

MINUTES OF SPECIAL CONVOCATION

Thursday, 30th March, 2000  
2:00 p.m.

PRESENT:

The Treasurer (Robert P. Armstrong, Q.C.), Arnup, Backhouse, Carey, Carpenter-Gunn, R. Cass, Cherniak, Copeland, Cronk, Crowe, DiGiuseppe, E. Ducharme, Epstein, Furlong, Gottlieb, Hunter, Krishna, Laskin, MacKenzie, Manes, Millar, Mulligan, Murray, Pilkington, Porter, Potter, Puccini, Simpson, Swaye, Topp, Wilson and Wright.

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The reporter was sworn.

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IN PUBLIC

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TREASURER'S REMARKS

The Treasurer noted with regret the passing of Madam Justice Judith Bell, a former Bencher of the Law Society who died this month. On behalf of the Benchers the Treasurer extended condolences to Justice Bell's family.

ADMISSIONS COMMITTEE

Ms. Backhouse asked for Convocation's approval to reduce Phase III of the Bar Admission Course from a 12 week course to a 10 week course.

It was moved by Ms. Backhouse, seconded by Mr. Millar that Phase III of the Bar Admission Course be reduced from 12 weeks to 10 weeks.

Carried

MOTION - Committee Appointments

The Treasurer advised that he had accepted the resignations of Ms. Ross and Ms. Puccini as Co-Chairs to the Equity & Aboriginal Issues Committee. On behalf of Convocation he thanked them both for their hard work.

It was moved by Ms. Laskin, seconded by Mr. Swaye that Paul Copeland be appointed as Chair and George Hunter and Judith Potter as Vice-Chairs of the Equity & Aboriginal Issues Committee.

Carried

REPORT OF THE PROFESSIONAL DEVELOPMENT & COMPETENCE COMMITTEE

Ms. Cronk presented the Report for Convocation's approval.

Re: A Consultation Document on Implementing the Law Society's Competence Mandate

Professional Development & Competence Committee  
March 30, 2000

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Report to Convocation

Purpose of Report: Decision

Prepared by the Policy Secretariat  
(Sophia Sperdakos 947-5209)

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Professional Development and Competence Committee ("the Committee") met on March 16, 2000. Committee members in attendance were Eleanore Cronk (Chair), Ron Manes (Vice-Chair), Kim Carpenter-Gunn, Dino DiGiuseppe, Greg Mulligan, and Marilyn Pilkington. Staff in attendance were Scott Kerr, Gord Lalonde, Janine Miller, Felecia Smith, Sophia Sperdakos, Ursula Stojanowicz, and Richard Tinsley. Although unable to attend the meeting, Committee members Earl Cherniak (Vice-Chair), Stephen Bindman, and Margaret Ross provided comments, in advance of the meeting, on the consultation document discussed below.
2. The Committee is reporting on the following matters:  
  
Policy - For Decision
  - A consultation document on implementing the Law Society's competence mandate

POLICY - FOR DECISION

A CONSULTATION DOCUMENT ON IMPLEMENTING THE LAW SOCIETY'S COMPETENCE MANDATE

1. As part of the recommendations of the second Competence Task Force, approved by Convocation in April 1999, the Professional Development and Competence Committee is to develop, for Convocation's approval, all policy matters related to the competence scheme in Part II of the *Law Society Act* as well as all post-call competence-related policies beyond those legislatively mandated.
2. The Committee has been considering the issues related to implementing the Law Society's competence mandate. In September it established a working group to assist it in developing a proposed consultation document for Convocation's consideration. The purpose of such a document is to inform the profession of changes to, and developments concerning, the Law Society's competence mandate, canvass the issues relevant to the implementation of the Law Society's overall competence mandate, outline possible models for such implementation, and seek input thereon.

3. Tab 1 contains a draft document entitled *Implementing the Law Society's Competence Mandate: A Consultation Document*, for Convocation's consideration.
4. Tab 2 contains a draft Book of Appendices, that explores in further detail some of the issues highlighted in the consultation document, for Convocation's consideration.

Request to Convocation

5. Convocation is requested to consider the consultation document at Tab 1 and, if appropriate, approve it for distribution to the profession.
6. Convocation is further requested to consider, and if appropriate, approve the Book of Appendices at Tab 2, together with the consultation document, for distribution to legal organizations and professional and public groups, and to be made available on the Law Society's web site, in all county libraries, the Great library, and upon request.

March 2000

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Implementing the Law Society's Competence Mandate:  
A Consultation Document

Report for Convocation's Consideration

TABLE OF CONTENTS

A CONTINUING COMMITMENT TO COMPETENCE: A CALL TO THE PROFESSION .....	3
Why You Should Read This Document .....	3
What This Means To You .....	3
The Law Society's Competence Mandate .....	5
Purpose of this Consultation Document .....	6
Evolution of the Law Society's Competence Mandate .....	7
Expanded Competence Mandate .....	8
a) The First Foundational Aspect .....	8
b) The Second Foundational Aspect .....	9
Moving Forward .....	10
Quality Assurance and Quality Improvement .....	12
Common Approaches to Quality Assurance and Quality Improvement .....	14

Competence Guidelines .....	16
a) Guidelines Articulating Acceptable Performance .....	16
b) Best Practices Guidelines .....	17
Possible Competence Models .....	18
Model One: Formulation of a Continuum of Professional Development .....	19
Noteworthy Features of a Professional Development Continuum Model .....	21
Issues to be Addressed .....	21
Model Two: Random / Focused Practice Review .....	22
a) Focused Practice Review .....	22
b) Random Practice Review .....	22
Noteworthy Features of a Practice Review Model .....	24
Issues to be Addressed .....	24
Model Three: Limited Licencing .....	25
a) General Requirement of Limited Licences .....	26
b) Time or Situation Limitations on Licences .....	26
Noteworthy Features of a Limited Licencing Model .....	27
Issues to be Addressed .....	27
Model Four: Broadly-Based Specialist Certification .....	28
Noteworthy Features of a Revised Specialist Certification Model .....	29
Issues to be Addressed .....	29
Ongoing Work .....	30
Description Of Book Of Appendices .....	31
Appendix 1: Summary of Previous Law Society Competence-Related Work .....	31
Appendix 2: Issues Related to Self-Regulation .....	31
Appendix 3: Common Approaches to Quality Assurance .....	31
Appendix 4: Summary of Quality Assurance / Competence Measures Used by Other Professions and Other Legal Jurisdictions .....	31
Appendix 5: Excerpt from the 1997 Report of the MCLE Subcommittee <i>Post-call Learning for Lawyers</i> .....	31
Appendix 6: Common Features of Random Practice Review Programs .....	31
GLOSSARY OF QUALITY ASSURANCE/IMPROVEMENT APPROACHES .....	32
CONSULTATION SURVEY QUESTIONS .....	34
A CONTINUING COMMITMENT TO COMPETENCE: A CALL TO THE PROFESSION	

### Why You Should Read This Document

The Law Society is embarking on an initiative to enhance the legal profession's long-standing commitment to quality and competence. Over the past 25 years, the profession and the environment in which lawyers work have undergone many changes. As change continues to occur, and the environment becomes more complex, new strategies are needed to ensure that the legal profession thrives in the 21<sup>st</sup> century. Our legal profession is not alone in facing the challenges of change. Other professions have been moving to ensure that their commitment to quality keeps pace with a dynamic environment. The Law Society's own legislative mandate to address competence issues has recently been expanded. The Law Society is committed to developing strategies that further its mandate to govern in the public interest and support lawyers' commitment to competence and quality.

The Law Society's initiative is about building upon the commitment you make to professional competence and ensuring you have the necessary tools to maintain and enhance your competence, in the interest of the public and the profession. As you read this document, you will see that the Law Society is exploring a number of possible models for implementing its competence mandate. This document is the first step in identifying for the profession the issues and the models under discussion. It is your first opportunity to have input into the process, at its earliest stage.

### What This Means To You

The legal profession plays a fundamental role in society in ensuring that the values reflected in our legal system are preserved. Every day, thousands of lawyers in the province of Ontario advance that fundamental role in numerous ways both in service to individual, corporate, or government clients and in non-practice environments. It is a demanding, crucial role, with constitutional implications, that places the legal profession in the forefront of public scrutiny and challenges its members to meet the highest standards of competence in everything they do. The profession takes this critical role seriously and over the years lawyers and the Law Society have recognized the need to adapt their skills and approaches to reflect a changing society.

Competence and quality are, and must continue to be core requirements of the legal profession. They are central to self-regulation and the independence of the bar. For the public and government to continue to entrust control over the profession to lawyers themselves, there must be demonstrable and continuing evidence of the commitment to competent, quality service.

The Law Society's decision to move forward with the development of a comprehensive competence model arises from the following considerations:

- Although initial pre-call education provides the foundation for a legal career, it is unrealistic to expect it to prepare lawyers for all their future functions and work.
- The legal profession already recognizes the importance of a commitment to career-long learning and professional development in the interest of quality.
- In a competitive, changing environment the legal profession must continue to find ways to serve the public effectively to ensure its continued relevance and leadership in the delivery of legal services.
- Tools and mechanisms designed to foster quality service have been adopted with success in business and professional environments. These have benefited both the users of the services and those who provide them. Such tools and mechanisms have the dual goal of supporting the vast majority of service providers in enhancing their competence and providing remedial assistance to those demonstrating competence-related deficiencies.
- To offer "cutting-edge" service in a highly competitive environment, lawyers must have those tools and mechanisms readily available to them. The relevance of lawyers to those who use their services depends upon their ability to offer the highest quality of service.
- The Law Society's role in competence is a pro-active one designed to benefit the public in whose interests it regulates. The Law Society will provide those tools and mechanisms that support lawyers in their efforts to provide quality service, and will ensure compliance.

Developing a competence model will ensure that the profession's existing, strong commitment to quality is visible, relevant, and directed towards a future in which lawyers will continue to lead.

### The Law Society's Competence Mandate

*Law Society Act* (the "*Act*") amendments, proclaimed in February 1999, introduced a number of important changes and additions to the Law Society's regulatory authority.

Significant among these changes is the expansion of the Law Society's authority and obligation to regulate competence, both in the public interest and that of the profession at large. The *Act* now provides that, under specified circumstances, the Law Society may require members to participate in a review of their practices and may initiate a competence proceeding in respect of a member.

In recent years the Law Society also determined to adopt a pro-active, preventive approach to member competence designed to support members in their efforts to provide quality service and legal work.

The Law Society must now implement its expanded competence mandate. This mandate complements, but does not replace, the primary responsibility of lawyers to maintain and enhance their own competence throughout their careers. That responsibility has always been, and continues to be, a hallmark of a self-regulated profession. Legal education in substantive and procedural law, skills, values, and judgment, and in professional responsibility and ethics is intended to provide members of the profession with the necessary foundation for career-long learning and experiential growth.

Implementing its competence mandate will provide the Law Society with,

- the scope for supporting and assisting members in their commitment to maintaining and enhancing their own competence; and
- the tools necessary to address instances in which a member's competence to provide quality services to the public is in issue.

The importance of the Law Society's statutory mandate concerning competence and its commitment to a pro-active approach cannot be overstated. To discharge its responsibilities to the public and the profession the Law Society must introduce systemic measures for fostering, measuring, and monitoring competence and the quality of legal services.

It is of fundamental importance to the future of the legal profession in Ontario that the competence model adopted by the Law Society in the 21<sup>st</sup> century be comprehensive, integrated with the Law Society's other regulatory responsibilities and programs, and informed by the profession's and the public's advice.

The Law Society strongly urges you to consider the matters raised in this consultation document and to participate in this consultation process. The Law Society wishes to ensure that potential competence models, and Convocation's ultimate debate and decision-making on competence issues, are informed by and responsive to a broad range of views.

## II

### Purpose of this Consultation Document

This document is the first step in the Law Society's consultation process concerning its competence-related responsibilities. It is being distributed to all members to assist them in participating in the consultation process. A Book of Appendices, which provides additional detail on some of the matters discussed in this consultation document, along with the consultation document, are being provided to legal organizations and professional and public groups, and will be available on the Law Society's web site, in all county libraries, the Great Library, and upon request.

The Law Society will also conduct a variety of direct consultations and focus group meetings in various locations throughout the province during the fall of 2000. Times and locations for those consultations will be provided in the *Ontario Reports*, the *Ontario Lawyers' Gazette*, and on the Law Society web site.

The Law Society urges the profession to take this opportunity to engage in a full discussion on the issue of implementing the Law Society's competence mandate and to provide input to the Law Society on possible competence models.

### III

#### Evolution of the Law Society's Competence Mandate

The Law Society's responsibility to govern the legal profession in the public interest includes upholding and advancing the base principles that justify self-regulation. The methods used to discharge this responsibility have evolved over the decades to reflect the changing societal context in which the profession exists.

Traditional measures directed at promoting competence have included pre-call legal education, the bar admission course, continuing legal education, and the library system. Historically, the Law Society has addressed member *incompetence* through discipline proceedings initiated when a member's deficiencies arguably constituted professional misconduct. The sufficiency of this approach began to be questioned in the 1980s. By that time discipline proceedings had begun to be perceived as too blunt an instrument to deal with lawyer incompetence, particularly because,

- harm or potential harm to the public may exist before the regulator is ever involved; and
- the range of measures available to address incompetence only incidentally include remedial approaches.

In the last fifteen years the Law Society has undertaken a number of initiatives and programs reflective of a growing belief that *pro-active*, *preventive*, and *remedial* tools are necessary components of an effective approach to competence. These include,

- a practice advisory service to answer telephone inquiries on practice-related and ethical matters (1980);
- a voluntary practice review program to provide assistance to members with practice deficiencies (1988);
- a specialist certification program to accredit as specialists those members who have attained defined levels of expertise in identified practice areas (1986);
- the development of practice checklists to provide guidance on approaches to practice in specific practice areas (1988); and
- development of a comprehensive definition of "the competent lawyer" (1997). (See box.)<sup>1</sup>

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<sup>1</sup> More information on these and other initiatives is contained in Appendix 1 of the Book of Appendices.

*Definition of the Competent Lawyer*

*A competent lawyer has and applies relevant skills, attributes, and values in a manner appropriate to each matter undertaken on behalf of a client. These include:*

- i. knowing general legal principles and procedures, and the substantive law and procedure for the areas of law in which the lawyer practices;*
- ii. investigating facts, identifying issues, ascertaining client objectives, considering possible options, and developing and advising the client as to appropriate course(s) of action;*
- iii. implementing the chosen course of action through the application of appropriate skills including:*
  - (a) legal research,*
  - (b) analysis,*
  - (c) application of the law to the relevant facts,*
  - (d) writing, and drafting,*
  - (e) negotiation,*
  - (f) alternative dispute resolution,*
  - (g) advocacy, and*
  - (h) problem solving ability**as each matter requires;*
- iv. communicating in a timely and effective manner at all stages of the matter;*
- v. performing all functions conscientiously, diligently, and in a timely and cost effective manner;*
- vi. applying intellectual capacity, judgment, and deliberation to all functions;*
- vii. complying in letter and in spirit with the Rules of Professional Conduct;*
- viii. recognizing limitations in one's ability to handle a matter, or some aspect of it, and taking steps accordingly to ensure the client is appropriately served;*
- ix. managing one's practice effectively;*
- x. pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and*
- xi. adapting to changing professional requirements, standards, techniques, and practices.*

IV

Expanded Competence Mandate

The Law Society's competence mandate has two foundational aspects: an expanded legislative authority to regulate competence; and a commitment to a pro-active approach to competence.

a) The First Foundational Aspect

The 1999 legislative amendments that expanded the Law Society's statutory competence mandate address incompetent performance. Specifically, section 41 of the *Act* provides that a member fails to meet standards of professional competence if,

- (a) there are deficiencies in,*
  - (i) the members's knowledge, skill, or judgment,*
  - (ii) the member's attention to the interest 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.*

Two features of the statutory provisions relating to competence should be emphasized. The first relates to the process of directing a practice review where there are reasonable grounds for believing that a member has failed or is failing to meet standards of professional competence as defined in the *Act*, such that the *quality of service* to clients may be adversely affected. The second relates to provisions authorizing the Law Society to conduct a competence hearing, that is, to apply to a Hearing Panel for a determination of whether the member is failing or has failed to meet the defined standards of competence.

