25th January, 2001

MINUTES OF CONVOCATION

Thursday, 25th January, 2001
9:00 a.m.

PRESENT:

The Treasurer (Robert P. Armstrong, Q.C.), Arnup, Banack, Bindman (by telephone), Bobesich, Boyd, Braithwaite, Campion, Carey, Kim Carpenter-Gunn, Cass, Chahbar, Cherniak, Coffey, Copeland, Crowe, Curtis, Diamond, Divinsky, E. Ducharme, T. Ducharme, Elliott, Feinstein, Finkelstein, Furlong, Gottlieb, Jarvis, Krishna, Lalonde, Lamont, Laskin, Lawrence, MacKenzie, Manes, Marrocco, Martin, Millar, Mulligan, Murphy, Murray, O'Brien, Pilkington, Porter, Potter, Puccini, Ross, Ruby, Simpson, Swaye, Topp, Wardlaw, White, Wilson and Wright.

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The reporter was sworn.

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REPORT OF THE DIRECTOR OF EDUCATION

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The Director of Education asks leave to report:

B.
ADMINISTRATION

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

B.1.1. (a) Bar Admission Course

B.1.2. The following candidates have completed successfully the Bar Admission Course, filed the necessary documents, paid the required fee, and now apply to be called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, January 25th, 2001:

Mei-Ming Michelle Bau	Bar Admission Course
Howard Ellis Mark Lastman	Bar Admission Course
Guylene Michele Le Clair	Bar Admission Course
Michelle Karby	Bar Admission Course
Karuna Madanda	Bar Admission Course
Darrin Marcel Meehan	Bar Admission Course
Kevin Kenneth Rooney	Bar Admission Course
Kamaljit Kaur Saini	Bar Admission Course
Rameshwer Singh Sangha	Bar Admission Course

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

B.1.4. The following candidates have completed successfully the Transfer Examination or Phase Three of the Bar Admission Course, filed the necessary documents, paid the required fee, and now apply to be called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, January 25th, 2001:

Suzanie May-Li Chua	British Columbia
Richard Llewelyn Hammond	Alberta
Shauna Marie MacDougall	Nova Scotia
Jaswant Singh Mangat	Alberta
Philippe Chouinard Rousseau	Quebec
Amarpreet Singh	Alberta
Stephanie Jane Thompson	New Brunswick

B.2. APPLICATION TO BE LICENSED AS A FOREIGN LEGAL CONSULTANT

B.2.1. The following applies to be certified as a foreign legal consultant in Ontario:

Michael Adrian Smith	New York Skadden, Arps, Slate, Meagher & Flom

B.2.2. His application is complete and he has filed all necessary undertakings.

ALL OF WHICH is respectfully submitted

DATED this the 25th day of January, 2001

It was moved by Mr. Ruby, seconded by Ms. Ross that the Report of the Director of Education be adopted.

Carried

CALL TO THE BAR (Convocation Hall)

The following candidates listed in the Report of the Director of Education were presented to the Treasurer and called to the Bar and the degree of Barrister-at-law was conferred upon each of them. They were then presented by Mr. Carey to Mr. Justice Roman W. M. Pitt to sign the Rolls and take the necessary oaths.

Mei-Ming Michelle Bau	Bar Admission Course
Howard Ellis Mark Lastman	Bar Admission Course
Guylene Michele Le Clair	Bar Admission Course
Michelle Karby	Bar Admission Course
Karuna Madanda	Bar Admission Course
Darrin Marcel Meehan	Bar Admission Course
Kevin Kenneth Rooney	Bar Admission Course
Kamaljit Kaur Saini	Bar Admission Course
Rameshwer Singh Sangha	Bar Admission Course
Suzanie May-Li Chua	Transfer, British Columbia
Richard Llewelyn Hammond	Transfer, Alberta
Shauna Marie MacDougall	Transfer, Nova Scotia
Jaswant Singh Mangat	Transfer, Alberta
Philippe Chouinard Rousseau	Transfer, Quebec
Amarpreet Singh	Transfer, Alberta
Stephanie Jane Thompson	Transfer, New Brunswick

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APPOINTMENT OF CHIEF EXECUTIVE OFFICER

It was moved by Mr. Krishna, seconded by Mr. MacKenzie that Malcolm Heins be appointed the Law Society's Chief Executive Officer effective today.

Carried

The Treasurer and Benchers welcomed Mr. Heins.

CALL TO THE BAR CEREMONIES - February 2001

Mr. Millar reminded Benchers to contact the Admissions Office as to their availability to attend the Call to the Bar Ceremonies in February 2001.

REPORT OF THE ADMISSIONS COMMITTEE (November 29th, 2000)

Mr. Millar presented the policy issues contained in the Report of the Admissions Committee for decision by Convocation.

Admissions Committee
November 29, 2000

Report to Convocation

Purpose of Report: Decision Making

Prepared by the Policy Secretariat

TABLE OF CONTENTS

INFORMATION

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Admissions Committee ("the Committee") met on November 9, 2000. Committee members in attendance were Derry Millar (Chair), Ed Ducharme (Vice-Chair), John Campion, Tom Carey, Gillian Diamond, Pamela Divinsky, Todd Ducharme, Dean Alison Harvison-Young, Dean Peter Hogg, George Hunter, and Donald Lamont. Staff in attendance were Bob Bernhardt, Josée Bouchard, Katherine Corrick, Susan Lieberman, Charles Smith, and Roman Woloszcuk.

2. The Committee is reporting on the following matters:
Policy - For Decision
- Articling Credit for Summer Employment
- 2001 Fees Schedule

Information
- Articling Report 2000

POLICY - FOR DECISION

ARTICLING CREDIT FOR SUMMER EMPLOYMENT

1. In September 2000, Convocation directed the Committee to consider whether students should be granted credit toward the articling requirement for summer employment.

2. At its October meeting, the Committee requested the preparation of a report outlining the issues that must be considered in the development of such a policy. The Committee considered the report at its November meeting. The report is set out at Appendix 1 for Convocation's consideration.

Request to Convocation

3. Convocation is requested to consider the report set out at Appendix 1 and, if appropriate, approve one of the following recommendations:

a) in the event Convocation establishes a Task Force on the Continuum of Legal Education forthwith, that the issue of articling credit for summer employment be included for consideration by the Task Force.

b) in the event such a Task Force is not established forthwith, that Convocation direct the Admissions Committee to establish a working group to consider the issue, subject to Convocation's consideration and approval of a budget for undertaking a study of the issue to be provided to Convocation before any work is begun by the working group.

2001 FEES SCHEDULE FOR BAR ADMISSION COURSE

1. Appendix 2 contains the fees schedule for the 2001 Bar Admission Course. The schedule represents a 10% increase in fees as approved by Convocation, as fairly apportioned as is reasonable in the new model of the Bar Admission Course.

2. The Committee has considered the fees and recommends their approval to Convocation.

Request to Convocation

3. Convocation is requested to consider the fees schedule set out in Appendix 2 and, if appropriate, approve it.

INFORMATION

ARTICLING REPORT 2000

1. Appendix 3 contains a report on the Law Society's articling program, including information on its history as well as current procedures. The report contains "tab" references to forms and other documents that are found in *Articling Documents Year 2000*, available on request from the Head of Articling, Susan Lieberman at (416) 947-3422.

APPENDIX 1

POLICY CONSIDERATIONS RELATING TO ARTICLING CREDIT FOR SUMMER EMPLOYMENT

I. PURPOSE OF THIS REPORT

1. On September 21, 2000, Convocation directed the Admissions Committee "to study the question of whether summer employment with an approved principal after the second year of an LL.B.[1] program should count towards the total articling period, to a maximum of four months, and [to] report to the November Convocation, unless the Committee comes forward with a report to Convocation explaining why further time is required."

2. To properly assess the manner in which this issue should be resolved it is essential to understand the additional issues it raises and to consider the most appropriate process to follow in determining whether articling credit for summer employment should be given.

3. This report,
   a. sets out a number of issues that must be addressed in the development of a policy permitting articling credit for summer experience gained by students in law firms prior to completing LL.B. requirements;
   b. discusses time line issues for the completion of the research and study and for reporting to Convocation; and
   c. recommends the appropriate body to undertake the study of the issue, for Convocation's consideration.

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[1]This term includes the J.D. designation now being used for the degree obtained by students at the University of Toronto law school.

II. BACKGROUND

4. The articling term of the Bar Admission Course follows a teaching phase that stresses skills and professional responsibility. The articling term is intended to train the student to apply practically, the theoretical knowledge acquired at law school, to acquire usable skills, and to develop a sense of "professionalism"- the conduct, aims, or qualities that mark the legal profession. Articling is thus meant to build on the skills and ethical base established in the teaching phase of the Bar Admission Course and to provide the training in action necessary for the student to become qualified as a lawyer.

5. The majority of students who enter the Bar Admission Course have completed law school in Ontario or elsewhere in Canada. In fact, most of these students have completed law school in the same year as they enter the Bar Admission Course.

6. There are, however, a number of applicants who have additional or other qualifications that differentiate them from the "typical" Bar Admission Course candidate.[2] The Law Society's policies concerning the Bar Admission Course and the articling program contain special considerations for candidates whose particular qualifications and experience justify such an approach, including abridgment of articles.

7. Currently, the provisions concerning abridgments granted on experience other than in articling or practice specifically exclude abridgments based on "summer or part-time experience in law firms or clinical education experiences received before completing the LL.B. requirements."

8. Queen's University Faculty of Law offers three co-operative education programs. Each of these subsumes the articling requirement, as approved by Convocation. Two work periods are approvable for articling credit:

   a. The first period of four months takes place after the approximate equivalent of second year law school.

   b. The second period of eight months takes place prior to the last semester of studies.

III. ISSUES THAT MUST BE ADDRESSED IN THE DEVELOPMENT OF A POLICY FOR PERMITTING ARTICLING CREDIT FOR SUMMER EMPLOYMENT

9. The issues that arise in developing a policy permitting articling credit for summer employment raise a number of questions, including,

   a. whether this "credit" would be treated as a form of abridgment (sought after the fact) or as a component of the articling requirement (to be approved in advance);

   b. the impact of such a policy change on the effectiveness of the articling process and on other current articling procedures and policies;

   c. considerations of fairness to all students and to law firms;

   d. consistency of approach; and

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[2] Prior to entering the Bar Admission Course, these candidates ("NCA candidates") must fulfil the requirements for a Certificate of Qualification from the National Committee on Accreditation. NCA candidates complete these requirements either at a Canadian law school or through self-study.

e. the appropriate scope of the application of such a credit.

10. Some of the major questions that would have to be addressed as part of an analysis of the issue of articling credit for summer employment include the following:

a. Would such an articling credit be monitored and regulated in a fashion comparable to the existing articling placements, or would students apply retroactively for recognition of the summer work, as is currently done with abridgments?

b. Would a "four plus six month" articling experience be more or less valuable in preparing the students for entry into the profession?

c. Who would be eligible for "summer articling"?

d. If summer employment is to be recognized, should experience in intensive programs and legal clinics also be recognized?

e. Would the "summer articling" students be accepted into the Law Society as student members and accorded student-at-law status?

f. Could one of the unintended impacts of a policy permitting articling credit for summer employment be systemic discrimination toward students from groups under-represented in the legal profession?

g. Would there be two major call periods, in Spring and in Fall?

h. How would articling credit for summer employment impact the "50/50" Guideline, and the matching program? If they both disappear as a result of this change, what would be the likely impact upon students from groups under-represented in the legal profession?

i. What impact would the development of a policy granting credit toward the articling requirement for summer employment have on the hiring practices of smaller firms?

j. What impact might articling credit for summer employment have on students' choices of third year courses?

k. What resource implications might result from the approval of articling credit for summer employment?

Each of these is discussed more fully below.

(a) Would such an articling credit be monitored and regulated in a fashion comparable to the existing articling placements, or would students apply retroactively for recognition of the summer work, as is currently done with abridgments?

11. Approval of articling placements is required at the commencement of articles, as follows:

a. Supervising lawyers must be approved by the Articling & Placement Office as principals on the basis of experience, competency and ethical standards.

b. An education plan that describes the anticipated articling experience to be provided to that student must be approved by the Articling & Placement Office.

12. Monitoring features are currently in place for articling placements. These include,

a. articles of Clerkship, signed by both principal and students;

b. midterm evaluations and final evaluations, submitted by each of the articling student and principal, which compare the actual experience to that set out in the education plan. Where a problem is indicated, the Articling & Placement Office follows up the situation; and

c. the Certificate of Service under Articles submitted by the principal and the Student's Affidavit of Service under Articles submitted by the student at the end of the articling period.

13. If summer employment were to be developed as a component of articling the process would be integrated into the current articling procedural stream (described in paragraphs 11 and 12 above). Treating the approval and monitoring of summer employment in a way similar to that of articling would provide consistency.

14. The granting of articling abridgments is based on an after-the-fact approach that is geared towards individual assessment. Candidates submit a description of the experience that corresponds to an education plan, testimonials from supervising lawyers and evidence of good standing, where applicable. There is less control of the quality of the experience and of the supervising lawyer. There are no formal documents such as Articles of Clerkship or Principal's Certificate of Service under Articles.

15. Traditionally someone practising in a non-Canadian common law jurisdiction may receive one month articling credit for each year of experience. Accordingly, if the articling is recognized after the fact, it may be more appropriate to recognize a smaller ratio or maximum. For example, each month of summer employment might equal one-half month of articling credit to a maximum of two months.

16. If retroactive recognition of the experience is adopted it would be necessary, at a minimum, to formulate clear criteria for acceptance or denial, as well as a process for gathering and assessing the appropriate documentation.

(b) Would a "four plus six month" articling experience be more or less valuable in preparing the students for entry into the profession?

17. The question of whether a single articling period of ten months is more valuable than two periods of four and six months should be studied. Some of the issues raised by this question include:

a. Is recognition for experience gained during the summer following the second year of the LL.B. appropriate?

b. Are the goals of articling achievable at this point, without the benefit of the skills phase of the Bar Admission Course, and after only two years of law school?

c. Are the two separate periods of four months and then six months as effective for developing a student's lawyering skills as 10 consecutive months?

(c) Who would be eligible for "summer articling"?

18. Section 3 of By-law 12, made under the *Law Society Act*, provides that students who meet the academic requirements for admission to the Bar Admission Course include those who have graduated from an approved Canadian law program or those who have received the NCA Certificate of Qualification[3]. In practice, students may be admitted to the Bar Admission Course after all requirements for either an LL.B. or NCA Certificate have been attempted and the results are not yet known. The reason for this practice is that the Bar Admission Course begins before results or transcripts are available.

19. Students who subsequently fail law school or the NCA certification are not permitted to continue in the Bar Admission Course and any "credits" already obtained in either a teaching or articling phase are considered to be in jeopardy until successful completion of the LL.B. or NCA certificate. Upon subsequent successful completion of the LL.B. or NCA certificate, an abridgment may be granted to recognize time worked as articles.

20. A policy for articling credit for summer employment should examine the following questions:

    a. If articling credit is to be recognized for students who have completed their second year of law school, what of the student who fails one or more courses in second year? Is it sufficient only for the student to have attempted Year Two? What enforcement procedures would be required for implementation of this provision?

    b. NCA students are not enrolled in a three year Canadian law school program and so do not fit this model. At what point will NCA students be permitted to qualify to receive articling credit for summer employment?

(d) If summer employment is to be recognized, should experience in intensive programs and legal clinics also be recognized?

21. Canadian law schools provide practical, intensive programs[4], including, for example, hands-on experience in legal clinics. Some of these programs are credit courses; some are voluntary, non-credit programs. These provide learning in a variety of ways, which may include some combination of regular seminars, practical training, lectures, research papers and other assignments and simulated exercises. Supervision is generally provided by practising lawyers, professors or review counsel.

22. Some study of these programs and clinics is required to determine the extent to which experiences gained there might also qualify for articling recognition. Articling recognition of these other work experiences during law school would require the development of adequate controls to ensure that only valid experiences are recognised.

(e) Would the "summer articling" students be accepted into the Law Society as student members and accorded student-at-law status?

23. An articling student is a student member of the Law Society. Currently, a summer student is not. This raises two issues for consideration in developing any policy for granting credit for summer experience:

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[3]Section 3 of By-law 12 imposes a ten year time frame after receipt of LL.B. or NCA Certificate. The provisions relating to the "ten year rule" need not be considered in this report.

[4]In an intensive program, a student is assigned to a lawyer for a semester and instead of attending classes, the student works with the lawyer in a particular specialty, such as criminal law, and attends seminars.

a. Responsibility and discipline:

i. The public, profession and administration of justice are accorded some protection from incompetent and unethical articling students because, as student members of the Law Society, they are subject to the Rules of Professional Conduct and may be disciplined by the Law Society. Students who have not entered the Bar Admission Course are not members of the Law Society and are thus not subject to the same rules and potential discipline.

ii. The co-operative law programs at Queen's University address this difficulty by having the students agree in writing to be subject to the Law Society's jurisdiction during the placement terms, to the same extent as if they are articling students. They must also agree in writing to co-operate fully with Queen's University and the Law Society in the investigation or resolution of any problems arising during a placement, and acknowledge that the Law Society has the jurisdiction to deny credit for a whole or part of the co-operative placement based on all the relevant circumstances of any student misconduct.[5]

b. Rights of Appearance:

i. Currently articling students enjoy rights of appearance that are more extensive than those of an agent. For example, students may appear on the following civil matters: contested motions, consent motions, and matters before the Masters and Registrars of the Court of Ontario and before the Registrar of the Court of Appeal for Ontario, including references and assessments of costs; matters brought without notice, provided no substantial rights will be affected; simple contested interlocutory motions before the Superior Court of Justice and the Registrar of the Superior Court of Justice unless the result of such interlocutory motion could be to finally dispose of a party's substantive rights by determining the subject matter in dispute.

ii. An issue for determination would be whether summer students would enjoy these same rights of appearance and the impact on the quality of their training if they do not. [6]

Although students in the Queen's co-operative program do not enjoy these rights, the highly specialized placement and the steady academic monitoring that these students are experiencing has been considered an adequate balance.

24. A mechanism to ensure adequate investigation and resolution of placement problems must be developed if students are to be given articling credit for summer employment.

(f) Could one of the unintended impacts of a policy permitting articling credit for summer employment be systemic discrimination toward students from groups under-represented in the legal profession?

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[5]The Law Society of Newfoundland permits up to three months articling credit for summer employment. Section 38(1) of its *Law Society's Act* approves the admission of a student member of the Law Society who "is receiving or has received a degree in law....".

[6]The review and possible revision of the Articling Students' Rights of Appearance would involve input from both judges and lawyers, and may take some time to develop.

25. The majority of summer jobs are found in Toronto.[7] Students from outside of Toronto, students wanting smaller firm practice, and students who qualify via the NCA (National Committee on Accreditation) route may find it more difficult to complete a portion of their articles through summer placement than students accepted by large firms for employment in Toronto.

26. Although there are no current statistics about the distribution of summer students from groups under-represented in the legal profession, there are ongoing concerns about a lack of representation from equity-seeking candidates. The issue of recognition of summer employment should be examined in this context.

(g) Would there be two major call periods, in Spring and in Fall?

27. If credit were to be given for summer employment (up to four months) a student who received such credit would be required to serve an additional six months of articling after law school. If the student began articling immediately following the two teaching phases, he or she would complete the Bar Admission Course requirements at the end of February, and would expect to be called to the Bar sometime that Spring.

28. A student who did not article in the summer, would be required to complete ten months of articles, finishing the Bar Admission Course requirements at the end of June, and would expect to be called to the Bar the following September or October.

29. The possibility of separate calls may raise difficulties, including the possibility that the earlier call may come to be seen as the more valuable of the two, with the result that students associated with the later call might be less valued as candidates for future employment.

30. The impact of having two major calls approximately five months apart for students starting the Bar Admission Course should be examined as part of the assessment of the appropriateness of granting credit toward the articling requirement for summer employment.

(h) How would articling credit for summer employment impact the "50/50" Guideline, and the matching program? If they both disappear as a result of this change, what would be the likely impact upon students from groups under-represented in the legal profession?

31. The purpose underlying the 50/50 Guideline is that firms hiring more than five articling students are able to reserve 50% of their articling positions for students who have not "summered" with them. Although this guideline has been in place since 1989, it appears to be observed more in the breach than in practice.

32. The intention of the guideline is to provide opportunities for students to obtain quality articling positions even though they do not summer with a large firm. The guideline was designed to prevent students from feeling pressured to secure their articling positions at too early a stage and to afford them the opportunity to have second year marks count more than first year marks. It provided a second chance for students to obtain quality articles with a large firm. Moreover, the major recruitment for articling students took place in the summer, a time that would not be disruptive to their studies.

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[7] Currently, Toronto law firms account for more than 300 summer positions and this number will likely increase if articling credit is granted for summer employment.

33. The matching program is administered on behalf of the Law Society of Upper Canada by an independent contractor, National Matching Services Inc.[8] Because firms are moving away from the 50/50 guideline and hiring enough summer students to eventually fill all the articling positions, the match for articling students may well be losing its relevance. Still, the match protects a student by providing the student some risk control in being able to rank several firms.

34. A result of the substantive/procedural phase of Bar Admission Course being offered in July and August and the articling term being reduced to ten months is that there is a newly created gap in the supply of articling students over the summer months. One way that firms are dealing with the absence of articling students in July and August is by hiring more summer students.

35. Second year summer recruitment takes place during the school year. When there were fewer positions offered and less importance placed on those positions, this timing was not a great problem. However, with summer jobs increasing in number and in importance as both a guarantee of an articling position and, potentially as fulfilling part of the articling requirement, recruitment during the school year may become frenetic. There is an argument that the process will interfere with law school studies and that students may be less inclined to participate in activities such as moot competitions that conflict with the recruitment period. There could also be a disproportionate impact upon students from groups under-represented in the legal profession.

(i) What impact would the development of a policy granting credit toward the articling requirement for summer employment have on the hiring practices of smaller firms?

36. The articling experiences of students in smaller and regional firms are often very different from those of students recruited into the large firms. Smaller firms surveyed about the length of articles were less supportive of the reduction than the larger firms. As with so many other issues, it will be important to analyze the issue of articling credit for summer employment, keeping in mind regional and practice size issues.

(j) What impact might articling credit for summer employment have on students' choices of third year courses?

37. Anecdotal evidence suggests that students who have had summer employment with a law firm following the second year of the LL.B. tend to reconsider and alter their electives in the final year of the LL.B. in accordance with the areas of law they engaged in while working. There is an issue as to whether they feel they should make such changes to enhance their chances of obtaining an articling position.

38. It is appropriate to consider what impact, if any, the granting of articling credit for summer employment may have on faculties of law.

(k) What Resource Implications Might Result from the Approval of Credit for Summer Employment?

39. Bar Admission Course students are tracked and monitored from the time they submit a Bar Admission Course application until they receive their call to the Bar. All applications and other forms must be distributed on a timely basis. Once returned, these applications and forms must be checked manually, entered into the databases and filed. Frequent queries from students, principals and law firms must be answered. If articling credit is given for summer employment, there will be that many more students, likely 500 or more, to track and monitor, and many more applications and forms to check, enter and file. There will also be more queries and issues to sort out.

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[8] Using student and firm preference lists, the program administrator employs a computer algorithm to match articling students with firms.

40. Potential resource implications from the granting of articling credit for summer employment include,

a. additional staff in the Registrar's Office;

b. additional staff within the Articling & Placement Office;

c. if the students are under the supervision of the Law Society, they may have to be instructed, and perhaps examined, in the Rules of Professional Conduct prior to the start of their summer employment, resulting in additional resources needed to develop, administer, and process the instruction and/or examination;

d. two major calls yearly may lead to significantly increased costs. Much would depend upon the distribution of the students between the call dates and decisions with respect to the number of calls convened outside Toronto; and

e. to reduce the negative effects on NCA and other historically disadvantaged students, some supports might be recommended to assist them in obtaining positions. These supports would require additional resources.

41. The introduction of a policy for articling credit for summer employment must take into account resource implications.

IV. WHO MIGHT UNDERTAKE THE STUDY OF THIS ISSUE

42. The Strategic Planning Committee of the Law Society is currently considering a number of issues related to the direction the Law Society should take in the coming years.

43. One of the issues it is discussing is ways to enhance the continuum of legal education. In the course of its discussions it has raised, as a possibility, the creation of a Task Force to study this issue. Such a Task Force would potentially have members drawn from the Law Society, the law schools and continuing legal education providers.

44. The Task Force has not yet been established and it is not yet known what the scope of its terms of reference would be. Since articling is part of the legal education continuum it is likely that any full scale study would include an analysis of the articling process.

45. The two most likely bodies to study the issue of granting credit toward the articling requirement for summer employment are,

a. the Admissions Committee (through the creation of a working group); and

b. a Task Force on the Legal Education Continuum.

46. In assessing which group is the more appropriate choice to study the issue, the following considerations are relevant:

a. familiarity with the issues;

b. likely scope of the issues to be studied;

c. staff resources for undertaking the study; and

d. time line for assessing the issues.

47. A working group of the Admissions Committee may have greater familiarity with the issues, at least at the outset, than a Task Force with the membership described above. Similarly, a working group may be able to study the issue and reach conclusions sooner than would a Task Force with a much broader mandate.

48. A Task Force, however, may have more financial and staff resources assigned to it for studying all the issues than is currently available within the Department of Education. The Task Force may have greater ability to consider the issue in the larger context of the goals and direction of legal education. Any decisions made at the working group level might run counter to the overall direction taken by the Task Force.

49. A budget must be prepared for a working group to assess the necessary resources in view of the fact that the issue is more complex than appears at first glance.

50. The Task Force has not yet been approved. A working group of the Committee can be set up by the Committee, with Convocation's direction to do so.

V. POSSIBLE TIME LINE FOR DEVELOPING THE POLICY

51. Regardless of which group is assigned to study this issue there are a number of components that will be essential to any study undertaken. These include,

a. consideration of the potential impact of changes based on input from,

i. small, medium and large size firms;

ii. firms in Toronto and in other regions of Ontario;

iii. students who have completed the articling requirement;

iv. students who have not yet graduated from law school; and

v. law schools;

b. consideration of similar policies in place in other provincial Law Societies (particularly Newfoundland) and the views of the Federation of Law Societies of Canada; and

c. additional research that might include legislative and literature reviews, surveys, interviews, or focus groups.

52. There is no information available about when there might be a report on this issue if the matter is studied by a Task Force on the Continuum of Legal Education. The issue's place in the larger context of the continuum of legal education may render it important not to develop the policy outside of that context.

53. If a working group of the Admissions Committee is created to study this issue, adequate research, including the design, distribution, receipt and analysis of some surveys, will in all likelihood require between six and eight months, once a budget has been approved. Surveys could be ready for distribution in the New Year. Receipt and analysis of the surveys would occur through the spring. It is anticipated that a report might be possible to the Committee and Convocation in late spring.

Request to the Committee

54. Convocation is requested to consider this report and, if appropriate, approve one of the following recommendations:

a) In the event Convocation establishes a Task Force on the Continuum of Legal Education forthwith, that the issue of articling credit for summer employment be included for consideration by the Task Force.

b) In the event such a Task Force is not established, forthwith that Convocation direct the Admissions Committee to establish a working group to consider the issue, subject to Convocation's consideration and approval of a budget for undertaking a study of the issue, to be provided to Convocation before any work is begun by the working group.

APPENDIX 2

Proposed
Bar Admission Course
Law Society of Upper Canada

Fees Schedule for 2001
Student Members and Transfer Candidates

7% GST will be applied to these fees

Application for Admission (Non-refundable)	$125.00
Application for Admission - Transfer Member (Non-refundable)	$125.00
Application for Admission Late Filing Fee	$50.00
Bar Admission Course - Skills Phase Tuition Fee	$2,200.00
Bar Admission Course - Substantive/Procedural Phase Tuition Fee	$2,200.00
Bar Admission Course - Phase Three Tuition Fee	$3,275.00
Bar Admission Course - Individual Course Fees	
Barrister Module	$900.00
Solicitor Module	$900.00
Professional Responsibility and Practice Management Module	$500.00
Substantive/Procedural Courses (per course) including Transfer Candidates	$500.00
Late Filing Fee (Tuition payments, Documentation)	$100.00
Transfer Examination Fee (Includes materials for six courses)	$2,500.00
Application for Abridgment	$125.00

Application for National or International Articles $125.00

Call to the Bar Fee $210.00

Call to the Bar Fee - Occasional Appearances (reciprocal charge by applicant's provincial or territorial governing body to an Ontario member), or if undisclosed, to the maximum $500.00

APPENDIX 3

ARTICLING REPORT, 2000[1]

I PURPOSE OF THIS REPORT

1. The purpose of this report is to provide a snapshot of the Articling program and its administration as of October 15, 2000.[2] This report first provides some notes about the background and history of articling in Ontario. Then it describes the current program and the processes used to monitor the program. Current areas of improvement in the Articling Office's provision of a high quality articling experience are raised at the end of each section under 'Issues'.

II BACKGROUND

2. The objective of the Bar Admission Course (BAC) is to provide lawyers-in-training with the skills, knowledge and sense of professional responsibility required for the initial years of practice, and to assure not only effective service of clients' interests, but a steady, constructive growth of professional character and lawyering ability. The Bar Admission Course consists of a teaching term, with skills assessments and examinations, and an articling term of ten months which includes two weeks vacation.

3. The articling portion of the Bar Admission Course follows a teaching phase that stresses skills and professional responsibility. In fact, a significant feature of both the new and current models of the Bar Admission Course is the importance of the teaching skills phase: both principals and articling students have benefitted from the practical skills taught prior to commencing articles.

4. The articling portion is intended to train the student to apply, in a practical way, the intellectual knowledge acquired at law school, to acquire practical skills, and to develop a sense of "professionalism" which encompasses the attitudes and values of the legal profession. It builds on the skills and ethical base established in the teaching phase of the Bar Admission Course and provides the most practical portion of the student's training to become qualified as a lawyer.

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[1]Tab references in this report refer to forms and other documents contained in Articling Documents Year 2000.

[2]This report examines the articling program prior to the reduction of articles from twelve months (which includes four weeks vacation) to ten months (which includes two weeks vacation). All references are to the twelve month program.

5. Articling serves varying functions for different groups within the legal community. From the governing body's perspective, articling must ensure that a lawyer "...so licensed has had the opportunity to obtain the training and experience necessary to meet the requisite standard of professional competence."[3] From the students' perspective, articling "...is an opportunity to test both the labour market and their skills while gaining experience in the practice of law".[4] From the firm's perspective, articling is an "...opportunity to assess students as potential associates of the firm, while at the same time fulfilling a shared professional responsibility to ensure that new lawyers have been exposed to some real practical experience before their call."[5]

6. History of Articling in Ontario: Pre-1990 Articling Reform

   a. Articling has been a feature of legal training in Ontario since the Law Society's earliest days. In fact, "[u]ntil 1819 lawyers were trained by apprenticeship only: five years for barristers and three years for solicitors".[6]

   b. Prior to the Articling Reform of 1990, a student would submit an application for admission to the Bar Admission Course which would identify the student's principal. The principal would then be sent a letter signed by the chair of the Legal Education Committee which set out the role and responsibility of the principal and thanked the lawyer. Articles of Clerkship were executed at the commencement of articles and the Principal's Certificate of Service under Articles and the Student's Affidavit of Service under Articles were executed at the end of articles. Students were required to complete a Professional Responsibility exam during their articles.

   c. There were no education plans or evaluations. By monitoring "the qualifications of students, the qualifications of principals, mediation mechanisms, review by the Admissions Committee, surveys, the discipline process, and court action"[7], it was felt that articles as a whole were monitored.

7. History of Articling in Ontario: 1990 Articling Reform

   a. *The Proposals for Articling Reform*, (the *Proposals*) Adopted by Convocation, October, 1990 brought much needed structure to the articling process. The Executive Summary for the *Proposals*[8] set out the following new procedures for the articling process:

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[3]Graham W.S. Scott, Q.C., "The Articling Component in Legal Education", Legal Education in Canada: report and Background Papers of a National Conference on Legal Education, Winnipeg, Manitoba, 1985, published by Federation of Law Societies of Canada (1987), pg. 407.

[4]Ibid, pg. 408.

[5]Ibid, pg. 409.

[6]J. Burton, "Articling in Ontario: History and Recommendations for Change to 1985", Symposium on Articling 1988, Bar Admission Advisory Committee, Law Society of Upper Canada, (1988), pg. 37.

[7]K. Howard, "The Monitoring of Articles", Symposium on Articling 1988, Bar Admission Advisory Committee, Law Society of Upper Canada, (1988), pg. 143.

[8]*Proposals for Articling Reform 1990*, up-dated June 1994, pg. i.

> ...To ensure the educational quality of articles, the Articling Director will: approve prospective principals based upon prescribed criteria; restrict principals to a maximum of two articling students; and delineate the skills areas which should be learned as part of the articling process.
>
> Principals must submit Education Plans to the Articling Director for approval. The effectiveness of these plans will be formally evaluated by both principal and student at the mid-term and conclusion of the articling term. The Articling Director may intervene to ensure compliance with the Education Plan, and when any other serious problem arises during articling.
>
> Educational materials to assist principals in the provision of effective articles will be developed...

b. A model similar to that proposed in the *Proposals* is currently being followed; however, some changes (as will be pointed out where applicable in this report) to the specific processes mentioned have been made since 1990.

III ARTICLING PROGRAM, YEAR 2000

8. This section of the report is organized as follows:

a. Principals (Approval, Renewal, Monitoring),
b. Education Plans,
c. Evaluations,
d. Educational Materials,
e. Non-traditional Articles,
f. Professional Responsibility Exam, and
g. Forms.

Each section describes the topic and sets out issues relating to each of the topics.

a. PRINCIPALS (APPROVAL, RENEWAL, MONITORING)

9. Approval of Principals:

a. Articling students must be under the supervision of a member of the Law Society of Upper Canada (the principal) who has applied to the Law Society to act as an articling principal and has subsequently been approved.[9]

b. The application package (Tab 9), consisting of an application form and memorandum outlining the principal's role and responsibilities, is available on the Articling & Placement's website[10] for viewing and/or downloading. Otherwise, a package can be picked up by or faxed to an interested member.

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[9] An exception is made for supervising lawyers of students engaged in national or international articles. In these situations, a supervising lawyer must provide evidence (Certificate of Good Standing) of good standing by his/her governing body.

[10] The package may be downloaded at www.lsuc.on.ca/services/phase2/Articling.shtml

c. Principals are informed of the following in the application package[11]:

i. *Eligibility Criteria*:

- Experience: A member must have been actively engaged in the practice of law for three of the five years immediately preceding the commencement of the relevant articling period.
- Competency & Ethical Standards: All relevant information, including records maintained by the Law Society in connection with claims, professional standards, compensation fund and discipline, may be considered. Prospective principals with negative history in these areas may be denied the privilege of acting as an articling principal for a period of time.

ii *Application Process*:

In order to be approved, a principal must:

- apply in advance of the commencement of the student's articles
- complete an application form
- submit an education plan which:
  - sets out experience to be provided to the articling student in thirteen skills areas, outlined below in the "Skills Development" section.
  - may be based on sample plans available from the Articling & Placement Office, and
  - where the principal's firm has previously submitted an approved education plan, there is no need to submit another plan unless there have been changes to that plan
- agree to supervise no more than two articling students at any one time.[12]

iii *Continuing responsibilities*:

- Teaching: Typically, teaching in the articling context is teaching on the go, by precept and example, with interjected explanations and informal after-the-event discussions and, most importantly, by regular supervision of a student's work with appropriate constructive criticism and comment.
- Documents requiring Principal's involvement:
  - Articles of Clerkship, signed by both principal and articling student, setting out the term of the contract. This term is usually 12 months; however, where there is a shorter term (which must be at least 3 months), please attach a letter of explanation. Indefinite terms are not acceptable. Where the student has not completed the first teaching phase of the Bar Admission Course, an acknowledgment of this situation by the principal should also be attached.
  - Mid-term evaluations, completed by each of principal and student, assessing the quality of the articling experience against the objectives set out in the education plan.

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[11] The information about application process and continuing responsibilities has been provided in a written memorandum to all principal applicants as of September, 2000. Prior to that date, communication of these matters was haphazard.

[12] This information was not included in the application package prior to September 2000, resulting in some situations of principals supervising more than 2 students.

- Examination of Professional Responsibility, mailed to student and principal in early spring with The Certificate of Examination in Professional Responsibility to be signed by principal or his/her designate following review and discussion of the student's written examination.
- Principal's Certificate of Service under Articles signed by the principal at the end of the articling term confirming completion of the student's articling term, including vacation time.

d. The Articling & Placement Office processes applications as follows:

i. Each week, a member of the Articling & Placement Office e-mails a list of new applicants, by name and member number, to the Administrative Compliance Processes Department of the Law Society. This department checks each member's history and status with regards to the following areas:
- Compensation Fund
- Discipline (sitsheet, discipline tag, order restrictions, current conduct, past discipline)
- Forms
- Investigations
- Professional Standards/Practice Review
- Spot Audit
- Requalification
- Open complaints
- Number of closed complaints
- Trustee activity

ii. LPIC checks are not done, nor are LPIC waivers requested of the applicants.

iii. Reports are sent to the Articling & Placement Office for each applicant. If issues are raised by any of the above checks, the names of the Law Society's representatives who dealt with or are currently dealing with the situation are provided. The Articling & Placement Office then contacts that person for an opinion as to whether the issue raised is such that the individual in question would not be suitable to act as an articling principal.

iv. Where the applicant is considered unworthy of being approved as an articling principal and is already supervising a student, the matter is brought to the attention of the Admissions Committee for a decision.

e. From Jan. 1 to Oct. 6, 2000, 363 new principals were approved. Since the beginning of August, 2000, the system of principal approvals as described above has been in place[13]. In the two months following the new process, the Articling & Placement Office submitted approximately 130 applications/renewals for checks. Thirty-five of those applications returned with a compliance issue that required further evaluation. In a majority of these cases the issue concerned a Spot Audit of the applicant's firm. The Spot Audit staff advised whether or not the audits were directed or random. When the audits were random, as in most cases, the principal was approved. Five applications require additional response. One principal's situation will be presented at the November Admissions Committee meeting.

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[13]Prior to mid-July 2000, non-lawyer members of the Articling & Placement Office would directly review database information about complaints, discipline, and audit and then refer "problems" to the appropriate Law Society department for further clarification.

f. Provided that no issues are raised by the above checks that would affect a lawyer's ability or suitability to supervise an articling experience, an applicant is approved as a principal. The applicant's date of approval and contact information are entered in the Bar Ad database (principals' table), at which time the applicant is mailed a letter of confirmation and a current copy of the "Articling Handbook for Principals and Students"[14].

g. A difference to the *Proposals* is that the *Proposals* envisioned an Articling Sub-Committee of the Admissions Committee (then the Legal Education Committee) that would approve principals in the first instance, based upon the recommendation of the Articling Director. This Articling Sub-Committee is not part of the current articling model.

h. The Articling & Placement Office monitors Articles of Clerkship to ensure all supervising lawyers are approved principals: Each evening, after office hours, Information Services runs a program that compares supervising lawyers as per the Articles of Clerkship with the Principals approved as per the Principals Table of the Bar Admission Course database. Articling & Placement staff follow-up to ensure that lawyers acting as principals who are not approved properly apply for approval.

