MINUTES OF CONVOCATION

Thursday, 22nd February, 2007
9:10 a.m.

PRESENT:

The Treasurer (Gavin MacKenzie), Aaron, Alexander, Backhouse, Banack, Bobesich, Boyd, Campion, Carpenter-Gunn, Caskey, Chahbar, Coffey, Copeland, Crowe, Curtis, Dickson, Dray, Eber, Feinstein, Filion, Furlong, Gotlib, Gottlieb, Harris, Heintzman, Henderson, Krishna, Lawrence, Lawrie, Legge, Millar, Minor, Murray, O'Donnell, Pawlitza, Porter, Potter, Robins, Ross, Ruby, St. Lewis, Sandler, Silverstein, Simpson (by telephone), Swaye, Symes, Topp, Warkentin and Wright (by telephone).

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Secretary: Katherine Corrick

The Reporter was sworn.

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IN PUBLIC

.....

TREASURER'S REMARKS

The Treasurer reported on his activities since last Convocation.

DRAFT MINUTES OF CONVOCATION

The Draft Minutes of Convocation of January 25, 2007 were approved.

REPORT OF THE DIRECTOR OF PROFESSIONAL DEVELOPMENT AND COMPETENCE

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA
ASSEMBLED IN CONVOCATION

The Director of Professional Development and Competence presents the following candidates for Call to the Bar of Ontario pursuant to By-Law 11, section 7:

(a) Transfer from another Province

The following candidates have filed the necessary documents, paid the required fee and now

apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, February 22nd, 2007:

Jennifer Anne Lorraine Dagsvik	Province of British Columbia
Suhanya Pushpam Edwards	Province of Nova Scotia
Donald Michael Hewak	Province of Manitoba

(b) Transfer from another Province

The following candidate has successfully completed the transfer examinations, filed the necessary documents, paid the required fee and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, February 22nd, 2007:

Jonathan David Martin	Province of Quebec

(c) Licensing Process (Bar Admission Course)

Pursuant to By-Law 11, section 7(2) the following candidates have satisfied the requirements and have been excused from participating in a call day ceremony. The following candidates have successfully completed the Licensing Process (Bar Admission Course), filed the necessary documents, paid the required fee, and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, February 22nd, 2007:

Obiageli Gold Agu	Bar Admission Course
Daye Kaba	Bar Admission Course
Paul Michael Lawson	Bar Admission Course
Olabode Mobolaji Odetoyinbo	Bar Admission Course
Pius Lekwuwa Okoronkwo	Bar Admission Course

ALL OF WHICH is respectfully submitted

DATED this the 22nd day of February 2007

It was moved by Ms. Pawlitza, seconded by Ms. Potter, that the Report of the Director of Professional Development and Competence listing the names of the candidates for Call to the Bar be adopted.

Carried

FINANCE AND AUDIT COMMITTEE REPORT

Mr. Millar presented the Finance and Audit Committee Report.

Report to Convocation
February 22, 2007

Finance and Audit Committee

Committee Members
Derry Millar, Chair
Beth Symes, Vice-Chair
Brad Wright, Vice-Chair
Abdul Chahbar
Andrew Coffey
Marshall Crowe
Holly Harris
Ross Murray
Alan Silverstein
Gerald Swaye

Purposes of Report: Decision and Information

Prepared by the Finance Department
Wendy Tysall, Chief Financial Officer – 416-947-3322

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For Decision

COMMITTEE PROCESS

1. The Finance and Audit Committee ("the Committee") met on February 8, 2007. Committee members in attendance were: Derry Millar (c.), Brad Wright (v.c.) Abdul Chahbar, Marshall Crowe, Holly Harris, Alan Silverstein and Gerry Swaye.

2. Staff in attendance were Malcolm Heins, Wendy Tysall, Katherine Corrick, Fred Grady, Brenda Albuqerque-Boutilier and Andrew Cawse.

FOR DECISION

BENCHER REMUNERATION BY-LAW, AMENDMENT TO BY-LAW 7 - BENCHERS

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

Motion

3. THAT By-Law 7 [Benchers], made by Convocation on January 28, 1999 and amended by Convocation on March 26, 1999, be further amended as follows:

1. By-Law 7 [Benchers] be amended by adding the following:

REMUNERATION

Interpretation
2.1 (1) In this by-law,

"bencher year" means, as applicable,

(a) the period beginning on the day, in one calendar year, on which Convocation has its first regular meeting after an election of benchers and ending, in the following calendar year, on May 31,

(b) the twelve-month period beginning on June 1 in one calendar year and ending on May 31 in the following calendar year, and

(c) the period beginning on June 1 in one calendar year and ending, in the following calendar year, on the day before the day on which Convocation has its first regular meeting after an election of benchers;

"elected bencher" does not include a person appointed under subsection 16 (6) of the Act;

"full day" means,

(a) in the case of a payee whose business address, or, where the payee has no business address, whose home address, is within the City of Toronto,

(i) a total of more than 3 hours, in a period of 24 hours, if work is performed within the City of Toronto, or within a reasonable distance of the City of Toronto, and

(ii) any number of hours, in a period of 24 hours, if work is performed anywhere outside a reasonable distance of the City of Toronto, and

(b) in the case of a payee whose business address, or where the payee has no business address, whose home address, is outside the City of Toronto,

(i) a total of more than 3 hours, in a period of 24 hours, if work is performed at the payee's business address, or home address, or within a reasonable distance of the payee's business address or home address, and

(ii) any number of hours, in a period of 24 hours, if work is performed anywhere outside a reasonable distance of the payee's business address or home address;

"half day" means,

(a) in the case of a payee whose business address, or, where the payee has no business address, whose home address, is within the City of Toronto, a total of not more than 3 hours, in a period of 24 hours, if work is performed within the City of Toronto or within a reasonable distance of the City of Toronto, and

(b) in the case of a payee whose business address, or, where the payee has no business address, whose home address, is outside the City of Toronto, a total of not more than 3 hours, in a period of 24 hours, if work is performed at the payee's business address, or home address, or within a reasonable distance of the payee's business address or home address;

"payee" means a person who is entitled to receive remuneration from the Society under section 2.2;

"work" means,

(a) attending a Convocation,

(b) attending a meeting of a standing or other committee, including the Proceedings Authorization Committee and any subcommittee of a standing or other committee or the Proceedings Authorization Committee, of which the payee is a member,

(c) attending a meeting of a standing or other committee, including the Proceedings Authorization Committee and any subcommittee of a standing or other committee or the Proceedings Authorization Committee, of which the payee is not a member, at the request of the chair of the committee,

(d) attending an information session organized by the Society for benchers,

(e) attending a program of education or training required by the Society for benchers,

(f) hearing a hearing before the Hearing Panel or Appeal Panel,

(g) preparing reasons for a decision or order of the Hearing Panel or Appeal Panel,

(h) conducting a pre-hearing conference in a proceeding before the Hearing Panel,

(i) performing activities, as a chair of the Hearing Panel or Appeal Panel, that are integral to the office of chair of the Hearing Panel or Appeal Panel,

(j) performing activities, as a member of the Hearing Panel or Appeal Panel, that relate to the management of a proceeding before the Hearing Panel or Appeal Panel,

(k) performing activities, as a bencher appointed by Convocation for the purpose of making orders under sections 46, 47, 48, 49 and 49.1 of the Act, that are integral to the role of a bencher under sections 46, 47, 48, 49 and 49.1 of the Act,

(l) attending a meeting, other than a Convocation or a meeting of a standing or other committee, at the direction of the Treasurer or Convocation, and

(m) performing activities as a director of an organization, to which position the bencher was appointed, or nominated for appointment, by Convocation, provided that the performing of the activities would entitle any other director of the organization to be remunerated by the organization for performing the activities.

Interpretation: person elected as member of the Paralegal Standing Committee

(2) In this by-law, a person who is appointed under subsection 25.2 (2) of the Act is not a person who is elected as a member of the Paralegal Standing Committee.

Entitlement

2.2 (1) Subject to subsections (2) and (3), every elected bencher, every bencher who holds office under subsection 12 (1) of the Act, every bencher who holds office under subsection 12 (2) of the Act, every bencher who holds office under section 14 of the Act and every person who is elected as a member of the Paralegal Standing Committee is entitled to receive from the Society remuneration,

(a) for each half day of work performed for the Society in a bencher year, after the first 26 half or full days of work performed for the Society in that bencher year, in an amount determined by Convocation from time to time; and

(b) for each full day of work performed for the Society in a bencher year, after the first 26 half or full days of work performed for the Society in that bencher year, in an amount determined by Convocation from time to time.

Limits on remuneration: preparing reasons

(2) A payee is not entitled to receive from the Society remuneration for more than one full day of preparing written reasons for any decision or order of the Hearing Panel or Appeal Panel.

Limits on remuneration: performing activities as director of another organization

(3) A payee is not entitled to receive from the Society remuneration for performing activities as a director of an organization if the payee is remunerated, directly or indirectly, by the organization for performing the activities.

Claiming remuneration

2.3 (1) Subject to subsection (2), a payee may claim remuneration by submitting to the Society a claim for remuneration in a form provided by the Society.

Same

(2) A payee shall,

(a) claim remuneration for work performed for the Society within a reasonable period of time after the payee has performed the work; and

(b) shall claim all remuneration in respect of a bencher year by not later than six months after the end of the bencher year.

Payment of remuneration to payee

(3) Remuneration to which a payee is entitled shall be paid by the Society,

(a) within a reasonable period of time after the payee submits a claim for remuneration; and

(b) within the calendar year in which the payee submits a claim for remuneration.

Same

(4) Remuneration shall be paid to the individual payee claiming the remuneration or, at the direction of the individual payee, to the firm of which the payee is a partner or employee or to the professional corporation of which the payee is a shareholder or employee.

Background to By-Law Change

4. The framework for bencher remuneration was approved by Convocation in October 2004. After the referendum on bencher remuneration, the bencher remuneration policy

was approved by Convocation in September and November 2005. We have been operating under this policy since then and the policy has been used to draft the by-law. The policy and related guidelines are set out below.

5. The bilingual version of the by-law amendment will be provided to Convocation on February 22, 2007 for approval.

Bencher Remuneration Policy (Approved by Convocation, September and November 2005)

A. Elected benchers, former treasurers and ex-officio benchers will be remunerated for eligible activities.

B. Remuneration at $300 per half day and $500 per full day will be made with an annual inflation adjustment or adjustment after review by the Finance & Audit Committee.

C. Half and Full Days

(i) Inside Toronto Benchers: A half day will be work up to 3 hours in a 24 hour period. A full day constitutes work for more than 3 hours in a 24 hour period. Any work on eligible activity in another area, e.g. Ottawa, will comprise a full day.
(ii) Outside Toronto Benchers: Any work on eligible activity in Toronto will comprise a full day.
(iii) For work on eligible activity in the bencher's office area, a half day will be work up to 3 hours in a 24 hour period. A full day constitutes work for more than 3 hours in a 24 hour period.

D. There will be an annual deductible of 26 days before benchers can be remunerated for their time. For purposes of calculating the deductible of 26 days, half days and full days will all count as one day of attendance until the deductible of 26 days is exceeded.

E. The remuneration cycle will be based on the bencher year (June 1 to May 31) not calendar year. [1]

F. Eligible activities will include

(i) Convocation, meeting of committees, task forces, and working groups, special convocations, calls to the bar, bencher information sessions, mandatory bencher education sessions,
(ii) hearing panels, appeal panels, pre-hearing conferences
(iii) meetings attended as the Law Society's official representative at the direction of the Treasurer or Convocation as well as
(iv) time spent as the Law Society's appointed representative to boards of external organizations, and other roles in external organizations where that external organization permits remuneration.

G. A bencher, other than a bencher appointed by the provincial government, shall not accept[1] compensation from an external organization to which he or she is appointed as a bencher or otherwise accept compensation as a bencher except in accordance with this policy.

H. Attending a meeting by telephone is an eligible activity.

I. Questions relating to specific attendance and eligible activity issues can be directed to the Chief Executive Officer. Changes to these guidelines must be approved by the Finance & Audit Committee.

J. Benchers who opt for remuneration must submit quarterly activity sheets on the prescribed form. Benchers will certify this form.

K. Payment of remuneration will only be made directly to individual benchers or their firm.

L. The Finance Department will report on attendance, remuneration and expense reimbursement paid to individual benchers to the Audit Sub-Committee. Total amounts paid for bencher remuneration and expense reimbursements will be reported to the Finance & Audit Committee and Convocation on a quarterly basis. In addition, remuneration will be reported in total in the Annual Report.

Bencher Remuneration Guidelines (Circulated with Policy)

a) *Who qualifies for bencher remuneration?*

Elected benchers, former treasurers and ex-officio benchers will be eligible for remuneration. The eight appointed benchers will not be eligible for remuneration beyond amounts paid by the province.

b) *How will the rates for remuneration be maintained?*

The current framework sets remuneration at $300 per half day and $500 per full day.

c) *What is half a day and a day for remuneration purposes?*

The definition of half a day is intended to include eligible activity lasting up to 3 hours within a 24-hour period.

The definition of a full day is eligible activity in excess of three hours in a 24-hour period.

For all benchers, any eligible activity completed out of the bencher's office area (e.g. Ottawa benchers in Toronto, Toronto benchers in Ottawa) qualifies as a full day.

d) *How is the deductible calculated?*

[1] Except in a bencher election year, the year begins with the Convocation after the election. (per Amendment to By-Law 7 s 2.1)

The framework sets a deductible of 26 days before benchers can be remunerated for their time. For purposes of calculating the deductible of 26 days, half days and full days will all count as one day of attendance until the deductible of 26 days is exceeded. This means that 26 half days and not 52 half days will fulfill the 26 attendances required by the deductible.

e) *Is the deductible calculated on a calendar year or bencher year?*

The bencher year (June 1 – May 31), not calendar year (January 1 – December 31).[2]

Remuneration is retroactive to May 28, 2004. The first year for bencher remuneration will be May 28, 2004 to May 31, 2004 and the second year will be June 1, 2004 to May 31, 2005.

f) *What are eligible activities?*

Attendance at Convocation, meetings of committees, task forces, working groups (including the Ontario Lawyers Gazette Advisory Board), special convocations, calls to the bar, bencher information sessions, mandatory bencher education sessions, hearing panels, appeal panels, pre-hearing conferences and meetings attended as the Law Society's official representative.

Benchers will only be remunerated for attending meetings of committees, task force s and working groups where they are a member of the committee, task force or working group or where they have been formally invited to participate by the relevant chair.

Eligible activities also include:

a) The maximum of one day allowed for writing reasons for a panel's decisions.
b) Work integral to the offices of Chairs of the Hearing and Appeal Panels and the Summary Disposition Bencher.

Meetings between benchers and staff will not be eligible against the deductible or for remuneration. This is because these meetings are typically of the nature of pre- or post-meeting work (i.e. preparation time). The only exception to this would be work integral to the offices of Chairs of the Hearing and Appeal Panels and the Summary Disposition Bencher.

g) *Will a bencher acting as the Law Society's appointed representative be remunerated? (as opposed to the Law Society's official representative – see below).*

The Law Society, through Convocation, appoints a significant number of benchers to the boards of subsidiary and related organizations. These organizations are:

a) LawPro

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[2] Except in a bencher election year, the year begins with the Convocation after the election. (per Amendment to By-Law 7 s 2.1).

b) LibraryCo
c) BAR-eX
d) the Canadian National Exhibition
e) CanLII
f) Civil Rules Committee
g) Criminal Rules Committee
h) Diane Martin Medal Selection Committee
i) Family Rules Committee
j) the Federal Judicial Advisory Committee
k) the Federation of Law Societies
l) the Judicial Appointments Advisory Committee
m) Legal Aid
n) Law Foundation of Ontario
o) Law Society Foundation
p) LINK / OBAP
q) Ontario Bar Association Council
r) Ontario Centre for Advocacy Training
s) Ontario Judicial Council
t) OJEN
u) Pro Bono Law Ontario

Benchers, other than benchers appointed by the Provincial Government, appointed to external boards may not accept director's fees or other remuneration from these other organizations. A bencher appointed to an external organization who is not barred by that organization by laws or legislation from receiving remuneration will be eligible for remuneration by the Law Society for the time spent, and the time spent on the external organization's business will count toward the 26-day deductible. A bylaw passed in November 2005 by the LawPro Board, requires that remuneration for which lawyer benchers are eligible, will be paid directly to the Law Society from LawPro for Board activities.

h) *What is an official representative of the Law Society? (as opposed to the Law Society's appointed representative – see above).*

Where a bencher has been appointed by Convocation or requested by the Treasurer to represent the Law Society at a meeting, occasion or event, then that attendance would be eligible for remuneration as the Law Society's official representative.

It was agreed in Convocation in October 2004 that "only official representatives of the Law Society who attend meetings are compensated."

In certain instances, the Treasurer may request a bencher to attend a meeting, such as a swearing in ceremony, as representative of the Law Society or as a replacement for the Treasurer. Such meetings often require the official Law Society representative to play a role in proceedings. These types of meetings would be eligible for remuneration – whether the meeting takes the form of a business meeting, ceremonial event or swearing-in ceremony.

In the Treasurer's remarks, Convocation may be informed either in arrears or in advance, of the events attended by the Law Society's official representatives. This will confirm the bencher's attendance in an official capacity as the Law Society's

representative, assist benchers in their attendance reporting, as well as informing Convocation of ongoing events.

i) *What other bencher activities are specifically excluded from remuneration?*

Benchers attending meetings of organizations such as the Law Society Foundation, the Osgoode Society or CDLPA where their role may not be as official Law Society representative and have not been requested by the Treasurer or approved by Convocation are not be eligible for remuneration. The Law Society Foundation is illustrative because certain benchers are nominated to be members by the Treasurer, not appointed, with their role as member and trustee later approved by the Law Society Foundation Board of Trustees.

Attendance at receptions, dinners, symposia and other like events will not be applied to the 26-day deductible nor be remunerated.

Reason writing time in excess of one day, travel time and preparation time will not be applied to the 26-day deductible nor be remunerated.

j) *How will emerging issues and questions on bencher remuneration be resolved?*

Questions relating to whether any specific activity is an eligible activity may be directed to the Chief Executive Officer. Any changes to these guidelines must be approved by the Finance & Audit Committee.

k) *Does attending a meeting by telephone qualify for remuneration?*

Attending a meeting by telephone qualifies as an eligible activity.

FOR DECISION

(Submitted jointly with the Paralegal Standing Committee)

PARALEGAL BUDGET

Motion

6. That Convocation approve the Paralegal Start Up Budget.

7. Bill 14, The Access to Justice Act, expanding the public interest mandate of the Law Society to include independent paralegals largely comes into effect on May 1, 2007. The Law Society will begin taking applications from potential paralegal grandparent candidates from that date until October 31, 2007. The Society will begin taking complaints for the purposes of regulation when the first paralegals are licensed, likely in January 2008.

8. In preparing for these developments a start up budget has been drafted. Convocation is requested to approve the start up budget estimating the costs of implementation of paralegal regulation by the Law Society. Several of the associated activities must be undertaken as soon as possible and in fact many are in progress, typically undertaken

by existing Law Society staff. Upon adoption of the budget, recruitment of new staff and contractual obligations can be entered into.

10. The draft start up budget has been reviewed by the Paralegal Standing Committee on two occasions and the motion for approval of the start up budget is a joint motion from the Finance & Audit Committee and the Paralegal Standing Committee.

11. If approved, management intends to monitor the start up budget with quarterly status reporting to the Committees and Convocation on progress towards implementation and resource requirements.

Draft Paralegal Regulation Start Up Budget

Existing Law Society Budget Process

12. The Society currently prepares its annual budget and sets fees for licensing and annual membership on a break-even basis using a full cost allocation method that has been approved by Convocation. Direct costs for programs, including the licensing process, are tracked and augmented by the allocation of indirect expenses, administrative, facilities and governance costs, to determine the full cost of individual Law Society Programs. In principle, when fees are set for individual programs (such as continuing legal education), they are set to recover the full cost of the program including the allocation of indirect costs.

13. The Society's annual membership fee has four components that is charged to each member of the Law Society. For 2007 these components are as follows:

General membership	$ 1,107
Compensation Fund fee	200
County law library (LibraryCo)	219
Capital fund	75
Total	$ 1,601

15. Law Society fees are subject to GST.

16. Members fall into one of three fee-paying categories, broadly defined as practicing members (100% fee), employed not practicing (50% fee) and not working, including maternity leave (25% fee).

Paralegal Start up Overview

17. The attached budget summary provides estimates for the cost of implementation of paralegal regulation by the Law Society of Upper Canada. The estimated cost of implementation is approximately $ 3.4 million. Some of the cost estimates are relatively firm and are based on previous experience, for example PD&C costs related to program and exam development and exam administration.

18. Other costs are based on volume assumptions and may be over/under estimated when compared against actual volume. For example, Tribunal costs are based on 60 hearings

over 135 days. If actual hearing results vary from these estimates, costs will vary as well.

19. At this stage it is apparent that several activities have to be undertaken as soon as possible and in fact many are in progress. These include by-law drafting and review, rules of professional conduct and scope of practice definition, grandparent application and processing, licensing program and exam development for the initial round of grandparent examinations, information systems development (including Case management system and LSUC website), establishment and support for the Paralegal Standing Committee and a public and "member" communication campaign around paralegal regulation. To date this work has been undertaken in general by existing Law Society staff and not with the additional staff and resources detailed in this budget submission. Upon adoption of a budget, recruitment of staff and letting of relevant contracts will begin.

20. If approved, it is recommended that the budget be monitored with quarterly status reporting to committee and Convocation on progress towards implementation and resource requirements.

Basic Assumptions

Number of Applicants

21. The budget is compiled based on the assumption that the paralegal "grandparent application window" will open on May 1, 2007 and close on October 31, 2007. During that period, grandparent candidates will submit their applications for consideration.

22. It is assumed that 1,200 grandparent applications will be received and 1,000 will ultimately be approved to write the licensing exam. It also assumed that ten percent of exam candidates would require one exam re-write before ultimately acquiring a license to provide legal services.

Exams

23. The actual licensing exams for grandparent applicants will be held over three sessions, the first in January 2008, with subsequent exams in February and April of 2008. The examination format will be single exam on a single day. The examinations will be held in Toronto in rented premises (Toronto Convention Centre) similar to the current licensing process for lawyers.

24. This budget does not address the regular operating costs of the regulation of paralegals subsequent to the successful sitting of the first licensing exam in January 2008. This budget will be developed as part of the Society's annual budget when greater certainty around actual numbers of paralegal licensees is known.

Fees

25. The basic assumption underlying the establishment of examination and licensing fees to be charged for paralegal grandparent applicants is that the fees should be set such that the actual cost of the process can be recovered from the affected paralegal applicants.

26. In the attached budget the following fee assumptions are used:

- Application fee $500
- Exam fee $1,075
  Assumes direct costs for exam process plus 35% allocation of administration expenses and 1,000 writing exam
- Exam re-write no materials $925
  As above with cost of materials deducted
- Additional Materials $150
  Estimated cost of materials
- Licensing fee $125

27. Using these estimates, the start-up costs will exceed the revenue generated from grandparents by $1.5 million. The Society has sufficient cash reserves to pay the actual net cost of the start up, however, decisions have to be made on the ultimate disposition of the shortfall.

