-Law 21, as it relates to a referral to the Proceedings Authorization Committee of a matter respecting the professional competence of a member, a request to the Committee to withdraw an application for a professional competence order and an application to the Committee for a determination as to whether the Society should apply for an order under section 49.13 of the Act in respect of information that comes to the knowledge of a bencher, officer, employee, agent or representative of the Society as the result of a review, a search or seizure related to a review or a professional competence proceeding; and

(e) this By-Law.

INFORMATION

Requirement to provide information

3. (1) The Secretary may require a member to provide to the Society specific information about the member's quality of service to clients, including specific information about,

(a) the member's knowledge, skill or judgment;

(b) the member's attention to the interests of clients;

(c) the records, systems or procedures of the member's practice; and

(d) other aspects of the member's practice.

Notice of requirement to provide information

(2) The Secretary shall notify a member in writing of the requirement to provide information under subsection (1) and shall send to the member a detailed list of the information to be provided by him or her.

Time for providing information

(3) The member shall provide to the Society the specific information required of him or her not later than thirty days after the date specified on the notice of the requirement to provide information.

Extension of time for providing information

(4) Despite subsection (3), on the request of the member, the Secretary may extend the time within which the member shall provide to the Society the specific information required of him or her.

Request for extension of time

(5) A request to the Secretary to extend time under subsection (4) shall be made by the member in writing and not later than the day on which the member is required under subsection (3) to provide to the Society the specific information required of him or her.

PRACTICE REVIEWS

Appointment of persons to conduct reviews

4. The standing committee of Convocation responsible for professional competence matters or Convocation on the recommendation of the committee shall appoint one or more persons to conduct reviews of members' practices under section 42 of the Act.

Mandatory reviews

5. (1) On the request of the Secretary, the chair or a vice-chair of the standing committee of Convocation responsible for professional competence matters shall direct that a review of a member's practice be conducted if the

chair or the vice-chair to whom the Secretary has made the request is satisfied that there are reasonable grounds for believing that the member may be failing or may have failed to meet standards of professional competence.

Mandatory reviews: benchers
(2) The Treasurer shall exercise the authority of the chair or a vice-chair of the committee under subsection (1) when the Secretary requests a review of a bencher's practice.

Review of member's practice
6. (1) The Secretary shall assign one or more persons appointed under section 4 to conduct a review of a member's practice.

Assignment of additional persons to review
(2) At any time after a review has commenced, the Secretary may assign one or more persons appointed under section 4 to assist or replace the person or persons originally assigned to conduct the review.

Review of bencher's practice
(3) Subsections (1) and (2) do not apply to a review of a bencher's practice that is directed by the Treasurer under section 5.

Review of practice is not public information
(4) A direction under subsection 49.4 (1) of the Act that a review of a member's or bencher's practice be conducted and the fact that a review of a member's or bencher's practice is being or has been conducted shall not be made public, except as required in connection with a proceeding under the Act.

Final report
7. (1) On completion of a review of a member's practice, the person or persons who conducted the review shall submit to the Secretary a final report on the review.

Contents of final report
(2) The final report on a review of a member's practice shall contain,

(a) the opinion of the person or persons who conducted the review as to whether the member who was the subject of the review is failing or has failed to meet standards of professional competence; and

(b) if the person or persons who conducted the review are of the opinion that the member who was the subject of the review is failing or has failed to meet standards of professional competence, the recommendations of the person or persons.

Final report: Secretary's duties
(3) The Secretary shall consider every final report submitted to him or her and shall provide to the member who is the subject of the final report a copy thereof.

Recommendations
8. (1) If on completion of a review of a member's practice and receipt of the final report on the review, the Secretary decides to make recommendations to the member under subsection 42 (3) of the Act, but not to include the recommendations in a proposal for an order under subsection 42 (4) of the Act, the Secretary shall so notify the member in writing.

Same
(2) The Secretary may make recommendations to the member at the same time as he or she notifies the member under subsection (1) or within a reasonable period of time after he or she notifies the member under subsection (1).

Proposal for order
9. (1) If on completion of a review of a member's practice and receipt of the final report on the review, the Secretary decides to make recommendations to the member under subsection 42 (3) of the Act and to include the

recommendations in a proposal for an order under subsection 42 (4) of the Act, the Secretary shall so notify the member in writing.

Same

(2) The notice under subsection (1) shall be accompanied by the proposal for an order.

Form of proposal for an order

(3) A proposal for an order shall, as far as possible, be in the form of an order made under subsection 42 (7) of the Act.

Time for responding to proposal

(4) A member who receives a proposal for an order shall, not later than thirty days after the date specified on the notice given to the member under subsection (1), notify the Secretary in writing as to whether he or she accepts the proposal.