The primary goal of the practice review process is to assist members who have competence-related difficulties. Under this process, the member is given the opportunity to address and rectify practice and client service problems, rather than face discipline proceedings as they might have in the past. Depending upon the outcome of a competence proceeding, the Hearing Panel may make a wider range of remedial orders than would have been available in a discipline proceeding. Under either process a number of remedial steps are statutorily authorized, including that the member,

- institute new records, systems or procedures in his or her practice;
- obtain professional advice with respect to the management of his or her practice;
- retain the services of a person qualified to assist in the administration of his or her practice;
- participate in specified programs of legal education or professional training or other programs to improve his or her professional competence; or
- restrict his or her practice to specified areas of law.

The *Act* makes it clear, however, that where the public interest requires more intrusive intervention members may be suspended, ordered to work under supervision, or ordered to obtain, or continue, treatment or counselling for such problems as addiction to or excessive use of alcohol or drugs.

b) The Second Foundational Aspect

In the last three years the Law Society has established two competence task forces to consider its approach to competence. The first Task Force developed the definition of the "competent lawyer" described above, which Convocation approved in 1997. The report of the Law Society's second competence Task Force recommended that steps be taken to develop a blueprint for the Law Society's role in developing, maintaining, improving, and enforcing competence in the profession. The following principles, articulated in the report and approved by Convocation in 1999, reflect the context for implementing of the Law Society's competence mandate:

- *The Law Society should clarify the competence-related obligations of members under the Law Society Act and in particular, the competence sections of Part II of the Act.*
- *The Law Society should support lawyers in their efforts to meet their responsibility to maintain competence.*
- *Quality of service should be a major element of the Law Society's interest in competence.*
- *The Law Society's mandate should and does include a responsibility to ensure that the public is served by competent lawyers.*
- *The Law Society's approach to its competence mandate should be proactive and wide-ranging.*
- *The clear articulation of competence standards is an essential component of the Law Society's mandate.*

- *The competence definition underlies the development of standards and competence-related activities.*

V

Moving Forward

No decisions have been made on the approach or combination of approaches to be adopted by the Law Society to fulfill its competence mandate. The Law Society considers this to be an issue upon which member and public input is essential. All members are encouraged to provide input and to respond to some or all of the questions that follow at the end of this document.

To fulfill its competence mandate, the Law Society must administer, approve, monitor, and enforce a combination of activities, policies, and requirements whose overall purpose is to ensure that the public is *served* by competent lawyers. The Law Society's Role Statement reflects this objective. It provides as follows:

*The Law Society of Upper Canada exists to govern the legal profession in the public interest by,*

- *ensuring that the people of Ontario are served by lawyers who meet high standards of learning, competence, and professional conduct; and*
- *upholding the independence, integrity and honour of the legal profession,*

*for the purpose of advancing the cause of justice and the rule of law.*

Commentary 5.3 of the Role Statement confirms that the Law Society has "an obligation to ensure that its members *continue* to be fit [to practise], qualified, and competent".

Through the introduction of mandatory practice review and competence hearings, the new legislative amendments add a new component to the Law Society's competence mandate. It is important to emphasize, however, that the vast majority of members will never demonstrate performance that requires either a practice review or a competence hearing. Accordingly, the other components of the mandate should consist of mechanisms that,

- support all members in their pursuit of competence; and
- encourage and demonstrate that the profession is providing quality service.

Currently, the Law Society's competence-related initiatives and programs consist of,

- voluntary continuing legal education ("CLE");
- the county and district libraries and the Great Library;
- the teaching component of the bar admission course;
- specialist certification;
- the re-organization of advisory services to include a more pro-active approach to advice services, an enhanced law practice start-up workshop, and development of practice management tools;
- practice review and competence hearings; and
- requalification for those not making substantial use of legal skills for a specified period.

Each of these initiatives or programs to date has operated more or less autonomously, rather than as an integrated part of an overall competence model. The following factors contribute to the need for a specific, integrated competence model:

- Principles of risk avoidance point to the importance of quality assurance measures in reducing professional liability claims. An increase in such measures can further assist in improving the quality of practice, while working simultaneously to reduce liability exposure.
- Unless the Law Society and members demonstrate their ability to assure the availability of competent legal services there is a real risk of losing or having limitations imposed on the right to self-regulation.<sup>2</sup>
- There is a growing recognition within the profession that serious attention must be paid to addressing competence and creating tools to oversee the quality of service. This contrasts with the traditional view that once having obtained a licence to practise, it was not necessary to formally monitor a member's competence thereafter.
- If the new legislative provisions and the definition of the competent lawyer are to be useful mechanisms for addressing competence, they must exist within a well developed framework.
- The *Legal Aid Services Act*, which affects a significant portion of the Law Society's members who are legal aid service providers, clinic lawyers, or duty counsel, contains a requirement for a quality assurance program. The substance of the program is not yet defined, but includes the option of conducting "quality audits" (also undefined). Under that statute, the Legal Aid Corporation cannot conduct the audits of lawyers, but is empowered to direct the Law Society to do so. The Law Society must be positioned to participate in developing and carrying out such audits.

## VI

### Quality Assurance and Quality Improvement

Quality assurance measures are planned and systematic actions developed to provide the user of a service with adequate confidence that the service will satisfy requirements for quality. It involves a retrospective review or inspection of services intended to identify problems and provide tools to address them.

Quality improvement involves the continuous study and improvement of processes and practices. Applied to professions, it entails continuous analysis and improvement of the components that make up professional practice or work.

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<sup>2</sup>Further information on the threats to self-regulation in England and Wales and in New South Wales, Australia and concerning changes to self-regulation in the medical profession in Ontario and elsewhere, is set out in Appendix 2 of the Book of Appendices. It is fair to observe that the privilege of self-regulation of solicitors in England and Wales and in New South Wales, Australia has come under serious review and by some, under attack. In Ontario, it is also of interest that an arm's length review is currently being undertaken of the quality assurance program of the College of Physicians and Surgeons of Ontario, focusing particularly on that regulator's handling of complaints.

Quality assurance and quality improvement are the terms some professions use to describe their methods for promoting competence. These concepts are not new in the private sector. The interest in quality service has resulted in the development of a variety of international quality standards to which companies must conform if they wish to receive internationally recognized ratings of excellence, such as "ISO" ratings.<sup>3</sup>

Quality assurance focuses on ensuring compliance with clearly established standards. Quality improvement addresses both compliance with clearly established standards and development of tools designed to facilitate improved practices.

Both types of measures focus on creating systems for promoting quality and developing techniques that can be applied repeatedly to minimize the risk of inadequate performance. The purpose of such measures is to support a professional environment in which,

- the vast majority of members provide quality service and work within the ethical framework that underlies the profession;
- fewer members fall below acceptable levels of service and professionalism;
- those who do fall below acceptable levels are identified as early as possible and are quickly and efficiently provided with remedial measures; and
- members who are unable or unwilling to change are removed from areas of practice or positions in which they can do harm.

Consideration of quality assurance and quality improvement measures in the context of the Canadian legal profession is not new. The 1996 report of the Canadian Bar Association National Task Force on Systems of Civil Justice, adopted by the National Council of the CBA in early 1997, made specific recommendations with respect to quality assurance. The report recommended that,

- lawyers develop quality assurance programs and standards so that clients are able to evaluate the legal services provided;
- the CBA develop and promote a model statement of client rights and responsibilities, provide analysis and information to establish quality assurance programs and standards, and develop model quality assurance programs and standards; and
- law societies take the necessary steps to place greater emphasis on the enforcement of competence standards and, where necessary, seek legislative amendments to permit them to do so.

The Law Society must consider whether to focus on a competence model that emphasizes quality assurance, quality improvement, or some combination of the two.

## VII

### Common Approaches to Quality Assurance and Quality Improvement

The following charts compare approaches to competence and quality of service used by a number of professions, including the legal profession in Canada and other selected jurisdictions. Many of the professions follow a combination of approaches, or are in a state of transition and are considering a number of options. The choice of which approach to adopt usually involves balancing views about quality assurance, quality improvement, priorities, and allocation of

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<sup>3</sup>These ratings, developed by the Geneva-based International Organization for Standardization, consist of a set of 20 internationally recognized standards for quality assurance. These standards are general statements in a variety of areas such as management, client relations, staff relations, and training. They can be adapted to whatever industry or profession seeks to apply them. The major task for those seeking the rating is to examine their operation, agree on the appropriate standards for each of the areas and then comply with those standards.

resources. The following list of common approaches, used alone or in combination, is not exhaustive, but reflects common trends and means used to promote quality:

- Continuing Education (mandatory or voluntary)
- Limited Licencing
- Specialist Certification
- Random Practice Review<sup>4</sup>
- Focused Practice Review
- Reflective Practice and Self-Assessment Tools
- Publications of Standards and Guidelines for Practice
- Voluntary Practice Standards Accreditation
- Re-Testing
- Discipline/Competence Proceedings for those Demonstrating Incompetence

The *glossary* at the end of this document describes each approach and indicates whether it is primarily a quality assurance or quality improvement measure. The charts that follow indicate the approaches used by a number other professions and other legal jurisdictions, where known.<sup>5</sup>

CHART 1: Approaches to Professional Competence and Quality used by Provincial Law Societies in Canada, Australia(New South Wales -NSW), England and Wales (EW), United States (US)

	BC	Alta	Sask	Man	Ont	Que	PEI	NB	NS	Nfld	NSW	EW	US
Mandatory CLE											x	x	38
Specialist Certification					x						x	x	x
Limited Licences <sup>6</sup>											x	x	
Random Practice Inspection <sup>7</sup>		x				x							
Practice Review	x	x			x	x							
Reflective Practice													
Practice Guidelines/Checklists	x				x								

<sup>4</sup>Random practice inspection is referred to as random peer assessment by some professions. Both programs allow for the inspection/assessment to be conducted by practitioners who work in similar fields and practices as the member being inspected. These programs can be contrasted with focused practice review programs, which are targeted to address those with identified competence-related deficiencies. In this consultation document the term "random practice review" is used to refer to the inspection of practices or work environments chosen randomly throughout the profession. The term "focused practice review" refers to the inspection of practices or work environments specifically chosen because of evidence of actual or likely competence-related deficiencies.

<sup>5</sup>More detailed information on each of these approaches and their uses in various jurisdictions and professions is contained in Appendices 3 and 4 of the Book of Appendices.

<sup>6</sup>This column refers only to practice requirements or pre-requisites applicable to all members, not to restrictions placed on barristers/solicitors as a result of conduct, capacity, or competence proceedings.

<sup>7</sup>Alberta and Ontario conduct random spot audits of financial books and records.

Voluntary Practice Standards Accreditation											x	x	
Periodic Mandatory Re-testing													
Discipline/Competence Proceedings	x	x	x	x	x	x	x	x	x	x	x	x	x

CHART 2: Approaches to Professional Competence and Quality Used by Other Professions in Ontario <sup>8</sup>

	CPSO	CNO	RCDS	RCPSC	ICAO	CGA	CIA	OAA	PEO	CTO
Mandatory CLE			x	x		x	x	x		
Specialist Certification	x		x	x						
Limited Licencing	x	x	x	x						
Random Practice Inspection	x		x		x	x				
Practice Review	x	x	x		x					
Reflective Practice		x		x						
Practice Guidelines	x	x			x	x	x	x	x	
Voluntary Practice Standards Accreditation		x			x					
Periodic Mandatory Re-testing										
Discipline/Competence Proceedings	x	x	x	x	x	x	x	x	x	x

## VIII

## Competence Guidelines

Under any competence model, competence guidelines will play an important role. Practice guidelines used by other professions generally consist of two types, namely,

- those that articulate acceptable performance in given areas; and
- those that articulate "best practices" or recommended performance with a view to raising overall levels of performance across the profession.

The former type of guideline is used as a quality assurance tool; the latter is more often viewed as a voluntary quality improvement measure. Both types are discussed below.

a) Guidelines Articulating Acceptable Performance

In view of the provisions of the *Act* that expressly provide for the assessment of member competence, the Law Society must develop recognized and accepted performance guidelines against which member performance in pre-determined

<sup>8</sup> CPSO = College of Physicians and Surgeons of Ontario  
 RCDS = Royal College of Dental Surgeons of Ontario  
 ICAO = Institute of Chartered Accountants of Ontario  
 CIA = Canadian Institute of Actuaries  
 PEO = Professional Engineers of Ontario

CNO = College of Nurses of Ontario  
 RCPSC = Royal College of Physicians and Surgeons of Canada  
 CGA = Certified General Accountants of Ontario  
 OAA = Ontario Association of Architects  
 CTO = College of Teachers of Ontario

areas can be evaluated. Guidelines will assist members to know what the Law Society expects of them. They will also inform the public of the service and quality expectations to which the profession is committed.

If the language of the *Act* is used as an indication of specific areas in which guidelines could be developed, these could include some or all of the following:

- members' knowledge, skill, or judgment;
- members' attention to the interest of clients;
- the records, systems, or procedures of members' practices; or
- other aspects of members' practices.

Guidelines concerning these subject areas would serve as a preventive tool (if members are made aware of approaches they should take to issues they may avoid making errors). Further, they would help to ensure fairness in mandatory processes such as practice review and competence hearings. They may also assist in addressing commonly observed practice deficiencies concerning practice management issues and client relations that are routinely identified by both LPIC and the Law Society's complaints unit.

Whatever specific model the Law Society adopts to implement its competence mandate, acceptable performance guidelines will be an essential component so that the effectiveness of the model may be assessed. They will assist those who practise poorly to know what they must do to improve. They will provide those who practise competently with tools to stay abreast of changing approaches. Finally, they will focus attention on the minority who do not use them appropriately, so that the Law Society can intervene.

To be effective and useful for the entire profession such guidelines must reflect acceptable practice experience and approaches throughout the province, and in all settings, by taking into account geographic diversity, practice specific realities, and complexity of client files. They must not be so specific and detailed as to suggest that the practice of law can be reduced to a finite number of pre-identified steps. Moreover, the development of such guidelines must be prioritized to reflect the time commitment involved in developing them.

#### b) Best Practices Guidelines

"Best practices" tend to be voluntarily adopted approaches undertaken at the option of individual members or firms. Voluntary accreditation systems using best practices tools are in use in a number of professions. For example, the Law Society of England and Wales introduced the voluntary Lexcel Certification program in 1998 following a long developmental period, using the *Practice Management Standards (the "Standards")* published by that Law Society in 1993. The program involves an independent assessment of practices to determine if they have met the core requirements of the *Standards*. Members interested in pursuing certification are provided with manuals to assist them in the process. Assessors are independent of the Law Society, report their findings to the Law Society and, where the standards are met, the Society grants the certification. The Law Society of New South Wales also has a best practices program, with training and a certification process.

In 1999 the Law Practice Management Section of the American Bar Association indicated that, having acquired the Law Society of England and Wales' permission, it would begin exploring the development of a competence model for lawyers in North America, using the *Standards* as a starting point.

In Ontario, other regulators have adopted or are exploring best practices approaches. For example, as part of its quality assurance program the College of Nurses of Ontario has begun a Practice Setting Consultation Program. The program has resulted in the identification of the key attributes of a quality practice setting and a six-step self-directed process that assists each organization to measure the extent to which it is a quality setting, what strengths need to be built upon, and what areas need improvement. The program allows organizations to engage in critical self-analysis.

In the context of the Ontario legal profession LPIC is also promoting best practices through its *practicePro* program, with particular attention to risk management. The current *practicePro* booklets focus on two areas identified as contributing to claims. The booklets are entitled, “Managing the Lawyer/Client Relationship” and “Managing Conflict of Interest Situations”.

Any involvement of the Law Society in the development or use of best practices guidelines requires a cautionary approach. Addressing both quality assurance guidelines, in the form of acceptable performance guidelines, and quality improvement guidelines, in the form of best practices tools, must be done without confusing the fundamentally different purposes and objectives of the two types of guidelines. The pursuit of best practices is a laudable goal, but those standards should not establish acceptable performance for regulatory purposes.

## IX

### Possible Competence Models

Having examined various approaches to competence regulation, the Law Society is considering in detail the following four potential models.

- |          |   |
|----------|---|
| Model 1: | formulation of a continuum of professional development; |
| Model 2: | random / focused practice review;                       |
| Model 3: | limited licensing; and                                  |
| Model 4: | broadly-based specialist certification.                 |

Although articulated in this document as individual approaches, components of the models could be intermingled to combine both quality assurance and quality improvement features if it is determined that such an approach is preferable.