10. Renewal of Principals: A lawyer must be approved each year to act as a principal. In 1999, approximately 2000 lawyers were automatically renewed without submitting applications. In Year 2000, in an effort to streamline the process, members were asked to submit a renewal application. As a result, approximately 1300 renewals were processed, reducing compliance checks by approximately 700. Renewals are submitted for the same compliance checks as new applicants. Renewed principals also receive a letter of approval.

11. Monitoring of principals during the Articling Year: There are no current checks being made through-out the articling year. It is hoped that the Law Society's information systems will eventually be able to automatically notify the Articling & Placement Office of concerns affecting on-going principals.

12. Issues

a. Currently, principals must apply for approval every year. Some consideration is being given to a two year period of approval, with the renewals being staggered over the two year period.

b. Should the Articling Office automatically submit previously approved principals for renewal and the requisite compliance checks? Or should the principal be required to submit a renewal application, which in Year 2000 reduced the necessary compliance checks by approximately 600, but increased other resources to process the mailing and receipt of the forms?

c. When there is a "problem" principal, with or without an articling student already being supervised, should the matter go directly to the Admissions Committee? Or, should there be a right of written appeal to the Committee from the decision of the Head of Articling & Placement?

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[14]Prior to July 2000, the Articling Handbook was not sent to newly approved principals until March of the year following approval when the Handbook, along with the Professional Responsibility Exam, were sent to each principal. This delay in receiving the handbook contributed to problems with principals who did not act in accordance with the roles and responsibilities of a principal, as set out in the Handbook. Accordingly, all newly approved principals are now sent the Articling Handbook.

b. EDUCATION PLANS

13. Process:

a. Since the Articling Reform of 1990 was implemented, all firms taking on an articling student must submit an education plan that describes the anticipated articling experience to be provided to that student. Generally only one education plan per firm is filed with the Articling & Placement Office[15]. There is no expiration date for an education plan; and, in fact, firms are advised that their plans may remain in effect until the firm wishes to make a change, at which time the firm should notify the Articling & Placement Office to have the change approved. Although all other documents associated with the articling relationship involve the student and his/her principal, an education plan is filed by and maintained according to firm.

b. The *Proposals* state the intention "that [adhering to an education plan] will improve the quality of supervision and the quality of interaction between the articling student and the principal ... The Education Plan must meet the objective of demonstrating a sound educational experience. Its purpose is both to promote the quality of articling and to enhance awareness of articling as an educational experience"[16].

c. Sample education plans (Tab 2) are provided by the Articling & Placement Office. Although these plans were "meant as guidelines only, to assist principals in addressing their minds as to how an Education Plan can be organized"[17], in fact most firms reproduce the samples, making only minor modifications. Education plans can be either in a narrative or checklist format.

d. An education plan should address the following:

i. anticipated experience in terms of the thirteen lawyering skills[18],
ii. amount of secretarial support expected, and
iii. for large firms: information about rotations, educational seminars, guidance and advice.

e. When the Articling & Placement office receives an education plan, an administrator reviews the plan, comparing it to the sample plans and reviewing it for the thirteen lawyering skills. A plan does not have to include aspects of every skill. For example, a corporate education plan which provides no advocacy may well be approvable. However, all plans must address professional responsibility and practice management aspects. Where a plan is found to be deficient because it has not included any professional responsibility and practice management aspects or for another reason, the principal is contacted and the problem explained. In these situations, no resistence has been noted in having the principals amend their education plans.

f. Like the Articles of Clerkship, the educational plan is to be filed with the Articling & Placement Office within two weeks of the commencement of articles.

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[15]A firm might file two education plans where one plan covers the usual rotations of most of the students and a second plan has been tailored to those students who will be specializing in a particular area.

[16]Commentary to Section 6.1 of the *Proposals*.

[17]Ibid.

[18]The thirteen lawyering skills were identified in the *Proposals* as professional responsibility, interviewing, advising, fact investigation, legal research, problem analysis, planning & conduct of a matter, file & practice management, office systems, drafting, writing, negotiation, and advocacy.

14. Issues:

g. Ensuring that each principal files a firm education plan:

Since September 2000, the Articling & Placement Office has maintained a spreadsheet to ensure that all principals who are approved also file education plans with the Office.[19] However, a current review of principal and firm paper files indicates that some principals/firms have not filed education plans. These firms are being contacted. The new Application for Principal Approval, unlike the previous one, sets out the requirement for an education plan as part of the application process.

h. Ensuring that each student receives an education plan at the commencement of her/his articling term:

There are currently no controls in place to ensure that each student receives an education plan at the commencement of her/his articling term[20]. Anecdotal evidence indicates that several students article without having the benefit of knowing what their education plan, if there is one, has provided.[21] The Head of Articling & Placement, when visiting law schools, has urged Law students to request and review their educational plans. It may be advisable to either return to the practice of having a form filed with the department acknowledging the education plan or to add an appropriate clause in the Articles of Clerkship.

i. Ensuring that the education plan is specific to the situation and addresses the educational objectives:

There has been little follow-up in examining these concerns. The thirteen skills categories have not changed since 1990. It may be reasonable to change the itemized skills to blend more seamlessly with the skills taught in the Skills Phase (formerly Phase One) of the Bar Admission Course.

j. Renewal of Education Plans:

Currently an Education Plan may continue indefinitely without being reviewed or revised. Accordingly, either the plan might become irrelevant or the educational experience set out and followed might not be reviewed nor improved.

c. EVALUATIONS

15. Process:

a. Mid-term evaluations (Tab 4) must be completed at approximately the mid-point of the articling term by each of the student and the principal. These evaluations are similar and assess how closely the experience provided to date has matched up to what was outlined in the education plan. Also, there are questions about time spent on routine tasks and secretarial support provided. Only the students,

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[19]Because of incompatibilities between the Law Society's various databases and the fields of information provided in each database, there has been no adequate means of regularly checking the educational plan database against the approved principals database to ensure that each approved principal has an approved education plan. Support from Information Services has been requested in addressing these deficiencies; it is hoped that after the Oracle system is operating smoothly, necessary changes can be made to ensure better linking and searching.

[20]Until 1998, both the student and the principal signed a form that was filed in the Articling & Placement Office attesting to the education plan having being received and accepted by both parties.

[21] A survey being sent to Phase Three students this Fall will try to compile numerical data about students and their education plans.

not the principals, are asked to provide an overall rating of the articling experience in terms of unsatisfactory, satisfactory, good, or very good/excellent. This overall rating is to be made in the context of how closely the experience matches that which was promised in the education plan.

b. The format of the evaluations sets out specific items to be considered for each of thirteen skill areas outlined in the education plan.

c. It has been consistent over the last several years that 90% of students rate their articling experience as good, or very good/excellent on their mid-term evaluations. All comments are reviewed and significant ones are recorded in a report. Comments from the students who rated their articling experience as either unsatisfactory or satisfactory are summarised in a spreadsheet indicating the firm where they are placed, and the name of their articling principal.

d. Students who rate their experience as being unsatisfactory are contacted by the Articling & Placement Office to further review the situation and to work out strategies for improving the experience. In some cases, intervention with the principal is required. This intervention is of a positive rather than negative nature. These students are then monitored through follow-up conversations, and a mid-evaluation progress form.

e. Students are told at Law School talks and during Phase One that should a problem arise during their Articling term, they are to contact the Articling & Placement office immediately for support and advice. Several situations occur each year which require some type of intervention, involving mediation rather than confrontation. Approximately ten such situations have arisen in Year 2000. Sometimes, the resolution involves termination of a particular articling placement.[22]

f. At the end of the articling term, only the student completes a final evaluation. This evaluation is identical to the student's mid-term evaluation and compares the experience provided to that in the education plan. The statistics support the same distribution (90% good or very good/excellent) as for mid-term evaluations.

g. Where a significant problem is indicated, such as when a firm or principal receives several poor evaluations, that principal/firm is contacted. It is possible that the situation could affect the future approval of a principal.

16. Issues:

a. Candidness of the evaluations:

i. The *Proposals*[23] noted that "students who wish to be re-hired by the firm in which they article may be less than candid on the evaluation form. The Sub-Committee has laboured with this problem and finds no satisfactory answer. It would not be possible to do the evaluation on an anonymous basis, except perhaps in large firms, and it is felt that is access to the evaluation forms is restricted to the Law Society staff, then students will more likely accurately reflect on the evaluation forms the nature of their articling experience."

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[22]Termination guidelines are provided on p.21 of the Articling Handbook. The termination process involves a full and candid discussion between principal and student, a letter to the Articling & Placement Office explaining the situation and seeking assistance in resolving the issues, and where the matter is not resolved providing one month notice during which the usual articling relationship is maintained.

[23]*Proposals*, Commentary to Recommendation 8.2.

ii. Situations giving rise to less than candid student evaluations, in addition to the "rehire" situation described above, include students who are hoping for a reference and students who are afraid of losing articling credit (because of an inferior placement).

iii. A survey to be distributed to all Phase Three students in November 2000 includes some questions about the use of the education plan and the value of the evaluation experience.

b. Value of the evaluations:

i. Is the current detailed evaluation an adequate assessment of the articling experience? Should the student and principal evaluate the experience on the same basis? What should be the purposes of each of the evaluations? Should the format be changed to provide a more individualistic or general review of the skills? Should the principal be asked to evaluate the student's performance?

ii. One suggestion is to simplify the evaluation so that all the information given can be reviewed by the Articling and Placement Office, recorded, and analysed statistically. Currently much of the information provided by the lengthy evaluation is not even reviewed.

c. Timing of the evaluations:

i. Currently the mid-term evaluations are required to be submitted by Feb.1; however, often the forms are not received on a timely basis and although a late penalty is authorized, in practice this penalty has never been applied for late-filing of mid-term evaluations. These forms also take approximately two months to fully process. As a result, there has consistently been difficulty in contacting students with problem situations on a timely basis. Is there another process that might be more effective in recognizing and sorting out "problem situations" more quickly?

d. EDUCATIONAL MATERIALS

17. Process:

a. The *Proposals*[24] stated that principals should receive "adequate materials, including videotapes,... that deal with techniques of effective supervision and components of an effective articling experience, and if principals undertake to review these materials and certify that they have read and understood them, this will meet the educational criteria for principals." No videotapes nor acknowledgment of having read any training materials has been implemented[25].

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[24]Commentary to Recommendation 9.1.

[25]However, since September 2000, an acknowledgment of having read the Memorandum "Application for Approval as an Articling Principal" (Tab 9) has been required.

b. Principals are supplied with a hard copy of the Articling Handbook (Tab 1), upon approval and also in the Spring.[26] Students are given it during Phase One. The Articling Handbook is also available for downloading on the Law Society's web site.[27] It appears to staff of the Articling & Placement Office that frequently neither students nor principals read the Articling Handbook.

c. The Articling Handbook, updated yearly, describes the responsibilities of principals and students. It provides information about the articling term, required documentation, articled students' right to appear before courts and tribunals, appointment of articled students as commissioners for taking affidavits, termination of articles, summaries of the teaching phases, possible assignment checklists, sample education plan, and report from the Joint Sub-Committee on Sexual Harassment of Articling Students.

18. Issues:

a. Training:

i. Newly approved principals receive little training on how to provide quality articles. In the years since the *Proposals* were adopted by Convocation, there has been much concern about the scarcity of jobs. As a result, more effort and resources have been put forth to secure placements than to train newly approved principals.

ii. Where a newly approved principal is reported by the student to be providing a problematic placement, the Head of Articling & Placement will intervene and will engage in one-to-one training of the principal.[28]

iii. Ten years ago, the now readily accessible technology to provide training materials on a web platform was not available. With over four hundred new principals being approved each year, the sending of a video to each principal has not been feasible. However, the provision of some training materials using a web platform might be feasible today.

b. The Articling Handbook:

i. The purposes, content, and distribution of the Articling Handbook should be re-examined to provide a more relevant resource to both principals and students. There should perhaps be several publications created, such as one for principals, one for articling students, one for general information about the articling program. An example of an item that might be considered as general information is the current section[29] on withdrawal of articling commitments that is only of value to readers prior to commencing articles (i.e. prior to the receipt of the Articling Handbook). Also, the section on non-traditional articles[30] would be more useful read prior to commencing articles.

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[26]See footnote 12.

[27]Information, forms and memoranda may be downloaded at www.lsuc.on.ca/services/phase2/Articling.shtml.

[28]This situation has occurred once to date in Year 2000. There appeared to be a dramatic improvement in the quality of the student's articles shortly after the session. The situation is being monitored.

[29]Tab 1, pages 21 - 22.

[30]idem, pages 7, 12 - 14

ii. As mentioned in the previous section of this Report, web-base technology offers a new approach to the distribution of information. Currently the Articling & Placement Office has approximately forty items of information and forms posted in English on the Law Society's web site and is actively working on posting these items in French. Many of these items reproduce material currently found in the Articling Handbook.

e. NON-TRADITIONAL ARTICLES

19. Description:

a. The term "Non-traditional articles" encompasses abridgments, rescheduled articles (eg. articling prior to the first teaching phase or splitting articles on either side of a teaching phase), national, international, joint, part-time, or assigned articles.

b. The approval process varies somewhat for each of these non-traditional articles but the common themes are that there should be written documentation, including an approved education plan and the supervising lawyer's acknowledgement of the arrangement prior to commencement of articles, Articling & Placement Office approval of the supervising lawyer, and documentation signifying completion of the arrangement. Where applicable, certificates of good standing are required.

c. Requests are monitored by use of a spreadsheet which tracks the receipt of significant documentation.[31] In the first six months of 2000, staff processed and/or approved the following:

- Abridgment applications 31 (1999 - 45)
- Modifications or reschedulings of BAC program 54 (1999 - 26)[32]
- Other non-traditional articles 18 (1999 - 20)

20. Issues:

Issues relating to abridgments, national, and international articles are currently reviewed in detail in a separate report.[33]Currently, the forms relating to non-traditional articles are part of a form-streamlining process that was begun Spring 2000.[34]

f. PROFESSIONAL RESPONSIBILITY EXAM

21. Description:

A professional responsibility exam is mailed to each student in the spring of each year, with the answers being mailed directly to the principals. This "take-home" exam (Tab 8) consists of approximately ten questions which

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[31]Tracking spreadsheet has been in effect since August 2000. Prior to that time, tracking was done informally.

[32] Increase is due to the transition to the new approved Bar Admissions Course which will permit the two teaching phases to be taken prior to the articling term. As a result of this decision, more applications are being received by students without current articling placements who are requesting to be accorded the same opportunity.

[33]Report is to be included in the November 2000 Admissions Committee Agenda.

[34]This review is being done in conjunction with the Administrative Compliance Processes Department of the Law Society as part of a broader streamlining review of forms.

relate to ethical responsibilities of lawyers and avoidance of professional liability. Answers are to be hand-written in the book and must be discussed with the principal (or designate) who then signs a Certificate which attests to the process followed. The questions generally require the student to refer to the Rules of Professional Conduct and the Commentaries and to identify and discuss the professional responsibility issues raised by the facts. The entire exam booklet, with attached certificate, is then submitted to the Law Society. Anecdotal feed-back from students is positive.

22. Issues:

a. When a student articles in the normal order, after the first teaching phase, the student has had a course on professional responsibility prior to commencing articles. However, those students who article out-of-phase and prior to taking the teaching phase have not had the same exposure to the Rules of Professional Conduct. Requiring some level of training or testing of the Rules of Professional Conduct for those articling out of phase, prior to commencing articles, is currently being considered.

b. Some students who do not otherwise qualify for accommodation object to the exam being hand-written. Students are asked to hand-write the exam in order to deter cheating, and to keep the exam and certificate together in a convenient way.

g. FORMS

23. Description:

a. In addition to the forms mentioned earlier in this report, three significant articling forms are:

- Articles of Clerkship (Tab 3)
- Principal's Certificate of Service under Articles(Tab 5)
- Student's Affidavit of Service under Articles (Tab 6)

b. The Articles of Clerkship is the contract setting out the responsibilities of the principal and articling student and it must be completed and filed by the student within two weeks of commencing articles. Although there is a reference to fulfilling the requirements of the Education Plan in the Articles of Clerkship form, there is no positive onus on either party for having reviewed and accepted the Education Plan.

c. The end-of-term documents include the Principal's Certificate of Service under Articles and the Student's Affidavit of Service under Articles which are required to be completed and filed at the completion of the articling period. One of the features of the Principal's Certificate of Service under Articles form is a statement in which the principal attests, "I believe that ..... is a fit and proper person to be called to the Bar and admitted to practice as a Solicitor of her Majesty's Courts of Ontario". The limitations on permitting a student to work outside of the articling arrangement is also addressed in the end-of-term documents. These forms have changed very little since they were adopted in 1942. When a principal feels that (s)he cannot attest to such a statement, a letter is accepted setting out all other aspects required on the form. The matter is then sent to the Investigations Department of the Law Society to determine whether a good character investigation is warranted.

24. Issues:

a. Although Articles of Clerkship are required to be filed within two weeks of commencement of articles in order not to jeopardize the recognition of any articling portion and to avoid a late-filing penalty, in many cases it is filed later (often by months). Currently Bar Admission Course representatives do not have the authority to waive late filing fees on Articles of Clerkship, although this matter is under

review. The Head of Articling & Placement has the authority to recognize articles retroactively and such recognition is usually granted, at least to the more recent of the date when the student registered in the Bar Admission Course or the date the student began working for the lawyer.

b. Currently the Principal's Certificate of Service under Articles and the Student's Affidavit of Service under Articles cannot be signed until the end of the articling period. In those frequent cases where students take vacation at the end of the articling term, the student must return after the vacation to have these forms signed and executed. Consideration is being made to redesign the forms so that they may be signed at the end of the "active" articling period.

c. The "fit and proper" clause of the Principal's Certificate of Service under Articles is currently under review. Advisory Services and the Articling & Placement Office are examining various options that include providing guidelines to understanding the phrase or revision to the wording.

d. All of these forms are being reviewed in conjunction with the ongoing review and streamlining of forms by the Administrative Compliance Processes Department of the Law Society and by the Articling & Placement Office.

IV CONCLUSION

25. As this snapshot of the articling program indicates, all aspects of the articling program have been reviewed in the last twelve months. The Articling & Placement Office is committed to ensuring that each of the approximately eleven hundred students articling at any given time enjoy a quality articling experience. This report has been written during a period of transition and change of the articling program. Over the last several months, every aspect of the articling program has been examined, issues have been identified, new processes are being developed, and policies are being referred to the Admissions Committee for decision-making. All of the issues identified in this report are currently being studied. Those that involve policy consideration will be brought forward to the Admissions Committee. It is an appropriate time to reflect on the significant reforms introduced in the *Proposals* and in the spirit of the *Proposals,* to review the entire current implementation of the articling program.

Re: Articling Credit for Summer Employment

It was moved by Mr. Millar, seconded by Mr. E. Ducharme that if a Task Force is established on the Continuum of Legal Education that consideration of the issue of articling credit for summer employment be included in the Task Force's mandate.

Carried

Re: 2001 Fees Schedule for Bar Admission Course

It was moved by Mr. Millar, seconded by Mr. E. Ducharme that the Fees Schedule for the Bar Admission Course set out in Appendix 2 on page 17 of the Report be approved.

Carried

TREASURER'S REMARKS

The Treasurer remarked on the work of the Equity Initiatives Department.

The Equity and Diversity Mentorship Program was launched on December 1st, 2000 and offers high school students, law students and bar admission students opportunities to be mentored by a lawyer and encourages them to consider law as a career.

The Treasurer announced that the Law Society was selected by the Awards Jury of the Canadian Race Relations Foundation as a top nominee to be honoured at the 2001 Award of Excellence Symposium being held in Vancouver in March. The winners will be awarded for Excellence, the Award of Distinction and Honorary Mention.

In addition the Equity Initiatives Department has received a three-year $150,000 funding grant from the Maytree Foundation to further the work of the Initiatives Department on developing educational materials for the legal profession in support of the mentoring and public education programs.

SPECIAL COMMITTEE ON LAWYER'S DUTIES WITH RESPECT TO INCRIMINATING PHYSICAL EVIDENCE - INTERIM REPORT

Mr. MacKenzie presented the Report which related to the Murray discipline matter. He advised that a draft Rule and Commentary would be presented in February and made available to the profession and the public for comment. The proposed Rule and Commentary would be brought back at a later date for adoption.

Special Committee on Lawyer's Duties with Respect to Incriminating Physical Evidence
January 25, 2001

Interim Report to Convocation

Purpose of Report: Information

Prepared by the Policy Secretariat

STATUS OF WORK OF THE COMMITTEE

1. The Special Committee on Lawyer's Duties with Respect to Incriminating Physical Evidence (the "Committee")[1] has begun its work and met on three occasions. Prior to its first meeting, the Committee reviewed extensive material that included existing rules and standards in other jurisdictions, academic writings and case law on the subject of a lawyer's knowledge and possession of incriminating physical evidence.

Substantive Issues

2. The Committee's meetings to date have been largely devoted to consideration of the scope of a rule and commentary on the subject. The Committee identified a range of issues that must be considered in determining the appropriate guidance to lawyers in this area and how to formulate a rule that is clear and enforceable. The issues upon which the Committee has focussed include:

   - the role of the lawyer as advocate and the lawyer's duties to the client and the administration of justice;

[1]The members of the Committee are Gavin MacKenzie (chair), Stephen Bindman, Todd Ducharme, Alan Gold, Paul Lindsay, Tony Loparco, Niels Ortved, The Hon. Sydney Robins, Heather Ross and Clayton Ruby.

- the fundamental importance of solicitor and client confidentiality and privilege in the relationship between and a lawyer and client in situations in which the lawyer learns of or possesses incriminating evidence;
- the distinction between the lawyer's information about incriminating evidence and the lawyer's possession of such evidence;
- the possibility that the lawyer's duty may vary depending on whether the evidence is inculpatory, exculpatory, or partially inculpatory and partially exculpatory;
- the circumstances requiring, and the timing and method of, disclosure of incriminating physical evidence to either the prosecution or law enforcement authorities;
- the necessity and scope of, and the lawyer's method of seeking, advice from another lawyer or the Law Society on issues respecting possession and disclosure of incriminating physical evidence.

Form of the Rule

3. The Committee is attempting to accomplish two purposes in drafting a rule and commentary on this subject. First, the Committee is attempting to assist the Law Society to formulate a clear rule that can be enforced through discipline proceedings if breached. Second, the Committee is attempting to provide guidance to lawyers in the broad variety of circumstances in which issues pertaining to the possession of incriminating physical evidence may arise.

4. At present, the Committee's view is that these purposes may best be served by the formulation of a concise rule accompanied by a thorough commentary which draws to the lawyer's attention the many distinctions and factors that should be taken into account, and which also provides advice on the approach the lawyer should adopt.

5. This model would be consistent with the current *Rules of Professional Conduct*, a feature the Committee finds attractive.

Process Issues

6. The Committee discussed the desirability of obtaining comments from the profession and the public on this subject and the timing of a call for input. The Committee's view is that usefulness of the comments would be enhanced if the profession and the public had the benefit of the Committee's recommendations.

7. Accordingly, the Committee proposes that once it has completed a proposed rule and commentary, it should report to Convocation with a recommendation that the proposed rule and commentary be made available to the profession and the public for comment.

8. The Committee is working towards a report with a proposed rule and commentary for the February 21, 2001 Convocation.

DRAFT MINUTES OF CONVOCATION

It was moved by Ms. Ross, seconded by Ms. Pilkington that the November 29th and December 15th, 2000 Draft Minutes of Convocation be approved.

Carried

MOTION - APPOINTMENT

It was moved by Ms. Pilkington, seconded by Mr. Ruby that Robert Topp be appointed as a member to the Ontario Lawyers Gazette Advisory Board.

Carried

STRATEGIC PLANNING COMMITTEE

Messrs. MacKenzie and Manes presented the Report of the Strategic Planning Committee for consideration by Convocation.

REPORT OF THE STRATEGIC PLANNING COMMITTEE

I. Introduction

1. On May 26, 2000, Convocation considered the first report of the Strategic Planning Committee, and passed the following motion:

> That Convocation approve the overall strategic direction of the Strategic Planning Committee as set out in its Report, and directs the Committee to take into account the discussion in Convocation today and the motions passed and report back to Convocation with options for the implementation of the plan for its consideration with a further amendment accepted by the mover and seconder to include detailed information on costs and consequences of any such proposals.

2. Since May 26, 2000, the Committee has met on eight occasions – August 2, 11, 31, September 22, November 1, 23, December 11, 2000 and January 10, 2001. The Committee consists of Gavin MacKenzie and Ron Manes (co-chairs), Eleanore Cronk, Dino DiGiuseppe (until his appointment to the Ontario Court of Justice on November 3, 2000), Susan Elliott, George Hunter, Vern Krishna, Barbara Laskin, and Marilyn Pilkington. Katherine Corrick serves as secretary to the Committee, and staff members John Saso, Richard Tinsley, Anji Husain, and Sophia Sperdakos attended one or more of the committee meetings. Bencher Gillian Diamond attended the September 22 meeting, and bencher Ross Murray attended the November 1 meeting.

3. On November 9 and November 29, 2000, the Committee reported to Convocation on certain aspects of its deliberations that were relevant to the Society's search for a new Chief Executive Officer. Convocation passed the following motions on November 29, 2000:

> That the Law Society recruit a Chief Executive Officer whose responsibilities will include managing the day-to-day activities of the Law Society, including ensuring the effective management of the Law Society's regulatory functions, providing expert advice on the challenges confronting the Law Society and the profession, assisting Convocation to develop policy, and implementing Convocation's policies.
>
> That the Chief Executive Officer report to Convocation through the Treasurer.
>
> That the Secretary report to the Chief Executive Officer.
>
> In order that the present report will be comprehensive, the recommendations of the Committee on which these motions were based have been incorporated into the section of this report dealing with governance issues below.

II. The Committee's First Report – A Summary

4. As mentioned above, on May 26, 2000, Convocation approved "the overall strategic direction of the Committee as set out in its [first] report." The Committee's first report, as amended by Convocation, is attached as Appendix A. The overall strategic direction of the Committee is summarized below.

5. Consultation with benchers and others made it clear that there was wide spread support for the Law Society's Role Statement, which was reaffirmed in the Committee's first report. The Role Statement, adopted by Convocation on October 27, 1994, reads 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.

6. Three main themes became apparent to the Committee as a result of discussions at the benchers' planning retreat at Hockley Valley in October 1999 and surveys of and interviews with benchers, staff and others prior to May 26, 2000. The first theme was that the Law Society must concentrate on improving the performance of its core functions. The second theme was that the Society must improve its governance process, particularly the process by which decisions are made in Convocation. The third theme was that the Society must improve its communications with both its members and the public.

7. The following recommendations of the Committee flowed largely from the reaffirmation of the Role Statement and these three themes:

(a) We should establish and enforce high standards of professionalism, so that the public will be confident that lawyers they retain will be ethical and competent to carry out the task at hand.
(b) We should enhance the professionalism of lawyers by designing and implementing a co-ordinated continuum of education, including pre-call and post-call education, to help practising lawyers develop and maintain competence.
(c) We should establish a demonstrably reliable process for measuring competence.
(d) We should improve our communications with the public so that the public acquires a better understanding of the roles of the Society and the profession.
(e) We should improve our communications with the profession so that our members regard the Society as an ally in ensuring that the public has access to legal services delivered by lawyers who comply with high standards of competence and ethics.
(f) We should continue to strive to achieve equity and diversity and the elimination of discriminatory practices within the profession.
(g) We should create and enforce clear rules of debate to facilitate effective decision-making.
(h) We should form an executive committee to manage and streamline Convocation's agenda and to advise the Treasurer.
(i) We should review the size and composition of Convocation.
(j) We should re-examine the roles of the Treasurer, the Chief Executive Officer, and the Secretary, and the composition of the senior management team.

8. Convocation on May 26, 2000, also directed the Committee to consider the following issues:

(a) Staggered terms for benchers.
(b) Limited terms for benchers.
(c) The Treasurer's honorarium.
(d) The prosecution of unauthorized practice.
(e) The development of measures to assist small firms and sole practitioners to survive and thrive, and to ensure access of individuals and small businesses to legal services.

III. Core Functions

A Professional Conduct, Complaints, and Discipline

9. Four developments since May 26, 2000 will, in the Committee's view, assist the Society to improve its performance of its core regulatory functions in the areas of professional conduct, complaints, and discipline. They are as follows:

(a) The adoption in June 2000 of the new rules of professional conduct, effective November 1, 2000.
(b) The adoption in October 2000 of the recommendations of the Honourable W. David Griffiths Q.C. in his report on the Society's complaints, investigation, and discipline processes.
(c) The allocation of substantial new funding to the complaints, investigation and discipline processes in the Society's 2001 budget, including approximately $940,000 to implement the recommendations in the Griffiths' report.
(d) The adoption in November 2000 of the Strategic Planning Committee's recommendation that the Chief Executive Officer's responsibilities include ensuring the effective management of the Society's regulatory functions.

10. The Committee is satisfied that these measures should enable the Society to implement the Committee's recommendation that it improve its performance of these core functions.

B. Competence

11. The Committee regards the development and maintenance of high standards of competence among lawyers to be among the core functions on which the Society must concentrate. The form that the Society's efforts in this area will take will be influenced significantly by Convocation's consideration of the recommendations of the Professional Development and Competence Committee based on its recent consultation process concerning the possible models that the Society might adopt to discharge its competence mandate.

12. One of the key elements of the Committee's first report was its recommendation that the Society design and implement a co-ordinated continuum of education, including pre-call and post-call education, to help practising lawyers develop and maintain competence. This recommendation raises a host of issues, many of which arise from the delicate and complex relationship between the Society and Ontario's law schools. These issues include the following:

(a) To what extent should law schools focus on the training of lawyers for practice, and to what extent should they focus on the scholarship of law as an academic discipline?
(b) Is there a competency gap between law school and practice that must be filled before graduates of accredited law schools have the knowledge and skills necessary to practise law?
(c) If so, is that gap filled most effectively by the Society's current system of articling and classroom education in the bar admission course, or could it be filled more effectively by other means (for example, by expanding the list of mandatory courses in law schools, or by joint offerings of programs by the Society and the law schools)?
(d) What role, if any, should the Law Society have in preparing graduates of accredited law schools to practise law?
(e) What role should the Law Society, the law schools, and other continuing legal education providers play in post-call education?

13. The Committee recommends that a task force be struck to undertake a comprehensive review of the current systems of legal education in Ontario and, in consultation with all stakeholders, design the proposed co-ordinated continuum of education, and make recommendations on its implementation. To be effective and efficient, the Committee recommends that the task force be composed of five or six members, including knowledgeable representatives of the Society, the law schools, and other continuing legal education providers.

The task force must consult broadly and make recommendations to Convocation for the design and implementation of a co-ordinated continuum of legal education.

14. Funding of $100,000 for the proposed task force has been set aside in a contingency fund for 2001, pending Convocation's approval. The Committee recommends that the task force be required to report to Convocation within one year from the date on which it is populated.

Recommendation to Convocation

15. That a task force be struck to design, and in consultation with all stakeholders, propose a method of implementing a co-ordinated continuum of education, including pre-call education, to enable practising lawyers to acquire and maintain competence. The task force shall report to Convocation within one year from the date it is populated.

C. Delivery of Programs by Others

16. To enable the Law Society to focus more on its core regulatory functions, and to free up resources to fund increased investment in those core functions, the Committee's first report provides for the potential delivery of a number of programs by third parties.

17. It is not timely to consider many of the programs highlighted in the strategic plan as appropriate candidates for elimination or delivery by third parties. Many of the programs relate to competence and the continuum of legal education, and may take on new significance to the Law Society once the competence model and continuum of legal education are developed.

18. After submitting its first report, the Committee concluded that the savings that might be achieved in other areas would be either uncertain (as in the case of the Lawyer Referral Service, which may become self-funding or profitable now that callers are required to pay six dollars a call) or too modest to enable the Society to enhance performance in its core areas.

IV. Governance and Decision-Making Issues

19. There was consensus in the Committee that Convocation's current decision-making process must be reformed to make it less time consuming and more efficient. At times matters come before Convocation that are not ready for consideration, for example when *ad hoc* motions are brought on the floor of Convocation without advance notice or consideration of financial implications. Debates in Convocation can be unnecessarily long and repetitive. This view was expressed to Committee members by many benchers. The Committee considered a variety of measures, and is of the view that the development and enforcement of rules of procedure for Convocation, and the establishment of the Treasurer's Advisory Committee will assist Convocation to be more efficient in its decision-making (see below).

A. Size of Convocation

20. The Committee considered reducing the size of Convocation as a means of making the decision-making process more efficient. Several members of the Committee were of the view that the size of Convocation should be reduced, and that the reduction should be substantial. At the same time, the Committee recognized that any reduction in the size of Convocation would have to take into account the effect of such a measure on diversity and regional representation.

21. A reduction in the size of Convocation would require legislative amendment. Given how lengthy and resource intensive a process legislative change is, the Committee recommends the implementation of a number of other measures to improve Convocation's efficiency prior to embarking on a course of legislative amendment.

22. The measures being suggested for immediate implementation to improve the efficiency of Convocation include,

(a) the development and enforcement of rules of procedure for Convocation, and
(b) the establishment of the Treasurer's Advisory Committee.

B. Rules of Procedure for Convocation

23. Section 5 of by-law 8, made pursuant to the *Law Society Act*, provides that meetings of Convocation must be conducted in accordance with the by-laws, and where the by-laws are silent on a matter of procedure, in accordance with the Standing Orders of the Legislative Assembly of Ontario.

24. The by-laws are silent on rules of procedure for the meetings of Convocation.

25. The Standings Orders of the Legislative Assembly of Ontario have been drafted to assist in the orderly conduct of government business in the House. They are written to support a very different decision-making process than the one engaged in by Convocation. They are based on certain characteristics of the Legislative Assembly that are fundamentally different from Convocation. For example, they presume the existence of a party system and of a highly structured system of bringing government bills before the House for debate. They are not relevant to the meetings of Convocation.

26. The Committee is of the view that a set of rules, relevant to the meetings of Convocation, and designed to enhance the efficiency of the decision-making process, be approved in place of the Standing Orders.

27. Appendix B to this report sets out the substance of a proposed set of rules. The purpose of the rules would be to promote the efficient, orderly and fair conduct of Convocation's business and to ensure that Convocation makes decisions on the basis of complete information. If Convocation agrees with the substance, rules will be drafted, The Committee recommends that those rules be incorporated into by-law 8. Once drafted, the rules would be brought before Convocation for approval.

Recommendation to Convocation

28. That Convocation direct that rules of procedure for Convocation be drafted for incorporation into by-law 8, based on the principles set out in Appendix B.

C. Treasurer's Advisory Committee

29. There is currently no formal mechanism in place to plan Convocation's agenda; to determine when issues are ready for Convocation's consideration; to advise the Treasurer between meetings of Convocation; to ensure that the Chairs of the major policy-making committees are apprised of the issues being dealt with in each committee; to consistently and effectively monitor the implementation of Convocation's policies; to review the Law Society's governance policies to ensure they meet the Law Society's current needs; and to generally assist the Treasurer in the exercise of the Treasurer's duties.

30. The Committee is of the view that a formal process must be developed to accomplish these objectives if Convocation is to become more efficient. Too often, matters are before Convocation prematurely, the consequences of a course of action have not been fully examined, financial ramifications are not detailed, or further consultation with other committees, staff, or external organizations is required. Bringing such matters before Convocation results in time wasted on debate when the matter is eventually sent back to committee for further study, or decisions are made by Convocation on the basis of inadequate information.

31. Convocation has not always effectively monitored the implementation of the policies it sets. Once the policy is passed by Convocation, there is no formal mechanism for monitoring its implementation or its achievement of Convocation's goals.

32. In addition, the Committee is of the view that our governance policies, including the executive limitations, must be reviewed to ensure they are appropriate for the current circumstances of the Law Society. There is no formal mechanism to accomplish this.

33. The Committee recommends that a Treasurer's Advisory Committee be established to oversee the work of committees, task forces and working groups, to ensure that issues are channelled to the appropriate committee, that the work of the committees is progressing and finding appropriate space on Convocation's agenda, that the work of the committees is co-ordinated to avoid duplication of effort, that Convocation's policies are implemented by maintaining close liaison with the Chief Executive Officer, and that appropriate monitoring mechanisms are developed. The Treasurer's Advisory Committee would advise the Treasurer in responding to important issues until these can be dealt with by Convocation and assist the Treasurer to monitor the performance of the Chief Executive Officer.

34. The Treasurer's Advisory Committee would not acquire any of the decision-making powers vested in Convocation by section 10 of the *Law Society Act*, which reads as follows:

> The benchers shall govern the affairs of the Society, including the call of persons to practise at the bar of the courts of Ontario and their admission and enrolment to practise as solicitors in Ontario.

As always, all policy decisions would be made in Convocation. The Treasurer should be responsible for keeping Convocation apprised of the Committee's activities, for example, by circulating agendas and minutes of the Committee's meetings.

35. For maximum efficiency, the Treasurer's Advisory Committee should be small. The Committee would be composed of the Treasurer and the Chairs of those committees responsible for developing policy on matters related to the core mandate of the Law Society – Admissions, Professional Regulation, Professional Development and Competence - as well as the Chair of the Finance and Audit Committee and the Chief Executive Officer. In addition, the Treasurer should have the option of adding two further benchers to the Treasurer's Advisory Committee. Other benchers may be invited to attend Committee meetings for specific purposes.

Recommendation to Convocation

36. That a Treasurer's Advisory Committee be established with the mandate to ensure that,

(a) the work of committees, task forces and working groups is overseen;
(b) issues are channelled to the appropriate committee;
(c) the work of the committees is progressing and finding appropriate space on Convocation's agenda;
(d) the work of the committees is co-ordinated to avoid duplication of effort;
(e) Convocation's policies are implemented by maintaining close liaison with the Law Society's Chief Executive Officer;
(f) appropriate monitoring mechanisms are established; and
(g) the Law Society's governance policies meet the current needs of the Law Society.

The Advisory Committee would advise the Treasurer in responding to important issues until these can be dealt with by Convocation and assist the Treasurer to monitor the performance of the Chief Executive Officer.

37. The Treasurer's Advisory Committee is to be composed of the Treasurer, the Chairs of the Admissions, Professional Regulation, Professional Development and Competence, and Finance and Audit Committees, the Chief Executive Officer and up to two other benchers to be appointed at the option of the Treasurer.

