MINUTES OF CONVOCATION

Thursday, 25th March, 2004
8:30 a.m.

PRESENT:

The Treasurer (Frank N. Marrocco, Q.C.), Aaron, Alexander, Backhouse, Banack, Bobesich, Bourque, Boyd, Cass, Chahbar, Cherniak, Coffey, Copeland, Dickson, Doyle (by telephone), Dray, Ducharme, Eber, Feinstein, Filion, Finlayson, Furlong, Gold, Gottlieb, Harris, Hunter, Krishna, Legge, MacKenzie, Manes, Murphy, Murray, O'Brien, O'Donnell, Pattillo, Pawlitza, Potter, Robins, Ruby, Silverstein, Simpson, Swaye, Symes, Wardlaw, Warkentin and Wright.

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Secretary: Katherine Corrick

The reporter was sworn.

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IN PUBLIC

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TREASURER'S REMARKS

The Treasurer congratulated Laura Legge who will receive the Order of Ontario.

Congratulations were also extended to George Hunter on becoming a fellow of the American College of Trial Lawyers in Phoenix earlier this month.

The following Benchers were appointed to the Treasurer's advisory group on L.L.D. recipients: Constance Backhouse, Anne Marie Doyle, John Campion, Neil Finkelstein, William Simpson and Beth Symes.

The Treasurer asked Vern Krishna and Paul Copeland to be his representatives on the law school dean's group studying the impact of rising tuition fees on accessibility of a legal education.

The Law Society will be hosting a dinner to commemorate the career of The Honourable Madam Justice Louise Arbour. The tentative date is June 10th.

The Treasurer thanked staff for the work on the policy catalogue.

MOTION – DRAFT MINUTES OF CONVOCATION – FEBRUARY 26, 2004

It was moved by Mr. MacKenzie, seconded by Mr. Feinstein that the Draft Minutes of Convocation of February 26, 2004 be confirmed.

It was moved by Mr. Aaron, seconded by Mr. Gottlieb that approval of the February 26th Draft Minutes of Convocation be deferred until the ethical investment policy motion is placed on the web site.

Lost

ROLL-CALL VOTE

Aaron	For	Hunter	Against
Alexander	Abstain	Krishna	Against
Backhouse	Against	Legge	Against
Banack	Against	MacKenzie	Against
Bobesich	For	Manes	Against
Bourque	Against	Murray	Against
Chahbar	Against	O'Brien	For
Cherniak	Against	O'Donnell	Abstain
Coffey	Against	Pattillo	Against
Dickson	Against	Pawlitza	Against
Doyle	Against	Potter	Against
Dray	Against	Robins	Against
Ducharme	Against	Ruby	Against
Eber	Against	Silverstein	Against
Feinstein	Against	Simpson	Against
Filion	Against	Swaye	Against
Finlayson	Against	Symes	Against
Gold	Against	Warkentin	Against
Gottlieb	For	Wright	Against
Harris	Against		

Vote: 33 Against; For 4; 2 Abstentions

The MacKenzie/Feinstein motion to approve the February 26th Draft Minutes of Convocation was voted on and confirmed.

ROLL-CALL VOTE

Aaron	Against	Hunter	For
Alexander	For	Krishna	For
Backhouse	For	Legge	For
Banack	For	MacKenzie	For
Bobesich	For	Manes	For
Bourque	For	Murray	For
Chahbar	For	O'Brien	For
Cherniak	For	O'Donnell	Abstain
Coffey	For	Pattillo	For
Dickson	For	Pawlitza	For
Doyle	For	Potter	For
Dray	For	Robins	For
Ducharme	For	Ruby	For
Eber	For	Silverstein	For
Feinstein	For	Simpson	For
Filion	For	Swaye	For
Finlayson	For	Symes	For
Gold	For	Warkentin	For
Gottlieb	Against	Wright	For
Harris	For		

Vote: 36 For; 2 Against; 1 Abstention

REPORT OF THE PROFESSIONAL REGULATION COMMITTEE

Mr. Ducharme presented the Report of the Professional Regulation Committee.

Professional Regulation Committee
March 25, 2004

Report to Convocation [1]

Purposes of Report: Decision

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

OVERVIEW OF POLICY ISSUE

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

Request to Convocation

1. 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 16),
    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 25), and
    c. amendments to rules 2.04 and 2.06 on equity interests in clients (page 32).

Summary of the Issue

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

3. The working group focused on three issues. The first was the responsibility 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 discussions between the Law Society and the Ontario Securities Commission on the impact of this legislation in Canada. The second issue related to 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.

4. 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;

[1] Deferred from February 26, 2004 Convocation

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.

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

6. 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

7. The Committee met on February 12, 2004 (no meeting was held in March 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.

8. The Committee is reporting on the following matters:

For Decision
· Proposed amendments to the Rules of Professional Conduct relating to the lawyer's role in corporate governance

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

INTRODUCTION

9. In the fall of 2002, a working group of the Emerging Issues Committee[2] 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.

[2] 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.

10. 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?

11. 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.

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

13. 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

14. The context for this review 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 related to the SEC's rule-making initiative.

15. 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.[3]

16. The Society's response to the OSC appears at Appendix 1. 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.

17. 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.

18. 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.

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[3] 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.

19. Relevant rules from the Society's Rules (rules 2.02, 2.03, 2.04, 2.06 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 2.

20. 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 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 appropriately reflected in the Rules. While some refinements are desirable to reinforce certain aspects of a lawyer's responsibility and to demonstrate the profession's responsiveness to concerns about the manner in which professional advisors influence corporate conduct, the obligations of the lawyer should not change.

21. 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 COMMITTEE'S PROPOSALS

22. 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).

23. 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.

24. 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. 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.

Scope of the Rule

25. The language in the existing commentary, the ABA Model Rules' treatment of the organization as client, and the SEC's new and proposed rules[4] helped to frame the concepts in the proposed rules and commentaries. The Committee also received helpful input from the Canadian Corporate Counsel Association, which, at the request of the Committee, commented on the proposals from the perspective of in-house counsel.

26. 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 dishonest, fraudulent, criminal or illegal, the lawyer must resign. In such cases, rule 2.02(5) would prohibit the lawyer from knowingly assisting in or encouraging this conduct.

27. Accordingly, the proposed rule, which appears at page 16, 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 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.

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[4] 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 cororate 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 2. 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 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.

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 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.

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)).

28. The circumstances in which a lawyer withdraws as counsel for an organizational client 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.

29. The Committee discussed whether, in the circumstances described in 27 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. On this point, 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...

30. The view was that requiring a lawyer to withdraw in all circumstances might be a disincentive to report the conduct, and affect the integrity and desired result of the rule. 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 provides that the circumstances may be such that the lawyer must withdraw to comply with rule 2.09.

31. No changes are proposed to rule 2.03(1), which requires lawyers to maintain the confidentiality of 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.

32. 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 to be in a position to counsel the client against it or take appropriate steps to address it.

33. 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

34. The current location of the "up-the-ladder" commentary is in rule 2.03 (Confidentiality). It was placed within this rule in 2000 as it related to 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.

35. Events since 2000 have caused a shift in focus. While confidentiality of information still informs the instruction, the more specific issue requiring treatment is the lawyer's actions as professional advisor when he or she learns of corporate wrongdoing.

36. 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 the prohibition on a lawyer assisting a client in criminal, etc. activity, and
    c. Rule 2.09 on withdrawal from representation.

37. 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.

Particulars of the Proposed Rules

38. The above proposals have been incorporated in proposed amendments prepared by rules drafter 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 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))*

When Client an Organization

(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.

Commentary
A lawyer acting for an organization should keep in mind that the organization, as such, is the 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

39. 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.

40. 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

41. 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

42. 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. Some American jurisdictions 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.

43. 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."

44. 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)

45. 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[5] , which reads:

[5] 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

> 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 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.

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

47. 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

48. 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.

49. 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.

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(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.

50. 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.

51. 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

52. 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).

53. It is proposed that this commentary follow the third paragraph of the existing commentary that appears after rule 2.04(3) (see Appendix 2, pages 45 and 46).

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

A. INTRODUCTION

54. 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.

55. 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

56. 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?

57. 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

58. 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)[6] acknowledge that a lawyer accepting shares in a client 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.

59. 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).

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[6] 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

(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]

60. 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

61. 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.