28. The shortfall could be maintained in a separate Law Society fund and recovered by a surcharge on paralegal licensees in future periods. Assuming the initial cohort of 1,000 grandparents increases by 5% per year, beginning in 2009 a $100 surcharge per licensee per year would recover the $1.5 million in approximately 15 years, a $150 surcharge in approximately 10 years and $200 surcharge in approximately 8 years.

Administration Gross $ 1,395,000 Net $ 921,500

29. Total administration costs are $1,395,000. Consistent with general Law Society practice, administration costs are allocated to programs for the purpose of fully costing the program.

30. $473,500 of administration costs are allocated to the examination and licensing process for grandparent applicants to determine the appropriate fee structure that will recover the full cost of the examination and licensing process.

31. Administration costs are further offset by the recovery of application processing fees.

Client Service Centre $ 150,000

32. While paralegal regulation will affect all areas of the Client Service Centre (CSC), its primary impact is expected to be felt in two areas.

33. The first area will be the Complaints Services group. It is expected that a large influx of complaints about paralegals will start arriving at the Law Society almost immediately – especially since there has been no single avenue for complaints about paralegals until now, which means that anyone with a historical grievance against a current or former paralegal is now a potential complainant.

34. CSC created a paralegal access database early this year to capture concerns and issues from various tribunals and organizations that deal with paralegals. The paralegal complaints database will need to be enhanced in order to store the various types of

complaints until we are ready to deal with them. Once that is done, these paralegals' names will need to be matched against the grandparenting applications as they arrive.

35. Responses will also be required to all initial complainants, that address any fallout from the fact that we will not have a full regulatory framework in place until some time after complaints begin arriving. It can be expected that there will be a large number of frustrated correspondents, and dealing with them will be a further resource drain.

36. The Membership Services area will then be required to accept applications from current paralegals who wish to be considered for the grandparent provision. This will entail the creation and maintenance of a new "paralegal member" database, with provision for acceptance of related details including, but not limited to, acceptance of application fees and possibly insurance information.

Other anticipated impacts

37. The Call Centre is expected to experience an increase in activity as paralegals inquire about the grandparenting process or call with other questions and concerns they may have. In addition, call activity from the public is likely to increase as well. These calls may be requests for further information, inquiries about the complaints process, questions about how to become a paralegal, or opinions about items that may have appeared in the media on the issue from time to time.

38. The development of a paralegal version of the Member's Annual Report will be a priority in the Administrative Compliance Processes (ACP) area. However, the impact of this initiative will not likely be as immediate as in some other business units. The first Annual Report is anticipated to be for the 2008 reporting year, and will not be due until early 2009. However, the development process for this document will need to begin in the first or second quarter of 2008. ACP will also need to develop other application procedures as well, but these will be dependent on the scope and content of by-laws relating to paralegals.

Staffing requirements

39. The Call Centre plans to manage the call influx with existing staff. It should be noted, however, that current call standard (95% of calls answered within 20 seconds) may require adjustment to accommodate anticipated increases in call volumes.

40. Existing ACP staff should also be able to manage, at least for the near future, since most of the impact in that area will be deferred until early 2008.

41. However, Complaints Services and Membership Services will take on a critical role in building and maintaining two key databases related to the framework for paralegal regulation. As such, two additional full-time positions will be required (one in each of these departments).

Communications $200,000

42. The Communications department anticipates an overall requirement of $200,000 for the implementation of paralegal regulation comprising $140,000 for public

education/paralegal information and $60,000 for a full-time French contract translator for a period of one year, starting in 2007.

Public education

43. The bulk of this cost would focus on the production of public education/paralegal information materials. These would include multi-lingual public information brochures, as well as media materials, including any required public print ads and community notices for paralegals.

44. All writing and design work for these projects would be done in-house by our communications team. The majority of costs would relate to translation, printing and distribution.

    Brochures: Approximately $40,000 (including translation, printing and distribution)

    Placement of required notices and advertising materials, $ 100,000
    French Translator: $60,000

45. It is recommended that a full-time French translator be hired for a one-year contract to translate all routine materials relating to paralegal regulation. The volume will likely be consistent with the material we currently receive for translation, so there will be a great deal of material to translate, including all the bylaws, rules, Code of Conduct, notices, web pages, news releases, brochures, etc.

46. Having an on-site resource will ensure speed and consistency in the translation process. In addition, the contract person could also provide assistance in translating the PD & C materials that are currently sent out to out-of-house translators.

Legal Services $300,000

47. In house corporate counsel will be actively involved in the development of new by-laws and the redrafting of existing by-laws to accommodate changes required for the regulation of paralegals. To accommodate counsel's involvement in these activities, many of the regular duties normally undertaken by corporate counsel will be sent to outside counsel for review and action. A provision of $100,000 is allocated to the paralegal startup costs to provide for the use of outside counsel.

48. In addition, corporate counsel coordinates the translation of by-laws for the Society. A provision of $200,000 is provided for translation requirements beyond the routine matters to be covered off by the contract translator hired in the Communications department.

Information Systems $215,000

49. The Society's information systems are at the core of its operations. Virtually all components of the Society's systems will be impacted by the regulation of paralegals. Some systems will require only modification while others will require new development. In each case this will require additional resources to support the implementation of paralegal regulation.

50. The department will require an additional programmer and additional software licenses for staff added in other departments to implement paralegal regulation.

Other Administrative Requirements $ 530,000

51. The Society's administrative functions will also be impacted by paralegal regulation. All new staff required for implementation will require, computers, telephones desks/workstations, some will require office space. All of these will have to be accommodated in the Society's existing premises or may require additional rental accommodation. Estimated cost $260,000.

52. Human resources will have to recruit new staff to fill the positions identified in this budget. A provision of $ 200,000 is provided to support this activity.

53. Finance will be actively involved in the development and testing of new systems for billing new paralegal applicants and licensees. This will require the attention of at least one full time equivalent position from the existing complement to be involved in drafting requirements, development and testing. The budget provides for the replacement of staff dedicated to these activities with temporary assistance as required. Estimated cost $70,000

Professional Development and Competence $826,500 Direct and $473,500 Admin Costs

54. The Professional Development and Competence Department (PDC) is charged with the responsibility for the design, development, delivery and administration of the licensing examinations for paralegal grandparents. The division has in the past two years been responsible for the complete redevelopment of the licensing process for lawyers. Using this experience the division has developed a comprehensive plan for the examination from education systems development requirements to examination development delivery and candidate support services. These exams will be offered in the first quarter of 2008.

55. A budget of just over $800,000, including four additional staff, in direct costs is required to develop and administer a single exam, offered at three different times, for successful paralegal candidates. In addition $473,500 of administration costs are allocated to this activity for a total cost of $1,300,000. Fees for exam materials, exam sitting and exam re-writing have been set to fully recover the $1,300,000 on the assumption that 1,000 applicants will take the exam.

Professional Regulation $ 1,185,000

Development of policy and procedures

56. Counsel and Law Clerk: The Division will require an additional lawyer for this transition with experience in policy development, with clerical-operational assistance, to support the development of an integrated regulatory scheme including work on amendments to lawyer regulation to reflect the changes. The requirements include a review of our practices and procedures, development of a transition plan and support for the development of new staff and other policies. The development and implementation of these changes will also require a senior law clerk to coordinate the work within and

outside the division, and ensure orderly project development and implementation, including support for the division's staff and departments.

57. Additional Counsel as temporary replacement for Counsel in the Director's office: The Director's office has largely lost the contribution of a counsel for the division's ongoing policy and operational needs. An additional counsel is required to replace this counsel during assignment as project lead to the Paralegal Steering Group.

58. Outside Counsel: provision should be made for use of outside counsel in response to the various divisional court and other challenges expected in the early days of the transition in response to investigations and prosecutions. A provision of $100,000 for outside counsel is provided.

Investigations: Good Character and Paralegal Misconduct

59. During the portion of the transition period commencing in May 2007, Investigations activities will focus on good character (based on what potential grandparented applicants disclose when they seek to be licensed, as well as what we find out from other sources). We will need staff in place in April 2007. Over the course of the year, Investigations staff will also focus increasingly on the more systematic investigation of unauthorized practice. Budget request for 1 investigator and 1 assistant would enable the division to conduct and process approximately 70 investigations per year.

Discipline: Good Character

60. The anticipated requirement is for two Discipline staff (one prosecutor and an administrative assistant) starting September 2007. The Discipline department will require an additional counsel to deal with good character hearings. The Law Society will likely have approximately 60 good character hearings as a result of the grandparented applicants. These hearings will likely start by the fall of 2007. The cases will likely be more complex factually and legally than current good character hearings. Given the lack of certainty about case load during the transitional period, this budget request is only for one counsel to carry out this work, however more may be required depending on the development of work load during the transition.

Tribunals

61. A reasonable working assumption for the number of admission hearings the Law Society will be required to conduct for grandparent applicants is 60. The estimated costs are based on 60 hearings in 135 hearing days. Current admission hearings for students in the licensing process last anywhere from 1½ to 5 days. Assuming that admission hearings for the grandparent applicants will be contested, and will take an average of 2¼ days to hear.

62. Included are the cost of an extra hearings clerk, a court reporter, transcripts, the rental of hearing space off site, and increased office expenses for delivering material to adjudicators by courier, etc. Not included are the associated bencher expenses for attendance at the hearings, including remuneration.

Hearings clerk	27,000
Court reporter @ $290 per day	39,150
Transcripts	50,000
Increased office expenses	5,000
Rental space	380,000
TOTAL	$ 501,150

FOR DECISION

PARALEGAL START UP EXPENDITURES AND FUNDING

Motion

63. That Convocation authorize spending of paralegal start up expenditures from the existing cash reserves of the Law Society's General Fund. These amounts, less any fees for services received from paralegals, are to be repaid by the paralegals over a reasonable period of time.

64. In the prior motion in this report, Convocation is requested to approve the start up budget that estimates the costs of implementation of paralegal regulation by the Law Society. Several of the start up activities must be undertaken as soon as possible and in fact many are in progress, typically undertaken by existing Law Society staff. Upon adoption of the budget and this motion, recruitment of new staff and contractual obligations can be entered into.

65. Implementing the paralegal start up budget will require expenditures in advance of the collection of any significant amounts from potential paralegal candidates. The paralegal "grandparent application window will open on May 1, 2007. Furthermore, the start up budget projects the expected costs of the start up will exceed projected revenues from paralegal candidates by approximately $1.5 million. It is recommended that the costs of paralegal start up be captured in a separate Paralegal Fund and the deficit generated be recovered, with interest, by an annual surcharge to paralegals until such time as the deficit has been eliminated.

66. The Society's existing cash reserves within the Working Capital Reserve are sufficient to meet the needs of the Society's continuing operations and cover the projected deficit in the proposed Paralegal Fund. Therefore, Convocation is requested authorize payments from the Society's cash reserves to implement paralegal regulation in advance of the receipt of fees from paralegal candidates.

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

(1) Copy of the Draft Paralegal Start Up Budget Summary.

(page 27)

(2) Copy of the Draft Paralegal Start Up Budget – Detail Administration

(page 28)

(3) Copy of the Draft Paralegal Start Up Budget – Detail Professional Development and Competence.

(page 29)

(4) Copy of the Draft Paralegal Start Up Budget – Detail Professional Regulation.

(page 30)

Bencher Remuneration – Amendment to By-Law 7 [Benchers]

It was moved by Mr. Millar, seconded by Ms. Symes, that By-Law 7 be amended as set out in the motion distributed to Convocation.

THAT By-Law 7 [Benchers], made by Convocation on January 28, 1999 and amended by Convocation on March 26, 1999, be further amended as follows:

1. By-Law 7 [Benchers] be amended by adding the following:

REMUNERATION

Interpretation

2.1 (1) In this by-law,

"bencher year" means, as applicable,

(a) the period beginning on the day, in one calendar year, on which Convocation has its first regular meeting after an election of benchers and ending, in the following calendar year, on May 31,

(b) the twelve-month period beginning on June 1 in one calendar year and ending on May 31 in the following calendar year, and

(c) the period beginning on June 1 in one calendar year and ending, in the following calendar year, on the day before the day on which Convocation has its first regular meeting after an election of benchers;

"elected bencher" does not include a person appointed under subsection 16 (6) of the Act;

"full day" means,

(a) in the case of a payee whose business address, or, where the payee has no business address, whose home address, is within the City of Toronto,

(i) a total of more than 3 hours, in a period of 24 hours, if work is performed within the City of Toronto, or within a reasonable distance of the City of Toronto, and

(ii) any number of hours, in a period of 24 hours, if work is performed anywhere outside a reasonable distance of the City of Toronto, and

(b) in the case of a payee whose business address, or where the payee has no business address, whose home address, is outside the City of Toronto,

(i) a total of more than 3 hours, in a period of 24 hours, if work is performed at the payee's business address, or home address, or within a reasonable distance of the payee's business address or home address, and

(ii) any number of hours, in a period of 24 hours, if work is performed anywhere outside a reasonable distance of the payee's business address or home address;

"half day" means,

(a) in the case of a payee whose business address, or, where the payee has no business address, whose home address, is within the City of Toronto, a total of not more than 3 hours, in a period of 24 hours, if work is performed within the City of Toronto or within a reasonable distance of the City of Toronto, and

(b) in the case of a payee whose business address, or, where the payee has no business address, whose home address, is outside the City of Toronto, a total of not more than 3 hours, in a period of 24 hours, if work is performed at the payee's business address, or home address, or within a reasonable distance of the payee's business address or home address;

"payee" means a person who is entitled to receive remuneration from the Society under section 2.2;

"work" means,

(a) attending a Convocation,

(b) attending a meeting of a standing or other committee, including the Proceedings Authorization Committee and any subcommittee of a standing or other committee or the Proceedings Authorization Committee, of which the payee is a member,

(c) attending a meeting of a standing or other committee, including the Proceedings Authorization Committee and any subcommittee of a standing or other committee or the Proceedings Authorization Committee, of which the payee is not a member, at the request of the chair of the committee,

(d) attending an information session organized by the Society for benchers,

(e) attending a program of education or training required by the Society for benchers,

(f) hearing a hearing before the Hearing Panel or Appeal Panel,

(g) preparing reasons for a decision or order of the Hearing Panel or Appeal Panel,

(h) conducting a pre-hearing conference in a proceeding before the Hearing Panel,

(i) performing activities, as a chair of the Hearing Panel or Appeal Panel, that are integral to the office of chair of the Hearing Panel or Appeal Panel,

(j) performing activities, as a member of the Hearing Panel or Appeal Panel, that relate to the management of a proceeding before the Hearing Panel or Appeal Panel,

(k) performing activities, as a bencher appointed by Convocation for the purpose of making orders under sections 46, 47, 48, 49 and 49.1 of the Act, that are integral to the role of a bencher under sections 46, 47, 48, 49 and 49.1 of the Act,

(l) attending a meeting, other than a Convocation or a meeting of a standing or other committee, at the direction of the Treasurer or Convocation, and

(m) performing activities as a director of an organization, to which position the bencher was appointed, or nominated for appointment, by Convocation, provided that the performing of the activities would entitle any other director of the organization to be remunerated by the organization for performing the activities.

Interpretation: person elected as member of the Paralegal Standing Committee

(2) In this by-law, a person who is appointed under subsection 25.2 (2) of the Act is not a person who is elected as a member of the Paralegal Standing Committee.

Entitlement

2.2 (1) Subject to subsections (2) and (3), every elected bencher, every bencher who holds office under subsection 12 (1) of the Act, every bencher who holds office under subsection 12 (2) of the Act, every bencher who holds office under section 14 of the Act and every person who is elected as a member of the Paralegal Standing Committee is entitled to receive from the Society remuneration,

(a) for each half day of work performed for the Society in a bencher year, after the first 26 half or full days of work performed for the Society in that bencher year, in an amount determined by Convocation from time to time; and

(b) for each full day of work performed for the Society in a bencher year, after the first 26 half or full days of work performed for the Society in that bencher year, in an amount determined by Convocation from time to time.

Limits on remuneration: preparing reasons

(2) A payee is not entitled to receive from the Society remuneration for more than one full day of preparing written reasons for any decision or order of the Hearing Panel or Appeal Panel.

Limits on remuneration: performing activities as director of another organization

(3) A payee is not entitled to receive from the Society remuneration for performing activities as a director of an organization if the payee is remunerated, directly or indirectly, by the organization for performing the activities.

Claiming remuneration

2.3 (1) Subject to subsection (2), a payee may claim remuneration by submitting to the Society a claim for remuneration in a form provided by the Society.

Same

(2) A payee shall,

(a) claim remuneration for work performed for the Society within a reasonable period of time after the payee has performed the work; and

(b) shall claim all remuneration in respect of a bencher year by not later than six months after the end of the bencher year.

Payment of remuneration to payee

(3) Remuneration to which a payee is entitled shall be paid by the Society,

(a) within a reasonable period of time after the payee submits a claim for remuneration; and

(b) within the calendar year in which the payee submits a claim for remuneration.

Same

(4) Remuneration shall be paid to the individual payee claiming the remuneration or, at the direction of the individual payee, to the firm of which the payee is a partner or employee or to the professional corporation of which the payee is a shareholder or employee.

RÉMUNÉRATION

Interprétation

2.1 (1) Les définitions qui suivent s'appliquent au présent règlement administratif.

« année d'exercice à titre de conseiller » signifie, selon le cas,

a) la période qui débute le jour où le Conseil tient sa première réunion ordinaire à la suite de l'élection de conseillères et de conseillers et qui se termine le 31 mai de l'année civile suivante;

b) la période de douze mois écoulée entre le 1er juin et le 31 mai de l'année civile suivante;

c) la période qui débute le 1er juin et qui prend fin l'année civile suivante, la veille de la première réunion ordinaire tenue par le Conseil à la suite de l'élection de conseillères et de conseillers.

« conseiller élu » exclut la personne nommée en vertu du paragraphe 16 (6) de la Loi.

« journée entière » signifie,

a) dans le cas d'une ou d'un prestataire dont l'adresse professionnelle ou, à défaut d'une telle adresse, l'adresse domiciliaire, se trouve à Toronto,

(i) un minimum de trois heures par période de 24 heures, si le travail est accompli dans les limites de la ville de Toronto ou à proximité de Toronto;

(ii) un nombre indéfini d'heures par période de 24 heures, si le travail est accompli en région éloignée de Toronto;

b) dans le cas d'une ou d'un prestataire dont l'adresse professionnelle ou, à défaut d'une telle adresse, l'adresse domiciliaire, se trouve à l'extérieur des limites de Toronto,

(i) un minimum de trois heures par période de 24 heures, si le travail est accompli à son adresse professionnelle ou domiciliaire, ou à proximité de ces adresses;

(ii) un nombre indéfini d'heures par période de 24 heures, si le travail est accompli dans un endroit éloigné de son adresse professionnelle ou domiciliaire;

« demi-journée » signifie,

a) dans le cas d'une ou d'un prestataire dont l'adresse professionnelle ou, à défaut d'une telle adresse, l'adresse domiciliaire, se trouve à Toronto, un nombre d'heures de travail inférieur à trois heures par période de 24 heures, si le travail est accompli dans les limites de la ville de Toronto ou à proximité de Toronto;

b) dans le cas d'une ou d'un prestataire dont l'adresse professionnelle ou, à défaut d'une telle adresse, l'adresse domiciliaire, se trouve à l'extérieur des limites de Toronto, un nombre d'heures de travail inférieur à trois heures par période de 24 heures, si le travail est accompli à son adresse professionnelle ou domiciliaire ou à proximité de celle-ci;

« prestataire » s'entend d'une personne habilitée à recevoir une rémunération du Barreau conformément à l'article 2.2.

« travail » signifie notamment ce qui suit :

a) assister à une réunion du Conseil;

b) participer à une réunion d'un comité permanent ou autre, y compris le Comité d'autorisation des instances ainsi que tout autre sous-comité mis sur pied par un comité permanent ou autre ou par le Comité d'autorisation des instances, duquel la ou le prestataire est membre;

c) participer à une réunion d'un comité permanent ou autre, y compris le Comité d'autorisation des instances ainsi que tout autre sous-comité mis sur pied par un comité permanent ou autre ou par le Comité d'autorisation des instances, duquel la ou le prestataire n'est pas membre, à la demande de la directrice ou du directeur du comité visé;

d) assister à une séance d'information organisée par le Barreau à l'intention des conseillères et des conseillers;

e) assister à un programme de perfectionnement ou de formation à l'intention des conseillères et des conseillers conformément aux exigences du Barreau;

f) instruire une audience devant le Comité d'audition ou le Comité d'appel;

g) rédiger les motifs à l'appui d'une décision ou d'une ordonnance rendue par le Comité d'audition ou le Comité d'appel;

h) mener une conférence préparatoire à l'audience dans un dossier instruit devant le Comité d'audition;

i) exécuter des fonctions inhérentes au poste de présidente ou de président du Comité d'audition ou du Comité d'appel;

j) exécuter des fonctions, en qualité de membre du Comité d'audition ou du Comité d'appel, liées à la gestion des dossiers soumis au Comité d'audition ou au Comité d'appel;

k) exécuter des fonctions, en qualité de conseillère ou de conseiller nommé par le Conseil afin de rendre des ordonnances en vertu des articles 46, 47, 48, 49 et 49.1 de la Loi, qui s'inscrivent dans le rôle de conseiller, conformément aux articles 46, 47, 48, 49 et 49.1 de la Loi;

l) assister à une réunion, autre que celle du Conseil, d'un comité permanent ou d'un autre comité, sur demande de la trésorière ou du trésorier ou du Conseil;

m) exécuter des fonctions inhérentes au poste de directrice ou de directeur d'un organisme à l'égard duquel la conseillère ou le conseiller à été nommé ou désigné aux fins de nomination par le Conseil, pourvu qu'une directrice ou qu'un directeur de l'organisme qui exécute des fonctions similaires puisse être rémunéré par l'organisme dans l'accomplissement des activités visées.

Interprétation « personne élue membre du Comité permanent des parajuristes »

(2) Aux fins du présent règlement administratif, une personne nommée conformément au paragraphe 25.2 (2) de la Loi diffère de la personne élue membre du Comité permanent des parajuristes.

Rémunération

2.2 (1) Sous réserve des paragraphes (2) et (3), est habilité à recevoir une rémunération du Barreau la conseillère ou le conseiller élu, la conseillère ou le conseiller qui occupe un poste conformément au paragraphe 12 (1) de la Loi, la conseillère ou le conseiller qui occupe un poste conformément à l'article 14 de la Loi et quiconque est élu membre du Comité permanent des parajuristes

a) à l'égard de chaque demi-journée de travail accompli pour le compte du Barreau dans une année d'exercice à titre de conseiller, à la suite des 26 premières demi-journées ou journées entières de travail accompli pour le compte du Barreau dans une année d'exercice à titre de conseiller, dont le montant est précisé au besoin par le Conseil;

b) à l'égard de chaque journée entière de travail accompli pour le compte du Barreau dans une année d'exercice à titre de conseiller, à la suite des 26 premières demi-journées ou journées entières de travail accompli pour le compte du Barreau dans une année d'exercice à titre de conseiller, dont le montant est précisé au besoin par le Conseil.