Each potential model should be assessed in the context of whether it,

- addresses the public’s and the profession’s interest in quality of service;
- is adaptable to a wide range of work realities, including private/non-private practice, geographical location, firm size, and years of legal experience;
- is cost effective as a delivery model;
- addresses the Law Society legislative obligations; and
- meets the Law Society’s chosen emphasis on quality assurance or quality improvement.

#### *Model One: Formulation of a Continuum of Professional Development*

It has long been recognized that competent professionals never stop learning. They maintain and enhance their knowledge, skills, and judgment through a combination of experiential learning and observation, reading, studying, reflecting, attending continuing legal education programs, and discourse with colleagues and mentors.

The Law Society’s definition of the “competent lawyer” recognizes that he or she will pursue “appropriate professional development to maintain and enhance legal knowledge and skills” and “adapt to changing professional requirements, standards, techniques, and practices”. Rule 2 of the current Rules of Professional Conduct states that the lawyer should “keep abreast of developments in the branches of the law wherein the lawyer’s practice lies by engaging in continuing study and education”. Law school, bar admission and continuing legal education, along with the county and district library and Great Library system are current programs that contribute to professional development.



A continuum of professional development model would focus on ensuring a systematic approach to professional development that is progressive and relevant to the various stages of a lawyer's career. Such a model could include,

- tools that will allow members to engage in professional development throughout their careers (quality improvement); and
- mechanisms for monitoring whether such professional development is taking place (quality assurance).

The development of such a model would include an analysis of the appropriateness of a voluntary or mandatory approach to professional development, or some combination thereof.

In assessing whether the model should entail mandatory professional development requirements, consideration could be given to possible mandatory requirements based on,

- topics (eg. annual ethics requirements; changing legislation; equity matters);
- situations (eg. professional development requirements for the newly-called who intend to do trial work, similar pre-requisites for those handling legal aid files or commencing private practice; or specialist certification designations); or
- members (eg. all those in private practice; all members).

The model would recognize that the nature of members' professional development requirements change as they move through their careers. It would focus on how post-call professional development could be broadly designed and used for supportive, remedial, and monitoring purposes. The model could,

- identify various segments of the profession for whom particular development tools may be required, including lawyers who are newly-called; are interested in changing practice areas or who wish to specialize; are not in private practice and whose professional development needs are diverse; are in practice review; have been identified in a spot or focused audit as having deficient financial records; are ordered, in a capacity, competence, or conduct proceeding, to undertake professional development; practise in high claims risk areas; or are required to requalify as a result of not having made substantial use of their legal skills for a specified period;
- consider the goals of professional development for each of these areas, including whether the priority is to remediate, support, or monitor the lawyer;
- determine the range of learning tools that could be most effective in each area and that could best complement the Society's competence mandate under the *Act*;
- determine what aspects of the continuum, if any, should be mandatory, and for whom;<sup>9</sup>
- determine how to evaluate whether the chosen professional development tools actually affect or change behaviours or performance; and
- consider whether bar admission course training might be designed more directly as part of the professional development continuum.

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<sup>9</sup>Information on the analysis done by the Law Society's Mandatory Continuing Legal Education Subcommittee on the advantages and disadvantages of mandatory CLE is contained in Appendix 5 of the Book of Appendices.

### Noteworthy Features of a Professional Development Continuum Model

- Generally speaking, professional development is a well-known and widely accepted part of the legal profession.
- Existing infrastructures, such as CLE organizations and the library system, can be used for the model's development.
- The model is well-positioned to take advantage of current and future technological developments to deliver professional development tools across a broad range of geographic settings throughout the province.<sup>10</sup>
- Specific learning tools that address risk management issues identified from practice reviews, spot and focused audits, practice advisory, complaints, and conduct and competence proceedings could be developed that would reach a wide audience of members.
- The model could accommodate both a quality assurance and quality improvement focus by continuing the tradition of offering voluntary professional development designed to meet lawyer-identified needs, and by having mandatory components designed to address specific quality of service issues.
- The model can be developed to match professional development opportunities and requirements to members' evolving levels of experience and practice thereby providing both supports for maintenance and enhancement of competence, and, if there is a mandatory component, tools by which the Law Society could monitor such evolving development.
- The model provides opportunities for the Law Society to partner with other organizations in developing the range of tools that would meet the needs of the profession and the public.
- The model is equally relevant to those members not in private practice as to those who are.

### Issues to be Addressed

The developmental process would need to address a number of issues, including,

- whether the model could be an effective quality assurance tool if there is no mandatory component;
- whether features that would provide demonstrable and continuing evidence of quality service could exist in an entirely voluntary model;
- what types of monitoring mechanism would be effective, including, for example, testing;
- whether improved competent lawyer performance could be measured in an across-the-board mandatory component, with no monitoring feature other than confirmation of attendance at or participation in professional development activities;
- how the model should be structured to measure member use of Law Society guidelines; and
- how to ensure that educational tools are delivered at an affordable cost across the entire province.

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<sup>10</sup> A number of technologically driven initiatives are currently being investigated or developed that would facilitate both the development and the effectiveness of this model. These include Bar-Ex, an electronic forum for facilitating lawyers' business transactions, research and continuing legal education opportunities, and other commercial interaction; a Virtual Law Library that could provide lawyers with a wide range of research tools in a single electronic location; and the Law Foundation grant to the Law Society for enhancing the delivery of bar admission and continuing legal education.

*Model Two: Random / Focused Practice Review*<sup>11</sup>

a) Focused Practice Review

The Law Society is required by the *Law Society Act* to conduct a practice review where there are reasonable grounds to believe that a member has failed or is failing to meet standards of professional competence. Accordingly, any competence model the Law Society implements must include practice review.

Focused practice review is premised on the belief that members encountering multiple practice problems cannot benefit solely, if at all, from passive learning tools. They must be directly observed, provided with tools specific to their needs, given specific instructions on steps for improvement, monitored and, where possible, re-evaluated. The program is separate from the Law Society's conduct processes, its focus being on assisting members to improve their competence.<sup>12</sup>

The value of practice review depends, in part, upon the nature of the resources available to assist, the attitude toward the review of the individuals being assisted, and the extent to which the program has targets and a reasonable point of completion.

Focused practice review is primarily reactive. It addresses competence issues when members have already experienced multiple competence-related complaints or concerns. Members are chosen or focused upon precisely because problems have been identified.

b) Random Practice Review

The question for further analysis and discussion is whether practice review should be expanded and incorporated into a broader model that includes random reviews.

Random practice review has a preventive focus. Its broad goal is to monitor member adherence to articulated standards of practice. An ancillary goal is to raise the quality of service across the profession. Such programs apply to all members, randomly, and are not directed only to those who have demonstrated problems with competence or who have experienced multiple client complaints.

Random practice reviews are used by a number of other regulatory bodies as a key element of quality assurance. For example, the College of Physicians and Surgeons of Ontario, the Royal College of Dental Surgeons of Ontario, the Institute of Chartered Accountants of Ontario, the Certified General Accountants of Ontario (for members in public practice), and the Barreau du Québec all use forms of random peer inspection (practice review). In Ontario and Alberta the law societies conduct random audits of lawyers' financial books and records. The College of Physicians and Surgeons has recently announced that its random practice inspection program, which has existed since 1981, will be significantly expanded.

Random practice review programs in other professions are separate from the discipline stream of the regulatory body. Where the review reveals minor difficulties the member receives guidance on how to improve. Where more substantial remedial assistance is necessary, various professions use different means to assist members to obtain the help they need. Typically, the programs do not focus on assessing substantive knowledge, but rather on practice issues such as record-keeping or file management, attention to client interests, and compliance with required features of practice.

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<sup>11</sup> Additional information on these approaches is contained in Appendices 3 and 6 of the Book of Appendices.

<sup>12</sup> Nothing learned in a practice review is used to initiate or continue a conduct proceeding with the exception of information that comes within Rule 13, Commentary 1 of the current Rules of Professional Conduct.

A model that combines focused and random practice review is primarily a quality assurance measure with some modest features of quality improvement. The quality improvement features emerge essentially from three areas:

- Prior to the random review members prepare by addressing aspects of their practices they may have overlooked and seeking to improve them before the review takes place.
- Members institute changes to their practices to reflect problems identified.
- Members of the profession at large are informed of the areas of deficiency observed in each year's reviews, so that they can consider whether to make improvements in their own work environments and practices.

#### Noteworthy Features of a Practice Review Model

##### Generally

- The model is a hands-on approach to assessing quality and competence, thereby offering a more precise analysis of the strengths and weakness of lawyers' work.
- It is directed specifically to monitoring areas that are critical to competent performance and to areas of risk, thereby focusing members' efforts where they can have the most impact on risk avoidance.
- It combines supportive and remedial perspectives with a monitoring perspective.
- Guidelines are interwoven in the development of assessment tools, namely criteria by which members' practices will be assessed.

##### Focused Practice Review

- It concentrates resources on those already identified as having demonstrated competence-related deficiencies. This permits more intense scrutiny where there is proven need.
- The scope of focused practice review could also be expanded to be directed to members in those areas determined by statistical profiles to be high risk areas.

##### Focused and Random Practice Review Model

- It has potential to be effective in monitoring competent practice and raising the standards of the profession if carried out with sufficient proficiency and frequency. This, in turn, addresses the public's and the profession's interest in quality service.
- By applying standard evaluation tools the model allows the Law Society to monitor the effectiveness of the approach and its ability to complement the Law Society's overall regulatory responsibilities. The information obtained can be used to monitor effectiveness, assess risk areas for more focused attention, and gather data on how professionals practice.
- It allows for assessment of members who work outside of private practice in corporate or government settings.
- It satisfies the requirements of the *Legal Aid Services Act* for quality assurance audits of legal service providers.
- Although it has a mandatory component it may not be as time-consuming for the member as other possible quality assurance measures, such as certain forms of mandatory CLE. Inspections happen relatively infrequently.
- The existence of focused practice review provides the tool for supporting those members randomly inspected who require more substantial assistance.

#### Issues to be Addressed

The developmental process would need to address a number of issues, including,

Focused Practice Review

- whether a model that is restricted only to those who have already demonstrated deficiencies can be viewed as a quality assurance model for the profession;
- whether it is appropriate for the Law Society to wait for competence-related deficiencies to appear before it acts, rather than take proactive steps to ensure problems are prevented;
- whether the findings from focused practice reviews will be of a nature that the profession at large will be able to learn from them - the level of competence-related deficiencies will in most instances be well below the standards of practice and work met by most lawyers;

Focused and Random Practice Review Model

- whether the model should focus primarily on reviewing practice management components of work and practice or address substantive practice areas;
- whether the model can include an effective quality improvement feature. Other professions have indicated that each year they find approximately the same percentage of members who demonstrate deficiencies in their practices; and
- whether a legislative amendment would be required to implement random practice review and, if so, whether it could be obtained.

*Model Three: Limited Licencing*

Upon their call to the bar, lawyers in Ontario receive a general credential entitling them to practise as barristers and solicitors. The system is premised on the view that law school and the bar admission course equip the lawyer to take on any legal work, subject to the lawyer's self-assessment of competence as set out in the Rules of Professional Conduct.

In a rapidly changing and complex legal environment, it is arguable that, by attempting to equip every new lawyer to practise in any area, the legal education system undermines the ability to develop and maintain the competence of members of the bar. This is because there is little opportunity and no requirement in Ontario that lawyers limit their fields of practice upon call to the bar. For this reason, one of the substantive competence models the Law Society is considering involves elements of limited licencing.

The medical profession in Canada provides the best example in this country of widespread use of specialization. Its approach defines the area in which a physician will concentrate his or her skills, and effectively limits those outside of each specialty area from practising in complex areas in which they have little practical experience. The educational requirements for each specialty are developed to fit the unique needs of each group and the professional development opportunities are directed towards specific needs. This type of approach has built-in checks and balances that protect the public, so that, for example, a newly admitted doctor cannot book an operating room and undertake sophisticated surgery. This formalized approach does not exist in the legal profession where, at least theoretically, a newly-called lawyer could take on a murder trial.

Two possible approaches to limited licencing are being considered, as follows.

a) General Requirement of Limited Licences

Under this approach lawyers could qualify initially to practise in one or two areas of law. Through well-developed and highly accessible professional development streams they could build upon their expertise either to obtain a licence in additional practice areas, or to develop more specialized expertise in their initial fields. This approach could complement a system of specialist certification (discussed below as Model 4). It would also provide appropriate education and skills development for general practitioners, focused on those fields and matters within a range of general practice.

b) Time or Situation Limitations on Licences

Under this approach to licencing, the limitations on licences are more time- or- situation-limited. In New South Wales, Australia, and in England and Wales, for example, solicitors must work as employees in a firm for a specified period and meet certain other requirements (such as successful completion of a practice management course), before being entitled to establish a sole practice offering services to the public. Once these requirements are met, lawyers may practise in the areas they choose.

In Ontario a model could also be designed to include situation-limited restrictions such as introducing the requirement of,

- completing a trial advocacy program before being entitled to practice in the courts or before tribunals; or
- completing a program on representing legally aided clients as a pre-requisite to being entered upon the legal aid panel.

Regardless of which limited licensing approach is followed, the intent of such a model is to address the increasingly complex and rapidly changing nature and demands of legal practice. By focusing lawyers' knowledge and skills in more clearly defined ways, and at an early stage, a limited licensing model seeks to integrate the importance of quality service into how lawyers develop their work from the outset of their professional lives and throughout their careers.

Noteworthy Features of a Limited Licencing Model

Generally

- This kind of approach may assist in distinguishing the legal profession even more clearly from non-lawyers seeking to provide legal services, because issues of quality, expertise, specialized training, and professional development would be focused, direct, and demonstrable.
- This type of model provides direct regulatory checks and balances to ensure members do not take on matters outside their expertise. While there is a rule of professional conduct that requires that members be competent to take on specific services, there is no mechanism other than the reactive tool of the complaints process to monitor adherence to the rules. Limited licensing is such a mechanism.

General Requirement of Limited Licences

- Professional development opportunities would be more focused and developed in a progressive manner to reflect changing career needs.
- Quality assurance and improvement would be combined and could be developed to meet the specific needs of each licencing area, rather than as a one-size-fits-all approach.
- The public may find it easier to access lawyers who can meet their specific needs, because they are readily identifiable, as with the medical profession.

Time or Situation Limitations on Licence

- These approaches to limited licences seek to ensure that inexperienced practitioners receive the supervision or formal exposure to practice issues, including management, they might not otherwise receive if they were to open up an office immediately as sole practitioners or attempt particular kinds of work with no prior experience.
- This approach is not as comprehensive as a general requirement of limited licences would be, but would still offer some important focused quality assurance and improvement measures.

Issues to be Addressed

The developmental process would need to address a number of issues, including,

Generally

- whether adoption of a limited licensing model would require a shift in law school education and, if so, how that would be undertaken;
- how lawyers already called to the bar would be affected by the model;

General Requirement of Limited Licences

- whether the developmental time for pursuing this model necessitates that other quality measures be implemented in the interim;
- whether quality assurance/ improvement processes would be developed within each area of practice;

Time or Situation Limitations on Licences

- whether the supervised practice pre-requisite may apply an overly broad brush to the issue of quality service, beginning from the assumption that the only way to acquire good practice management exposure and practice wisdom is in the service of a more experienced practitioner. This issues does not arise under the general requirement of limited licence model;
- whether the supervised practice pre-requisite may restrict lawyers from practising at all in poor economic times, because they are unable to find employment;
- whether a supervised practice model might become an unreasonable barrier to practice, if it is difficult to provide quality placements; and
- whether successfully completed situation-limited and time-limited licenses would provide sufficient and continuing evidence of quality and competence.

*Model Four: Broadly-Based Specialist Certification*

Specialist certification is a quality improvement program. Lawyers voluntarily choose to develop and seek accreditation for having attained established standards of practice and expertise. In its current form the Law Society's program does not preclude certified specialists from practising in other areas.

Specialist certification of lawyers is not unique to Ontario. For example, a number of American legal jurisdictions as well as the Law Society of New South Wales in Australia have certification programs. These programs have multiple goals of providing the public with access to lawyers who meet their specialized legal needs, enhancing the quality of service provided to the public, and potentially raising the standards of all members in a particular area of practice. The programs have a variety of educational and testing requirements.

It is important to recognize that, at the present time, certification of specialists in Ontario is a recognition program, not a developmental one. This means that members are certified for having already met operative standards and are periodically re-certified for maintaining them. Lawyers are not directed on a developmental path leading to specialization. Very few lawyers in Ontario have sought to be certified as specialists under the current program. What is now under consideration as a potential competence model is a fundamentally revised and expanded certification program having distinct developmental aspects.