38. The Treasurer shall keep Convocation apprised of the Committee's activities.

D. Staggered Terms for Benchers

39. Staggered terms for benchers were initially suggested as a means of rejuvenating Convocation every two years. Rather than have all 40 benchers elected every four years, 20 would stand for election every two years.

40. The Committee is of the view that there is no lack of fresh ideas within Convocation. Approximately 25% of the bench changes with each election bringing in new people with new ideas. As benchers leave throughout the term, new benchers join, bringing fresh ideas.

41. Staggered terms for benchers would result in an information imbalance within Convocation every two years. New benchers joining mid-term would not have the same background information as other benchers to deal with issues that had been the subject of study for up to two years. Some of the most important issues recently considered by Convocation have taken two years of study or more – for example, the Law Society's competence mandate, the MDP Task Force, County and District Libraries, and the new Rules of Professional Conduct.

42. Bencher elections cost approximately $300,000. Conducting an election every two years would substantially increase the expenditures of the Law Society.

43. For the above reasons, the Committee is not recommending staggered terms for benchers.

E. Limited Terms for Benchers

44. Convocation last considered the issue of limited terms for benchers on November 25 1994, when it defeated a motion that a bencher who has served two full consecutive terms be required to sit out a term before seeking re-election.

45. The reasons put forth in support of the motion in 1994 were as follows:

(a) To increase the degree of participation in self-governance by other members of the profession.
(b) To bring fresh perspectives to Convocation.
(c) To ensure a periodic interruption of tenure for benchers – to expect benchers to maintain the necessary level of commitment of time and energy for eight years is a significant burden.
(d) To dispel the perception of the majority of the profession that Convocation is a self-perpetuating clique.

46. As mentioned above, the Strategic Planning Committee is of the view that there is no evidence that Convocation lacks fresh ideas. In addition, 25% of the bench changes at each election in any event.

47. Further, the Committee feels it is undemocratic and unwise to limit the term of a bencher who is willing to volunteer substantial time and energy to the Law Society.

48. The motion in 1994 predates the regional bencher election process, which is designed to provide more incentive for members of the profession to run as bencher and participate in the self-governance of the profession.

49. For the above reasons, the Committee is not recommending limited terms for benchers.

F. Treasurer's Honorarium

50. Prior to 1983, the Treasurer received no honorarium. The Treasurer was reimbursed only for out of pocket expenses incidental to the discharge of the Treasurer's duties. In 1983, an annual honorarium of $50,000 for the Treasurer was implemented.

51. On April 23, 1993, Convocation approved increasing the honorarium to $75,000. Convocation has not examined the honorarium since 1993.

52. The Committee considered the enormous commitment the Treasurer must make to the business of the Law Society, and the toll that commitment exacts on the Treasurer's law practice. The Committee is of the view that the Treasurer's honorarium must keep pace with the cost of living. It is therefore suggesting that, commencing in June 2001 with the election of the Treasurer, the current honorarium of $75,000 be adjusted to reflect the increase in the cost of living since 1993, and thereafter be indexed annually to inflation.

53. According to the Bank of Canada, the cost of living increased 11.32% between 1993 and 2000. An increase of 11.32% to the current honorarium of $75,000 results in an honorarium of $83,490.

Recommendation to Convocation

54. That the current annual honorarium for the Treasurer of $75,000 be adjusted commencing in June 2001 with the election of the Treasurer to reflect the increase in the cost of living since 1993, and thereafter be indexed annually to inflation.

G. Roles of the Treasurer, Chief Executive Officer and Secretary

55. On November 29, 2000, Convocation approved a motion put forward by the Strategic Planning Committee articulating the role of the Chief Executive Officer as manager of the day-to-day activities of the Law Society, including ensuring the effective management of the Law Society's regulatory functions, providing expert advice on the challenges confronting the Law Society and the profession, assisting Convocation to develop policy, and implementing Convocation's policies.

56. Convocation further approved two motions stating that the Chief Executive Officer report to Convocation through the Treasurer and that the Secretary report to the Chief Executive Officer.

57. The Committee is of the view that the role of the Secretary requires further examination. The Committee recognizes the importance of the issue raised in Convocation on November 29 about the possible incompatibility of and perceived conflict between the many functions performed by the Secretary.

58. The Committee recommends that the role of the Secretary be examined by the Strategic Planning Committee in collaboration with the new Chief Executive Officer, and in consultation with the Secretary, and that this matter be given urgent attention by the Committee and the new Chief Executive Officer.

Recommendation to Convocation

59. That the role of the Secretary be examined by the Strategic Planning Committee, together with the new Chief Executive Officer, and in consultation with the Secretary, and that the Committee report back to Convocation on the matter within two months of the new Chief Executive Officer's start date of employment.

H. Composition of the Senior Management Team

60. In its first report, the Committee recommended that the composition of the senior management team be changed to reflect the importance of the core functions of the Law Society. Currently the majority of the senior management team is composed of senior managers responsible for the administrative functions of the Law Society.

61. It is the view of the Committee that the composition of the senior management team is a matter within the purview of the Chief Executive Officer, who is responsible for the management of the day-to-day activities of the Law Society, including the effective management of the Law Society's regulatory functions. The Committee recommends that Convocation reaffirm its position that the senior management team of the Law Society be changed to reflect the importance of the Law Society's core functions, but ought not be more specific than that.

I. Establishment and Oversight of Committees, Task Forces and Working Groups

62. The Committee is of the view that the establishment of committees, task forces and working groups ought to be limited to those that are necessary to assist Convocation to fulfil its mandate and that they should not be established without clearly articulated terms of reference and a sunset clause.

63. In addition, the Committee is of the view that more effective oversight of committees, task forces and working groups is required to ensure that the work of the groups remains within the terms of reference set by Convocation, is progressing at a pace sufficient to meet any sunset clause set by Convocation, and is co-ordinated to avoid duplication of effort. The Treasurer's Advisory Committee should perform this key oversight function.

64. The other concerns of the Committee are adequately addressed in the current Governance Policies, Part II, Section G, entitled, "Convocation, Committee and Task Force Principles." A copy of this section of the Governance Policies is attached as Appendix C to this report.

V. Other Issues

A. Prosecution of Unauthorized Practice

65. Pending action by the provincial government on the Cory Report on Paralegals, the Committee is of the view that the Law Society ought to continue its current practice of investigating and prosecuting unauthorized practice pursuant to section 50.1 of the *Law Society Act*.

66. Currently, the Law Society investigates allegations of unauthorized practice, and where the investigation reveals that a prosecution is warranted, the matter is referred to the Proceedings Authorization Committee. In 2000, 77 investigations of unauthorized practice were undertaken.

B. Sole Practitioners, Small Firms and Technological Change

67. The preamble to the strategic plan sets out the Law Society's Role Statement and affirms the Law Society's responsibility to govern and lead the legal profession by ensuring access to legal services and influencing the evolution of the legal profession in Ontario.

68. The vast majority of legal work in Ontario is performed for individuals and small businesses. The development of measures to assist small firm and sole practitioners to survive and thrive is critical to ensuring that these individuals and small businesses, particularly in non-urban centres, have access to legal services. Sole practitioners make up 73% of all law firms in Ontario, while 95% of all law firms have five or fewer lawyers.

69. In recent years, the Law Society has undertaken a number of initiatives and measures to assist sole practitioners and small firms. A few examples include the very well received continuing legal education program, "Sole Practices and Small Firms: From Surviving to Thriving," which was offered in ten different centres in Ontario in 2000; the implementation of universal funding for County and District law libraries; the free Continuing Legal Education programs on the new Rules of Professional Conduct, videotapes of which will be sent at no charge to all County and District law libraries; the Practice Advisory Service; and the use of Bar-ex to provide low and no cost continuing legal education to members of the profession without geographical constraints.

70. The Law Society must continue to develop programs and initiatives designed to assist all members of the bar, particularly sole practitioners and small firm lawyers, to provide cost-efficient, competent and effective legal services to ensure access to legal services for individuals and small businesses.

71. An important issue raised during the Committee's deliberations was the technological proficiency of the legal profession. As provincial and federal governments begin mandating electronic means as the sole means to perform certain legal tasks, lawyers must become technologically adept if they are to survive.

72. The Law Society must lead the profession by clearly conveying to the profession the importance of being technologically adept and the consequences of failing to be so. It has already done so to a certain extent by making "adapting to changing professional requirements, standards, techniques and practices" a necessary attribute of the competent lawyer in rule 2.01 of the Rules of Professional Conduct.

73. The Committee is of the view that the Law Society ought to use its means of communication with the profession, such as the *Ontario Lawyers Gazette*, to emphasize the requirement of being technologically adept, and develop means to support lawyers in their efforts to keep up with technological changes.

74. In addition, the Committee will consult with the new Chief Executive Officer on the most effective way to examine and address this issue.

Recommendation to Convocation

75. That the Law Society develop a plan to assist sole practitioners and small law firms to provide access to legal services for individuals and small businesses. In particular, the Law Society ought to continue to develop programs designed to assist members, particularly sole practitioners and small law firms, to develop technological competencies and to provide cost-efficient, competent and effective legal services.

76. That the Strategic Planning Committee consult with the new Chief Executive Officer on the most effective means to examine and address these issues and report back to Convocation.

VI. SUMMARY OF RECOMMENDATIONS

77. The following is a list of the recommendations contained in this report.

Competence

78. That a task force be struck to design, and in consultation with all stakeholders, propose a method of implementing a co-ordinated continuum of education, including pre-call education, to enable practising lawyers to acquire and maintain competence. The task force shall report to Convocation within one year from the date it is populated.

Rules of Procedure for Convocation

79. That Convocation direct that rules of procedure for Convocation be drafted for incorporation into by-law 8, based on the principles set out in Appendix B.

Treasurer's Advisory Committee

80. That a Treasurer's Advisory Committee be established with the mandate to ensure that,

(a) the work of committees, task forces and working groups is overseen;
(b) issues are channelled to the appropriate committee;
(c) the work of the committees is progressing and finding appropriate space on Convocation's agenda;
(d) the work of the committees is co-ordinated to avoid duplication of effort;
(e) Convocation's policies are implemented by maintaining close liaison with the Law Society's Chief Executive Officer,
(f) appropriate monitoring mechanisms are established; and
(g) the Law Society's governance policies meet the current needs of the Law Society.

The Advisory Committee would advise the Treasurer in responding to important issues until these can be dealt with by Convocation and assist the Treasurer to monitor the performance of the Chief Executive Officer.

81. The Treasurer's Advisory Committee is to be composed of the Treasurer, the Chairs of the Admissions, Professional Regulation, Professional Development and Competence, and Finance and Audit Committees, the Chief Executive Officer and up to two other benchers to be appointed at the option of the Treasurer.

82. The Treasurer shall keep Convocation apprised of the Committee's activities.

Treasurer's Honorarium

83. That the current annual honorarium for the Treasurer of $75,000 be adjusted commencing in June 2001 with the election of the Treasurer to reflect the increase in the cost of living since 1993, and thereafter be indexed annually to inflation.

Role of the Secretary

84. That the role of the Secretary be examined by the Strategic Planning Committee, together with the new Chief Executive Officer, and in consultation with the Secretary, and that the Committee report back to Convocation on the matter within two months of the new Chief Executive Officer's start date of employment.

Sole Practitioners, Small Firms and Technological Change

85. That the Law Society develop a plan to assist sole practitioners and small law firms to provide access to legal services for individuals and small businesses. In particular, the Law Society ought to continue to develop programs designed to assist members, particularly sole practitioners and small law firms, to develop technological competencies and to provide cost-efficient, competent and effective legal services.

86. That the Strategic Planning Committee consult with the new Chief Executive Officer on the most effective means to examine and address these issues and report back to Convocation.

APPENDIX B

RULES OF PROCEDURE FOR CONVOCATION

1. The purpose of these rules is to promote the efficient, orderly and fair conduct of Convocation's business.

2. A basic principle of these rules is to give the Treasurer the authority to lead the meeting of Convocation through its business, using these rules as a guide.

3. The essential element of democratic form is preserved in these rules by allowing any member of Convocation to appeal a ruling of the Treasurer to the meeting as a whole.

4. The Treasurer shall preside over every meeting of Convocation, and is responsible for the timely, fair and reasonable conduct of Convocation's business.

Motion Procedure

There are three categories of motion that may be made at Convocation - meeting conduct motions, disposition motions and main motions. The following list sets out the type of motion and its characteristics. The motions are listed in order of precedence; when any motion is pending, any motion listed above it in the list is in order, but those below it are out of order. Where a vote is required, reference is made to those benchers with voting rights who are present.

A. MEETING CONDUCT MOTIONS.

1. Point of Privilege
Characteristics:
- may interrupt a speaker
- second not required
- not debatable
- not amendable
- resolved by the Treasurer; no vote required

This motion is a communication from a bencher to the Treasurer drawing attention to the need for personal accommodation. For example, the point may relate to a bencher's inability to see or hear, a matter of requested convenience, or an overlooked right or privilege that should have been accorded. It is a call to the Treasurer for the purpose of assuring the bencher's convenient and appropriate participation in Convocation.

2. Point of Procedure
Characteristics:
- may interrupt a speaker
- second not required
- not debatable
- not amendable
- resolved by the Treasurer; no vote required

This is a question addressed to the Treasurer, either inquiring into the manner of conducting business or raising a question about the propriety of a particular procedure. It is resolved by correction or clarification by the Treasurer.

3. To Appeal a Ruling of the Treasurer
Characteristics:
- may not interrupt a speaker
- second required

- debatable
- not amendable
- majority vote required

A motion made when a bencher questions the appropriateness or essential fairness of the Treasurer's ruling. If the Treasurer's ruling is based on governing law (e.g., not a proper subject of the meeting or a matter requiring prior notice), it is not appealable.

4. To Recess the Meeting
Characteristics:
- may not interrupt a speaker
- second required
- debatable
- amendable
- majority vote required

This motion requests a brief interruption of Convocation's business. Unless stated in the motion, the period of recess shall be decided by the Treasurer.

B. DISPOSITION MOTIONS

1. To Withdraw a Motion
Characteristics:
- may interrupt a speaker
- second not required
- not debatable
- not amendable
- resolved by the Treasurer; no vote required

This motion may only be made by the maker of the motion and is a communication to the Treasurer that the maker is withdrawing the proposal. This is the maker's privilege and thus does not require a second. In addition, because a similar motion can be made later by another bencher, a withdrawal motion is not subject to debate, amendment or vote. The Treasurer simply states that the motion is withdrawn and Convocation continues with the next piece of business.

Option: The rules governing the procedure at the annual general meeting require that the mover and the seconder of the motion consent to its withdrawal and that no one present at the meeting objects to its withdrawal.

2. To Postpone Consideration
Characteristics:
- may not interrupt a speaker
- second required
- debatable
- amendable
- majority vote required

This motion may arise from a need for further information, a matter of convenience, or for any other reason that will enable Convocation to deal with the issue more effectively at a later time. A postponed motion may be renewed at a later appropriate time.

3. To Refer
Characteristics:
- may not interrupt a speaker

- second required
- debatable
- amendable
- majority vote required

This motion would be used to submit an issue to a committee for study. Because it ordinarily disposes of the motion for purposes of the current meeting, a motion to refer is subject to the same rules that apply to a main motion.

4. To Amend
Characteristics:
- may not interrupt a speaker
- second required
- debatable
- amendable
- majority vote required

A motion to amend proposes a change in the wording of a motion currently under consideration, without materially changing its purport. When a motion to amend is pending and an amendment to the amendment is proposed, the Treasurer must focus discussion on the latest amendment, resolve that question, then proceed to the first amendment before continuing discussion on the main motion. Votes on amendments are thus in reverse order of the sequence in which they were proposed.

No more than two amendments may be on the floor at any one time.

An amendment may be accepted by the Treasurer only if it does not substantially alter or exceed the scope of the original motion. For example, a permitted amendment might be adding or deleting words, varying minor details, or rephrasing sentences.

5. Roll Call Vote
Characteristics
- may not interrupt a speaker
- mandatory, no vote required

This motion represents the right of a bencher to have a vote demonstrated by a roll call count. Upon completion of the count, the Treasurer announces the result.

Option: A motion for a roll call vote must be seconded.

C. MAIN MOTIONS - TO TAKE ACTION
Characteristics:
- may not interrupt a speaker
- second required
- debatable
- amendable
- majority vote required

A main motion may be made only when a prior main motion has been disposed of.

5. Only a bencher entitled to vote in Convocation may move a motion.

Notices of Motion

6. A notice of motion must be given when a matter of import to Convocation is to be raised by any bencher.

7. A notice of motion must be given orally at the meeting of Convocation immediately preceding the meeting at which the mover of the motion proposes to present it, or in writing to the Secretary at least twenty days prior to the day fixed for the meeting at which the mover of the motion proposes to present it.

8. The Treasurer shall have the discretion to abridge the notice requirement, for example in urgent circumstances.

9. Notice of motion may be given orally at a duly constituted meeting by stating, and having recorded, that "at the next or later meeting, I shall move ..." with the relevant words to indicate what will be placed before Convocation; or in writing and sent to the Secretary to be circulated with the documents prepared for the meeting at which the mover of the motion proposes to present it.

10. If a bencher who is entitled to vote in Convocation and who is present at a meeting of Convocation at which a motion is made without prior notice objects to the motion being voted on at that meeting, the motion shall not be voted on at that meeting but may be debated at that meeting and shall be voted on at the next meeting of Convocation.

Reconsideration

11. A notice of motion that a question be reconsidered must be given to the Secretary in writing at least twenty days prior to the day fixed for the meeting of Convocation at which the mover of the motion proposes to present it.

12. Where a motion to reconsider is brought within one year of the date upon which the original motion was voted upon by Convocation, the motion to reconsider shall be determined by a two-thirds majority of the votes cast.

Debate

13. No person, other than a bencher or the Chief Executive Officer, may address Convocation, except with leave of the Treasurer.

14. In a debate, benchers are entitled to speak to a motion or an amendment to a motion in the following order:

1) The bencher who proposed the motion or amendment.
2) The bencher who seconded the motion or amendment.
3) Any other bencher present at the meeting when recognized by the Treasurer.

15. The bencher who seconds a motion or an amendment to a motion may reserve the right to speak until a later time in the debate.

16. (1) Subject to subsection (2), a bencher is entitled to speak to a motion or an amendment to a motion only once.

(2) A bencher may speak twice to a motion or an amendment to a motion only to explain a material part of a previous speech that may have been misquoted or misunderstood. No new matter may be introduced, except with leave of the Treasurer.

Ruling of Treasurer

17. The Treasurer may make rulings as to the conduct of the meeting and may rule upon the propriety, acceptability, form and substance of any motion or amendment to a motion proposed at a meeting.

18. (1) Subject to subsection (2), a ruling of the Treasurer may be appealed by any bencher present at the meeting.

(2) No bencher is entitled to appeal a ruling of the Treasurer that a matter may not be made the subject of debate or motion by the meeting because,

(a) it is a matter in respect of which a hearing may be conducted under the Act, regulations, by-laws or rules of practice and procedure; or

(b) it is a matter that is pending before a court or tribunal for determination.

19. Where a bencher wishes to appeal a ruling of the Treasurer, the appeal shall be made immediately after the ruling.

20. An appeal of a ruling of the Treasurer may be debated by the benchers present at the meeting.

21. An appeal of a ruling of the Treasurer relating to inappropriate language or behaviour shall not be debated.

22. An appeal of a ruling of the Treasurer shall be disposed of by a vote on the question: "Should the ruling of the Treasurer be upheld?"

Voting

23. No bencher is entitled to appeal a call by the Treasurer for a vote on a motion, an amendment to a motion or an appeal of a ruling.

24. All amendments to a motion shall be put to a vote before the motion is put to a vote.

25. Amendments to a motion shall be put to a vote in the following order:

1) The second amendment proposed.
2) The first amendment proposed.

26. The Treasurer shall not vote on any motion, amendment to a motion or appeal of a ruling. However, in the case of a tied vote, except on a vote of an appeal of a ruling of the Treasurer, the Treasurer shall have a casting vote.

27. Votes may not be cast by proxy.

28. Voting shall be by a show of hands unless a motion for a roll call vote is made.

29. Each question put to the meeting shall be determined by the majority of the votes cast, except for a motion to reconsider brought within one year of the date upon which the original motion was voted upon, in which case the motion shall be determined by a two-thirds majority of the votes cast.

30. A ruling of the Treasurer shall be upheld on appeal when,

1) the majority of votes cast are in favour of upholding the ruling of the Treasurer; or

2) the vote on the appeal results in a tie.

APPENDIX C

G. Convocation, Committee and Task Force Principles

1. Committees, task forces and working groups must adhere to the Policy Governance Model.

2. Convocation should not establish more committees and task forces than it needs to further its mission.

3. The role of committees and task forces is not to establish policy but to assist Convocation in doing so. Accordingly, committees and task forces shall identify all reasonable policy options and implications to inform Convocation's decisions.

4. Committees shall assist Convocation in setting policy on ongoing matters which further the core mandate and responsibilities of the Law Society.

5. Task forces shall assist Convocation in setting policy on specific matters on a time-limited basis. All task forces must have clearly articulated terms of reference and a sunset clause.

6. Convocation, on the recommendation of the Treasurer, shall establish committees and task forces and appoint members to committees including their chairs and vice-chairs. The Treasurer appoints members of task forces and their chairs and vice-chairs.

7. Chairs and vice-chairs of committees and task forces must be benchers.

8. All committee and task force members are equal and may vote. Subject to s. 7, membership on committees and task forces is not restricted to benchers. Benchers may attend meetings of any committee or task force, but voting is restricted to members of committees only.

9. The results of committee and task force proceedings are public unless the committee or task force determines otherwise in accordance with Convocation's provisions regarding confidentiality.

10. Committees shall,
(a) adhere to their mandates and/or terms of reference as established by Convocation and vary same only with the approval of Convocation;
(b) report regularly to Convocation regarding all work in progress;
(c) be constituted so as to ensure broad representation;
(d) in their reports to Convocation, ensure that a range of options for each matter recommended for approval has been considered by the committee and has been identified for Convocation, together with the implications thereof; and
(e) not perform staff/administrative work.

11. Task forces shall,
(a) adhere to their mandates and/or terms of reference as established by Convocation and vary same only with the approval of Convocation;
(b) in cases where their mandate affects the work or responsibilities of committees or other task forces, consult with those committees or task forces before submitting their final report to Convocation;
(c) report to Convocation as directed;
(d) be constituted so as to ensure broad representation;
(e) in their reports to Convocation, ensure that a range of options for each matter presented for approval has been considered by the task force and has been identified for Convocation, together with the implications thereof; and
(f) not perform staff/administrative work.

12. Working groups,
(a) shall carry out such discrete and time limited functions and duties as are assigned to them by the committee to which they report;
(b) may be composed of non-benchers at the discretion of the committee chair; and
(c) may be chaired by non-benchers.

13. Chairs of committees shall,
(a) ensure that a plan and timetable for the work or their committee is established on an annual basis in consultation with committee members, staff and the Treasurer;
(b) strike working groups where necessary to perform the work of the committee as set out in its mandate;
(c) consult regularly with other committee chairs and the Treasurer about the work of their committee;
(d) report regularly on work in progress to the Treasurer and Convocation;
(e) on a monthly basis, prepare agendas in consultation with staff; and
(f) ensure that the content of committee reports conforms to the guidelines established by Convocation.

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

(1) First Report of the Strategic Planning Committee - The Law Society of Upper Canada, Strategic Plan 2000 - 2003. (Appendix A)

A debate followed.

Convocation took its morning recess at 10.50 a.m. and resumed at 11:15 a.m.

The Treasurer and Benchers expressed their appreciation to Ms. Wendy Tysall, Chief Financial Officer who was appointed Acting Chief Executive Officer in the period following the resignation of Mr. John Saso.

The debate on the Report of the Strategic Planning Committee resumed.

CONVOCATION ADJOURNED FOR LUNCHEON AT 1:00 P.M.

CONVOCATION RECONVENED AT 2:15 P.M.

PRESENT:

The Treasurer, Arnup, Banack, Bobesich, Boyd, Campion, Carey, Cass, Chahbar, Cherniak, Coffey, Copeland, Crowe, Curtis, Diamond, E. Ducharme, T. Ducharme, Feinstein, Finkelstein, Gottlieb, Krishna, Lalonde, Laskin, Lawrence, MacKenzie, Manes, Marrocco, Mulligan, Murphy, Murray, Pilkington, Porter, Potter, Puccini, Ross, Simpson, Swaye, Topp, White, Wilson and Wright.

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IN PUBLIC

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RESUMPTION OF THE STRATEGIC PLANNING COMMITTEE REPORT

It was moved by Mr. Porter, seconded by Mr. O'Brien that the word "implementing" in paragraph 15 on page 6 and paragraph 78 on page 20 be changed to "developing".

The amendment was accepted.

It was moved by Mr. MacKenzie, seconded by Mr. Manes that paragraphs 15 on page 6 and paragraph 78 on page 20 of the recommendations be amended and adopted as follows:

> That a task force be struck to design, and in consultation with all stakeholders, propose a method of developing a co-ordinated continuum of education, including pre-call education, to enable practising lawyers to acquire and maintain competence. The task force shall defer consideration of continuing legal education until after Convocation has considered the forthcoming Professional Development and Competence Committee's Report concerning the Competence Mandate.

Carried

Convocation voted on and adopted the Committee's recommendation set out in paragraph 79 on page 20, that Convocation direct that rules of procedure for Convocation be drafted for incorporation into by-law 8, based on the principles set out in Appendix B of the Report.

It was moved by Mr. Murray, seconded by Ms. Puccini that the recommendation for the establishment of a Treasurer's Advisory Committee and its mandate set out in paragraphs 36, 37 and 38 on pages 11 and 12 and paragraphs 80, 81 and 82 on pages 20 and 21, be deleted from the Report.

A Roll-Call Vote was requested and the Treasurer proposed that the motion read: should there be a Treasurer's Advisory Committee?

Convocation voted against the establishment of a Treasurer's Advisory Committee.

ROLL-CALL VOTE

Arnup	Against
Banack	Against
Bobesich	Against
Campion	Against
Carey	For
Cherniak	For
Crowe	Against
Curtis	Against
Diamond	Against
E. Ducharme	For
T. Ducharme	For
Feinstein	Against
Finkelstein	Against
Gottlieb	Against
Krishna	For
Lalonde	Against
Laskin	For
MacKenzie	For

Manes	For
Marrocco	Against
Mulligan	Against
Murray	Against
Pilkington	For
Porter	For
Potter	Against
Puccini	Against
Ross	For
Simpson	Against
Swaye	Against
White	Against
Wilson	For
Wright	Against

Vote: 20 - Against, 12 - For

Convocation voted on and adopted the recommendation set out at paragraph 83 on page 21 that the current annual honorarium for the Treasurer of $75,000 be adjusted commencing in June 2001 with the election of the Treasurer to reflect the increase in the cost of living since 1993 and thereafter be indexed annually to inflation.

Convocation voted on and adopted the recommendation set out at paragraph 84 on page 21 that the role of the Secretary be examined by the Strategic Planning Committee together with the new Chief Executive Officer, and in consultation with the Secretary, and that the Committee report back to Convocation on the matter within two months of the new Chief Executive Officer's start date of employment.

Convocation voted on and adopted the recommendations set out at paragraphs 85 and 86 on page 21 that the Law Society develop a plan to assist sole practitioners and small law firms to provide access to legal services for individuals and small businesses and that the Law Society continue to develop programs designed to assist members, particularly sole practitioners and small law firms, to develop technological competencies and to provide cost-efficient, competent and effective legal services and further, that the Strategic Planning Committee consult with the new Chief Executive Officer on the most effective means to examine and address these issues and report back to Convocation.

It was moved by Ms. Curtis, seconded by Ms. Potter that the issues of limited and staggered terms for Benchers and reducing the size of Convocation be referred to a separate committee who would report back with options in three to five months.

Lost

It was moved by Mr. Cherniak, seconded by Messrs. Simpson and Topp that paragraph 78 on page 20 be amended to read:

> "That a task force be struck to review the current system of the legal education and Bar Admission course including the articling program and make recommendations concerning the reform of that system."

Withdrawn

It was moved by Ms. Puccini that paragraph 36 on page 11 be amended by deleting the reference to a Treasurer's Advisory Committee and that it be replaced with procedures to be put in place to effect the objectives in subparagraphs (a) to (g).

Withdrawn

It was moved by Ms. Potter, seconded by Ms. Carpenter-Gunn that the Chair of the Equity and Aboriginal Issues Committee be included in the composition of the Treasurer's Advisory Committee.

Not Put

It was moved by Mr. Simpson, seconded by Mr. Wilson that the Chair of the Government and Public Affairs Committee be included in the composition of the Treasurer's Advisory Committee.

Not Put

It was moved by Mr. Campion, seconded by Messrs. Marrocco, Finkelstein and Lawrence that paragraph 87 be added to read as follows:

"Strategic Initiatives

That the Strategic Planning Committee consider the advisability of, and, if appropriate, provide the means to educate Ontario lawyers and law students and facilitate the provision of national and international legal services including arbitration, business, finance and taxation, litigation, family and estate matters, criminal law and international organizations."

Convocation expressed support of the concept of the "Strategic Initiatives" and it was suggested that Messrs. Campion, Marrocco, Finkelstein and Lawrence look into the matter and report back to Convocation in February.

Convocation took a recess at 4:00 p.m. and resumed at 4:15 p.m.

REPORT OF THE EQUITY AND ABORIGINAL ISSUES COMMITTEE

Ms. Ross presented the Report of the Equity and Aboriginal Issues Committee for consideration by Convocation.

Equity and Aboriginal Issues Committee/
Comite sur L'equite et les Affaires Autochtones
January 17, 2001

Report to Convocation

Purpose of Report: Decision Making
Information

Prepared by the Equity Initiatives Department

TABLE OF CONTENTS

APPENDIX:

4. APPENDIX "A": REPORT ON EXPANSION OF FRENCH LANGUAGE LEGAL AID CLINICS

TERMS OF REFERENCE/COMMITTEE PROCESS

The Committee met on Thursday, January 11, 2001 from 12 - 2 p.m. In attendance were:

Paul Copeland (Chair)
Judith Potter (Vice-Chair)
George Hunter (Vice-Chair)
Marshall Crowe
Stephen Bindman
Barbara Laskin
Don White
Janet Stewart (non-bencher)
Andrew Pinto (non-bencher, Chair Equity Advisory Group)
Jeff Hewitt (non-bencher, Chair Roti io' ta'-kier)

Staff: Charles Smith (Equity Advisor), Rachel Osborne (Public Education Coordinator), Josée Bouchard (Training Coordinator)

The Committee addressed two matters which it now brings forward for Convocation decision-making and for information:

For Convocation Decision-Making:

EXPANSION OF FRENCH LANGUAGE SERVICES IN LEGAL AID CLINICS

For Convocation Information:

*EXECUTIVE SUMMARY: DEMOGRAPHIC PROFILE OF THE LEGAL PROFESSION IN ONTARIO**

** A copy of the full report is available from the Equity Initiatives Department*

FOR CONVOCATION DECISION-MAKING:
EXPANSION OF FRENCH LANGUAGE SERVICES IN LEGAL AID CLINICS

1. A report on the Expansion of French Language Services in Legal Aid Clinics (see Appendix "A") was presented to the Committee. Prepared in consultation with Mr. Peter Annis, President of AJEFO, this report is related to the decision-making and service delivery structure of Legal Aid Ontario, and provides background information on provincial commitments to ensuring effective delivery of French language services.

2. At a meeting on December 8, 2000, representatives of AJEFO met with various representatives of provincial ministries, including the Attorney-General's ministry. At this meeting, the provincial representatives identified that there is $1,000,000 available in the legal aid system to support the provision of French language services throughout Legal Aid Ontario.

3. In response to this matter, AJEFO has requested that these funds be used for the establishment of French language legal aid clinics in Sudbury, Ottawa and Toronto, areas of high need for the French-speaking community. AJEFO has further requested the Law Society of Upper Canada to support its request for the allocation of these funds.

4. AJEFO has also requested that Convocation support the establishment of a Standing Committee within Legal Aid Ontario to address the ongoing provision of French language services throughout legal aid clinics. If established, this committee will take a leadership role in enabling Legal Aid Ontario to be responsive to both the French-speaking bar and public, thereby, reducing the barriers to services facing those in need of legal aid and developing the resources/capacities of legal aid clinics to be able to respond to those in need of French language services.

5. These requests are a follow-up to a study conducted by the Réseau franchophone des cliniques juridiques de l'Ontario (Francophone network of Ontario legal aid clinics), an organization whose mandate is to promote French language services in legal aid clinics. They also respond to one of the options included in a consultation paper recently released by Legal Aid Ontario aimed at addressing the issue of French language services in legal aid clinics. (Copies of the summary and recommendations of the Réseau's study as well as the Legal Aid Ontario consultation document entitled *Consultation on Clinic System Expansion: French Language Services* are available from the Equity Initiatives Department.)

6. *The Committee endorsed the recommendations included in the attached report and, following consultation with the Chair of Convocation's Legal Aid Committee as well as its representative to the Board of Legal Aid Ontario, the Committee is requesting that Convocation adopt recommendations calling for Legal Aid Ontario to:*

   a. *use the $1,000,000 set-aside for French language services to establish French language legal aid clinics in Sudbury, Ottawa and Toronto;*

   b. *establish a Standing Committee to oversee the implementation and follow-up on the expansion of French language services throughout Ontario's legal aid clinics; and*

   c. *respond formally to the Réseau franchophone des cliniques juridiques de l'Ontario and ensure representatives of the Réseau and AJEFO are integrally involved in any consultations regarding the provision of legal aid to the French-speaking community of Ontario.*

FOR CONVOCATION INFORMATION

Lawyers in Ontario:
Evidence from the 1996 Census

A Report for the Law Society of Upper Canada

Michael Ornstein, Director
Institute for Social Research
York University

January 2001

Executive Summary

Using the 1996 Canadian Census, this Report describes the representation, work situations and income of lawyers in Ontario, focussing on Aboriginal persons, racialized groups and women. Detailed information is provided for Blacks, South Asians, Chinese, Southeast Asians, Koreans, Japanese, Filipinos and Pacific Islanders, Latin Americans, and Arabs and West Asians.

In 1996, 7.3 percent of lawyers in Ontario were non-white, compared to 17.5 percent of the population. Only 0.6 percent of lawyers were Aboriginal, compared to 1.4 percent of the population. Three-quarters of non-white lawyers are South Asian, Black or Chinese. Except for the Japanese, all the other racialized groups are under-represented in the legal profession.

The 7.3 percent non-white lawyers compares to 24.5 percent non-white physicians, 22.1 percent of engineers, 20.6 percent of medical specialists and 13.7 percent of professors; and 9.5 percent of high-level managers and 13.0 of middle managers are non-white. More than four-fifths of lawyers in Ontario were born in Canada, 2.8 percent in the US and 8.1 percent in Europe. Just 6.3 percent of lawyers are from outside Canada, the US and Europe. In comparison, about 30 percent of high- and middle-level managers and 45 percent of physicians, specialists, engineers and professors are born outside Canada.

Among the youngest lawyers there is greater diversity, with a noticeable increase in the proportion of lawyers from all the racialized groups except for Southeast Asians and Filipinos, who have almost none. Thirteen percent of Ontario lawyers between 25 and 34 years of age are non-white, compared to 5.0 percent of lawyers 35-44, 3.7 percent of lawyers 45-54, and 7.1 percent of lawyers between 55 and 64.

In 1996, 30.1 percent of lawyers in Ontario were women. The proportion of women is roughly similar for physicians, medical specialists, professors and middle managers. Women account for just 7.8 percent of lawyers between the ages of 55 and 64, compared to 18.0 percent of lawyers 45-54, 33.1 percent of lawyers 35-44 and 45.3 percent of lawyers between 25 and 34. The increased representation of women lawyers has been more rapid than in any of the six other occupations studied.

Defining "Francophones" as persons whose first language was French and had French heritage, in 1996 2.8 percent of lawyers in Ontario were Francophone, somewhat less than their 3.3 percent share of the Ontario population.

In 1995, the mean annual earnings of non-white and white lawyers, respectively, were $28,000 and $33,900 for lawyers between 25 and 29, rising to $58,500 and $91,200 for the 35-39 age group. Non-white lawyers between 40 and 49 earned about $70,000 per year on average, compared to $110,000 for whites. At the peak age for white earnings, between 50 and 54, the average income of white lawyers is about $130,000, versus $60,000 for non-whites.

At the beginning of their careers, the incomes of female and male lawyers are not different, but for lawyers between 30 and 34 the gender difference averages $7,900, rising to $16,300 for ages 35-39, to about $35,000 for lawyers 40-49, and to almost $65,000 for lawyers between 50 and 54. Male lawyers between 50 and 54 earned 94 percent more than women the same age. Regression analysis shows that after age 40 the income disparity cannot be explained by gender differences in hours or work, sector of employment and self-employment.

To better understand why Aboriginals and racialized groups are under-represented in the legal profession requires new data on recruitment into the profession. Further research on why women's income is lower, and on the incomes of lawyers who are Aboriginal and from racialized groups also requires new information, on recruitment to different areas of legal practice and on the hiring, promotion and compensation practices of law firms.

Acknowledgements

At Statistics Canada, the author thanks Dr. Douglas Norris for arranging access to the Census and Mr. Derrick Thomas for arranging my visits to Ottawa and answering many questions about the data.

At the Law Society of Upper Canada, Mr. Charles Smith and Ms. Rachel Osborne provided encouragement and good advice.

Disclaimer

Opinions expressed in this Report are those of the author, not Statistics Canada or the Law Society of Upper Canada.

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This report may be found as an HTML document
or PDF file at WWW.LSUC.ON.CA

APPENDIX "A": REPORT ON FRENCH LANGUAGE SERVICES IN LEGAL AID CLINICS

Introduction

1. Paul Copeland, Chair of the Equity and Aboriginal Issues Committee, received a letter from Peter Annis, President of AJEFO, dated December 20, 2000, regarding the expansion of legal aid in French (Attached). AJEFO invites the Law Society of Upper Canada to support the creation, within Legal Aid Ontario's structure, of a standing committee on legal aid services in French as well as for the creation of French legal clinics in Ottawa, Sudbury, and Toronto. The following is background information on the expansion of legal aid in French.

Expansion of Legal Aid in French

2. The Ontario Government introduced legislation in late 1998 that created Legal Aid Ontario. On November 17, 1998, AJEFO presented a brief to the Standing Committee on the Administration of Justice of the Legislative Assembly of Ontario regarding Bill 68 (*An Act to Incorporate Legal Aid Ontario and to Create the Framework for the Provision of Legal Aid Services in Ontario, to Amend the Legal Aid Act and to make Consequential Amendments to other Acts).* AJEFO welcomed the establishment of an independent corporation for providing high quality legal aid services to low-income individuals in Ontario but asked that Bill 68 be modified to make the *French Language Services Act* applicable to Legal Aid Ontario. This modification, adopted on April 1, 1999, gave Ontarians the right to communicate in both

official languages at the central office of the government agency and at local offices located in the 23 areas designated under the *French Language Services Act.* In 1998, only three legal aid clinics were deemed capable of offering services in French: Prescott & Russell, Stormont, Dundas & Glengarry and Grand Nord (Northern Ontario).