Limites à la rémunération : Rédaction des motifs

(2) Une ou un prestataire n'a pas droit de toucher une rémunération du Barreau supérieure à une journée entière de travail relativement à la rédaction des motifs d'une décision ou d'une ordonnance du Comité d'audition ou du Comité d'appel.

Limites à la rémunération : Exécution de fonctions en qualité de directeur d'un autre organisme

(3) Une ou un prestataire n'a pas droit de toucher une rémunération du Barreau relativement à l'exécution de fonctions en qualité de directrice ou de directeur d'un organisme si elle ou il reçoit déjà une rémunération, directe ou indirecte, de l'organisme en question en contrepartie de son travail.

Demande de rémunération

2.3 (1) Sous réserve du paragraphe (2), une ou un prestataire peut réclamer une rémunération en déposant auprès du Barreau une demande de rémunération dûment remplie.

Idem

(2) Une ou un prestataire

a) dépose une demande de rémunération relativement au travail accompli pour le compte du Barreau dans un délai raisonnable à la suite de la prestation desdits services;

b) dépose une demande de rémunération de l'ensemble du travail accompli dans une année d'exercice à titre de conseiller dans les six mois qui suivent la clôture d'une telle année.

Versement de la rémunération

(3) Le Barreau verse la rémunération à laquelle a droit la ou le prestataire

a) dans un délai raisonnable à la suite du dépôt de la demande de rémunération par la ou le prestataire;

b) dans l'année civile au cours de laquelle la ou le prestataire dépose la demande de rémunération.

Idem

(4) La rémunération est versée directement à la prestataire ou au prestataire qui a déposé la demande ou, à son gré, au cabinet pour le compte duquel elle ou il évolue en tant qu'associé(e) ou employé(e) ou encore à la société professionnelle de laquelle la ou le prestataire est actionnaire ou est employé.

Carried

Re: Paralegal Start-Up Budget

It was moved by Mr. Millar, seconded by Mr. Dray, that Convocation approve the Paralegal Start-Up Budget.

Carried

ROLL CALL VOTE

Aaron	Against	Lawrie	For
Alexander	For	Legge	For
Backhouse	For	Millar	For
Banack	For	Minor	For
Bobesich	Against	Murray	For
Boyd	For	O'Donnell	For
Campion	For	Pawlitza	For
Carpenter-Gunn	For	Porter	For
Caskey	For	Potter	For
Chahbar	For	Robins	For
Coffey	For	Ross	For
Copeland	For	Ruby	For
Crowe	For	St. Lewis	For
Curtis	Against	Sandler	For
Dickson	For	Silverstein	For
Dray	For	Simpson	For
Eber	For	Swaye	For
Feinstein	For	Symes	For
Filion	For	Topp	Against
Gotlib	For	Warkentin	For

Gottlieb	Against
Harris	For
Heintzman	For
Henderson	For
Krishna	For

Vote: 40 For; 5 Against

Re: Paralegal Start-Up Expenditures and Funding

It was moved by Mr. Millar, seconded by Ms. Symes, that Convocation authorize spending of paralegal start up expenditures from the existing cash reserves of the Law Society's General Fund. These amounts, less any fees for services received from paralegals, are to be repaid by the paralegals over a reasonable period of time.

Carried

ROLL-CALL VOTE

Aaron	For	Lawrie	For
Alexander	For	Legge	For
Backhouse	For	Millar	For
Banack	Against	Minor	For
Bobesich	Against	Murray	Against
Boyd	For	O'Donnell	For
Campion	For	Pawlitza	For
Carpenter-Gunn	Against	Porter	For
Caskey	For	Potter	Against
Chahbar	For	Robins	For
Coffey	For	Ross	Against
Copeland	For	Ruby	For
Crowe	For	St. Lewis	Against
Curtis	Against	Sandler	For
Dickson	For	Silverstein	Against
Dray	For	Simpson	For
Eber	For	Swaye	For
Feinstein	For	Symes	For
Filion	Against	Topp	Against
Gotlib	For	Warkentin	For
Gottlieb	Against		
Harris	For		
Heintzman	For		
Henderson	For		
Krishna	Against		

Vote: 32 For; 13 Against

It was moved by Mr. Silverstein, seconded by Mr. Aaron, that the following words be added at the end of the motion at paragraph 63 under Tab C:

"not to exceed 10 years bearing interest at the Bank of Canada rate with updates to be provided to Convocation yearly."

Lost

ROLL CALL VOTE

Aaron	For	Lawrie	Against
Alexander	For	Legge	For
Backhouse	Against	Millar	Against
Banack	For	Minor	Against
Bobesich	For	Murray	For
Boyd	Against	O'Donnell	Against
Campion	For	Pawlitza	Against
Carpenter-Gunn	Against	Porter	For
Caskey	Against	Potter	For
Chahbar	Against	Robins	Against
Coffey	Against	Ross	For
Copeland	For	Ruby	Against
Crowe	Against	St. Lewis	For
Curtis	For	Sandler	Against
Dickson	Against	Silverstein	For
Dray	Against	Simpson	Against
Eber	For	Swaye	Against
Feinstein	Against	Symes	Against
Filion	Against	Topp	For
Gotlib	Against	Warkentin	Against
Gottlieb	For		
Harris	Against		
Heintzman	Against		
Henderson	Against		
Krishna	For		

Vote: 18 For; 27 Against

It was moved by Mr. Aaron, seconded by Mr. Gottlieb, that the Law Society borrow the $500,000 from our Law Reform Commission commitment to fund paralegal regulation and revisit the issue in a few years.

Withdrawn

PROFESSIONAL REGULATION COMMITTEE REPORT

Mr. Ruby presented the Professional Regulation Committee Report.

Report to Convocation
February 22, 2007*

Professional Regulation Committee

Committee Members
Clayton Ruby, Chair
Tom Heintzman, Vice-Chair
Heather Ross, Vice-Chair
Anne Marie Doyle
George Finlayson
Alan Gold
Allan Gotlib
Gary Gottlieb
Paul Henderson
Ross Murray
Sydney Robins
Robert Topp
Roger Yachetti

Purposes of Report: Decision and Information

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

* Includes reports from the December 7, 2006, January 11 and February 8, 2007 meetings.

TABLE OF CONTENTS

Professional Regulation Division Quarterly Report.....TAB F

COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on December 7, 2006, January 11, 2007 and February 8, 2007.

   In attendance on December 7 were Clayton Ruby (Chair), Tom Heintzman (Vice-chair), George Finlayson, Alan Gold, Gary Gottlieb, Allan Gotlib (by telephone), Paul Henderson (by telephone) and Ross Murray. Staff attending were Naomi Bussin, Lesley Cameron, Katherine Corrick and Donna Farquharson.

   In attendance on January 11, 2007 were Clayton Ruby (Chair), Tom Heintzman and Heather Ross (by telephone) (Vice-chairs), Anne-Marie Doyle, George Finlayson, Gary Gottlieb and Ross Murray and Joanne St. Lewis. Staff attending were Josee Bouchard, Naomi Bussin, Leslie Greenfield, Malcolm Heins, Zeynep Onen, Roy Thomas and Jim Varro.

   In attendance on February 8, 2007 were Clayton Ruby (Chair), Tom Heintzman and Heather Ross (Vice-chairs), Anne-Marie Doyle, George Finlayson, Gary Gottlieb and Ross Murray. Staff attending were Naomi Bussin, Terry Knott, Zeynep Onen and Jim Varro. Clare Lewis and Miriam Weinfeld also attended.

AMENDMENTS TO *RULES OF PROFESSIONAL CONDUCT* 2.02 AND 2.04 AND COMMENTARIES

Motion

2. That Convocation make the following amendments to the *Rules of Professional Conduct:*

   a. Add new rule 2.02(14) and (15) and commentary as follows:

      Reporting on Mortgage Transactions

      2.02 (14) Where a lawyer acts for a lender and the loan is secured by a mortgage on real property, the lawyer shall provide a final report on the transaction, together with the duplicate registered mortgage, to the lender within 60 days of the registration of the mortgage, or within such other time period as instructed by the lender.

      (15) The final report required by subrule (14) must be delivered within the times set out in that subrule even if the lawyer has paid funds to satisfy one or more prior encumbrances to ensure the priority of the mortgage as instructed and the lawyer has obtained an undertaking to register a discharge of the encumbrance or encumbrances but the discharge remains unregistered.

Commentary

If, at the time a lawyer delivers a final report required by subrule (14), any encumbrance described in subrule (15) remains undischarged, the lawyer's report to the lender should state that it is conditional on the registration of the discharge. The lawyer should then take the necessary steps to verify the registration of the discharge and to fulfill the requirement to provide the lender with timely confirmation of the registration of the discharge.

b. Add new rule 2.04(6.1) and commentary as follows:

2.04 (6.1) Where a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer shall disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

Commentary

What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or "flip", where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information. In some cases, it may be necessary for the lawyer to make disclosure to an institutional lender's legal department if the lender's normal contact person does not appear to be acting on the information.

c. Amend rule 2.04(6) through (8) and add new rules 2.04(8.1) and (8.2) and commentary as follows:

(6) Except as provided in subrule (8.2), before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that

(a) the lawyer has been asked to act for both or all of them,
(b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and
(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

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

(7) Except as provided in subrule (8.2), where a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

Commentary

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

(8) Except as provided in subrule (8.2), where a lawyer has advised the clients as provided under subrules (6) and (7) and the parties are content that the lawyer act, the lawyer shall obtain their consent.

(8.1) In subrule (8.2), "lending client" means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

(8.2) If a lawyer is jointly retained by a client and by a lending client in respect of a mortgage or loan from the lending client to that client, including any guarantee of that mortgage or loan, the lending client's consent is deemed to exist upon the lawyer's receipt of written instructions from the lending client to act and the lawyer is not required to

(a) provide the advice described in subrule (6) to the lending client before accepting the employment,
(b) provide the advice described in subrule (7) if the lending client is the other client as described in that subrule, or
(c) obtain the consent of the lending client as described in subrule (8), including confirming the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.

Commentary

Subrules (8.1) and (8.2) are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g. mortgage loan instructions) and the consent is generally deemed by such clients to exist when the lawyer is requested to act.

Subrule (8.2) applies to all loans where a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.

Introduction

3. In the spring of 2005, through the efforts of the Law Society's Chief Executive Officer, the Working Group on Real Estate Issues was formed to focus on issues arising in real estate practice that relate to the Law Society's regulatory responsibilities. Mortgage fraud, standards of practice and facilitating the public's access to lawyers knowledgeable about real estate law are examples of the issues being addressed in this forum. The aim is to deal with these matters in a more comprehensive way through the united efforts of the organized bar and the Law Society. The Working Group includes benchers, representatives from the Ontario Bar Association (OBA) Real Property Section and the County and District Law Presidents' Association (CDLPA) and relevant Law Society staff.[1]

4. In a series of meetings beginning in April 2005, the working group focussed on two issues: practice guidelines for residential real estate transactions and new *Rules of Professional Conduct* intended to assist in preventing mortgage fraud.

5. A third issue referred to the Society from the Ontario Bar Association some time ago was also discussed at the working group. It involved a proposal to amend the Rules that require a written consent or written confirmation of an oral consent from an institutional lender in a joint retainer involving a borrower and the lender.

6. The Working Group reported its proposals to the Committee and the Professional Development, Competence and Admissions Committee for review.

7. With respect to mortgage fraud, the Committee acknowledged the concern about the increasing incidence of lawyer involvement in fraudulent real estate transactions. Additional resources have been allocated to address this issue and, as reported to Convocation in March 2005, the Law Society is working with other institutions, agencies

[1] Members of the Working Group are Bradley Wright, Alan Silverstein, Ray Leclair (OBA), Clare Brunetta (CDLPA), Sidney Troister (Counsel to the Society on real estate issues), Malcolm Heins, Zeynep Onen and staff from the Professional Regulation Division, Professional Development & Competence Department and Policy and Tribunals.

and authorities in an effort to identify ways to prevent, detect and counteract fraudulent activity.

8. As the Law Society is responsible for regulating the legal profession in the public interest, the Committee's view is that it must be proactive in recognizing problems and taking steps to address them. To assist in addressing fraud in relation to real estate transactions, the Committee is proposing amendments to the *Rules of Professional Conduct* as set out in this report.[2]

9. The Committee agreed with the Working Group that its proposals should be the subject of consultation with the real estate bar before further steps are taken to implement them within the Law Society's regulatory scheme. Following a joint report to the Committee and the Professional Development, Competence & Admissions Committee on the work of the Working Group, the Committees sought Convocation's approval to engage in the consultations. In November 2005, Convocation approved consultations with the real estate bar on these issues.

10. The consultations were conducted in April and May of 2006 in a number of locations across Ontario – Hamilton, Kitchener-Waterloo, Thunder Bay, Ottawa, Toronto, Brampton, Sudbury, Windsor, Aurora, London and Kingston. Meetings were held by satellite in additional locations - Kenora, Fort Frances, Sault Ste. Marie, Timmins, North Bay and Parry Sound.[3] The lawyers who attended the consultations appreciated the outreach it afforded to legal communities across the province the opportunity for a two-way dialogue on the issues. Generally, the sessions across the province were well-attended. The topics for discussion at the consultations also formed part of the agenda for the Real Estate Summit in Toronto, a major CLE event attended by over 400 real estate practitioners.

11. The feedback received through the consultation was very informative and resulted in some changes to the proposed Rule amendments and guidelines, discussed in this report.

12. The proposed rules and rule amendments in this report were prepared by the Society's rules drafter Don Revell, based on drafts prepared by Law Society policy and regulatory staff. The new rules are shown in the context of rules 2.02 and 2.04 in Appendix 2.

Residential Real Estate Transactions Guidelines

13. The Guidelines were reported to Convocation on January 25, 2006 for information. They now form part of the guidance to members in real estate matters and are available through various Law Society media.

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[2] The Committee is continuing its review of other proposals for Rule amendments that were the subject of the consultation and additional suggestions for consideration by the Working Group.

[3] The material used for the consultation on the Rules amendments appears at Appendix 1.

New Rules to Prevent Mortgage Fraud

14. The Law Society's inventory of mortgage fraud investigations presents a tremendous cost to the Law Society and thus the individual members of the profession. The cost of mortgage fraud to the profession is already manifesting itself in annual fee increases to cover the high cost of investigating and prosecuting these cases. There is also a huge potential for claims to LawPRO.

15. In addition to the estimated monetary impact, mortgage fraud damages the profession's credibility and reputation with the public.

16. That said, a very small number of the over 37,000 lawyers in Ontario are involved in mortgage fraud or are used unwittingly by unscrupulous clients facilitate frauds. Lawyers remain as the best protection for the interests of borrowers and lenders in real estate transactions, and as competent professionals, are required to be vigilant to ensure that these transactions are not used as vehicles for frauds.

17. In the Committee's view, the proposed new Rules, explained below, will help to prevent mortgage fraud by instituting certain measures that relate to the lawyer's representation of clients in a real estate transaction.

<u>New Rules 2.02(14) and (15) and Commentary</u>

18. The new rules require a lawyer to provide a final report to a lender client with 60 days of the registration of the mortgage. The rules codify the expected practice in real estate transactions that a lawyer acting for a lender will report on the registration of the mortgage within a reasonable period of time.

19. One other law society has a rule that deals with reports on mortgage transactions. The Law Society of British Columbia has a very specific rule (the equivalent to a Law Society of Upper Canada By-Law) which requires a lawyer to make a written report to the Executive Director of the Law Society if he or she does not receive a discharge within 60 days of closing.

20. Lawyers who participated in the consultations supported the new rules, but some expressed concern that lenders can be slow to register discharges of mortgages after receiving payment of discharge funds. There may be many instances where discharges are not registered within 60 days after closing. This may result in a lawyer being unable to meet the requirement to provide a final unconditional report within the 60 days, even where he or she in good faith attempts to do so. To address this concern, subrule (15) and the commentary were added. The proposed rules 2.02 (14) and (15) and commentary read:

> 2.02 (14) Where a lawyer acts for a lender and the loan is secured by a mortgage on real property, the lawyer shall provide a final report on the transaction, together with the duplicate registered mortgage, to the lender within 60 days of the registration of the mortgage, or within such other time period as instructed by the lender.

(15) The final report required by subrule (14) must be delivered within the times set out in that subrule even if the lawyer has paid funds to satisfy one or more prior encumbrances to ensure the priority of the mortgage as instructed and the lawyer has obtained an undertaking to register a discharge of the encumbrance or encumbrances but the discharge remains unregistered.

Commentary

If, at the time a lawyer delivers a final report required by subrule (14), any encumbrance described in subrule (15) remains undischarged, the lawyer's report to the lender should state that it is conditional on the registration of the discharge. The lawyer should then take the necessary steps to verify the registration of the discharge and to fulfill the requirement to provide the lender with timely confirmation of the discharge.

New rule 2.04(6.1) and commentary

21. The proposed rule, within the rules on conflicts of interest and joint retainers, requires a lawyer to disclose to a lender and borrower all material information relevant to a lending transaction. The rule reflects the common law principle for the disclosure of material facts in such transactions.[4] Information about the transaction that is known to the lawyer may prove to be crucial to the decision of the institutional lender to complete the transaction and may assist in detecting fraud or other illegal activity. The rule and commentary are as follows:

> 2.04 (6.1) Where a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer shall disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

[4] In *Commerce Capital v. Berk* (1989), 68 O.R. (2d) 257 (Ont. CA), the court found that a law firm breached its fiduciary duty to a lender for failing to disclose material facts. The court did not define "material" but stated that it must be determined "on some objective basis, and later found that "any reasonable lawyer" would have considered the particular information in that case to be material to the lender's decision-making. The court also held that it would be inappropriate to speculate on what the lender would have done if the information had been disclosed, and that the onus is on the lawyer to prove that the lender would have proceeded with the transaction even if the facts had been disclosed. *Commerce Capital v. Berk* was followed by the Law Society's Hearing Panel in *Re Kadir Baksh* 2004 LSDD No. 24.

Commentary

What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or "flip", where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information. In some cases, it may be necessary for the lawyer to make disclosure to an institutional lender's legal department if the lender's normal contact person does not appear to be acting on the information.

22. Lawyers at the consultation did not oppose a rule requiring disclosure, but raised an issue about the meaning of "material" and how that should be interpreted. The commentary was drafted to address this concern. The lawyer is responsible to bring the information to the lender so that the lender may determine whether it is material.[5]

[5] The Committee reviewed some examples of material information that may be an indicator of mortgage fraud, and that, if known prior to advancing funds, a lawyer would be obligated to disclose to a lender client pursuant to the proposed rule. These examples were discussed in an article in the Fall/Winter edition of the *Ontario Lawyers Gazette*:

a. Price Escalation or "Flips": A property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. While some price increases may be legitimate, the lawyer should notify the lender so that the lender can investigate the reason for the price increase;
b. Amendments to an agreement of purchase and sale, either formal or otherwise, changing the terms of the agreement upon which the bank has based its mortgage transaction. Examples include: purchase price reductions, extra deposits payable; renovation credits; cash-backs or other credits to purchaser; and/or changing the parties to the transaction; changing the purchase price, adding subsequent mortgages; adding a vendor take-back mortgage; changing the amount payable on closing, changing the manner of taking title;
c. The use of a power of attorney to execute mortgage or transfer documentation in circumstances where this fact or troubling aspects of the power is not apparently known to the lender. The lawyer should inquire why a power of attorney is being used.
d. Information about the circumstances of the agreement of purchase and sale upon which the lender has based its mortgage transaction and which could affect the ultimate decision to advance funds. Examples include: the vendor named in the purchase agreement is not the registered owner at the time of the agreement; the true payment of the deposit noted; the actual date of closing; and/or the actual sale proceeds expected by the vendor; the use of counter cheques; identification irregularities;
e. Information about the transaction or purchaser that is inconsistent with the information shown in the mortgage commitment. Examples include the lawyer's knowledge of changes in the mortgagor's economic circumstances, changes in mortgagor's employment; changes in mortgagor's marital status; evidence of inaccurate appraisals;
f. Mortgage surpluses: The mortgage advance exceeds the balance due or actually paid on closing;

23. This proposal also includes disclosure to the borrower. The Committee's view is that borrower may be complicit in some, but not all, cases of fraud.

Amendments to the Joint Retainer Rule for Loan Transactions with Institutional Lenders

24. The proposed amendments to rule 2.04 on conflicts of interest would exempt a lawyer from the current disclosure and consent obligations with respect to an institutional lender client in circumstances in which the lawyer acts jointly for a borrower and an institutional lender.

25. The issue prompting the amendment, raised by a former chair of the Ontario Bar Association Real Property Section, relates to the way "consent" has been defined in the Rules since 2000.

26. Under the joint retainer rules (rules 2.04(6) and following), the lawyer is required to give the proposed clients specified information and then under subparagraph 2.04(8), "obtain their consent." "Consent" is defined in Rule 1.02 as a consent in writing, provided that where more than one person consents, each may sign a separate document recording his or her consent, or an oral consent, provided that each person giving the oral consent receives a separate letter recording his or her consent. The Rule on joint retainers expressly requires that the documenting of the consent occur *after* the disclosure about the retainer by the lawyer. Under the Rules prior to 2000, "consent" was not defined and the exact process was not specified in the Rules.

27. The Society learned that obtaining such consent from a financial institution is almost impossible in the residential context, but the general assumption is that lenders are consenting to the joint retainer by virtue of the fact that they provide loan documents to a lawyer knowing the lawyer is acting for the borrower.

28. The proposed amendment takes the form of new subrules 2.04(8.1) and (8.2), with corresponding changes in existing subrules 2.04(6) through (8). The amendments would apply to a retainer in which a lawyer is acting for both a lender and borrower in the circumstances described in rule 2.04(12)(c) (i.e. where a lawyer is permitted to act for both a borrower and lender where the lender is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business). In these situations, the lenders will be informed of the identity of the borrower's lawyer and proceed on the understanding that that lawyer will be acting for both borrower and lender. By virtue of the amendments, simultaneously with the lawyer's receipt of instructions from the lender for the transaction, the lender will be deemed to have received the disclosure required under subrule (6) and the lawyer will be deemed to have received the lender's consent under subrule (8) as defined in rule 1.02. In effect, the lender's consent would be effective upon the lawyer's acceptance of instructions from the lender to act in the transaction.

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g. Direct payment of deposit or down payment to the vendor: A deposit is payable directly to the vendor rather than to the vendor's lawyer in trust or to a real estate broker. The down payment on closing is ostensibly paid by the purchaser directly to the vendor rather than to the purchaser's lawyer.

29. The proposed amendments to rule 2.04 were uncontroversial at the consultations and there were no comments reflecting opposition to the amendments.