An effective broadly-based specialist certification model would be based on standards that are perceived to be objective, rigorous, and fair. Under this new type of program it would be possible for lawyers throughout the province to satisfy the knowledge requirements for specialist certification through study and assessment. This would be in contrast to the current requirement that a candidate concentrate his or her practice and establish broad experience in the field in which he or she seeks certification, a requirement that excludes many lawyers.

The model would identify a process consisting of educational opportunities and indicia of experience that could lead a junior member of the bar on a path toward certification. This could also be developed to enable those lawyers in general practice to be recognized as specialists in that field, akin to a family practice specialty in the medical field.

#### Noteworthy Features of a Revised Specialist Certification Model

- This model is potentially a powerful quality improvement tool, providing opportunities for a broad range of younger and less experienced lawyers to develop expertise through a developmental path of education, progressive experience, and satisfaction of specified standards of performance.
- It can be seen as having a quality assurance feature that allows the public to assess effectiveness, provided it includes some measurement tools.
- Recognizing the reality that most lawyers voluntarily narrow the focus of their work from an early stage in their careers, it provides guidance and incentives to doing so in the most competent manner.
- The model entails the development of accepted standards of performance and best-practices in each specialty area that could have the indirect effect of raising minimum standards across the profession.
- It could have significant relevance to sole and small firm practitioners many of whom have not been able to qualify for specialist certification under the current program because they practice as “generalists”.
- It may assist in distinguishing the legal profession even more clearly from non-lawyers seeking to provide legal services, if embraced widely by the profession.
- It could complement a system of limited licences, discussed in Model 3.

#### Issues to be Addressed

The developmental process would need to address a number of issues, including,

- whether specialist certification, as a voluntary program would be sufficient to meet the Law Society’s competence mandate;
- whether such an approach would require a shift in law school education and, if so, how that would be undertaken;
- how lawyers already called to the bar would be affected by the model;
- whether the developmental time for pursuing this model necessitates other quality measures be implemented in the interim;
- whether it is possible to develop sufficient professional development tools across the province to make broadly-based specialist certification feasible; and
- how standards for the assessment process leading to certification would be developed and by whom.

#### X Ongoing Work

The possible competence models identified in this consultation paper are intended to stimulate discussion within the legal profession and the public, with a view to guiding the selection and development of an appropriate future approach to implementing the Law Society’s competence mandate. This issue is of fundamental importance to the profession. Members of the profession are urged to consider the issues raised in this consultation document and to provide their views and suggestions to the Law Society. Comments will greatly assist the Law Society and will be gratefully received.

In addition, those members wishing to complete the attached survey are requested to return it to the Law Society by no later than May 31, 2000. Completion and return of the survey would be much appreciated.

All comments, completed surveys, questions and requests for the Book of Appendices that supplements this consultation document should be directed to:



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## XI

### Description Of Book Of Appendices

This consultation document does not contain a detailed discussion of all the matters raised in it. Rather it highlights them and provides reference to a Book of Appendices for those members or organizations interested in obtaining further information. The Book of Appendices contains the following.

#### Appendix 1: Summary of Previous Law Society Competence-Related Work

This includes discussion of the introduction of the practice advisory service(1980), specialist certification (1986), practice review (1988), practice checklists(1988), original proposal for authority to obtain competence orders (1992), the work of the joint committee of legal aid and professional standards (1993), and the work of the Mandatory CLE Subcommittee (1995-97).

#### Appendix 2: Issues Related to Self-Regulation

This contains information on the changes to, and pressures facing, self-regulation of solicitors in England and Wales and New South Wales, Australia, and the medical profession in Ontario and elsewhere.

#### Appendix 3: Common Approaches to Quality Assurance

This provides a description of each of the common approaches to quality assurance highlighted in the glossary to this consultation document.

#### Appendix 4: Summary of Quality Assurance / Competence Measures Used by Other Professions and Other Legal Jurisdictions

This describes, in some detail, the quality assurance and improvement measures adopted by the College of Physicians and Surgeons of Ontario; the Royal College of Dental Surgeons of Ontario; the College of Nurses of Ontario; the Royal College of Physicians and Surgeons of Canada; the Institute of Chartered Accountants of Ontario; the Certified General Accountants Association of Ontario; the Canadian Institute of Actuaries; the Ontario Association of Architects; the Professional Engineers of Ontario; the College of Teachers of Ontario; the Law Societies of Alberta and Nova Scotia and the Barreau du Québec, the Law Society of England and Wales, and New South Wales, Australia, and some general approaches of state bars in the United States.

#### Appendix 5: Excerpt from the 1997 Report of the MCLE Subcommittee *Post-call Learning for Lawyers*

This sets out the pros and cons of Mandatory CLE as described in the report of the Law Society's MCLE subcommittee in its 1997 report.

#### Appendix 6: Common Features of Random Practice Review Programs

This provides some further detail on random practice review programs in other jurisdictions.

### GLOSSARY OF QUALITY ASSURANCE/IMPROVEMENT APPROACHES

#### Continuing Education (mandatory or voluntary)

This is the term used to describe the various tools by which members of a profession undertake ongoing learning throughout their careers. It can encompass formal educational programs, experiential learning, self-study, teaching, writing, discussion groups. When voluntary it is viewed as a quality improvement approach. When mandatory it is viewed as a quality assurance measure.

#### Discipline Proceedings for those Demonstrating Incompetence

Most professions have codes of professional conduct or statutory provisions that require members to be competent to practise and consider failure to do so to be a disciplinary offence. This is a reactive approach, allowing those who practice at sub-standard levels to continue to do so until some event, or series of events, reveal deficiencies. This is neither a quality assurance nor quality improvement measure, but is often considered as the final component in broadly-based quality programs.

#### Limited Licensing

Members are licensed within specified areas of practice or satisfy the pre-requisites necessary to undertake certain work. This can be profession-wide (like the medical profession) or for specific requirements (necessary steps before entering private practice). Limited licensing is primarily a quality assurance measure.

#### Practice Review (Focused)

A process whereby members with a pattern of competence-related deficiencies are identified, their practices reviewed, and tools provided to assist them in improving. A quality assurance measure.

#### Practice Review (Random) [known as practice inspection/peer assessment in other professions]

Profession-wide review of randomly chosen members' practices or work to monitor adherence to standards. This is primarily a quality assurance measure with some possible quality improvement features.

#### Publications of Standards or Guidelines for Practice

The articulation of standards or guidelines that should govern legal work. These may be general, specific or detailed. When providing guidance as to acceptable performance and service expectations this is a quality assurance measure. When directed at voluntary best practices this is a quality improvement measure.

#### Reflective Practice and Self-Assessment Tools

A process whereby members are provided with tools to assist them in reflecting upon their strengths, identified areas for improvement, and goals for the future with a view to developing professional development approaches that will enable them to maintain and enhance their competence. It requires a conscious commitment to self-analysis and reflection upon the features and components that go into making a competent professional. Reflective practice has been defined by Donald Schön, in his book *The Reflective Practitioner*, as a kind of "reflection-in-action" - "an informal improvisation that professionals undertake to deal with the myriad of unpredictable situations they face that is the essence of professional knowledge". This is primarily a quality improvement measure, although some professions have made this a mandatory feature of their quality assurance program.

**Re-Testing**

A process whereby members' competence is monitored by periodic membership-wide re-testing or re-certification. There is some possibility that teachers in Ontario may be required to undergo some re-testing in the future. This is a quality assurance measure.

**Specialist Certification**

Specialist certification is a voluntary exercise undertaken by those members who choose to develop and seek accreditation for the attainment of established standards of practice and expertise. The Law Society's current program does not preclude those certified as specialists in one area from practising in other areas. Specialist certification programs are quality improvement measures.

**Voluntary Practice Standards Accreditation**

Like guidelines, these provide performance expectations, but are voluntarily pursued by lawyers. Under these systems law firms or practitioners choose to take the steps necessary to comply with set program requirements in order to then market themselves as having met the accreditation standards of excellence. These programs focus on ensuring that those accredited meet identified quality control standards designed to result in more efficient, competent, and client-centred work environments. This is a quality improvement measure.

**CONSULTATION SURVEY QUESTIONS**

PLEASE RETURN TO:

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Please return to the Law Society by May 31, 2000

NAME (OPTIONAL) \_\_\_\_\_

GENERAL INFORMATION

1. In what period were you called to the bar?
  - ☐ 1921-30
  - ☐ 1931-40
  - ☐ 1941-50
  - ☐ 1951-60
  - ☐ 1961-70
  - ☐ 1971-80
  - ☐ 1981-90
  - ☐ 1991-00
  
2. Where do you work?
  - ☐ Central East Region of Ontario
  - ☐ Central West Region of Ontario
  - ☐ Central South Region of Ontario
  - ☐ East Region of Ontario
  - ☐ Northwest Region of Ontario
  - ☐ Northeast Region of Ontario
  - ☐ Southwest Region of Ontario
  - ☐ Toronto
  
3. What is the nature of your work?
  - ☐ private practice
  - ☐ corporate counsel
  - ☐ government
  - ☐ legal education
  - ☐ other \_\_\_\_\_
  
4. If you are in private practice how many lawyers are there in your firm?
  - ☐ 1
  - ☐ 2-5
  - ☐ 6-10
  - ☐ 11-50
  - ☐ 51+
  
5. In how large a population centre do you work?
  - ☐ < 10,000
  - ☐ 10,000 - 50,000
  - ☐ 51,000 - 100,000
  - ☐ 100,000 - 999,000
  - ☐ > 1,000,000

QUALITY ASSURANCE/QUALITY IMPROVEMENT

6. In implementing its competence mandate should the Law Society focus on quality assurance measures?

☐ Yes  
☐ No  
☐ No opinion

quality improvement measures?

☐ Yes  
☐ No  
☐ No opinion

a combination of quality assurance and quality improvement measures?

☐ Yes  
☐ No  
☐ No opinion

7. In developing guidelines to assist it in implementing its competence mandate how should the Law Society prioritize its guideline development? (with 3 being the highest priority and 1 being the lowest priority)

(i) guidelines concerning members' knowledge, skill, or judgment,  
1 2 3  
(ii) guidelines concerning members' attention to the interest of clients,  
1 2 3  
(iii) guidelines concerning the records, systems, or procedures of members' practices  
1 2 3

8. Should the Law Society participate in the development of voluntary "best practices" guidelines as a quality improvement measure?

☐ Yes  
☐ No  
☐ No opinion

PROFESSIONAL DEVELOPMENT

9. In your opinion, would a voluntary professional development approach satisfy the Law Society's obligation to ensure that the public is served by lawyers who meet high standards of competence?

☐ Yes  
☐ No  
☐ No opinion

10. In your opinion, should there be some mandatory requirements related to professional development?

☐ Yes  
☐ No  
☐ No opinion

11. If the Law Society were to consider mandatory requirements related to professional development, should they apply to: (indicate as many categories as you wish)
- ☐ all active members
  - ☐ those engaging in private practice for the first time or after a lengthy absence
  - ☐ those seeking to change practice areas
  - ☐ as a pre-requisite to engaging in certain kinds of practice, eg. trial advocacy, legal aid
  - ☐ specialists
  - ☐ those in identified high-risk practice areas
  - ☐ those in practice review
  - ☐ those who have previously demonstrated competence-related deficiencies (eg. multiple complaints)

#### FOCUSED / RANDOM PRACTICE REVIEW

12. Should the Law Society introduce random practice review, in addition to focused practice review?
- ☐ Yes
  - ☐ No
  - ☐ No opinion
13. If the Law Society were to introduce random practice review to assist in implementing its competence mandate, in which of the following areas should the Law Society concentrate:
- (i) members' knowledge, skill, or judgment?
- ☐ Yes
  - ☐ No
  - ☐ No opinion
- (ii) members' attention to the interest of clients?
- ☐ Yes
  - ☐ No
  - ☐ No opinion
- (iii) the records, systems, or procedures of members' practices?
- ☐ Yes
  - ☐ No
  - ☐ No opinion

#### LIMITED LICENCES

14. If you are in private practice, do you limit the number of substantive areas in which you practise?
- ☐ Yes
  - ☐ No
15. Do you believe that members should be required to meet established standards before changing practice areas?
- ☐ Yes
  - ☐ No
  - ☐ No opinion

16. Do you believe lawyers should continue to be able to self-elect their substantive practice areas?
- ☐ Yes
- ☐ No
- ☐ No opinion
17. If the Law Society were to consider the introduction of limited licences should it consider,
- (a) a general requirement of limited licences for all members?
- ☐ Yes
- ☐ No
- ☐ No opinion
- (b) time limitations on licences (eg. practice under supervision for a fixed period)?
- ☐ Yes
- ☐ No
- ☐ No opinion
- (c) situation limitations on licences (eg. take a trial advocacy course before being entitled to appear in court)?
- ☐ Yes
- ☐ No
- ☐ No opinion

#### SPECIALIST CERTIFICATION

18. In your opinion, would a revised specialist certification model be sufficient to satisfy the Law Society's competence mandate?
- ☐ Yes
- ☐ No
- ☐ No opinion
19. If the Law Society were to develop a model of broadly-based specialist certification should there be a specialty for general practitioners?
- ☐ Yes
- ☐ No
- ☐ No opinion
20. Would a broadly based specialist certification model, along the lines described in the attached consultation document, be useful to you?
- ☐ Yes
- ☐ No
- ☐ No opinion
21. The consultation document describes four potential models for implementing the Law Society's competence mandate (please refer to Part IX of the document). The name of each of these models is listed below. Please rank each of the models, in order, assigning a "1" to the model that you consider would be most effective in implementing the Law Society's competence mandate through to a "4" for the model you think would be least effective. Where there are sub-headings under a model you may indicate which subheading is relevant to your ranking. Simply write the number on the line beside the model. (Please rank all the models and do not use the same number twice.)

- Formulation of a continuum of professional development \_\_\_\_\_
    - a) entirely voluntary \_\_\_\_\_
    - b) mandatory for all members \_\_\_\_\_
    - c) mandatory for certain identified categories of members and voluntary for the balance \_\_\_\_\_
  - Practice Review \_\_\_\_\_
    - a) Focused only \_\_\_\_\_
    - b) Random and focused \_\_\_\_\_
  - Limited Licensing \_\_\_\_\_
    - a) General Requirement of Limited Licences \_\_\_\_\_
    - b) Time or Situation Limitations on Licences \_\_\_\_\_
  - Broadly based Specialist Certification \_\_\_\_\_
22. For the model identified above as the most effective (1), please indicate why you thought the model would be most effective.
23. What, if any, modifications or enhancements would you suggest for strengthening the model you chose?
24. If the model you chose as being most effective in implementing the Law Society's competence mandate is not the model you would find most *personally* useful, please indicate which model that would be and why.

If you have any additional comments please attach them to the survey.

THANK YOU.

FULFILLING THE LAW SOCIETY'S COMPETENCE MANDATE

Book of Appendices to Consultation Document

Draft for Convocation's Consideration

Policy Secretariat  
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## TABLE OF CONTENTS

INTRODUCTION .....	2
APPENDIX 1: SUMMARY OF PREVIOUS LAW SOCIETY COMPETENCE-RELATED WORK .....	3
APPENDIX 2: ISSUES RELATED TO SELF-REGULATION .....	7
APPENDIX 3: COMMON APPROACHES TO QUALITY ASSURANCE .....	11
APPENDIX 4: SUMMARY OF QUALITY ASSURANCE / COMPETENCE MEASURES USED BY OTHER PROFESSIONS AND OTHER LEGAL JURISDICTIONS .....	20
APPENDIX 5: EXCERPT FROM THE 1997 REPORT OF THE MCLE SUBCOMMITTEE <i>POST-CALL LEARNING FOR LAWYERS</i> .....	37
APPENDIX 6: COMMON FEATURES OF RANDOM PRACTICE REVIEW PROGRAMS .....	40

## INTRODUCTION

On March \* 2000 Convocation approved, for distribution to all members of the profession, a consultation document on competence entitled, *Implementing the Law Society's Competence Mandate: A Consultation Document*.

The consultation document is the first step in a process the Law Society is undertaking to design and implement an approach to its competence mandate. The document discusses the evolution of the Law Society's competence mandate, the need for the introduction of an integrated approach to competence, the tools used by other professions and legal jurisdictions to implement competence, and 4 possible models the Law Society is exploring in detail.