British Columbia

62. 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:
>
> 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

63. 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

64. 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.

65. In 2001, the ABA published a report on the independent lawyer. It noted the opinion above and stated 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

66. The Committee, based on the Emerging Issues Committee recommendation, concluded that lawyers must recognize the professional conduct standards that apply in these situations, and in this respect, reliance is placed on rules 2.04, 2.06 and 2.08 (Fees and Disbursements). 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.

67. 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.

68. 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).

69. 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

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 2

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.

(7) 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's office,

(b) the lawyer's 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.

2.06 DOING BUSINESS WITH A CLIENT

Definitions

2.06 (1) In this rule

"related persons" means related persons as defined in the *Income Tax Act (Canada)* and "related person" has a corresponding meaning, and

"syndicated mortgage" means a mortgage having more than one investor.

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

(a) shall disclose and explain the nature of the conflicting interest to the client or, in the case of a 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]

Commentary

If the lawyer does not choose to make disclosure of the conflicting interest or cannot do so without breaching a confidence, the lawyer must decline the retainer.

The lawyer should not uncritically accept the client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined.

Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, and that the client's consent was obtained.

If the investment is by borrowing from the client, the transaction may fall within the requirements of subrules 2.06(4) or (6).

Certificate of Independent Legal Advice

(3) A lawyer retained to give independent legal advice shall, before any advance of funds has been made by the client,

(a) provide the client with a written certificate that the client has received independent legal advice, and

(b) obtain the client’s signature on a copy of the certificate of independent legal advice and send the signed copy to the lawyer with whom the client proposes to transact business.

Borrowing from Clients

(4) A lawyer shall not borrow money from a client unless

(a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, or

(b) the client is a related person as defined by the Income Tax Act (Canada) and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the case and by independent legal advice or independent legal representation.

Commentary

The relationship between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and the lawyer's duty to the client can be permitted.

Whether a person lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is to be considered a client within this rule is to be determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice in respect of the loan or investment, the lawyer will be considered bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

(5) In any transaction, other than a transaction within the provisions of subrule (4), in which money is borrowed from a client by a lawyer's spouse or by a corporation, syndicate, or partnership in which either the lawyer or the lawyer's spouse has, or both of them together have, directly or indirectly, a substantial interest, the lawyer shall ensure that the client's interests are fully protected by the nature of the case and by independent legal representation.

Lawyers in Loan or Mortgage Transactions

(6) A lawyer engaged in the private practice of law in Ontario shall not directly, or indirectly through a corporation, syndicate, partnership, trust, or other entity in which the lawyer or a related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities

(a) hold a syndicated mortgage or loan in trust for investor clients unless each investor client receives

(i) a complete reporting letter on the transaction,

(ii) a trust declaration signed by the person in whose name the mortgage or any security instrument is registered, and

(iii) a copy of the duplicate registered mortgage or security instrument,

(b) arrange or recommend the participation of a client or other person as an investor in a syndicated mortgage or loan where the lawyer is an investor unless the lawyer can demonstrate that the client or other person had independent legal advice in making the investment, or

(c) sell mortgages or loans to, or arrange mortgages or loans for, clients or other persons except in accordance with the skill, competence, and integrity usually expected of a lawyer in dealing with clients.

Commentary

ACCEPTABLE MORTGAGE OR LOAN TRANSACTIONS

A lawyer may engage in the following mortgage or loan transactions in connection with the practice of law:
(a) a lawyer may invest in mortgages or loans personally or on behalf of a related person or a combination thereof,
(b) a lawyer may deal in mortgages or loans as an executor, administrator, committee, trustee of a testamentary or inter vivos trust established for purposes other than mortgage or loan investment or under a power of attorney given for purposes other than exclusively for mortgage or loan investment, and
(c) a lawyer may collect, on behalf of clients, mortgage or loan payments that are made payable in the name of the lawyer under a written direction to that effect given by the client to the mortgagor or borrower provided that such payments are deposited into the lawyer's trust account.

A lawyer may introduce a borrower (whether or not a client) to a lender (whether or not a client) and the lawyer may then act for either, and when subrule 2.04 (12) applies, the lawyer may act for both.

Disclosure

(7) Where a lawyer sells or arranges mortgages for clients or other persons, the lawyer shall disclose in writing to each client or other person the priority of the mortgage and all other information relevant to the transaction that is known to the lawyer that would be of concern to a proposed investor.

No Advertising

(8) A lawyer shall not promote, by advertising or otherwise, individual or joint investment by clients or other persons who have money to lend, in any mortgage in which a financial interest is held by the lawyer, a related person, or a corporation, syndicate, partnership, trust or other entity in which the lawyer or related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities.

Guarantees by a Lawyer

(9) Except as provided by subrule (10), a lawyer shall not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender.

(10) A lawyer may give a personal guarantee in the following circumstances:

(a) the lender is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent, or child,

(b) the transaction is for the benefit of a non profit or charitable institution where the lawyer as a member or supporter of such institution is asked, either individually or together with other members or supporters of the institution, to provide a guarantee, or

(c) the lawyer has entered into a business venture with a client and the lender requires personal guarantees from all participants in the venture as a matter of course and

(i) the lawyer has complied with rule 2.04 (Avoidance of Conflicts of Interest) and this rule (Doing Business with a Client), and

(ii) the lender and participants in the venture who are or were clients of the member have received independent legal representation.

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.

Relation to Other Rules

~~[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.

Dual Representation

~~[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.

Chapter 6. Impartiality and Conflict of Interest Between Clients

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.

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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 or other 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

Re: Amendments to Rules 2.02 and 2.03 re: Role of Lawyers in Corporate Governance

It was moved by Mr. Ducharme, seconded by Mr. Pattillo that the amendments to Rules 2.02 and 2.03 set out at pages 16 to 20 of the Report be adopted.

Carried

ROLL-CALL VOTE

Aaron	Against	Hunter	For
Alexander	For	Krishna	For
Backhouse	For	Legge	For
Banack	For	MacKenzie	For
Bobesich	For	Manes	For
Bourque	For	Murray	For
Chahbar	For	O'Brien	For
Cherniak	For	O'Donnell	For
Coffey	For	Pattillo	For

Dickson	For	Pawlitza	For
Doyle	For	Potter	For
Dray	For	Ruby	For
Ducharme	For	Silverstein	For
Eber	For	Simpson	For
Feinstein	For	Swaye	For
Filion	For	Symes	For
Finlayson	For	Wakentin	For
Gold	For	Wright	For
Gottlieb	For		
Harris	For		

Vote: 37 For; 1 Against

Re: New Commentary to Rule 2.04 re: Conflicts of Interest on the Lawyer's Role as Counsel for and Director of an Organizational Client

It was moved by Mr. Ducharme, seconded by Mr. Pattillo that the new commentary to Rule 2.04 on conflicts of interest at page 25 of the Report be adopted.

Carried

It was moved by Mr. Ducharme, seconded by Mr. Pattillo that the amendments to Rule 2.04(1) commentary set out at page 32 of the Report and the amendment to Rule 2.06(2.1) set out in the memorandum be adopted.

The following amendment to Rule 2.06(2.1) on page 33 of the Report was accepted by the mover and seconder.

Rule 2.06(2.1)
(2.1)

"……transferring corporate shares or securities……..to his, her or its lawyer…."

The motion as amended was adopted.

Carried

The following memorandum was distributed at Convocation.

MEMORANDUM

To:	All Benchers
From:	Jim Varro, Policy Advisor, Policy Secretariat, Policy and Legal Affairs
Date:	March 25, 2004
Re:	Amendments to Rule 2.06(2.1) Professional Regulation Committee Report Convocation Material, Tab 6, page 33

Based on a member's suggestion, Todd Ducharme is proposing that language be added to the proposed amended rule 2.06(2.1) to make it more comprehensive. The additional language permits lawyers who receive from clients limited partnership interests, trusts units or other securities that are publicly traded to have the benefit of the exemption described in the rule. This does not change the nature of the amendment approved by the Professional Regulation Committee.

The following is the proposed new language for the amendment, on which drafter Paul Perell's input was provided, replacing the current language in the Committee's report at Tab 6, page 33:

When a client intends to pay for legal services by transferring to his or her lawyer ~~corporate shares or securities to his or her lawyer~~ a share, participation or other interest in property or in an enterprise, other than a non-material interest in a publicly traded enterprise, the lawyer shall recommend but need not require that the client receive independent legal advice before accepting a retainer.