3. In September, 2000, legal aid clinics in Ontario were provided with a Legal Aid Ontario consultation document on how to develop principles for allocating new funding in unserved and underresourced areas. The report dedicates, in addition to extra funding for unserved and underresourced areas, $1 million to expand and improve French language services in the clinic system.

4. The Réseau francophone des cliniques juridiques de l'Ontario (Francophone network of Ontario legal aid clinics), whose mandate is to promote French language services in clinics, mandated Lucie Brunet, of the firm Brunet Sherwood, to prepare a study of French language services. The study found that three quarters of the 48 clinics located in the 23 areas designated under the *French Language Services Act* do not provide services French. Only four designated clinics guarantee the delivery of French language services (Prescott Russell, the united counties of Stormont, Dundas and Glengarry, Windsor/Essex and Grand Nord (Northern Ontario). In the entire network of legal clinics, only ten or so individuals (lawyers and community legal workers) are capable of presenting oral arguments and written submissions in French. The largest concentrations of low-income Francophones are found in Ottawa, Sudbury and Toronto.

5. The study summarizes the problems as follows: French language services are not permanent; there is no active offer of services; Francophones are under-represented or not represented at all on clinics' boards of directors; it is difficult to recruit staff with a good mastery of French (especially lawyers and receptionists); and Francophones who work in Anglophone structures suffer from isolation and do not have access to tools and resources in French.

6. The study makes a number of recommendations:

- That Legal Aid Ontario acknowledge its obligation to provide French language services in the 23 designated areas, and that it adopt a proactive approach with legal clinics by making them aware of the need to make an active offer of French language services.
- That Legal Aid Ontario require an advanced or superior level of written and oral French, and that the bilingualism bonus be granted only when this level is reached.
- That parallel French language legal clinics be created in Ottawa, Sudbury and Toronto.
- That Legal Aid Ontario add bilingual positions in the existing clinics located in the designated areas.
- That Legal Aid Ontario utilize the memorandum of understanding mechanism to require that clinics provide French language services in the designated areas and that this become a condition of funding.
- That Legal Aid Ontario and its partners in the francophone community explore innovative models for providing services and increase the number of French language service points.
- That Legal Aid Ontario oblige specialty clinics to provide French language services.
- That Legal Aid Ontario create a French language legal resources centre.
- That Legal Aid Ontario provide those involved in providing French language services with the tools and resources they need to provide high-quality services.
- That Legal Aid Ontario create, within its structure, a unit responsible for implementing and following up on the three-year action plan for expanding French language services.

- That Legal Aid Ontario modify its data gathering system and require that clinics keep statistics concerning the language of clients, the language in which service was provided and the language in which representations or pleadings were submitted.

- That Legal Aid Ontario recruit representatives of the Francophone community and appoint them to its Board of Directors.

- That Legal Aid Ontario improve conditions for the recruitment of lawyers with an advanced or superior level of French.

- That Legal Aid Ontario increase the basic amount of funding granted to the Réseau francophone des cliniques juridiques de l'Ontario.

7. Legal Aid Ontario has received the Réseau's study but no preferred model for the delivery of French language services has been identified. On November 20, 2000, a meeting was held between Judge Linden, the Réseau and other interested clinics to discuss issues around the improvement of French Language Services in the clinic system. It was agreed that a working group should be set up to consult with Legal Aid Ontario on issues around the French language services expansion in the clinics. The first meeting will take place in Toronto in January and will involve representatives of the Réseau and AJEFO. The working group will concentrate on clinic expansion issues but could play an on-going role in Legal Aid Ontario's French language services programming. The Réseau and AJEFO take the position that it is critical that Legal Aid Ontario establish, within its structure, a standing committee with a mandate to play an on-going role in Legal Aid Ontario's French language services programming.

8. A meeting was held on December 8, 2000 between Elaine Gamble and Vincent Gogolek, who are representatives of Legal Aid Ontario, and approximately thirty five members of the Francophone community. The Francophone participants included both lawyers and non-lawyers. Josée Bouchard, Education and Training Coordinator in the Equity Initiatives Department of the Law Society of Upper Canada, attended the meeting. The Francophone community asked that Legal Aid Ontario establish, within its structure, a standing committee on legal aid services in French and create French legal clinics in Ottawa, Sudbury, and Toronto. The Law Society of Upper Canada's support for such initiatives is important for the promotion of French legal services in Ontario and furthers the Law Society's commitment to implement positive changes within the legal profession to achieve equality for Francophones.

9. Legal Aid Ontario has published a consultation document, *Consultation on Clinic System Expansion: French Language Services*, dated December 19, 2000 to obtain input from community legal clinics and other interested parties on the expansion of French language services in the clinic system. The document sets out options for allocating the $1 million clinic expansion funds to improve French language services. Option 2 proposes the creation of Francophone clinics in Ottawa, Sudbury and Toronto, areas which have the largest population of Francophones and also the largest numbers of low-income Francophones. The creation of Francophone clinics would allow those clinics to operate entirely in French, from the meetings of the board to the reception and all documentation. Francophone clients would be assured that they will be able to receive all services offered by the clinic in French, including outreach and community development to the Francophone community.

Translation of letter from AJEFO dated December 20, 2000

Mr. Paul Copeland, chair
Committee on Equity and Native Affairs
Law Society

Dear Chairman;

In Toronto on December 8, 2000, an important meeting was held with two representatives from Legal Aid Ontario, Elaine Gamble and Vincent Gogolek, to discuss the situation of legal services in French. They told us that in early February, a work group will study the expansion of legal aid in French. We are pleased that the Law Society was represented at that meeting, and that Josée Bouchard, Education and Training Coordinator in the Equity Initiative Department, will be invited to participate in that group's work.

AJEFO's Board of Directors has decided to spend a great deal of energy in 2001 on promoting legal aid in French. This issue is an important topic and will be addressed at our conference on June 21-24, 2001, in Ottawa.

We think that it is essential for Ontario Legal Aid to set, within its structure, a standing committee on legal aid services in French. Our organization has proposed this idea before. For your information, I have enclosed a copy of the proposal presented by AJEFO on November 17, 1998, to the Committee of the Legislative Assembly studying the bill to create Ontario Legal Aid.

We invite you to inform the new Legal Aid Ontario CEO, Mrs. Angela Longo, of the Law Society's support for the creation of such a standing committee as well as for the creation of French legal clinics in Ottawa, Sudbury, and Toronto, as recommended by the Réseau francophone des cliniques juridiques de l'Ontario (Francophone Network of Legal Clinics in Ontario).

Please find enclosed the December 2000 issue of our newsletter L'Expression.

Sincerely,

Mr. Peter Annis
Chairman

c: Robert Armstrong
Charles Smith

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

(1) Copies of Statistics attached to the Report - Lawyers in Ontario: Evidence from the 1996 Census.

(2) Copy of French version of a letter addressed to Mr. Paul Copeland from AJEFO dated December 20, 2000.

Re: Expansion of French Language Services in Legal Aid Clinics

It was moved by Ms. Ross, seconded by Ms. Laskin that Convocation adopt the recommendations calling for Legal Aid Ontario to:

a) use the $1,000,000 set aside for French language services to establish French language legal aid clinics in Sudbury, Ottawa and Toronto;

b) establish a Standing Committee to oversee the implementation and follow-up on the expansion of French language services throughout Ontario's legal aid clinics; and

c) respond formally to the Reseau franchophone des cliniques juridiques de l'Ontario and ensure representatives of the Reseau and AJEFO are integrally involved in any consultations regarding the provision of legal aid to the French-speaking community of Ontario.

Carried

REPORT OF THE PROFESSIONAL DEVELOPMENT AND COMPETENCE COMMITTEE (November 9th, 2000)

Mr. Cherniak presented the Committee's Report dated November 9th, 2000 for consideration.

Professional Development & Competence Committee
November 9, 2000

Report to Convocation

Purpose of Report: Policy - Decision Making
Information

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

TABLE OF CONTENTS

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Professional Development and Competence Committee ("the Committee") met on November 9, 2000. Committee members in attendance were Eleanore Cronk (Chair), Earl Cherniak (Vice-Chair), Ron Manes (Vice-Chair) Stephen Bindman, Greg Mulligan, Marilyn Pilkington, Judith Potter, and Bill Simpson. Ron Cass also attended the meeting. Staff in attendance were Scott Kerr, Paul Truster, Sophia Sperdakos, and Ursula Stojanowicz.

2. The Committee is reporting on the following matters:

Policy - For Decision; Information

- Confirmation of Appointment of former Treasurer Susan Elliott, as Law Society nominee to Board of LibraryCo.; Status Report on Implementation of the Libraries Report and Creation of LibraryCo.

Information

- Implementation of the Law Society's Competence Mandate - A Status Report
- Report on Specialist Certification Matters Finalized by the Working Group of the Committee on November 8, 2000 and Approved in Committee on November 9, 2000

POLICY - FOR DECISION; INFORMATION

CONFIRMATION OF APPOINTMENT OF FORMER TREASURER SUSAN ELLIOTT, AS LAW SOCIETY NOMINEE TO BOARD OF LIBRARYCO.; STATUS REPORT ON IMPLEMENTATION OF THE LIBRARIES REPORT AND CREATION OF LIBRARYCO.

1. On September 21, 2000 Convocation approved Dino DiGiuseppe as the Law Society's nominee to the Board of "LibraryCo." The CDLPA nominee to the Board is Michael Hennessy. In October Mr. DiGiuseppe was appointed to the Ontario Court of Justice, necessitating his replacement as the Law Society's nominee to the Board. The Treasurer appointed former Treasurer, Susan Elliott, as the Law Society's nominee.

2. A number of steps have been taken with respect to implementing the Libraries Report and creating LibraryCo. as follows:

   a) Interviews were held on November 9 with four candidates for the position of managing director for LibraryCo. The interview team consists of Felecia North (Human Resources, Law Society), Janine Miller, Michael Hennessy, Anne Matthewman (Librarian - Metropolitan Toronto Lawyers Association), Peter Bourque (lawyer - Orangeville), and Susan Elliott;

   b) Discussion of a number of tax-related issues relevant to the incorporation of LibraryCo. continues. The Chair of the Law Society's Finance and Audit Committee raised a number of issues, on which an opinion is being sought.

   c) Pursuant to the shareholder structure approved by Convocation in June 2000 LibraryCo has two shareholders - the Law Society (holding the common shares) and CDLPA (holding special shares). A draft shareholders' agreement is being prepared.

   d) Each of the shareholders of LibraryCo. has a single nominee on a nominating committee to select nine of 15 Library Board members. The remaining six board members are to be selected by a number of interested organizations, including both the Law Society and CDLPA. The Board members of LibraryCo. have now been appointed and an informal first meeting of the Board is scheduled for November 15, 2000. The members of the Board are:

      Members Selected by the Shareholder Representatives, after direct consultation with MTLA and others

      Derry Miller (Bencher)
      Greg Mulligan (Bencher)
      Richmond Wilson (Bencher)
      Judith Potter (Bencher)

Urmas Suits (North York)
Jennifer Carten (Thunder Bay)
David Ziriada (Windsor/Essex)
Rob Whitmore (Hamilton)
Peter Bourque (Orangeville)

Members chosen by other interested groups as described in the Libraries Report
Susan Elliott (Law Society)
Michael Hennessy (CDLPA)
Janine Miller (Toronto - Law Society staff)
Alan Smith (Mississauga - CBAO)
Karen MacLaurin (Ottawa - OCLA)
Anne Matthewman (Toronto - MTLA)

Request to Convocation

3. Convocation is requested to confirm the appointment of Susan Elliott as the Law Society's nominee to the Board of LibraryCo. to replace Dino DiGiuseppe.

FOR INFORMATION

IMPLEMENTATION OF THE LAW SOCIETY'S COMPETENCE MANDATE - A STATUS REPORT

1. In March 2000 Convocation approved for distribution to the profession a document entitled, *Implementing the Law Society's Competence Mandate: A Consultation Document.* Convocation also approved the distribution of a survey to all members and a regional consultation process intended to complement the survey with face-to-face meetings with members of the profession.

2. The regional consultation process has now been completed. It consisted of two components:

   a) 11 focus group meetings, which took place in Toronto, Sudbury and Kingston; and
   b) regional consultation meetings in each of eight regions of the province namely:
      (i) Central East
      (ii) Central West
      (iii) Central South
      (iv) Northeast
      (v) Northwest
      (vi) Southwest (2 meetings)
      (vii) East
      (viii) Toronto

3. The Treasurer chaired a meeting about implementing the Law Society's competence mandate with a group of newly-called lawyers from around the province with whom he meets on a regular basis.

4. The Committee sought written submissions from a number of legal organizations. The deadline for submissions was October 31, 2000. A number of submissions have been received.

5. On November 2, 2000 the Committee hosted a round table discussion with representatives of a number of regulatory bodies from other professions, namely,
   a) The College of Physicians and Surgeons of Ontario;
   b) The Royal College of Physicians and Surgeons of Canada;
   c) The College of Nurses of Ontario;

d) The Royal College of Dental Surgeons of Ontario;
e) The Institute of Chartered Accountants of Ontario;
f) The Certified General Accountants of Ontario;
g) The Ontario Association of Architects; and
h) The Professional Engineers of Ontario.

6. Over the next six weeks the Committee will conduct a number of meetings with individuals and organizations to obtain additional input on issues relevant to implementing the Law Society's competence mandate. These will include representatives from a number of organizations that provided written submissions as well as representatives from Legal Aid Ontario's quality assurance department and LPIC.

7. Reports are currently being prepared on the various aspects of the consultation process, described above. The Committee will submit a report to Convocation in January on the outcome of the consultation process and in February will propose an approach for undertaking the next phase of implementing the Law Society's competence mandate, for Convocation's consideration.

REPORT ON SPECIALIST CERTIFICATION MATTERS FINALIZED BY THE WORKING GROUP OF THE COMMITTEE ON NOVEMBER 8, 2000 AND APPROVED IN COMMITTEE ON NOVEMBER 9, 2000

The Committee is pleased to report final approval of the following lawyers' applications for re-certification, on the basis of the review and recommendation of the Certification Working Group.

Civil Litigation	James W. W. Neeb (of Kitchener)
Criminal Law	J. Joseph Kelly (of Kitchener) Michael D. McArthur (of Simcoe) G. Gary McNeely (of Oshawa)

It was moved by Mr. Cherniak, seconded by Mr. Porter that Convocation confirm the appointment of Ms. Susan Elliott as the Law Society's nominee to the Board of LibraryCo. To replace Dino DiGiuseppe.

Carried

REPORT OF THE PROFESSIONAL DEVELOPMENT AND COMPETENCE COMMITTEE

Re: Implementing the Law Society's Competence Mandate: Report on the Consultation Process

Mr. Cherniak presented the Report for the purposes of information and advised that the Report with recommendations would be brought back to Convocation in March.

Professional Development & Competence Committee
January 25, 2001

Implementing the Law Society's Competence Mandate:
Report on the Consultation Process

Purpose of Report: Information

Prepared by the Policy Secretariat

(Sophia Sperdakos 947-5209)

ACKNOWLEDGMENT

The Professional Development and Competence Committee wishes to take this opportunity to thank the thousands of lawyers, and the legal organizations, who took the time to respond to the competence consultation survey, provide comments on the proposed models or attend meetings or focus groups. Their comments were reflective, creative, and helpful and given with generosity and humour. Their interest in the future of their profession and their willingness to contribute to that future have been greatly appreciated. It is the Committee's hope that as this competence initiative continues to unfold these members and others will continue to provide input and insight into its development.

TABLE OF CONTENTS

INTRODUCTION

Background to the Consultation Process

1. In March 2000 Convocation approved for distribution to the profession a document entitled, *Implementing the Law Society's Competence Mandate: A Consultation Document* (the "Consultation Document"). Convocation also approved,

   a. the distribution of a survey[1] to all members;

   b. a regional consultation process intended to complement the survey with face-to-face meetings with members; and

   c. a request to legal organizations for written comments on issues raised in the Consultation Document.

2. The consultation process has spanned the period from April 2000 to January 2001. It has involved,

   a. the distribution of the Consultation Document and survey to the profession at large;

   b. notifying members in the *Ontario Reports* and the *Ontario Lawyers Gazette* of the consultation process and requesting their comments and responses to the survey;

   c. providing information to county law association presidents and benchers on the consultation process and regional meetings and encouraging them to notify members in their counties and regions about the process;

   d. conducting ten regional consultation meetings, led by members of the Professional Development and Competence Committee and, in one instance, the Treasurer, and 11 focus group sessions facilitated by the consulting firm of Strategic Communications Inc.;

   e. writing to 28 legal organizations requesting their comments on the Consultation Document and discussing the process with representatives from a number of those organizations;

   f. receiving individual submissions from members, in addition to those provided with the survey responses;

   g. hosting a roundtable meeting with regulators from a number of other professions including the professions of accounting, architecture, dentistry, engineering, medicine, and nursing;

[1] Prepared by the Professional Development and Competence Committee and approved by Convocation.

h. meeting with two practitioners involved with ISO - 9000 registration;[2]

i. meeting with representatives of LPIC and Legal Aid Ontario; and

j. inviting comments from the Chief Justices and Associate Chief Justices of the Ontario courts.

Implementing the Law Society's Competence Mandate

3. In deciding how best to implement its competence mandate the Law Society must keep in mind both internal and external factors.

4. External factors to be considered include,

a. the public interest in having access to and receiving competent legal services;

b. the profession's privilege of self-regulation and factors that may have an impact on that privilege; and

c. the growing role that quality assurance plays in professional regulation in Ontario and the world, and its impact on professional regulation of lawyers.

5. Internal factors to be considered include,

a. the views of the profession on issues related to competence and quality assurance; and

b. cost and other resource allocation limitations that may affect the choice and timing of the introduction of a competence model.

Goals of the Consultation Process

6. The competence consultation process was developed to address one of the main internal factors that will play a role in the implementation of the competence model, namely the views of the profession.

7. There were two main goals of the competence consultation process:

a. To provide the profession with information on the new legislative provisions dealing with competence, the evolution and expansion of the Law Society's competence mandate, and the increasing role that quality assurance and quality improvement play in professional regulation throughout the world; and

b. To identify possible approaches the Law Society might take to implement its competence mandate and to seek advice and comments from the profession on a number of issues related to that mandate.

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[2]The ISO-9000 ratings, developed by the Geneva-based International Organization for Standardization, consist of a set of 21 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. The meeting was held with Susan Easterbrook and David Sims. Ms. Easterbrook's firm, Easterbrook and Associates (five lawyers) in Windsor, is the first Ontario law firm to acquire ISO-9002 registration. Mr. Sims' firm, Sims, Thomson and Babbs in Whitby, is currently working towards ISO-9001 registration.

8. The Consultation Document states,

> *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 competence mandate...Members of the profession are urged to consider the issues raised in the 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 no later than June 15, 2000. Completion and return of the survey would be much appreciated.*[3]

9. The Law Society's efforts to engage the profession in a discussion of the issues has been significant. An examination of the results of each aspect of the consultation process reveals overlap among the issues raised by the participants at the meetings and focus groups, respondents to the survey, and in the written submissions. There will be additional opportunities for members to comment on the implementation of the competence mandate as the process continues to develop.

THE COMPONENTS OF THE CONSULTATION PROCESS

The Consultation Process Reports

10. The reports, attached at Tabs 1-6 are as follows:

a. *Implementing the Law Society's Competence Mandate: A Consultation Document* and Survey (Tab 1);
b. *Competence Consultation Document Membership Survey 2000: Summary of Results* (Tab 2);[4]
c. *Competence Consultation Document Membership Survey 2000: Qualitative Results* (Tab 3);[5]
d. *Implementing the Law Society's Competence Mandate: Report on the Regional Consultation Meetings* [6] (Tab 4);
e. *Report on Focus Group Research for the Law Society of Upper Canada* [7] (Tab 5); and
f. *Implementing the Law Society's Competence Mandate: Report on Written Submissions Received* (Tab 6).[8]

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[3] Consultation Document, p. 28.

[4]Prepared by Strategic Communications Inc. and hereinafter referred to as the "Quantitative Findings Report".

[5]Prepared by Strategic Communications Inc. and hereinafter referred to as the "Qualitative Report".

[6]Prepared by Sophia Sperdakos of the Policy Secretariat and hereinafter referred to as the "Regional Meetings Report".

[7]Prepared by Strategic Communications Inc. and hereinafter referred to as the "Focus Group Report".

[8]Prepared by Sophia Sperdakos of the Policy Secretariat and hereinafter referred to as the "Written Submissions Report".

Chart 1 - Consultation Process Components

Component	Type of Participation	Number of Participants/Respondents
Consultation Document Survey: 21 close-ended questions; 3 open-ended questions	Written survey	Distribution to profession at large; 2,762 completed surveys returned; 1,000 of the respondents provided 2,815 answers to qualitative questions.
Regional Meetings	10 Meetings in 8 regions	Approximately 180 participants.
Focus Groups	11 focus group sessions in 3 cities	Approximately 82 participants.
Submissions from Legal Organizations	Written Comments Oral Submissions	14 organizations provided comments; 6 of those made oral submissions

The Survey and Results (Tabs 1, 2, and 3)

11. The survey was created by the Professional Development and Competence Committee ("the Committee"), with the advice of a consultant, to elicit input on the issues raised in the Consultation Document. The survey was sent to members in April 2000, with a return date of June 15, 2000. It was not mandatory, as the Committee was of the view that a mandatory survey would not engender the most meaningful responses and because the Committee was interested in the profession's voluntary assistance. As such, it was clear to the Committee that those who returned the survey would be a self-selecting group, with a variety of reasons for responding.

12. The survey was, in effect, a convenient format through which members could provide their feedback to the Law Society. Members were not required to fill in their names. The surveys were returnable to the Law Society. The vast majority of the surveys were returned anonymously, although a number of members identified themselves.

13. The survey consisted of 21 close-ended questions and three open-ended or "comment" questions. Approximately 2,700 surveys were returned. Over 1,000 of those who completed the survey provided 2,815 responses to the open-ended questions. The consulting firm of Strategic Communications Inc. was retained to collate the thousands of answers and comments and provide a report on the data and information received.

14. In its report on the qualitative results of the survey Strategic Communication Inc. notes:

> *Questionnaire-based research usually garners very broad, but relatively shallow information about individuals' attitudes, opinions, and experiences. The information is broad since it represents the views of a large number of people. It is shallow because responses to close-ended questions are usually simple rather than complex, and because the terms of reference in the study come from the designers of the survey rather than from the respondents themselves. The Competence Consultation document survey is unusual in that it has also successfully gathered 2,815 responses to open-ended questions from more than 1,000 Law Society members. This qualitative data set enriches the results of the survey by shedding light on the ways that members define and frame issues related to the competence mandate and to the four competence models proposed in the consultation documents.*[9]

[9] Qualitative Report, p.3.

15. The reports set out at Tabs 2 and 3 provide the analysis of the data gathered in the quantitative portion of the survey and the information obtained from the qualitative portion of the survey, respectively.

Report on the Regional Consultation Meetings (Tab 4)

16. In developing the Consultation Document the Committee was of the view that the written survey sent to members should be complemented by a process in which members of the profession were provided with an opportunity to meet with members of the Committee, ask questions, and provide their opinions on the various models discussed in the document. This would allow for more detailed discussion of some of the issues raised in the survey.

17. Regional consultation meetings were held in each of eight regions of the province namely:

i. Central East
ii. Central West
iii. Central South
iv. Northeast
v. Northwest
vi. Southwest (2 meetings)
vii. East
viii. Toronto

18. An additional session was held with a group of recently-called lawyers whose members meet regularly with the Treasurer of the Law Society. As this group has members drawn from around the province the discussion that took place is treated as a regional consultation meeting for the purposes of the report on the regional meetings.

19. Members of the Committee attended each meeting and sought participants' views on the various issues raised in the Consultation Document.

20. Approximately 180 members, exclusive of benchers, attended the 10 meetings. Most of those who attended the meetings were in private practice. A range of practice areas was represented, as were types and size of firms and practice locations throughout the province. Some government lawyers, corporate in-house counsel, and those in the legal education field attended as well.

21. The regional meetings were not intended to provide quantitative findings and certainly the low attendance would undermine the statistical reliability of any quantitative findings that might have been put forward. The meetings do, however, constitute a component of the qualitative analysis that is represented by members' comments, suggestions, and concerns as expressed in,

a. the qualitative component of the survey;
b. focus groups; and
c. the regional meetings.

22. The representativeness of the comments may be affected by the low attendance, but where the comments correspond with the qualitative findings from the survey and the focus group meetings, their representativeness is enhanced.

Report on Focus Groups (Tab 5)

23. Strategic Communications Inc. was retained to recruit participants for 11 focus groups, conduct the meetings, which took place in September and October 2000, and report on the findings. The focus groups were held in Toronto, Sudbury, and Kingston and involved members of the profession from a variety of work settings and firm sizes as follows:

a. two groups in Toronto with sole practitioners;
b. one group in Sudbury with sole practitioners;
c. one group in Kingston with sole practitioners;
d. two groups in Toronto with corporate counsel and those in government;
e. two groups in Toronto with large firm practitioners;
f. one group in Sudbury with small/large firm practitioners;
g. one group in Kingston with small/large firm practitioners; and
h. one group in Toronto with those not in private practice, government, or corporate work settings.

24. Strategic Communications' report sets out the purpose of the meetings:

> *To go beyond the results of the spring 2000 LSUC Competence Consultation survey, to understand the attitudes that lie behind the viewpoints measured there. With quantitative data from the survey in hand, we set out to probe reasons why LSUC members hold specific opinions about the competence mandate.*
>
> *Specifically , the research objectives of the focus groups were to,*
>
> *a) investigate participants' perspective of the legal profession in general and uncover their 'top of mind' issues with respect to the profession;*
>
> *b) investigate participants' attitudes to competence monitoring and regulation in general; and*
>
> *c) investigate participants' attitudes to the Law Society competence regulation proposals.*

25. The report points out that "ultimately this research reveals evidence about members' understanding of what is meant by 'competence', about the viability of a systematic approach to dealing with competence issues, and the sources of resistance to, and acceptance of, LSUC's proposals, including the introduction of new standards." [10]

Report on Written Submissions of Organizations (Tab 6)

26. In June 2000, letters were sent to 28 organizations enclosing copies of the Consultation Document and the Book of Appendices, which provides additional detail and research not included in the document that went to the entire profession.

27. Organizations were encouraged to provide written comments to the Law Society by September 8, 2000. A number of organizations indicated a desire to send representatives to regional consultation meetings before completing their comments. Accordingly, the deadline was extended to October 31, 2000.

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[10]Focus Group Report, p. i.

28. The Law Society has received written submissions from:

a. Advocacy Resource Centre for the Handicapped (ARCH)*
b. The Advocates' Society*
c. Canadian Bar Association - Ontario
d. Canadian Corporate Counsel Association*
e. County of Carleton Law Association
f. Criminal Lawyers' Association
g. Law Society's Equity Advisory Group (EAG)*
h. Medico-Legal Society of Ontario*
i. Metropolitan Toronto Lawyers Association
j. Ministry of the Attorney General
k. Ontario Crown Attorneys' Association
l. Ontario Trial Lawyers Association*
m. Roti io' ta'-kier (the Aboriginal Advisory Group to the Law Society)*[11]

29. In addition, the Law Society has received the County and District Law Presidents' Association's resolution concerning the competence models.

30. The written comments provided by organizations are more narrow in focus than those provided at either the regional meetings or the focus groups. Organizations have focused their comments on issues relevant to their mandate. In particular, the comments focus primarily on the four models discussed in the Consultation Document, rather than on some of the more general issues related to competence and the legal profession that were discussed in the meetings and focus groups.

31. Despite this narrower focus, however, there are some commonly held views and overarching comments that are common to the 14 organizations providing comments or resolutions. These relate to,

a. the appropriate approach to be taken to a competence mandate, generally;

b. the role of legal organizations in addressing issues related to the competence of the profession; and

c. the diversity of the profession and the impact of this on any approach to competence.

NATURE AND PURPOSE OF THIS REPORT

32. The consultation process has provided a wealth of information on the issues raised in the Consultation Document and on issues of general concern to members of the profession. This report on that process has two main purposes, namely,

a. to provide Convocation with reports on each of the main components of the consultation process; and

b. to identify, for Convocation's assistance, the major themes or comments that emerge across all the components of the consultation process.

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[11]Those groups whose names are followed by an asterisk (*) made oral submissions to supplement their written comments.

33. The consultation process elicited the views of members,

a. in large urban centres and in small communities;

b. in sole and small firm practice settings and in mid-size and large firms;

c. in private practice and in corporate, government, and other settings;

d. from those recently called to the bar, practitioners for many years, and those in-between; and

e. from those concerned with the impact of the competence mandate on groups traditionally under-represented in the profession or with special needs.

34. Members did not hesitate to express their views and, in some cases, fears about what the competence mandate might mean to them, individually, and for the profession overall. They described their views of each of the models and provided suggestions for how the competence mandate might balance the needs of the profession with the public interest.

35. Each individual and community revealed a perspective on the issues under discussion that flowed from their own experience with the legal profession and with the Law Society. Yet, across the surveys, meetings, comments, and submissions a number of similar themes arose again and again. There are many members who have not provided feedback on the issues under discussion. Nonetheless, the common themes that emerged from thousands of lawyers who did participate from across the province and in every aspect of the consultation process lends credence to the view that the information the Law Society has received addresses views and perspectives of general application.

36. This report identifies and highlights the main over-arching themes and comments that were repeated throughout the consultation process. It is not a substitute for reading the in-depth reports prepared for each component of the process, but is an overview to what the Committee has learned. These themes and comments are an important part of the information that will underlie implementation of the Law Society's competence mandate.

MAJOR THEMES AND COMMENTS

37. Although regional disparities and differences in perspective affected participants' and respondents' responses to the competence initiative and particular models, the common points raised suggest that the profession overall is concerned about many similar issues and pressures that affect their efforts to provide quality service. Although there is no consensus across the province as to how the competence mandate would best be implemented, the feedback provided does contribute significantly to the discussion of what considerations should underlie the development of any model.

38. The major themes and comments that emerged across the province relate to,

a. the state of the profession, including issues of mentoring and collegiality;
b. member views about the purpose of the competence initiative;
c. the role of the marketplace vs. the regulator in addressing competence;
d. concerns about overly-intrusive regulation; and
d. diverse perspectives within the profession, and their impact on the choice of a competence model.

The State of the Profession

39. In the surveys and at the regional meetings and focus groups members took the opportunity to raise issues that are having an effect on their professional lives, their service to clients, and their relationship with the Law Society.

40. The report on the focus groups lists, and then discusses, the "top of mind" concerns participants expressed about being a lawyer. These are,

    a. *increases in procedural complexity, delays, clogged courts, and paperwork;*

    b. *the difficulty of keeping up with changes in the law;*

    c. *economic and financial stress, which is felt to be on the upswing for at least the past decade;*

    d. *time pressures, partly brought on by financial pressures and by the introduction of new technologies; and*

    e. *a general decline in civility, co-operation, and collegial relations among lawyers and in Canadian society in general.*[12]

41. Similar concerns were expressed at the regional meetings, particularly with respect to increased work pressures, longer hours, and the increasing complexity of the law. It was also noted by some that client expectations have shifted, sometimes to the detriment of quality of service. Participants noted that, increasingly, clients appear more interested in lawyers' fees being as low as possible than in the quality of work that will be provided. Many of the participants viewed this as making it difficult to compete with lawyers who significantly undercharge or with paralegals.

42. Participants emphasized the impact of such stresses on civility and collegiality. Some county law associations noted the decline in participation at social events and continuing education programs, which they attribute, at least in part, to demoralization, over-work, and the decline in the perception of the social benefits and shared community that membership in the profession once entailed.

43. The degree to which participants and respondents are concerned about the forces pulling the profession apart is perhaps best revealed in the discussions of mentoring that occurred throughout the consultation process. Participants discussed the benefits of such relationships to help address professional isolation, the need for feedback, advice, and sharing of experience.

44. There are other indications of stresses within the profession, illustrated by the sometimes significant differences in perspective of those,

    a. working in Toronto from those working in other parts of the province;

    b. in large firms from those in small or sole practices; and

    c. in private practice from those in other types of work, such as government and the corporate sector.

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[12]Focus Group Report, p. iv.

45. Concerns about the state of the profession affected participants' and respondents' comments in the following ways:

a. Participants and respondents suggested that the effectiveness of the competence mandate, if implemented without attention to the external pressures affecting quality of service and professionalism, would be undermined. Any model adopted must not ignore the range of pressures on the profession;

b. In addition to the competence mandate steps should be taken to address these pressures if the long-term health of the profession overall is to be sustained. These larger issues should not be forgotten because of a competence mandate focused on addressing individual competence;

c. The model chosen should not result in a system that pits clients against lawyers; and

d. The model chosen should not result in a reduction of access to legal services because it forces lawyers out of the profession.

Member Views about the Purpose of the Initiative

46. The Consultation Document states,

> *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 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 the 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... 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.*[13]

47. Despite the Law Society's efforts to make it clear that this competence initiative is not engendered by a crisis in the profession relating to competence, some participants and respondents raised questions about what is prompting the Law Society's decision to pursue a competence initiative, at this time. They asked whether the competence initiative was engendered by "problems" in the profession. Participants who believe that the Law Society considers there to be a crisis necessitating profession-wide action asked whether there is empirical evidence to support such a view.

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[13] Consultation Document, pp. 4-5.

48. To some degree the perception that a profession-wide quality assurance program is only justified if there is indeed a crisis reflects individual members' desires to preserve their autonomy. This is perhaps highlighted by the participants' and respondents' substantial interest in the Law Society and others creating and improving tools that permit lawyers to enhance their *own* efforts to maintain competence.

49. The critical importance of professionals being committed to career-long professional development and competence was not in dispute anywhere in the consultation process. The debate focused, however, on whether such commitment should be left entirely to individual lawyers to pursue, at least until they demonstrate they cannot or will not do so, or whether there should be some systemic component that is designed, mandated, and monitored by the Law Society to complement members' voluntarily chosen approaches.

50. This debate is reflected in the general comments that were made during the process as well as in participants' and respondents' reactions to various models.

The Role of the Marketplace vs. the Law Society in Addressing Competence

51. Law as a business in contrast with law as a profession was the subject of discussion in many of the meetings and focus groups. The issue of whether the marketplace is the best arbiter of competence was raised. Particularly in communities outside of the larger metropolitan centres, those in private practice spoke about the impact of reputation on a lawyer's ability to continue to attract clients and referrals. The suggestion was made that the pressures and judgment of the marketplace are a powerful incentive to competent service. The fixed costs of practising law, including errors and omissions insurance, make it increasingly difficult for an incompetent lawyer to survive.

52. At the same time, however, participants described incidents of incompetence in their community or area of law and raised concerns about the impact of such incompetence on the profession.[14] They pointed to the need for the Law Society to pay particular attention to addressing competence-related deficiencies. Thus, although the participants pointed to the role that the marketplace plays in assuring competence there was a recognition that this could not be the sole arbiter of the issue.

53. Although discussions of the marketplace were raised by those in private practice the influence of third parties on members' efforts to maintain competence is relevant in non-private practice settings as well. Participants and respondents in corporate, government, educational and other fields pointed out the influence that employers, clients, other regulators, and peers have on the maintenance and enhancement of competence.

54. Participants' and respondents' comments about the impact of third party influences, be it the marketplace, employers, or others were most often given in the context of the following:

    a. The Law Society should not design a model that assumes that it is the only source for monitoring the competence of the profession; and

    b. There are factors external to professional regulation that might affect the profession's ability to implement aspects of some of the possible competence models. These need to be reflected in any approach the Law Society is considering.

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[14]In the focus groups participants reflected on the types of competence-related deficiencies as follows: poor judgment or understanding, inadequate adherence to appropriate legal practices, inappropriate client management, lack of regard for clients' interests, insufficient knowledge of substantive law, lawyers practising in fields in which their knowledge of the law is no longer up-to-date. Focus Group Report, pp. iv-v.

Overly-intrusive Regulation

55. At all stages of the consultation process members raised concerns that the Law Society would develop a model that is overly-intrusive and heavy-handed.

56. The reasoning behind this view has a number of sources, including,

a. anecdotal and personal evidence of how members have been dealt with in the complaints and discipline processes at the Law Society;

b. a belief that the Law Society is a bureaucracy that simply keeps growing and, by its very nature, engenders over-regulating solutions;

c. a link between regulatory problems in the past (insurance crisis) and the likelihood that any new program will be similarly problematic;

d. a belief that the competence model will be used to "get" lawyers (discipline under another name); and

e. the nature of some of the models themselves, in particular practice review and limited licensing.

57. A number of members linked the concerns about too intrusive a model to the public interest. This was expressed in two main ways:

a. The greater the burdens on lawyers to meet the competence requirements, the greater the potentially negative impact on affordable services; and

b. If the model requires members to comply with overly-detailed approaches to their practices and if the public is encouraged to complain if these exact approaches are not followed, it may result in members insulating themselves from their own clients, to the detriment of the services provided.

58. Some participants spoke of ways in which the Law Society could accomplish the goal of implementing its mandate that would encourage and promote the values of professionalism and competence, while at the same time respecting the autonomy of members. In their view the Law Society should ensure that, in implementing its mandate, it remembers that the legal profession is a "thinking" profession. It should avoid an approach that is paper intensive and ignores the fact that there is a uniqueness to lawyers' individual work settings. If lawyers could be convinced of the need to embrace quality assurance to reflect the growth in the profession and the increasing complexity of the law, they would be more receptive to new regulatory approaches to competence.

Diverse Perspectives within the Profession and their Impact on the Choice of a Competence Model

59. Of all the common themes that ran through the consultation process the issue of differing needs and realities within the profession was among the most pronounced. That diversity is represented by comments focusing on regional distinctiveness and by the contrasting perspectives of,

a. small and sole practice firms versus mid-size and large firms;
b. large urban versus smaller urban or rural lawyers;
c. those in private practice versus non-private practice work environments;
d. those groups traditionally under-represented in the legal profession;
e. lawyers with disabilities and other special needs; and
f. generalists versus specialists.

60. The implication of these diverse perspectives for competence regulation is significant. Many participants and respondents repeated fears that a "cookie-cutter" approach to the issue would be chosen and that it would be Toronto-focused and geared to large firms. Responses to and comments about each model raised issues that spoke directly to these many perspectives and demonstrated the complexity in designing an approach that will address them fairly and reasonably.

Guidelines and Standards

61. The Consultation Document states that "under any competence model, competence guidelines will play an important role...In view of the provisions of the *Act* that expressly provide for the assessment of member competence, the Law Society must develop recognized and acceptable performance guidelines against which member performance in pre-determined areas can be evaluated."[15] The Consultation Document indicates that the Law Society could develop guidelines that articulate acceptable performance in given areas (quality assurance) or guidelines for "best practices" (quality improvement).