Extension of time for responding to proposal

(5) Despite subsection (4), on the request of the member, or on his or her own initiative, the Secretary may extend the time within which the member shall respond to the proposal.

Request for extension of time

(6) A request to the Secretary to extend time under subsection (5) shall be made by the member in writing and not later than the day on which the member is required under subsection (4) to respond to the proposal.

Modifying proposal for order

(7) Before the time for responding to a proposal for an order has expired, the Secretary may modify the proposal if the member consents to the modification, and the modified proposal shall be deemed to be the proposal to which the member is required to respond under subsection (4).

Failure to respond

(8) A member who fails to respond in writing to a proposal for an order within the thirty day period specified in subsection (4), or within the extended time period specified by the Secretary under subsection (5), the member shall be deemed to have refused to accept the proposal.

Review of proposal by bencher: materials

10. The Secretary shall provide to the elected bencher appointed under subsection 42 (6) of the Act to review a proposal for an order made to a member the following materials:

1. The final report on the review of the member's practice.

2. The member's written response, if any, to the final report, including the member's written response, if any, to the recommendations of the person or persons who conducted the review.

3. The proposal for an order made to the member.

4. The member's written response, if any, to the proposal.

Review of proposal by bencher: refusal to make order

11. An elected bencher appointed under subsection 42 (6) of the Act to review a proposal for an order made to a member may refuse to make an order giving effect to the proposal only after a meeting with the member and the Secretary.

Review of proposal by bencher: modifications

12. An elected bencher appointed under subsection 42 (6) of the Act to review a proposal for an order made to a member may make an order that includes modifications to the proposal only after a meeting with the member and the Secretary.

Communications with member and Secretary prohibited

13. An elected bencher appointed under subsection 42 (6) of the Act to review a proposal for an order made to a member shall not communicate with the member or the Secretary with respect to the proposal except in accordance with section 14.

Meeting with member and Secretary

14. (1) An elected bencher appointed under subsection 42 (6) of the Act to review a proposal for an order made to a member may meet with the member and the Secretary by means of such telephone, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other instantaneously.

Both parties to be present

(2) Subject to subsection (3), an elected bencher appointed under subsection 42 (6) of the Act to review a proposal for an order made to a member shall not meet with the member alone or with the Secretary alone to discuss the proposal, but nothing in this subsection is intended to deny to the member the right to counsel.

Exception

(3) An elected bencher appointed under subsection 42 (6) of the Act to review a proposal for an order made to a member may meet with the Secretary alone to discuss the proposal if,

(a) the meeting is not held under section 12; and

(b) notice of the meeting has been given to the member in accordance with subsections (4) and (5) and the member fails to attend at the meeting.

Notice

(4) The Secretary shall give to a member reasonable notice of a meeting with the elected bencher appointed under subsection 42 (6) of the Act to review the proposal for an order made to the member.

Same

(5) A notice of a meeting shall be in writing and shall include,

(a) a statement of the time, place and purpose of the meeting; and

(b) a statement that if the member does not attend at the meeting, the elected bencher appointed under subsection 42 (6) of the Act to review the proposal for an order made to the member may meet with the Secretary alone to discuss the proposal.

Order

15. (1) An order made under subsection 42 (7) of the Act shall be in Form 24A [Order] and shall contain,

(a) the name of the elected bencher who made it;

(b) the date on which it was made; and

(c) a recital of the particulars necessary to understand the order, including the date of any meeting and the persons who attended at the meeting.

Same

(2) The operative parts of an order made under subsection 42 (7) of the Act shall be divided into paragraphs, numbered consecutively.

Notice of order

(3) The Secretary shall send to the member who is the subject of an order made under subsection 42 (7) of the Act a copy of the order by any of the following methods:

1. Personal delivery to the member.

2. Regular lettermail to the last known address of the member.

3. Fax to the last known fax number of the member.

4. E-mail to the last known e-mail address of the member.

Date of receipt: mail

(4) If the copy of the order is sent by regular lettermail, it shall be deemed to be received by the member on the fifth day after the day it is mailed.

Date of receipt: fax or e-mail

(5) If the copy of the order is sent by fax or e-mail, it shall be deemed to be received on the day after it was sent, unless the day is a holiday, in which case the copy shall be deemed to be received on the next day that is not a holiday.

Effective date of order

(6) Unless otherwise provided in the order, an order made under subsection 42 (7) of the Act is effective from the date on which it is made.

Order is not public information

(6.1) An order made under subsection 42 (7) of the Act shall not be made public.