……

Mr. Hunter rose to thank the working group of the Emerging Issues Committee, and Jim Varro for their work on the amendments to the Rules of Professional Conduct on the issues of corporate governance. The Treasurer will write a letter of appreciation to each of the members.

REPORT OF THE DIRECTOR OF PROFESSIONAL DEVELOPMENT & COMPETENCE

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, March 25th, 2004:

Jonathan Paul Affleck	Bar Admission Course
Miles Edward Backhouse	Bar Admission Course
Tanya Yolande Bartucz	Bar Admission Course
Christopher Ivan Biscoe	Bar Admission Course
Desmond Michael Dunn	Bar Admission Course
Asim Mehdi Khan	Bar Admission Course
Chantal Marie Josée Lafrenière	Bar Admission Course
Andrew Michael Mae	Bar Admission Course
Lorelee Ruth Messenger	Bar Admission Course
Jaqueline Andrea Michielli	Bar Admission Course
Devikarani Penekelapati	Bar Admission Course
Maya Raja	Bar Admission Course

Richard Grant Startek	Bar Admission Course
Anthony Michael Tamburro	Bar Admission Course
Antonio Mendezo Villarin	Bar Admission 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, March 25th, 2004:

Gawain Ka Wang Chan	Province of British Columbia
Carrie Marie Kennedy	Province of British Columbia
Jennifer Regan Lindsay Kraft	Province of British Columbia
Wade Lawrence Raaflaub	Province of Alberta
Gerald Hixxon Stobo	Province of Alberta

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, March 25th, 2004:

Janet Marie Christian-Campbell	Province of Nova Scotia

ALL OF WHICH is respectfully submitted

DATED this the 25th day of March, 2004

It was moved by Mr. Hunter seconded by Mr. Cherniak that the Report of the Director of Professional Development & Competence setting out the candidates for the Call to the Bar, be adopted.

Carried

CALL TO THE BAR (Convocation Hall)

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

Jonathan Paul Affleck	Bar Admission Course
Miles Edward Backhouse	Bar Admission Course
Tanya Yolande Bartucz	Bar Admission Course
Christopher Ivan Biscoe	Bar Admission Course
Desmond Michael Dunn	Bar Admission Course
Asim Mehdi Khan	Bar Admission Course
Chantal Marie Josée Lafrenière	Bar Admission Course
Andrew Michael Mae	Bar Admission Course
Lorelee Ruth Messenger	Bar Admission Course

Jaqueline Andrea Michielli	Bar Admission Course
Devikarani Penekelapati	Bar Admission Course
Maya Raja	Bar Admission Course
Richard Grant Startek	Bar Admission Course
Anthony Michael Tamburro	Bar Admission Course
Antonio Mendezo Villarin	Bar Admission Course
Gawain Ka Wang Chan	Transfer, Province of British Columbia
Carrie Marie Kennedy	Transfer, Province of British Columbia
Jennifer Regan Lindsay Kraft	Transfer, Province of British Columbia
Wade Lawrence Raaflaub	Transfer, Province of Alberta
Gerald Hixxon Stobo	Transfer, Province of Alberta
Janet Marie Christian-Campbell	Tarnsfer, Province of Nova Scotia

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REPORT OF THE PROFESSIONAL DEVELOPMENT AND COMPETENCE COMMITTEE

Re: Practice Review Program – Amendments to By-law 24

Mr. Simpson presented the Report of the Professional Development and Competence Committee.

Professional Development, Competence & Admissions Committee
March 25, 2004

Report to Convocation

Purpose of Report: Decision

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 discussed this issue 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 matter:

Policy – For Decision

- Amendment to By-law 24 (Professional Competence)

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.

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.

……

It was moved by Mr. Simpson, seconded by Mr. Hunter that the amendments to By-law 24 set out at Appendix 2 of the Report be adopted.

Carried

EQUITY & ABORIGINAL ISSUES COMMITTEE/COMITÉ SUR L'ÉQUITÉ ET LES AFFAIRES AUTOCHTONES REPORT

Re: Discrimination and Harassment Counsel – Amendment to By-law 36

Mr. Simpson presented the Report of the Equity & Aboriginal Issues Committee.

Equity and Aboriginal Issues Committee/
Comité sur l'équité et les affaires autochtones
March 25, 2004

Report to Convocation

Purpose of Report: Decision
Information

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

OVERVIEW OF POLICY ISSUES

ALTERNATE DISCRIMINATION AND HARASSMENT COUNSEL POSITION: PROPOSED AMENDMENTS TO BY-LAW 36

Request to Convocation

1. That Convocation approves amendments to By-Law 36 [Discrimination and Harassment Counsel] as set out on pages 7 to 11.

Summary of the Issue

2. On November 27, 2003, Convocation approved recommendations for the creation of the Alternate Discrimination and Harassment Counsel position to assume the function of the Discrimination and Harassment Counsel (DHC) when he or she is temporarily unable to fulfill his or her duties.

3. Convocation also approved recommendations describing the function of the Alternate DHC, the duty of confidentiality of the Alternate DHC and the appointment process for the position.

4. The amendments that the Committee is asking Convocation to adopt reflect the recommendations adopted by Convocation on November 27, 2003.

POLICY ISSUES – DISCRIMINATION AND HARASSMENT COUNSEL PROGRAM

Request to Convocation

5. That Convocation approves an amendment to the mandate of the Discrimination and Harassment Counsel and of the Alternate Discrimination and Harassment Counsel to include the provision of advice to members who believe that they have been the subject of discrimination and/or harassment in the workplace by a non-member of the Law Society:

Summary of the Issue

6. The Discrimination and Harassment Counsel (DHC) asked the Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones (the Committee) to consider whether the DHC's mandate should be amended to authorize the provision of advice to members complaining of harassment and/or discrimination in the workplace by non-members.

7. The Committee is of the view that if the Law Society wishes to more effectively address issues of harassment and discrimination in the legal profession, it should broaden the mandate of the DHC to include the provision of advice to members complaining about harassment and discrimination in the workplace by non-members of the profession. This service would be beneficial for the Law Society's membership, might reduce incidences of harassment and discrimination and increase awareness of those issues. Also, the DHC does not receive a high volume of calls from members about issues of harassment and discrimination in the workplace by non-members and it is expected that the human and financial resources dedicated to that service would be minimal.

8. The Committee recommends that Convocation amend the mandate of the DHC and the Alternate DHC to deal with members complaining of harassment and/or discrimination in the workplace by non-members.

THE REPORT

Terms of Reference/Committee Process

9. The Committee met on March 11, 2004. Committee members in attendance were Derry Millar (Vice-Chair and Chair of the meeting), Mary Louise Dickson, Dr. Sy Eber, Thomas Heintzman and William Simpson. Invited members in attendance were Senka Dukovich (Chair of the Equity Advisory Group) and Katherine Hensel (Co-Chair of Rotiio> taties). Staff members in attendance were Josée Bouchard and Trupati Patel.

10. The Committee is reporting on the following matters:

Policy - For Decision

- Alternate Discrimination and Harassment Counsel Position: Proposed Amendments to By-Law 36
- Policy Issues – Discrimination and Harassment Counsel Program

Information

- Amendments to the Equity Advisory Group's Terms of Reference
- Public Education Program Report
- Upcoming Public Education Event: Justice for Women from Ethno-Racial Communities who are Victims of Violence

ALTERNATE DISCRIMINATION AND HARASSMENT COUNSEL POSITION: PROPOSED AMENDMENTS TO BY-LAW 36

Background

11. On November 27, 2003, Convocation approved the following recommendations:

a. That the position of Alternate Discrimination Harassment Counsel (DHC) be created to assume the function of DHC when he or she is temporarily unable to fulfill his or her duties.
b. That the function of the Alternate DHC be that of the DHC, with the exception of the duty to provide semi-annual reports to the standing committee of Convocation responsible for matters relating to equity and diversity in the legal profession.
c. That the Alternate DHC provide semi-annual reports to the standing committee of Convocation responsible for matters relating to equity and diversity only when the Alternate DHC assumes the function of the DHC for an uninterrupted period of more than six months.

d. That the Alternate DHC maintain statistical information relevant to the reporting function of the DHC and provide such statistical information to the DHC on request.
e. That the Alternate DHC be bound by the duty of confidentiality outlined in By-Law 36.
f. That an appointment process for the Alternate DHC be adopted which provides that Convocation appoints to the position of Alternate DHC persons recommended by the standing committee of Convocation responsible for matters relating to equity and diversity in the legal profession.
g. That, unless modified by Convocation, the Alternate DHC function on a fee-for-services basis at an hourly rate not to exceed $175.00 and the funding level of the program will be maintained at $100,000.00.
h. That By-Law 36, other relevant By-laws and the *Rules of Professional Conduct* be amended to reflect the recommendations adopted by Convocation in this report.