The consultation document does not provide a detailed discussion of all the matters that are raised in it. Rather it highlights them and provides reference to this Book of Appendices for those members or organizations interested in obtaining further information.

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## APPENDIX 1: SUMMARY OF PREVIOUS LAW SOCIETY COMPETENCE-RELATED WORK

### Practice Advisory Service (1980)

The service grew out of the 1978 Report of the Special Committee on Professional Competence, which articulated the view that the Law Society might assist lawyers to avoid becoming the subjects of complaints due to lack of efficient office organization and poor business practices. The service was seen as a competence enhancing tool. Over the years the advisory service has included a telephone advice line, mentoring service, and start-up workshop program, and has provided guidance on office systems through a systems advisor. As part of the Society's commitment to enhancing its pro-active role in supporting member competence the service has been restructured to take on a broader educational role, providing information to members to enhance practice.<sup>13</sup>

### Specialist Certification (1986)

A Certification Board was established in March 1986. The program's introduction reflected the Society's desire to improve both access to legal services for the public and to create a program designed to enhance lawyer competence. The view was that the setting of high standards of excellence for certification could also have the effect of raising the quality of all legal services offered. The program now offers certification in nine practice areas. It is currently being reviewed as part of the recommendations of the second Competence Task Force to consider what role it should play in the implementation of the Law Society's competence mandate.

### Practice Review (1988)

In 1988 Convocation adopted the report of the Special Committee on Competence (1986) and initiated the Practice Review Program in an effort to assist members, whose professional competence was in issue, to improve their performance. Prior to February 1999 the *Law Society Act* did not provide direct authority to compel members in need of assistance to participate in practice review. The program was a voluntary initiative. The report's recognition that the Society had a role to play in assisting members with competence-related deficiencies to improve marked an important shift in the Society's thinking about its role as regulator.

### Practice Checklists

Since 1988 the Law Society has engaged in the production and distribution of checklists in a number of substantive law areas. The decision to publish checklists arose out of the Report of the Special Committee on Competence in 1986, with the goal of enhancing member competence. Not intended to be binding on members, the checklists were to provide assistance and support in day-to-day practice.

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<sup>13</sup>The mission statement of Advisory Services states:

The Advisory Services Team:

1. provides timely, accurate
  - a) advice on legislation, Rules of Professional Conduct, and policy relating to the Law Society and its mandate;
  - b) information and support relating to legal and practice issues; and
2. identifies emerging issues affecting the legal profession and participates in the development of effective responses;
  - to promote the provision of competent legal services and widespread compliance by key stakeholders' with Law Society regulatory requirements.

#### Proposal for Professional Competence Orders (1992)

In the early 1990s the former Professional Standards Committee and the Reforms Implementation Committee proposed statutory amendments to the *Law Society Act* to provide for the better regulation of professional standards of competence in the legal profession.

The report of the Reforms Implementation Committee was approved by Convocation in February 1992. The procedural code for better regulating the competence of members of the profession, now contained in Part II of the *Law Society Act*, was first reflected in that report.

In the Reform Implementation Committee's report, the rationale for the Committee's proposals was set out:

The proposals for regulating professional competence reflect two policies. The first policy, on which there appears to be broad consensus, is that concerns about professional competence should generally be dealt with through remedial rather than disciplinary procedures, provided that such an approach will adequately protect the interests of clients. The second policy ... is that the Law Society should have statutory authority to inquire into the competence of members of the profession...The assumption that, once qualified for admission, every member of a profession will necessarily continue to maintain standards of competence in a rapidly changing legal environment, is not, in the view of the Committee, an assumption which can be justified.

#### Joint Committees of Legal Aid and Professional Standards (1993)

In April 1993 the Joint Committees of Legal Aid and Professional Standards made recommendations to Convocation concerning the need for an improved approach to competence standards for the profession generally, and in particular for those members of the profession on the legal aid panel. One of the recommendations Convocation approved, stated:

- ...
3. That the Professional Standards Committee, in its capacity as a working group reviewing Rule 2 of the Rules of Professional Conduct, define competence in terms of a general standard of acceptable practice, taking into consideration the legislative amendments proposed with respect to professional standards as a result of the Reform Implementation Committee's report. The question in any case whether a member had practiced to standard would be determined on evidence with respect to the appropriate standard in the circumstances of that case.

Although nothing was done at that time to define competence, the principles enunciated were relevant to later competence-related work.

#### Mandatory Continuing Legal Education Subcommittee (1995-1997)

In January 1997 Convocation approved a number of recommendations from the MCLE Subcommittee, among which was a statement of minimum expectations for post-call learning for the profession. The statement articulates the link between competence and ongoing professional learning.

- *Professional competence is maintained and enhanced by ongoing professional development and education.*

- *The Law Society has an obligation to encourage and monitor professional development and education, and to foster the creation and development of learning supports both in the public and the profession's interest.*
- *Membership in the legal profession requires a conscious commitment by all members of the profession to ongoing professional development and education and to self-assessment of educational need.*
- *Fulfilment of such a commitment enhances the ability of all members to meet their obligation to the public to provide effective and competent service, to adapt to and function in a changing and challenging environment, and to maintain and enhance their expertise and overall competence.*
- *While members of the profession have individual responsibility for and direction over the conduct of their professional development and education, all members of the profession have a collective interest in this responsibility being fulfilled.*
- *The professional development and education members of the profession undertake should include both informal education through self-study, reading, and research, and more formal education through participation in continuing education programs.*
- *The Law Society, the Canadian Bar Association - Ontario, the law schools, county and district law associations, other continuing legal education providers, the County and District Law Presidents' Association, providers of library resources and facilities, and the members of the profession should collaborate to ensure that the development of educational policies, opportunities, and programs becomes a priority.*

Convocation did not adopt MCLE at that time, but did accept a number of recommendations designed to enhance CLE opportunities within the province. The Subcommittee recognized that a great deal of effort was needed to make CLE effective, affordable, and accessible for all practitioners wherever they practice.

## APPENDIX 2: ISSUES RELATED TO SELF-REGULATION

In Australia and England the Law Societies have both a regulatory and representative function. This dual function has often been used against these Law Societies in the political pressure to remove some of their regulatory functions.

### England and Wales

The Law Society of England and Wales has had significant political problems over its handling of complaints against solicitors. These problems began more than two decades ago when it was discovered that a complaint against a council member (the equivalent of a benchers) was not pursued.

A semi-autonomous organization to deal with public complaints against solicitors was established. Currently, this function is carried out by the Office for the Supervision of Solicitors (OSS), which is part of the Law Society's operation, although it operates semi-autonomously.

More recently, the OSS has come under attack in England for its failure to deal promptly and effectively with complaints. In 1990, the government created the office of the Legal Services Ombudsman. The role of the Ombudsman is to oversee the handling of complaints by the OSS. A complainant who is dissatisfied with the manner in which the OSS has handled the complaint, may then refer the matter to the Legal Services Ombudsman.

The OSS currently has a 16,000 case backlog. This has prompted the government to give the Law Society one year to improve its handling of complaints or lose the complaints function outright.

Aggravating the already difficult political position of the Law Society is the fact that it mounted an aggressive political campaign against the government's Access to Justice Bill, which makes sweeping changes to the Legal Aid system in England. The campaign incurred the displeasure of the Lord Chancellor.

As a result, the *Access to Justice Act, 1999*, gives the Lord Chancellor the power to restrict the way in which the Law Society can spend the fees it collects from solicitors. Section 47 of the *Act* provides that the Lord Chancellor may require the Law Society to apply those fees to the regulation, education and training of solicitors, rather than to programs that support the representative function of the Law Society.

There has been a great deal of discussion in Council about the Law Society relinquishing its regulatory role. The political mood of the Council swings back and forth on this issue.

The Law Society is also struggling with its 936-page guide to professional ethics, which is in need of radical revision. It is currently being reviewed by a Task Force, which is hoping to build a new "minimalist" code based on ten fundamental principles. The overall purpose of the revision is to reduce some of what is perceived to be over-intrusive regulation of the profession.

There is a perception that membership in the Law Society of England and Wales could become voluntary in the future.

#### New South Wales, Australia

The Law Society of New South Wales acts as both licensing and regulating authority of the legal profession and trade union for its members.

In the past decade, the government of New South Wales has adopted a very aggressive policy of deregulation of the legal profession. This policy has been developed following many significant reviews of the structure and regulation of the legal profession in New South Wales since 1977. These reviews have generally been conducted by government agencies, such as the New South Wales Law Reform Commission in the context of the examination of three policy imperatives: competition policy, access to justice, and the cost of justice. Many of the reviews take as a starting point the public concern over the cost of legal services. Many of them have suggested that the structure, regulation and practices of the legal profession contribute to the high cost of legal services.

The Attorney General's paper entitled, "The Structure and Regulation of the Legal Profession," released in 1992, resulted in significant deregulatory measures regarding solicitors' costs, advertising practices, and practice structures. These measures were implemented in 1994. Prior to that, solicitors' fees were based on scales of costs.

In 1993, the New South Wales Law Reform Commission reported in its paper, "Scrutiny of the Legal Profession: Complaints against Lawyers", that the system of handling complaints against lawyers did not serve the needs of complainants, lawyers, or the community. According to the report, the processing of complaints took too long and investigations were inadequate. The Commission found a large gap between what angered clients and what the Law Society saw as important enough to merit serious attention. The central criticism of the complaints system was that it was geared to ensure the diligence and competence of the individual lawyers, but failed to address the need to redress the dissatisfied users of legal services and the need to set and maintain high standards of ethics and practice for the legal profession generally.

The New South Wales Law Reform Commission recommended that an entity separate from the Law Society be established to deal with complaints about lawyers. In 1994, the Office of the Legal Services Commissioner was established. It oversees and participates in a co-regulatory disciplinary system with the Law Society. It receives and investigates complaints against lawyers, or it can refer the complaint to the Law Society.

Discipline matters are adjudicated by the Legal Services Tribunal, the members of which are appointed by the state government. The Law Society of New South Wales acts as prosecutor but not as adjudicator. Admission to the bar in New South Wales is controlled by the Supreme Court. The Law Society therefore does not control admission, nor does it have exclusive control of complaints, investigation or discipline.

The Law Society of New South Wales has exclusive control of the following programs and services:

1. issuance of practising certificates
2. mandatory continuing legal education
3. trust account inspections
4. compensation fund
5. LawCover - professional indemnity insurance

In August 1993, the National Competition Policy Report made a number of recommendations to promote the policy that self-regulation cannot be used to restrict competition in a way that is not justified in the public interest.

This report has given rise to voluntary membership in the law society in the state of Victoria. New South Wales may also move in that direction. In that event, it would function more like the American Bar Association. It is unclear who would then regulate the profession. There is a perception at the Law Society of New South Wales that its trade union role has allowed the government to easily take control of its regulatory functions.

#### The Medical Profession

The legal profession is not the only profession whose self-regulation has undergone change in some way.

Of the 32 to 34 members of the Council of the College of Physicians and Surgeons of Ontario, between 13 and 15 must be lay people. In addition, an arms-length body is currently reviewing the quality assurance program of the College of Physicians and Surgeons and its handling of complaints about physicians. A five year review of all the regulated health profession is underway in accordance with the *Regulated Health Professions Act*.

The Director of Policy and Research at the College of Physicians and Surgeons of Ontario indicated that self-regulation of the medical profession in England is under attack. The government has taken control of the complaints process against physicians. The National Health Service now controls the quality assurance program for English physicians.

### APPENDIX 3: COMMON APPROACHES TO QUALITY ASSURANCE

- a. Discipline / Competence Proceedings for Those Demonstrating Incompetence
1. Most professions have codes of professional conduct or statutory provisions that require members to be competent to practice, and consider failure to do so to be professional misconduct. In the past many professions relied primarily on discipline proceedings to monitor member competence. This approach assumes that from the time of licensing the regulator does not need to take positive steps to foster or monitor quality other than stepping in to review and discipline those members whose conduct is found to fall below minimum standards. This approach allows those who practice at a sub-standard level to continue to do so until some event or series of events reveals their deficiencies. The potential downside to this is both harm to the public and damage to the profession's overall reputation.

2. Although use of discipline proceedings as a means to regulate both conduct and competence continues to form one important branch of most regulators' responsibilities, few professions follow this approach exclusively today. Some, however, still consider this as the mainstay of their regulatory focus adding components such as publication of guidelines to assist members in practice or encouragement of voluntary continuing education to supplement the approach.<sup>2</sup>
- b. Continuing Education
3. Continuing education is an important component of regulation in virtually all professions. No profession questions the value of its members undertaking ongoing learning throughout their careers, rather the debate has centred on what constitutes continuing education and whether it should be imposed upon members of the profession mandatorily or left to them to pursue as part of their sense of, and commitment to, professionalism.
4. The arguments for and against mandatory continuing education have been canvassed by all professions considering its introduction, including the Law Society of Upper Canada in its 1997 study, *Post-Call Learning for Lawyers*. Appendix 5 sets out the portion of that report that canvassed the major arguments cited in most professional debates, both in favour and against the introduction of a mandatory program.
5. Mandatory continuing education has been, and continues to be, a popular quality assurance tool. It is specified in the Ontario *Regulated Health Professions Act* as one appropriate form of quality assurance that regulatory Colleges may choose to adopt. Some professions have chosen to use incentives and exhortations to members to voluntarily undertake a certain number of hours of CE.<sup>3</sup> New South Wales, which has had mandatory CLE since 1987, is in the process of considering whether to change the program to a voluntary one.<sup>4</sup>

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<sup>2</sup>Until recently both the Professional Engineers of Ontario and the Ontario Association of Architects had, in large part, relied upon this approach. Each has recently made changes, the former introducing an "Excellence Program" to encourage members to take a certain number of continuing education programs per year (voluntarily) and the latter introducing mandatory continuing education one year ago. In addition, both professions publish guidelines or standards of practice to assist members in maintaining their competence in particular areas. The Nova Scotia Barristers' Society has established a Task Force to examine ways for it to assess its approach to competence, which up to now has appeared to rely heavily on the ethical code of conduct requirement for competence and discipline proceedings as the mainstay of its approach.

<sup>3</sup>The Alaska Supreme Court has just approved a voluntary CLE rule (VCLE) that suggests a minimum of 12 hours of CLE each year, including one hour of ethics. What is somewhat different about Alaska's voluntary rule from that of other states is the introduction of incentives to complete the recommended hours. These include a reduction in Bar dues, eligibility for participation in the Bar's lawyer referral service and inclusion in a published listing of those who complete the recommended CLE. Failure to complete the recommended number of hours may be taken into account in Bar disciplinary matters dealing with competence.

The state of Maine also has a voluntary system of CLE with a recommendation that members take 12 hours per year. Members are required to report how many hours they take. In October 1999 the Treasurer of the Maine State Bar Association reported that fewer than half of Maine's lawyers reported attending 12 hours of CLE. The Treasurer called for MCLE to be introduced, since one of the main arguments against it had been that members acquired the hours voluntarily. The Maine system does not have incentives for attendance.

<sup>4</sup>The study was engendered in part because of criticisms of the value of the program and partly because of the possibility that membership in the Law Society of New South Wales may become voluntary, making a mandatory program difficult to sustain.

c. Limited Licensing

6. A number of jurisdictions and professions have developed restricted or limited licensing as forms of quality assurance. The medical profession, for example, makes widespread use of specialization to define the area in which a physician will concentrate his or her skills and to limit those outside of each specialty area from practising in complex areas in which they have little practical experience. The educational requirements for each specialty are developed to meet the unique needs of each group and the professional development opportunities are focused.
7. In Ontario, regulation of the health professions has included a form of limited licensing since at least 1993. Twenty-three regulated health professions including audiology and speech language pathology, medicine, nursing, dentistry, massage therapy, midwifery, and psychology, to name a few, are covered by the *Regulated Health Professions Act*. Under the regulatory scheme of that statute, professional colleges continue to retain self-governance, but licensure has been replaced with the concept of a “controlled acts” practice model. The legislation provides that no one shall perform a controlled act unless he or she is a member of the health profession authorized to do so. There are 13 controlled acts. Physicians may do 12 of the 13 controlled acts. Members of the other professions have more limited practice scope.
8. The Law Society of New South Wales and the Law Society of England and Wales have a form of limited licensing. Before being entitled to establish a legal practice offering services to the public, solicitors in these jurisdictions must first work as employees for a number of years and meet certain other requirements, such as taking a practice management course.

d. Specialist Certification

9. In Ontario, to date, and in many other jurisdictions, certification of specialists is a voluntary process whereby members of the profession choose to apply for certification in a chosen practice area. Under the current Law Society program, and many others, those certified are not precluded from practicing in other areas once they attain certification as a specialist, but are able to inform the public that they have particular expertise in a given area. Certification programs have a variety of goals including providing the public with access to lawyers who meet their specialized legal needs, enhancing the quality of service provided to the public, and potentially raising the standards of all members in a particular area of practice. The programs have a variety of educational and testing requirements.<sup>5</sup>
10. Certification has not received wide endorsement in all jurisdictions and professions. For many, the professional license is seen as sufficient accreditation, and professional reputation is viewed as equally or more valuable than further formal accreditation. Where certification is viewed primarily as an advertising tool for lawyers it tends to be regarded as being of limited importance to the profession overall. There can be a wide variation in the standards chosen as appropriate for certification. Some lawyers are of the view that the programs tend to be biased in favour of older, male, urban-based practitioners and reflect a less-than-perfect assessment of what constitutes specialized practice.<sup>6</sup>

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<sup>5</sup>Currently the Canadian Institute of Chartered Accountants is studying whether to introduce a Tax Specialist Designation. This would be a voluntary program, but would allow those who satisfy certain educational and experiential requirements to obtain such a designation and advertise it. The Institute of Chartered Accountants of Ontario has introduced a voluntary program with steps members may take to meet standards for web security and transmitting confidential information. Members who meet the standards may obtain a Web Trust Seal for use on their letterhead.