Order limiting member's rights and privileges is public information

(6.2) Despite subsection (6.1), an order made under subsection 42 (7) of the Act that suspends or limits a member's rights and privileges is a matter of public record.

Interpretation: "holiday"

(7) In this section, "holiday" means,

(a) any Saturday or Sunday;

(b) New Year's Day;

(c) Good Friday;

(d) Easter Monday;

(e) Victoria Day;

(f) Canada Day;

(g) Civic Holiday;

(h) Labour Day;

(i) Thanksgiving Day;

(j) Remembrance Day;

(k) Christmas Day;

(l) Boxing Day; and

(m) any special holiday proclaimed by the Governor General or the Lieutenant Governor.

Form 24A

Order

(File no., if any)

The Law Society of Upper Canada

(Name of elected bencher)

(Day and date order made)

In the matter of the *Law Society Act*
and *(identify member)*, a member of The Law Society of Upper Canada

ORDER

A PROPOSAL FOR THIS ORDER was made by the Secretary, under subsection 42 (4) of the Law Society Act, to the member *(identify member)* on *(specify date)* and was accepted by the member on *(specify date).*
(OR, where the order includes modifications to the proposal,
A PROPOSAL FOR AN ORDER was made by the Secretary, under subsection 42 (4) of the Law Society Act, to the member (identify member) on (specify date).)

ON READING the final report on the review of the member's practice, *(the member's response to the final report,) (and*) the proposal for the order, *(and the member's response to the proposal for the order,)*

(ON MEETING with the member and the Secretary (or the Secretary alone, the member not attending and not being represented at the meeting, although properly notified), and on hearing the submissions of the member and the Secretary (or the Secretary),
OR
ON MEETING with the member and the Secretary and on hearing their submissions on an order that would include modifications to the proposal made by the Secretary to the member (if applicable, add: including their consent to such an order),)

IT IS ORDERED as follows:
1. ... .
2. ... .

(Signature of elected bencher)

APPENDIX 2

THE LAW SOCIETY OF UPPER CANADA

BY-LAWS MADE UNDER
SUBSECTIONS 62 (0.1) AND (1) OF THE LAW SOCIETY ACT

BY-LAW 24
[PROFESSIONAL COMPETENCE]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON FEBRUARY 26, 2004

MOVED BY

SECONDED BY

THAT By-Law 24 [Professional Competence], made by Convocation on March 26, 1999 and amended on May 28, 1999, April 26, 2001, January 24, 2002, October 31, 2002 and April 25, 2003, be further amended as follows:

1. Section 5 of By-Law 24 [Professional Competence] is amended by adding the following:

Determination of reasonable grounds

(3) In determining that there are reasonable grounds for believing that the member may be failing or may have failed to meet standards of professional competence, the chair or vice-chair of the standing committee of Convocation responsible for professional competence or the Treasurer may consider the following:

1. The nature, number and type of complaints made to the Society in respect of the conduct and competence of the member.

2. Any order made against the member under section 35, 40, 44 or 47 or subsection 49.35 (2) of the Act.

3. Any undertaking given to the Society by the member.

4. Any information that comes to the knowledge of an officer, employee, agent or representative of the Society in the course of or as a result of considering a complaint which suggests that the member may be failing or may have failed to meet standards of professional competence.

5. Any information that comes to the knowledge of an officer, employee, agent or representative of the Society in the course of or as a result of an investigation which suggests that the member may be failing or may have failed to meet standards of professional competence.

6. Any information that comes to the knowledge of an officer, employee, agent or representative of the Society in the course of or as a result of a proceeding which suggests that the member may be failing or may have failed to meet standards of professional competence.

7. The result of an audit where the result suggests that,

   (a) the member is in default of the requirements of By-Law 18 [Record Keeping Requirements] or 19 [Handling of Money and Other Property];

   (b) the member is in default of the requirements of Rule 2.04 of the Rules of Professional Conduct;

   (c) there are deficiencies in the records, systems or procedures in the member's practice; or

   (d) there are deficiencies in the administration of the member's practice.

Établissement des motifs raisonnables

(3) La personne assumant la présidence ou la vice-présidence du Comité permanent du Conseil chargé des questions de compétence professionnelle ou le trésorier ou la trésorière peut tenir compte des éléments suivants pour établir s'il y a des motifs raisonnables de croire que le membre ne respecte pas ou n'a pas respecté les normes de compétence de la profession :

1. La nature, le nombre et le genre de plaintes que le Barreau a reçues à l'égard de la conduite et de la compétence du membre.

2. Les ordonnances rendues, le cas échéant, contre le membre en application de l'article 35, 40, 44 ou 47 ou du paragraphe 49.35 (2) de la Loi.