12. The proposed amendments to By-Law 36 [Discrimination and Harassment Counsel] reflect the recommendations Convocation adopted on November 27, 2003.

Request to Convocation

13. That Convocation approves amendments to By-Law 36 [Discrimination and Harassment Counsel] as set out on pages 7 to 11.

THE LAW SOCIETY OF UPPER CANADA

BY-LAWS MADE UNDER
SUBSECTIONS 62 (0.1) AND (1) OF THE *LAW SOCIETY ACT*

BY-LAW 36

[DISCRIMINATION AND HARASSMENT COUNSEL]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON MARCH 25, 2004

MOVED BY

SECONDED BY

THAT By-Law 36 [Discrimination and Harassment Counsel], made by Convocation on June 22, 2001 and amended on July 26, 2001 and September 28, 2001, be further amended as follows:

1. Section 1 of By-Law 36 [Discrimination and Harassment Counsel] is deleted and the following substituted:

Appointment
1. (1) Convocation shall appoint a person as Discrimination and Harassment Counsel in accordance with section 2.

Same
(2) Convocation may appoint one or more persons as Alternate Discrimination and Harassment Counsel in accordance with section 2.1.

Term of office
(3) Subject to subsection (4), the Counsel and each Alternate Counsel hold office for a term not exceeding three years and are eligible for reappointment.

Appointment at pleasure
(4) The Counsel and each Alternate Counsel hold office at the pleasure of Convocation.

Nomination

1. (1) Le Conseil nomme une personne au poste de conseiller ou conseillère juridique en matière de discrimination et de harcèlement conformément à l'article 2.

Idem

(2) Le Conseil peut nommer une ou plusieurs personnes au poste de conseiller ou conseillère juridique substitut en matière de discrimination et de harcèlement conformément à l'article 2.1.

Mandat

(3) Sous réserve du paragraphe (4), le conseiller ou la conseillère et chaque conseiller ou conseillère substitut est nommé pour un mandat renouvelable d'une durée maximale de trois ans.

Amovibilité

(4) Le conseiller ou la conseillère et chaque conseiller ou conseillère substitut exerce ses fonctions à titre amovible.

2. The By-Law is amended by adding the following:

No appointment without recommendation

2.1 (1) Convocation shall not appoint a person as Alternate Counsel unless the appointment is recommended by the standing committee of Convocation responsible for matters relating to equity and diversity in the legal profession.

Vacancy in office

(2) If the committee wishes Convocation to appoint another person as Alternate Counsel, the committee shall give Convocation, from the most recent list of persons the committee recommended to Convocation for appointment as Counsel, a ranked list of at least two persons the committee recommends for appointment as Alternate Counsel, with brief supporting reasons.

Same

(3) If the committee is not able to give Convocation, from the most recent list of persons the committee recommended to Convocation for appointment as Counsel, a ranked list of at least two persons the committee recommends for appointment as Alternate Counsel, the committee shall,

(a) conduct a search for candidates for appointment as Alternate Counsel in accordance with procedures and criteria established by the committee; and

(b) at the conclusion of the search, the committee shall give Convocation a ranked list of at least two persons the committee recommends for appointment as Alternate Counsel, with brief supporting reasons.

Additional candidates

(4) If the committee gives Convocation a list of persons it recommends for appointment, Convocation may require the committee to give Convocation a list of additional persons who are recommended by the committee for appointment.

Recommendations considered in absence of public

(5) Convocation shall consider the committee's recommendations in the absence of the public.

Recommandation préalable

2.1 (1) Le Conseil ne doit pas nommer une personne au poste de conseiller ou conseillère substitut sans que cette nomination soit recommandée par le comité permanent du Conseil responsable des questions concernant l'équité et la diversité dans la profession juridique.

Vacance

(2) Si le comité souhaite que le Conseil nomme une autre personne conseiller ou conseillère substitut, il lui remet une liste indiquant, par ordre préférentiel, au moins deux personnes qu'il lui recommande pour ce poste en les choisissant dans la liste la plus récente des personnes qu'il lui a recommandé de nommer conseiller ou conseillère et en motivant de façon concise sa recommandation.

Idem

(3) S'il est dans l'impossibilité de remettre au Conseil une liste indiquant, par ordre préférentiel, au moins deux personnes qu'il lui recommande de nommer conseiller ou conseillère substitut en les choisissant dans la liste la plus récente des personnes qu'il lui a recommandé de nommer conseiller ou conseillère, le comité fait ce qui suit :

a) il procède au recrutement de candidats et candidates au poste de conseiller ou de conseillère substitut conformément aux procédures et critères qu'il a établis;

b) à la conclusion du recrutement, il remet au Conseil une liste indiquant, par ordre préférentiel, au moins deux personnes qu'il recommande de nommer conseiller ou conseillère substitut en motivant de façon concise sa recommandation.

Candidats supplémentaires

(4) Si le comité remet au Conseil une liste des personnes qu'il recommande en vue d'une nomination, le Conseil peut lui demander de lui remettre une liste de personnes supplémentaires qu'il recommande.

Examen des recommandations à huis clos

(5) Le Conseil examine les recommandations du comité à huis clos.

3. Section 3 of the By-Law is deleted and the following substituted:

Application of ss. 2 and 2.1

3. If Convocation, on the recommendation of the committee,

(a) reappoints the Counsel, subsections 2 (2) to (4) do not apply; or

(b) reappoints an Alternate Counsel, subsections 2.1 (2) to (4) do not apply.

Application des art. 2 et 2.1

3. Si, sur la recommandation du comité, le Conseil :

a) renouvelle le mandat du conseiller ou de la conseillère, les paragraphes 2 (2) à (4) ne s'appliquent pas;

b) renouvelle le mandat du conseiller ou de la conseillère substitut, les paragraphes 2.1 (2) à (4) ne s'appliquent pas.

4. Subsection 5 (1) of the By-Law is amended by adding at the beginning "Unless the committee directs otherwise,/Sauf directive contraire du comité,".

5. The By-Law is amended by adding the following:

Alternate Counsel: Counsel unable to act

7. (1) If the Counsel for any reason is unable to perform the function of the Counsel during his or her term in office, an Alternate Counsel shall perform the function of the Counsel.

Selection of Alternate Counsel

(2) The Alternate Counsel mentioned in subsection (1) shall be chosen by the Counsel or, if the Counsel is unable to do so, by the Chief Executive Officer.

Alternate Counsel: Counsel office vacant

(3) Despite subsection (1), if there is a vacancy in the office of the Counsel, an Alternate Counsel chosen by the committee shall perform the function of the Counsel until a Counsel is appointed under section 1.

Annual and semi-annual report to committee

(4) If the committee directs, an Alternate Counsel shall make any report mentioned in section 5.

Application of s. 6

(5) Section 6 applies to an Alternate Counsel while performing the function of the Counsel.

Conseiller substitut : empêchement

7. (1) Un conseiller ou une conseillère substitut exerce les fonctions du conseiller ou de la conseillère en cas d'empêchement de sa part pendant son mandat pour quelque raison que ce soit.

Choix du conseiller substitut

(2) Le conseiller ou la conseillère substitut visé au paragraphe (1) est choisi par le conseiller ou la conseillère ou, en cas d'empêchement de sa part, par le directeur général ou la directrice générale.

Conseiller substitut : vacance au poste de conseiller

(3) Malgré le paragraphe (1), en cas de vacance au poste de conseiller ou de conseillère, un conseiller ou une conseillère substitut exerce les fonctions de ce poste jusqu'à ce qu'un conseiller ou une conseillère soit nommé en application de l'article 1.

Présentation de rapports annuels et semestriels au comité

(4) Sur directive du comité, les conseillers ou conseillères substituts présentent les rapports prévus à l'article 5.