62. Many participants felt that, in the face of mandatory legislative provisions for focused practice reviews and competence hearings where there are reasonable grounds for believing a member has failed or is failing to meet standards of professional competence, guidelines would assist members of the profession to know what acceptable performance levels they should meet.

63. With respect to the development of acceptable performance guidelines the survey asked respondents to rate the priority of development in three areas, (1) "members' knowledge/skills/judgment"; (2) "members' attention to the interests of clients"; and (3) "the records, systems or procedures of members' practices".

    a. "Members' knowledge/skills/judgment" was most frequently assigned the highest priority by the total sample (52.7%);

    b. "Members' attention to the interests of clients"was most frequently assigned the second priority by the total sample (41.6%); and

    c. "The records, systems or procedures of members' practices" was most frequently assigned the lowest priority by the total sample (31.8%). [16]

64. In the consultation survey 73.5% of respondents supported the development of voluntary best practices guidelines.[17]

65. Participants spoke of the potential benefit of guidelines as a way for practitioners to check their own performance. At the same time they expressed concerns about the impact of guidelines on negligence standards.

66. To the extent that members support the development and enhancement of guidelines, they do so with the following caveats:

    a. "Best practices" guidelines should not form the basis of minimum acceptable practice;

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[15]Consultation Document, p.15.

[16]Quantitative Report, p. 6.

[17]Ibid.

b. Local realities and practices and different client needs and resources should be taken into account when assessing what is appropriate practice;

c. Guidelines or standards should not be seen as the complete answer to competence. Judgment, ethics, common sense, strategy, and creativity are all fundamental components of the practice of law and cannot be reduced to a list;

d. Guidelines and standards must be developed in consultation with those who will be affected by them; and

e. Guidelines should be developed as tools to support members, not as weapons to discipline them. There is a view, expressed in the focus groups, that guidelines are voluntary, but standards are mandatory, the breach of which could lead to disciplinary consequences.

REACTIONS TO INDIVIDUAL MODELS

67. An examination of the reports in Tabs 2-6 demonstrates the range and scope of participants' and respondents' reactions to each of the four models discussed in the Consultation Document. Those models are:

a. Model One: Continuum of Professional Development
b. Model Two: Random/Focused Practice Review
c. Model Three: Limited Licensing
d. Model Four: Enhanced Specialist Certification

68. The purpose of this section of the report is to highlight the common reactions that emerged across all aspects of the consultation process regarding each of the models.

General Comments

69. The respondents and participants in the consultation process provided a wide range of perspectives on the issues under discussion in the Consultation Document, stemming from their geographic location, work realities, firm size, economic condition, view of the Law Society and themselves, and whether they spoke as individuals or on behalf of legal organizations. There are myriad views on which of the proposed models or combination of models, if any, is the preferable approach. However, a number of points emerged that underlay participants' and respondents' views about implementing the Law Society's competence mandate, as follows:

a. The model should be flexible, capable of adaptation to a wide range of work and practice realities, personal circumstances, and geographical differences;

b. The tools members are expected to use within any model should be accessible, affordable, and relevant;

c. The goals of the model should be clearly stated and not result in overly-intrusive regulation;

d. The model should respect the autonomy of members; and

e. The model, to the extent possible, should be developed making use of the expertise of a number of legal organizations and members of the profession to enhance its acceptance by the profession.

70. Few participants spoke directly of the public interest. Overall, participants and respondents evaluated models based upon their perception of what would be palatable to the profession or to them personally. This is not to say that participants did not appreciate the central role of competence and the need to maintain it throughout a career in law. Rather their view appeared to be that most members maintain their competence voluntarily and that the public interest does not require the regulator to introduce profession-wide measurement tools.

Model One - The Continuum of Professional Development

71. In all aspects of the consultation process Model One attracted the most positive response from participants and respondents. There was no consensus on whether there should be a mandatory component to such a model.

72. A question in the survey asked for members' opinions on whether "a voluntary professional development approach [would] satisfy the Law Society's obligation to ensure that the public is served by lawyers who meet high standards of competence." Of the respondents, 51.6% believed it would, 38.3% believed it would not satisfy the obligation, 6.2% registered "no opinion" and 3.9% did not answer the question. A high proportion of sole practitioners endorsed voluntary measures (61.9%), but support declined with firm size. Only 38.1% of respondents from firms with more than 51 lawyers endorsed the voluntary approach. [18]

73. In response to a question about whether there should be some mandatory requirements related to professional development a narrow majority (54.3%) responded that there should be mandatory requirements, while 38.3% responded that there should not. 67.3% of respondents did agree that there should be mandatory professional development requirements for those "with previously demonstrated competence-related deficiencies."[19]

74. The qualitative survey results support the view that Model One is the most acceptable to members. Seventy percent of respondents to the open-ended questions endorsed the model as the most effective for implementing the Law Society's competence mandate. Of the 940 explanations given in the survey for endorsing the model, only 10% did so because other models were unacceptable:

a. 46% of the endorsements were associated with the structure or form of the model;

b. 36% of the endorsements referred to content or substantive curriculum that could be presented under this model; and

c. 8% of the endorsements flowed from the sense that this model would receive a positive reception from the public and/or members of the Law Society.[20]

75. The comments included 481 responses discussing the issue of voluntary versus mandatory requirements. Among those responses, 37% reflected support for voluntarism, 41% favoured mandatory requirements, and 9% recommended a combination of the two approaches.[21]

76. The same type of responses emerged at the regional meetings and focus groups, where participants spoke in detail about their acceptance of the principle that career-long learning is a fundamental component of working as a lawyer. They also spoke of their efforts to maintain their competence, and of their view that Model One

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[18]Quantitative Report, pp.7-8.

[19]*Ibid.*, pp.8 and 9.

[20]Qualitative Report, pp. 4 and 5.

[21]Qualitative Report, p. 9. The report provides detailed information on attitudes to Model One.

would best reflect the approach most lawyers already embrace. In the views of many participants the model could be flexible, minimally intrusive, and less likely to be perceived as punitive. Participants believed it would be the most easily integrated model. This view applied whether participants endorsed a mandatory component or not.

77. Virtually all participants and respondents were concerned about the accessibility and affordability, and, to a lesser degree, the relevance of professional development tools. They were particularly vocal about insufficient locally-delivered continuing legal education programs in communities outside of Toronto. Many comments were made about the need to enhance the technological means for delivering professional development.

Model Two: Random/Focused Practice Review

78. The quantitative survey results demonstrate significant opposition to random practice review:
   a. 65.1% of respondents opposed random reviews;
   b. 23.4% supported random reviews;
   c. almost 10% expressed no opinion; and
   d. 2.2% did not respond.[22]

79. The qualitative results reflect this low level of support. Only 13% of respondents preferred Model Two as the most effective for implementing the Law Society's competence mandate.[23] Of these, however, many approved a "focused" approach, not a "random" one. In their view the benefits of the focused approach is its ability to target "problems" and address those lawyers with already demonstrated competence-related deficiencies. Many participants were unaware that the Law Society currently has authority to conduct focused practice reviews. As such their comments often endorsed the introduction of such a model.

80. The focus groups and regional meetings reflected similar concerns about random reviews. Participants were unclear about the nature of such a program and as such tended to react to the potential for it to be highly intrusive, rigid, time-consuming, and expensive. Their concerns were somewhat reduced when the preventive and remedial focus of similar programs in the medical and accounting professions were described.[24]

81. Some sole practitioner participants did indicate that the model could be helpful if it were remedial in nature. This is because practising without partners or associates leaves the lawyer with little feedback or support with respect to the practice of law and the running of a business. Some participants noted that in their experience the recent program of random spot audits has been helpful for these reasons.

82. Participants and respondents who did not support random practice review often did endorse practice supports that would guide them in the establishment and enhancement of the business aspects of practising law. Flowing from an endorsement of the continuum of professional development, this view points to the creation of supports and tools that allow members to better meet their personal commitment to competent service.

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[22]Quantitative Report, p. 13.

[23]Qualitative Report, p. 24.

[24]The report on the regional consultation meetings sets out the kinds of questions participants had with respect to random practice review. The Regional Meetings Report, pp. 19-20.

Model Three: Limited Licensing

83. There was significant opposition to a general limited licensing model. When asked in the survey whether "members should continue to be able to self-elect their substantive practice areas", 91.9% of respondents agreed that they should. [25] Members were also asked if the Law Society were to consider introducing limited licences whether it should consider a general limited licensing requirement, time-limitations on licences, or practice circumstance limitations. Of those who responded to the question 60% of total respondents were opposed to general limited licensing, 53.9% of respondents opposed time limitations and 39.5% opposed practice circumstance limitations.[26]

84. The qualitative survey results indicate that fewer than 8% of respondents who selected a preferred model endorsed limited licensing as the preferred model. Of those, 68% came from large urban regions. Model Three was viewed as the most intrusive model, and potentially the most disruptive and expensive.[27] In addition, many of those opposed to the model raised concerns about its negative impact on lawyers practising in small communities and in general practice and on clients in those communities who might have to travel distances to find a lawyer providing services in certain substantive areas of law. Participants also raised the concern that limited licensing would result in lawyers viewing client issues through too narrow a lense, to the detriment of client service.

85. Those who supported limited licensing did so primarily on the basis that the increasing complexity of the law makes it impossible to maintain competence in a wide range of practice areas. Limited licensing would create a system in which members choose their practice areas, meet the appropriate standards for those areas, and do not "dabble" in other areas in which they may not be qualified.

86. Participants had a number of concerns about how the model would work, which may have had an impact on their reactions to it. These include,

a. whether limited licensing would apply to those already called to the bar, or only to future calls;
b. whether law school education would have to be restructured;
c. how the model would be monitored; and
d. whether a practice area would be broadly (eg. corporate law) or narrowly (eg. mergers and acquisitions) defined.

Model Four: Enhanced Specialist Certification

87. Enhanced specialist certification is a quality improvement rather than quality assurance model. Under the current Law Society program there are approximately 600 certified specialists. The program is currently a peer recognition program, not a developmental one as is envisaged by Model Four. There is the perception that the current program is Toronto focused and not accessible to many practitioners. Perhaps because many participants in the consultation process had the current program in mind, views on Model Four ranged from highly supportive to highly ambivalent. The responses were not as negative in tone as they tended to be with limited licensing because the model is primarily a voluntary one.

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[25] Quantitative Report, p.15.

[26] *Ibid.*, p.16.

[27] Qualitative Report, p.36.

88. The survey asked whether a broadly-based specialist certification model along the lines described in the Consultation Document would be useful to members. More than 25% of respondents expressed no opinion and 7% did not answer the question. Of those who responded 43.3% thought the model would be useful, 56.7% did not.[28]

89. In the qualitative report it was noted that 13.8% of respondents endorsed this model as the most effective for implementing the competence mandate. Of those 42% were based in Toronto.[29]

90. Participants in the focus groups appear to have registered the highest interest in specialization, or at least in the benefits that might flow from such a model.

91. Those who supported specialist certification emphasized its role in providing incentives to members to enhance the quality of their work, to motivate them, and to assist them in marketing their skills. They view it as truly supportive, without the "stick" of discipline attached for choosing not to pursue it. Some participants felt this model could facilitate the development of practice guidelines.

92. Those who opposed this model, or were ambivalent toward it, tended to be from smaller communities and in sole or small firm practice. There is a sense that in smaller communities there is insufficient work in specialized areas to allow people to qualify for a specialist designation. The prospect of a designation for "generalists" did not alter participants' views significantly, in part because they were not clear how this could be done.

93. There were concerns that this model could result in an increase in negligence standards and in the perception that those who are not certified are somehow less capable of providing quality service.

94. It appears, however, that there is greater scope for improving attitudes to this model than to Model Three, largely because of the voluntary nature of specialist certification as compared with the mandatory nature of limited licensing.

SUGGESTIONS FOR SUPPORTING MEMBER COMPETENCE

95. Participants and respondents had numerous suggestions for supporting the profession in its efforts to enhance its competence and for addressing competence-related issues. These are described in the reports on various components of the consultation process, in particular in the reports on the regional meetings, focus groups, and the qualitative component of the survey.

96. These suggestions rest on a number of broad underpinnings as follows:

a. For many there is a sense that the profession is pulling apart. Competence is affected by the stresses on the profession. Many suggestions are aimed at improving the links among lawyers through,
   i. mentoring;
   ii. remedial provisions to assist with practice issues;
   iii. improved opportunities for learning; and
   iv. strategies to improve collegiality.

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[28]Quantitative Report, p. 18.

[29]Qualitative Report, p. 44.

b. There is a need to improve the links among law schools, the bar admission course, including articling, and the Law Society, in order to create a more effective continuum that trains and supports the profession in the philosophy, values, tools, and practical approaches its members should have to meet their professional responsibilities;

c. Regulatory attention should focus on "problem" lawyers, while providing supportive tools to the rest of the bar; and

d. There is a need to level the professional playing field for all members of the profession.

NEXT STEPS

97. The Professional Development and Competence Committee anticipates returning to Convocation in February, 2001 for Convocation's consideration of proposals outlining possible approaches for implementing the Law Society's competence mandate. The Committee's report will seek Convocation's direction as to what approach the Committee should develop further.

TAB INDEX

TAB 4

IMPLEMENTING THE LAW SOCIETY'S COMPETENCE MANDATE : REPORT ON THE REGIONAL CONSULTATION MEETINGS

Prepared for The Professional Development
and Competence Committee

by Sophia Sperdakos

November 2000/ January 2001

TABLE OF CONTENTS

INTRODUCTION

1. In March 2000 Convocation approved for distribution to the profession a document entitled, *Implementing the Law Society's Competence Mandate: A Consultation Document.* Convocation also approved the distribution of a survey to all members and a regional consultation process intended to complement the survey with face-to-face meetings with members of the profession.

2. The regional consultation process has now been completed. It consisted of two components:

a. 11 focus group meetings; and
b. regional consultation meetings in each of eight regions of the province namely:

i. Central East
ii. Central West
iii. Central South
iv. Northeast
v. Northwest
vi. Southwest (2 meetings)
vii. East
viii. Toronto

3. An additional session was held with a group of recently-called lawyers whose members meet regularly with the Treasurer of the Law Society. As this group has members drawn from around the province the discussion that took place is being treated as a regional consultation meeting for the purposes of this report.

4. This report summarizes and analyses the points raised at the regional consultation meetings and raises issues for consideration by the Committee as it contemplates its next steps. A separate report on the focus groups is being prepared by Strategic Communications Inc., the consulting firm that conducted the focus group meetings on the Law Society's behalf.

THE REGIONAL MEETING CONSULTATION PROCESS

a) Purpose of the Regional Meetings

5. In developing the Consultation Document the Professional Development & Competence (PD&C) Committee was of the view that the written survey sent to members should be complemented by a process in which members were provided an opportunity to meet with members of the Committee, ask questions, and provide their opinions on the various models discussed in the document. This would allow for more detailed discussion of some of the issues raised in the survey.

6. Regional consultations were also intended to build upon the out-reach to members that has been undertaken during the current Treasurer's term through his meetings with law associations and through the CLE program for sole and small firm practitioners that has been put on throughout the province.

7. There were a number of "givens" underlying the process, as follows:

a. It was to be made clear to participants that no decisions have yet been made as to the model the Law Society will adopt. As such, the meetings were truly consultative.

b. The Committee agreed that the meetings were to be part of a "fact-finding" process. In other words, members of the Committee and other benchers were to use the opportunity to learn members' views, not provide their own views on what Convocation should ultimately do to implement the Law Society's competence mandate.

c. The meetings, and the consultation process in general, were considered to be one piece of the overall process that will be used to determine what competence model to adopt. There would be no suggestion at the meetings that the members' views were to be the only basis upon which decisions would be made.

b) Organization

8. The working group on implementing the Law Society's competence mandate and the PD&C Committee agreed that the regional consultation process would be conducted on a regional, rather than county, basis.

9. It was agreed that there would be one meeting in each region, except in the Southwest region where two meetings were held. The regional benchers for each region were asked to assist the process by liaising with Policy Secretariat staff to discuss appropriate dates and locations for the meetings and by communicating with county law association presidents or their designates.

10. In each region, except the Northwest region, a similar process was followed. The Northwest region hosted a three day CLE program in October and the regional meeting was co-ordinated to take place at the same time as that program. In the other regions the following steps were taken to plan the meetings and communicate with the lawyers in the relevant counties:

    a. An appropriate meeting date and location was chosen in consultation with the regional benchers, the county law association president in whose county the meeting was to take place, and, where applicable, the county law librarian;

    b. The regional bencher sent a letter to the presidents of each county law association in his or her region advising them of the meeting and encouraging him or her to advise members of the meeting and the importance of the process. A flyer advertising the meeting was included with the letter, for posting in county law libraries or for inclusion with newsletter mailings to association members. Presidents from counties not actually hosting the meeting were encouraged to send at least one or two representatives from the county to the meeting;

    c. In regions where members might have to travel more than 225 kilometres to attend a regional meeting the presidents were notified that such members would be entitled to a $75 credit toward a Law Society CLE program or publication; and

    d. The Law Society hosted a reception in conjunction with the meeting.

11. All benchers were notified of the meeting dates and encouraged to attend a meeting in their region. Notice of the meetings appeared on several occasions in the *Ontario Reports,* in both French and English, and in one issue of the *Ontario Lawyers' Gazette.* A notice of the meeting dates was also posted on the Law Society's web page.

12. Each meeting, except one, was chaired by one of Eleanore Cronk, Earl Cherniak, or Ron Manes. Greg Mulligan chaired the Central West meeting. The Treasurer chaired the meeting with the group of newly-called lawyers. Sophia Sperdakos, of the Law Society's Policy Secretariat department, attended all the meetings. A number of other benchers, both members of the PD&C Committee and non-members also attended the meetings. A list of benchers attending is attached as Appendix 1.

c) Discussion Content

13. Because the nine meetings were chaired by four different people it was not possible to ensure coverage of exactly the same topics, across the meetings. Individual meetings tended to focus more on one topic than another depending upon the particular interests of those participating.

14. All chairs did ensure, however, that there was some discussion of,

    a. each of the four models outlined in the Consultation Document;
    b. the development of standards/guidelines;
    c. the role of the Law Society in regulating competence; and
    d. regional issues.

d) Attendance at the Meetings

(i) Numbers

15. Meeting attendance was low. Overall approximately 180 members, exclusive of benchers, attended the 10 meetings. This represents less than 1% of the bar overall and approximately 1% of those in private practice.

16. Although there may be some argument that low attendance was connected somewhat to the fact that the meetings were held on a regional, rather than county, basis the MCLE consultation process, organized on a county basis in September and October 1995, did not have a high attendance rate either. In all 441 lawyers attended 32 meetings.

17. Most of those who did attend the regional meetings were in private practice. A range of practice areas was represented at the meetings, as were types of firms (sole, small, boutique, middle, and large) and practice locations throughout the province. Some government lawyers, corporate in-house counsel, and those in the legal education field attended as well.

(ii) Implications

18. The regional meetings were not intended to provide quantitative findings and certainly the low attendance would undermine the statistical reliability of any quantitative findings that might have been put forward.

19. The meetings do, however, constitute a small piece in a qualitative analysis that is represented by members' comments, suggestions, and concerns as set out in the survey, focus groups, and the regional meetings themselves. Because of low participation in the meetings the representativeness of the comments may be limited, but to the extent that they correspond with the qualitative findings from the survey and the focus group meetings their representativeness will be enhanced.[2]

NATURE OF THIS REPORT

20. An examination of the notes taken at the meetings[3] reveals, in essence, 10 "conversations", each somewhat unique by virtue of the person who chaired the meeting and the particular dynamic of those who participated. There are, however, certain overlapping themes that link the meetings to each other and to the overall consultation process.

21. This report addresses four main topics that were touched upon at all the meetings, as follows:

a. Over-arching themes and comments;
b. Development of standards/guidelines;
c. Reactions to individual models; and
d. Participants' suggestions for the Committee's consideration as it develops the competence model.

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[1]There are 17,204 members in private practice, 281 in education, 3,180 in government, 4,728 in other employment, 1,392 not employed, and 2,134 residing out of Ontario for a total of 28,919. In addition there are 535 life members, 1,074 members who are excused from paying the annual fee and 3,057 members who are suspended.

[2]Reports on these aspects on the consultation process will be available by the end of November 2000.

[3]The notes are available for review on request. They are not a transcript of the meeting, but a summary of the points made by the chairs and the participants.

22. Generally speaking this report does not discuss the individual views expressed at each meeting, but provides an overall analysis of the attitudes and views expressed across the 10 meetings. To the extent, however, that a particular region had a viewpoint that contrasted with others, or a comment illustrates a generally expressed viewpoint well, the report notes this.

OVER-ARCHING THEMES AND COMMENTS

23. A number of themes emerged across the province. Although the themes were not emphasized to the same degree from meeting to meeting, they were present as a consistent backdrop. The themes are,

a. member views about the purpose of the initiative;
b. the role of the marketplace vs. the regulator in addressing competence;
c. the state of the profession;
d. views on intrusive regulation; and
e. regional distinctiveness and the effect of this on the competence mandate.

The Purpose of the Initiative

24. The introductory remarks made by the chairs emphasized that the initiative was not undertaken because of a crisis in the profession, but because,

a. the *Law Society Act*, more clearly and directly than ever before, emphasizes the Law Society's role in regulating competence;

b. the regulator should assist the profession in maintaining its competence by providing the tools that allow members to do so; and

c. quality assurance has become a central feature of many professions and the legal profession should take the opportunity to design its own model, lest someone else impose a model upon it.

25. Despite this general overview, participants at many of the meetings wanted to better understand why the Law Society felt the need to act now. In a number of instances they wondered if there is some more serious problem in the profession that is causing the Society to take this initiative.[4] Based on this supposition there were a number of questions about empirical evidence to support the view that the profession is in trouble.[5]

26. To some extent, some of the models may have caused participants to wonder if the Law Society perceives there to be a profession-wide competence deficit. During the meetings discussions about the limited licensing model, for example, tended to focus on the problems engendered by people who undertake work which they are not competent to do, in part because there are no limitations on lawyers' ability to change practice areas. Although the model could be characterized as an opportunity to adopt a new theoretic framework for the legal profession, along the lines of the medical model, it was viewed as a drastic shift, leading to speculation that it must be prompted by more of a crisis than is being suggested.

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[4]At the Central East meeting the question was asked whether Convocation is concerned about the deterioration of the profession. At the Southwest region meeting in London one of the participants wanted to know who or what was "driving" the initiative. In Hamilton a member noted that if the primary motivation is to protect the public then the Law Society should strive for members to meet higher than minimum standards and should provide incentives that will encourage lawyers to strive for more.

[5]Some participants questioned whether there is empirical evidence to support the view that the methods currently in place to deal with "miscreants" are inadequate and need changing.

27. As will be seen below, the issue of motivation for the initiative leads to differing attitudes toward the kind of model that should be adopted. Simply put, many of the participants felt that if there is no crisis in the profession the Law Society should design a model that reflects that, by focusing on those who have already demonstrated incompetence and trusting the rest of the profession to voluntarily maintain competence.

The Role of the Marketplace Vs. The Regulator in Addressing Competence

28. One of the themes that arose during the meetings was whether some of the issues the Law Society considers its responsibility to address are already being addressed in the context in which lawyers work - the marketplace.

29. The basic argument expressed is that a lawyer who is incompetent - does not serve his or her clients well or does not know what he or she is doing in a given transaction or case - will not remain in business for very long.[6] This view was expressed in a number of ways. Members from smaller communities indicated that the legal community and the community of the public requiring lawyers' services is small enough that word gets around if a lawyer does not do competent work. Others noted that the cost of incompetent practice has gone up because of increased LPIC levies and also that fixed overheads are so high that a lawyer whose reputation results in fewer clients will be driven out of business.

30. Although the participants highlighted the role the marketplace plays in assuring competence there was a recognition that this could not be the sole arbiter of the issue. Often the comment about the role of the marketplace was raised in conjunction with the concern that the Law Society might over-regulate members in pursuit of its competence model.[7]

The State of the Profession

31. This theme emerged in the context of other issues, most often in discussions about what members do to maintain their own competence. Members spoke of the challenge of finding time for continuing profession development in the face of increased work pressures, longer hours, and increasing complexity of the law. The comment was made that fewer people turn out for law association events and programs than was the case even a few years ago. More than once people spoke of colleagues who are demoralized or who no longer enjoy the practice of law.

32. In a number of instances the issue of paralegals was raised. There is concern about the impact of paralegals on work for lawyers and the ability of lawyers to compete in an environment in which the low cost of services seems more significant to many members of the public than the quality of service.

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[6]Somewhat contradictorily, in some of these same meetings participants reflected upon their experience with a practitioner in their community who was incompetent over a long period and was "propped up" by other members in the profession.

[7]In the Central East meeting it was noted that there is a recognition that the effect of market forces is not a complete answer to the need to monitor competence. Regulation in the public interest differentiates the legal profession from other groups such as paralegals. The fear is, however, that the Law Society will over-regulate, losing sight of the market realities that complement self-regulation.

Intrusiveness

33. The perception that the Law Society deals with its members with a heavy hand was raised on numerous occasions. There is a sense of mistrust that the Society will introduce a model that is over-bearing and over-regulates members. [8]

34. The reasoning behind this view has a number of sources, including,

a. anecdotal and personal evidence of how members are dealt with in the complaints and discipline processes at the Law Society;

b. a belief that the Law Society is a bureaucracy that simply keeps growing and, by its very nature, engenders over-regulating solutions;[9]

c. a link between regulatory problems in the past (insurance crisis) and the likelihood that any new program will be similarly problematic;[10]

d. a belief that the competence model will be used to "get" lawyers (discipline under another name); and

e. the nature of some of the models themselves, in particular practice review and limited licensing.

35. Some participants expressed the view that unless the profession is in crisis the Society should not make rules that apply to everyone, bur rather to those lawyers with competence problems, who represent a minority of the profession. Others noted that the model introduced should not result in making lawyers more paranoid to practise than they already are. Further, it was noted that too intrusive an approach could result in people leaving the profession to work as paralegals.

36. A number of members linked the comments about too intrusive a model to the public interest. This was expressed in two main ways:

a. The greater the burdens on lawyers to meet the competence requirements, the greater the potentially negative impact on affordable services;[11] and

b. If the model requires members to comply with overly-detailed approaches to their practices and if the public is encouraged to complain if these exact approaches are not followed, it may result in members insulating themselves from their own clients, to the detriment of the services provided.

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[8]Although not expressed by many, there were a few participants who questioned the value of self-regulation over government regulation.

[9]Reference was made to the complexity and intimidating nature of Law Society and LPIC forms.

[10]A comment was made that lawyers have survived a number of regulatory fiascos, which doesn't engender faith in the Law Society.

[11]These burdens could include both the direct cost of such things as education requirements or practice review costs as well as an increase in the annual fee engendered by the increase of staff and facilities to administer the model.

37. Some participants spoke of ways in which the Law Society could accomplish the goal of implementing its mandate that would encourage and promote the values of professionalism and competence, while at the same time respecting the autonomy of members. The Law Society should ensure that, in implementing its mandate, it remembers that the legal profession is a "thinking" profession. It should avoid an overly "cookie-cutter" approach that is paper intensive and ignores the fact that there is a uniqueness to lawyers' individual work settings.[12] If lawyers could be convinced of the need to embrace quality assurance to reflect the growth in the profession and the increasing complexity of the law, they would be more receptive to new regulatory approaches to competence.

Regional Distinctiveness

38. The issue of the "cookie-cutter" approached raised in discussions about intrusiveness is linked to a strong suspicion among participants outside of Toronto that any model adopted will be based on Toronto considerations and realities.

39. Examples of how this might occur were raised in conjunction with specific models (eg. Toronto practice reviewers from big firms assessing small town sole practitioners; the bulk of CLE continuing to be available only in Toronto), but the general principle expressed is that each community has its own local practices and culture that work well for it. These must not be ignored in the development of a competence model. In fact, these distinguishing features must be a central, enriching part of what *is* developed.

DEVELOPMENT OF STANDARDS/GUIDELINES

40. The Consultation Document indicates that whatever model is chosen the Law Society must develop guidelines/standards to assist members in knowing what level of performance they should meet. This will be important whether the Law Society adopts guidelines for minimum performance (quality assurance) or guidelines for "best practices" (quality improvement).

41. The chairs raised the issue of standards/guideline development at most meetings, both as a general concept relating to the Law Society's legislative competence provisions and with respect to certain models, such as practice review.

42. In some locations there was a general discussion about professional standards. Some participants felt that these have been falling somewhat in recent years. Competition for clients was raised as one of the reasons. The poor morale of some members and their corresponding loss of interest in doing quality work was given as another reason.

43. When speaking more specifically about practice standards, participants overall appeared to agree that it would be useful to have some articulated standards that could guide them as to whether they are doing things appropriately. Most agree that some standards would be essential if random practice review were to be introduced, and recognize that since the Law Society is now authorized to conduct focused reviews and competence hearings, clearly articulated standards of which the profession is fully aware are essential.

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[12] One comment was that the Law Society should look at determining "what a lawyer should look like" and hopefully avoid creating a robotic image.

44. The view was expressed by many participants, however, that any standards or guidelines developed must recognize local realities and practices. Participants spoke of the distinction between what is "doable" for private clients with limited funds as compared with huge corporate or institutional clients that can afford to assemble teams of lawyers and spend significant amounts on legal services. Minimum standards of performance cannot be based on an unrealistic set of benchmarks.

45. The checklists prepared under the auspices of the Law Society a number of years ago were frequently raised as examples of an approach that ignores reality and sets lawyers in smaller communities up for failure.[13]

46. Participants agreed that no attempt should be made to create standards so detailed that they interfere with individual judgment. This is reflected in the comment (mentioned above) that this is a "thinking profession" and nothing should be done to undermine that essential quality by the creation of an overly mechanized approach.

47. There was a strong view that any standards or guidelines developed must be done in consultation with those to be affected by them.[14]

48. The importance of recognizing local realities in developing standards or guidelines was more strongly expressed in connection with the development of substantive law standards rather than practice management ones, although even with this type some participants thought that office management would be dictated by the systems in place in large Toronto law firms.

49. Finally, in one community the issue of tariffs was raised as being something that might need to be addressed in the context of developing standards.[15]

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[13]These same checklists were a source of irritation when the Law Society did the MCLE consultations in 1995.

[14]At one meeting reference was made to the medical profession, which assembles groups to develop standards and seeks representation from a wide range of affected interests, tests the standards in the community before finalizing them and ensures regional relevance. The suggestion was made that funding for such a process in the legal community might be sought from LPIC, the Law Society, and Legal Aid Ontario.

[15]The members in Thunder Bay who spoke of tariffs pointed out that currently there is fierce price-cutting in some areas of law that has the likely effect of compromising standards. Yet there is no prohibition against such competition. The question was asked whether perhaps there is a reason to look at the tariff issue in the context of the competence initiative. Simply put the question was asked whether in order to ensure that members maintain levels of competence the Law Society should make it less possible for members to cut fees to the point that standards are compromised.

REACTIONS TO INDIVIDUAL MODELS

Continuum of Professional Development[16]

50. There was overwhelming agreement at all the meetings that a commitment to career-long learning is essential to the legal profession. The development of a continuum of professional development meant different things to different participants, but its value and its link to competence were never questioned. The challenge participants identified is in finding the time to undertake this essential process in the face of work pressures and cost burdens.

51. The professional development discussions focused on four themes:
    a. accessibility;
    b. affordability;
    c. relevance; and
    d. mandatory versus voluntary.

52. Many participants outside of Toronto emphasized how difficult it is to find CLE programs locally. Many spoke of having to travel to Toronto to attend programs with the attendant loss of time in their offices and the related travel and accommodation costs. Participants noted that in some circumstances the local CLE offered is too general. Any specialized CLE must be obtained in larger centres, predominantly Toronto. The implication was that if more was available closer to home members might attend more programs.

53. Inextricably linked with accessibility is affordability. Participants spoke of the high cost of CLE, both direct (registration fees) and indirect (lost office time and travel and accommodation costs). Local programs (dinner meetings, video replays) have the double benefit of being close to home and inexpensive, but do not always address the full range of topics that are covered elsewhere.[17]

54. The relevance of the offerings was often raised as being of equal importance to accessibility. Those in small communities indicated that in some instances local programs were too general to attract many people. Relevance of delivery approach was also an issue. Participants spoke of the need for greater use of technology and interactive programs to satisfy different learning needs. Finally, participants spoke of the use to which curriculum development might be put to enhance the quality and relevance of the learning undertaken.

55. Participants were divided on the issue of whether a professional development model should be voluntary or mandatory. Those who were in favour of a mandatory component gave different reasons including,

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[16]Much of the discussion about this potential model mirrored discussions that took place at the 32 consultation meetings on MCLE in 1995. The MCLE Subcommittee *Report on Post-call Learning* highlights these overlapping themes in detail. If a professional development model is chosen it may be helpful to consider some of the issues raised in the MCLE Subcommittee *Report on Post Call Learning*, which sought to address issues of affordability, accessibility, relevance, and local realities.

[17]The issue of how much members are willing to pay for CLE was not addressed. In the MCLE consultations the amount members were willing to pay depended somewhat on the nature of the program, but tended to be quite low. There tends to be a view among members, not necessarily informed by any data, that CLE is a "money maker" and a belief that it does not cost very much to put on.

a. a voluntary approach has not worked. There are many, many programs available (local and otherwise) and insufficient numbers of people take advantage of them. Only through a mandatory program can the Law Society be sure people are obtaining a minimum amount of CLE;

b. through mandatory CLE and testing[18] the Law Society can establish and monitor standards;

c. provided it is affordable, accessible, and relevant and the requirement can be satisfied by a wide list of activities, there is no reason not to have mandatory minimum level of CLE;[19]

d. it is the most flexible of all the models and can be adapted to a number of different practice and work realities.

56. Some participants were in favour of a mandatory model for those who have demonstrated competence-related difficulties or for certain specified categories (eg. specialist certification candidates).[20]

57. There were those who believe that the continuum of professional development is the most appropriate model, but only on a voluntary basis, in some cases in combination with other models (eg. specialist certification and/or focused practice review). Their opposition to a mandatory model stems from, among other things,

a. a view that, despite assurances to the contrary, all the current issues around accessibility, affordability, and relevance will continue, with far greater adverse consequences to those outside Toronto because the requirements are mandatory;[21]

b. a mandatory requirement does not recognize self-study and the different ways in which people learn; and

c. there is no evidence to demonstrate that attendance at programs has a positive impact on performance. Further it is impossible to force people to learn who are not disposed to do so. All that MCLE would demonstrate is that people have registered for a minimum number of courses per year.

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[18]One or two participants suggested the creation of self-testing tools, prepared by the Law Society, so that members could assess their own levels of competence as part of a professional development model.

[19]Concern was expressed that nothing be done to interfere with or "kill" the programs currently offered by providers such as the Criminal Lawyers' Association or the Advocates Society.

[20]Some concern was expressed about pre-judging groups and including them in a focused mandatory professional development regime. The advantage of focusing on those who have already demonstrated difficulties is that the evidence of their need for additional learning is available.

[21]There was concern that in a mandatory environment local learning programs would not be recognized, that specialized areas of law would not generate sufficient programming to meet requirements, and that there would be insufficient Francophone materials and courses. There was also concern that only Law Society programs would be accredited. This led to a question of whether the Law Society, as a provider and as an accrediting body for programs, would be in a conflict of interest position.

58. There were those who, though opposed to a mandatory requirement, felt that more members should attend CLE than are currently doing so. These members were of the view that incentives should be developed that would encourage more members to attend. The definition of "incentives" ranged from such things as insurance premium and annual fee reductions[22] to requiring members who wish to work in particular areas to take courses (eg. electronic registration training; a CLE program for those on the Children's Lawyer panels).

59. Some participants remained unsure of whether they would approve of MCLE. One participant suggested that what must be considered is whether it is appropriate for the majority to put up with the minimal inconvenience of a mandatory environment to protect the public from the minority.

Practice Review

60. Although members were told that mandatory practice review is now statutorily legislated there were some participants who expressed concerns about the program, particularly about the basis upon which a member would be judged to be in need of practice review. This stemmed largely from the view expressed by some that the Law Society is heavy handed in its dealings with members and the worry that Toronto large firm standards are used to judge all other lawyers.

61. Participants expressed many doubts about random practice reviews. The issue of the motivation for the Law Society's initiative is reflected in a discussion about this model in which a participant asked if there was a public demand for random review.

62. In part, the doubts stem from the fact that members do not know what is contemplated by a random practice review model. The comments were often in the form of questions:[23]

a. How intensive would such a review be? (as intensive as focused reviews?)
b. Who would conduct the review? (A reviewer from Toronto? A reviewer from a large firm?)
c. Would it be remedial in nature?
d. What would the impact of such a model be on a member's individual practice style?
e. How could a litigator's competence be assessed by an examination of his or her files?
f. What would be the impact on solicitor-client privilege?
g. Would there be a disproportionate number of sole practitioners assessed?[24]
h. Who would pay for the review?
i. How much would it cost?
j. What would be assessed?[25]
k. Would it be applied to those not in private practice, or those who are employees? How?

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[22]Participants did not seem to be concerned that premium reductions for some members would be absorbed by the membership overall having to pick up the loss of funds from the overall pool available to meet the Law Society's funding requirements.

[23]If the Law Society were considering random practice review as a model it would be essential to reflect on all the areas of concern, address the many questions raised by members, and build a program that has clear articulated standards to be met, assesses only on those standards, is sensitive to local issues, is gradual in implementation, and is clearly remedial in its focus and approach.

[24]Some participants expressed concern that practice reviews would have a disproportionately adverse impact on sole practitioners. Large firms would have greater resources to devote to preparing for practice reviews.

[25]Some members were sceptical that this approach would reveal incompetence or dishonesty.

63. Many members felt random practice review would be a very intrusive model.[26] Some participants' resistance to the model was reduced if it was suggested that practice review would not cover substantive law areas, but rather the business and practice management aspects of law. At the same time they were often skeptical that client satisfaction would increase if a lawyer's office were better organized.[27]

64. Some felt it would be less intrusive to give members more courses on practice management and on running their businesses. It was agreed at many meetings that there is not enough training either at law school or the bar admission course on these skills.

65. Some sole practitioners did say that they thought the model could be useful to them as long as it is remedial in nature. This is because practising without associates or partners leaves them somewhat isolated, without colleagues with whom to share concerns. In this context a number of people admitted that they had recently been spot audited by the Law Society and found the reviewers and the process helpful. Similarly, those working in clinics funded by Legal Aid Ontario, in which audits are conducted, also found the process very instructive.

Limited Licences

66. Participants were largely opposed to limited licensing as a mandatory model. Many spoke of the natural process of specialization that is occurring throughout the profession and province, but were firmly of the view that this should continue to be a process of self-selection.