30. The following are the proposed amendments to rule 2.04:

(6) Except as provided in subrule (8.2), before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that

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

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

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

Commentary

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

(7) Except as provided in subrule (8.2), where a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

Commentary

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

(8) Except as provided in subrule (8.2), where a lawyer has advised the clients as provided under subrules (6) and (7) and the parties are content that the lawyer act, the lawyer shall obtain their consent.

(8.1) In subrule (8.2), "lending client" means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

(8.2) If a lawyer is jointly retained by a client and by a lending client in respect of a mortgage or loan from the lending client to that client, including any guarantee of that mortgage or loan, the lending client's consent is deemed to exist upon the lawyer's receipt of written instructions from the lending client to act and the lawyer is not required to

1. provide the advice described in subrule (6) to the lending client before accepting the employment,
2. provide the advice described in subrule (7) if the lending client is the other client as described in that subrule, or
3. obtain the consent of the lending client as described in subrule (8), including confirming the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.

Commentary

Subrules (8.1) and (8.2) are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g. mortgage loan instructions) and the consent is generally deemed by such clients to exist when the lawyer is requested to act.

Subrule (8.2) applies to all loans where a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.

APPENDIX 1

Consultations with Real Estate Practitioners on
Proposed Amendments
to the *Rules of Professional Conduct*

INTRODUCTION

The Law Society Working Group on Real Estate Issues was created to address a range of issues arising in real estate practice. Members of the Working Group include Law Society benchers and representatives from the Ontario Bar Association Real Property Section and the County and District Law Presidents Association and the Ontario Real Estate Lawyers Association.

One of the primary concerns of the Working Group is mortgage fraud. The scope of the mortgage fraud problem and the joint effort among institutions, agencies and authorities to address the problem is set out in the Law Society's Report to Convocation on Mortgage Fraud ("Report on Mortgage Fraud") dated March 24, 2005. The Report on Mortgage Fraud should be read as background to the proposed rule amendments contained in this document. It may be obtained from the Law Society web site at http://www.lsuc.on.ca/media/convmar05mortgagefraud.pdf. As the Law Society indicated in this Report, the Law Society has identified changes to the *Rules of Professional Conduct* to minimize the potential for fraud. One of the purposes of these consultations is to receive feedback on the proposed new *Rules*. Three new rules are proposed, consisting of two

amendments to rules 2.04 on Avoidance of Conflicts of Interest and one amendment to Rule 2.02 on Quality of Service. The amendments are shown in the context of the current rules in Appendix 1.

In addition, the Law Society is seeking input on proposed amendments to Rule 2.04 (Conflicts of Interest) that would exempt a lawyer from the current disclosure and consent obligations with respect to an institutional lender client in circumstances in which the lawyer acts jointly for a borrower and an institutional lender. This issue was raised by the former chair of the Ontario Bar Association Real Property Section. The proposed amendments appear in Appendix 2.

2. PROPOSED AMENDMENTS: MORTGAGE FRAUD

Proposed Amendment #1
A general prohibition against acting for both the vendor and the purchaser in a real estate transaction, with certain exceptions: New Rules 2.04(11.1) and (11.2)

> Prohibition Against Acting for More Than One Party in a Real Estate Transaction
>
> 2.04 (11.1) Subject to sub-rule (11.2) a lawyer or two or more lawyers practicing in a law firm shall not act for or otherwise represent both transferor and transferee in an arm's length real estate transaction. For the purposes of this subrule, "arm's length" shall have the same meaning as defined in the *Income Tax Act (Canada).*
>
> 2.04 (11.2) Provided there is no violation of this rule, a lawyer may act for or otherwise represent both a transferor and a transferee in a real estate transaction if
>
> (a) lawyer practices in a remote location where there are no other lawyers that either party could conveniently retain for the real estate transaction, or
>
> (b) the transaction is pursuant to the administration and/or settlement of an estate.

The language in the new rule is borrowed from existing rule 2.04(12) (the "two lawyer rule" for mortgage/lending transactions).

Reasons for the Rule

The Law Society's Mortgage Fraud Team has identified certain real estate practices that those committing mortgage fraud are taking advantage of. One example is a lawyer or the lawyer's partner or associate/employed lawyer acting for both vendor and purchaser in a real estate transaction.

It is unclear how many real estate practitioners act for more than one of the vendor or purchaser parties in a residential real estate transaction, although it is recognized that it is customary for the lawyer acting for the purchaser/mortgagor to also act for the institutional lender in the placing of a mortgage to assist in funding the purchase price.

The proposed rules have been drafted to have a minimal impact on real estate practitioners, especially in smaller communities, while providing maximum impact on mortgage fraud prevention. Real estate and mortgage work is a large part of the business of small firms and sole practices, especially in smaller communities.

If the Law Society is unable to demonstrate that it can regulate this problem, institutional lenders may lose confidence in the legal profession with the possible consequence that lenders will use only selected large law firms or in-house counsel for all mortgage work in the province.

Given the importance of real estate and mortgage work to many lawyers in smaller firms outside of the greater Toronto area, large-scale reductions in the availability of work will have a large impact on their practice. If this work is no longer available, the viability of these firms will be threatened and the communities they serve could lose their local services in all areas of practice.

Proposed Amendment #2
A requirement to make full disclosure to the lender: New Rule 2.04 (6.1)

2.04 (6.1) Where a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer shall disclose to the mortgagee or lender, in writing, before completion of the transaction, all material facts that are relevant to the transaction *[or]* any information that could affect the lender's decision to advance funds.

Commentary *[if "all material facts that are relevant to the transaction" is used]* "Material" means any unusual sales activities within the last year, or changes to the agreement of purchase and sale such as additional deposits or credits to the purchaser.

Reasons for the Rule

When acting for both a borrower and institutional lender, a lawyer must be mindful of his or her continuing obligations to the lender client. In that regard, information about the transaction that is known to the lawyer may prove to be crucial to the decision of the institutional lender to complete the transaction and may even assist in detecting fraud or other illegal activity.

In these circumstances the lawyer must adhere to the obligations imposed by Rule 2.04(6)

Proposed Amendment #3
A requirement to provide final reports to lenders within 90 days of the registration of the mortgage: New Rule 2.02 (14)

Requirement to Provide Final Reports to Lenders
2.02 (14) Where a lawyer acts for a lender and the loan is secured by a mortgage on real property, the lawyer shall provide a final report on the transaction, together with the duplicate registered mortgage, to the lender within 90 days of the registration of the mortgage.

One other law society has a rule that deals with reports on mortgage transactions. The Law Society of British Columbia has a very specific rule (the equivalent of the Law Society's By-Laws) which requires a lawyer to make a written report to the Executive Director of the Law Society if he/she does not receive a discharge within 60 days of closing.

Reasons for the Rule
The rule codifies the expected practice in real estate transactions that a lawyer acting for a lender will report on the registration of the mortgage within a reasonable period of time.

3. AMENDMENTS TO THE JOINT RETAINER RULE FOR LOAN RANSACTIONS WITH INSTITUTIONAL LENDERS

The proposed amendments to rule 2.04 on conflicts of interest would exempt a lawyer from the current disclosure and consent obligations with respect to an institutional lender client in circumstances in which the lawyer acts jointly for a borrower and an institutional lender.

This issue was raised by the former chair of the Ontario Bar Association (OBA) Real Property Section, Steven Pearlstein. His concern related to the ability of a lawyer to comply with the requirement to obtain consent from an institutional lender in a joint retainer involving a borrower and the lender. Such transactions are an exception to the rule that prohibits the same lawyer from acting for a borrower and lender (rule 2.04(12)). The lawyer's responsibilities in a joint retainer are set out in rules 2.04(6) through (10).

Mr. Pearlstein explained that the issue has arisen because of the way "consent" is defined in the Rules, a new feature of the Rules adopted in 2000. Under the joint retainer rules (rules 2.04(6) and following), the lawyer is required to give the proposed clients specified information (which varies depending on whether the lawyer has a continuing relationship with one of the clients), and then under subparagraph 2.04(8), "obtain their consent." "Consent" is defined in Rule 1.02 as a consent in writing, provided that where more than one person consents, each may sign a separate document recording his or her consent, or an oral consent, provided that each person giving the oral consent receives a separate letter recording his or her consent.

Mr. Pearlstein indicated that obtaining such consent from a financial institution is almost impossible in the residential context. The Rules do not permit a lawyer to simply send a letter to the lender advising of the conflict and stating that the lawyer will act for both unless advised to the contrary, nor do the Rules contemplate a blanket "in advance" consent from the financial institution that could be included in the Instructions to Solicitor. The Rule expressly requires that the documenting of the consent occur after the disclosure by the lawyer. Mr. Pearlstein pointed out that this was not as significant an issue under the old Rules as "consent" was not defined and the exact process was not specified in the Rules.

The Society learned, as Mr. Pearlstein advised, that institutional lenders will not generally provide a separate consent to the lawyer in the transaction, although some financial institutions include in their loan documentation notice and consent provisions similar to the language in the Society's Rules on joint retainers. Generally, the assumption is that lenders are consenting to the joint retainer by virtue of the fact that they provide loan documents to a lawyer knowing the lawyer is acting for the borrower.

While the Society canvassed with some of the major financial institutions the possibility of including a standard clause in the mortgage or loan instructions that reflects the disclosure and consent, ultimately, the decision was made to pursue amendments to the joint retainer rules to exempt lawyers who act jointly for institutional lenders and borrowers from the requirements to advise and obtain consent from institutional lenders.

The proposed amendment would take the form of new subrule 2.04(9), with corresponding changes in existing subrules 2.04(6) through (10). The proposed amendments appear in Appendix 2.

The amendments would apply to a retainer in which a lawyer is acting for both a lender and borrower in the circumstances described in rule 2.04(12)(c).[6] In these situations, the lenders will be informed of the identity of the borrower's lawyer and proceed on the understanding that that lawyer will be acting for both borrower and lender. By virtue of the amendments, simultaneously with the lawyer's receipt of instructions from the lender for the transaction, the lender will be deemed to have received the disclosure required under subrule (6) and the lawyer will be deemed to have received the lender's consent under subrule (8) as defined in rule 1.02. In effect, the lender's consent would be effective upon the lawyer's acceptance of instructions from the lender to act in the transaction. The proposed rule contains some options that relate to a possible variation in the confirmation of the consent, and commentary is also proposed to address certain matters related to these circumstances.

Appendix 1
(to Consultation Document)

RULES OF PROFESSIONAL CONDUCT WITH PROPOSED AMENDMENTS TO ASSIST IN PREVENTING MORTGAGE FRAUD

2.02 QUALITY OF SERVICE

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

> (a) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction,
>
> (b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price,
>
> *(c) the lender is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business,*
>
> …
>
> [emphasis added]

Honesty and Candour

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

Commentary

The lawyer's duty to the client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law, and the lawyer's own experience and expertise.

The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.

When Client an Organization

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

Commentary

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

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

[New – March 2004]

Encouraging Compromise or Settlement

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

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

Threatening Criminal Proceedings

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

Dishonesty, Fraud etc. by Client

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

[Amended – March 2004]

Commentary

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

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

Dishonesty, Fraud, etc. when Client an Organization

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

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

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

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

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

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

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

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

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

Commentary

The past, present, or proposed misconduct of an organization may have harmful and serious consequences not only for the organization and its constituency but also for the public, who rely on organizations to provide a variety of goods and services. In particular, the misconduct of publicly traded commercial and financial corporations may have serious consequences to the public at large. Rules 2.02 (5.1) and (5.2) address some of the professional responsibilities of a lawyer acting for an organization, which includes a corporation, when he or she learns that the organization has acted, is acting, or proposes to act in a way that is dishonest, fraudulent, criminal or illegal. In addition to these rules, the lawyer may need to consider, for example, the rules and commentary about confidentiality (rule 2.03).

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

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

These rules recognize that lawyers as the legal advisers to organizations are in a central position to encourage organizations to comply with the law and to advise that it is in the organizations' and the public's interest that organizations do not violate the law. Lawyers acting for organizations are often in a position to advise the executive officers of the

organization not only about the technicalities of the law but about the public relations and public policy concerns that motivated the government or regulator to enact the law. Moreover, lawyers for organizations, particularly in-house counsel, may guide organizations to act in ways that are legal, ethical, reputable, and consistent with the organization's responsibilities to its constituents and to the public.

[New – March 2004]

Client Under a Disability

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

Commentary

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

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

Medical-Legal Reports

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

Commentary

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

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

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

Title Insurance in Real Estate Conveyancing

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

Commentary

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

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

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

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

Commentary

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

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

Requirement to Provide Final Reports to Lenders

2.02 (14) Where a lawyer acts for a lender and the loan is secured by a mortgage on real property, the lawyer shall provide a final report on the transaction, together with the duplicate registered mortgage, to the lender within 90 days of the registration of the mortgage.

2.04 AVOIDANCE OF CONFLICTS OF INTEREST

Definition

2.04 (1) In this rule

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

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

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

Commentary

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

Where a lawyer is acting for a friend or family member, the lawyer may have a conflict of interest because the personal relationship may interfere with the lawyer's duty to provide objective, disinterested professional advice to the client.

Amended - May 2001, March 2004, October 2004]

Avoidance of Conflicts of Interest

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

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

Commentary

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

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

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

A conflict of interest may arise when a lawyer acts not only as a legal advisor but in another role for the client. For example, there is a dual role when a lawyer or his or her law firm acts for a public or private corporation and the lawyer serves as a director of the corporation. Lawyers may also serve these dual roles for partnerships, trusts, and other organizations. A dual role may raise a conflict of interest because it may affect the lawyer's independent judgment and fiduciary obligations in either or both roles, it may obscure legal advice from business and practical advice, it may invalidate the protection of lawyer and client privilege, and it has the potential of disqualifying the lawyer or the law firm from acting for the organization. Before accepting a dual role, a lawyer should consider these factors and discuss them with the client. The lawyer should also consider rule 6.04 (Outside Interests and Practice of Law).

If a lawyer has a sexual or intimate personal relationship with a client, this may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. Before accepting a retainer from or continuing a retainer with a person with whom the lawyer has such a relationship, a lawyer should consider the following factors:

a. The vulnerability of the client, both emotional and economic;
b. The fact that the lawyer and client relationship may create a power imbalance in favour of the lawyer or, in some circumstances, in favour of the client;
c. Whether the sexual or intimate personal relationship will jeopardize the client's right to have all information concerning the client's business and affairs held in strict confidence. For example, the existence of the relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship;

d. Whether such a relationship may require the lawyer to act as a witness in the proceedings;
e. Whether such a relationship will interfere in any way with the lawyer's fiduciary obligations to the client, his or her ability to exercise independent professional judgment, or his or her ability to fulfil obligations owed as an officer of the court and to the administration of justice.

There is no conflict of interest if another lawyer of the firm who does not have a sexual or intimate personal relationship with the client is the lawyer handling the client's work.

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

Amended – March 2004, October 2004]

Acting Against Client

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

(a) in the same matter,

(b) in any related matter, or

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

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

Commentary

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

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

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

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

(i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur,

(ii) the extent of prejudice to any party,
(iii) the good faith of the parties,
(iv) the availability of suitable alternative counsel, and
(v) issues affecting the public interest.

Commentary

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

Joint Retainer

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

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

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

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

Commentary

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

2.04 (6.1) Where a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer shall disclose to the mortgagee or lender, in writing, before completion of the transaction, all material facts that are relevant to the transaction
[or]
any information that could affect the lender’s decision to advance funds.

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

Commentary *[if all material facts that are relevant to the transaction" is used]*

In Rule 2.04(6.1), "material" would include any unusual sales activities within the last year, or changes to the agreement of purchase and sale such as additional deposits or credits to the purchaser.

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

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

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

(a) not advise them on the contentious issue, and

(b) refer the clients to other lawyers, unless

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

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

Commentary

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

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

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

Affiliations Between Lawyers and Affiliated Entities

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

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

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

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

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

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

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

Commentary

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

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

[New - May 2001]

Prohibition Against Acting for More Than One Party in a Real Estate Transaction

2.04 (11.1) Subject to sub-rule (11.2) a lawyer or two or more lawyers practicing in a law firm shall not act for or otherwise represent both transferor and transferee in an arm's length real estate transaction. For the purposes of this subrule, "arm's length" shall have the same meaning as defined in the *Income Tax Act, Canada.*

2.04 (11.2) Provided there is no violation of this rule, a lawyer may act for or otherwise represent both transferor and transferee, in a real estate transaction if

(a) the lawyer practices in a remote location where there are no other lawyers that either party could conveniently retain for the real estate transaction, or
(b) the transaction is pursuant to the administration and/or settlement of an estate.

Prohibition Against Acting for Borrower and Lender

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

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

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

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

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

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

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

[Amended - May 2001]

Multi-discipline Practice

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

Unrepresented Persons

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

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

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

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

Commentary

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

Appendix 2
(to Consultation Document)

RULES OF PROFESSIONAL CONDUCT WITH PROPOSED AMENDMENTS ON JOINT RETAINERS WITH BORROWERS AND INSTITUTIONAL LENDERS

RULE 2.04 AVOIDANCE OF CONFLICTS OF INTEREST

…

(6) Except as provided in subrule (9), before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that

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

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

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

Commentary

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

(7) Except as provided in subrule (9), where a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

Commentary

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

(8) Except as provided in subrule (9), where a lawyer has advised the clients as provided under subrules (6) and (7) and the parties are content that the lawyer act, the lawyer shall obtain their consent.

(9) If the joint retainer involves and is limited to a loan to a client, including any guarantee of that loan, from a lending client who is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business ("the lending client"),

(a) the lending client's consent is deemed to exist upon the lawyer's receipt of written instructions from the lending client to act,
(b) the lawyer is not required to
(i) provide the advice in subrule (6) to the lending client before accepting the employment,

(ii) provide the advice in subrule (7) if the other client is the lending client,
(iii) obtain the consent of the lending client as described in subrule (8), including confirming the lending client's consent in writing unless the lending client requires that its consent be reduced to writing,

[optional, or include in commentary as "should confirm":]

(c) where the lending client's written instructions are silent with respect to its consent for the lawyer to act, the lawyer shall confirm the lending client's consent in writing as soon as reasonably possible.

Commentary

Subrule (9) is intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g. mortgage loan instructions) and the consent is generally deemed by such clients to exist when the lawyer is requested to act.

[optional, or include in rule as "shall provide written confirmation":]

Notwithstanding the above, the lawyer should provide written confirmation of the terms of the joint retainer and of the consent to act where such confirmation does not appear in the documentation from the institutional lender relating to the transaction.

(~~9~~10) Save as provided by subrule (1011), where clients have consented to a joint retainer and an issue contentious between them or some of them arises, the lawyer shall

(a) not advise them on the contentious issue, and

(b) refer the clients to other lawyers, unless

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

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

Commentary

The rule does not prevent a lawyer from arbitrating or settling or attempting to arbitrate or settle, a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer. Where, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

(~~10~~11) Where clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them and a contentious issue does arise, the lawyer may advise the one client about the contentious matter and shall refer the other or others to another lawyer.

APPENDIX 2

2.02 QUALITY OF SERVICE

Honesty and Candour

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

Commentary

The lawyer's duty to the client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law, and the lawyer's own experience and expertise.

The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.

When Client an Organization

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

Commentary

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

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

[New – March 2004]

Encouraging Compromise or Settlement

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

Dishonesty, Fraud, etc. when Client an Organization

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

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

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

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

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

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

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

(b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer, or the chief executive officer refuses to cause the wrongful conduct to be stopped, advise progressively the next highest persons or groups, including

ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the conduct was or is dishonest, fraudulent, criminal, or illegal and should be stopped, and

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

Commentary

\The past, present, or proposed misconduct of an organization may have harmful and serious consequences not only for the organization and its constituency but also for the public, who rely on organizations to provide a variety of goods and services. In particular, the misconduct of publicly traded commercial and financial corporations may have serious consequences to the public at large. Rules 2.02 (5.1) and (5.2) address some of the professional responsibilities of a lawyer acting for an organization, which includes a corporation, when he or she learns that the organization has acted, is acting, or proposes to act in a way that is dishonest, fraudulent, criminal or illegal. In addition to these rules, the lawyer may need to consider, for example, the rules and commentary about confidentiality (rule 2.03).

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

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

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

[New – March 2004]

Client Under a Disability

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

Commentary

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

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

Medical-Legal Reports

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

Commentary

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

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

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

have the benefit of the expertise of the physician or health professional in understanding the significance of the conclusion contained in the medical legal report.

Title Insurance in Real Estate Conveyancing

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

Commentary

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

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

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

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

Commentary

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

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

Reporting on Mortgage Transactions

2.02 (14) Where a lawyer acts for a lender and the loan is secured by a mortgage on real property, the lawyer shall provide a final report on the transaction, together with the duplicate registered mortgage, to the lender within 60 days of the registration of the mortgage, or within such other time period as instructed by the lender.

(15) The final report required by subrule (14) must be delivered within the times set out in that subrule even if the lawyer has paid funds to satisfy one or more prior encumbrances to ensure the priority of the mortgage as instructed and the lawyer has obtained an undertaking to register a discharge of the encumbrance or encumbrances but the discharge remains unregistered.

Commentary

If, at the time a lawyer delivers a final report required by subrule (14), any encumbrance described in subrule (15) remains undischarged, the lawyer's report to the lender should state that it is conditional on the registration of the discharge. The lawyer should then take the necessary steps to verify the registration of the discharge and to fulfil the requirement to provide the lender with timely confirmation of the registration of the discharge.

2.04 AVOIDANCE OF CONFLICTS OF INTEREST

Definition

2.04 (1) In this rule

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

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

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

Commentary

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

Where a lawyer is acting for a friend or family member, the lawyer may have a conflict of interest because the personal relationship may interfere with the lawyer's duty to provide objective, disinterested professional advice to the client.

[Amended - May 2001, March 2004, October 2004]

Avoidance of Conflicts of Interest

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

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

Commentary

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

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

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

A conflict of interest may arise when a lawyer acts not only as a legal advisor but in another role for the client. For example, there is a dual role when a lawyer or his or her law firm acts for a public or private corporation and the lawyer serves as a director of the corporation. Lawyers may also serve these dual roles for partnerships, trusts, and other organizations. A dual role may raise a conflict of interest because it may affect the lawyer's independent judgment and fiduciary obligations in either or both roles, it may obscure legal advice from business and practical advice, it may invalidate the protection of lawyer and client privilege, and it has the potential of disqualifying the lawyer or the law firm from acting for the organization. Before accepting a dual role, a lawyer should consider these factors and discuss them with the client. The lawyer should also consider rule 6.04 (Outside Interests and Practice of Law).

If a lawyer has a sexual or intimate personal relationship with a client, this may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. Before accepting a retainer from or continuing a retainer with a person with whom the lawyer has such a relationship, a lawyer should consider the following factors:

a. The vulnerability of the client, both emotional and economic;

b. The fact that the lawyer and client relationship may create a power imbalance

c. in favour of the lawyer or, in some circumstances, in favour of the client;

d. Whether the sexual or intimate personal relationship will jeopardize the client's right to have all information concerning the client's business and affairs held in strict confidence. For example, the existence of the relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship;

e. Whether such a relationship may require the lawyer to act as a witness in the proceedings;

f. Whether such a relationship will interfere in any way with the lawyer's fiduciary obligations to the client, his or her ability to exercise independent professional judgment, or his or her ability to fulfill obligations owed as an officer of the court and to the administration of justice.