Application de l'art. 6

(5) L'article 6 s'applique au conseiller ou à la conseillère substitut qui exerce les fonctions du conseiller ou de la conseillère.

POLICY ISSUES - DISCRIMINATION AND HARASSMENT COUNSEL PROGRAM

A. BACKGROUND

14. The DHC has received calls from lawyers who are complaining about discrimination and/or harassment in their workplace, but not by other lawyers. For example, members complain about harassment and/or discrimination in the workplace by clients, non-member co-workers, or by non-member employers.

15. The DHC asked the Committee to consider whether Convocation should expand the mandate of the DHC to allow her or him to deal with members who complain of harassment and/or discrimination in the workplace by non-members.

16. By-Law 36 clearly indicates that the mandate of the DHC is to address harassment or discrimination by members or student members. Therefore, if Convocation were to allow the DHC to handle complaints against non-lawyers, the mandate of the DHC would have to be amended to reflect such a change.

17. Subsection 4(1) of By-Law 36 (APPENDIX 1) states that it is the function of the DHC :

a. to assist, in a manner that the Counsel deems appropriate, any person who believes that he or she has been discriminated against or harassed by a member or student member;

b. to assist the Society, as required, to develop and conduct for members and student members information and educational programs relating to discrimination and harassment; and

c. to perform such other functions as may be assigned to the Counsel by Convocation.

18. The Committee recommends that Convocation expand or clarify the mandate of the DHC to deal with members complaining of harassment and/or discrimination in the workplace by non-members. The Committee considered the following options.

B. OPTIONS

Arguments against expanding mandate

19. The mandate of the Law Society of Upper Canada (Law Society) is to regulate the legal profession in the interest of the public. The *Rules of Professional Conduct (the Rules)* have been adopted to regulate the professional conduct of members of the legal profession and not to regulate the conduct of non-members. It is beyond the mandate of the Law Society to assist members who have complaints against non-members of the profession. By-Law 36 defines the mandate of the DHC in a way that is consistent with the mandate of the Law Society and the *Rules of Professional Conduct*: to assist those who believe that there has been discrimination and harassment by a member or student. The Committee determined that some might argue against expanding the mandate of the DHC to allow her or him to deal with complaints that are beyond the jurisdiction of the Law Society and using membership fees that fund the DHC Program to do so.

Arguments in favour of expanding mandate

20. By-Law 36 reflects the original purpose of establishing the DHC Program: "to provide services aimed at enabling and supporting individuals who perceive they have been discriminated against or harassed by a member of the legal profession."[1] However, if the Law Society wishes to more effectively address issues of harassment and discrimination in the legal profession, it might extend the mandate of the DHC to include the right to provide advice to members complaining about harassment and discrimination in the workplace by non-members of the profession. This service would be beneficial to the Law Society's membership, might reduce incidences of harassment and discrimination and increase awareness of those issues. The DHC, in her presentation to the Committee, noted that it would be useful if she could provide advice to these members, as she may be in a position to address issues in an informal way and before issues escalate.

21. The DHC noted that she typically spends thirty minutes to one hour per intake call. However, she estimates that she spends more time on each call received from the public than on calls from members of the profession. The DHC also notes that the volume of calls received from members about harassment and/or discrimination in the workplace by clients, non-member co-workers, or by non-member employers is very low, from 1 to 2 calls per reporting period. Therefore, the Committee does not anticipate that a change of mandate to allow the DHC to deal with members who are complaining about discrimination and/or harassment in their workplace, but not by other lawyers would have significant financial implications for the DHC Program.

22. The Committee is of the view that, for the above-mentioned reasons, Convocation should expand the DHC's mandate to address calls from lawyers who are complaining about discrimination and/or harassment in their workplace, but not by other lawyers.

Request to Convocation

23. That Convocation approves an amendment to the mandate of the Discrimination and Harassment Counsel and of the Alternate Discrimination and Harassment Counsel to include the provision of advice to members who believe that they have been the subject of discrimination and/or harassment in the workplace by a non-member of the Law Society.

[1] See *Report on the Establishment of the Law Society of Upper Canada Discrimination/Harassment Ombudsperson,* prepared by the Equity Initiatives Department in 1998.

INFORMATION

AMENDMENTS TO THE EQUITY ADVISORY GROUP'S TERMS OF REFERENCE

Background

26. The Equity Advisory Group (EAG) has been discussing the issue of organizational membership on EAG since 1999 when it was first established as the Treasurer's Equity Advisory Group (TEAG). The Terms of Reference indicated at that time that the membership of TEAG would be no less that 15 and no more than 17 with no fewer than 5 benchers and 10 non-benchers. Minutes of meetings indicate that representatives from equity-seeking organizations concerned about equity and diversity in the legal profession would be invited to participate at TEAG meetings and would receive the agenda for each meeting.

27. It appears that organizational representation on TEAG, and later on EAG, was instituted because the Law Society found it difficult to recruit individuals from specific groups or communities. Also, it was felt that by having permanent seats for organizations there would be more continuity on TEAG.

28. Minutes of TEAG meetings indicate that organizations were given seats on TEAG for the purpose of establishing a network for information sharing amongst TEAG and these organizations.

29. At the beginning of 2000, TEAG became EAG and the Terms of Reference were amended to reflect that change. The Terms of Reference of EAG were never amended to provide for organizational representation. However, in practice, some members of EAG hold seats as representatives of organizations. For example, organizations such as Association des juristes d'expression française de l'Ontario, the Women's Law Association of Ontario, the Canadian Association of Black Lawyers and the Advocates' Society are currently members of EAG.

30. At its February 25, 2004 meeting, members of EAG approved amendments to its Terms of Reference to reflect the fact that there will be no permanent seats for organizations on EAG. However, up to half of EAG's members will be organizational representatives. The organizations will apply for membership in the same fashion as individual members and will be appointed for a three-year term.

31. At its March 11, 2004 meeting, the Committee approved the amended Terms of Reference of EAG, effective January 1, 2005.

32. Current Terms of Reference of EAG are presented at APPENDIX 2 and amended Terms of Reference of EAG are presented at APPENDIX 3

PUBLIC EDUCATION EVENTS REPORT

33. The following is a summary of two public education events held by the Equity Initiatives Department between December 2003 and February 2004.

National Day of Remembrance and Action on Violence Against Women
Beyond the Montréal Massacre: Why We Must Remember; What More We Must Do

34. On December 5, 2003, the Law Society held a staff education event to commemorate National Day of Remembrance and Action on Violence Against Women. The event was presented as part of a series of *lunch-and-learn* sessions for employees.

35. Forty staff members from all departments of the Law Society attended the event. In addition, awareness of the issue was raised among all employees of the Law Society through internal communication activities.

36. The event speaker was Irshad Manji, an acclaimed TV personality, producer, author and media entrepreneur based in Toronto.

Black History Month 2004 - Symposium on the 10th Anniversary of the Genocide in Rwanda - Promoting Human Rights and Building a Civil Society

37. On February 26, 2004, the Canadian Association of Black Lawyers (CABL) and the Law Society hosted a public education event and reception to commemorate Black History Month.

38. The symposium examined the legal, political and social issues that led to genocidal conflicts in Rwanda and their implications on human rights and society.

39. Topics included:
    a. Reconciliation and re-building in Rwanda
    b. Justice and the International Criminal Tribunal for Rwanda
    c. Displacement and re-settlement of Rwandans
    d. Input from the legal community on supporting Rwandan civil society
    e. Public response
    f. Portrait of a family survivor

40. The following individuals made presentations:
    a. Dr. Gerald Caplan, the Canadian author of "Rwanda: The Preventable Genocide", published by the International Panel of Eminent Personalities to Investigate the 1994 Rwandan Genocide, an organization appointed by the Organization of African Unity.
    b. Georgette Gagnon, an international human rights lawyer who has monitored the conditions of detention in Rwanda and provided advice on setting up a national human rights commission.
    c. Grace-Edward Galabuzzi, a professor of political science at Ryerson University who has followed the political and economic implications of the genocide in Rwanda.
    d. Léo Kabalisa, a teacher and a member of the Rwandan community in Canada; also a family member survivor.
    e. Dr. Carole Ann Reed, a member of the Rwanda Genocide 10th Anniversary Memorial Project and a former Director of the Toronto Holocaust Centre. Dr. Reed is a consultant on holocaust and genocide matters.