3. Les engagements que le membre a pris à l'égard du Barreau, le cas échéant.

4. Les renseignements qui viennent à la connaissance d'un dirigeant, d'une dirigeante, d'un employé, d'une employée, d'un mandataire, d'une mandataire, d'un représentant ou d'une représentante du Barreau dans le cadre ou par suite de l'examen d'une plainte selon laquelle le membre ne respecterait pas ou n'aurait pas respecté les normes de compétence de la profession.

5. Les renseignements qui viennent à la connaissance d'un dirigeant, d'une dirigeante, d'un employé, d'une employée, d'un mandataire, d'une mandataire, d'un représentant ou d'une représentante du Barreau dans le cadre ou par suite d'une enquête sur le fait que le membre ne respecterait pas ou n'aurait pas respecté les normes de compétence de la profession.

6. Les renseignements qui viennent à la connaissance d'un dirigeant, d'une dirigeante, d'un employé, d'une employée, d'un mandataire, d'une mandataire, d'un représentant ou d'une représentante du Barreau dans le cadre ou par suite d'une instance concernant le fait que le membre ne respecterait pas ou n'aurait pas respecté les normes de compétence de la profession.

7. Les résultats d'une vérification qui indiquent :

   a) soit que le membre ne respecte pas les exigences du règlement administratif no 18 [Tenue de registres] ou 19 [Opérations touchant des fonds ou d'autres biens];

   b) soit que le membre ne respecte pas les exigences de la règle 2.04 du Code de déontologie;

   c) soit que les registres, les systèmes et les méthodes que le membre utilise dans le cadre de ses activités présentent des lacunes;

   d) soit que l'administration des activités du membre présente des lacunes.

APPENDIX 3

PRACTICE REVIEW
GUIDE FOR MEMBERS
RELEVANT CONSIDERATIONS IN DIRECTING A PRACTICE REVIEW

COMPLAINTS HISTORY

A member's complaints history is a relevant consideration in assessing whether there are reasonable grounds for believing that the member may be failing or may have failed to meet standards of professional competence.

In assessing complaints the following considerations are relevant:

- the number of complaints;
- the time frame over which they have occurred;
- the seriousness of the complaints;
- the nature of the complaints, in particular,
  - failure to account to clients
  - failure to fulfill financial or other commitments or undertakings in a timely fashion
  - investigation authorizations pursuant to section 49.3 of the Law Society Act

CONDUCT, CAPACITY OR COMPETENCE ORDERS

- Conduct, capacity or competence orders that limit or restrict the member's rights to practice, or relate to practice management issues.

UNDERTAKINGS

- Undertakings given to the Law Society that limit or restrict the member's rights to practice, or relate to practice management issues.

REFERRALS FROM LAW SOCIETY DEPARTMENTS

- Referrals from Law Society departments, including Complaints, Discipline, Investigation, and Spot Audit that indicate that there may be reasonable grounds to believe that the member may be failing or may have failed to meet standards of professional competence.

- Referrals from Law Society departments including Complaints, Discipline, Investigation, and Spot Audit that indicate that the member may require professional or personal counseling.

- Referrals from spot audit that indicate that there are deficiencies in the records, systems or procedures of the member's practice regarding,
  - Filing systems
  - File organization
  - Compliance with By-laws 18 [Record Keeping Requirements] and 19 Handling of Money and Other Property]
  - Compliance with conflicts management systems as required by the Rules of Professional Conduct
  - Staff support

  that gives rise to a reasonable apprehension that the quality of service to clients may be adversely affected.

ADMINISTRATIVE SUSPENSIONS

- Administrative suspensions for failure to file, in combination with other indicators.

Attached to the original Report in Convocation file, copies of:

Copy of A qualitative Research Study on Information and Library Services at the LSUC (InnerViews Inc. April 2003).

(Appendix 4, pages 21 – 82).

Litigation Committee Report

- Bencher Indemnification – Amendment to By-Law 2
- Mandate of Committee – Amendment to By-Law 9

Litigation Committee
February 26, 2004

Report to Convocation

Purposes of Report: Decision

Prepared by Legal Affairs
(Elliot Spears: 416-947-5251)

OVERVIEW OF POLICY ISSUES

INDEMNIFICATION OF BENCHERS AND OFFICERS OF THE SOCIETY:

PROPOSED AMENDMENT TO BY-LAW 2

Request to Convocation

1. Convocation is requested to amend By-Law 2 [General] to add a provision requiring the Society to indemnify benchers, officers of the Society and certain other individuals. A motion to amend By-Law 2 [General] is found at pages 12 to 15.