There is no conflict of interest if another lawyer of the firm who does not have a sexual or intimate personal relationship with the client is the lawyer handling the client's work.

While subrule 2.04(3) does not require that a lawyer advise the client to obtain independent legal advice about the conflicting interest, in some cases, especially those in which the client is not sophisticated or is vulnerable, the lawyer should recommend such advice to ensure that the client's consent is informed, genuine, and uncoerced.

[Amended – March 2004, October 2004]

Acting Against Client

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

(a) in the same matter,

(b) in any related matter, or

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

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

Commentary

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

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

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

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

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

Commentary

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

Joint Retainer

(6) Except as provided in subrule (8.2), before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that

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

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

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

Commentary

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

A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act, 1992 S.O. 1992* c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that if subsequently only one of them were to communicate new instructions, for example, instructions to change or revoke a will:
(a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;
(b) in accordance with rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; but

(c) the lawyer would have a duty to decline the new retainer, unless;
i. (i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship, or permanently ended their close personal relationship, as the case may be;
ii. (ii) he other spouse or partner had died; or
iii. (iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.
iv.
After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).

[Amended – February, 2005]

2.04 (6.1) Where a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer shall disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

Commentary

What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or "flip", where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information. In some cases, it may be necessary for the lawyer to make disclosure to an institutional lender's legal department if the lender's normal contact person does not appear to be acting on the information.

(7) Except as provided in subrule (8.2), where a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

Commentary

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

(8) Except as provided in subrule (8.2), where a lawyer has advised the clients as provided under subrules (6) and (7) and the parties are content that the lawyer act, the lawyer shall obtain their consent.

(8.1) In subrule (8.2), "lending client" means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

(8.2) If a lawyer is jointly retained by a client and by a lending client in respect of a mortgage or loan from the lending client to that client, including any guarantee of that mortgage or loan, the lending client's consent is deemed to exist upon the lawyer's receipt of written instructions from the lending client to act and the lawyer is not required to

(a) provide the advice described in subrule (6) to the lending client before accepting the employment,

(b) provide the advice described in subrule (7) if the lending client is the other client as described in that subrule, or

(c) obtain the consent of the lending client as described in subrule (8), including confirming the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.

Commentary

Subrules (8.1) and (8.2) are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g. mortgage loan instructions) and the consent is generally deemed by such clients to exist when the lawyer is requested to act.

Subrule (8.2) applies to all loans where a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.

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

(a) not advise them on the contentious issue, and

(b) refer the clients to other lawyers, unless

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

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

Commentary

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

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

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

Affiliations Between Lawyers and Affiliated Entities

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

(a) any possible loss of solicitor and client privilege because of the involvement of the affiliated entity, including circumstances where a non-lawyer or non-lawyer staff of the affiliated entity provide services, including support services, in the lawyer's office, (b) the lawyer's role in providing legal services and in providing non-legal services or in providing both legal and non-legal services, as the case may be,

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

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

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

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

Commentary

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

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

[New - May 2001]

Prohibition Against Acting for Borrower and Lender

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

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

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

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

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

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

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

[Amended - May 2001]

Multi-discipline Practice

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

Unrepresented Persons

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

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

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

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

Commentary

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

FEDERATION OF LAW SOCIETIES' PROTOCOL FOR LAW OFFICE SEARCHES

Motion

31. That Convocation approve in principle the Federation of Law Societies of Canada Draft "Protocol on Law Office Searches" for the purposes of consultation with relevant stakeholders on procedures in respect of such searches.

Introduction and Background

32. In September 2002, the Supreme Court of Canada released its reasons in *R. v. Lavallee*,[7] in which the Court struck down s. 488.1 of the *Criminal Code* as unconstitutional. This section details the procedures police officers must follow in the execution of a search warrant on a lawyer's office.

33. Pending new federal legislation on the subject, the Court articulated the general principles that govern the legality of searches of law offices, as follows:

    a. No search warrant can be issued with regard to documents that are known to be protected by solicitor-client privilege.
    b. Before searching a law office, the investigative authorities must satisfy the issuing justice that there exists no other reasonable alternative to the search.
    c. When allowing a law office to be searched, the issuing justice must be rigorously demanding so to afford maximum protection of solicitor-client confidentiality.
    d. Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession.
    e. Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or the client cannot be contacted, a representative of the bar should be allowed to oversee the sealing and seizure of documents.
    f. The investigative officer executing the warrant should report to the Justice of the Peace the efforts made to contact all potential privilege holders, who should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided.
    g. If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a

[7] *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink,* [2002] 3 S.C.R. 209

claim of privilege should be asserted, and should be given a reasonable opportunity to do so.

h. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged.

i. Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation.

j. Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court.

34. On January 21, 2003, the Ontario Superior Court of Justice issued its decision in R. v. Rosenfeld[8] which involved a search of the office of an accused lawyer. The Law Society intervened in the case, addressing the issue of its involvement in the process. The court made the following order in respect of the process that follows the seizure in the first instance to notify potential clients regarding the issue of privilege:

a. The court will appoint a referee who will review the seized documents and, in conjunction with the affidavit to be produced by the respondent [lawyer], identify the clients who are to receive notice of a hearing to establish the process for determining the issue of solicitor and client privilege respecting the documents;

b. The lawyer will provide an affidavit detailing, to the best of his information, knowledge and belief, the names and last known addresses of the clients whose documents are, or may be, involved in this seizure;

c. The referee will recommend to the court the proper process for notifying all such clients which may include a recommendation that advertisements be placed in the relevant media if the referee is of the view that such a step in necessary;

d. The costs of the referee and the costs of the notification program shall be borne by the Crown;

e. If the Crown refuses to bear these costs, then the seized documents shall forthwith be returned to the respondent.

35. The court also said:

> If the parties, with the involvement of the Law Society, cannot agree on a person to be recommended to the court to act as the referee within fifteen days of the date of these reasons, then the *Law Society shall propose the names of three appropriate individuals for the court's consideration.*

(Emphasis added)

36. The particular issue in the *Rosenfeld* case on the choice of the referee was resolved. On the assumption that the courts would follow the same or a similar procedure in cases that follow *Rosenfeld*, criteria were developed for the Law Society's selection of appropriate individuals to act as referees, for the purposes of the court's appointment. In

[8] *R. v. Law Office of Simon Rosenfeld*, (2003), 108 C.R.R. (2d) 165. See Appendix 1 for a copy of the case.

March 2003, Convocation received an information report from the Committee that included the criteria it approved.[9]

Development of the Federation's Protocol

37. The Department of Justice has not yet formulated an amended s. 488.1 of the *Criminal Code*.

38. Following the *Lavallee* decision, the Federation of Law Societies of Canada formed a working group to develop a protocol for a lawyer's use when faced with a law office search. The protocol is based on the principles articulated in *Lavallee* and the practical direction provided in *Rosenfeld*.

39. On November 5, 2004, the Federation's President sent to the then Minister of Justice, Irwin Cotler, a copy of the protocol as approved by the Federation's Council, dated October 15, 2004. The protocol appears at Appendix 2.

40. Thereafter, over a period of months, Department of Justice counsel reviewed the protocol and addressed some questions with the Federation, which were answered by the Federation in May 2006. Federation representatives also met with Department of Justice counsel to discuss the protocol.

Current Status of the Protocol

41. All other Canadian law societies rely on the protocol as the document that governs law office searches. The protocol has been generally accepted by the respective ministries of the Attorney General and law enforcement officials in these provinces and territories. Judicial notice of the protocol appears in an Alberta Court of Queen's Bench decision, where the judge addressed the issue relating to a search of a lawyer's office and commented on the process that included the protocol.[10]

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[9] The criteria are as follows:
a. The referee should be familiar with criminal procedure.
b. The referee should understand the essence of solicitor and client privilege.
c. The referee should be a person respected by the courts, the profession and the public.
d. The referee should be in a position to act impartially and independently in the subject case.
e. The referee should have access to administrative support personnel to assist in the referee's work (e.g. mailings, advertising).
f. The referee should have liability coverage for his or her duties as a referee.

[10] *R. v. Tarrabain, O'Byrne & Company*, 2006 ABQB 14. The Court said:
In furtherance of this objective, Mr. Lepp, the Director of Special Prosecutions for the Province of Alberta, contacted the Law Society of Alberta to seek advice. He did so because this was the first time in his experience that a member of the Law Society was a potential target of the investigation being undertaken. In the past, Mr. Lepp had been involved in many searches of law offices where a client of the firm was the target of the investigation. *A protocol with the Law Society covered this situation.* Because this was a unique occurrence, he felt that the Law Society should be consulted. He wanted to ensure compliance with *Lavallee*. Any advice the Law Society could provide, because of the important role it plays in the regulation of the profession in the Province, was welcome.

42. In Ontario, the post-seizure process outlined in the Rosenfeld decision is observed and followed by law enforcement officials.

43. However, unlike the other Canadian jurisdictions, the process outlined in the protocol with respect to the warrant and the search and seizure in Ontario is unevenly applied by the Crown and law enforcement officials. Some law enforcement officials are willing to work within the ambit of the protocol, and others want the Law Society to send a representative whenever a search warrant is executed. For example, some law enforcement authorities call the Law Society to have a representative attend on the execution of the warrant. On occasion, challenges to the position sought to be taken by law enforcement officials that vary from the process in the protocol must be brought before the Court to ensure proper procedures are followed.

The Committee's Proposal

44. To ensure a consistent approach that is in keeping with the direction of the Court, the Committee determined that the Law Society needs to address with the Ministry of the Attorney General and any other relevant stakeholders issues relating to application and observance of the protocol.

45. The Committee proposes that Convocation approve the protocol in principle as the working document for the purposes of its consultation with the Ministry and others in respect of procedures to be followed when a search warrant is to be executed at a lawyer's office. This will permit the Society to engage in a meaningful discussion with a view to resolving procedural issues that affect the proper execution of law office searches, for the benefit of the public and the profession.

APPENDIX 1

COURT FILE NO.: SM95-02

DATE: 20030121

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
HER MAJESTY THE QUEEN	)	*A. S. Meghani*, for the applicant
	)	
Applicant	)	
	)	
- and -	)	
	)	
LAW OFFICE OF SIMON	)	*G. Kaiser,* for defendants/respondents

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(emphasis added)

ROSENFELD and SIMON ROSENFELD, BARRISTER & SOLICITOR	)	
Respondents	)	
	)	
- and -	)	
	)	
THE LAW SOCIETY OF UPPER CANADA	)	*N. Spies and B. Van Niejenhuis,* for the intervener
	)	
	)	
	)	HEARD: January 13, 2003

REASONS FOR DECISION

NORDHEIMER J.:

[1] This application raises the issue as to the proper procedure to be followed in determining whether documents seized pursuant to a search warrant are the subject of solicitor and client privilege. The issue arises in the wake of the decision of the Supreme Court of Canada in *Lavallee, Rackel & Heintz v. Canada (Attorney General)* 2002 SCC 61 (CanLII), (2002), 216 D.L.R. (4th) 257 (S.C.C.).

[2] On August 14, 2002, fifteen boxes of documents were seized from the respondent Rosenfeld's law office, and one box of documents from his home, pursuant to a search warrant issued by Mr. Justice Scott of the Ontario Court of Justice on August 13, 2002. The search warrant was executed in the presence of representatives of the Law Society of Upper Canada as required by the conditions attached to the search warrant.

[3] All of the documents seized were indexed and sealed in boxes which were then delivered into the hands of the Sheriff for the Toronto Region. The Crown then brought this application to determine which, if any, of the documents are subject to a proper claim of solicitor and client privilege so that those documents not covered by the privilege can be released to the Royal Canadian Mounted Police, who are the investigating officers in this case. On September 30, 2002, Mr. Justice Archibald granted leave to the Law Society of Upper Canada to intervene in this application.

[4] While the application raises the broader issue of the proper procedure for determining any claim of solicitor and client privilege, the principle issue that arose at the hearing before me was the narrower issue of what procedure should first be followed to notify persons, who may be clients of Mr. Rosenfeld, that their documents had been seized so that those clients might, if they wish, take steps to ensure that their solicitor and client privilege over the documents is preserved. As will no doubt be seen from my analysis below, however, it is not possible to deal with this narrower issue without establishing certain basic principles which necessary impact on the broader issue.

[5] The Crown submits that the proper procedure, in the first instance, should be as follows. First, Mr. Rosenfeld should be required to review all of the documents seized and delineate those documents which are personal to him and those that belong to clients. The Law Society should then review Mr. Rosenfeld's classification of the documents to ensure that it is correct. The Crown submits that, at that point, all documents personal to Mr. Rosenfeld should be turned over to the R.C.M.P. Mr. Rosenfeld should then be required to provide the name and last known address of each client as well as identifying which documents belong to which clients. The Law Society would be required to check the list of clients to ensure that it is accurate, file a copy with the court and then the Law Society would be required to sent notices to each client in a specific form advising the clients of a hearing date where they could attend and assert their claim of solicitor and client privilege.

[6] The respondents object to the Crown's proposed procedure on the basis that Mr. Rosenfeld should not be required to participate in the investigative process or the collecting of evidence which may be used against him in the underlying criminal proceeding. At the same time, the Law Society objects to being ordered to participate in the process and being required to notify the clients. The Law Society's objections are two-fold. One objection is that the lawyers of Ontario should not be required to bear any costs of having the issue of solicitor and client privilege over these documents determined. The other objection to the Law Society being involved in the procedure is that it might place them in a conflict of interest, either because clients might contact the Law Society looking for advice and direction on these matters or because the Law Society may have a disciplinary role to play in reviewing the conduct of Mr. Rosenfeld which forms the subject matter of the underlying allegations.

[7] The Law Society suggests, and the respondents agree, that since the court must bear the ultimate responsibility for determining the issue of solicitor and client privilege, the court should take responsibility for supervising the procedure necessary to arrive at that determination. The Law Society submits that this issue is akin to the production of third-party records in a criminal proceeding (so-called O'Connor applications named after the decision in *R. v. O'Connor*, 1995 CanLII 51 (S.C.C.), [1995] 4 S.C.R. 411) in which the court bears the task of reviewing the records and deciding which ones are properly producible. The Law Society submits, however, that the court need not itself perform the review of the documents here. Rather, the Law Society submits that the court can appoint a referee to conduct the process and to report to the court as was done in *Re Church of Scientology et al. and The Queen (No. 6)* 1987 CanLII 122 (ON C.A.), (1987), 31 C.C.C. (3d) 449 (C.A.). The Law Society and the respondents submit that the costs of the referee should be borne by the Crown. The Crown objects to being saddled with these costs. The Crown's proposed procedure would, of course, put the costs of the notification procedure onto the Law Society. In the alternative, the Crown says that if the procedure of using a referee is adopted, then it is the respondents who should bear the costs of that procedure.

[8] In *Lavallee, Rackel & Heintz v. Canada (Attorney General), supra*, Madam Justice Arbour, at para. 49, laid out ten principles to be applied when search warrants are issued for the seizure of documents that may be the subject of solicitor and client privilege. Four of those principles are particularly relevant to the issue that is before me. They are:

"5. Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents.

6. The investigative officer executing the warrant should report to the Justice of the Peace the efforts made to contact all potential privilege holders, who should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided.

7. If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.

8. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged."

[9] I do not agree with the Crown's submission that the Law Society should bear the burden of conducting all, or any part of, the procedure for the determination of the issue of solicitor and client privilege. I agree with the Law Society's submission that it is not their responsibility to protect the privilege. It is the court's responsibility. I also agree with the Law Society's submission that to require them to become engaged in the process, except for the limited role which they have already performed of supervising the actual seizure and sealing of the documents, would potentially place them in a conflict of interest in both of the aspects I have referred to above. In my view, it would be particularly problematic for the Law Society to be engaged in vetting the documents when they may well subsequently determine that they ought to proceed with disciplinary measures involving the solicitor which would, in turn, involve them in gathering evidence necessary for that purpose, including, potentially, these very same documents.

[10] The Crown's submission that the Law Society is the proper body to undertake this task is based principally on the following statement by Madam Justice Arbour in *Lavallee,* at para. 41:

"In cases where it would not be feasible to notify the potential privilege holders that they need to assert their privilege in order to bar an intrusion by the state into these protected materials, at the very least independent legal intervention, for instance in the form of notification and involvement of the Law Society, would go a long way to afford the protection that is so lacking under the present regime."

[11] I believe the Crown misreads this statement. As I read it, it does not suggest that the Law Society should be required to notify the clients concerned, but, rather, it suggests that in situations where notification is not feasible, it might be necessary to ask the Law Society to make submissions in terms of any claim of privilege respecting the documents. For example, if documents were seized from a lawyer who could not be found, and there was no client list or other way of identifying and locating the clients, the court might well consider asking the Law Society to make representations on behalf of the unknown and absent clients. Otherwise, any privilege over the documents might be lost by default. That, however, is not the situation in this case.

[12] Given that it is the court's responsibility to ensure that any privilege claim is properly reviewed and evaluated, it is the court that must take responsibility for the process. The question becomes whether the court must undertake the task itself (as generally happens on an *O'Connor* application) or whether the court is entitled to appoint someone to perform the

necessary review, including the steps leading up to it, and then to report the results to the court. Mr. Justice Osler, as referred to in *Re Church of Scientology et al. and The Queen (No. 6), supra*, appointed a retired judge to perform a review of the documents seized to determine which documents, if any, were privileged. The referee's report was later confirmed by Mr. Justice Osler. It must be noted, though, that in that case the appointment was made with the consent of all parties.

[13] Having noted that, however, I do not believe that the court needs the consent of the parties to utilize this method of dealing with this issue. The court often refers matters to other individuals for them to take certain steps and make certain findings. The most obvious example is in the civil context where issues can be referred by a judge to another person for determination. Rule 54 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194 governs references generally. Of particular interest for the purpose of this application is the provision found in rule 54.02(1)(b) which states:

> "(1) Subject to any right to have an issue tried by a jury, a judge may at any time in a proceeding direct a reference of the whole proceeding or a reference to determine an issue where,
>
> …
>
> (b) a prolonged examination of documents or an investigation is required that, in the opinion of the judge, cannot conveniently be made at trial;"

[14] I see no reason why that general process ought not to be able to be applied in the context of a criminal proceeding as long as the ultimate determination of the application of the privilege remains with the court. In my view, it falls within the inherent jurisdiction of a superior court to undertake this procedure as a necessary adjunct to its authority to control its own process. The concept of inherent jurisdiction was explained in *Re R. and Unnamed Person* reflex, (1985), 22 C.C.C. (3d) 284 (C.A.) where Zuber J.A. said, at p. 286:

> "The term 'inherent jurisdiction' is one that is commonly and not always accurately used when arguments are made with respect to the jurisdictional basis upon which a court is asked to make a particular order. The inherent jurisdiction of a superior court is derived not from any statute or rule of lab but from the very nature of the court as a superior court (see, generally, I.H. Jacob, The Inherent Jurisdiction of the Court, 1970, C. Leg. Probs. 23). Utilizing this power, superior courts, to maintain their authority and to prevent their processes from being obstructed or abused, have amongst other things punished for contempt of court, stayed matters that are frivolous and vexatious and regulated their own process. The limits of this power are difficult to define with precision but cannot extend to the creation of a new rule of substantive law." [emphasis added]

The alternative to the proposed procedure is to have a judge undertake the task of reviewing what could be many thousands of pages of documents. That would not be a useful expenditure of judicial time, which is a very limited resource, and one which can be better expended on the actual trial process.

[15] I have concluded, therefore, that the proper procedure to be followed is for the court to appoint a referee to examine the documents and to notify all clients who can be identified of the process that will be followed respecting the documents so that those clients can, if they wish, participate in that process for the purpose of protecting their solicitor and client privilege over the documents.

[16] Having reached that conclusion, the next question is who should bear the costs of the referee. While there is some superficial attractiveness to the suggestion that the respondents should bear those costs since it is the lawyer's obligation, in the normal instance, to ensure that the privilege claim is advanced and that the clients' interests are protected, I do not consider that to be the appropriate result in this case. A very significant distinction in this case from cases such as *Lavallee* is that here the lawyer is also the accused person. Mr. Rosenfeld has certain *Charter* rights, as a consequence, including the right not to be compelled to be a witness against himself. The court should not make any order against an accused person which might, either actually or in appearance, tread on those rights. Specifically, to require an accused person to fund a process which may ultimately lead to the Crown acquiring evidence against him or her seems to me to raise that very serious concern.

[17] Having said that, however, I do not believe that it involves any transgression on the rights of the accused person, in a situation such as this, to require Mr. Rosenfeld to provide to the referee an affidavit detailing, to the best of his information, knowledge and belief, the names and last known addresses of the clients whose documents are, or may be, involved in this seizure. That very limited participation in the process is consistent with the professional obligations of Mr. Rosenfeld as a lawyer and, at the same time, does not involve him in making any disclosure of evidence.

[18] I also cannot see any proper basis upon which the Court could order the Law Society to bear these costs. As I earlier noted, it is not the Law Society's responsibility to protect the privilege and there is therefore no reason why the lawyers in this Province should collectively have to bear the costs of a process designed to protect the privilege. It seems evident to me that the proper party upon whom to place the burden of the costs of this process is the party who has caused the need for the process in the first place, that is, the Crown. It is the Crown who has instituted the charges and it is the Crown who sought and obtained the search warrant for the documents. The Crown must know that by laying charges against a lawyer, and by seizing his or her documents in pursuit of evidence in support of those charges, there are going to be issues of solicitor and client privilege that are going to have to be dealt with. The costs of dealing with those issues are costs naturally associated with the prosecution of the offences. They are also costs clearly associated with the execution of the search warrant. As a general proposition, costs associated with a prosecution are costs which the Crown normally bears. I see no reason to treat the costs of this process any differently. I find some support for this conclusion in the sixth principle which I quoted from Lavallee above, namely, that "the investigative officer executing the warrant should report to the Justice of the Peace the efforts made to contact all potential privilege holders". That requirement implicitly suggests that the duty of contacting the clients resets with the police and therefore with the Crown.

[19] The issue which the seizure of these documents raises is a very serious one. As Madam Justice Arbour said in *Lavallee* at the end of para. 49:

> "Solicitor-client privilege is a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law. While the public has an interest in effective criminal investigation, it has no less an interest in maintaining the integrity of the solicitor-client relationship. Confidential communications to a lawyer represent an important exercise of the right to privacy, and they are central to the administration of justice in an adversarial system. Unjustified, or even accidental infringements of the privilege erode the public's confidence in the fairness of the criminal justice system. This is why all efforts must be made to protect such confidences."

[20] The administration of justice is a matter of public interest and the costs of the administration of justice is a matter of public expense. The Crown represents the public in the enforcement of the criminal law and it is the Crown who should, therefore, bear the costs of ensuring the protection of this fundamental principle. It is the Crown which, consequently, must bear the costs of the referee to be appointed.