41. The Law Society and CABL also worked with *Remembering Rwanda: The Rwanda Genocide 10th Anniversary Memorial Project*, a widespread international network to promote the commemoration of the 10th anniversary of the genocide.

42. The symposium was attended by over 120 participants from the legal profession, governments, community organizations, and the Law Society.

43. Following the symposium, a reception was held in Convocation Hall. It was attended by over 150 people to celebrate, highlight and recognize the achievements of Black Canadians for Black History Month. Law Society Treasurer Frank Marrocco and CABL president, Sue-Lynn Noel delivered speeches at the reception.

UPCOMING PUBLIC EDUCATION EVENT

COMMUNITY FORUM: JUSTICE FOR WOMEN FROM ETHNO-RACIAL COMMUNITIES WHO ARE VICTIMS OF ABUSE AND VIOLENCE

Date: Thursday, March 25, 2004
Time: 4:00 – 6:00 p.m.
Location: Law Society of Upper Canada, Lamont Lecture Hall

The Law Society of Upper Canada and the Barbra Schlifer Commemorative Clinic are hosting a public legal education forum that will examine legal and social issues affecting women from ethno-racial communities who are victims of abuse and violence.

A panel of speakers will present topics on the criminal justice, family, civil and immigration law systems and will examine service delivery models for the community, including the provision of legal services.

Speakers include:

- Sudabeh Mashkuri, Lawyer – Barbra Schlifer Commemorative Clinic
- Janet Mosher, Parkdale Legal Services Clinic, Associate Professor – Osgoode Hall Law School
- Avvy Go, Director of Metro Toronto Chinese & Southeast Asian Legal Clinic
- Helen How, Domestice Violence Court
- A community agency representative is being confirmed.

Reception

A reception will be held after the forum to honour international women's rights. The reception will be held in Convocation Hall from 6:00 p.m. to 7:30 p.m.

APPENDIX 1

BY-LAW 36

Made: June 22, 2001
Amended: July 26, 2001
September 28, 2001

DISCRIMINATION AND HARASSMENT COUNSEL

Appointment
1. (1) Convocation shall appoint a person as Discrimination and Harassment Counsel in accordance with section 2.

Term of office
(2) The Counsel shall be appointed for a term not exceeding three years and is eligible for reappointment

Appointment at pleasure
(3) The Counsel holds office at the pleasure of Convocation.

No appointment without recommendation
2. (1) Convocation shall not appoint a person as Counsel unless the appointment is recommended by the standing committee of Convocation responsible for matters relating to equity and diversity in the legal profession.

Vacancy in office
(2) When a vacancy exists in the office of Counsel, the committee shall conduct a search for candidates for appointment as Counsel in accordance with procedures and criteria established by the committee.

List of candidates
(3) At the conclusion of the search, the committee shall give Convocation a ranked list of at least two persons the committee recommends for appointment as Counsel, with brief supporting reasons.

Additional candidates
(4) If the committee gives Convocation a list of persons it recommends for appointment, Convocation may require the committee to give Convocation a list of additional persons who are recommended by the committee for appointment.

Recommendations considered in absence of public
(5) Convocation shall consider the committee's recommendations in the absence of the public.

Application of s. 2
3. Section 2 does not apply if Convocation reappoints the Counsel under subsection 1 (2).

Function of Counsel
4. (1) It is the function of the Counsel,
(a) to assist, in a manner that the Counsel deems appropriate, any person who believes that he or she has been discriminated against or harassed by a member or student member;
(b) to assist the Society, as required, to develop and conduct for members and student members information and educational programs relating to discrimination and harassment; and
(c) to perform such other functions as may be assigned to the Counsel by Convocation.

No authority to conduct investigation
(2) Despite clause (1) (a), the Counsel has no authority to require an investigation to be conducted or to conduct an investigation under section 49.3 of the Act.

Access to information
(3) Except with the prior permission of the Secretary, the Counsel is not entitled to have any information in the records or within the knowledge of the Society respecting a member or student member.

Annual and semi-annual report to Committee
5. (1) The Counsel 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; and
(b) not later than September 1 in each year, upon the affairs of the Counsel during the period January 1 to June 30 of that year.

Report to Convocation
(2) The committee shall submit each report received from the Counsel to Convocation on the first day following the deadline for the receipt of the report by the Committee on which Convocation has a regular meeting.

Confidentiality
6. (1) The Counsel shall not disclose,
(a) any information that comes to his or her knowledge as a result of the performance of his or her duties under clause 4 (1) (a); or
(b) any information that comes to his or her knowledge under subsection 4 (3) that a bencher, officer, employee, agent or representative of the Society is prohibited from disclosing under section 49.12.

Rules of Professional Conduct
(2) For greater certainty, clause (1) (a) prevails over the Society's Rules of Professional Conduct to the extent that the Rules require the Counsel to disclose to the Society the information mentioned in clause (1) (a).

Exceptions
(3) Subsection (1) does not prohibit,

(a) disclosure required in connection with the administration of the Act, the regulations, the by-laws or the rules of practice and procedure;

(b) disclosure of information that is a matter of public record;

(c) disclosure of information where the Counsel has reasonable grounds to believe that there is an imminent risk to an identifiable individual or group of individuals of death, serious bodily harm or serious psychological harm that substantially interferes with the individual's or group's health or well-being and that the disclosure is necessary to prevent the death or harm;

(d) disclosure by the Counsel to his or her counsel; or

(e) disclosure with the written consent of all persons whose interest might reasonably be affected by the disclosure.

APPENDIX 2

TERMS OF REFERENCE OF EQUITY ADVISORY GROUP/GROUPE CONSULTATIF EN MATIÈRE D'ÉQUITÉ

CURRENT

Terms of Reference:

1. Mandate

To assist the Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones, in the development of policy options for the promotion of equity and diversity in the legal profession by:

- identifying and advising the Committee on issues affecting equity seeking communities, both within the legal profession and relevant to those seeking access to the profession;
- providing input to the Committee on the planning and development of policies and
- practices related to equity, both within the Law Society and the profession; and commenting to the Committee on Law Society reports and studies relating to equity issues within the profession

2. Appointment Process of Member of the EAG

2.1 The EAG will appoint, at the beginning of a selection process, a selection committee of no less than two members of EAG and one member of the legal profession who is not a member of the EAG. A staff member of the Equity Initiatives Department of the Law Society of Upper Canada will provide secretarial support to the selection committee.

2.2 The selection committee will adopt selection criteria, approved by the EAG, consistent with the Terms of Reference.

2.3 The EAG will invite applications for appointment to the EAG by announcing vacancies using various forms, including announcing in the Ontario Reports, emailing and/or targeted mailings to particular communities. The announcement will invite members of the profession to forward a curriculum vitae and letter of interest to the Equity Advisor of the Law Society of Upper Canada. The Equity Advisor will forward copies of the curriculum vitae and letter of interest to the Chair of the selection committee of the EAG.

2.4 The selection committee, guided by the selection criteria, will review each application and recommend candidates for appointment to EAG. The selection committee will support each recommendation by a rationale indicating how the candidate meets the criteria and the nature of the community involvement.

2.5 The applications that do not comply with the application process will not be reviewed.

2.6 EAG will consider the selection committee's recommendations and approve the recommendation of candidates by consensus. In the event that EAG cannot arrive at a consensus, EAG will approve the recommendation based on a two-third majority vote of EAG's membership.

2.7 EAG will recommend the candidates to EAIC for approval.

2.8 EAIC will forward approved names of new EAG members to Convocation along with brief biographical information.

3. Membership

3.1 The Advisory Group has no fewer than 15 members and no more than 19 members, with at least one member who may be a member of the Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones.

3.2 Members have direct experience or commitment to access and equity for equity seeking communities, including but not limited to communities of ethno racial people, people of colour, immigrants and refugees, people with disabilities, gays, lesbians, bisexuals, transgenders, and women. Such experience is in areas of employment equity, access to the legal system, human rights; anti racism, anti oppression training; managing access and equity plans, or social justice issues

3.3.1 The membership reflects gender parity and balance among the various equity seeking communities.

4. Chair and Vice-Chair

4.1 The Advisory Group has a chair and a vice-chair, who are named by the Advisory Group members.

5. Meetings

5.1 The Advisory Group meets once a month, [except in the months of July and August], with schedules and agendas being established by the co chairs in consultation with staff and the members of the Advisory Group.