<sup>6</sup>There are currently 592 certified specialists in Ontario in 9 practice areas. The Law Society has just approved a new specialty in construction law.



11. Advocates of the concept of specialist certification view it as a potentially significant tool for quality assurance and improvement and a powerful benchmark for professional competence. Rather than being used only to confirm that expertise in a particular area has been achieved, these proponents view certification as providing opportunities for younger and less experienced members to pursue a developmental path toward certification through education, progressive experience, and satisfaction of certain levels of accreditation. Such an approach, it is argued, is potentially attractive to a wide proportion of the profession. The belief is that the public cannot help but benefit from widespread adherence to quality standards of practice.
- e. Random Practice Review <sup>7</sup>
12. Random inspection of practices, or peer assessment, is carried out by a wide range of regulators. Although there are some variations among random practice inspection or peer assessment programs the main features are the same. These are set out in Appendix 6.
13. Random practice inspections represent a balance between quality assurance and quality improvement. There is a mandatory component to such programs, but inspections happen relatively infrequently. Usually before the programs are introduced, the standards to be applied are well defined and, in many cases, have been the subject of consultation with members of the affected profession. The programs are designed to be educational, not disciplinary, and the opportunities to improve problem areas are generous.
14. Voluntary practice inspection has assumed central significance in a number of professions where regulators have adopted it as their main quality improvement tool.<sup>8</sup> Those who have adopted it often contrast it with mandatory CLE, arguing that the latter has no benchmarks for measuring success. Practice inspection monitors compliance with certain specified standards, provides specific prescriptions for improvement where deficiencies are found, and allows for collection of data and dissemination of guidance intended to be helpful to the practitioner. Because of this it is seen as superior to the passive approach of the typical mandatory CLE system, in which there are few defined parameters and no evaluation or measurement tools.<sup>9</sup>

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<sup>7</sup> A number of professions refer to this as random practice inspection or peer assessment. It is referred to as random practice review in the consultation document.

<sup>8</sup> The Law Society has introduced a random or "spot" audit program to monitor member compliance with financial requirements and reporting. The program, introduced as a pilot project, is now permanent.

<sup>9</sup> It is important to note that both tools require the regulator to provide administrative structures and supports.

15. For all that practice inspection has increased in popularity, however, there are issues surrounding the breadth of its reach, depending upon the frequency of inspections. Whereas accountants in public practice can anticipate having their practices inspected once in every four year cycle, the dental profession is anticipating inspecting 1% of the profession each year.<sup>10</sup> The College of Physicians and Surgeons of Ontario has recently decided to increase the number of annual inspections, but has not yet finally determined how many physicians it will assess per year. The CPSO program has been in existence since 1981. Currently, it assesses approximately 400 physicians per year, less than one-quarter of its 28,000 members since the program's inception. Some medical studies have demonstrated, however, that those who have been assessed and have been required to take steps to improve their practices, tend to maintain improved performance for long periods.<sup>11</sup>
  - f. Practice Review (Focused)
16. Practice review is one of the competence assurance models used by those professions that have chosen to concentrate resources on improving the skills of those who need remedial attention. Unlike random inspection to which every member is subject, a focused approach targets those lawyers who meet certain profiles for risk, have had numerous client complaints registered against them or have demonstrated competence-related deficiencies.<sup>12</sup>
17. The Law Society's practice review program (voluntary from 1988 to 1999 and mandatory since February 1999) applies where there are reasonable grounds for believing that a member may be failing, or may have failed, to meet standards of professional competence as defined in the *Law Society Act*. A number of other provinces, such as Alberta and British Columbia, have practice review programs for lawyers.
  - g. Reflective Practice and Self-Assessment Tools
18. Most professions assume that members make a career-long commitment to learning that includes self-analysis of professional needs and reflection on the components that are necessary to engage in competent, ethical practice. Historically, professions have not assumed a need to guide members in that reflective process or provide tools to stimulate that reflection.

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<sup>10</sup>The lower the percentage of members inspected each year the more difficult it is to consider practice inspection as an effective profession-wide quality assurance program.

<sup>11</sup>The medical profession in Ontario, which has done substantial research into the effectiveness of practice inspection and the lessons it has taught, has noted two significant challenges:

1. In view of limited resources, how to find efficient and effective ways to identify physicians in need of help; and
2. What further means can be found to improve practice of all physicians - the studies have shown that the experience has not had a measurable effect on the entire population because each year they find approximately the same percentage of physicians who demonstrate deficiencies in their practices.

See Norton, Dunn, Beckett, and Faulkner, "Long-term Follow-up in the Peer Assessment Program for Nonspecialist Physicians in Ontario, Canada", 24 *Journal on Quality Improvement*, (June 1998), number 6; and Peter G. Norton and Daniel Faulkner, "A Longitudinal Study of Performance of Physicians' Office Practices: Data from the Peer Assessment Program in Ontario, Canada", 25 *Journal on Quality Improvement*, (June 1999), number 5.

<sup>12</sup>The College of Physicians and Surgeons of Ontario, for example, does a practice inspection of every physician who reaches the age of 70 years, based on statistical data that has revealed higher practice deficiencies in this sector of clinical practitioners. In addition the College makes use of a Physician Review and Enhancement Program ("PREP"), a standardized assessment process that reviews physicians with practice deficiencies and provides an education plan for improvement. There is a similar program for dentists.

19. More recently it has been emphasized that the requirement to maintain competence is a career-long obligation and ongoing process. From this has grown a move toward reflective practice. Proponents of this approach argue that the systematic analysis of professional strength and weaknesses, learning needs, and plans for improvement may institutionalize a reflective approach to professional practice that cannot help but improve the quality of service provided.<sup>13</sup>
20. Reflective practice requires those who participate in it to make a commitment to the principles that underlie it. Professionals may resist undertaking a process that does not appear to have immediately realizable benefits. Further, professionals are often unable to describe how they do what they do and may not value efforts to render an unconscious process a conscious one.<sup>14</sup>
- h. Publications of Standards and Guidelines for Practice
21. Some professions have undertaken significant efforts to articulate the standards that should govern practice, both in substantive areas and in practice management.<sup>15</sup> Other professions have developed guidelines which, although not articulated as mandatory standards, are seen as persuasive indicators of acceptable performance.
22. In a quality assurance or quality improvement environment it seems only appropriate to provide guidelines to assist members to know what is expected of them. This has value both as a preventive tool (if members are made aware of the type of approaches they should take to issues they may avoid making errors) and to ensure fairness in mandatory processes such as practice review and competence hearings. Guidelines can, however, be controversial if a consensus is lacking on the appropriateness of the content.

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<sup>13</sup>Of the professions examined the College of Nurses of Ontario has the most significant reflective practice component in its quality assurance program. The Royal College of Physicians and Surgeons of Canada also includes aspects of reflective practice in its mandatory CE program. Nurses complete questionnaires and keep journals covering such areas as their goals for practice, their areas of strength and weakness, learning needs, their proposed learning goals and the means by which to attain them. The initiative focuses on continuous improvement, the monitoring feature being minimal to non-existent.

<sup>14</sup>One of the issues surrounding reflective practice is that the developmental process may be very time consuming and the ability to measure effectiveness somewhat limited. This may work better as a voluntary tool than a mandatory one.

<sup>15</sup>Chartered accountants in Ontario, for example, are governed by detailed standards set out in the CICA Handbook and the ICAO Member's handbook. The Professional Engineers of Ontario and the Ontario Association of Architects provide guidelines to support their respective members' work in a wide range of areas.

- i. Voluntary Practice Standards Accreditation
23. In some jurisdictions and professions the regulator has introduced voluntary “best practices” accreditation systems. Under these systems, as commonly structured, law firms or practitioners may take the steps necessary to comply with set program requirements in order to then market themselves as having met the accreditation standard of excellence. Like the ISO-9000 series of accreditations used by the corporate sector, these programs focus on ensuring that practices meet certain quality control standards designed to result in more efficient, competent, and client-centred practices.<sup>16</sup> The ISO ratings, developed by the Geneva-based International Organization for Standardization, consists of a set of 20 internationally recognized standards for quality assurance. These standards are general statements in a variety of areas such as management, client relations, staff relations, and training. They can be adapted to whatever industry or profession seeks to apply them. The major task for those seeking the rating is to examine their operation, agree on the appropriate standards for each of the areas, and then comply with those standards.
24. For the best practices approach to have widespread appeal it must be applicable to sole practices and small law firm settings as well as to larger firm and practice environments. In addition, the costs of attaining accreditation must be manageable for all practitioners and law firms.
- j. Re-testing
25. There has been some suggestion from the government of Ontario that the teaching profession may have to undergo such a quality assurance measure. Similarly, in some specialist certification programs testing may be a component of re-certification. To date, in Ontario, self-regulating professions have treated base-line testing as appropriate for entrance into the professions, but as inadequate as a post-entry indicator of quality of service.

#### APPENDIX 4: SUMMARY OF QUALITY ASSURANCE / COMPETENCE MEASURES USED BY OTHER PROFESSIONS AND OTHER LEGAL JURISDICTIONS

##### I. EXAMPLES FROM THE REGULATED HEALTH PROFESSIONS IN ONTARIO

###### COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

Regulates approximately 28,000 members

The focus of the College’s approach is,

- peer assessment;

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<sup>16</sup>The Law Society of England and Wales introduced the voluntary Lexcel Certification program in 1998 following a long developmental period, using the *Practice Management Standards* published by the Society in 1993. The program involves an independent assessment of practices to determine if they have met the core requirements of the *Standards*. Members interested in pursuing certification are provided with manuals to assist them in the process. Assessors are independent of the Law Society, report their findings to the Law Society and, where the standards are met, the Society grants the certification. The Law Society of New South Wales also has a best practices program with training and a certification process. In 1999 the Law Practice Management Section of the American Bar Association indicated that, having acquired the Law Society of England and Wales’ permission, it would begin exploring the development of a competence model for lawyers in North America, using the *Standards* as a starting point. As part of its quality assurance program the College of Nurses of Ontario has begun a Practice Setting Consultation Program. The program had developed the key attributes of a quality practice setting and a six-step self-directed process that assists each organization to measure the extent to which it is a quality setting, what strengths need to be built upon, and what areas need improvement. Similar to the reflective practice program the nurses follow for individual members, the program allows organizations to engage in critical self-analysis.

- the PREP program for physicians in need of substantial assistance; and
- initiatives coming under the rubric of continuous quality improvement and flowing in some large degree out of research undertaken by the College and others on effective strategies for improving the quality of care.

The College also carries out assessments of out-of-hospital facilities under the Independent Health Facilities Program, in particular facilitating the development of clinical practice parameters and facility standards.

Continuing education is not mandatory, but there are many voluntary CE although programs available.

#### Peer Assessment Program (PAP)

The program was introduced in 1980 as one of the first in North America. It is now used in British Columbia and the Maritimes. It consists of an office based assessment of medical records for specialists and non-specialist physicians, using explicit criteria. Until now physicians were chosen on two bases: every physician attaining the age of 70 is assessed as are a randomly selected group of physicians under 70. Only those with independent practice certificates are chosen. Although the assessment is of individual practitioners approximately 40-50% practise in some form of group environment.

Written questionnaires are sent out to chosen practitioners to identify demographics, education, and practice characteristics. The assessment is conducted by a practising physician with a similar practice to physician being assessed. Assessors have undergone a PAP and have received an exemplary rating. They take ongoing training, usually an annual seminar, video and audiotapes with scenarios and FAQs, written material including a bulletin issues every 6-8 months and receive feedback concerning their assessments.

Assessors visit the premises, examine 20 - 30 files (this number has been shown to be sufficient for reliability). They look to record keeping; content of records for compliance with legal requirements and CPSO expectations; what records reveal about quality of examinations, history taking, diagnosis, and management plan.

The questionnaire covers 44 specific questions - 31 related to medical records and 13 to quality of care. There are 4 categories for evaluating the recording of information in medical records (always, usually, sometimes, never). The final part of the assessment is communicating the findings to the physician and obtaining clarification of questions and findings, where necessary.

The assessor does not decide on the quality of the physician's practice. This is done by the Peer Assessment Committee, made up of 6 practising physicians and 2 public members. It meets monthly. It considers the pre-visit questionnaire, the pre-set questions and answers, and the narrative description, and assigns a grade. Physicians are rated as,

- B1 - essentially perfect; no examples where care in doubt;
- B2 - minor deficiencies in record keeping or care;
- C1 - more errors in charting; little care concern: letter sent with explicit suggestions for improvement and written materials (the member will be re-assessed);
- C2 - records so deficient can't make judgment about care - (interview mandatory); and
- D - evidence of inappropriate care (interview mandatory).

The committee splits into two panels of similar composition to determine the grade. Each year a blind overlap is done to ensure similar approaches are taken within the two sub-committees. Five to ten assessments are sent to both panels. The grades are compared - in the event of variation cases are reviewed by the whole committee. The exercise is repeated. The distribution of grades has remained stable over time.

Those who receive a C2 or D ratings are interviewed, the educational focus of the process being emphasized. The member is asked to bring the charts reviewed plus 12 additional ones of his or her choice. The interview takes place several months after the grade has been received. The committee consists of a public member plus 3 physicians.

Many physicians have taken steps to remedy the deficient areas by the time of the meeting. If they have remedied all the areas there is no further action necessary. If changes have not yet been made, the committee discusses areas of concern with the physician and offers suggestions for improvement (1 hour interview). A report is prepared while the physician waits and is read to the physician with materials for study provided. A formal report is mailed out a month later confirming the information provided.

Reassessment takes place 9-12 months after the interview. About ½ of this group (usually 1/4 of the original group of C2 or D) will be practising appropriately at reassessment. Most of the rest will have decided to retire (usually in the 70 and over range). About 2% can't or won't change, in which case other CPSO measures are used.

Since 1991 revisits are now conducted for those in C2 or D, mixed in with the randomly selected; assessors do not know they are revisits. Follow-up assessments of physician practices are done on average of six years after 1<sup>st</sup> intervention. There is some empirical evidence concerning doctors revisited. In a sample of 81 doctors they were found to be practising at least as well as the doctor group randomly assessed for comparison.

#### Effectiveness of the Assessments

- The data on those revisited suggests that there is sustained improvement in the group of revisit physicians who have moved from the bottom 10-15% of performers to at least an average level of performance for a sustained period and in many cases to a high level of performance.( Studies have certain limitations to them, which should be kept in mind)
- The view of the committee on why there is sustained improvement is that most physicians want to deliver good service, but may have few opportunities to see and understand the issues in their practice; the College's authority makes the assessments possible and leads to those assessed taking the findings seriously.
- Having said this there are still a number of those revisited who are at the same or worse grade level as when first visited, with problems in the same area.
- The future challenges the College has identified are how to find efficient and effective ways to identify physicians in need of help in view of limited resources and how to improve practice of all physicians - the studies have shown that the experience has not had a measurable effect on the entire population because each year they find approx. the same percentage of physicians in C2 and D.

In September 1999, the Council of the College agreed to develop new programs and enhance existing programs, to review how all physicians are practising, and to assist all physicians in acquiring and applying new knowledge and skills. Over the next 3-4 years the College will implement a regular performance review and enhancement process.