[21] I therefore grant an order directing that the following process is to be used in the first instance in terms of notifying potential clients regarding the issue of solicitor and client privilege:

> (i) the court will appoint a referee who will review the seized documents and, in conjunction with the affidavit to be provided by the respondent, identify the clients who are to receive notice of a hearing to establish the process for determining the issue of solicitor and client privilege respecting the documents;
> (ii) Mr. Rosenfeld will provide an affidavit detailing, to the best of his information, knowledge and belief, the names and last known addresses of the clients whose documents are, or may be, involved in this seizure;
> (iii) the referee will recommend to the court the proper process for notifying all such clients which may include a recommendation that advertisements be placed in the relevant media if the referee is of the view that such a step is necessary;
> (iv) the costs of the referee and the costs of the notification program shall be borne by the Crown;
> (v) if the Crown refuses to bear these costs, then the siezed documents shall forthwith be returned to the respondents.

If the parties, with the involvement of the Law Society, cannot agree on a person to be recommended to the court to act as the referee within fifteen days of the date of these reasons, then the Law Society shall propose the names of three appropriate individuals for the court's consideration.

[22] If there are any issues with the above directions, I may be spoken to. The application is otherwise adjourned to a further hearing date to be arranged through the trial co-ordinator's office.

NORDHEIMER J.

Released: January 21, 2003

AMENDMENT TO BY-LAW 18
(RECORD KEEPING REQUIREMENTS)

Motion

46. That Convocation amend subsection 5(2) of By-Law 18 [Record Keeping Requirements] by deleting "fifteen" / "quinze" and substituting "twenty-five" / "vingt-cinq".

Introduction and Background

47. By-Law 18 sets out lawyers' record keeping requirements. Subsection 5(2) requires trust accounts to be reconciled within 15 days after the end of the month in which the records were created. The By-Law appears at Appendix 1.

48. In the spring of 2006, a member raised a concern with the Law Society about difficulty in performing the reconciliation within the prescribed time.

49. The member, who practices in a small firm, receives his trust account statements from his financial institution by mail typically between the 12th and 14th days of each month. Like many small firms and sole practices, the member's firm does not employ a full-time bookkeeper but uses the services of a bookkeeper on a weekly basis. The member advised that he has met the By-Law requirement but not without requiring his staff to work outside of normal business hours. In his e-mail message to the Society, the member summarized his concerns as follows:

> We fully understand the need to reconcile the trust statements promptly. However, the deadline of the 15th of each month proves to be a problem for many sole practitioners and small firms, given that the statements have barely made it in the door by that date. Any time there is a discrepancy, it is a battle to have the matter resolved by the 15th. …Could there not be a change made to the regulation to make the deadline the 25th (or even the 20th) of each month? This would still satisfy the Society's mandate of protection of the public and it would be in line with the reality of our practice.

50. Law Society staff, including staff from the Spot Audit Department and Policy Secretariat, spoke with the member about his concerns and possible solutions, which were shared with the chair of the Committee. He determined that the Committee should review this matter, and it was placed before the Committee for the first time in November 2006.

Information on the Current Requirement

51. By-Law 18 reflects the requirement that appeared in Regulation 708 under the *Law Society Act* prior to 1999. The requirement in Regulation 708 included the requirement that appeared in Regulation 573 (R.R.O. 1980), which was revoked in November 1992. Thus, the 15-day period has been in place for a number of years.

52. Other law societies in Canada apply varying periods for the trust reconciliations. British Columbia, Alberta and Nova Scotia require reconciliations within 30 days. Saskatchewan applies a 20-day period. Manitoba specifies "not later than the end of the following month".

53. The Society's Spot Audit Department has advised that, based on 1654 surveys (since 1999) of members who have been audited, only three members had any comments on the requirement to prepare the trust reconciliation by the 15th of the following month.

The Committee's Views

54. The Committee benefited from the views of the Manager of the Spot Audit Department, Leslie Greenfield, on this matter. In response to questions from the Committee, he advised that changing the date for the reconciliation as suggested by the member would not affect the integrity of the record-keeping requirements in the By-Law.

55. Based on additional information from staff, the Committee determined that a caution should be exercised in moving to a period longer than the 20th or 25th day of the following month, such as the 30th day or end of the month. This is because banks provide a 30-day period from the date of the bank statement for banking clients to inform the bank of any errors or irregularities. Thereafter, the bank will assume that the statement is correct, and correcting errors would be more difficult. The Committee agreed that a period short of 30 days would be appropriate to facilitate a member's ability to address any errors, if necessary.

56. The Committee determined that the Society's primary interest is that a member reconcile his or her trust statements on a monthly basis. The fact that the date is the 15th, 20th or 25th day of the following month will not change the effect of this requirement. The Committee concluded that if a slightly longer period than 15 days will make compliance with the requirement easier for members, and encourage compliance, the change should be made. Moreover, there is a possibility that other firms and practitioners are experiencing the same difficulty that the member described, although they are part of the overwhelming majority of members who complete the reconciliation monthly, even if slightly outside the 15 day period.

57. In the Committee's view, the technical requirements of a regulation should not be a barrier to compliance with its substance. In this case, extending the date for the reconciliation to the 25th day of the following month will facilitate compliance without affecting the regulatory imperative the By-Law is designed to meet.

58. For these reasons, the Committee is proposing that the By-Law be amended to change the 15-day period to a 25-day period for completion of trust reconciliations.

APPENDIX 1

BY-LAW 18

Made: January 28, 1999
Amended:
February 19, 1999
May 28, 1999
October 31, 2002
January 27, 2005
February 24, 2005

RECORD KEEPING REQUIREMENTS

GENERAL

Interpretation
1. (1) In this By-Law,

"cash" means current coin within the meaning of the *Currency Act,* notes intended for circulation in Canada issued by the Bank of Canada pursuant to the *Bank of Canada Act* and current coin or banks notes of countries other than Canada;

"client" includes a person or group of persons from whom or on whose behalf a member receives money or other property;

"firm of members" means a partnership of members and all members employed by the partnership;

"lender" means a person who is making a loan that is secured or to be secured by a charge, including a charge to be held in trust directly or indirectly through a related person or corporation;

"member" includes a firm of members;

"money" includes cash, cheques, drafts, credit card sales slips, post office orders and express and bank money orders.

"Arm's length" and "related"
(2) For the purposes of this By-Law, "arm's length" and "related" have the same meanings given them in the *Income Tax Act* (Canada).

"Charge"
(3) For the purposes of this By-Law, "charge" has the same meaning given it in the *Land Registration Reform Act*.

"Teranet"
(4) In paragraph 12 of section 2, "Teranet" means Teranet Inc., a corporation incorporated under the *Business Corporations Act*, acting as agent for the Ministry of Consumer and Business Services.

Requirement to maintain financial records
2. Every member shall maintain financial records to record all money and other property received and disbursed in connection with the member's practice, and, as a minimum requirement, every member shall maintain, in accordance with sections 4, 5 and 6, the following records:

1. A book of original entry identifying each date on which money is received in trust for a client, the method by which money is received, the person from whom money is received, the amount of money received and the client for whom money is received in trust.

2. A book of original entry showing all disbursements out of money held in trust for a client and identifying each date on which money is disbursed, the method by which money is disbursed, including the number or a similar identifier of any document used to disburse money, the person to whom money is disbursed, the amount of money which is disbursed and the client on whose behalf money is disbursed.

3. A clients' trust ledger showing separately for each client for whom money is received in trust all money received and disbursed and any unexpended balance.

4. A record showing all transfers of money between clients' trust ledger accounts and explaining the purpose for which each transfer is made.

5. A book of original entry showing all money received, other than money received in trust for a client, and identifying each date on which money is received, the method by which money is received, the amount of money which is received and the person from whom money is received.

6. A book of original entry showing all disbursements of money, other than money held in trust for a client, and identifying each date on which money is disbursed, the method by which money is disbursed, including the number or a similar identifier of any document used to disburse money, the amount of money which is disbursed and the person to whom money is disbursed.

7. A fees book or a chronological file of copies of billings, showing all fees charged and other billings made to clients and the dates on which fees are charged and other billings are made to clients and identifying the clients charged and billed.

8. A record showing a comparison made monthly of the total of balances held in the trust account or accounts and the total of all unexpended balances of funds held in trust for clients as they appear from the financial records together with the reasons for any differences between the totals, and the following records to support the monthly comparisons:

    i. A detailed listing made monthly showing the amount of money held in trust for each client and identifying each client for whom money is held in trust.

    ii. A detailed reconciliation made monthly of each trust bank account.

9. A record showing all property, other than money, held in trust for clients, and describing each property and identifying the date on which the member took possession of each property, the person who had possession of each property immediately before the member took possession of the property, the value of each property, the client for whom each property is held in trust, the date on which possession of each property is given away and the person to whom possession of each property is given.

10. Bank statements or pass books, cashed cheques and detailed duplicate deposit slips for all trust and general accounts.

11. Signed electronic trust transfer requisitions and signed printed confirmations of electronic transfers of trust funds.

12. Signed authorizations of withdrawals by Teranet and signed paper copies of confirmations of withdrawals by Teranet.

Record keeping requirements if cash received

2.1 (1) Every member who receives cash shall maintain financial records in addition to those required under section 2 and, as a minimum additional requirement, shall maintain, in accordance with sections 4, 5 and 6, a book of duplicate receipts, with each receipt identifying the date on which cash is received, the person from whom cash is received, the amount of cash received, the client for whom cash is received and any file number in respect of which cash is received and containing the signature of the member or the person authorized by the member to receive cash and of the person from whom cash is received.

No breach

(2) A member does not breach subsection (1) if a receipt does not contain the signature of the person from whom cash is received provided that the member has made reasonable efforts to obtain the signature of the person from whom cash is received.

Record keeping requirements if mortgages and other charges held in trust for clients

3. Every member who holds in trust mortgages or other charges on real property, either directly or indirectly through a related person or corporation, shall maintain financial records in addition to those required under section 2 and, as a minimum additional requirement, shall maintain, in accordance with sections 4, 5 and 6, the following records:

1. A mortgage asset ledger showing separately for each mortgage or charge,

   i. all funds received and disbursed on account of the mortgage or charge,

   ii. the balance of the principal amount outstanding for each mortgage or charge,

   iii. an abbreviated legal description or the municipal address of the real property, and

   iv. the particulars of registration of the mortgage or charge.

2. A mortgage liability ledger showing separately for each person on whose behalf a mortgage or charge is held in trust,

   i. all funds received and disbursed on account of each mortgage or charge held in trust for the person,

   ii. the balance of the principal amount invested in each mortgage or charge,

   iii. an abbreviated legal description or the municipal address for each mortgaged or charged real property, and

   iv. the particulars of registration of each mortgage or charge.

3. A record showing a comparison made monthly of the total of the principal balances outstanding on the mortgages or charges held in trust and the total of all principal balances held on behalf of the investors as they appear from the financial records together with the reasons for any differences between the totals, and the following records to support the monthly comparison:

    i. A detailed listing made monthly identifying each mortgage or charge and showing for each the balance of the principal amount outstanding.

    ii. A detailed listing made monthly identifying each investor and showing the balance of the principal invested in each mortgage or charge.

Financial records to be permanent

4. (1) The financial records required to be maintained under sections 2, 2.1 and 3 may be entered and posted by hand or by mechanical or electronic means, but if the records are entered and posted by hand, they shall be entered and posted in ink.

Paper copies of financial records

(2) If a financial record is entered and posted by mechanical or electronic means, a member shall ensure that a paper copy of the record may be produced promptly on the Society's request.

Financial records to be current

5. (1) Subject to subsection (2), the financial records required to be maintained under sections 2, 2.1 and 3 shall be entered and posted so as to be current at all times.

Exceptions

(2) The record required under paragraph 8 of section 2 and the record required under paragraph 3 of section 3 shall be created within fifteen days after the last day of the month in respect of which the record is being created.

Preservation of financial records required under ss. 2 and 2.1

6. (1) Subject to subsection (2), a member shall keep the financial records required to be maintained under sections 2 and 2.1 for at least the six year period immediately preceding the member's most recent fiscal year end.

Same

(2) A member shall keep the financial records required to be maintained under paragraphs 1, 2, 3, 8, 9, 10 and 11 of section 2 for at least the ten year period immediately preceding the member's most recent fiscal year end.

Preservation of financial records required under s. 3

(3) A member shall keep the financial records required to be maintained under section 3 for at least the ten year period immediately preceding the member's most recent fiscal year end.

Record keeping requirements when acting for lender

7. (1) Every member who acts for or receives money from a lender shall, in addition to maintaining the financial records required under sections 2 and 3, maintain a file for each charge, containing,

(a) a completed investment authority, signed by each lender before the first advance of money to or on behalf of the borrower;

(b) a copy of a completed report on the investment;

(c) if the charge is not held in the name of all the lenders, an original declaration of trust;

(d) a copy of the registered charge; and

(e) any supporting documents supplied by the lender.

Exceptions

(2) Clauses (1) (a) and (b) do not apply with respect to a lender if,

(a) the lender,

(i) is a bank listed in Schedule I or II to the *Bank Act* (Canada), a licensed insurer, a registered loan or trust corporation, a subsidiary of any of them, a pension fund, or any other entity that lends money in the ordinary course of its business,

(ii) has entered a loan agreement with the borrower and has signed a written commitment setting out the terms of the prospective charge, and

(iii) has given the member a copy of the written commitment before the advance of money to or on behalf of the borrower;

(b) the lender and borrower are not at arm's length;

(c) the borrower is an employee of the lender or of a corporate entity related to the lender;

(d) the lender has executed Form 1 of Regulation 798 of the Revised Regulations of Ontario, 1990, made under the *Mortgage Brokers Act*, and has given the member written instructions, relating to the particular transaction, to accept the executed form as proof of the loan agreement;

(e) the total amount advanced by the lender does not exceed $6,000; or

(f) the lender is selling real property to the borrower and the charge represents part of the purchase price.

Requirement to provide documents to lender

(3) Forthwith after the first advance of money to or on behalf of the borrower, the member shall deliver to each lender,

(a) if clause (1) (b) applies, an original of the report referred to therein; and

(b) if clause (1) (c) applies, a copy of the declaration of trust.

Requirement to add to file maintained under subs. (1)

(4) Each time the member or any member of the same firm of members does an act described in subsection (5), the member shall add to the file maintained for the charge the investment authority referred to in clause (1) (a), completed anew and signed by each lender before the act is done, and a copy of the report on the investment referred to in clause (1) (b), also completed anew.

Application of subs. (4)

(5) Subsection (4) applies in respect of the following acts:

1. Making a change in the priority of the charge that results in a reduction of the amount of security available to it.

2. Making a change to another charge of higher priority that results in a reduction of the amount of security available to the lender's charge.

3. Releasing collateral or other security held for the loan.

4. Releasing a person who is liable under a covenant with respect to an obligation in connection with the loan.

New requirement to provide documents to lender

(6) Forthwith after completing anew the report on the investment under subsection (4), the member shall deliver an original of it to each lender.

Requirement to add to file maintained under subs. (1): substitution

(7) Each time the member or any other member of the same firm of members substitutes for the charge another security or a financial instrument that is an acknowledgment of indebtedness, the member shall add to the file maintained for the charge the lender's written consent to the substitution, obtained before the substitution is made.

Exceptions

(8) The member need not comply with subsection (4) or (7) with respect to a lender if clause (2) (a), (b), (c), (e) or (f) applied to the lender in the original loan transaction.

Investment authority: Form 18A

(9) The investment authority required under clause (1) (a) shall be in Form 18A.

Report on investment: Form 18B

(10) Subject to subsection (11), the report on the investment required under clause (1) (b) shall be in Form 18B.

Report on investment: alternative to Form 18B

(11) The report on the investment required under clause (1) (b) may be contained in a reporting letter addressed to the lender or lenders which answers every question on Form 18B.

Commencement

8. This By-Law comes into force on February 1, 1999.

AMENDMENT TO *RULE OF PROFESSIONAL CONDUCT* 6.01 RESPECTING REPORTING OF CRIMINAL AND OTHER CHARGES

Motion

59. That Convocation add the following subrule and commentary to rule 6.01 of the *Rules of Professional Conduct*:

> Duty to Report Certain Offences
>
> 6.01 (8) If a lawyer is charged with an offence described in By-law 20 of the Society, he or she shall inform the Society of the charge and of its disposition in accordance with the By-law.
>
> Commentary
>
> A person of integrity respects the law. When a lawyer fails to respect the law, his or her integrity is called into question and clients and others may suffer loss or damage. By-law 20 relates to the reporting of serious criminal charges under the Criminal Code and charges under other Acts that bring into question the honesty of a lawyer or that relate to a lawyer's practice of law. Such a charge may be a red flag that clients may need protection. The Society must be in a position to determine what, if any, action is required by it if a member is charged with an offence described in By-law 20 and what, if any, action is required if the lawyer is found guilty.

Introduction

60. On December 9, 2005, Convocation made By-Law 20 (Reporting Requirements), which appears at Appendix 1. At that time, Convocation requested the Committee to consider whether the subject of the By-Law should also appear in a rule of professional conduct. In its report to February 23, 2006 Convocation, the Committee concluded that while it is important that the reporting requirement remain in a By-Law, it is appropriate that the requirement also appear in the Rules. Convocation agreed.

61. The Committee has prepared a rule and commentary for Convocation's consideration. The Committee consulted with the Society's Rules drafter, Don Revell, on this matter, who drafted the rule and commentary appearing in this report.

Comments on the Proposed Rule

62. The proposed rule is brief, referencing the obligation in By-Law 20 which sets out in detail the reporting requirement. The commentary to the rule elaborates on the purpose of and need for the reporting requirement.

63. The proposed rule is placed in rule 6.01 as new subrule (8). In the Committee's view, this is a logical placement as subrule 6.01(3) already deals with one reporting issue and the new subrule deals with a significant integrity issue that reflects subrule 6.01(1).[1]

[1] See Appendix 2 for the proposed rule in the context of rule 6.01.

64. The Committee considered a rule that would duplicate form and the language of the By-Law. The Committee determined that the proposed rule in paragraph 65 was the preferred option for the following reasons.

65. The By-Law reflects the particulars of the reporting requirement, and is the appropriate instrument for such a requirement. The direct reference to the By-Law in the proposed rule and commentary imports the obligation to the Rules, in keeping with Convocation's direction, in an understandable way.

66. This form avoids the following concerns:

a. It is difficult to duplicate the required content in both a By-law and a rule that deal with the same subject matter. Of necessity, differences will remain between the By-law and the rule as they exist in different contexts. Moreover, following more closely the wording of By-Law 20 in the Rules would not fit the style of the Rules; and
b. Difficulties in enforcement and interpretation can arise when the same subject matter in similar language is dealt with in more than one regulatory instrument. This risk is increased when there are greater variances in wording between the instruments.

67. A rule that requires lawyers to make the report in reference to the By-Law avoids these difficulties and, it is hoped, will forestall any question about the necessity of having the same language in both the By-Laws and the Rules.

68. The Committee believes that the proposed rule and commentary will sufficiently notify lawyers, including those who access the Rules first for guidance, of the obligation to report and information about the substance of the requirement, all of which is detailed in the By-Law.

APPENDIX 1

By-Law 20
REPORTING REQUIREMENTS
OFFENCES

Requirement to report offences: members
1. (1) Every member shall inform the Society in writing of,

(a) a charge that the member committed,

(i) an indictable offence under the *Criminal Code* (Canada),

(ii) an offence under the *Controlled Drugs and Substances Act* (Canada),

(iii) an offence under the *Income Tax Act* (Canada) or under an Act of the legislature of a province or territory of Canada in respect of the income tax law of the province or territory,

where the charge alleges, explicitly or implicitly, dishonesty on the part of the member or relates in any way to the practice of law by the member,

(iv) an offence under an Act of the legislature of a province or territory of Canada in respect of the securities law of the province or territory, where the charge alleges, explicitly or implicitly, dishonesty on the part of the member or relates in any way to the practice of law by the member, or

(v) an offence under another Act of Parliament, or under another Act of the legislature of a province or territory of Canada, where the charge alleges, explicitly or implicitly, dishonesty on the part of the member or relates in any way to the practice of law by the member; and

(b) the disposition of a charge mentioned in clause (a).

Requirement to report offences: student members
(2) Every student member shall inform the Society in writing of,

(a) a charge that the student member committed,

(i) an indictable offence under the *Criminal Code* (Canada),

(ii) an offence under the *Controlled Drugs and Substances Act* (Canada),

(iii) an offence under the *Income Tax Act* (Canada) or under an Act of the legislature of a province or territory of Canada in respect of the income tax law of the province or territory, where the charge alleges, explicitly or implicitly, dishonesty on the part of the student member or relates in any way to the conduct of the student member as such,

(iv) an offence under an Act of the legislature of a province or territory of Canada in respect of the securities law of the province or territory, where the charge alleges, explicitly or implicitly, dishonesty on the part of the student member or relates in any way to the conduct of the student member as such, or

(v) an offence under another Act of Parliament, or under another Act of the legislature of a province or territory of Canada, where the charge alleges, explicitly or implicitly, dishonesty on the part of the student member or relates in any way to the conduct of the student member as such; and

(b) the disposition of a charge mentioned in clause (a).

Requirement to report: private prosecution
(3) Despite subsection (1) and (2), a member or student member is only required to inform the Society of a charge contained in an information laid under section 504 of the *Criminal Code* (Canada), other than an information referred to in subsection 507 (1) of the *Criminal Code* (Canada), and of the disposition of the charge, if the charge results in a finding of guilt or a conviction.

Time of report
(4) A member or student member shall report a charge as soon as reasonably practicable after he or she receives notice of the charge and shall report the disposition of a charge as soon as reasonably practicable after he or she receives notice of the disposition.

Same
(5) In the circumstances mentioned in subsection (3), a member or student member shall report a charge and the disposition of the charge as soon as reasonably practicable after he or she receives notice of the disposition.

Interpretation: "indictable offence"
(6) In this section, "indictable offence" excludes an offence for which an offender is punishable only by summary conviction but includes,

(a) an offence for which an offender may be prosecuted only by indictment; and

(b) an offence for which an offender may be prosecuted by indictment or is punishable by summary conviction, at the instance of the prosecution.

APPENDIX 2

6.01 RESPONSIBILITY TO THE PROFESSION GENERALLY

Integrity

6.01 (1) A lawyer shall conduct himself or herself in such a way as to maintain the integrity of the profession.

Commentary

Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed regardless of how competent the lawyer may be.

Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer’s irresponsible conduct. Accordingly, a lawyer's conduct should reflect credit on the legal profession, inspire the confidence, respect and trust of clients and the community, and avoid even the appearance of impropriety.

Meeting Financial Obligations

(2) A lawyer shall promptly meet financial obligations in relation to his or her practice, including payment of the deductible under a professional liability insurance policy when properly called upon to do so.