5.2 Special meetings may be convened by the chair.

5.3 Members must attend meetings regularly either in person or by electronic means such as teleconference.

5.4 Failure to attend more than three consecutive meetings without explanation constitutes resignation from the Advisory Group.

6. Quorum

6.1 Four members of the Advisory Group constitute a quorum for the purposes of the transaction of business.

7. Term of Membership

7.1 The term of membership is three years, for a maximum of two consecutive terms.

7.2 To maintain continuity, not more than half the membership is changed in any year.

8. Staff

8.1 Research and administrative support is provided by the Law Society's Equity Advisor or his or her delegate.

APPENDIX 3

TERMS OF REFERENCE OF EQUITY ADVISORY GROUP/GROUPE CONSULTATIF EN MATIÈRE D'ÉQUITÉ

AMENDMENTS IN BOLD AND ITALICS

The following Terms of Reference are effective on January 1, 2005.

1. Mandate

1.1 To assist the Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones (EAIC), in the development of policy options for the promotion of equity and diversity in the legal profession by:

- Identifying and advising the Committee on issues affecting equity communities, both within the legal profession and relevant to those seeking access to the profession;
- Providing input to the Committee on the planning and development of policies and practices related to equity, both within the Law Society and the profession; and
- Commenting to the Committee on Law Society reports and studies relating to equity issues within the profession.

2. Appointment Process of Member of the Equity Advisory Group (EAG)

2.1 *The terms "member"or "members" shall mean members of the legal profession (including law students) and organizations committed to legal or justice issues.*

2.2 *The EAG has no fewer than 16 members and no more than 20 members. The EAG has no more than 10 individual members of the legal profession and no more than 10 organizational members.*

2.3 *Each organizational member shall designate one person and an alternate to act as representative for the organization.*

2.4 *The EAG shall make recommendations for appointment as follows:*

a) between 8 and 10 members shall be recommended for appointment at its first meeting of 2005; and

b) between 8 and 10 members shall be recommended for appointment every 18 months thereafter.

2.5 *The EAG may recommend new members for appointment when required to do so to maintain its membership between 16 and 20.*

2.6 *All organizational members of EAG shall cease to be members of EAG at its first meeting of 2005. Those organizations shall be entitled to apply for membership on EAG.*

2.7 All individual members of EAG shall remain members of EAG until the first meeting of 2005. Up to 10 most senior members of EAG shall cease to be members on the first meeting of 2005. Those individuals shall be entitled to apply for membership on EAG. All remaining individual members of EAG shall remain members until the second appointment of new members. They shall be entitled to apply for membership on EAG.

*2.8*The EAG will appoint, at the beginning of a selection process, a selection committee of no less than two members of EAG and one member of the legal profession who is not a member of the EAG. A staff member of the Equity Initiatives Department of the Law Society of Upper Canada will provide secretarial support to the selection committee.

2.9The selection committee will adopt selection criteria, approved by the EAG, consistent with the Terms of Reference.

2.10 The EAG will invite applications for appointment to the EAG by announcing vacancies using various forms, including announcing in the Ontario Reports, emailing and/or targeted mailings to particular communities. The announcement will invite members of the profession and organizations to forward a curriculum vitae *or an outline of the mandate and activities of the organization,* and a letter of interest to the Equity Advisor of the Law Society of Upper Canada. The Equity Advisor will forward copies of the *documents provided* to the Chair of the selection committee of the EAG.

2.11 The selection committee, guided by the selection criteria, will review each application and recommend candidates for appointment to EAG. The selection committee will support each recommendation by a rationale indicating how the candidate meets the criteria.

2.12 The applications that do not comply with the application process will not be reviewed.

2.13 EAG will consider the selection committee's recommendations and approve the recommendation of candidates by consensus. In the event that EAG cannot arrive at a consensus, EAG will approve the recommendation based on a two-third majority vote of EAG's membership.

2.14 EAG will recommend the candidates to EAIC for approval.

2.15 EAIC will forward approved names of new EAG members to Convocation along with brief biographical information.

3. *Criteria for* Membership

3.1 Members have direct experience or commitment to access and equity for Aboriginal, Francophone and/or equity seeking communities, including but not limited to communities of ethno racial people, people of colour, immigrants and refugees, people with disabilities, gays, lesbians, bisexuals, transgenders, *Francophones, Aboriginal people* and women. Such experience is in areas of employment equity, access to the legal system *and to justice*, human rights, anti racism *and* anti oppression, *equity and diversity training* or social justice issues

3.2 The membership reflects gender parity and balance among the various equity seeking communities. *The membership reflects the desirability for periodic membership change.*

3.3 The EAG has a chair and a vice-chair appointed by the EAG members.

4. Meetings

4. 1 The EAG meets once a month, [except in the months of July, August and December], with schedules and agendas being established by the Chair and Vice-Chair in consultation with staff of the Equity Initiatives Department and the members of the EAG.

4.2 Special meetings may be convened by the Chair or Vice-Chair.

4. 3 Members must attend meetings regularly either in person or by electronic means such as teleconference.

4.4 Failure to attend more than three consecutive meetings without explanation constitutes resignation from the EAG.

5. Quorum

5.1 Four members of the EAG constitute a quorum for the purposes of the transaction of business.

6. Term of Membership

6.1 The term of membership is three years. *Individual members shall serve* for a maximum of two consecutive terms. .

7. Staff

7.1 Research and administrative support is provided by the Law Society's Equity Advisor or his or her delegate.

It was moved by Mr. Simpson, seconded by Ms. Dickson that Convocation approve amendments to By-law 36 as set out on pages 7 to 11 of the Report.

Carried

Re: Amendment to Discrimination and Harassment Counsel Mandate

It was moved by Mr. Simpson, seconded by Ms. Dickson that Convocation approve an amendment to the mandate of the Discrimination and Harassment Counsel and the Alternate Discrimination and Harassment Counsel to include the provision of advice to members who believe that they have been the subject of discrimination and/or harassment in the workplace by a non-member of the Law Society.

Carried

ITEMS FOR INFORMATION

- Amendments to Equity Advisory Group's Terms of Reference
- Public Education Report
- Announcement of Public Education Event, March 25, 2004

MOTION – REAPPOINTMENT TO ONTARIO BAR ASSISTANCE PROGRAM

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

Carried

MOTION – DRAFT MINUTES OF CONVOCATION – JANUARY 22, 2004

It was moved by Mr. MacKenzie, seconded by Mr. Banack that the Draft Minutes of Convocation of January 22, 2004 be confirmed.

Carried

REPORT OF THE LITIGATION COMMITTEE

Re: Bencher Indemnification – Amendment to By-law 2

Mr. Cherniak presented the Report of the Litigation Committee.

Litigation Committee
March 25, 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 MARCH 25, 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 that is brought, commenced or prosecuted against the person 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 engagée contre eux 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.

It was moved by Mr. Cherniak seconded by Mr. Ruby that By-law 2 as set out at pages 12 to 15 of the Report be amended to add a provision requiring the Society to indemnify benchers, officers of the Society and certain other individuals.

Carried

ROLL-CALL VOTE

Aaron	Against	Hunter	For
Alexander	For	Krishna	For
Backhouse	For	Legge	For
Banack	For	MacKenzie	For
Bourque	For	Manes	For
Chahbar	For	Murray	For
Cherniak	For	O'Brien	For
Coffey	For	O'Donnell	For
Dickson	For	Pattillo	For
Doyle	For	Pawlitza	For

Dray	For	Potter	For
Eber	For	Robins	For
Feinstein	For	Ruby	For
Filion	For	Silverstein	For
Gold	For	Simpson	For
Gottlieb	For	Swaye	For
Harris	For	Symes	For
		Warkentin	For
		Wright	For

Vote: 35 For; 1 Against

Re: Mandate of Committee – Amendments to By-law 9

It was moved by Mr. Cherniak, seconded by Mr. Ruby that By-law 9 be amended to add a provision specifying the mandate of the Litigation Committee as set out at paragraphs 16 to 18 of the Report.

An amendment to By-law 9, 16.5(a) on page 17 was accepted by the mover and seconder that the words "notification of any new litigation and" be inserted between the words "Officer" and "progress".