Summary of the Issue

2. Currently, the by-laws of the Society do not provide for indemnification of benchers and officers of the Society.

3. However, benchers and officers of the Society are immune from certain litigation by virtue of section 9 of the *Law Society Act*, and they may be entitled to indemnification under common law and under section 80 of the *Corporations Act.*

4. Under paragraph 1 of subsection 62 (0.1) of the *Law Society Act*, the Society has authority to make by-laws relating to the affairs of the Society. This authority includes the authority to make a by-law providing for the indemnification of benchers and officers of the Society. Indemnification rights granted to benchers and officers of the Society under a by-law need not be restricted to the scope of the rights available under section 80 of the *Corporations Act.* (They cannot, however, be inconsistent with those statutory rights, be otherwise prohibited by statute or be contrary to public policy.) If a by-law is made providing for the indemnification of benchers and officers of the Society, it will prevail over section 80 of the *Corporations Act.*

5. The *Canada Business Corporations Act* (Canada) (which does not apply to the Society) contains an indemnification provision that is more up-to-date than section 80 of the *Corporations Act.* The indemnification provision in the *Canada Business Corporations Act* (Canada) was amended to take into account the increasing litigation risk faced by directors. The indemnification provision in the Canada *Business Corporations Act,* unlike that in the Corporations Act, extends to former directors and officers and deals with expenses incurred by a director or officer to defend investigative proceedings, expenses incurred by a director or officer to settle an action and the advance of defence costs by a corporation to a director or officer.

6. The indemnification provision that the Committee is asking Convocation to add to By-Law 2[General] is based on the indemnification provision contained in the *Canada Business Corporations Act* (Canada).

MANDATE OF LITIGATION COMMITTEE: PROPOSED AMENDMENT TO BY-LAW 9

Request to Convocation

7. Convocation is requested to amend By-Law 9 [Committees] to add a provision specifying the mandate of the Litigation Committee. A motion to amend By-Law 9 [Committees] is found at pages 16 to 18.

Summary of the Issue

8. Currently, By-Law 9 [Committees], which establishes the standing committees of Convocation and provides for their mandates, does not provide for the mandate of the Litigation Committee (a standing committee of Convocation).

9. The Committee is asking Convocation to amend By-Law 9 [Committees] to include the mandate of the Litigation Committee.

THE REPORT

Terms Of Reference/Committee Process

10. The Committee met on January 14, 2004. Committee members in attendance were Neil Finkelstein (chair), Earl Cherniak (vice-chair), John Campion, Kim Carpenter-Gunn, James Caskey, Paul Copeland, Alan Gold and Clay Ruby. Staff in attendance were Malcolm Heins and Elliot Spears.

11. The Committee also met on February 4, 2004. Committee members in attendance were John Campion, Kim Carpenter-Gunn, James Caskey, Alan Gold and Bonnie Warkentin. Staff in attendance were Malcolm Heins and Elliot Spears.

12. The Committee is reporting on the following matters:

For Decision

- Indemnification of Benchers and Officers of the Society: Proposed Amendment to By-Law 2
- Mandate of the Litigation Committee: Proposed Amendment to By-Law 9

INDEMNIFICATION OF BENCHERS AND OFFICERS OF THE SOCIETY: PROPOSED AMENDMENT TO BY-LAW 2

A. BACKGROUND

9. Currently, the by-laws of the Society do not provide for indemnification of benchers.

10. However, benchers and officers of the Society are immune from certain litigation by virtue of section 9 of the *Law Society Act* ("LSA"). This section provides that "no action or other proceedings for damages" may be brought against a bencher or "official of the Society" with respect to,
    a. "any act done in good faith in the performance or intended performance" of the bencher's or official's "statutory" duties;
    b. the "exercise or intended exercise" of any "statutory" power; or
    c. "any neglect or default in the performance or exercise in good faith" of any "statutory" duty or power.

11. As well, benchers and officers of the Society may be entitled to indemnification under common law and under section 80 of the *Corporations Act* ("CA")

12. At common law, a director, acting *bona fide* and to the best of his or her knowledge for the company, is entitled to be indemnified for so acting.

13. Section 80 of the CA provides that directors and officers may be indemnified out of the funds of the company from and against certain expenses "with the consent of the company, given at any meeting of the shareholders". This section applies to the Society by virtue of section 133 of the CA, which states that section 80 applies, with necessary modifications, to corporations without share capital. The Society is a corporation without share capital (subsection 2 (2) of the LSA). The directors of the Society are its benchers, since the benchers must govern the affairs of the Society (subsection 283 (1) of the CA; section 10 of the LSA). The word "shareholders" in section 80 of the CA means members of the Society (subsection 133 (1) of the CA; subsection 1 (1) of the LSA).