Commentary
In order to maintain the honour of the Bar, lawyers have a professional duty (quite apart from any legal liability) to meet financial obligations incurred, assumed, or undertaken on behalf of clients unless, before incurring such an obligation, the lawyer clearly indicates in writing that the obligation is not to be a personal one.

When a lawyer retains a consultant, expert, or other professional, the lawyer should clarify the terms of the retainer in writing, including specifying the fees, the nature of the services to be provided, and the person responsible for payment. If the lawyer is not responsible for the payment of the fees, the lawyer should help in making satisfactory arrangements for payment if it is reasonably possible to do so.

If there is a change of lawyer, the lawyer who originally retained a consultant, expert, or other professional should advise him or her about the change and provide the name, address, telephone number, fax number, and e-mail address of the new lawyer.

Duty to Report Misconduct

(3) 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

(e) any other situation where a lawyer's clients are likely to be severely prejudiced.

Commentary

Unless a lawyer who departs from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these rules. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Society directly or indirectly (e.g., through another lawyer).

Nothing in this paragraph is meant to interfere with the traditional solicitor client relationship. In all cases the report must be made bona fide without malice or ulterior motive.

Often, instances of improper conduct arise from emotional, mental, or family disturbances or substance abuse. Lawyers who suffer from such problems should be encouraged to seek assistance as early as possible. The Society supports the Ontario Lawyers' Assistance Program (OLAP), and other support groups in their commitment to the provision of confidential

counselling. Therefore, lawyers acting in the capacity of counsellors for OLAP and other support groups will not be called by the Society or by any investigation committee to testify at any conduct, capacity, or competence hearing without the consent of the lawyer from whom the information was received. Notwithstanding the above, a lawyer counselling another lawyer has an ethical obligation to report to the Society upon learning that the lawyer being assisted is engaging in or may in the future engage in serious misconduct or criminal activity related to the lawyer's practice. The Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.

[Amended - October 2006]

Encouraging Client to Report Dishonest Conduct

(4) A lawyer shall attempt to persuade a client who has a claim against an apparently dishonest lawyer to report the facts to the Society before pursuing private remedies.

(5) If the client refuses to report his or her claim against an apparently dishonest lawyer to the Society, the lawyer shall inform the client of the policy of the Lawyers' Fund for Client Compensation and shall obtain instructions in writing to proceed with the client's claim without notice to the Society.

(6) A lawyer shall inform a client of the provision of the *Criminal Code of Canada* dealing with the concealment of an indictable offence in return for an agreement to obtain valuable consideration (section 141).

(7) If the client wishes to pursue a private agreement with the apparently dishonest lawyer, the lawyer shall not continue to act if the agreement constitutes a breach of section 141 of the *Criminal Code of Canada*.

Duty to Report Certain Offences

6.01 (8) If a lawyer is charged with an offence described in By-law 20 of the Society, he or she shall inform the Society of the charge and of its disposition in accordance with the By-law.

Commentary

A person of integrity respects the law. When a lawyer fails to respect the law, his or her integrity is called into question and clients and others may suffer loss or damage. By-law 20 relates to the reporting of serious criminal charges under the Criminal Code and charges under other Acts that bring into question the honesty of a lawyer or that relate to a lawyer's practice of law. Such a charge may be a red flag that clients may need protection. The Society must be in a position to determine what, if any, action is required by it if a member is charged with an offence described in By-law 20 and what, if any, action is required if the lawyer is found guilty.

REPORT OF THE COMPLAINTS RESOLUTION COMMISSIONER

69. By-Law 37, which governs the office of the Complaints Resolution Commissioner, requires that the Commissioner submit an annual report to the Committee. The

Committee must then provide the report to Convocation. The relevant section of the By-Law reads:

> Annual report
>
> 3. Not later than March 31 in each year, the Commissioner shall submit to the standing committee of Convocation responsible for professional regulation matters a report upon the affairs of the office of the Commissioner during the immediately preceding year, and the committee shall lay the report before Convocation not later than at its regular meeting in June.

70. The report of the Commissioner, Clare Lewis, is provided to Convocation by the Committee in accordance with the By-Law.

71. The report of the Commissioner, Clare Lewis, was submitted to and reviewed by the Committee at its February 2007 meeting. In accordance with By-Law 37, the report is laid before Convocation, and appears on the following pages.

72. The Committee wishes to thank Mr. Lewis for his dedication to the function he performs in independently reviewing complaints referred to him under the By-Law.

Annual Report 2006

A. Introduction

On April 1, 2005, Clare Lewis undertook his position as the first Complaints Resolution Commissioner, upon appointment by Convocation pursuant to sections 49.14 through 49.19 of the *Law Society Act* and in accordance with O. Reg. 31/99. The *Law Society Act* had been amended by the *Law Society Amendment Act*, 1998, to provide for the creation of the position of Complaints Resolution Commissioner. Attached, as Appendix 1 is a copy of the relevant provisions of the Act.

Pursuant to Section 62 (0.1) of the Act, the Law Society adopted By-Law 37, which governs the referral of complaints to the Complaints Resolution Commissioner. Attached, as Appendix 2, is a copy of By-Law 37, which includes a description of the functions of the Complaints Resolution Commissioner in the review and resolution of complaints. The By-Law also provides for the administrative functions to be performed by the office.

Prior to the appointment of the Complaints Resolution Commissioner, reviews were performed by Lay Benchers functioning as Complaints Review Commissioners in accordance with By-Law 20[2] , which is attached as Appendix 3. With the exception of the standard of review, the review function performed by the Complaints Review Commissioners was very similar to the review function now being performed by the Complaints Resolution Commissioner.

In conducting a review of the Law Society's decision to close a complaint file, the Complaints Review Commissioners determined whether the Law Society's decision was appropriate. The standard of review, as set out in By-Law 37 section 9, however, is a standard of

[2] By-Law 20 was revoked on December 9, 2005 and replaced with a new unrelated By-Law.

reasonableness. It requires the Complaints Resolution Commissioner to determine whether the Society's consideration of the complaint and its resulting decision to take no further action with respect to the complaint was reasonable. In performing an ombudsman type of role, some degree of deference is given in assessing the decision of the Law Society staff. Therefore, when the Commissioner is satisfied that the decision of the Law Society to close a file is reasonable, no further action is taken. However, when the Commissioner is respectfully of the view that the decision arrived at by the Law Society is not reasonable, the file is referred back to the Law Society with a recommendation that further action be taken.

By-Law 37 also requires the Complaints Resolution Commissioner to prepare an annual report. In particular, section 3 provides as follows:

> Annual Report
>
> 3. Not later than March 31 in each year, the Commissioner shall submit to the standing committee of Convocation responsible for professional regulation matters a report upon the affairs of the Office of the Commissioner during the immediately preceding year, and the committee shall lay the report before Convocation not later than at its regular meeting in June.

Although the Complaints Resolution Commissioner began acting as Commissioner on April 1, 2005 and first submitted an annual report to the Standing Committee of Convocation (Professional Regulation Committee) in March 2006, the Commissioner has just completed his first full calendar year as Complaints Resolution Commissioner.

This report is now being presented as the Annual Report for 2006. When appropriate, a comparison with the data collected in 2004 and 2005 will also be provided.

B. Composition of the Office of the Complaints Resolution Commissioner

The Office of the Complaints Resolution Commissioner is comprised of a Complaints Resolution Coordinator, part-time Counsel and the Complaints Resolution Commissioner who also performs his functions on a part-time basis.

Prior to establishment of the Office of the Complaints Resolution Commissioner, the Complaints Review Commissioners were assisted at the reviews by pro bono counsel. In the late fall of 2004, the position of Counsel to the Complaints Resolution Commissioner was created and during the transition period, Counsel to the Complaints Resolution Commissioner provided counsel assistance during the review meetings. This counsel position was initially a contract position but was made permanent part-time in November 2005. Since that time, Counsel to the Complaints Resolution Commissioner has managed the Office.

C. The Review Function

By-Law 37 provides the Complaints Resolution Commissioner with two distinct functions. In addition to the review function, the Commissioner has the authority to perform a formal resolution function. To date, the Commissioner has only been performing reviews.

When the staff of either the Complaints Resolution or Investigations departments close a complaint file, the complainant has the right to ask for a review of the Law Society's decision. The Society's closing letter to the complainant includes an Information Sheet (see Appendix 4 attached), which explains the role of the Complaints Resolution Commissioner and the process to be followed.

On receipt of a request for review by the Office of the Complaints Resolution Commissioner, the complainant receives a letter of confirmation from the Coordinator. The lawyer who is the subject of the complaint is notified in writing of the complainant's request for review by the Professional Regulation Division. The investigator is advised of the request and is responsible for preparing the materials for the review. Although the Commissioner is provided with the entire Law Society file, the investigator is also responsible for preparing bound copies of the materials, referred to as the Complaints Review Index, to be used at the review meeting. The Complaints Review Index includes copies of all the materials that the complainant provided to the Law Society, together with copies of correspondence between the Law Society and the complainant, and a copy of the closing letter or report prepared by the Law Society.

Once the Complaints Review Index is completed, this book of documents is provided to the Coordinator for distribution to the complainant. The Coordinator then schedules the date for the review meeting. A letter confirming the date, accompanied by the Complaints Review Index, is sent to the complainant. The Commissioner and Counsel also receive a copy of the bound materials for review in advance of the meeting.

Documentation that falls within the confidentiality provisions of s. 49.12[3] of the *Law Society Act* is provided to the Complaints Resolution Commissioner in a separate Confidential Index Book. The type of information considered confidential includes:

1. Personal information collected about the Member
2. Evidence from third parties which is protected by confidentiality or solicitor-client privilege
3. Solicitor-client information, when the Complainant is not the client or the information is in respect of other clients

(i) Reviewable Complaints

Section 6(1) of By-Law 37 identifies which complaints the Commissioner may review. A review is only available when,

(a) the merits of the complaint have been considered by the Law Society;
(b) the complaint has not been disposed of by the Proceedings Authorization Committee, Hearing Panel or Appeal Panel;
(c) the complaint has not been previously reviewed by the Commissioner; and
(d) the Law Society has notified the complainant that it will be taking no further action in respect of the complaint.

Section 6 (2) provides that a complaint may not be reviewed by the Complaints Resolution Commissioner if, in the opinion of the Commissioner, it concerns only the quantum of fees or

[3] 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.

disbursements charged by a member, a member's filing requirements, the handling of money and other property or negligence of a member or student member.

(ii) The Review Meeting

Most reviews conducted by the Commissioner are performed in a personal meeting with the complainant. Counsel to the Commissioner is also present. On occasion, the complainant is accompanied by his or her legal counsel. The member is not entitled to participate. The Coordinator is usually in attendance to provide administrative support.

Complaints review meetings were traditionally held in Convocation Room, or occasionally in the Benchers Dining Room. The Commissioner was concerned about the formality of these rooms so the location of the review meetings was changed. Although consideration was given to moving the location off-site entirely, it was decided that the costs of doing so outweighed the benefits. Furthermore, during a review meeting, the Commissioner often requires access to the administrative services provided by the Law Society including photocopying services and on-site security. As a result, the review meetings are now conducted in other locations of the Law Society.

When the complainant is unable to attend a meeting in person, the review may be conducted by teleconference. There were 15 reviews conducted by telephone in 2006. The same number of reviews were conducted by teleconference in 2005.

Under limited circumstances, for example when the complainant fails to attend without a request for an adjournment, or if the complainant is unwilling or unable to participate, the review may proceed based on the written material alone. Six reviews proceeded in this manner in 2006 and only one such review was conducted in 2005.

Although the meetings are held, for the most part, at Osgoode Hall, in December 1997 Convocation approved the holding of complaint review meetings in centres outside Toronto to provide greater accessibility to the process for those complainants who reside outside of the Toronto area. The Complaints Review Commissioners held review meetings in Kitchener, London and Ottawa. The Complaints Resolution Commissioner has continued this practice. In 2006, 5 review meetings were conducted in Ottawa and 3 were performed in Cambridge.

(iii) Disposition of Complaints

After reviewing the Law Society's consideration of the complaint and its resulting decision to take no further action in respect of the complaint, if the Commissioner is satisfied that the Law Society's consideration and decision was reasonable, the Commissioner will so notify the complainant and the Society. The Act provides that the Commissioner's decision is final and not subject to appeal. If the Commissioner is not satisfied that the Law Society's decision to close the file was reasonable, the Commissioner is required to refer the complaint back to the Law Society with a recommendation that further action be taken. The Complainant is notified of the Commissioner's decision.

D. Review Meeting Statistics

(i) Requests for Review

In 2006, 109 requests for review were received compared with 103 requests in 2005. The following Table 1 provides a breakdown of the department from which the files were referred for complaints review.

CRC Requests Received by Source

(see graph in Convocation Report)

Table 2 below provides a summary of the current status of the 109 files for which a request for review was received in 2006, as at February 1, 2007.

Status of Requests

(see graph in Convocation Report)

Following receipt of the requests for review, 4 files were withdrawn to allow for further investigation to be performed. The department Manager identified the need for further investigation during a managerial review for readiness to proceed. A fifth file was withdrawn prior to the review meeting at the request of the complainant. No reason for the withdrawal was provided.

(ii) Reviews Conducted

From January 1, 2006 through December 31, 2006, the Complaints Resolution Commissioner conducted a review of 79 files. The requests for review on these files were received in 2005 and 2006.

During 2005, a total of 69 files were reviewed. The Complaints Review Commissioners performed 17 of the reviews in 2005 and 52 were conducted by the Complaints Resolution Commissioner.

Table 3 below identifies the department that conducted the investigation.

CRC Requests Received by Source

(see graph in Convocation Report)

Two of the investigations were conducted by outside counsel pursuant to s. 49.5(2) of the Law Society Act.

The 67 requests received from the Complaints Resolution department represent approximately 85% of the total requests, the 10 from the Investigations department represent approximately 13% and the 2 requests received from Investigations conducted by outside counsel represent approximately 2.5% of the total requests received.

Table 4 that follows identifies the types of cases or nature of the issues that were reviewed by the Commissioner during 2006.

Case Types for Cases in CRC 2006

(see graph in Convocation Report)

(iii) Review Meeting Results

Figure 1(1), set out below, depicts the dispositions rendered following all reviews conducted in 2006.

2006 Review Results

(see graph in Convocation Report)

The 2006 review results, depicted in figure 1(1) above, indicate that in 2006 a total of 13 complaints, representing 16.45% of the files reviewed, required further action. 9 of the 13 files were from the Complaints Resolution department, 3 cases were from the Investigations department and Outside Counsel investigated 1of the files.

The following figures 1(2) and 1(3) below depict the dispositions achieved in 2004 and 2005. This information is being provided for comparison purposes only.

2004 Review Results

(see graph in Convocation Report)

Therefore, 20.77% of the files reviewed by the Complaints Review Commissioners in 2004 were referred back for further action.

2005 Review Results

(see graph in Convocation Report)

In 2005, 13 or 18.84% of the files reviewed were referred back for further action. Of the 13 files referred back in 2005, the former Complaints Review Commissioners made 5 of the referrals and 8 were made by Clare Lewis as the Complaints Resolution Commissioner.

(iv) Status of Files Referred Back for Further Action in 2006

Figure 2 below sets out the status of the 13 files that the Complaints Resolution Commissioner referred back to the Law Society in 2006.

2006 Referral Back Results

(see graph in Convocation Report)

E. Jurisdictional Issues

Not all complainants are entitled to a review by the Complaints Resolution Commissioner.

Section 6 of By-Law 37, in part, provides as follows:

6(1) A complaint may be reviewed by the Commissioner if,
(a) the merits of the complaint have been considered by the Society.

Section 6(1) of By-Law 37, has been interpreted to mean that the Commissioner can only review those files that have been investigated under the investigation authority set out in section 49.3 of the Act. This means that generally complaints referred to the Complaints Resolution or Investigations departments are reviewable by the Commissioner, but the Commissioner does not have the authority to review those cases closed earlier in the process, for example, because of the Law Society's lack of jurisdiction to act on the complaint.

Following 4 reviews of files referred to the Commissioner in 2005 from the Intake department, it became clear to the Commissioner that since the Commissioner did not have the authority to review the Intake files, an alternate process for review was required. Following discussions with the Director, Professional Regulation, a process for responding to requests for a review from decisions made by the Intake department was established. When a complainant disputes the closure of a complaint file by the Intake department, the request for further review is considered by the Director, Professional Regulation and dealt with accordingly.

When a request for review is now received by the Commissioner following a complaint closing by the Intake department, the complainant is advised that the Commissioner does not have the jurisdiction to review the matter and the complaint is referred back to the Intake department for a further response. The Intake Manager reviews the file. If the Manager believes that the file should remain closed and the Complainant remains dissatisfied, then the Director, Professional Regulation, reviews the file. A similar review process is used for complaints closed by Complaints Services in the Client Service Centre.

Further to the suggestion of the Complaints Resolution Commissioner, the Director, Professional Regulation, is also in the process of implementing regular audits of files for quality control.

F. Systemic Issues

The Commissioner has continued to identify systemic issues during the review process.

Although a number of files have remained closed following a review meeting, both the Commissioner and his counsel have worked with the Director, Professional Regulation, her counsel and Management on an informal basis to clarify issues and identify, address and improve practices and procedures within the Professional Regulation departments. For example:

- Discussions have taken place regarding communications within the file and the content of closing letters.
- Practice Review has been recommended on one file.

- Additional materials that were received post closing of the files have been provided to the department manager and/or the investigator for consideration, before conducting the review meetings.
- Following review meetings, discussions regarding related files have taken place with the department manager.
- The Commissioner's concerns regarding a member's general course of conduct have been discussed.
- Concerns that relate to the conduct of other members have been identified and discussed.
- Discussions regarding the Law Society's interpretation and application of sections of the Act and the Rules of Professional Conduct, including issues of disclosure, have taken place.

The Commissioner has raised these issues and concerns in an effort to support and improve the Society's service to the public.

The Director, Professional Regulation, and the Commissioner have also continued to develop mutually supportive practices and procedures relevant to the review process.

G. The Resolution Function

In addition to the review function performed by the Complaints Resolution Commissioner, section 11 of By-Law 37 also provides that the Secretary may refer a complaint to the Complaints Resolution Commissioner for resolution.

This new function will provide a more formal resolution process for addressing complaints. By-Law 37 states that the Secretary will determine whether a matter is referred to the Commissioner for resolution, prior to the file being closed or referral to the Proceedings Authorization Committee. The Secretary can only refer a file to resolution with the consent of the complainant, the lawyer and the Society.

The Complaints Resolution Commissioner has the broad discretion to determine the process for the resolution function. However, the applicable procedure and the method for identifying cases appropriate for resolution have yet to be determined. Counsel to the Commissioner and the Commissioner have met with the Director, Professional Regulation and her counsel during 2006 to discuss a draft proposal for identifying and streaming files for resolution. Counsel to the Director is currently working on the necessary policies to implement this process and it is anticipated that the process will be implemented in 2007.

H. The Commissioner's Observations

As Complaints Resolution Commissioner, I have been responsible for ensuring that the Law Society is responding to public complaints in a transparent, fair and efficient manner. I believe that I have provided the public with an independent and impartial forum for reviewing the Law Society's decisions to close complaint files.

To ensure greater transparency in the complaints process, I have provided complainants with comprehensive reasons for my decision.

During the performance of my functions as Complaints Resolution Commissioner, I have also identified issues and made recommendations for improving the Society's current processes.

The communications between this office, Counsel to the Director, Professional Regulation and Management have been open and encouraging. Furthermore, the liaison function performed by Professional Regulation Counsel has assisted in the smooth and efficient transfer of files. I believe this interaction has also resulted in the need to refer fewer files back to the Law Society for further action.

Working with the Law Society to protect the public interest, since my appointment in April 2005, has been both challenging and rewarding.

APPENDIX 1

EXCERPT FROM THE *LAW SOCIETY ACT*

COMPLAINTS RESOLUTION COMMISSIONER

Appointment

49.14 (1) Convocation shall appoint a person as Complaints Resolution Commissioner in accordance with the regulations. 1998, c. 21, s. 21.

Restriction

(2) A bencher or a person who was a bencher at any time during the two years preceding the appointment shall not be appointed as Commissioner. 1998, c. 21, s. 21.

Term of office

(3) The Commissioner shall be appointed for a term not exceeding three years and is eligible for reappointment. 1998, c. 21, s. 21.

Removal from office

(4) The Commissioner may be removed from office during his or her term of office only by a resolution approved by at least two thirds of the benchers entitled to vote in Convocation. 1998, c. 21, s. 21.

Restriction on practice of law

(5) The Commissioner shall not engage in the practice of law during his or her term of office. 1998, c. 21, s. 21.

Functions of Commissioner

49.15 (1) The Commissioner shall,

(a) attempt to resolve complaints referred to the Commissioner for resolution under the by-laws; and

(b) review and, if the Commissioner considers appropriate, attempt to resolve complaints referred to the Commissioner for review under the by-laws. 1998, c. 21, s. 21.

Investigation by Commissioner

(2) If a complaint is referred to the Commissioner under the by-laws, the Commissioner has the same powers to investigate the complaint as a person conducting an investigation under section 49.3 would have with respect to the subject matter of the complaint, and, for that

purpose, a reference in section 49.3 to the Secretary shall be deemed to be a reference to the Commissioner. 1998, c. 21, s. 21.

Note: Effective May 1, 2007, subsection (2) is amended by the Statutes of Ontario, 2006, chapter 21, Schedule C, subsection 48 (1) by striking out "the Secretary" and substituting "an employee of the Society holding an office prescribed by the by-laws". See: 2006, c. 21, Sched. C, ss. 48 (1), 138 (2).

Access to information

(3) If a complaint is referred to the Commissioner under the by-laws, the Commissioner is entitled to have access to,

(a) all information in the records of the Society respecting a member or student member who is the subject of the complaint; and

Note: Effective May 1, 2007, clause (a) is amended by the Statutes of Ontario, 2006, chapter 21, Schedule C, subsection 48 (2) by striking out "member or student member" and substituting "licensee". See: 2006, c. 21, Sched. C, ss. 48 (2), 138 (2).

(b) all other information within the knowledge of the Society with respect to the subject matter of the complaint. 1998, c. 21, s. 21.

Delegation

49.16 (1) The Commissioner may in writing delegate any of his or her powers or duties to members of his or her staff or to employees of the Society holding offices designated by the by-laws. 1998, c. 21, s. 21.

Terms and conditions

(2) A delegation under subsection (1) may contain such terms and conditions as the Commissioner considers appropriate. 1998, c. 21, s. 21.

Identification

49.17 On request, the Commissioner or any other person conducting an investigation under subsection 49.15 (2) shall produce identification and, in the case of a person to whom powers or duties have been delegated under section 49.16, proof of the delegation. 1998, c. 21, s. 21.

Confidentiality

49.18 (1) The Commissioner and each member of his or her staff shall not disclose,

(a) any information that comes to his or her knowledge as a result of an investigation under subsection 49.15 (2); or

(b) any information that comes to his or her knowledge under subsection 49.15 (3) that a bencher, officer, employee, agent or representative of the Society is prohibited from disclosing under section 49.12. 1998, c. 21, s. 21.