67. Opposition to the model was expressed on a number of levels. Many felt that the logistics of the model are overwhelming, and raised a number of specific questions:

    a. Would the model necessitate a complete re-organization of law school education?;

    b. What would be the impact on those already called to the bar (grand-parenting?);

    c. How specialized would the limited licence be? (eg. a licence to practise corporate or a licence to practise corporate acquisitions and mergers law?); and

    d. How would the model be monitored for compliance in thousands of offices?

68. Participants expressed views about the impact of such a model on sole practitioners, particularly in smaller communities. Many noted that in small communities there is simply not enough work in one substantive area for a lawyer to specialize. Similarly, there are not enough lawyers in the community to make the option of referrals to another lawyer viable.[28] Participants were not satisfied that a limited licence in general practice (along the lines of the medical model of family practice) was a viable option. In particular, participants expressed the view that,

    a. clients would not want to spend funds to have a generalist "triage" their file and then send them to a specialist;

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[26]There was some sense that this would be embarrassing for lawyers who know they have some problems and don't need someone coming in to judge them.

[27] Those who expressed this view said that all the client wants is the best result at the cheapest price.

[28]The issue of one-lawyer communities was raised in a number of meetings.

b. whatever work was left to generalists would be highly limited and mundane; and

c. large firms would continue to appropriate more and more work.[29]

69. Participants also noted that lawyers do not always know until they have tried work in a number of areas what practice area is the right "fit" for them. Lawyers may also find they need to change practice areas for a number of reasons during their careers. Limited licensing would create difficulties in both these circumstances. Further, lawyers may be unwilling to work in particularly narrow specialties for fear of being unable to change direction.

70. Members also expressed the more general view that for the sake of the profession lawyers should not be pigeon-holed too narrowly. Approaching client matters with too narrow a lense may not be in the best interest of the public.[30]

71. To the extent that some participants spoke favourably about limited licensing it was in two contexts:

a. The public would know better what lawyers do; and

b. If used to ensure that before a lawyer changes areas he or she has to meet some educational or other pre-requisite, it might be a useful educational tool.

72. Ultimately most people thought that limited licensing was too difficult a model to adopt and, more importantly, that there was insufficient reason to introduce such a fundamental shift in the profession.

Specialist Certification

73. There were mixed views about this model. In contrast to limited licensing it has the advantage of being a voluntary (quality improvement) program in which members self-select for specialization. There were, accordingly, those who felt it was a valuable model to explore. These participants felt that it would be supported by members because it reflects the kind of self-specialization choices many members are already making.

74. There was general agreement that the current specialist certification model is not a significant force in the profession. Many felt that the program is too Toronto-centred and too expensive for the benefit received. Many participants noted that very few people who are, in fact, specialists have chosen to be certified. There are firms specializing in one practice area that have members who are certified and members who are not.

75. Many people were of the view that the public does not pay any attention to the designation, if they even know about it. These participants do not believe the program makes a difference to the community and is simply a marketing tool that is not all that effective.

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[29]The level of concern about available work in smaller communities is reflected in a comment made in several meetings that even the change in the rules of professional conduct allowing referral fees may not result in as many referrals as might have been thought. This is because of fear that the lawyer to whom the referral is made will "poach" the client for future matters.

[30]Limited licensing, more than any other model, raises questions of what the professional legal credential should be. Is there merit to maintaining the right of lawyers to move from one substantive area to another because the nature of their law school education gives them the intellectual capacity and skill to do so? Or is modern society a place for specialists only?

76. Those who were in favour of a specialist certification model saw it as a way to provide incentives to members to improve the quality of their work, to motivate them, and to assist them in marketing their skills. Many agreed that to be certified a specialist a lawyer should have to meet very high standards and be tested. Marketing of the program should come from a central source (eg. the Law Society), since leaving it to individual lawyers does not allow for widespread communication with the public.

77. There were some participants who were of the view that this kind of quality improvement model will become more and more important when purchasers of services say they want this value-added approach.[31]

78. Some participants, particularly those from smaller communities did not agree that specialist certification was a model to be pursued. In their view it is too difficult to find the volume of work in one area that permits specialization. Clients do not care about a designation if the work is done well. Further, many of their clients could not afford to pay higher fees because their lawyer is a specialist.[32] Their views were not affected by the possibility of a specialist designation for general practice.

79. An additional concern raised in the context of this model was whether there would be a shift in negligence standards that would hold all lawyers to higher standards than in the past. This issue was raised, as well, in the general discussion about the articulation of standards.

PARTICIPANTS' SUGGESTIONS

80. In the course of the discussions on the specific competence models and on the Law Society's regulatory approach in general, a number of suggestions were made that may be of assistance as the Law Society begins to develop the model. They were not discussed in any detail, but present interesting perspectives on the issues under consideration.

81. The suggestions made include the following:

a. Broaden bursary programs for CLE;
b. Broaden mentoring programs;
c. Make start-up workshops mandatory for anyone entering private practice who will not be an employee (have 3 sessions over the first year of practice);
d. Make bar admission materials available to the entire profession on CD-ROM (free or nominally priced);
e. Provide a reduction in premiums for participation in particular kinds of educational programs, (eg. those that address issues commonly seen in negligence claims), with or without testing;
f. Enhance both the Practice Advisory Service and CLE programming focused on practice management and the business of law;
g. Make courses in ethics mandatory;
h. Make practice management courses mandatory in law school;

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[31]Lawyers wishing to receive work from certain automobile manufacturers, for example, are obtaining ISO-9000 certification.

[32]Specialist certification was characterized by one participant as dealing with the difference between competence and super-competence.

i. Consider the imposition of minimum tariffs as a necessary pre-requisite to enhanced standards of performance;

j. If CLE is made mandatory, permit lawyers to satisfy their requirements by volunteering for a practice review and give more credits for certain kinds of CLE (eg. interactive or practice management related);

k. Expand the current spot audit program slightly to include examination of a few of the business-related components of practice such as tickler systems and retainer letters; and

l. Ensure that whatever model is chosen it does not ignore the reality of what is happening with paralegals.

DISCUSSION

82. For the purposes of this part of the report it is assumed that many of the broad themes raised by participants during the consultation process reflect the views held by many others who were not present at the meetings. Some credence is given to this view by examining the quantitative survey results. It is anticipated that both the qualitative survey results and the report on the focus group meetings will reveal similar member input.

83. The summary of comments described in the previous sections do not address the overall attitude with which participants approached the consultation process. Participants were, by and large, appreciative of the opportunity to discuss the issues in their own communities. Generally speaking, for each topic raised there were views on both sides of the issue, although in some instances there was a clear majority view on one side. There were some participants who demonstrated a level of animosity towards the Law Society and toward what they perceive as Toronto-centred approaches toward regulation, but overall the participants did not pre-judge the discussion. At the same time there was some wariness about what might be imposed upon members by the Law Society and whether it would be something that would greatly alter the way they currently work or would be something less significant. Linked with this is a sense expressed in many of the meetings that the profession is under siege and the competence model must not add to its burdens.

84. Because no single model was fully fleshed out in the Consultation Document the meetings involved many more questions than answers and to some degree a discussion might sound more negative than it was simply because there was a desire on the part of participants to express their views about what they hoped the model would *not* entail.

85. Summarizing the themes outlined earlier in this report, what can be said to have emerged from the meetings is the following portrait:

a. There is some doubt as to the "real" motivation for the initiative;

b. Members are not clear on what goal(s) the initiative seeks to address and how the models will clearly accomplish these goals;

c. There is some sense that the Law Society takes more of a hands-on, intrusive approach to regulation than is necessary in view of the external, market pressures on members to maintain their competence, and in view of the fact that those "in trouble" represent a minority of the profession;

d. There is a view that local realities may be ignored by the Law Society in the development of its competence model, resulting in greater advantages to those in Toronto and more difficulty for sole practitioners and small firm lawyers outside of the large centres; and

e. There are many questions to be answered about each of the models, but most are directed to the issues of local relevance, intrusiveness, practicality, necessity, and benefit.

86. Although the meetings did not involve significant direct discussion of what it means to be a self-regulating profession, there were comments that reflect this underpinning. It is difficult to know whether in the face of external forces that seem to undermine the value of being a professional this discussion has become more fraught than it would have been even 20 years ago. Whether the implementation of the competence mandate can bolster the value of the privilege of self-regulation, without becoming what the profession perceives as another burden on it, is the test the Law Society faces.

CONCLUSION

87. Despite low participation in the regional meetings a number of consistent themes emerged for consideration as the Law Society moves into the next phase of the process to implement its competence mandate. As with the quantitative results the message appears to be that whatever is done should be flexible, fair, easy to implement and comply with, gradual, and cost effective.

APPENDIX 1

Benchers Participating in the Regional Consultation Meetings

Central East	Earl Cherniak (chair), Greg Mulligan, Marilyn Pilkington
Central West	Greg Mulligan (chair), Gordon Bobesich, Tom Carey
Central South	Earl Cherniak (chair), Kim Carpenter-Gunn, Judith Potter, Gerald Swaye
Northeast	Ron Manes (chair) , Greg Mulligan
Northwest	Eleanore Cronk (chair), Earl Cherniak, Dino DiGiuseppe, Ross Murray, Greg Mulligan, Bill Simpson
Southwest: Windsor	Ron Manes (chair), Ed Ducharme, Judith Potter, Bill Simpson
Southwest: London	Earl Cherniak (chair), Ed Ducharme, Judith Potter, Heather Ross
East	Eleanore Cronk (chair), Robert Armstrong (Treasurer), Stephen Bindman, Marshall Crowe, George Hunter, Helene Puccini, Bill Simpson, Rich Wilson, Brad Wright, and Margaret Ross (non-bencher member of the PD&C Committee)
Toronto	Eleanore Cronk (chair), Earl Cherniak, Larry Banack, Carol Curtis, Seymour Epstein, Gary Gottlieb, Gavin MacKenzie
Newly-called lawyers group	Robert Armstrong (Treasurer)

TAB 6

IMPLEMENTING THE LAW SOCIETY'S COMPETENCE MANDATE: REPORT ON WRITTEN SUBMISSIONS RECEIVED

Prepared for the Professional Development
and Competence Committee

by Sophia Sperdakos

November 2000/ January 2001

TABLE OF CONTENTS

INTRODUCTION

1. In March 2000 Convocation approved for distribution to the profession a document entitled, *Implementing the Law Society's Competence Mandate: A Consultation Document.* Convocation also approved,

   a. the distribution of a survey to all members;

   b. a regional consultation process intended to complement the survey with face-to-face meetings with members of the profession; and

   c. a request to legal organizations for written comments on the Consultation Document.

2. In June 2000, letters were sent to 28 organizations, listed in Appendix 1 enclosing copies of the Consultation Document and the Book of Appendices, which provides additional detail and research not included in the document that went to the entire profession.

3. Organizations were encouraged to provide written comments by September 8, 2000. A number of organizations indicated a desire to send representatives to regional consultation meetings before completing their comments. Accordingly, the deadline was extended to October 31, 2000.

4. The Law Society has received written submissions from:

   a. Advocacy Resource Centre for the Handicapped (ARCH)*[1]
   b. The Advocates' Society*
   c. Canadian Bar Association - Ontario (CBAO)
   d. Canadian Corporate Counsel Association* (CCCA)
   e. County of Carleton Law Association (CCLA)
   f. Criminal Lawyers Association (CLA)
   g. Law Society's Equity Advisory Group (EAG)*
   h. Medico-Legal Society of Ontario*
   i. Metropolitan Toronto Lawyers Association (MTLA)
   j. Ministry of the Attorney General
   k. Ontario Crown Attorneys' Association (OCAA)
   l. Ontario Trial Lawyers Association* (OTLA)
   m. Roti io' ta'-kier (the Aboriginal Advisory Group to the Law Society)*

5. In addition, the Law Society has received a Resolution from the County and District Law Presidents' Association concerning the competence models.

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[1]Those organizations whose names are followed by an asterisk (*) made oral submissions to supplement their written comments.

NATURE OF THIS REPORT

6. A summary of each of the written comments followed by the full text are set out in Appendix 2 for the Committee's and Convocation's review.

7. The purpose of this report is to highlight those comments and concerns that appear as overarching themes across the organizations, as well as to highlight the range of responses to the four possible models described in the Consultation Document. In doing so, the report allows for some comparison with the views expressed in the regional meetings and the focus groups. [2]

8. Most of the submissions make reference to the four possible models discussed in the Consultation Document. The four models are:

   a. Model One: Continuum of Professional Development
   b. Model Two: Random/Focused Practice Review
   c. Model Three: Limited Licensing
   d. Model Four: Enhanced Specialist Certification

   They will be referred to in this report as Models One, Two, Three, or Four.

OVERARCHING THEMES AND COMMENTS

9. The written comments provided by organizations are more narrow in focus than those provided at either the regional meetings or the focus groups.[3] Organizations have focused their comments on issues of particular interest to their mandate. So, for example, the groups representing the interests of advocates, such as the Advocates' Society, speak of training and delivery of educational programs of particular interest to their members. ARCH focuses on the need to ensure that any competence model addresses the needs and requirements of lawyers with disabilities. EAG and Roti io' ta'-kier focus on the need to ensure that lawyers from groups traditionally under-represented in the legal profession and Aboriginal lawyers are not disadvantaged by whatever model is chosen. In particular, the comments focus primarily on the four models, rather than on some of the more general issues related to competence and the legal profession that were discussed in the meetings and focus groups.

10. Despite this narrower focus, however, there are some commonly held views and overarching comments that are common to the 14 organizations that provided comments or resolutions. These relate to,

    a. the appropriate approach to be taken to a competence mandate, generally;

    b. the role of legal organizations in addressing issues related to the competence of the profession; and

    c. the diversity of the profession and the impact of this on any approach to competence.

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[2]Separate reports have been prepared on these components of the consultation process.

[3]For example, there is virtually no discussion of the development of practice guidelines except to some extent in the CBAO comments and those of Roti io' ta'-kier. This topic was discussed quite frequently in the regional meetings and focus groups.

The Approach to the Competence Mandate

11. All of the organizations that provided comments or resolutions accept and embrace the view that an ongoing commitment to competence is fundamental to the legal profession. The organizations differ, however, on the appropriate scope of the Law Society's role in implementing a competence mandate. Some of the organizations, such as ARCH, express support for the general principle that the Law Society must play a more active role in ensuring professional competence. Others, such as CLA and CBAO question whether there is evidence of the need for an expanded or more intrusive competence mandate.

12. Although not fleshed out in detail, the underlying themes that are reflected in the differing views about the scope of the Law Society's role in competence mirror some of the comments raised in the regional consultation meetings and focus groups.

13. One of the themes focuses on the extent to which the Law Society's approach may intrude unnecessarily into members' ability to practise law. As in the case of the focus groups and the regional meetings the issue raised is whether, in the name of enhancing competence, a model may be chosen that over-regulates the profession at large. The view expressed is that such a model would unnecessarily burden the vast majority of members, who are competent, with additional costs and paperwork and create unrealistic expectations that would undermine lawyer-client relations.

14. The implication of these comments is that in any model the Law Society adopts there should be a balance struck between mandating requirements and providing incentives that encourage members to voluntarily undertake steps to enhance competence.

The Role of Organizations in the Competence of the Profession

15. The organizations all make the case that, based on their particular mandate, they have a significant role to play in ensuring that the model that is developed is meaningful, inclusive, and rationally designed and evaluated for effectiveness.

16. The components of the role they envision, depending upon the nature of the organization, include,

    a. partnering with the Law Society to develop curricula for any professional development educational requirement;

    b. continuing to provide or have input into legal educational programming for both practice-specific audiences (eg. Aboriginal lawyers, criminal defence lawyers, Crown Attorneys, corporate counsel, those involved in medical-legal cases) and across a broader range of lawyers (eg. CBAO);

    c. developing practice guidelines; and

    d. assisting in the design of a model to address needs of specific groups (eg. lawyers from disadvantaged groups, lawyers with disabilities, Aboriginal lawyers, litigators).

17. Stated in positive terms these proposals for assistance demonstrate a significant degree of commitment on the part of legal organizations to enrich the competence mandate by contributing expertise to its development. At the same time the comments suggest that each of the organizations believes their involvement is essential to improve the likelihood of their members' acceptance of any model the Law Society introduces.

The Diversity of the Profession

18. Each organization's comments highlight the diversity of the profession and the impact that this should have on the design of a competence model. Some of the organizations highlight principles of equity and non-discrimination and the importance of accommodating special needs such as those of lawyers with disabilities. Others focus on the need to recognize the very different realities of large firm/small firm and urban/rural legal practices. They also illustrate the difference between private practice and non-private practice environments, such as corporate in-house counsel and government legal work.

19. Recognition of this diversity is considered to be integral to any competence model such that, according to the organizations, it must be taken into account in the following ways:

    a. The model must be designed keeping in mind the need for costs to be fair to all members. This necessitates keeping in mind the range of work realities and differing support systems and tools available to members of the profession;

    b. The tools necessary to comply with the model must be fairly allocated across the province;

    c. The requirements to be met must not have a disproportionately negative impact on some groups over others. To avoid this, there must be a conscious effort to design a model that avoid these pitfalls;

    d. As discussed above, there should be widespread input on specific design issues to ensure a comprehensive and inclusive model; and

    e. The less intrusive the model the more it will be able to accommodate the wide range of professional activities and realities.

20. These features were raised as well in the regional meetings and focus groups where members emphasized the need to avoid a "cookie-cutter" approach to competence.

REACTIONS TO INDIVIDUAL MODELS

21. In discussing the models the organizations take slightly different approaches.

    a. Some comment only on those models they feel are relevant to their particular mandate. The Advocates Society does not, for example, specifically reject Model Two but focuses its comments on the other models, which it says "coincide more directly with [its] mandate."

    b. Some organizations only comment on the models they believe could, practically, be adopted, providing no discussion on the others.

    c. Some organizations, such as the Ontario Trial Lawyers Association, discuss the pros and cons of all the models without specifically endorsing one.

    d. Some organizations simply point out what would need to be done to ensure that whatever model is chosen meets the needs of all, not just some members of the bar.

    e. .Some organizations endorse a particular model, provided certain features are contained in the design, or endorse aspects of several models.

It is the case, however, that most of the organizations focus their comments on Model One, reflecting to some degree their views that the other three options are inappropriate.

22. Because of these different approaches this section will simply highlight the range of comments and responses to each of the models.

Model One - Continuum of Professional Development

23. All the organizations acknowledge and embrace career-long learning as a hallmark of the profession, as did participants at the regional consultation meetings and focus groups.

24. In discussing the reality of pursuing a commitment to learning, however, the organizations point to a number of challenges, including:

a. the cost of participating in continuing education and the disproportionate impact of costs on members from diverse work realities;

b. insufficient incentives to support lawyers in their efforts to participate in continuing education;

c. the difficulty in accessing education outside of Toronto and the hidden costs that members from outside of Toronto incur for lost time in the office and travel and accommodation costs; and

d. difficulty in finding educational programs that address diverse or specialized practices and fields of work, or accommodate special learning needs or French language needs.

25. Many of the organizations speak of the need to seriously improve access to, and the cost of, continuing education programs through improved delivery techniques and expanded offerings around the province. Many also discuss the need for incentives to encourage members to attend. The most frequently-cited type of incentive is reductions in LPIC premiums or Law Society annual fees.

26. In the view of some organizations, such as the Canadian Corporate Counsel Association, incentives are needed to encourage fuller participation. The CBAO is of the view that "meaningful incentives" to greater participation would be more effective than "trying to mandate learning", although it does go on to say that it is "prepared to support a mandatory CLE model if and when timely CLE can be provided across the province at a reasonable cost."

27. On the issue of whether there should be a mandatory component to the continuum of professional development a number of the organizations express varying degrees of endorsement or acceptance of this approach. As in the case of the CBAO, some organizations accept the possibility of a mandatory approach only on the assumption that certain prerequisites are satisfied or questions are answered. So, for example,

a. the *Criminal Lawyers Association* asks whether an expanded competence mandate is necessary at all, but later in its comments indicates that it would be prepared to consider "some form of ongoing mandatory education as long as it does not affect its ability to be an effective service provider in the criminal law education field."

b. EAG supports a commitment to professional development "so long as programs include mandatory education around principles of equity and non-discrimination, programs are accessible to all; and to the extent the model is mandatory there be a recognition of and accommodation for the differential impact on disadvantaged groups."

28. Other organizations appear to approve of a mandatory continuing education requirement, believing that any such system can be designed to address the needs of a diverse profession. So, for example,

    a. The *Advocates Society* indicates that a mechanism needs to be developed to ensure that all practising members access continuing education programs. One way of doing this is "through a graduated model of mandatory continuing education with a variety of means of gaining credits, which includes teaching and mentoring."

    b. The Medico-Legal Society concludes that "the development of an enhanced and required continuing education program would, as it did in medicine, constitute an important, if difficult to achieve, first step in establishing a reasonably credible competence assuring system."

    c. MTLA supports the Law Society assuming a competency assurance mandate and is in favour of Model One, with "particular stress on a model that will encourage ethical conduct and civility between lawyers". It endorses a mandatory component.

29. CDLPA endorses Model One, but its resolution does not directly state whether it supports or rejects a mandatory component.

30. The remaining organizations, such as OTLA and ARCH, do not reject or endorse Model One, but discuss pros and cons or indicate what important features would need to be included in the design of such a model were it to be introduced.

31. The organizations consider important features of any mandatory continuing education model to include, in addition to accessibility and affordability,

    a. a broad range of activities that members could undertake to satisfy their requirements;
    b. proper accreditation of providers of CLE programs; and
    c. a system that continues to embrace the current not-for profit providers, recognizing the specialty providers such as CLA, CCCA, CCLA, OCAA, and the Medico-Legal Association, to name a few.

Model Two - Focused/Random Practice Review

32. A number of the organizations did not comment on Model Two, either because it is beyond their mandate or because they endorse another approach, thereby excluding practice review. ARCH indicates that if Model Two is adopted the design must recognize the importance of appropriate training to ensure reviewers understand issues that might affect lawyers with disabilities.

33. The Medico-Legal Society comments indirectly on Model Two by pointing out that evidence in the medical context has suggested that mandatory continuing education may not be sufficient in and of itself to protect the public. Accordingly the College of Physicians and Surgeons of Ontario has a practice inspection program for on-site random inspection of doctors' offices.

34. Roti io'ta'-kier endorses random practice review provided certain issues are addressed. It states that "the addition of random practice review will broaden the use of practice review as a tool which monitors competency across the profession. Applied on a truly random basis, this model is an appropriate part of an integrated approach to competency. The issues surrounding these review methods focus on the fairness of reviews...Regardless of whether it is a random or focussed review, the thresholds applied must be fairly applied to those regardless of the size, location or nature of practice."

35. Most of the organizations that did comment on this model express unease and, in some cases, disagreement with the appropriateness of random practice review. Most of them accept as appropriate a properly designed *focused* practice review program that assesses members who have demonstrated incompetence and assists them to improve their performance. These organizations have a different view with respect to the application of such a program to the rest of the bar.

36. The issues raised about random practice review include that,

a. reviews will unnecessarily tie up lawyers offices;

b. the process will have a disproportionately negative impact on sole and small firm practitioners and those from traditionally disadvantaged groups who tend to be disproportionately represented among sole and small firm practitioners;

c. lawyers may feel pressured to "paper their files" so substantially, in anticipation of reviews, that there could be an increase in the cost of legal services;

d. for the vast majority of lawyers who are maintaining competent practices the program would not result in sufficient enhancement of competence to justify the costs; and

e. in the case of lawyers who are not in private practice (corporate counsel, government lawyers) the model may be unworkable.

Model Three - Limited Licensing

37. A few organizations did not express any views on limited licensing, but those that did were opposed to it. Issues raised about the model include that,

a. there are too many obstacles in the way of its implementation in a fair and inclusive way;[4]

b. it is too bureaucratic and costly to administer;

c. it does not offer sufficient flexibility to develop and expand practices;

d. it takes lawyers time to determine whether they wish to specialize and in what area. The model would interfere with this;

e. it is a first step to eliminating the general practitioner; and

f. it may have a negative impact on access to legal services, particularly in smaller communities.

[4]See the ARCH comments and those of EAG and Roti io' ta'-kier for an explanation of this concern.

Model Four - Enhanced Specialist Certification

38. Model Four is seen by some as less problematic than Model Three, largely because it is a voluntary model. Although some organizations such as CCLA strongly support this model, a number of organizations do not comment on it at all or in any detail. To the extent that it can improve access to specialty areas of practice for those from traditionally disadvantaged groups within the profession it is seen as a beneficial program. There is some positive sense of its merit to the extent that it can guide members in the systematic development of their skills and practice area.

39. Views on Model Four highlight a number of issues, including,

a. if an enhanced certification program is adopted it will need to be designed with full accommodation for those with disabilities;

b. certification should not be available strictly by means of education and testing;

c. if there is to be certification of generalists there will need to be considerable flexibility to address the broad range of work done by generalists;

d. consideration must be given to avoiding a situation in which those who do not pursue certification are viewed as less competent; and

e. whether it will be too bureaucratic and too costly to administer.

CONCLUSION

40. As was the case with the regional meetings and the focus groups, the written comments or resolutions received from 14 organizations express the view that the model adopted by the Law Society should be flexible, fair, practical, and cost effective. In addition the written comments reveal a commitment to providing input into enhancing whatever approach is chosen so that the model reflects the diversity and range of experience within the legal profession.

APPENDIX 1: ORGANIZATIONS TO WHOM REQUESTS FOR WRITTEN COMMENTS WERE SENT

Advocacy Resource Centre for the Handicapped (ARCH)	comments received
The Advocates' Society	comments received
Ontario Centre for Advocacy Training (OCAT)	
African Canadian Legal Clinic	
Association des juristes d'expression française de l'Ontario	
Association of Chinese Canadian Lawyers	
Canadian Association of Black Lawyers	
Canadian Association of Visually Impaired Lawyers	
Canadian Bar Association - Ontario (CBAO)	comments received
Canadian Corporate Counsel Association (CCCA)	comments received
County and District Law Presidents Association (CDLPA)	resolution received
Criminal Lawyers Association (CLA)	comments received
Delos Davis Law Guild	
Family Law Lawyers' Association	

Indigenous Bar Association	
Law Society's Equity Advisory Group (EAG)	comments received
Medico-Legal Society of Toronto	comments received
Metropolitan Toronto Chinese and Southeast Asian Legal Clinic	
Metropolitan Toronto Lawyers Association (MTLA)	comments received
Ministry of the Attorney General - Law Officers of the Crown	comments received
Ontario Crown Attorneys Association (OCAA)	comments received
Ontario Real Estate Lawyers Association (ORELA)	
Ontario Trial Lawyers Association (OTLA)	comments received
Refugee Lawyers Association	
South Asian Lawyers Association	
South East Asian Lawyers Association	
Thomas More Lawyers Guild of Toronto	
Women's Law Association	

APPENDIX 2

A) SUMMARY OF SUBMISSIONS

Advocacy Resource Centre for the Handicapped (ARCH)

1. ARCH expresses "support for the general principle that the Law Society must play a more active role in ensuring professional competence." It notes, however, the "need to ensure that the overall design of any competency model adopted by the Law Society fully accommodates lawyers with disabilities and complies with human rights obligations....all aspects of the program must be fully inclusive and it cannot inadvertently have an adverse impact on lawyers with disabilities."

2. ARCH addresses the specific models discussed in the Consultation Document from the perspective of their possible impact on lawyers with disabilities:

   a. If Model One is adopted all lawyers with disabilities must be fully accommodated, both with a wide range of educational delivery mechanisms and through the provision of educational materials in alternate format for those for whom the standard paper materials are inadequate. In addition there should be professional development on disability issues and representing disabled clients.

   b. If Model Two is adopted there should be specific training for those who conduct practice reviews, whether random or focused, to ensure they understand issues that might affect lawyers with disabilities.

   c. ARCH does not support Model Three on the basis that "there are too many obstacles for its effective implementation in a fair and inclusive way." ARCH's full comments on this model can be read in its submission.

   d. If Model Four is adopted "all methods used to educate and develop expertise would need to be designed from the outset with full accommodation in mind."

Advocates' Society

3. The Advocates' Society prefaces its comments on the possible models by saying that it is "of the view that more rigorous standards are necessary for those practising advocacy. This need extends to knowledge of substantive law and to improvement in advocacy skills."

4. The submission also states that "as leading advocates and practitioners members of the Advocates' Society are uniquely suited to assisting the Law Society with the formulation of performance guidelines, checklists and best practices".

5. The Advocates' Society's comments are restricted primarily to Model One:

   a. The submission states, with respect to Model One, "that a mechanism needs to be developed to ensure that all practising members access continuing education programs. One of the ways of achieving this is through a graduated model of mandatory continuing education with a variety of means of gaining credits, which includes teaching and mentoring." It goes on to discuss the insufficiency of skills training for law students and states that " at a minimum there should be a revision to the mandatory curriculum of the law schools to require skills training to begin in the law schools."

   b. It considers it essential for there to be a curriculum designed to meet the needs of advocates, both in the areas of substantive law and in the provision of advocacy skills training, for which it states it is uniquely positioned to partner with the Law Society.

6. e Advocates' Society does not comment on Model Two. With respect to Models Three and Four it does not indicate a position, commenting only that it is ready to assist in providing the educational support necessary for implementing either model.

Canadian Bar Association - Ontario

7. The CBAO submission states that Ontario lawyers have "amply demonstrated their commitment to maintaining and enhancing their competence through voluntary attendance at continuing education courses and participation in professional organizations such as the Canadian Bar Association - Ontario, the Advocates' Society, the Criminal Lawyers' Association and others." It goes on to elaborate on other ways in which Ontario lawyers demonstrate their commitment.

8. It takes the view that whereas it supported the amendments to the *Law Society Act* that gave the Law Society the mechanism to deal more effectively with competence-related issues it is "not convinced that there is or has been any demonstrated need for the Law Society to move from a model intended to address competency issues identified in the disciplinary process to a more paternalistic and intrusive approach to governing the profession."

9. It states that the Law Society "can best fulfill its competence mandate by,

   a. encouraging and supporting CLE providers such as CBAO in offering the necessary programs to meet the demand by lawyers;

   b. providing the tools to help lawyers adapt to a changing market environment;

   c. encouraging and promoting the advantages of technology in the delivery of legal services;

   d. providing meaningful incentives to professional development, such as savings in insurance premiums or reduction of practice fees; and

   e. providing incentives for use of practice management tools."

10. The submission states that CBAO supports the concept of acceptable performance guidelines and the development of reflective practice and self-assessment tools. It has concerns, however, "that "best-practice" guidelines will become the benchmark for acceptable standards and thus increase the risk of successful claims in negligence against lawyers".

11. With respect to Model One the CBAO states that voluntary participation in CLE has worked well but additional incentives should be created to encourage greater participation. In its view meaningful incentives would be more effective than "trying to mandate learning".

12. It raises an additional issue about introducing mandatory professional development without first ensuring that there are programs available at a reasonable cost that will enhance a member's practice. This applies, most particularly , in the case of specialty areas of law. It has indicated in the past and maintains the position that it is prepared to support a mandatory CLE model if and when timely CLE can be provided across the province at a reasonable cost." It indicates its commitment to work toward achieving more effective and timely delivery models. This includes developing a core curriculum of programming and working with the Law Society to further these ends.

13. With respect to Model Two CBAO supports focused practice review, provided there are "clear criteria to measure deficiencies" but has "grave concerns about the efficacy of 'random' practice reviews". In its view the spot audit program has not provided meaningful deterrence or revealed defalcations and to implement a similar competence review without demonstrable need would not be an effective use of scarce resources. The other issues it raises about practice review, include that,

    a. reviews will unnecessarily tie up lawyers offices;

    b. lawyers may feel pressured to paper their files to protect themselves in the event of a review. This could result in an increase in the cost of legal services;

    c. there is a very real perception that sole practitioners and small firms will be disproportionately targeted for reviews; and

    d. it will be difficult to determine an objective measure for the standards of the "required features of practice", particularly if the reviews address substantive law.

14. CBAO is opposed to Model Three since it does not offer lawyers sufficient flexibility to develop and expand their practices to meet market demands and client expectations, or develop and enhance their competence in different practice areas. The points it raises with respect to Model Three include that,

    a. limiting lawyers' training is short-sighted since lawyers need a general understanding of a number of areas of law;

    b. it takes time and experience for a lawyer to decide whether to restrict her or his practice and to what area; and

    c. this model is the first step to eliminating the general practitioner.

15. With respect to Model Four the CBAO indicates that "the current program seems to be satisfactory although there is some concern that certification may be too readily available if based solely on peer recognition without some objective criteria being met as well." Other issues it raises about Model Four include,

    a. education and testing alone should not be a substitute for hands-on experience and demonstrated ability in the appropriate forum;

b. the risk that those who do not pursue certification may be regarded as less competent than those who do; and

c. if there is to be certification for generalists "considerable flexibility would be necessary to adequately address the broad range of "generalists".

Canadian Corporate Counsel Association (CCCA)

16. As a preamble to its submission the CCCA notes that,

a. slightly less than half the Bar is not in private practice;

b. in the case of in-house counsel, their employer, not the public, bears the risk of incompetence; and

c. in-house counsel tend to be generalists, adapting to the fluid requirements of their employers.

17. The CCCA is in favour of a voluntary professional development model that has,

a. incentives such as discounts for LPIC, annual dues, CLE charges;

b. equivalency in credits between attending a CLE program and teaching at a CLE program;

c. credits for attending relevant CLE outside of Ontario; and

d. reasonable time lines for CLE compliance (24 month windows).

18. The reasons for its support of this approach are fleshed out in the submission, but are essentially based on the view that this approach builds on the present system, is flexible enough to accommodate the needs of a widely diverse bar and the ability of educational providers to address those needs, and requires no further infrastructure costs.

County and District Law Presidents' Association

19. CDLPA did not submit written comments on each of the models, but considered them and passed a Resolution in favour of Model One, and "in particular, continuing and improving upon the availability of CLE and improving the County Library system to assist members to meet the needs they identify to enhance professional development."

County of Carleton Law Association (CCLA)

20. CCLA prefaces its comments on the models by noting the Association's reputation for excellent, well-attended CLE programs. It noted as well that the majority of its members "specialize" to some degree, attend CLE, participate in self-study, have access to practice aids, have a well established support system, and have faced few, if any, valid complaints with respect to their competence.

21. With respect to Model One, CCLA is of the view that the Law Society's competence mandate is already adequately met by the CLE opportunities currently provided to CCLA members. If, however, the Law Society were to include a mandatory educational component in its competence model, CCLA "would clearly wish to be included in that process as a provider of mandatory continuing legal education programs."

22. With respect to Model Two, CCLA is opposed to the introduction of random review as it "in effect intrudes on and interferes with the independence of the majority of the profession as a result of the failure of a very small percentage of the profession to maintain their professional competence...". CCLA does endorse focused practice reviews as part of the disciplinary process.

23. CCLA opposes Model Three. In its view the legal profession is not as easily adaptable to such a model as is the medical profession. This model would in all likelihood eliminate the general practitioner, force lawyers to choose their area of specialization too early in their careers, and be inflexible to the changing realities of practising law.

24. CCLA endorses Model Four, "which would allow lawyers to obtain specialist certification through study and assessment" in addition to practice experience.

Criminal Lawyers' Association (CLA)

25. The CLA states that "the first step in the process should be a consideration as to whether an expanded competence mandate is necessary at all. There does not appear to be sufficient empirical evidence to suggest that the small percentage of incompetent lawyers would be affected to a significant degree by any of the proposed models of competence."

26. The CLA's comments are restricted to Model One. It is of the view that any expanded competence model should apply as well to Crown Attorneys. The CLA "would be prepared to consider some form of ongoing mandatory education as long as it does not affect [its] ability to be an effective service provider in the criminal law education field." (its emphasis)

27. The CLA expresses concern that there "be a comprehensive plan in place to ensure that lawyers in outlying areas have complete accessibility to required programs" and "that significant consideration be given to providing voluntary or mandatory continuing legal education at a "no cost" basis to young lawyers."

28. It requests the Law Society to make every effort to keep costs of a competence mandate to a reasonable level.

Law Society's Equity Advisory Group (EAG)

29. The submission notes the Law Society's commitment to equity and non-discrimination through its Bicentennial Report on Equity in the Legal Profession and policies, but states that the Consultation Document makes very little reference to either principle. It states that the competence mandate should acknowledge and incorporate equity principles by ensuring that,

    a. any model designed include specific mention of equity and non-discrimination; and

    b. that members of historically disadvantaged groups are not disproportionately burdened by the design, application, and enforcement of the competence model chosen.

30. The submission also recommends that the definition of the competent lawyer be amended to include specific reference to competent lawyers acting in accordance with principles of equity and non-discrimination.

31. With respect to Model One EAG notes that a mandatory model will place a heavier burden on lawyers who are poorer, in smaller firms, or less well-established. A voluntary model is unlikely to be accessed by those most in need of training. It supports a commitment to professional development so long as programs include mandatory education around principles of equity and non-discrimination, programs are accessible to all; and to the extent the model is mandatory there be a recognition of, and accommodation for, the differential impact on disadvantaged groups.

32. With respect to Model Two EAG is of the view that random and focused practice reviews pose serious concern from an equity standpoint for reasons discussed in the submission.

33. With respect to Model Three EAG is concerned that "similar to the articling requirement, access to certain specializations within the profession is likely to be limited to lawyers from certain communities. This could lead to further segregation within the profession." To the extent that Model Three is adopted, pro-active steps must be taken to ensure that all lawyers have the opportunity to acquire expertise in desired areas.

34. With respect to Model Four EAG endorses the principle of greater access to specialization for those from disadvantaged groups.

Medico-Legal Society

35. The Medico-Legal Society states, among other things, "that the idea of mandatory continuing legal education is a very important piece of any quality assurance program. Such an approach must eventually be adopted if basic levels of competence are to be ensured and the public thus protected."

36. It goes on to acknowledge that there is serious question in the continuing medical education literature as to whether this mandatory requirement is enough to protect the public, with the result that the medical profession has adopted on-site practice inspection. However the Medico-Legal Society concludes that, "the development of an enhanced and required continuing education program would, as it did in medicine, constitute an important, if difficult to achieve, first step in establishing a reasonably credible competence assuring system."

37. In supporting a mandatory professional development approach the Medico-Legal Society points out the following:

    a. "Continuing education in health professions and we believe the legal profession will best provide for needs of so eclectic a bar as ours by providing for a large number of offerings of many kinds, lengths, characters and locations"; and

    b. Providers of such programs must meet a reasonable standard of organization, of expertise, and of content, through an accreditation system.

Metropolitan Toronto Lawyers Association (MTLA)

38. MTLA supports the Law Society assuming a competency assurance mandate and is in favour of Model One, with "particular stress on a model that will encourage ethical conduct and civility between lawyers".

39. Its submission does not support either limited licensing or specialist certification because they are "too bureaucratic and costly to administer". It is also of the view that "practice review should be limited to remedial disciplinary matters at present".