#### Reasons for Regular Performance Review and Enhancement

According to the College its reasons for introducing or expanding regular performance review stem from the following factors:

- The College has a mandate for Continuous Quality Improvement.
- There is a shifting emphasis from reactive complaints and discipline emphasis to an approach that guides the profession and prevents practice problems.

- The College has endorsed a national framework for monitoring and enhancing physician performance being developed by the Federation of Medical Licensing Authorities.
- In the College's view programs that review physicians' practices have identified risk factors for performance concerns, have sustainable long term impact on practices, and have shown that physicians performance may decline over 10 years.
- This pro-active approach is being pursued in other jurisdictions.
- The focus is on doctor performance - how physicians apply their knowledge, skill and judgment to patient care.

The College will create a review continuum.

Step 1	Screening of all physicians (being developed)
Step 2	Assessment of Physicians (peer assessment program)
Step 3	Individualized Needs Assessment (The Physician Review Program PREP and the Specialties Assessment Program SAP)

All physicians will be assessed, but it has not yet been determined how often. In the year 2000 there will be 250 assessments of those in general practice and 250 assessments of specialists.

#### ROYAL COLLEGE OF DENTAL SURGEONS OF ONTARIO

Regulates approximately 7,000 dentists including 800-900 specialists

The College wants to emphasize the "helping" focus of the quality assurance program. The College, which has existed since 1868, has been primarily an investigative and disciplinary body. It is aware of the importance of creating a program that is consistent with the new supportive principle.

There are two main components to the QA program. The first is Mandatory Continuing Dental Education (MCDE). The second is a peer assessment program with characteristics similar to those in the CPSO program.

##### MCDE

When the College began considering its QA program it commissioned a Decima survey of its members. Among the questions it asked were a number to determine how many continuing education programs members were taking. It revealed that in the previous 3 year period only 25% of older dentists (50s and older) and only 10% of the other age groups had taken a continuing education course.

Having introduced an MCDE program the College knows that all members are now receiving at least some exposure every year to CDE. In addition members who have never attended dental society meetings are now attending and being exposed to issues relevant to the profession.

The MCDE program requires members to obtain 90 credit points over 3 years. Licensed specialists must receive 50% of their points in their specialty area. Credits may be received through a variety of means including attendance at approved continuing education courses, attendance at multi-day convention meetings, participation in approved study clubs, teaching, publication, and self-study. In some cases only a certain percentage of the credits may be obtained from a particular source. A member who fails to meet MCDE requirements will automatically be subject to a peer assessment.

The College has not done any studies on the effectiveness of MCDE. There are general studies that show that certain kinds of CE can change behaviours. For this reason the College plans to provide incentives to members to take certain types of CE. So, for example, a member may be able to receive more credits for attending a "hands-on" interactive program than a lecture program.

### Peer Assessment Program (PAP)

- Peer Assessment is included in the College's yet-to-be-passed regulation. At the outset the program will not apply to specialists. This is because of the need to develop a pool of specialist assessors. Currently there is a peer assessment program, but it has been voluntary. Under the regulation there will be three main ways by which a member will come within the PAP.
  - Random Selection
  - Automatic referral for failure to comply with MCDE requirements
  - Member's agreement with a complaints committee proposal or other process recommendation that the member be assessed

The assessment has two aspects. The first is a facilities review in which the premises are assessed to see if there are appropriate systems in place such as infection control, x-ray safety, emergency drugs, etc. The second is a chart review similar to the CPSO review. The assessor then produces a report. The new regulation will provide that a member who feels the review is not fairly representative of the practice can request a second review. Since the voluntary program has been in operation there have been positive responses from members who have undergone the assessment. Members have received a post-visit questionnaire about the process and the College has received positive feedback.

The program is seeking to develop its profile as a helping tool. It has had to overcome the view of the College as a disciplinary body. Essentially, the QA programs are to be separate from the discipline stream. This is important for the extent to which the PAP is accepted by members. Where a member's practice is in such disarray that the public interest may be affected, the College may refer the member's file to the Registrar of the College. The referral would simply indicate there were concerns about the member, but there is no authority to reveal the results of the review. The Registrar would then determine whether to open a new investigation.

The assessor will report one of the following results:

- no concerns;
- some concerns of a minor nature - if the member rectifies the concern by the time the QA Committee meets, the matter is at an end;
- some concerns of a more serious nature - the member is asked to correct them and an assessor comes back for a second look; or
- serious concerns and many of them - this possible report will come into play once the program is authorized under the regulation. It will entail more in-depth work with the member and possibly involvement with the dental equivalent of the CPSO PREP program.

The PAP for dentists is very similar to the older PAP of the College of Physicians and Surgeons.

The College has not paid much attention to evaluation tools to this point. There does not seem to be the same interest (or perhaps resources) as the CPSO and medical profession has to look at empirical evidence, particularly with respect to MCDE.

### COLLEGE OF NURSES OF ONTARIO

Regulates approximately 147,000 members

The College's quality assurance program embraces the philosophy of continuous life-long learning. The College is of the view that it is not the method chosen, but rather the process of continuous learning that is of paramount importance in maintaining and improving competence. The College's program seeks to offer a wide range of options from which nurses can choose to meet their QA requirements.



The program has three parts:

26. **Reflective Practice (general applicability)**  
All nurses are expected to engage in a reflective process to help them identify areas for continual improvement. Practising nurses are required to complete a detailed self-assessment, seek input from a peer, develop and implement a learning plan based upon the identified needs, and evaluate the outcomes of the plan. Non-practising nurses will participate in aspects of the reflective practice approach. In such cases a formal self-assessment is not required but the nurse is expected to identify and fulfil individual learning needs when returning to practice.  
  
Nurses must complete the reflective practice component, but monitoring is minimal and in large measure based on random sampling.
27. **Practice Review (focused)**  
This component focuses on facilitating practice development where areas for improvement exist or potentially exist. Only those nurses who have been identified as requiring a more in-depth assessment of their practice than is offered by the reflective practice tool will be required to participate in this component.
28. **Practice Setting Consultation Program (voluntary)**  
A voluntary program, this component focuses on contributing to, and influencing, practice settings that support quality care. Its intent is to help nurses and agencies identify, cultivate, and maintain workplace structures and processes that support quality professional practice.

One of the underpinnings of the quality assurance program are the standards that nurses must meet. The standards consist of three elements:

1. **The Professional Standards for RNs and RPNs in Ontario**  
Published in 1996 these are based on broad professional expectations of nurses. They emphasize the ethical, public service, and self-regulating aspects of practice.
2. **Practice expectations**  
These are the standards that apply to specific aspects of nursing practice. There are generic expectations applicable to a variety of practice settings and expectations for specific situations.
3. **Legislation and regulations**  
These identify the pieces of legislation and regulations that guide and direct nursing practice.

## II. *ROYAL COLLEGE OF PHYSICIANS AND SURGEONS OF CANADA*

Beginning in January 2001, Fellows of the Royal College of Physicians and Surgeons will be required to earn 400 credits during each 5 year period of active practice by participating in educational activities based on the needs of their current practice. Educational options include accredited group learning activities, other learning activities, accredited self-assessment programs, structured learning projects, voluntary practice review and appraisal, and educational development, teaching, and research.

Each year a random sampling of 3% of Fellows will be required to validate their self-reports of participation in educational activities. Records of participation are confidential.

Completion of the Maintenance of Certification Program (MOCOMP) will be mandatory for admission to and renewal of Fellowship in the College and use of the designation FRCPC and FRCSC.

III. *ACCOUNTANTS AND ACTUARIES*

INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO

Regulates approximately 27,000 members of whom 9,800 are in public practice

A central feature of the ICAO quality assurance approach is the Practice Inspection Program in place since 1980 for all members in public practice. The membership approved the introduction of the program. The main purpose of the program is to ensure that all members in the practice of public accounting maintain an appropriate level of professional standards.

The program is intended to be primarily educational - to improve the standards of practice where problems exist. Through a review of current accounting and audit engagement files, practice inspection identifies where a practising member may require assistance in maintaining prescribed professional standards, namely those prescribed in the CICA Handbook and the ICAO Member's handbook. Approximately 25% of public accounting practices or 2900 practices are inspected each year. The practice pays for the inspection. The selection of offices is made on an ongoing, cyclical, modified random basis.

In an effort to keep the costs of the program as low as possible, firms that have established internal quality controls may consider to what extent these controls reduce the necessary scope of the inspection. Each office is encouraged to describe its controls. The inspector then performs certain compliance tests on the procedures on which reliance is intended.

Where internal controls are not provided or where the compliance tests indicate the controls cannot be relied upon each member of the firm is considered a practising unit for inspection purposes. Where the internal controls are accepted the office is treated as a single practising unit in which case the number of files per member to be examined is reduced.

One of the responsibilities of the practice inspection is to designate offices for the training of students. Offices so designated have re-appraisals of the designation done at the time of the practice inspection. If the office is not so designated and the practice inspector believes the office meets the standards for such designation it may be encouraged to apply.

Following the inspection a draft report is prepared with findings and any suggestions or recommendations for improvement. The practising unit and the inspector discuss the report and the practising unit's comments are included. A final report is prepared and submitted to the ICAO's practice inspection committee. Prior to the consideration of the report by the Committee the report is reviewed by a "detailed reviewer" to ensure consistency within the program.

Once any changes are made, and the time for comments by the practising unit has passed, the committee reviews the report. The committee does one of the following:

Where a "no further action" recommendation is made by all levels of inspection and review, and agreed to by the committee member who reviews the file, the inspection is considered complete and a decision letter is issued to the practising unit.

Where more severe action is recommended, such as reinspection in a specified period or referral to the professional conduct committee for very serious problems, the file is reviewed by a second committee member. If the committee member makes more severe recommendations than the detailed reviewer, the practising unit has 14 days to comment. The entire committee will then review the file and report and decide on one of the following:

No further action  
Reinspection in one year  
Referral to the professional conduct committee

As the practice inspection program cannot result in a sanction or other disciplinary measures there is no hearing and accordingly no appeal from the decision of the practice inspection committee.

There is confidentiality in the process. No disclosure of information is permitted, with the exception that if the committee is of the view that the failure to maintain professional standards is sufficiently serious as to reflect adversely on the professional competence, reputation, or integrity of any member or student, the director of practice inspection will report the matter to the professional conduct committee for its independent investigation.

The identity of the member inspected and the member's clients are not known to the practice committee. The report identifies the practice unit by a number and the clients by alphabetical characters.

The cost of the inspection varies depending upon the size of the practice being inspected. The inspection costs are \$110 per hour. Those being inspected may ask for a full time inspector or one who is in practice and conducts inspections part-time.

The ICAO's other quality of service initiatives include:

#### Continuing Education

There are many continuing education opportunities on a wide-range of topics. CE is not mandatory. Like the College of Physicians and Surgeons the ICAO was not satisfied that the empirical evidence exists to demonstrate that MCE reduces complaints or addresses the key competence-related concerns.

#### Web Trust

A program has been developed by the ICAO for steps members may take to meet standards for web site security and the transmission of confidential information. The program is voluntary. Members who meet the standards get a Webtrust Seal that they are entitled to use on their letterhead.

#### Elder Care Services

The ICAO is bench marking standards for working in the area of elderly care, including interacting with other relevant professions. This will probably be available in a few years.

#### QA for Members not in Public Practice

There are by-laws related to competence with which members must comply. In addition there is a broad range of continuing education courses for members, some of which are intensive programs for member pursuing particular fields. (eg. There is a course for those seeking to become Chief Financial Officers).

### CERTIFIED GENERAL ACCOUNTANTS ASSOCIATION OF ONTARIO

Regulates approximately 11,500 members and 11,000 student members.

The main components of the quality assurance program are mandatory continuing education and, for those in public practice, practice review.

## MCE

Members are required to complete a minimum of 100 credits in each 3 year reporting period on a “moving total” basis. Documentation to support the credits claimed must be available and should be kept on record for three years. Failure to maintain compliance may result in disciplinary action.

Credits may be granted for attendance at seminars, in-house training, special interest study groups, breakfast, lunch or dinner meetings, attendance at university courses or community college programs, audio/visual presentations, correspondence courses, certain kinds of self-study courses, development and presentation of seminars, tutoring CGA courses, marking CGA assignments, and serving on the program review committee. In addition, credits may be obtained for major changes in job responsibilities that require significant development of new skills, first time major involvement in special projects, completing a successful practice review, certain volunteer activities, writing for publication, and personal study of technical material.

## Entry into Public Practice

Members newly registered in public practice must complete a registration form, purchase liability insurance, acquire and maintain the CGA Public Practice Manual and the two CICA handbooks, complete the one day orientation to public practice seminar, the one day GAAP and GAAS review seminar, and all 10 assignments from the Taxation 2 course (obtaining at least 65% in each assignment) within 12 months of registration, and have a minimum of 2 years experience in a professional accounting firm as an employee within the previous five years from the date of application.

Members in public practice are also subject to practice inspection.

## CANADIAN INSTITUTE OF ACTUARIES

As of January 1, 1997 members of the Institute must meet continuing professional development (CPD) requirements. The report recommending the program noted that most members probably obtain sufficient CPD, but stated that “in practice, however, any professional organization which does not have a formal program lacks credibility with its audiences”.

The purposes of the Institute Program is to,

- ◆ ensure that members are properly trained to discharge their responsibilities;
- ◆ promote and enhance public confidence in the actuarial process; and
- ◆ enhance the status of the CIA as a professional organization

The approach is premised on the notion that a member is already qualified to practice and through CPD is maintaining/enhancing skills. It is subjective rather than objective, it being left to the member to determine what kind of CPD is needed.

Some members commented that the CPD standard should be measured in relation to attaining a level of competence, not by the number of hours of activity. The committee studying the issue determined that although this was the ideal it was “practically unworkable” and that the Rule of Conduct requiring competence is sufficient.

Members must obtain a minimum of 24 hours of formal activities and a minimum of 100 hours of both formal and informal activities obtained over the most recent two year period. Formal activities include attendance at seminars, meetings, or other programs with relevant actuarial content. Informal activities are all other activities that contribute to continuing professional development, but which fall outside formal activities, eg. private reading, research and studies, and audiotapes of meetings.

The requirements must be met for each area of practice.

#### IV. *ONTARIO ASSOCIATION OF ARCHITECTS*

Regulates approximately 2600 members.

##### Regulatory Approach

The Associations's approach to regulation has been evolving over the last number of years from reactive regulation (discipline for misconduct including incompetence) to pursuing more positive approaches through development of standards of practice and codes of ethics.

It did have a form of peer review that was voluntary. Members could request that someone come and look over their practices. Few people availed themselves of the opportunity. Most who did were in fact very good practitioners. Eventually the architects will have some form of mandatory peer review, but it is not being actively discussed now.

The Association studied mandatory continuing education. Associations of architects in the United States were introducing it in a number of states. The Ontario Association of Architects had the sense that if it did not introduce some component the government would. The Ontario Architects Association President and Executive Director visited all the local architectural societies throughout the province to discuss mandatory professional development. The expectation was that there would be opposition, but in fact the members accepted the idea with little opposition.

The mandatory continuing education program (known as CON ED) has just completed its first year. The first reporting cycle will be three years. Thereafter it will be a two year reporting cycle. Members must fulfill 50 points of professional development over the reporting period. The program has two components:

Professional Renewal (refers to updating for all architects). These programs are designed and developed by the OAA, based on issues the Council determines are relevant for the year. Members must obtain 15 of their credits in this branch of the program. Members must register through the OAA and accordingly there is a record of whether or not they have met the requirements.

Self-directed Learning Opportunities (Related activities chosen individually by the individual architects) The member must record 35 credits in this aspect of the program. This part of the program is self-reporting (the honour system). The members may complete their transcript of credits on the OAA web site or manually.

The goal is to encourage people to pursue more professional development.

#### V. *PROFESSIONAL ENGINEERS OF ONTARIO*

Regulates approximately 62,000 licensed engineers.

Anyone offering services to the public or engaging in the business of providing services to the public within the practice of professional engineering must do so under and in accordance with a certificate of authorization. Where a firm has more than one member offering services to the public the firm will be given Certificates of Authorization (C of A). There are approximately 4,000 C of As in Ontario. The 4000 certificates represent approximately 12,000 - 13,000 engineers.