14. There is debate about whether a statutory power to indemnify is a comprehensive codification of a corporation's power to indemnify and, thus, overrides any power to indemnify found at common law. In the case of section 80 of the CA, it is likely that it is not a comprehensive codification of a corporation's power to indemnify a director. Likely, it is non-exclusive and supplements, rather than overrides, any power found at common law. However, any indemnification rights granted by a corporation to a director outside of those provided by statute cannot be inconsistent with those statutory rights, cannot be otherwise prohibited by statute and cannot be contrary to public policy.

15. Under paragraph 1 of subsection 62 (0.1) of the LSA, the Society has the authority to make by-laws relating to the affairs of the Society. This authority includes the authority to make a by-law providing for the indemnification of benchers and officers of the Society. Indemnification rights granted to benchers and officers of the Society under a by-law need not be restricted to the scope of the rights available under section 80 of the CA. (They cannot, of course, be inconsistent with those statutory rights, be otherwise prohibited by statute or be contrary to public policy.) If a by-law is made dealing with the indemnification of benchers and officers of the Society, this by-law will prevail over the provisions of the CA dealing with indemnification of directors and officers.

B. SUBSTANCE OF THE PROPOSED INDEMNIFICATION PROVISION

16. The *Canada Business Corporations Act* (Canada) ("CBCA") contains an indemnification provision that is more up-to-date than section 80 of the CA.

17. Section 80 of the CA reads as follows:

> Every director and officer of a company, and his or her heirs, executors and administrators, and estate and effects, respectively, may, with the consent of the company, given at any meeting of the shareholders, from time to time and at all times, be indemnified and saved harmless out of the funds of the company, from and against,
>
> (a) all costs, charges and expenses whatsoever that he, she or it sustains or incurs in or about any action, suit or proceeding that is brought, commenced or prosecuted against him, her or it, for or in respect of any act, deed, matter or thing whatsoever, made, done or permitted by him, her or it, in or about the execution of the duties of his, her or its office; and
>
> (b) all other costs, charges and expenses that he, she or it sustains or incurs in or about or in relation to the affairs thereof, except such costs, charges or expenses as are occasioned by his, her or its own wilful neglect or default.

18. Section 124 of the CBCA reads as follows:

> (1) A corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or another individual or acts or acted at the corporation's request as a director or officer, or an individual acting in a similar capacity, of another entity, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation or other entity.
>
> (2) A corporation may advance moneys to a director, officer or other individual for the costs, charges and expenses of a proceeding referred to in subsection (1). The individual shall repay the moneys if the individual does not fulfil the conditions of subsection (3).
>
> (3) A corporation may not indemnify an individual under subsection (1) unless the individual

(a) acted honestly and in good faith with a view to the best interests of the corporation, or, as the case may be, to the best interests of the other entity for which the individual acted as a director or officer or in a similar capacity at the corporation's request; and

(b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, the individual had reasonable grounds for believing that the individual's conduct was lawful.

(4) A corporation may with the approval of a court, indemnify an individual referred to in subsection (1), or advance moneys under subsection (2), in respect of an action by or on behalf of the corporation or other entity to procure a judgment in its favour, to which the individual is made a party because of the individual's association with the corporation or other entity as described in subsection (1) against all costs, charges and expenses reasonably incurred by the individual in connection with such action, if the individual fulfils the conditions set out in subsection (3).

(5) Despite subsection (1), an individual referred to in that subsection is entitled to indemnity from the corporation in respect of all costs, charges and expenses reasonably incurred by the individual in connection with the defence of any civil, criminal, administrative, investigative or other proceeding to which the individual is subject because of the individual's association with the corporation or other entity as described in subsection (1), if the individual seeking indemnity

(a) was not judged by the court or other competent authority to have committed any fault or omitted to do anything that the individual ought to have done; and

(b) fulfils the conditions set out in subsection (3).

(6) A corporation may purchase and maintain insurance for the benefit of an individual referred to in subsection (1) against any liability incurred by the individual

(a) in the individual's capacity as a director or officer of the corporation; or

(b) in the individual's capacity as a director or officer, or similar capacity, of another entity, if the individual acts or acted in that capacity at the corporation's request.

(7) A corporation, an individual or an entity referred to in subsection (1) may apply to a court for an order approving an indemnity under this section and the court may so order and make any further order that it sees fit.

(8) An applicant under subsection (7) shall give the Director notice of the application and the Director is entitled to appear and be heard in person or by counsel.