40. MTLA notes that other jurisdictions have ongoing professional development requirements and have been able to design delivery mechanisms that recognize the diversity of their members' activities and lessen the impact of compliance.

41. With respect to the design of the model MTLA,

    a. favours a "flexible approach to mandatory professional development with frequent monitoring of program delivery";

b. favours a review process that would redesign the professional development model over time; and

c. is of the view that the model should distinguish between active and inactive members, with inactive members being given the choice to maintain their requirements or be exempt, with re-examination upon re-entry to practice.

Ministry of the Attorney General

42. The Ministry of the Attorney General's submission outlines the comprehensive training program that the Criminal Law Division and the Ontario Crown Attorneys' Association deliver as well as the program offered to Crown Counsel within the Legal Services Division of the Ministry. The Ministry has a Crown Policy Manual currently being revised to contain policies and practice memoranda, with strong educational and accountability components. It also describes the Performance Management program for individual Crown lawyers.

43. The submission notes that the structure within the Ministry, described above, as well as the system whereby management assigns work having regard to individual professional development and experience assists in addressing quality improvement and assurance. The implication is that Model One best mirrors the current approach.

44. With respect to Model Two the Ministry has questions about a practice review program "to the extent that it might review the exercise of discretion of individual counsel on behalf of the Attorney General, or systemic responses to the administration of justice overseen or advanced by the Attorney General."

Ontario Crown Attorneys' Association (OCAA)

45. The OCAA's submission is framed by the dual role of its members as lawyers and as agents of the Attorney General. In its view the Law Society's mandate with respect to the competence of Crown Attorneys should properly be confined to Crown Attorneys as lawyers.

46. In this regard the OCAA is of the view that current measures in place for ensuring that its members are competent, which include a fully-developed program of educational conferences, which Crown counsel are expected to attend, and other Ministry accountability policies, are effective. As with the Ministry's submission, above, the implication is that Model One is the most appropriate model.

Ontario Trial Lawyers Association (OTLA)

47. OTLA's submission outlines the pros and cons of each model and indicates that there is no consensus among its members that one of the four models should be implemented in isolation. Parts of all four models are thought to be effective in advancing a level of performance required by Ontario lawyers. Limited licensing is, however, the least popular option.

48. With respect to Model One OTLA's comments include the view that the formulation of a continuum of professional development is necessary and advisable, including some mandatory aspect for all lawyers, and a variety of mechanisms for delivering education throughout the province. OTLA does pose questions about the use of testing with such a model, cost issues, monitoring the system to maintain quality assurance, and the impact on the general practitioner, and expresses a reluctance to have the Law Society oversee the legal courses offered by groups like OTLA.

49. With respect to Model Two OTLA's comments include the view that focused reviews would help poor performing lawyers and those with multiple complaints, particularly if done in conjunction with LPIC. OTLA "supports a focused practice review for clearly identified lawyers who are failing to meet the minimum standards required." It expresses concern about random reviews, however, on the grounds that the vast majority of lawyers, already meeting required standards, would not be assisted by such a review and would be disrupted by the process, which would not raise the level of competence of the Bar as a whole. It also points out that focused practice review is reactive only. OTLA raises issues about the cost of such a model and about the expertise of those who would conduct reviews.

50. With respect to Model Three OTLA notes that it would be effective in large firm settings and in large population settings and would recognize the usual career paths that lawyers take to specializing. It raises a number of issues about the model, however, including how it will affect general practitioners, small town practitioners, and newly-called lawyers and whether it will reduce access to legal services, particularly in smaller communities.

51. With respect to Model Four OTLA's comments in favour of the model are that it will assist the public in finding lawyers who practise in certain areas and help lawyers develop throughout their careers, if the Law Society establishes a clear path to certification. It states that the current program is inadequate, particularly with respect to the certification of civil litigation specialists, and members of the public are not generally familiar with, nor do they seek out, specialists. As well, it notes that generalists are unable to meet the current guidelines, but lowering certification standards to allow more lawyers to qualify may not help the public. It is of the view there should be specialist certification for those who specialize in personal injury law.

Roti io' ta'-kier

52. Roti io' ta'-kier is a committee made up of Aboriginal lawyers, academics, law students and community members from across Ontario, which advises the Law Society on issues affecting Aboriginal peoples.

53. As a preamble to its comments on the models Roti io' ta'-kier emphasizes its view that, whatever measures of competence and quality are undertaken, care be taken to avoid subjective measurements that are fraught with cultural bias, resulting in discrimination when applied. It outlines what it considers the Law Society should do to avoid these pitfalls in implementing the competence mandate.

54. With respect to Model One Roti io' ta'-kier views the use of CLE, "whether mandatory, voluntary or a hybrid approach, as one piece of an appropriate integrated model of measuring and maintaining competence in the profession". The issues it raises about the model focus on the selection of courses to be developed and offered, which courses become mandatory, whether or not they will be relevant to Aboriginal lawyers' practices and work environments, and whether they will be accessible.

55. With respect to Model Two, Roti io' ta'-kier endorses both focused and random practice review provided certain concerns are met. It states that "the addition of random practice review will broaden the use of practice review as a tool which monitors competency across the profession. Applied on a truly random basis, this model is an appropriate part of an integrated approach to competency. The concerns surrounding these review methods focus on the fairness of reviews...Regardless of whether it is a random or focussed review, the thresholds applied must be fairly applied to those regardless of the size, location or nature of practice."

56. Roti io' ta'-kier opposes Model Three on the basis that it "does not, in any way, serve the interest of Aboriginal lawyers practising in smaller communities." In such communities they must provide a very broad range of services, as there are few lawyers in each community and not enough work of one type to permit specialization. Roti io' ta'-kier adds that limited licensing may also lead to further marginalisation of Aboriginal lawyers.

57. With respect to Model Four Roti io' ta'-kier does not envision that Aboriginal lawyers in any significant number would benefit from such a model although it can see the potential for some members, with more specialized practices, to pursue certification. The model must be accessible and not cost prohibitive. It does, however, raise some concern that the model could create a two-tiered system of accreditation.

B) TEXT OF SUBMISSIONS

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

(1) Copy of Implementing the Law Society's Competence Mandate - A Consultation Document (Approved by Convocation: March 30, 2000). (TAB 1)

(2) Copy of Law Society of Upper Canada, Competence Consultation Document, Membership Survey 2000 - Summary of Results (Quantitative Report) Strategic Communications Inc., July 2000. (TAB 2)

(3) Copy of Law Society of Upper Canada, Competence Consultation Document, Membership Survey 2000, Quantitative Report, Strategic Communications Inc. November 2000. (TAB 3)

(4) Copy of Perceptions, Attitudes, and Opinions of the Competence Mandate Report on Focus Group Research for the Law Society of Upper Canada. (TAB 5)

REPORT OF THE PROFESSIONAL REGULATION COMMITTEE

Mr. MacKenzie presented the Report of the Professional Regulation Committee for decision by Convocation.

Professional Regulation Committee
December 7, 2000 and January 11, 2001

Report to Convocation [1]

Purpose of Report: Decision and Information

Prepared by the Policy Secretariat

[1] Also includes item deferred from December 2000 Convocation

TABLE OF CONTENTS

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on December 7, 2000 and January 11, 2001. In attendance on December 7 (with members of the Equity and Aboriginal Issues Committee) were:

Gavin MacKenzie (Chair)

Larry Banack (Vice-Chair)

Andrew Coffey
Laura Legge

Staff: Janet Brooks, Lesley Cameron, Zelia Pereira, Elliot Spears, Richard Tinsley and Jim Varro.

In attendance on January 11 were:

Gavin MacKenzie (Chair)

Larry Banack (Vice-Chairs)
Niels Ortved

Gordon Bobesich
Andrew Coffey
Carole Curtis
Patrick Furlong
Ross Murray
Robert Topp

Staff: Janet Brooks, Vivian Kanargelidis, Zelia Pereira, Felecia Smith, Elliot Spears, Richard Tinsley, Jim Varro and Jim Yakimovich.

2. This report contains policy reports on

- amendments to By-Law 21 respecting the role of the Proceedings Authorization Committee in disclosure of information to law enforcement authorities (originally reported as a matter from the Committee's October 5 meeting),
- confidentiality issues relating to the office of the Discrimination and Harassment Counsel (December 7 meeting), and
- a new by-law dealing with lawyers' unclaimed trust funds (January 11 meeting),

and information reports on

- file and caseload management in the resolution and compliance, investigations and discipline departments,
- discussion of suggested changes to the format of the *Ontario Lawyers Gazette* discipline digests, and
- three additional issues upon which the Committee expects to report over the next six months.

I. POLICY
AMENDMENTS TO BY-LAW 21 RESPECTING THE FUNCTION OF THE PROCEEDINGS AUTHORIZATION COMMITTEE IN DISCLOSURE OF INFORMATION TO LAW ENFORCEMENT AUTHORITIES
(Originally report October, 2000; deferred from December 2000)

A. INTRODUCTION AND BACKGROUND

3. At the request of the chair of the Committee, following discussion at a meeting of the Proceedings Authorization Committee ("PAC"), the Committee considered whether PAC should be the entity to review and determine requests for Society disclosure of information to law enforcement authorities.

4. As a result of the February 1999 amendments, the *Law Society Act* ("the Act") in section 49.13[2] provides for

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[2]The provisions of sections 49.12 and 49.13 read as follows:

Confidentiality

49.12 (1) A bencher, officer, employee, agent or representative of the Society shall not disclose any information that comes to his or her knowledge as a result of an audit, investigation, review, search, seizure or proceeding under this Part.

Exceptions

(2) Subsection (1) does not prohibit,

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

(g) disclosure required in connection with a proceeding under this Act;

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

(i) disclosure by a person to his or her counsel; or

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

Testimony

(3) A person to whom subsection (1) applies shall not be required in any proceeding, except a proceeding under this Act, to give testimony or produce any document with respect to information that the person is prohibited from disclosing under subsection (1).

Disclosure to public authorities

49.13 (1) The Society may apply to the Ontario Court (General Division) for an order authorizing the disclosure to a public authority of any information that a bencher, officer, employee, agent or representative of the Society would otherwise be prohibited from disclosing under section 49.12.

Restrictions

(2) The court shall not make an order under this section if the information sought to be disclosed came to the knowledge of the Society as a result of,

(a) the making of an oral or written statement by a person in the course of the audit, investigation, review, search, seizure or proceeding that may tend to criminate the person or establish the person's liability to civil proceedings;

(b) the making of an oral or written statement disclosing matters that the court determines to be subject to solicitor-client privilege; or

(c) the examination of a document that the court determines to be subject to solicitor-client privilege.

Documents and other things

a scheme for disclosure of information to such authorities, described as a "public authority". In brief, the Society must apply to the court for an order for disclosure, and the court may make an order, subject to certain restrictions defined in subsection 49.13(2).

5. Prior to February 1999, the Act was silent on disclosure of information to public authorities. The practice, however, was to refer matters of this nature to the then Discipline Authorization Committee, which would determine the matter pursuant to a policy approved by Convocation in 1993 (please see Appendix 1). The 1993 policy affirmed a policy that had previously been adopted by Convocation in 1989.

6. The PAC by-law (By-Law 21, attached at Appendix 2) does not specifically provide for this function for the PAC. The question for the Committee was, given the process provided in the Act, whether PAC or some other entity or individual was the appropriate body to which requests for disclosure, emanating either from within or outside of the Law Society, should be referred for determination of whether the Society should bring an application to the court.

B. THE COMMITTEE'S VIEWS

7. The Committee concluded in its discussions on this issue in September and October that the PAC would be the appropriate entity for determining whether an application should be made to the courts for disclosure of information to a public authority, for the following reasons:

- the PAC, since the amendments to the Act, has assumed responsibility for considering these matters and has gained some familiarity with the issues that arise;
- the PAC is the successor to the Discipline Authorization Committee, to which was entrusted review of these matters; using that committee for this review process worked well and achieved what the policy described above was designed to achieve;
- having a committee of benchers is preferable to having one bencher (for example the chair of the PAC) or the Secretary, make decisions in this respect.

Amendments to By-Law 21

8. As noted above, By-Law 21 - Proceedings Authorization Committee, does not provide for the function of determining whether an application should be made to the court for disclosure of information to public authorities. Accordingly, if the Committee's proposal is accepted by Convocation, amendments will be required to By-Law 21 to establish the decision making authority of the PAC for this purpose, and to set out a process for determining in what circumstances an application should be made to the court.

9. Amendments to the by-law reflecting the above are included in a motion appearing in the next portion of this section of the report. The process in new section 14.1 of the by-law includes:

- a quorum requirement for a decision, which is the requirement otherwise applicable to the PAC;
- factors to be considered when making a determination for an application, which have been taken from the 1993 policy on disclosure of information to the police.

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(3) An order under this section that authorizes the disclosure of information may also authorize the delivery of documents or other things that are in the Society's possession and that relate to the information.

No appeal

(4) An order of the court on an application under this section is not subject to appeal.

C. DECISION FOR CONVOCATION

10. Convocation is requested to:

a. Approve the Committee's proposal that the Proceedings Authorization Committee ("PAC") perform the function of determining whether information should be disclosed to a public authority under section 49.13 of the Act, or make such other determination in this respect as Convocation deems appropriate;

b. If approving the above, make the required amendments to By-Law 21. The following motion sets out the proposed amendments to the by-law:

THE LAW SOCIETY OF UPPER CANADA

BY-LAW 21
[PROCEEDINGS AUTHORIZATION COMMITTEE]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON JANUARY 25, 2001

MOVED BY

SECONDED BY

THAT By-Law 21 made by Convocation on January 28, 1999 and amended by Convocation on February 19, 1999, March 26, 1999 and May 28, 1999 be further amended as follows:

1. Section 4 of the By-Law is revoked and the following substituted:

Function of Committee
4. It is the function of the Committee,

(a) to review all matters referred to it in accordance with this By-Law or any other by-law and, in respect of each matter, to determine whether any action mentioned in subsection 9 (1) should be taken; and

(b) to determine, in any given case, whether the Society should apply to the Superior Court of Justice for an order under section 49.13 of the Act.

2. The By-Law is amended by adding immediately preceding section 5 the heading "REVIEW OF MATTERS REFERRED TO COMMITTEE".

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

APPLICATION FOR DISCLOSURE ORDER

Application by secretary
14.1 (1) On application by the Secretary, the Committee shall determine whether the Society should apply to the Superior Court of Justice for an order under section 49.13 of the Act.

Quorum of Committee

(2) Any two members of the Committee constitute a quorum for the purposes of making the determination under subsection (1).

Factors to be considered

(3) In making the determination under subsection (1), the Committee shall give primary consideration to the extent to which disclosure of information is necessary in order to protect the public and further the administration of justice.

Application of certain sections

(4) Sections 6, 7, 11, 12 and 13 apply, with necessary modifications, to the making of a determination under subsection (1).

4. The French version of the By-Law is revoked.

ISSUES CONCERNING CONFIDENTIALITY IN THE OFFICE OF THE DISCRIMINATION AND HARASSMENT COUNSEL

Joint Meeting of the Professional Regulation and Equity and Aboriginal Issues Committees

A. INTRODUCTION AND BACKGROUND

11. An issue was raised with the Committee last year through Charles Smith, the Law Society's Equity Advisor, about the need to address confidentiality of information in the office of the Discrimination and Harassment Counsel ("DHC").

12. The DHC was established by Convocation in 1998 through adoption of the Report of the ADR Systems Design Team.[3] The DHC is funded by the Law Society, and provides an arm's length service to individuals who have complaints about discrimination and harassment by lawyers. The service is promoted as a confidential service. Attached at Appendix 3 is a notice published in the *Ontario Reports* that describes the office and the services it provides.

13. The current DHC, Mary Teresa Devlin, who attended the meeting, is a lawyer and is therefore bound by the obligations in the Society's *Rules of Professional Conduct* (the "Rules"), including the obligation to report to the Society misconduct on the part of another lawyer. The obligations in the reporting rule, rule 6.01(3)[4], are

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[3]See Appendix 4 for excerpts from the report dealing with the establishment of the DHC, which was described in terms of an ombudsman's office.

[4]A lawyer shall report to the Society, unless to do so would be unlawful or would involve a breach of solicitor-client privilege,

(a) the misappropriation or misapplication of trust monies,

(b) the abandonment of a law practice,

(c) participation in serious criminal activity related to a lawyer's practice,

(d) the mental instability of a lawyer of such a serious nature that the lawyer's clients are likely to be severely prejudiced, and

modified somewhat for the office of the DHC by the last paragraph of commentary following the rule. That commentary reads:

> The Society also recognizes that communications with the harassment and discrimination counsel appointed to assist in resolving complaints of discrimination or harassment against lawyers must generally remain confidential. Therefore, the harassment and discrimination counsel will not be called by the Society or by any investigative committee to testify at any conduct, capacity, or competence hearing without the consent of the person from whom the information was received. Notwithstanding the above, a lawyer serving as harassment and discrimination counsel has an ethical obligation to report to the Society upon learning that a lawyer is engaging in or may in the future engage in serious misconduct or criminal activity related to the lawyer's practice.

14. This commentary, based on commentary in the Rules adopted by Convocation in February 1998 dealing with lawyer counsellors for such organizations as OBAP and LINK, was added after consultation with the then Equity Committee and Charles Smith in the context of the review of the Rules. That review resulted in the adoption of new Rules in June 2000, effective November 2000. The new commentary addressed the issues of confidentiality in the office of the DHC with respect to Law Society discipline matters.

15. From the time the current DHC took office, there have been concerns about the duty to report and the tension between that obligation and the need to maintain confidentiality of the information received. Because of the close linkage between the Society's equity initiatives in the area of discrimination and harassment through the Equity and Aboriginal Issues Committee and the office of the DHC, a joint meeting of this committee and the Committee was held on December 7, 2000, following earlier discussions at the Committee, to address the issues of confidentiality.

16. The issues fall within three categories:

a. Information received by the DHC as related to Law Society proceedings;
b. Information received by the DHC as related to external (to the Society) proceedings; and
c. The duty of the DHC as a lawyer to report misconduct on the part of another lawyer.

17. The Committees had the benefit of research completed by Elliot Spears on the issues.

B. DISCUSSION OF THE ISSUES

The Need for Confidentiality in the Office of the DHC

18. In order for the DHC to fulfill his or her role, it is necessary that the DHC give an assurance of confidentiality to the users of the services. This is to encourage those who would otherwise not access the service or who choose not to complain to the Society about the conduct of a lawyer, for various reasons, to seek the DHC's advice and counsel on issues relating to discrimination and harassment.

19. The Society has recognized the importance of the DHC preserving secrecy with respect to information that comes to his or her knowledge in fulfilling the duties of the office. However, apart from the commentary in the Rules, there was some concern about how this could be accomplished in those circumstances where the information received by the DHC in the course of his or her duties may be sought, for example, by third parties.

(e) any other situation where a lawyer's clients are likely to be severely prejudiced.

20. The Committees examined the *Law Society Act* ("the Act") as a starting point. As the office is currently structured, unlike agents and representatives of the Society (among others), the DHC is not subject to the duty of confidentiality contained in the Act and is not protected from any requirement to give testimony or produce documents in "non-Society" proceedings.[5] Although the DHC is an agent or representative of the Society to whom the duty of confidentiality and the protection provision apply, the DHC's information is the not the kind of information in respect of which the duty of confidentiality described in the Act and the immunity provision apply. Specifically, the DHC does not obtain information as the result of any investigation under Part II of the Act, which must be commenced by the Secretary. In such cases, the Secretary initiates the information gathering with respect to the investigation. The Secretary does not do so with respect to the DHC. The DHC's duties expressly exclude the conduct of investigations.

Information Received by the DHC As Related to Law Society Proceedings

21. Subsection 49.12(2) makes it clear that even if the DHC were subject to the duty of confidentiality and could enjoy the benefit of the protection provision in the Act, without more, the duty of confidentiality and the protection provision would not ensure that information obtained by the DHC in the fulfilment of his or duties was "inadmissible" in Society proceedings.

22. The Committees noted rules adopted by the Law Society of Alberta and the Law Society of British Columbia, both of which have offices similar to the DHC. These rules, the equivalent of our by-laws, have the effect of

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[5]The Act prohibits agents and representatives of the Society from disclosing information the comes to their knowledge as a result of an audit, investigation, review, search, seizure or proceeding under Part II of the Act. The Act also protects the agents and representatives from being required in non-Society proceedings to give testimony or produce documents with respect to information that they are prohibited from disclosing. The duty of confidentiality is subject to exceptions. The relevant subsections are 49.12(1) through (3), which state:

(1) A bencher, officer, employee, agent or representative of the Society shall not disclose any information that comes to his or her knowledge as a result of an audit, investigation, review, search, seizure or proceeding under this Part.

(2) Subsection (1) does not prohibit,

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

(b) disclosure required in connection with a proceeding under this Act;

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

(d) disclosure by a person to his or her counsel; or

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

(3) A person to whom subsection (1) applies shall not be required in any proceeding, except a proceeding under this Act, to give testimony or produce any document with respect to information that the person is prohibited from disclosing under subsection (1).

protecting against the use of information obtained by the counsel in those jurisdictions in proceedings at the respective law societies.[6]

23. The Committees determined that to protect information obtained by the DHC in fulfilment of his or her duties from being used in Society proceedings,

a. a by-law should be made establishing the office of the DHC, providing for the appointment of the DHC by Convocation, specifying the duties of the DHC and requiring the DHC to maintain the secrecy of information obtained in the fulfilment of his or her duties[7], and

b. a rule of practice and procedure should be made dealing with the admissibility in evidence in named Society proceedings of information obtained the by the DHC in the fulfilment of his or her duties.[8]

24. A draft by-law and rule appear at pages 20 and 23 respectively of this report.

25. The by-law deals specifically with the issue of confidentiality in section 6, and provides in subsection 6(2) that the by-law supercedes any requirement in the *Rules of Professional Conduct* that may require the DHC to disclose information to the Society as a matter of reporting misconduct. While this particular issue is the

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[6]British Columbia's Rule 4-33(4) reads:

> In a proceedings under this Part of Part 2,
>
> (a) no one is permitted to give evidence about any discussion or other communication with the Ombudsperson in the capacity, and
>
> (b) no record can be admitted in evidence or disclosed under rule 4-025 or 4-26 if ti was produced
>
> (i) by or under the direction of the Ombudsperson in that capacity, or
>
> (ii) by another person while receiving or seeking assistance from the Ombudsperson , unless the record would otherwise be admissible or subject to disclosure under rule 4-25 or 4-26.

Alberta's Rule 81.1(3) reads:

> Communications made for the purpose of resolving disputes according to the Ombudsman's mandate are confidential. Neither the communications nor the information contained therein may be disclosed in any proceeding under Part 3 without the consent of the parties to the dispute.

[7]The Society's by-law-making authority in subsection 62(0.1), paragraph 1 of the Act would permit this as a matter "relating to the affairs of the Society".

[8]The Society's authority for making such a rule is found in clause 61.2(2)(e), read together with subsection 61.2(1). They state:

> 61.2 (1) Convocation may make rules of practice and procedure applicable to proceedings before the Hearing Panel and the Appeal Panel and to the making of orders under sections 46, 47, 48, 49 and 49.1.
>
> (2) Without limiting the generality of subsection (1), Convocation may make rules of practice and procedure,
>
> (e) governing the admissibility of evidence in proceedings, including the admissibility in evidence of documents and other information disclosed under this Act or under the regulations, by-laws or rules;

subject of discussion later in this report, as a drafting matter, the Committees determined that the by-law should reflect the proposal upon which the Committees agreed that there be no duty on the DHC to report misconduct.

26. The rule of practice and procedure relevant to the DHC is an amendment to current Rule 11 on evidence.[9] The amendment provides that information obtained by the DHC in the course of his or her duties cannot be used and is inadmissible in a Law Society proceeding.

27. The Committees discussed the possibility of a member's challenge to the operation of the rule which a member may see as contrary to *Charter* rights, if the member believes that the DHC has information relevant to the matter before the Society.[10]

28. The Committees were of the view that there was uncertainty around the issue, and determined that, notwithstanding the possibility of such evidentiary challenges, the rule should be adopted to protect the confidentiality of the DHC's information in Law Society proceedings.

Information Received by the DHC as Related to External (to the Society) Proceedings

29. As noted above, neither the duty of confidentiality, nor the immunity from giving testimony or producing documents, contained the Act, applies to the DHC. Currently, information obtained by the DHC in the fulfilment of his or her duties is not protected by statute from being used in proceedings outside the Society.

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[9] Rules of Evidence

11.01 (1) The rules of evidence applicable in civil proceedings apply in proceedings under the Act.

(2) Notwithstanding subrule (1), with leave of the tribunal, an affidavit or statutory declaration of any person is admissible in evidence as proof, in the absence of evidence to the contrary, of the statements made therein.

(3) An affidavit for use in a proceeding may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit but where, in the opinion of the tribunal, better evidence should be adduced through direct evidence of a witness, the tribunal may require the party to file or call such direct evidence and strike out the evidence filed.

Cross-Examination before Official Examiner

11.02 (1) A tribunal may order, on its own motion or on the motion of a party, that the cross-examination of the deponent of an affidavit or statutory declaration be conducted before an official examiner.

(2) Where the cross-examination of the deponent of an affidavit or statutory declaration is conducted before an official examiner, it shall be conducted in a manner analogous to the procedure under the *Rules of Civil Procedure* and, where necessary, the parties may seek direction from the tribunal.

Documentary Evidence

11.03 In addition to providing a copy to the other party, any party tendering a document as evidence shall provide to the Clerk of the tribunal,

(a) four copies of each document where the hearing is before a three member Hearing Panel; or,

(b) two copies of each document where the hearing is before a one member Hearing Panel, the HMT, or the AMT.

[10] Assuming that a Law Society proceeding involves a member's or student member's right to life, liberty or security of the person, an absolute bar against using or admitting into evidence information obtained by the DHC may not be considered to be in accord with the principles of fundamental justice.

In such proceedings, the DHC would be required to rely on common law principles to prevent the disclosure or admissibility in evidence of the information.

30. The Committees considered that provision could be made in the by-law discussed above requiring the DHC to maintain the secrecy of information obtained by him or her in the fulfilment of his or her duties, and that that may assist the DHC to resist the disclosure of the information in non-Society proceedings.

31. The Committees, however, felt that the best protection that could be provided to the DHC would be to extend the duty of confidentiality and the protection from any requirement to give testimony or produce documents in the Act to the DHC. This would require an amendment to the Act. Such protection could not be achieved through a by-law as the only by-law making power that could be relied on to make such a by-law is limited in the scope of its application to the Society (i.e. the benchers, officers, employees, agents and other representatives of the Society and its members).

32. The Committees were mindful of the issues that surround amendments to the Act and at this stage simply wish to propose that if or when the Society decides to approach the Attorney General with respect to amendments to the Act for other reasons, this issue be included in the discussions. The Committees also recognized that if the information of the DHC were sought by a third party in proceedings that were a matter of federal jurisdiction (e.g. criminal proceedings), a provincial statute would not assist the DHC by way of protecting the information. However, the Committees did not think that these were reasons for not requesting an amendment to the Act, so that protection, as far as it would extend, could be provided to the DHC.

33. In the interests of doing all that can be done to protect the confidentiality of information obtained by the DHC, the Committees propose that this matter be referred to the Government and Public Affairs Committee for its consideration.

The Duty of the DHC as a Lawyer to Report Misconduct on the Part of Another Lawyer

34. As discussed above, commentary was added to the rule 6.01(3) to deal with information about a lawyer or lawyers that the DHC may receive in the course of his or her duties from an individual who has sought the services of the DHC.

35. The Committees recognized the importance of confidentiality as a key component of the DHC's office, central to its success and the purpose for which it was designed. The Committees had the benefit of input from the current DHC, Mary Teresa Devlin, on the issue. In responding to initial discussions on the issue, Ms. Devlin offered the following comments:

> ... an exemption [from disclosing information that comes to the DHC's knowledge as a result of the performance of DHC duties] is a critical component of the Program's success since a duty to report will have a "chilling effect" on callers and will effectively ruin the credibility of the Program".

36. Ms. Devlin advised the Committees that she works as the DHC on the premise that the service is completely confidential and that she need not report matters to the Society. She indicated that to date, this has not presented a problem for her.

37. The Committees discussed the issue of the duty to report at length. Views were expressed both in favour of and against requiring the DHC as a lawyer to observe the reporting requirement by which lawyers generally are bound. The Committees also discussed a modified reporting requirement. The Committees recognized that

the issue only arises because the current DHC is a lawyer, and that a non-lawyer incumbent would not be faced with the same ethical dilemma.[11]

38. The Committees determined that there were four main options with respect to the reporting requirement:

a. Include nothing in the Rules or the by-law with respect to a reporting requirement, in which case the DHC would be subject to the Rules in the same way as other lawyers;
b. Include an exemption for the DHC respecting reporting matters related to discrimination and harassment only;
c. Include a complete exemption from the reporting requirement, where the DHC would urge or encourage the complainant to contact the Society to file a complaint, or contact other appropriate authorities; or
d. Include a complete exemption from the reporting requirement, on the basis that the DHC's relationship with the complainant is akin to a solicitor and client relationship, where, if a matter is privileged, the lawyer is prevented from reporting a matter of misconduct to the Society, as reflected in rule 6.01(3).

39. The following points were raised in the discussion:

- with respect to the "carve out" for matters concerning discrimination and harassment in b. above, the problem with this approach is that it appears that conduct is graded, and that may send the wrong message to the public;
- the office of the DHC may be affected in a negative way if the DHC was obliged to explain the reporting duties every time the DHC met or spoke with a complainant; in particular, the complainant may be confused and less likely to be completely frank in discussing matters with the DHC;
- if there was no reporting requirement, and the DHC learned of ongoing misappropriation, for example, other members of the public could be severely disadvantaged by the misconduct of the lawyer; it may be possible to accommodate the non-disclosure of the source for defalcation issues, as the Society's audit teams could commence investigation immediately armed only with the name of the lawyer;
- if the DHC is seen as connected with the Society, even though the office is arm's length from the Society, the Society may be exposed to liability; this may occur where a lawyer engages in a series of client sexual assaults, for example, that remain unreported, but a particular victim learns of the lawyer's past conduct with the other victims, and that the Society (as including the DHC) did nothing to address it;
- the Society will risk destroying the essence of the office of the DHC if confidentiality is not guaranteed; it is in the interests of the public that the DHC maintain the confidentiality of information, so that the DHC can encourage those who access the service to take action with respect to the matter and provide options for dealing with the issues; without confidentiality, this will not happen.

40. After significant discussion on the issue, the Committees agreed that inasmuch as the Society should do all it can to protect the confidentiality of the information obtained by the DHC, the approach outlined in paragraph 38d. above should be adopted. The proposed by-law, as discussed in paragraph 25 above, accomplishes this through the language of section 6. Accordingly, it is proposed that the existing commentary to rule 6.01(3) dealing with the office of the DHC, being the last paragraph of the commentary under that rule, be deleted. That paragraph reads:

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[11]The Committees noted, however, that if the DHC were a member of certain other professions, there would be a duty to report some matters to law enforcement authorities notwithstanding the confidentiality of the service.

The Society also recognizes that communications with the harassment and discrimination counsel appointed to assist in resolving complaints of discrimination or harassment against lawyers must generally remain confidential. Therefore, the harassment and discrimination counsel will not be called by the Society or by any investigative committee to testify at any conduct, capacity, or competence hearing without the consent of the person from whom the information was received. Notwithstanding the above, a lawyer serving as harassment and discrimination counsel has an ethical obligation to report to the Society upon learning that a lawyer is engaging in or may in the future engage in serious misconduct or criminal activity related to the lawyer's practice.

C. SUMMARY OF THE COMMITTEES' PROPOSALS

41. The Committees propose that:

a. A by-law should be made establishing the office of the DHC, providing for the appointment of the DHC by Convocation, specifying the duties of the DHC and requiring the DHC to maintain the secrecy of information obtained in the fulfilment of his or her duties. Draft By-Law 31 appears on page 20,
b. With respect to Law Society proceedings, a rule of practice and procedure should be made dealing with the admissibility in evidence in Society proceedings of information obtained the by the DHC in the fulfilment of his or her duties. Draft rule 11.04(1) appears at page 23,
c. At the appropriate time, an amendment to the *Law Society Act* should be pursued to provide protection to information obtained by the DHC in the fulfilment of his or her duties from being used in proceedings outside the Society. At present, the matter should be referred to the Government and Public Affairs Committee for its consideration,
d. Amendments should be made to rule 6.01(3) of the *Rules of Professional Conduct* to delete the commentary dealing with the DHC's reporting requirements.

D. DECISION FOR CONVOCATION

42. Convocation is requested to:

a. make By-Law 31 on the Discrimination and Harassment Counsel, as presented below or amended as Convocation deems appropriate;
b. make rule 11.04(1) of the Rules of Practice and Procedure, as presented below or amended as Convocation deems appropriate;
c. adopt the amendments to rule 6.01(3) of the *Rules of Professional Conduct* as described in paragraph 40, and
d. refer the issue of amendments to the *Law Society Act* to protect the confidentiality of information obtained by the DHC in proceedings external to the Society to the Government and Public Affairs Committee for consideration.

43. If Convocation approves the by-law and rule of practice and procedure, appropriate motions with respect to these items appear below, together with the text of the by-law and rule.

THE LAW SOCIETY OF UPPER CANADA

BY-LAWS MADE UNDER
SUBSECTION 62 (0.1) OF THE *LAW SOCIETY ACT*

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON JANUARY 25, 2001

MOVED BY

SECONDED BY

THAT, pursuant to the authority contained in paragraph 1 of subsection 62 (0.1) of the *Law Society Act*, By-Law 31 [Discrimination and Harassment Counsel] be made as follows:

BY-LAW 31

DISCRIMINATION AND HARASSMENT COUNSEL

Appointment

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

Term of office

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

Appointment at pleasure

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

No appointment without recommendation

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

Vacancy in office

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

List of candidates

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

Additional candidates

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

Recommendations considered in absence of public

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

Application of s. 2

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

Function of Counsel

4. (1) It is the function of the Counsel,

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

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

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

No authority to conduct investigation

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

Access to information

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

Annual and semi-annual report to Committee

5. (1) The Counsel shall make a report to the committee,

(a) not later than January 31 in each year, upon the affairs of the Counsel during the period July 1 to December 31 of the immediately preceding year; and

(b) not later than September 1 in each year, upon the affairs of the Counsel during the period January 1 to June 30 of that year.

Report to Convocation

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

Confidentiality

6. (1) The Counsel shall not disclose,

(a) any information that comes to his or her knowledge as a result of the performance of his or her duties under clause 4 (1) (a); or

(b) any information that comes to his or her knowledge under subsection 4 (3) that a bencher, officer, employee, agent or representative of the Society is prohibited from disclosing under section 49.12.

Rules of Professional Conduct

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

Exceptions

(3) Subsection (1) does not prohibit,

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

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

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

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

THE LAW SOCIETY OF UPPER CANADA

RULES OF PRACTICE AND PROCEDURE
MADE UNDER SECTION 61.2 OF THE *LAW SOCIETY ACT*

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON JANUARY 25, 2001

MOVED BY

SECONDED BY

THAT Rule 11 [Evidence] of the Rules of Practice and Procedure made under section 61.2 of the *Law Society Act* be amended by adding the following rule:

Certain information not admissible

11.04 (1) Notwithstanding subrule 11.01 (1), information obtained by the Discrimination and Harassment Counsel as a result of the performance of his or her duties under clause 4 (1) (a) of By-Law 31 shall not be used and is inadmissible in a proceeding before the tribunal.

NEW BY-LAW ON UNCLAIMED TRUST FUNDS

A. INTRODUCTION AND BACKGROUND

44. Sections 59.6 through 59.14 of the *Law Society Act* (the "Act") provide a scheme for the Society's receipt, administration and payment to claimants of unclaimed trust funds. These sections of the Act appear at Appendix 5.

45. Unclaimed trust funds, according to the Act, are those funds held by a lawyer in trust where the owner of the funds cannot be located, or where the lawyer does not know to whom the funds should be paid. The Act permits members who hold unclaimed trust funds for a least two years to pay the money to the Law Society, pursuant to the by-laws. The money is to be held in trust by the Society in perpetuity for the purpose of satisfying the claims of those entitled to the money. The Act provides that a person may apply to the Society in accordance with the by-laws for payment of the money held in the Society's trust.

46. Subsection 59.7(4) requires the Society to apply to the court for a passing of the accounts of the trust established under the Act. Subsection 59.7(7) requires the Society to make its first application under subsection 59.7 (4) not later than two years after this section comes into force (i.e. by February 1, 2001). As it is not anticipated that any funds will be deposited in the trust before February 1, 2001, it is expected that the judge considering the application will simply set a date for the next passing, as provided in the Act.

47. By-law making authority in section 62 (0.1) of the Act provides as follows:

> Convocation may make by-laws,
>
> ...
>
> 37. Governing applications to pay trust money to the Society under section 59.6 and governing the making of and determination of claims under section 59.10;

48. The Committee reviewed a draft by-law prepared by Elliot Spears with respect to unclaimed trust funds. The Committee is proposing that Convocation adopt the by-law so that the Society can establish the trust, permit members to transfer funds to it and permit claimants to make application for payment of the funds. Until a by-law is adopted, the Society cannot deal with and administer a process with respect to unclaimed trust funds, as outlined in the Act. The 2001 Law Society budget includes an allocation for the establishment of the trust.

B. FEATURES OF THE BY-LAW

49. The draft by-law appears in this report following paragraph 53. The following is an overview of the main features of the by-law:

a. a member may make an application to transfer funds to the Society through completion of an application form (s. 1(1));
b. the member is required to provide certain information that will vary depending on whether the owner cannot be located (s. 1(2)) or the lawyer does not know to whom to pay the funds (s. 1(3));
c. the Secretary reviews and either approves or refuses the application (s. 2);
d. claimants are required to complete an application to the Society for payment of the funds (s. 4(1)) and must provide certain information in support of the application (s. 4(2));
e. the Secretary considers claims and shall either grant or deny the claim, or refer the claim to a committee of benchers appointed under section 6 of the by-law (s. 5(1));
f. the committee of benchers shall either grant or deny the claim (s. 8(1)) and its decision is final (s. 8(2)).

50. The forms described in the by-law are not prescribed, which will permit the Society, as it gains experience with the process, to adapt or modify the forms as necessary without the requirement for a by-law amendment. Draft forms appear at Appendix 6.

C. THE COMMITTEE'S PROPOSAL

51. The Committee agreed with the form and content of the by-law and believes that it reflects the scope and intent of the Act's scheme for unclaimed trust funds.

52. The Committee proposes that Convocation adopt the by-law.

D. DECISION FOR CONVOCATION

53. Convocation is requested to make By-Law 32 on Unclaimed Trust Funds in the form provided in the following motion or as amended as Convocation deems appropriate.