It was moved by Mr. Gottlieb, seconded by Mr. Aaron that the Litigation Committee be required to report quarterly.

It was moved by Mr. Wright, seconded by Mr. Ruby that the Gottlieb/Aaron motion be tabled.

Carried

ROLL-CALL VOTE

Aaron	Against	Hunter	Against
Alexander	For	Krishna	For
Backhouse	For	Legge	For
Banack	Against	MacKenzie	Against
Bourque	For	Manes	Against
Chahbar	For	Murray	Against
Cherniak	Against	O'Brien	Against
Coffey	For	O'Donnell	Against
Dickson	For	Pattillo	Against
Doyle	For	Pawlitza	For
Dray	For	Potter	Against
Eber	For	Robins	Against
Feinstein	For	Ruby	For
Filion	For	Silverstein	Against
Finlayson	For	Simpson	Against
Gold	For	Swaye	Against
Gottlieb	Against	Symes	Against
Harris	For	Warkentin	Against
		Wright	For

Vote: 19 For; 18 Against

It was moved by Mr. Gottlieb, seconded by Mr. Aaron that the Cherniak/Ruby motion to adopt the amendment to By-law 9 be tabled.

Lost

ROLL-CALL VOTE

Aaron	For	Hunter	Against
Alexander	Against	Krishna	Against
Backhouse	Against	Legge	Against
Banack	Against	MacKenzie	Against
Bourque	Against	Manes	Against
Chahbar	Against	Murray	Against
Cherniak	Against	O'Brien	Against
Coffey	Against	O'Donnell	Against
Dickson	Against	Pattillo	Against
Doyle	Against	Pawlitza	Against
Dray	Against	Potter	Against
Eber	Against	Robins	Against
Feinstein	Against	Ruby	Against
Filion	Against	Silverstein	Against
Finlayson	Against	Simpson	Against
Gold	Against	Swaye	Against
Gottlieb	For	Symes	Against
Harris	Against	Warkentin	Against
		Wright	Against

Vote: 35 Against; 2 For

The Cherniak/Ruby motion as amended to add the mandate of the Litigation Committee to By-law 9 was voted on and adopted.

ROLL-CALL VOTE

Aaron	For	Hunter	For
Alexander	For	Krishna	For
Backhouse	For	Legge	For
Banack	For	MacKenzie	For
Bourque	For	Manes	For
Chahbar	For	Murray	For
Cherniak	For	O'Brien	For
Coffey	For	O'Donnell	For
Copeland	For	Pattillo	For
Dickson	For	Pawlitza	For
Doyle	For	Potter	For
Dray	For	Robins	For
Eber	For	Ruby	For
Feinstein	For	Silverstein	For
Filion	For	Simpson	For
Finlayson	For	Swaye	For
Gold	For	Symes	For
Gottlieb	For	Warkentin	For
Harris	For	Wright	For

Vote: 38 For

Convocation adjourned into a committee of the whole.

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IN CAMERA

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IN CAMERA Content Has Been Removed

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IN PUBLIC

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Convocation was reconvened.

It was moved by Mr. Hunter, seconded by Mr. Cherniak that RESOLVED THAT for the purpose of considering the following motion, the notice of motion request to Convocation be suspended.

Carried

HUNTER/CHERNIAK MOTION

It was moved by Mr. Hunter, seconded by Mr. Cherniak that:

RESOLVED THAT

(i) The Law Society consider the presentation of a response to the Department of Constitutional Affairs, Government of the United Kingdom's paper entitled "Review of the Regulatory Framework for Legal Services in England and Wales";

(ii) For that purpose the Interjurisdictional Mobility Committee be mandated to draft a response, and for that purpose be empowered to engage such internal resources of the Society as may be required;

(iii) The draft response be presented to the May 2004 Convocation for consideration and approval, given a deadline of June 4, 2004 for submission.

Carried

REPORTS FOR INFORMATION ONLY

ACCESS TO JUSTICE COMMITTEE REPORT

- Report on the Law Society Support of the University of Toronto Panel on Rights of Victims of Torture

LITIGATION COMMITTEE REPORT

- Supreme Court of Canada Decision in *CCH Ltd. V. Law Society of Upper Canada*

Access to Justice Committee
March 25th, 2004

Report to Convocation

Purpose of Report: Information

Prepared by the Policy Secretariat
Julia Bass 416 947 5228

FOR INFORMATION

PUBLIC PANEL ON REMEDIES FOR VICTIMS OF TORTURE

1. The Law Society has agreed to co-sponsor an event being organized in Toronto to address the needs of Canadians who have been the victims of torture. Organizers for the event include Human Rights Watch (Toronto Committee) and the University of Toronto Faculty of Law, International Human Rights Programme.

2. The tentative date for the event is September 2004; the final date will be designed to accommodate the schedule of the Minister of Justice, the Honourable Irwin Cotler, or the Minister of Foreign Affairs, the Honourable Bill Graham.

3. The agenda for the meeting will include discussion of:
    a. Amending the *State Immunity Act*, RSC 1985, to create an exception for torture and other grave human rights violations.

    b. Private law remedies against torturers, including the possibility of tort actions.

    c. Whether Canada should sign the *Optional Protocol One to the Convention against Torture*. The *Optional Protocol* proposes the creation of an international monitoring mechanism that will enable the effective implementation of the UN Convention Against Torture. Its objective is to enhance the worldwide protection of persons deprived of liberty from torture and other cruel and degrading treatment or punishment.

4. The panel discussion will be open to the public; attendance will include parliamentarians, law professors, human rights advocates and interested lawyers, with the objective of promoting discussion and educating the public.

5. The principal expenses for the event will be travel costs and accommodation for some of the participants. Two thirds of the expenses will be contributed by the University of Toronto Faculty of Law and Human Rights Watch (Toronto Committee). The Law Society has agreed to co-sponsor the event to add prominence to the list of sponsors, and to contribute $2,500 to expenses.

Litigation Committee

March 25, 2004

Report to Convocation

Purposes of Report: Information

Prepared by Legal Affairs
(Elliot Spears: 416-947-5251)

THE REPORT

Terms Of Reference/Committee Process
1. The Committee is reporting on the following matters:

For Information
· Decision of the Supreme Court of Canada in CCH Canadian Ltd. v. Law Society of Upper Canada

INFORMATION

DECISION OF THE SUPREME COURT OF CANADA
IN
CCH CANADIAN LTD. V.
LAW SOCIETY OF UPPER CANADA

A. BRIEF SUMMARY OF DECISION

2. On March 4, 2003, the Supreme Court of Canada released its decision in CCH Canadian Ltd. v. Law Society of Upper Canada.

3. At issue in the case, in very general terms, was whether the Society infringed copyright when a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise was made by staff of the Great Library (for a patron of the Great Library), or by a patron of the Great Library, for research purposes. The Great Library provides a request-based photocopy service for its patrons. Under the service, staff of the Great Library will photocopy for a patron a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise and deliver the copy to the patron, in person, by mail or by facsimile transmission. The Great Library also maintains self-service photocopiers for use by its patrons.

4. The court found that the Society does not infringe copyright when a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise is made by staff of the Great Library (for a patron of the Great Library) for research purposes. The court gave "research" a large and liberal interpretation to ensure that "research" is not restricted to non-commercial or private contexts. The court found that a lawyer who carries on the business of law for profit is conducting research within the meaning of the Copyright Act (Canada). Photocopying for a lawyer carrying on the business of law constitutes "fair dealing" within the meaning of the Copyright Act and, thus, does not amount to copyright infringement.

5. The Society also does not authorize copyright infringement by maintaining self-service photocopiers in the Great Library for use by its patrons, with a posted notice warning patrons that the Society will not be responsible for copies made that do infringe copyright.

6. The court also found that a publisher has copyright in the headnote and case summary of a reported decision. The court also found that a publisher has copyright in the topical index and compilation of

reported judicial decisions. However, a publisher has no copyright in a decision itself, that is, in a reported decision without a headnote or case summary.

7. A copy of the court's decision is attached at TAB 1.

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

(1) In camera portion in Report.

(page 5)

(2) Copy of the Court's decision in *CCH Canadian Ltd. V. Law Society of Upper Canada.*

(TAB 1, pages 6 – 29)

CONVOCATION ROSE AT 12:40 P.M.

Confirmed in Convocation this 22nd day of April, 2004.

Treasurer