(9) On an application under subsection (7) the court may order notice to be given to any interested person and the person is entitled to appear and be heard in person or by counsel.

19. Some of the differences between section 80 of the CA and section 124 of the CBCA are as follows:

a. Section 124 of the CBCA extends to former directors and officers. Section 80 of the CA does not.
b. Section 124 of the CBCA clearly extends to investigative proceedings. This is in response to case law which suggested that costs incurred by a director to defend criminal and administrative investigations were not the same and were not covered by an indemnity for criminal or administrative "actions or proceedings".
c. Section 124 of the CBCA expressly contemplates and extends to amounts paid to settle an action. Section 80 of the CA does not.
d. Section 124 of the CBCA expressly contemplates that, in certain circumstances, the corporation may advance defence costs to the director or officer. Section 80 of the CA does not.

e. Section 124 of the CBCA provides for mandatory indemnity in certain circumstances. Section 80 of the CA does not.

f. In section 124 of the CBCA, the statutory standards that a director must meet in order to obtain indemnification mirror the statutory duties of a director (codified in section 122 of the CBCA). In section 80 of the CA, the statutory standard that a director must meet in order to obtain indemnification is the absence of "wilful neglect or default".

20. When making by-laws providing for the indemnification of directors and officers, corporations typically track the statutory provision dealing with indemnification in their governing legislation.

21. Given that any by-law made by the Society under its by-law making authority prevails over the provisions of the CA, the Society may make a by-law granting benchers and officers of the Society greater indemnification rights than would otherwise be available to them under section 80 of the CA. However, such a by-law could not be inconsistent with section 80 of the CA, be otherwise prohibited by statute or be contrary to public policy.

22. In October 2003, the Committee considered whether to amend By-Law 2 [General] to provide for the indemnification of benchers and officers of the Society. The Committee discussed the differences between the indemnification provision contained in section 124 of the CBCA and that contained in section 80 of the CA. The Committee determined that if an indemnification provision were included in By-Law 2 [General], the provision should be based on the indemnification provision contained in the CBCA.

23. At its meeting on January 14, 2004, the Committee considered draft wording for an indemnification provision to be included in By-Law 2 [General]. The draft wording was prepared by staff with the assistance of outside counsel.

24. The Committee suggests that By-Law 2 [General] be amended to add the indemnification provision contained in the following motion and asks Convocation to pass the following motion:

THE LAW SOCIETY OF UPPER CANADA

BY-LAWS MADE UNDER
SUBSECTIONS 62 (0.1) AND (1) OF THE LAW SOCIETY ACT

BY-LAW 2
[GENERAL]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON FEBRUARY 26, 2004

MOVED BY

SECONDED BY

THAT By-Law 2 [General], made by Convocation on January 28, 1999 and amended by Convocation on March 26, 1999, be further amended by adding the following:

INDEMNIFICATION

Indemnification of benchers, etc.

6.1 (1) The Society shall indemnify every bencher, officer of the Society, former bencher, former officer of the Society and other individual who, not being a bencher or officer of the Society, acts or acted as a bencher or officer of the Society at the request of the Society against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the person in respect of any civil, criminal, administrative, investigative or other proceeding in which the person is involved because of the person's association with the Society.

Advance of costs

(2) The Society may advance moneys to a person referred to in subsection (1) for the costs, charges and expenses of a proceeding referred to in subsection (1).

Repayment of moneys

(3) If a person referred to in subsection (1) does not fulfil the conditions of subsection (4), the person shall repay moneys advanced to him or her under subsection (2).

Limitation

(4) Despite subsection (1), the Society shall not indemnify a person referred to in subsection (1) unless the person,

(a) acted honestly and in good faith with a view to the best interests of the Society; and

(b) in the case of a criminal or administrative proceeding resulting in a monetary penalty, the person had reasonable grounds for believing that his or her conduct was lawful.

Insurance

(5) The Society may purchase and maintain insurance for the benefit of every person referred to in subsection (1) against any liability incurred by the person in the person's capacity as a bencher or officer.

INDEMNISATION

Indemnisation des conseillers

6.1 (1) Le Barreau indemnise ses conseillers, conseillères, dirigeants et dirigeantes, ses anciens conseillers, conseillères, dirigeants et dirigeantes et les personnes qui, à sa demande, agissent ou ont agi à titre de conseiller, de conseillère, de dirigeant ou de dirigeante du Barreau de tous les frais et de toutes les dépenses raisonnables, y compris les sommes versées pour le règlement d'une action ou pour satisfaire à un jugement, qu'ils ont engagés à l'égard, notamment, d'une instance civile, pénale ou administrative ou encore d'une enquête par laquelle ils sont concernés en raison de leur association avec le Barreau.