## Professional Competence

In the early 1990s concerns were raised about the effectiveness of regulation. A report was issued with recommendations for a “new licensure model”. The report was extremely divisive and some of the fundamental information that had in fact prompted the establishment of the Task Force report was found to have been inaccurate. The new licensure model would have introduced a formal continuing education requirement, first voluntary, then mandatory. The members would have been obliged to take a certain number of professional development credits every 3-5 years. There had also been some discussion that in this new model those with a C of A would undergo a random practice inspection. There was opposition to this both in terms of the content and in terms of the name. It did not proceed.

What has recently been suggested is something called an Excellence Program - voluntary reporting of professional development activities. This will be introduced although there does not seem to have been any determination of what will be done with the information and there does not appear to be a penalty for not providing the information. The focus is on encouragement, not monitoring.

So, in essence the engineers operate on a model whereby there is an ethical obligation to be competent. Members may be disciplined for failure to be competent. (eg. Member displays lack of knowledge, skill, or judgment or disregard for the welfare of the public.)

## Standards/Guidelines

The *Professional Engineers Act* includes, among the Association’s objects, to establish, develop, and maintain standards of knowledge and skill, of qualification and practice, of professional ethics, and of performance standards. Although the legislation uses the language of standards the engineers publish guidelines. These are issued and revised by the Practice Committee.

## VI. COLLEGE OF TEACHERS OF ONTARIO

In November 1999, the College approved standards of practice for teachers.

Its regulations contain provisions for ongoing professional development and the concept of “teacher as learner” is now a formal part of the definition of the teaching profession.

Regulations also outline additional requirements that are necessary in order to teach in a wide variety of areas. The basic teaching certificate must be supplemented by additional qualifications for each specialty area. This is a form of limited licensing.

There are both institutional professional development opportunities and others provided through universities and community college programs for teachers to maintain their competence.

The Minister of Education has recently sought advice from the College on a number of issues, including those related to quality assurance, such as the possibility of recertification of teachers on a periodic basis. The College is currently preparing a response to the Minister’s request.

VII. *EXAMPLES OF LEGAL PROFESSION APPROACHES IN OTHER PROVINCES AND JURISDICTIONS*

LAW SOCIETY OF ALBERTA

In 1996 the Law Society of Alberta established a competency planning committee to review existing competence initiatives of the Law Society of Alberta, determine what additional measures might be appropriate, and plan for implementation. Following its interim report in 1997 the committee was directed to focus its continuing efforts on ways to improve the competence of the marginally competent members of the Society and the remediation of those members who had shown themselves to be incompetent, and to recommend ways in which those members who proved themselves impervious to assistance might be removed from the profession. The benchers rejected the idea of attempting to raise the competence level of the entire profession. The committee made its recommendations in May 1998 and completed its implementation report in November 1998, following bench debate of the recommendations.

The Law Society of Alberta has a spot audit program, a practice advisor and a mentor program operating out of the office of the practice advisor. It also has a practice management advisor and a focussed practice review program. The competency planning committee made certain recommendations for the improvement of the practice review program, including the development of remedial mandatory education for those in practice review and that the practice review committee operate separately from the conduct committee to support the remedial focus of practice review.

It recommended against introduction of mandatory continuing legal education. Alberta does not have specialists certification but is considering it. The Competency Planning Committee did not make any recommendations on this issue because it was outside of its mandate.

There is a lawyer referral program, and the committee recommended that the Report of the lawyer Referral Committee, adopted by benchers in 1996 be implemented with respect to competence requirements for members participating.

The committee has recommended an increase in practice management CLE and as well recommended that certain target groups be encouraged to take a practice management course.

BARREAU DU QUÉBEC

Like other Canadian law societies the Barreau has professional conduct codes, professional development opportunities, and practice guidelines. The Barreau is also considering the introduction of mandatory continuing legal education, possibly in one or two years.

The Barreau also has a Practice Inspection program begun approximately 10 years ago. Each year a randomly selected number of members (between 1000 and 1200) are chosen to receive a written questionnaire asking questions directed to assessing the member's attention to client interest, records and office procedures, and professional development. Members are required to complete the questionnaire and return it to the Barreau. The responses are read and recommendations for improvement are sent to the member. Once the members have made the changes they receive a visit from a practice inspector. Approximately 800 offices a year are visited. A random sampling of files are reviewed and a discussion between the member and the inspector (also in private practice) ensues.

There are two types of recommendations the Barreau can make: those that are mandatory (defined in the regulation) and those that are merely suggestions. Failure to comply with the former has regulatory consequences for the member. Failure to comply with the latter does not.

The typical inspection lasts ½ day. The program is funded through the annual members' fees.

## NOVA SCOTIA'S BARRISTER SOCIETY

The Nova Scotia Barristers' Society appointed a Competency Task Force to consider options for its Council with regard to addressing competence in its regulatory framework. The Task Force has presented a number of new options for regulating competence including,

1. adopting a new definition of the competent lawyer, based upon the definition adopted by the Law Society of Upper Canada in 1997;
2. developing additional practice standards with a priority in the area of practice management;
3. developing a practice management program and possible a practice management advisory program;
4. articulating a vision for the ongoing role of education in any competence regime developed, and the Society's role in such education, including the issue of MCLE.
5. consider the possibility of specialist certification, and
6. consider providing authority to the insurer and the discipline committee to refer members for voluntary practice assistance.

Nova Scotia currently has authority to address incompetence primarily within the discipline process, by means of practice investigations.

## LAW SOCIETY OF ENGLAND AND WALES

(See Appendix 2 for more information on the Law Society of England and Wales.)

### MCPD

There are mandatory continuing professional development (CPD) requirements affecting all solicitors. In each of a solicitor's first three years he or she must take 16 hours of CE, including a compulsory course in the first year on Financial & Business Skills, Ethics, and Client Responsibilities. From the fourth year onward solicitors must take 48 hours of CE over a three year period.

At least 25% of the requirements must be met by participation in accredited courses. Up to 75% may be met through other activities such as writing law books, attending unaccredited courses, teaching, or delivering certain training courses.

### Specialist Panels

There are specialists panels open to all members who meet accreditation criteria. These include Children Panel, Family Law Panel, Personal Injury Panel, Planning Panel, Medical negligence Panel, and Mental Health Review Panel.

### Limited Licenses

Members seeking to enter sole practice, must meet certain prerequisites before being entitled to do so, including working for a period of time as an employee in a firm.

### Lexcel

The Society administers a voluntary practice management standards certification program, using Practice Management Standards approved by the Society in 1993. Independent assessors assess applicants and, where successful, the applicant's practice is certified by the Society.

The Society provides a wide array of supports for members.



## LAW SOCIETY OF NEW SOUTH WALES

The Law Society of New South Wales has had a mandatory continuing legal education requirement since 1987. The program is currently being reviewed with the possibility that it will cease to be mandatory, at least in part because membership in the Society may become voluntary. The discussion paper on MCLE has raised questions about the development of a comprehensive model of professional competence with appropriate performance indicators.

The Law Society has a number of supports and best practice tools for members, including:

Practice Support Telephone Enquiry Unit

Precedents

Library

Specialist Accreditation

Solicitor Referral Services

Mediation Program

Best Practice Program

Through the best practice program members can meet certain standards and obtain certification to the Best Practice Standard.

There is a restricted practice requirement. Solicitors called after 1994 who seek an unrestricted practising certificate will first be required to complete a 2 year period of restricted practice and a practice management course approved by the Law Society.

## GENERAL APPROACH IN THE UNITED STATES

The legal profession in the United States is regulated by the state Supreme Courts, which set policy, rules of admission and discipline, and other regulatory provisions. Each state has a bar association which liaises with the courts and represents the bar's interests.

The main general quality assurance provision in approximately 38 states is mandatory continuing legal education. The first state to enact MCLE was Minnesota in the 1970s. Typically members are required to take a specified number of credits per year or in a two or three year reporting cycle, on average between 12 and 15 credits per year. For the most part members are free to take their credits in whatever law-related subjects they choose, although some jurisdictions require some credits in ethics or diversity issues. A few states have voluntary CLE, but mandatory reporting. One state (Alaska) has voluntary CLE, mandatory reporting, and an incentive system to encourage members to take the recommended hours.

Other quality assurance programs are, by and large, voluntary and include components such as specialist certification, and practice supports. The Practice Management Section of the ABA is undertaking a study to determine whether a practice management standards program similar to Lexcel program of the Law Society of England and Wales might be implemented across North America.

APPENDIX 5: EXCERPT FROM THE 1997 REPORT OF THE MCLE SUBCOMMITTEE *POST-CALL LEARNING FOR LAWYERS*

The MCLE Debate<sup>17</sup>

1. On the issue of whether MCLE is, in principle, a valid initiative, the Subcommittee is satisfied that the nature of discussions has been similar in all the jurisdictions the Subcommittee researched that have considered MCLE. To some degree, both in other jurisdictions and in Ontario, the MCLE debate is based on different views
  - of the role of a governing body in a self-regulating profession;
  - on what goals such an initiative must be based in order to justify its existence; and
  - on the degree of "evidence" necessary to demonstrate that such an initiative would be effective.
2. Added to the Ontario debate on the principle of MCLE are issues related to
  - the economic climate, including its impact on the practice of law;
  - the Law Society's involvement; and
  - delivery and cost issues.

In Principle

1. Those who favour the introduction of MCLE do so primarily on the following analysis:
  - Professionalism requires that the profession maintain and enhance its competence through, among other things, a collective commitment to education. It is insufficient for a self-regulating profession to have no further educational requirement beyond the call to the bar. A profession may use a number of means to ensure that its members continue to maintain the expertise necessary for a professional. These may include practice inspection or perhaps even examinations at regular intervals in a professional's career. A mandated minimum requirement for continuing education reflects a balanced approach between intensive regulation and a completely hands off approach to promoting the competence of the profession. While many lawyers maintain their currency without the presence of a mandatory scheme, the pressures of practice and time constraints do produce barriers to engaging in continuing learning.
  - A requirement to attend CLE programs serves as a reminder to the profession to continue its education and, as well, provides a needed opportunity to learn by interacting with other professionals. It may reduce the isolation lawyers feel and it may enhance public perception of the profession. It is the responsibility of the governing body to oversee a collective commitment to education.
  - Education through CLE programs cannot help but enhance the competence of the profession. This kind of requirement is not intended to replace the other forms of learning in which people engage, but to supplement them.

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<sup>17</sup> The Subcommittee is satisfied that in the course of its discussions and research and during the consultation process all the significant issues related to the pros and cons of introducing mandatory education have been canvassed. (See the bibliography, available from the Subcommittee's Project Director on request.)

- The negative emphasis on the "mandatory" feature is misplaced. Much of what lawyers do is mandated and otherwise regulated. It is not an insult to say that there will be a minimum commitment to formal continuing education by all lawyers. In a post-call learning environment in which learning supports are well developed, broadly based, diverse in content, and reasonably priced, a minimum learning requirement should fit without controversy into the learning culture.
2. Those who oppose the introduction of MCLE do so primarily on the following analysis:
- Legal professionals make their living by learning and applying what they learn in serving their clients. Self-directed learning means choosing the most personally satisfying learning approach both in terms of time, cost, delivery method, and content. If lawyers are committed to their profession, they make it their responsibility to remain current. They should not be told how, when, or where to educate themselves.
  - The existence of a self-governing profession does not mean that the governing body must be involved in regulating every aspect of the profession. It should provide necessary supports, but engage in regulatory behaviour only where necessary. For some the benefits of self-regulation have begun to be outweighed by what is perceived as incompatibility with the business necessities of private practice.
  - As professionals, lawyers should be trusted to know what they need. It is an insult to mandate education. For those members who do not value their profession or business sufficiently to remain current, forced attendance will have no impact. Attendance without participation is useless, and is in no way proof of learning. More time should be spent focusing on the people who cause the profession problems in complaints and errors and omissions, with programs directed specifically to them.
  - The onus should be on those proposing MCLE to demonstrate that there has been a reduction in negligence and complaints against lawyers in jurisdictions that have an MCLE requirement.

#### The Possible Justification for the Requirement of Minimum Mandatory Education

1. The Subcommittee members were asked by many participants in the consultation process about the motivation driving its inquiry. The Subcommittee members have responded that the issue arises in the context of an inquiry into the means by which to maintain and enhance competent performance, not out of a need to deal with a profession whose performance standards are insufficient.
2. For this type of profession-wide initiative to be appropriate, it must be because it is believed it can assist the profession overall and because it is viewed as an important component in the mosaic of learning supports that the Subcommittee has described. As an additional or perhaps included and important goal, such a program may seek to reduce errors and omissions by alerting the profession to risk avoidance issues, but the Subcommittee does not believe the introduction of the program could be justified on the basis that it is a solution to errors and omissions.<sup>18</sup>

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<sup>18</sup> Based on available information, the Subcommittee agrees there does not appear to be the kind of evidence that could definitely prove that a mandatory continuing legal education scheme would be a solution to the errors and omissions and complaints problems with which the profession is faced. This lack of evidence does not mean that there is no link between education and a reduction in lawyer mistakes, but rather that the link may be difficult to prove. Having said this, however, the Subcommittee believes that an MCLE scheme should not be introduced as *the* solution to errors and omissions. Not only should MCLE not promise to produce this type of "quick-fix", but no program, no matter how excellent, should hold out the hope of satisfying such an agenda. Jurisdictions that have introduced MCLE have not viewed it as a remedial program with a remedial curriculum. Rather, they have introduced MCLE primarily on the basis that a self-regulating profession should make a demonstrable commitment to ongoing education and that through this

## APPENDIX 6: COMMON FEATURES OF RANDOM PRACTICE REVIEW PROGRAMS<sup>19</sup>

The broad goal of the program is to raise the quality of service provided across the profession. The program is administered to all members, not simply those who have demonstrated problems with competence and the inspection or assessment is done to monitor member adherence to certain articulated standards of practice.

Members to be inspected or assessed are notified well in advance of the office visit, complete a preliminary questionnaire, and provide a specified number of files for inspection.

In the case of the physician and dental assessments the assessors are themselves practitioners. In the case of the accountants the member is offered the choice of a full-time inspector or a practising accountant who does assessments part-time.

The program is separate from the discipline stream of the regulatory body. Where the inspection reveals minor difficulties the member is provided with guidance on how to improve. Where some intense remediation is necessary professions have different means by which to assist members in obtaining the help they need. The physicians', dentists', and accountants' programs provide that a referral may be made to the conduct committee where the problems are so egregious as to raise serious issues of competence amounting to misconduct, however once the referral is made a separate and independent investigation is undertaken by that conduct department.

The programs do not focus on assessing substantive knowledge, but rather on practice issues such as record keeping or file management, proper disposal of medical waste,( in the case of dentists) x-ray safety procedures, the recording of diagnostic information, etc.

The interval between assessments varies depending upon the percentage of the professions to be assessed each year. This is in large part a function of resources. Individual accountants pay for their inspections and are inspected every four years. The medical and dental professions assess a much lower percentage annually and the costs of the inspection program form part of the members' annual fees.

The ancillary goal of each year's inspections is to publish for the profession information on trends revealed during that year. The hope is to communicate problem areas to those not inspected so they too will improve their practice habits. Further, the information obtained is used, by some professions more than others, to monitor the effectiveness of the program, try to assess risk areas for more focused attention, and gather data on how professionals practice.

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It was moved by Mr. Gottlieb, seconded by Mr. E. Ducharme that the Appendices at Tab 2 be distributed in hard form to the profession.

Lost

It was moved by Ms. Cronk, seconded by Mr. Cherniak and Mr. Manes that the Consultation Document be approved for distribution to the profession.

Carried

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policy commitment a profession takes pro-active steps to further the enhancement of competency.

<sup>19</sup> Referred to by some professions as practice inspection or peer assessment.

It was moved by Ms. Cronk, seconded by Mr. Cherniak and Mr. Manes that the Book of Appendices together with the Consultation Document be approved for distribution to legal organizations and professional and public groups and be made available on the Law Society's web site, in all county libraries, the Great Library and upon request.

Carried

Ms. Cronk thanked Sophia Sperdakos of the Policy Secretariat for all the work she had done.

The Treasurer reported on a recent meeting with the law school deans. Among the issues discussed was the arrangement made in 1969 between the law schools and the Law Society as to courses to be taught at law schools. Another matter discussed was the proposal of a joint venture to establish a research program devoted to researching issues of professionalism and competence.

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CONVOCATION ROSE AT 4:00 P.M.

Confirmed in Convocation this 28<sup>th</sup> day of April, 2000.

  
Treasurer