THE LAW SOCIETY OF UPPER CANADA

BY-LAWS MADE UNDER
SUBSECTION 62 (0.1) OF THE *LAW SOCIETY ACT*

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON JANUARY 25, 2001

MOVED BY

SECONDED BY

THAT, pursuant to the authority contained in paragraph 37 of subsection 62 (0.1) of the *Law Society Act*, By-Law 32 [Unclaimed Trust Funds] be made as follows:

BY-LAW 32

UNCLAIMED TRUST FUNDS

APPLICATION TO PAY MONEY TO SOCIETY

Application form

1. (1) A member who makes an application under subsection 59.6 (1) of the Act shall complete an application form provided by the Society.

Information: application based on clause 59.6 (1) (a)

(2) A member who makes an application under subsection 59.6 (1) of the Act based on circumstances described in clause 59.6 (1) (a) of the Act shall provide to the Society the following information:

1. The member's member number, address, telephone number, fax number and, if any, e-mail address.

2. If the member holds the money in trust together with one or more other persons, the name, member number, if applicable, and contact information of each of those persons.

3. The amount of the money.

4. The conditions, if any, subject to which the money is held is trust.

5. The name and last known address and telephone number, according to the member and each person who together with the member holds the money in trust, of each person who is entitled to the money or a part of the money.

6. The social insurance number, if known, of each individual who is, and the corporation number, if known, of each corporation that is, entitled to the money or a part of the money.

7. The date of birth, if known, of each individual who is entitled to the money or a part of the money.

8. If two or more persons are entitled to the money, the amount of the money to which each person is entitled, according to the financial records of the member and each person who together with the member holds the money in trust.

9. If a person who is entitled to the money is a corporation, information as to whether the corporation exists at the time of the application, according to the official records of the government of the jurisdiction in which the corporation was incorporated or continued.

10. If a person who is entitled to the money is a corporation that exists at the time of the application, the name and address of each director, officer and shareholder of the corporation, according to the official records of the government of the jurisdiction in which the corporation was incorporated or continued.

11. The name and last known address, according to the member and each person who together with the member holds the money in trust, of the person from whom the money was received.

12. The date on which the money was received.

13. The reasons for which the money was received.

14. The efforts made by the member and each person who together with the member holds the money in trust to locate each person entitled to the money.

15. Any other information that the Secretary may require.

Information: application based on clause 59.6 (1) (b)

(3) A member who makes an application under subsection 59.6 (1) of the Act based on circumstances described in clause 59.6 (1) (b) of the Act shall provide to the Society the information described in paragraphs 1 to 4 of subsection (2) and the following information:

1. The period of time for which the money has been held in trust.

2. The reasons why the member is unable to determine who is entitled to the money.

3. Any other information that the Secretary may require.

Supporting documents

(4) A member who makes an application under subsection 59.6 (1) of the Act shall provide to the Society copies of documents that are in the member's possession and control that may be required by the Secretary to support the information provided under subsection (2) or (3).

Certification

(5) A member who makes an application under subsection 59.6 (1) of the Act shall certify that all information provided under subsection (2) or (3) is correct to the best knowledge of the member.

Secretary's consideration of application

2. (1) The Secretary shall consider every application under subsection 59.6 (1) of the Act made in accordance with section 1 of this By-Law and, on the basis of the information provided under subsection 1 (2) or subsection 1 (3) of this By-Law and any documents provided under subsection 1 (4) of this By-Law, shall,

(a) if he or she is satisfied that the condition for making the application set out in clause 59.6 (1) (a) or (b) of the Act is met, approve the application; or

(b) if he or she is not satisfied that the condition for making the application set out in clause 59.6 (1) (a) or (b) of the Act is met, refuse to approve the application.

Application based on clause 59.6 (1) (a)

(2) If an application under subsection 59.6 (1) of the Act is based on circumstances described in clause 59.6 (1) (a) of the Act, in considering the application, the Secretary shall have regard to,

(a) what efforts the member has made to locate the person entitled to the money; and

(b) whether or not there is any reasonable prospect the person entitled to the money can be located.

Application based on clause 59.6 (1) (b)

(3) If an application under subsection 59.6 (1) of the Act is based on circumstances described in clause 59.6 (1) (b) of the Act, in considering the application, the Secretary shall have regard to the nature of trust in which the money was held and the circumstances in which the trust arose.

CLAIMS FOR PAYMENT OF MONEY

Interpretation: "claimant"

3. In section 4, "claimant" means a person who makes a claim under subsection 59.10 (1) of the Act.

Making claim

4. (1) A claimant shall complete a claim form provided by the Society.

Information

(2) A claimant shall provide to the Society the following information:

1. The claimant's name, address and telephone number.

2. If the claimant is a corporation, the claimant's corporation number.

3. The amount of the money that the claimant is claiming payment of.

4. The name of the member to whom the money was paid in trust and, if the money was paid to the member and one or more other persons for them together to hold the money in trust, the name of each of those other persons.

5. The last known address, according to the claimant, of the member to whom the money was paid in trust and, if the money was paid to the member and one or more other persons for them together to hold the money in trust, the last known address, according to the claimant, of each of those other persons.

6. The date on which the money was paid in trust to the member, or to the member and one or more other persons, or, if the money was paid in trust to the member, or to the member and one or more other persons, in two or more separate payments, the date of each separate payment.

7. The reason or reasons why the money was paid in trust to the member, or to the member and one or more other persons.

8. The reason or reasons why the claimant did not claim payment of the money from the member or the member and the person or persons who held the money in trust.

9. Any other information that the Secretary may require.

Supporting documents

(3) A claimant shall provide to the Society copies of documents that are in the claimant's possession and control that may be required by the Secretary to support the information provided under subsection (2).

Certification

(4) A claimant shall certify that all information provided under subsection (2) is correct to the best knowledge of the claimant.

Consideration of claim

5. (1) The Secretary shall consider every claim under subsection 59.10 (1) of the Act made in accordance with section 4 of this By-Law and, on the basis of the information provided under subsection 4 (2) of this By-Law and any documents provided under subsection 4 (3) of this By-Law, shall,

(a) grant the claim;

(b) deny the claim; or

(c) refer the claim to the committee of benchers appointed under section 6 of this By-Law.

Secretary grants or denies claim

(2) If the Secretary grants the claim under clause (1) (a) or denies the claim under clause (1) (b), subject to section 59.11 of the Act, the Secretary's disposition of the claim is final.

Committee of benchers

6. (1) Convocation shall appoint a committee of at least three benchers to consider claims under subsection 59.10 (1) of the Act that are referred by the Secretary under clause 5 (1) (c) of this By-Law.

Term of office

(2) A bencher appointed under subsection (1) shall hold office until his or her successor is appointed.

Consideration of claim by committee of benchers: quorum

7. (1) Three benchers who are members of the committee appointed under section 6 constitute a quorum for the purposes of considering a claim under subsection 59.10 (1) of the Act that is referred by the Secretary under clause 5 (1) (c) of this By-Law.

Procedure

(2) The procedure applicable to the consideration by the committee appointed under section 6 of a claim under subsection 59.10 (1) of the Act that is referred by the Secretary under clause 5 (1) (c) of this By-Law shall be determined by the committee.

Consideration of claim by committee of benchers

8. (1) The committee appointed under section 6 shall consider every claim under subsection 59.10 (1) of the Act that is referred by the Secretary under clause 5 (1) (c) of this By-Law and shall,

(a) grant the claim; or

(b) deny the claim.

Dispositions final

(2) Subject to section 59.11 of the Act, the committee's disposition of a claim is final.

FORMER MEMBERS

9. This By-Law also applies, with necessary modifications, in respect of former members.

II. INFORMATION

REPORT ON COMPLAINTS, INVESTIGATIONS AND DISCIPLINE FILE MANAGEMENT AND CASELOADS

54. Secretary, Richard Tinsley and the Manager of Investigations, James Yakimovich reported to the Committee on caseload management in the Resolution and Compliance, Investigations, and Discipline Departments. The reports appear at Appendix 7. These reports are prepared monthly for review by the Committee as part of its

monitoring function respecting file management. The Committee receives general information and statistics on file management and caseloads in the departments noted above.[12]

55. addition to discussion of the file management and caseload information, staff also provided an update on hiring initiatives in the Investigations and Discipline departments. The information, in addition to that appearing at page 5 of James Yakimovich's memorandum at Appendix 7, included the following:

- the complement of Society discipline counsel recommended by the report of The Honourable W. David Griffiths has now been reached, with the hiring of four new discipline counsel and the conversion of one contract counsel to permanent status. The new counsel will commence their responsibilities at the latest by the end of February 2001;
- interviews for candidates for the two new counsel positions in Investigations, approved in the budget for 2001, are at the second stage, and it is anticipated that decisions will be made by the end of January 2001 on these hirings;
- the job description for the new position to deal with the resolution and compliance component of Investigations work has been drafted and the process of advertising for the position will now begin.

DISCUSSION OF SUGGESTED CHANGES TO THE FORM OF DISCIPLINE DIGESTS IN THE *ONTARIO LAWYERS GAZETTE* ("OLG")

56. Committee discussed an issue referred to the Committee, as a request for guidance, by bencher Greg Mulligan of the OLG editorial board that originated with bencher Gordon Bobesich. It involved a suggestion to include the names of the members of a hearing panel in the discipline digests that appear in the OLG and discontinue publishing the name of the Society's discipline counsel in the digests. The rationale for the suggested change is that publishing the names of hearing panel members would assist lawyers who represent members before hearing panels in preparing for hearings.

57. rently, the digests include the name of the member, a brief description of the matter, the finding and penalty, and the name of counsel for the Society and the member.

58. er discussion, where a number of opinions were expressed both for and against the change, the majority of Committee members determined that no change should be made to the current format of the digests or any information with respect to hearing panel members, on the basis that:

there appeared to be little utility to adding the names of panel members,

- the identity of panel members is available through the Law Society, as are the reasons, where provided, and decisions of hearing panels which identify panel members,
- the digest is not in the nature of a headnote of a reported decision of a court or tribunal as it does not include any information about the hearing panel members' consideration of the issues or even whether there was a dissent, and
- Society's discipline counsel should continue to be the person with whom those who inquire about a matter should speak, and publication of counsel's name serves that end.

OUTSTANDING ISSUES AT COMMITTEE

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[12]The Chair of the Committee, as a member of the Proceedings Authorization Committee, is not a member of the Hearing Panel and accordingly does not and cannot have adjudicative responsibilities. Information received by the Committee, as reflected in the reports appended to this report, does not itemize specific cases.

59. Committee continues to consider a number of issues in connection with the regulation and professional conduct of members. The following are three items upon which the Committee anticipates reporting within the next six months:

- Issues Respecting the New *Rules of Professional Conduct*

  On November 1, 2000, the new *Rules of Professional Conduct* came into force. From the time of adoption of the new Rules by Convocation in June 2000 through to the end of last year, issues have arisen respecting the text of some of the Rules. In particular, a number of issues were raised at the two CLE sessions on the Rules held in October and November 2000, at which over 1000 members attended (and at meetings of local bar associations at which presentations on the new Rules were made). Other comments were received from individual members in correspondence to the Committee's chair or Advisory Services and from staff at the Society who use the Rules on a regular basis. The Committee determined that, in light of its mandate to consider issues respecting the Rules, a working group of the Committee and others should be formed, mirroring as much as possible the membership of the Task Force on Review of the Rules of Professional Conduct as a means of providing continuity. The working group will report from time to time to the Committee with proposals for resolution of the issues raised.

- Guidelines for Members on Taking Shares for Fees or Equity Interests in Clients

  Discussion of this item began at the Committee's November 2000 meeting. At its January meeting, the Committee reviewed revised draft guidelines prepared by Advisory Services and discussed the application of the rules of conduct on conflicts of interest (rule 2.04) and whether rule 2.06 on doing business with a client is entirely applicable in an arrangement whereby a lawyer accepts shares in payment for fees. While Advisory Services will continue to provide guidance to members on the conflicts issues in this area, the Committee determined that the issue of the application of rule 2.06, given the possibility of the need for amendments to the rule, should be considered in the rule review discussed above.

- New By-Law on Complaints Resolution Commissioner

  Under the *Law Society Act*, Convocation is required to appoint a Complaints Resolution Commissioner (CRC) in accordance with the regulations. The Act indicates that the details of the functions of the CRC are to be set out in the by-laws, in particular, the resolution and review of complaints. Consideration of this item began at the Committee's November 2000 meeting. The Committee at that time reviewed a draft by-law outlining the functions and the responsibilities of the Complaints Resolution Commissioner. The discussion led to instructions to staff that the by-law be redrafted to address some issues raised. It is anticipated that the revised draft will be prepared for the Committee's March 2001 meeting.

APPENDIX 1

1993 POLICY OF CONVOCATION ON
DISCLOSURE OF INFORMATION TO POLICE

APPENDIX 2

BY-LAW 21

Made: January 28, 1999
Amended:

February 19, 1999
March 26, 1999
May 28, 1999

PROCEEDINGS AUTHORIZATION COMMITTEE

Definitions
1. In this By-Law,

"Committee" means the Proceedings Authorization Committee;

"outside counsel" means a person appointed under section 49.53 of the Act to represent the Society in any proceeding under Part II of the Act before the Hearing Panel, the Appeal Panel or a court that concerns a bencher or employee of the Society;

"outside investigator" means a person appointed under subsection 49.5 (2) of the Act to conduct an investigation of the conduct or capacity of a bencher or employee of the Society.

"outside reviewer" means a person appointed under subsection 49.6 (2) of the Act to conduct a review of a bencher's practice.

Establishment of Proceedings Authorization Committee
2. (1) There is hereby established a committee to be known in English as the Proceedings Authorization Committee and in French as Comité d'autorisation.

Composition
(2) The Committee shall consist of four benchers appointed by Convocation.

Chairs and vice-chairs of certain standing committees
(3) The Committee must include,

(a) the chair or a vice-chair of the Professional Regulation Committee; and

(b) the chair or a vice-chair of the Professional Development and Competence Committee.

Restrictions on appointments
(4) A bencher who holds office under paragraph 1 or 2 of subsection 12 (1), or under paragraph 1 of subsection 12 (2), of the Act may not be appointed to the Committee.

Term of office
(5) Subject to subsection (6), a bencher appointed to the Committee shall hold office for a term of one year and is eligible for reappointment.

Appointment at pleasure
(6) A bencher appointed to the Committee holds office as a member of the Committee at the pleasure of Convocation.

Chair

3. (1) Convocation shall appoint one member of the Committee who is an elected bencher as chair of the Committee.

Term of office

(2) Subject to subsection (3), the chair holds office for a term of one year and is eligible for reappointment.

Appointment at pleasure

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

Function of Committee

4. The Committee shall review all matters referred to it in accordance with this By-Law or any other by-law and, in respect of each matter, shall determine whether any action mentioned in subsection 9 (1) should be taken.

Review of matters: quorum of Committee

5. (1) Two members of the Committee constitute a quorum for the purposes of reviewing a matter and taking action in respect of the matter.

Temporary members

(2) If no two members of the Committee are able to constitute a quorum because three or more members of the Committee are unable for any reason to act, subject to subsection (3), the chair of the Committee may appoint one or more benchers as temporary members of the Committee for the purposes of constituting a quorum, and the temporary members shall be deemed, for the purposes of subsection (1), to be members of the Committee.

Ineligible benchers

(3) The chair shall not appoint as a temporary member of the Committee a bencher who holds office under paragraph 1 or 2 of subsection 12 (1), or under paragraph 1 of subsection 12 (2), of the Act.

Review by telephone conference call, etc.

6. The Committee may meet to review a matter by means of such telephone, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other simultaneously.

No right to participate

7. (1) Subject to subsection (2), no person may participate in the review of a matter by the Committee.

Participation at request of Committee

(2) For the purposes of answering any questions that the Committee might have about a matter referred to it or about actions that may be taken by the Committee with respect to a matter referred to it, the Committee may require one or more of the following persons to participate in a review of a matter:

1. A person who has referred a matter to it.

2. An officer, employee, agent or representative of the Society who is or was involved in an audit, investigation, review, search or seizure relating to a matter.

Referral by Secretary, outside investigator, outside reviewer

8. (1) Subject to subsection (2), during or after an audit, investigation or review, the Secretary, an outside investigator or an outside reviewer, as the case may be, may refer to the Committee a matter respecting the conduct of a member, group of members or student member, the capacity of a member or student member or the professional competence of a member for one or more of the following purposes:

1. Obtaining directions with respect to the conduct of an audit, investigation or review.

2. Obtaining approval or directions for the informal resolution of the matter.

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

4. Obtaining authorization for the Society to apply to the Hearing Panel for a determination of whether,

   i. a member or student member has contravened section 33 of the Act,

   ii. a member or student member is or has been incapacitated, or

   iii. a member is failing or has failed to meet standards of professional competence.

Restrictions on referrals by Secretary, outside investigator

(2) The Secretary, or an outside investigator, shall not refer to the Committee a matter respecting the conduct of a member or student member if the matter is a complaint that has been referred to the Complaints Resolution Commissioner for resolution or review and the Complaints Resolution Commissioner has not yet disposed of the matter.

Referral by elected bencher

(2.1) Subject to subsection (2.2), an elected bencher appointed under subsection 42 (6) of the Act to review a proposal for an order made to a member may refer to the Committee a matter respecting the professional competence of the member for the purpose of obtaining authorization for the Society to apply to the Hearing Panel for a determination of whether the member is failing or has failed to meet standards of professional competence.

Restrictions on referrals by elected bencher

(2.2) An elected bencher appointed under subsection 42 (6) of the Act to review a proposal for an order made to a member shall not refer to the Committee a matter respecting the professional competence of the member except after the bencher has,

(a) met with the member and the Secretary, as required under sections 11 and 12 of By-Law 24, in accordance with sections 13 and 14 of By-Law 24; and

(b) refused to make an order under subsection 42 (7) of the Act.

Recommendations for action

(3) A person who refers a matter to the Committee may recommend actions to be taken by the Committee in respect of the matter, and, in making his or her recommendations, the person is not restricted to recommending the actions mentioned in paragraphs 1 to 5 of subsection 9 (1).

Review of matters

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

1. Approve, or give directions for, the informal resolution of the matter.

2. Authorize the Society to apply to the Hearing Panel for a determination of whether,

   i. a member or student member has contravened section 33 of the Act,

   ii. a member or student is or has been incapacitated, or

iii. a member is failing or has failed to meet standards of professional competence.

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

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

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

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

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

6. Any other action that the Committee considers appropriate.

Restriction on authorization of conduct proceedings

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

Restriction on authorization of capacity proceedings

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

Restriction on authorization of professional competence proceedings

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

Appointment of representative

10. (1) Where the Committee authorizes the Society to apply to the Hearing Panel for a determination of whether a member or student member is or has been incapacitated, the Committee may appoint another member to represent the member or student member in proceedings under Part II of the Act before the Hearing Panel, the Appeal Panel or a court if the Committee is satisfied that,

(a) the member or student member is unable to participate in the proceedings or is unable to instruct counsel to do so;

(b) the member or student member is not represented by counsel; and

(c) the member or student member does not have a guardian, an attorney or a similar person who has authority to represent the member or student member in the proceedings.

Costs

(2) The costs resulting from an appointment under subsection (1) shall be paid for by the Society.

Decision in writing
11. The Committee shall record in writing its decision on every matter referred to it.

Notice
12. The Committee shall give to the Secretary notice of its decision on every matter referred to it.

Reasons
13. The Committee is not required to provide at any time to any person its reasons for a decision.

Withdrawal of application to Hearing Panel
14. (1) If the Committee authorizes the Society to apply to the Hearing Panel for a determination mentioned in paragraph 2 of subsection 9 (1) but the Hearing Panel has not commenced a hearing to determine the merits of the proceeding, the Society shall not withdraw its application to the Hearing Panel unless the Committee has first authorized the withdrawal.

Request for withdrawal: procedure
(2) A request to the Committee to withdraw an application to the Hearing Panel shall be made by the Secretary or an outside counsel, as the case may be, and sections 5, 6, 7, 11, 12 and 13 apply, with necessary modifications, to the Committee's consideration of the request.

Commencement
15. This By-Law comes into force on February 1, 1999.

APPENDIX 3

NOTICE PUBLISHED IN THE *ONTARIO REPORTS* RESPECTING THE OFFICE OF THE DISCRIMINATION AND HARASSMENT COUNSEL

APPENDIX 4

EXCERPT FROM THE REPORT OF THE ADR SYSTEMS DESIGN TEAM, SEPTEMBER 1998 RESPECTING THE OFFICE OF THE DISCRIMINATION AND HARASSMENT COUNSEL

APPENDIX 5

SECTIONS 59.6 THROUGH 59.14 OF THE *LAW SOCIETY ACT*

UNCLAIMED TRUST FUNDS

Unclaimed trust funds
59.6 (1) A member who has held money in trust for or on account of a person for a period of at least two years may apply in accordance with the by-laws for permission to pay the money to the Society, if,

(a) the member has been unable to locate the person entitled to the money despite having made reasonable efforts throughout a period of at least two years; or

(b) the member is unable to determine who is entitled to the money.

Approval of application

(2) If the Secretary approves an application under subsection (1), the member may pay the money to the Society, subject to such terms and conditions as the Secretary may impose.

Financial records

(3) A member who pays money to the Society under subsection (2) shall provide the Society with copies of financial records relating to the money that are in the member's possession or control.

Member's liability

(4) Payment of money to the Society under subsection (2) extinguishes the member's liability as trustee or fiduciary with respect to the amount paid to the Society.

Society becomes trustee

59.7 (1) Money paid to the Society under section 59.6 shall be held in trust by the Society in perpetuity for the purpose of satisfying the claims of the persons who are entitled to the money.

One or more accounts

(2) Money held in trust under this section may be held in one or more accounts.

Trust income

(3) Subject to subsections (5) and (6), all income from the money held in trust under this section shall be paid to the Law Foundation.

Passing accounts

(4) The Society shall from time to time apply to the Ontario Court (General Division) under section 23 of the Trustee Act to pass the accounts of the trust established by this section and the court's order on each application shall specify a date before which the Society must make its next application to pass the accounts.

Trustee compensation

(5) Subject to subsection (6), the Society may take compensation from the trust property in accordance with orders made under subsection 23 (2) of the *Trustee Act*.

Same

(6) Compensation may be taken under subsection (5) only from the income of the trust.

First application

(7) The Society shall make its first application under subsection (4) not later than two years after this section comes into force.

Transfer to trust fund

59.8 (1) Despite section 59.6, the Society may transfer to the trust established by section 59.7 any money received in trust by the Society from a member after the day the *Law Society Amendment Act, 1998* came into force, if,

(a) immediately before the money was received by the Society, the member was holding the money in trust for or on account of a person; and

(b) the Secretary is satisfied that the Society is unable to locate the person entitled to the money or to determine who is entitled to the money.

Exception

(2) Money held in trust by the Society pursuant to an order made under section 49.47 shall not be transferred under subsection (1) without the approval of the Ontario Court (General Division) provided for in the order made under section 49.47 or obtained on an application under section 49.48 or 49.51.

Money held before *Law Society Amendment Act, 1998*

(3) The Society may transfer to the trust established by section 59.7 any money held in trust by the Society immediately before the *Law Society Amendment Act, 1998* came into force, if,

(a) the money was received by the Society from a member who held the money in trust for or on account of a person; and

(b) the Secretary is satisfied that the Society is unable to locate the person entitled to the money or to determine who is entitled to the money.

Transferred money to be held in trust

(4) Money transferred under this section to the trust established by section 59.7 shall be held in trust by the Society under section 59.7.

Member's liability

(5) The transfer of money under this section extinguishes the member's liability as trustee or fiduciary with respect to the amount transferred.

Notice

59.9 (1) The Secretary shall publish a notice annually in *The Ontario Gazette* listing the name and last known address of every person entitled to money that, during the previous year, was paid to the Society under section 59.6 or transferred under section 59.8 to the trust established by section 59.7.

Exception

(2) Subsection (1) does not require publication of any name or address of which the Society is not aware.

Other steps

(3) The Society shall take such other steps as it considers appropriate to locate the persons entitled to money held in trust by the Society under section 59.7.

Claims

59.10 (1) A person may make a claim in accordance with the by-laws for payment of money held in trust by the Society under section 59.7.

Payment of claims

(2) Subject to sections 59.12 and 59.13, the Society shall pay claims in accordance with the by-laws.

Application to court

59.11 Subject to sections 59.12 and 59.13, if a claim under section 59.10 is denied by the Society in whole or in part, the claimant may apply to the Ontario Court (General Division) for an order directing the Society to pay the claimant any money to which the claimant is entitled.

No entitlement to interest

59.12 A claimant to whom money is paid under section 59.10 or 59.11 is not entitled to any interest on the money that was held in trust by the Society.

Limit on payments

59.13 (1) The total of all payments made to claimants under sections 59.10 and 59.11 in respect of money paid to the Society by a particular member under section 59.6 shall not exceed the amount paid to the Society under section 59.6 by that member.

Money transferred to trust fund

(2) Subsection (1) also applies, with necessary modifications, in respect of money transferred under section 59.8 to the trust established by section 59.7.

Former members

59.14 Sections 59.6 to 59.13 also apply, with necessary modifications, in respect of money held in trust by former members.

APPENDIX 6

DRAFT FORMS AS DESCRIBED IN
PROPOSED BY-LAW 32 ON UNCLAIMED TRUST FUNDS

LAWYER'S APPLICATION FORM

THE LAW SOCIETY OF UPPER CANADA

UNCLAIMED TRUST MONEY
Section 59.6 of the Law Society Act

NOTE: All questions on this form must be answered. One form must be submitted for each client on whose behalf an application is being made to pay trust money to the Law Society of Upper Canada.

A. MEMBER/FORMER MEMBER/FIRM INFORMATION

1. Member/Firm Name: _____

2. Member/Firm Address: _____
_____
_____
_____

3. Member/Firm Telephone Number: _____

Fax Number: _____

E-Mail Address: _____

4. Responsible Lawyer: _____

Law Society Member No: _____

5. Firm File Number: _____

6. File Name/Style of Cause: _____

1. File Type (i.e. personal injury, litigation, real estate, etc.): _____

B. CLIENT/CLAIMANT INFORMATION

1. Dollar amount of unclaimed trust money of client (attach copy of client trust ledger) _____

2. Full name of client/person entitled to the money (including any middle initials)(if corporation, name of person instructing lawyer): _____

3. Name and last known address of person/corporation that is entitled to the funds: _____

_____

_____

4. Last known telephone number: _____

2. SIN/Corp. number (if known): _____

3. Date of Birth (if known): _____

4. Any other information to identify client: _____

_____

_____

5. Name and address of any known relatives of clients: _____

_____

_____

NOTE: If more than one person is entitled to funds, list names, amounts each is entitled to, and answer all applicable questions for each person individually.

9. If corporation, current status of the corporation and last known head office address: _____

_____

_____

Full names and addresses of corporate officers, directors and shareholders: _____

_____

10. Length of time monies have been held for client (in months from last date this client's trust money was active): _____

2. Reason funds in possession of Member/Firm. _____

_____

12. Attempts to contact client in the past two years (state dates, methods and address, telephone number):

a. _____

_____

_____

b. _____

_____

_____

c. _____

_____

_____

13. Have any searches been done in your attempt to locate the client? (*E.g.*, a motor vehicle licence search; a Canada 411 search (Internet);a *P.P.S.A.* search; a Bell Canada search; a title search; a corporate search; a Key Facts search; a Skip Tracer search.)

If yes, please specify the searches done and include copies of any search materials with the application.

_____

_____

_____

14. Personal or transaction information useful in confirming validity of client's claim to these funds including the nature of the trust and the circumstances in which it arose:

Driver's Licence Number (if known): _____

_____

_____

_____

15. Are these funds subject to trust conditions or competing claims? (If so, give complete details and attach documents as relevant):

_____
_____
_____

D. CERTIFICATION

I,_____, of _____,
in the Province of Ontario, certify that the foregoing information is complete and correct to the best of my knowledge.

_____ _____
Date Member's Signature

APPLICATION FORM

THE LAW SOCIETY OF UPPER CANADA

CLIENT CLAIM FOR TRUST MONEY
Section 59.10 of the Law Society Act

_____

A. CLAIMANT

Name: _____

Address: _____

_____

_____

Telephone: Home: _____

Work: _____

Fax: _____

E-mail:_____

SIN/Corp. No.: _____

Date of Birth: _____

B. LAW FIRM TO WHOM TRUST MONIES WERE PAID

Law firm name: _____

Address: _____

_____

_____

Lawyer in charge of file: _____

File number: _____

Type of file: _____

C. CLAIM

Amount: _____

Is this the actual amount? (If not the Law Society will interpret the amount to be an approximate amount)	Yes	No
	○	○

Payments made to law firm:

Date:	Amount:
_____	_____
_____	_____
_____	_____

For what purpose(s) was the lawyer/law firm retained? (Provide a copy of any retainer, agreements, accounts or reporting letters, copies of cancelled cheques, receipts, or other relevant documentation.)

_____

_____

_____

Why were these funds provided to the law firm?

_____

_____

_____

Why was the trust money left unclaimed with the law firm?

_____

_____

_____

D. OTHER INFORMATION THAT MAY BE USEFUL IN VERIFYING THE CLAIM

_____

_____

E. CERTIFICATION

I,_____, of _____,
in the Province of Ontario, certify that the foregoing information is complete and correct to the best of my knowledge.

_____ _____
Date Signature

APPENDIX 7

FILE MANAGEMENT AND CASELOAD STATISTICS FOR RESOLUTION AND COMPLIANCE, INVESTIGATIONS AND DISCIPLINE TO DECEMBER, 2000

MACS MEMORANDUM

TO: *Richard Tinsley*

FROM: *Scott Kerr*

DATE: *December 17, 2000*

RE: *Resolution & Compliance Complaints Process Statistics*

---

1. Number of Active Files

January	March	May	August	October	December
1,505	1,450	1,219	1,032	799	727

2. Median Caseloads (quarterly average)

January - March	April - June	July - September	December
182	132[13]	111	104

3. Number of New Files Opened (quarterly average)[14]

January - March	April - June	July - September	November
61	44	76	67

4. Number of Files Closed (quarterly average)

January - March	April - June	July - September	November
178	153	187	188

5. File Aging - Active Files By Year (previous reported numbers in brackets)

1999 -Jan.-June	1998	1997	1996	Other
141 (158)	55(91)	4[15](4)	0 (0)	0 (0)

6. File Aging - Active Overdue for Action (previous reported numbers in brackets)

By 90+ Days	By 60-90 Days	By 30-60 Days
190 (216)	27(27)	59(55)

Complaints Review Statistics

Total Active Cases	53 (45)
Review Completed - Pending Decision	20 (14)
Review Scheduled	28 (23)
Review Requested (Not Yet Scheduled)	5 (8)

---

13 Decline in median caseload caused by increase in number of staff handling complaints from 8 to 9.

14 New and closed file statistics always run one month behind current figures in order to ensure that data entry for the entire month is captured.

15 All 4 cases are "send backs" from CRC involving requests for further investigation.

File Aging - Active Files By Year

2000	1999	1998	1997	1996	Other
5(4)	15(15)	18 (20)	9(6)	2(0)	4(0)

DISCIPLINE MATTERS

MATTERS AUTHORIZED BUT NOT YET ISSUED AS AT DECEMBER 15, 2000 (MATTERS HANDLED BY LAW SOCIETY COUNSEL)		
3 to 6 Months Old	6 to 12 Months Old	Over 1 Year Old
Total Authorizations: 9	Total Authorizations: 2	Total Authorizations: 2
Total Applications: 9	Total Applications: 2	Total Applications: 2

MATTERS AUTHORIZED BUT NOT YET ISSUED AS AT DECEMBER 15, 2000 (MATTERS HANDLED BY OUTSIDE COUNSEL)		
3 to 6 Months Old	6 to 12 Months Old	Over 1 Year Old
Total Authorizations: 4	Total Authorizations: 4	Total Authorizations: 10
Total Applications: 4	Total Applications: *3	Total Applications: 4

* one matter to be included in another application over 1 year old

TOTAL MATTERS AUTHORIZED BUT NOT YET ISSUED AS AT DECEMBER 15, 2000	
No. of Authorizations:	51
No. of Applications:	44

COMPLAINTS /CONDUCT APPLICATIONS AS AT DECEMBER 15, 2000		
	No. of Complaints/Notices of Application	No. of Members
Complaints/Conduct Applications Issued - Hearings Not Commenced	50	45
Complaints/Conduct Applications Issued - Hearings Commenced	10	12

Re: Amendments to By-Law 21 Respecting the Role of the Proceedings Authorization Committee in Disclosure of Information to Law Enforcement Authorities (Meeting of October 5th, 2000)

It was moved by Mr. MacKenzie, seconded by Ms. Ross that the Proceedings Authorization Committee perform the function of determining whether information should be disclosed to a public authority under section 49.13 of the Act and make the required amendments to By-Law 21 as set out on pages 6 and 7.

Carried

Re: Confidentiality Issues Relating to the Office of the Discrimination and Harassment Counsel (Meeting of December 7th, 2000)

It was moved by Mr. Wilson, seconded by Mr. Crowe that consideration of the By-law be postponed until Convocation determines whether or not the Discrimination and Harassment Counsel advisory program be continued.

Carried

Re: A New By-Law Dealing with Lawyers' Unclaimed Trust Funds (Meeting of January 7th, 2001)

It was moved by Mr. Gottlieb, seconded by Mr. Swaye that there be a Right of Appeal to a panel of Benchers of the Secretary's decision of the claim in section 5(2).

Carried

It was moved by Mr. MacKenzie, seconded by Ms. Ross that a new By-Law 31 on Unclaimed Trust Funds in the form set out on pages 26 to 31 be adopted as amended.

Carried

MOTION RE: COMPENSATION FUND RE-INSURANCE

Mr. Wright withdrew his motion.

REPORTS FOR INFORMATION

Report of the Finance and Audit Committee

Finance and Audit Committee
January 12, 2001

Report to Convocation

Purpose of Report: Information

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

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Finance and Audit Committee ("the Committee") met on January 12, 2001. Committee members in attendance were: Krishna, V. (c), Chahbar, A., Epstein, S., Murphy, D., Porter J., Puccini, H., Ruby C., White, D., Wilson, R., Wright, B.. Armstrong R. was also in attendance. Staff in attendance were Tysall, W., Grady, F., Cawse, A..

2. The Committee is reporting on the following matters:
Information

- Investment Compliance Report for the quarter ended December 31, 2000.

FOR INFORMATION

3. Attached as pages 3 to 8 are:

The Investment Compliance Report for the quarter ended December 31, 2000 for the General Fund;
The Investment Compliance Report for the quarter ended December 31, 2000 for the Lawyers Fund for Client Compensation;
A short commentary on investment activity during the 2000 year.

The Reports confirm there are no breaches in compliance.

Finance Department
Memorandum

TO: Chair and Members of the Finance and Audit Committee

FROM: Fred Grady

DATE: January 12, 2001

RE: 2000 INVESTMENT SUMMARY

GENERAL FUND

The General Fund Short Term Portfolio had an opening balance in 2000 of $9.2 million, the lowest it would be throughout the year. The December 31, 2000 closing balance was $11.1 million The average portfolio size for the year was $20.8 million. 450 individual securities were purchased during the year, the average size being $340,000 with an average duration of 46 days.

Approximately $1.1 million of interest revenue was generated, compared to the budget of $700,000. The portfolio rate of return was 5.31%. The average Canadian Money Market Mutual Fund posted net rate of return for the twelve months ended November 30, 2000 was 4.5%, (source - The Globe and Mail Report on Mutual Funds, December 21, 2000)

COMPENSATION FUND

The Compensation Fund Short Term Portfolio had an opening balance in 2000 of $6.3 million. The December 31, 2000 closing balance was $5.3 million. The average portfolio size for the year was $8.0 mil. 198 individual securities were purchased, the average size being $240,000, with an average duration of 56 days. This portfolio generated just under $440,000 of revenue, with a 5.5% rate of return.

The Long Term Portfolio was held at a steady level of just under $14.0 million (maturity value). Three long term purchases were made during the year, the average purchase being $620,000 with an average duration of almost four years. The long term portfolio generated almost $840,000 in revenue, with a 6.3% rate of return. The average Canadian Short Term Bond Mutual fund posted a net rate of return of 5.0% for the twelve months ended November 30, 2000, (source - The Globe and Mail Report on Mutual Funds, December 21, 2000). The combined interest revenue of the long and short term portfolios was almost $1.3 mil. The total budgeted interest income was $1.2 mil.
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Attached to the original Report in Convocation file, copies of:

(1) Copies of the Investment Compliance Report for the quarter ended December 31, 2000 for the General Fund, The Investment Compliance Report for the quarter ended December 31, 2000 for the Lawyers Fund for Client Compensation and a short commentary on investment activity during the 2000 year. (pages 3 - 8)

Report of the Professional Development and Competence Committee (December 15th, 2000)

Professional Development & Competence Committee
December 15, 2000

Report to Convocation

Purpose of Report: Information

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 December 8, 2000. Committee members in attendance were Eleanore Cronk (Chair), Earl Cherniak (Vice-Chair), Stephen Bindman, Ron Cass, Greg Mulligan, Marilyn Pilkington, Judith Potter, Bill Simpson, James Wardlaw. Marg Ross attended a portion of the meeting. Staff in attendance were Bob Bernhardt, Felecia Smith, Scott Kerr, Paul Truster, Sophia Sperdakos, Ursula Stojanowicz, and Richard Tinsley.

2. The Committee is reporting on the following matters:

Information

- Report on Specialist Certification Matters Finalized by the Working Group of the Committee on December 8, 2000 and approved in Committee on December 8, 2000

FOR INFORMATION

REPORT ON SPECIALIST CERTIFICATION MATTERS FINALIZED BY THE WORKING GROUP OF THE COMMITTEE ON DECEMBER 8, 2000 AND APPROVED IN COMMITTEE ON DECEMBER 8, 2000

1. The Committee is pleased to report final approval of the following lawyers' applications for certification, on the basis of the review and recommendation of the Certification Working Group.

Construction Law	Matthew R. Alter (of Toronto) Duncan W. Glaholt (of Toronto) Joseph Gottli (of St. Catharines) Bernard McGarva (of Toronto) Stanley Naftolin (of Toronto) Lori R. Roth (of Toronto) J. Stephen Tatrallyay (of Toronto)

2. The Committee is pleased to report final approval of the following lawyers' applications for re-certification, on the basis of the review and recommendation of the Certification Working Group.

Civil Litigation	Jack B. Berkow (of Toronto) S. Wayne Morris (of Toronto) Barry B. Papazian (of Toronto) Philippa G. Samworth (of Toronto) Lawrence D. Zaldin (of Toronto)
Criminal Law	P. Berk Keaney (of Sudbury)
Family Law	Warren S. Fullerton (of Windsor) Michael A. Minear (of London) H. Hunter Phillips (of Ottawa) Lorne Wolfson (of Toronto)

CONVOCATION ROSE AT 5:55 P.M.

Confirmed in Convocation this 21st day of February, 2001

Treasurer