Avance

(2) Le Barreau peut avancer des fonds à une personne visée au paragraphe (1) au titre des frais et des dépenses liés à une instance visée à ce paragraphe.

Remboursement des fonds

(3) La personne visée au paragraphe (1) qui ne satisfait pas aux conditions énoncées au paragraphe (4) rembourse les fonds qui lui ont été avancés en vertu du paragraphe (2).

Restriction

(4) Malgré le paragraphe (1), le Barreau ne doit indemniser les personnes visées au paragraphe (1) que si :

a) d'une part, elles ont agi avec intégrité et de bonne foi au mieux des intérêts du Barreau;

b) d'autre part, dans le cas d'instances pénales ou administratives aboutissant au paiement d'une amende, elles avaient des motifs raisonnables de croire que leur conduite était conforme à la loi.

Assurance

(5) Le Barreau peut souscrire au profit des personnes visées au paragraphe (1) une assurance couvrant la responsabilité qu'elles encourent pour avoir agi à titre de conseiller, de conseillère, de dirigeant ou de dirigeante.

MANDATE OF LITIGATION COMMITTEE:

PROPOSED AMENDMENT TO BY-LAW 9

A. BACKGROUND

25. By-Law 9 [Committees] establishes the standing committees of Convocation and provides for their mandates. Currently, By-Law 9 [Committees] does not provide for the mandate of the Litigation Committee (a standing committee of Convocation).

26. The Litigation Committee was first established in 1997. Although not expressed in any executive legislation or policy document, the purpose of the committee appears to have been to deal with litigation that the Society was then involved in.

27. Since that time, the Committee's function has come to be receive progress reports on the conduct of all litigation that the Society is involved in, for the purpose of communicating the same to Convocation, to assist/guide the Chief Executive Officer in the conduct of litigation outside the usual course of the Society's business and to consider intervention requests made to the Society and to the Federation of Law Societies of Canada and to recommend to Convocation, or in urgent circumstances to decide, whether the Society should intervene in a matter or support intervention in a matter by the Federation.

28. At its meeting in January 2004, the Litigation Committee determined that its mandate, as set out in the preceding paragraph, should be expressed in By-Law 9 [Committees].

B. MOTION TO AMEND BY-LAW 9

29. The Committee suggests that By-Law 9 [Committees] be amended to add the new section 16.5 contained in the following motion and asks Convocation to pass the following motion:

THE LAW SOCIETY OF UPPER CANADA

BY-LAWS MADE UNDER
SUBSECTIONS 62 (0.1) AND (1) OF THE LAW SOCIETY ACT

BY-LAW 9
[COMMITTEES]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON FEBRUARY 26, 2004

MOVED BY

SECONDED BY

THAT By-Law 9 [Committees], made by Convocation on January 28, 1999 and amended by Convocation on February 19, 1999, March 26, 1999, May 28, 1999, December 10, 1999, July 26, 2001, November 22, 2001 and October 31, 2002, be further amended by adding the following:

LITIGATION COMMITTEE

Mandate
16.5 The mandate of the Litigation Committee is,

(a) to receive from the Chief Executive Officer progress reports on the conduct of all legal proceedings in which the Society is involved, for the purpose of communicating the reports to Convocation;

(b) to provide assistance and guidance to the Chief Executive Officer in the conduct of legal proceedings that are outside the usual course of the Society's business; and

(c) to consider requests made for the Society or the Federation of Law Societies of Canada to intervene in legal proceedings and to recommend to Convocation, or in urgent circumstances to decide, whether the Society should intervene in a legal proceeding or support the Federation intervening in a legal proceeding.

COMITÉ DU CONTENTIEUX

Mandat

16.5 Le mandat du Comité du contentieux est :

a) de recevoir du directeur général ou de la directrice générale des rapports d'étape sur la conduite de toutes les instances qui concernent le Barreau en vue de les transmettre au Conseil;

b) d'aider et de guider le directeur général ou la directrice générale dans la conduite des instances qui ne ressortent pas des affaires courantes du Barreau;

c) d'étudier les demandes d'intervention dans des instances que reçoit le Barreau ou la Fédération des ordres professionnels de juristes du Canada et de faire des recommandations au Barreau quant à l'opportunité d'y intervenir ou de soutenir le fait que la Fédération y intervienne, ou, en cas d'urgence, de prendre une décision en ce sens.

CONVOCATION ROSE AT 1:00 P.M.

The Treasurer and Benchers had as their guest for luncheon The Honourable Michael J. Bryant, Attorney General of Ontario.

Confirmed in Convocation this 25th day of March, 2004

Treasurer