Exceptions

(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. 1998, c. 21, s. 21.

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). 1998, c. 21, s. 21.

Decisions final

49.19 A decision of the Commissioner is final and is not subject to appeal. 1998, c. 21, s. 21.

APPENDIX 2

BY-LAW 37
Made: April 25, 2003
Amended: June 26, 2003

COMPLAINTS RESOLUTION COMMISSIONER

PART I
GENERAL

Definitions

1. In this By-Law,

"complainant" means a person who makes a complaint;

"complaint" means a complaint made to the Society in respect of the conduct of a member or student member;

"Commissioner" means the Complaints Resolution Commissioner appointed under section 49.14 of the Act;

"reviewable complaint" means a complaint that may be reviewed by the Commissioner under subsection 6 (1).

Provision of funds by Society

2. (1) The money required for the administration of this By-Law and sections 49.15 to 49.18 of the Act shall be paid out of such money as is budgeted therefor by Convocation.

Restrictions on spending

(2) In any year, the Commissioner shall not spend more money in the administration of this By-Law and sections 49.15 to 49.18 of the Act than is budgeted therefor by Convocation.

Annual report

3. Not later than March 31 in each year, the Commissioner shall submit to the standing committee of Convocation responsible for professional regulation matters a report upon the affairs of the office of the Commissioner during the immediately preceding year, and the committee shall lay the report before Convocation not later than at its regular meeting in June.

Delegation of powers and duties of Secretary: Professional Regulation Counsel
4. If the Secretary for any reason is unable to do so, an employee or officer of the Society who holds the office of Professional Regulation Counsel may exercise the powers and perform the duties of the Secretary under this By-Law.

Complaints against benchers and Society employees
5. In Parts II and III, a reference to the Secretary shall be deemed, with respect to a complaint that concerns the conduct of a bencher or employee of the Society, to be a reference to the Treasurer.

PART II
REVIEW OF COMPLAINTS

Reviewable complaints
6. (1) A complaint may be reviewed by the Commissioner if,

(a) the merits of the complaint have been considered by the Society;

(b) the complaint has not been disposed of by the Proceedings Authorization Committee, Hearing Panel or Appeal Panel;

(c) the complaint has not been previously reviewed by the Commissioner; and

(d) the Society has notified the complainant that it will be taking no further action in respect of the complaint.

Same
(2) A complaint may not be reviewed by the Commissioner to the extent that, in the opinion of the Commissioner, it concerns only the following matters:

1. Quantum of fees or disbursements charged by a member to a complainant.

2. Requirements imposed on a member under By-Law 17 [Filing Requirements] or 19 [Handling of Money and Other Property].

3. Negligence of a member or student member.

Interpretation: “previously reviewed”
(3) For the purposes of this section, a complaint shall not be considered to have been previously reviewed by the Commissioner if the complaint was referred back to the Society for further consideration under subsection 9 (1).

Right to request referral
7. (1) A complainant may request the Secretary to refer to the Commissioner for review a reviewable complaint.

Request in writing
(2) A request to refer a reviewable complaint to the Commissioner for review shall be made in writing.

Time for making request
(3) A request to refer a reviewable complaint to the Commissioner for review shall be made within 60 days after the day on which the Society notifies the complainant that it will be taking no further action in respect of the complaint.

When notice given
(4) For the purposes of subsection (3), the Society will be deemed to have notified the complainant that it will be taking no further action in respect of the complaint,

(a) in the case of oral notification, on the day that the Society notified the complainant; and

(b) in the case of written notification,

(i) if it was sent by regular lettermail, on the fifth day after it was mailed, and
(ii) if it was faxed, on the first day after it was faxed.

Referral of complaints
8. (1) The Secretary shall refer to the Commissioner for review every reviewable complaint in respect of which a complainant has made a request under, and in accordance with, section 7.

Notice
(2) The Secretary shall notify in writing the member or student member who is the subject of a complaint in respect of which a complainant has made a request under, and in accordance with, section 7 that the complaint has been referred to the Commissioner for review.

Fresh evidence
9. (1) When reviewing a complaint that has been referred to the Commissioner for review, if the Commissioner receives or obtains information, which in the Commissioner's opinion is significant, about the conduct of the member or student member who is the subject of the complaint that was not received or obtained by the Society as a result of or in the course of its consideration of the merits of the complaint, the Commissioner shall refer the information and complaint back to the Society for further consideration.

Disposition of complaint referred for review
(2) After reviewing a complaint that has been referred to the Commissioner for review, the Commissioner shall,

(a) if satisfied that the Society's consideration of the complaint and its decision to take no further action in respect of the complaint is reasonable, so notify in writing the complainant and the Society; or

(b) if not satisfied that the Society's consideration of the complaint and its decision to take no further action in respect of the complaint is reasonable, refer the complaint back to the Secretary with a recommendation that the Society take further action in respect of the complaint, or the member or student member who is the subject of the complaint, and so notify in writing the complainant.

Disposition of complaint referred for review: notice
(3) The Secretary shall notify in writing the member or student member who is the subject of a complaint reviewed by the Commissioner of the Commissioner's disposition of the complaint.

Referral back to Society: notice
(4) If the Commissioner refers a complaint back to the Secretary with a recommendation that the Society take further action in respect of the complaint, or the member or student member who is the subject of the complaint, the Secretary shall consider the recommendation and notify in writing the Commissioner, complainant and member or student member who is the subject of the complaint of whether the Secretary will be following the recommendation.

Same
(5) If the Commissioner refers a complaint back to the Secretary with a recommendation that the Society take further action in respect of the complaint, or the member or student member who is the subject of the complaint, and the Secretary determines not to follow the recommendation of the Commissioner, the Secretary shall provide the Commissioner, complainant and member or student member who is the subject of the complaint with a written explanation for the determination.

Procedure
10. (1) Subject to this Part, the procedures applicable to the review of a complaint referred to the Commissioner shall be determined by the Commissioner.

Meeting
(2) The Commissioner shall, where practicable, meet with each complainant whose complaint has been referred to the Commissioner for review, and the Commissioner may meet with the complainant by such telephone, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other simultaneously and instantaneously.

Participation in review: Society
(3) Other than as provided for in subsections (5) and (6), or unless otherwise expressly permitted by the Commissioner, the Society shall not participate in a review of a complaint by the Commissioner.

Participation in review: member, student member
(4) The member or student member who is the subject of a complaint that has been referred to the Commissioner for review shall not participate in a review of the complaint by the Commissioner.

Description of consideration, *etc*.
(5) At the time that the Secretary refers a complaint to the Commissioner for review, the Society is entitled to provide the Commissioner with a description of its consideration of the complaint and an explanation of its decision to take no further action in respect of the complaint.

Requirement to answer questions
(6) The Commissioner may require the Society to provide information in respect of its consideration of a complaint that has been referred to the Commissioner for review and its decision to take no further action in respect of the complaint, and the Society shall provide such information.

PART III
RESOLUTION

Discretionary referral of complaints

11 (1) The Secretary may refer a complaint to the Commissioner for resolution if,

(a) the complaint is within the jurisdiction of the Society to investigate;

(b) the complaint has not been disposed of by the Proceedings Authorization Committee, Hearing Panel or Appeal Panel;

(c) the complaint has not been referred to the Proceedings Authorization Committee;

(d) no resolution of the complaint has been attempted by the Society; and

(e) the complainant and the member or student member who is the subject of the complaint consent to the complaint being referred to the Commissioner for resolution.

Parties

12. The parties to a resolution of a complaint by the Commissioner are the complainant, the member or student member who is the subject of the complaint and the Society.

Outcome of Resolution

13. (1) There shall be no resolution of a complaint by the Commissioner until there is an agreement signed by all parties agreeing to the resolution.

No resolution

(2) If there is no resolution of a complaint by the Commissioner, the Commissioner shall so notify in writing the parties and refer the complaint back to the Secretary.

Enforcement of resolution

(3) A resolution of a complaint by the Commissioner shall be enforced by the Society.

Confidentiality: Commissioner

14. (1) Subject to subsection (2), the Commissioner shall not disclose any information that comes to the Commissioner's knowledge during the resolution of a complaint.

Exceptions

(2) Subsection (1) does not prohibit disclosure required of the Commissioner under the Society's Rules of Professional Conduct.

Without prejudice

(3) All communications during the resolution of a complaint by the Commissioner and the Commissioner's notes and record of the resolution shall be deemed to be without prejudice to any party.

Procedure

15. Subject to this Part, the procedures applicable to the resolution of a complaint referred to the Commissioner shall be determined by the Commissioner.

APPENDIX 3

BY-LAW 20

Made: January 28, 1999
Amended:
May 28, 1999
April 26, 2001
January 24, 2002

REVIEW OF COMPLAINTS

Complaints Review Commissioners
1. Each lay bencher is a Complaints Review Commissioner.

Function
2. (1) Subject to subsection (2), the function of a Complaints Review Commissioner is to review the Society's disposition of a complaint against a member.

Same
(2) A Complaints Review Commissioner shall not review the disposition of a complaint against a member by,

(a) the chair and vice-chairs of the Discipline Committee as it was constituted before February 1, 1999;

(b) a committee of benchers acting under section 33 of the Act as that section read before February 1, 1999;

(c) Convocation acting under section 33 of the Act as that section read before February 1, 1999;

(d) The Proceedings Authorization Committee;

(e) The Hearing Panel; or

(f) The Appeal Panel.

Request to review disposition of complaint
3. (1) A complainant who is dissatisfied with the Society's disposition of his or her complaint against a member may request the Society to refer the disposition of the complaint to a Complaints Review Commissioner for review.

Referral of disposition of complaint to Commissioner
(2) If a request is made under subsection (1), unless a complaint was disposed of by the persons or body mentioned in subsection 2 (2), the Society shall refer the disposition of a complaint to a Complaints Review Commissioner for review.

Review by Commissioner of disposition of complaint
4. (1) A Complaints Review Commissioner shall review every disposition of a complaint referred to him or her under subsection 3 (2) and shall decide whether the Society's disposition of a complaint was appropriate.

Referral to Society for further investigation
(2) A Complaints Review Commissioner may, before or after deciding whether the Society's disposition of a complaint was appropriate, refer a complaint to the Society and direct the Society to investigate the complaint further.

Procedure on review
5. The procedure applicable to a review by a Complaints Review Commissioner of the Society's disposition of a complaint shall be determined by the Complaints Review Commissioner and, without limiting the generality of the foregoing, the Complaints Review Commissioner may decide who may make submissions to him or her, when and in what manner.

Independent counsel
6. The Complaints Review Commissioners may retain independent counsel on such terms and conditions as they consider appropriate to provide them with advice on the performance of their duties and the exercise of their duties under this By-Law.

Two or more Commissioners may review disposition of complaint
7. Despite any provision in this By-Law, two or more Complaints Review Commissioners may sit together to review the Society's disposition of a complaint and sections 2, 4 and 5 apply, with necessary modifications, to the review of the Society's disposition of a complaint by two or more Commissioners.

Commencement
8. This By-Law comes into force on February 1, 1999.

PROFESSIONAL REGULATION DIVISION
QUARTERLY REPORT

73. Professional Regulation Division's Quarterly Report (fourth quarter 2006), provided to the Committee by Zeynep Onen, the Director of Professional Regulation, appears on the following pages. The report includes information on the Division's activities and responsibilities, including file management and monitoring, for the period October to December 2006.

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

(1) Copy of "A Proposed Draft Protocol to address searches and seizures of documents from law offices" entitled "Protocol on Law Office Searches".

(Appendix 2, pages 72 – 77)

(2) Copy of the Complaints Review Process.

(pages 122 – 123)

(3) Copy of the Professional Regulation Division's Quarterly Report (fourth quarter 2006). (pages 125 – 171)

Re: Amendments to Rules of Professional Conduct 2.02 and 2.04 and Commentaries

It was moved by Mr. Ruby, seconded by Mr. Heintzman, that Convocation make the following amendments to the Rules of Professional Conduct:

a. Add new rule 2.02(14) and (15) and commentary as follows:

Reporting on Mortgage Transactions

2.02 (14) Where a lawyer acts for a lender and the loan is secured by a mortgage on real property, the lawyer shall provide a final report on the transaction, together with the duplicate registered mortgage, to the lender within 60 days of the registration of the mortgage, or within such other time period as instructed by the lender.

(15) The final report required by subrule (14) must be delivered within the times set out in that subrule even if the lawyer has paid funds to satisfy one or more prior encumbrances to ensure the priority of the mortgage as instructed and the lawyer has obtained an undertaking to register a discharge of the encumbrance or encumbrances but the discharge remains unregistered.

Commentary

If, at the time a lawyer delivers a final report required by subrule (14), any encumbrance described in subrule (15) remains undischarged, the lawyer's report to the lender should state that it is conditional on the registration of the discharge. The lawyer should then take the necessary steps to verify the registration of the discharge and to fulfill the requirement to provide the lender with timely confirmation of the registration of the discharge.

b. Add new rule 2.04(6.1) and commentary as follows:

2.04 (6.1) Where a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer shall disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

Commentary

What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or "flip", where a property is re-transferred or re-sold on the same day or within a

short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information. In some cases, it may be necessary for the lawyer to make disclosure to an institutional lender's legal department if the lender's normal contact person does not appear to be acting on the information.

c. Amend rule 2.04(6) through (8) and add new rules 2.04(8.1) and (8.2) and commentary as follows:

(6) Except as provided in subrule (8.2), before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that

(a) the lawyer has been asked to act for both or all of them,
(b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and
(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

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

(7) Except as provided in subrule (8.2), where a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

Commentary

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

(8) Except as provided in subrule (8.2), where a lawyer has advised the clients as provided under subrules (6) and (7) and the parties are content that the lawyer act, the lawyer shall obtain their consent.

(8.1) In subrule (8.2), "lending client" means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

(8.2) If a lawyer is jointly retained by a client and by a lending client in respect of a mortgage or loan from the lending client to that client, including any guarantee of that mortgage or loan, the lending client's consent is deemed to exist upon the lawyer's receipt of written instructions from the lending client to act and the lawyer is not required to

(a) provide the advice described in subrule (6) to the lending client before accepting the employment,
(b) provide the advice described in subrule (7) if the lending client is the other client as described in that subrule, or
(c) obtain the consent of the lending client as described in subrule (8), including confirming the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.

Commentary

Subrules (8.1) and (8.2) are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g. mortgage loan instructions) and the consent is generally deemed by such clients to exist when the lawyer is requested to act.
Subrule (8.2) applies to all loans where a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.

It was moved by Mr. Aaron, seconded by Mr. Gottlieb, that the commentary to rule 2.02 (15) set out at page 4 be deleted.

Carried

ROLL-CALL VOTE

Aaron	For	Lawrie	Abstain
Alexander	Abstain	Legge	For
Backhouse	For	Millar	For
Banack	For	Minor	For
Bobesich	For	O'Donnell	For
Boyd	For	Pawlitza	Abstain
Campion	For	Porter	Abstain
Carpenter-Gunn	Abstain	Potter	Abstain
Caskey	For	Robins	Abstain
Chahbar	For	Ross	Abstain
Coffey	For	Ruby	For

Copeland	Abstain	St. Lewis	Abstain
Crowe	For	Sandler	Abstain
Curtis	For	Silverstein	For
Dickson	For	Simpson	Abstain
Dray	For	Swaye	For
Eber	For	Warkentin	For
Feinstein	For		
Filion	For		
Gotlib	Abstain		
Gottlieb	For		
Harris	For		
Heintzman	Abstain		
Henderson	For		
Krishna	Abstain		

Vote: 27 For; 15 Abstentions

It was moved by Mr. Silverstein, seconded by Mr. Aaron, that the commentary to rule 2.04 (6.1) be amended to delete the last sentence that begins with 'in some cases'....and referred back to committee.

Carried

It was moved by Ms. Ross and failed for want of a seconder, that the word "should" be changed to "shall" in the last sentence of the commentary to rule 2.02 (15) set out at page 4.

The main motion as amended carried.

Federation of Law Societies of Canada Protocol for Law Office Searches

It was moved by Mr. Ruby, seconded by Mr. Heintzman, that Convocation approve in principle the Federation of Law Societies of Canada Draft "Protocol on Law Office Searches" for the purposes of consultation with relevant stakeholders on procedures in respect of such searches.

Carried

Re: Amendments to By-Law 18 (Record Keeping Requirements)

It was moved by Mr. Gottlieb, seconded by Mr. Ruby, that Convocation amend subsection 5(2) of By-Law 18 [Record Keeping Requirements] by deleting "fifteen" / "quinze" and substituting "twenty-five" / "vingt-cinq".

Carried

Re: Amendment to Rule 6.01

It was moved by Mr. Ruby, seconded by Mr. Heintzman, that Convocation add the following subrule and commentary to rule 6.01 of the Rules of Professional Conduct:

Duty to Report Certain Offences

6.01 (8) If a lawyer is charged with an offence described in By-law 20 of the Society, he or she shall inform the Society of the charge and of its disposition in accordance with the By-law.

Commentary

A person of integrity respects the law. When a lawyer fails to respect the law, his or her integrity is called into question and clients and others may suffer loss or damage. By-law 20 relates to the reporting of serious criminal charges under the Criminal Code and charges under other Acts that bring into question the honesty of a lawyer or that relate to a lawyer's practice of law. Such a charge may be a red flag that clients may need protection. The Society must be in a position to determine what, if any, action is required by it if a member is charged with an offence described in By-law 20 and what, if any, action is required if the lawyer is found guilty.

A friendly amendment was accepted that the first two sentences of the commentary be deleted.

The main motion as amended was approved.

Items for Information

- Complaints Resolution Commissioner Report
- Professional Regulation Division Quarterly Report

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IN CAMERA

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IN PUBLIC

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The Treasurer announced that W. Michael Adams of Innisfil is appointed by Convocation to preside over the Bencher Election.

PARALEGAL STANDING COMMITTEE REPORT

Mr. Dray presented the Report.

Report to Convocation
February 22, 2007

Paralegal Standing Committee

Committee Members
Paul Dray, Chair
William Simpson, Vice-Chair
Andrea Alexander
Marion Boyd
James Caskey
Anne Marie Doyle
Michelle Haigh
Abraham Feinstein
Thomas Heintzman
Brian Lawrie
Margaret Louter
Stephen Parker
Bonnie Warkentin

Purpose of Report: Decision

Prepared by the Policy Secretariat
Julia Bass 416 947 5228

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COMMITTEE PROCESS

1. The Paralegal Standing Committee met on January 10, 2007. Committee members participating were Paul Dray, Chair, William Simpson, Vice-Chair, James Caskey, Anne Marie Doyle, Abraham Feinstein, Michelle Haigh, Thomas Heintzman, Brian Lawrie, Margaret Louter, and Bonnie Warkentin. Also attending was bencher Marion Boyd. Staff members in attendance were Diana Miles, Janice Laforme, Terry Knott, Elliot Spears and Julia Bass.

2. The Committee further met on January 24th, 2007. Committee members participating were Paul Dray, Chair, William Simpson, Vice-Chair, Andrea Alexander, James Caskey, Anne Marie Doyle, Michelle Haigh, Thomas Heintzman, Brian Lawrie, Margaret Louter, Stephen Parker, and Bonnie Warkentin. The meeting was also joined by Treasurer Gavin MacKenzie. Staff members in attendance were Malcolm Heins, Wendy Tysall, Fred Grady, Elliot Spears, Diana Miles, Terry Knott, Janice Laforme and Julia Bass.

3. The Committee further met on February 8, 2007. Committee members participating were Paul Dray, Chair, William Simpson, Vice-Chair, Andrea Alexander, Marion Boyd (by teleconference), James Caskey, Anne Marie Doyle, Abraham Feinstein, Thomas Heintzman, Brian Lawrie, Margaret Louter and Stephen Parker. Staff members in attendance were Malcolm Heins, Zeynep Onen, Terry Knott, Naomi Bussin, Elliot Spears, Fred Grady, Janice Laforme, James Varro and Julia Bass.

FOR DECISION

CRITERIA FOR GRANDPARENT APPLICANTS

MOTION

4. That Convocation approve the criteria attached at APPENDIX 1 for use in consideration of applicants for 'grandparent status' in the introduction of paralegal regulation.

Introduction and Background

5. In the Report of the Task Force on Paralegal Regulation approved by Convocation in September 2004, there is a general description of the requirements to be considered for 'grandparent status'. The Report recommendations are as follows:

Recommendation Nine (paragraph 117)
Applicants should be eligible for grandparented status if they have worked as paralegals in areas covered by the proposed scope of practice described above, either independently or in employed positions, for three of the last five years, except where the person requires accommodation under one of the grounds in the Ontario Human Rights Code, in which case the requirement should be three years within the last seven.

Recommendation Ten (paragraph 119)
Applicants seeking grandparented status should be given six months to apply, from the coming into force of the relevant sections of the legislation.

Recommendation Eleven (paragraph 121)
Applicants for grandparented status should be required to submit at least two references, and conform to other criteria to be developed.

6. This indicated the need to develop criteria for the consideration of such applicants. The committee has developed the criteria at APPENDIX 1 for Convocation's consideration. They were approved at the meeting on January 24th.

Definition of 'full time' employment

7. It was necessary to develop a definition or guideline for the term 'full time' for the purposes of the required work experience. The concept behind the creation of this status is that it would be unfair for paralegals who have established themselves professionally for a period of several years to have to return to school. It is not intended for those who have had only a marginal involvement in paralegal work and who have some other principal occupation.

8. Although there is no universally accepted definition of 'full-time', the proposed criteria require applicants to specify that paralegal work has been their predominant activity for three years, for an average of 30 hours per work week.

Appendix 1

Criteria for Paralegal Applicant
('Grandparent': Minimum of three years' experience)

To be eligible to apply for a licence, applicants must:

1. be of good character;

2. have provided legal services within the permitted scope of practice[1] , on a full-time basis[2] for a minimum of three years. This work experience must be supported by a minimum of two references:

[1] The scope of permitted paralegal practice will be set out in a By-law.

a. One reference from a judge, JP, deputy judge or lawyer, or a member or senior employee of a tribunal, agency, small claims court, provincial offences court or summary convictions court before which the applicant has appeared, who must attest to the experience and/or ability of the applicant in advocacy work, including:

- Nature of the work experience
- Recentness of the experience[3] , and
- Duration of the applicant's legal services provision [4].

b. The other referee may be from the list above, or may be a client, and must attest to the experience and/or abilities of the applicant and the context within which the applicant provided the legal services.

DRAFT CRITERIA FOR 'TRANSITIONAL' APPLICANTS

MOTION

9. That Convocation approve the criteria attached at APPENDIX 2 for use in consideration of 'transitional' applicants for 'grandparent status' in the introduction of paralegal regulation.

Background

10. While the Task Force Report set out the requirements for 'grandparent status' and for the permanent qualification process for paralegals, there will also be a group of applicants who do not fulfill the requirements set out in the Report, but have some work experience, education or training relevant to paralegal qualification, such as a college diploma or two years of work experience. For example, a person who obtained a diploma in paralegal studies in 2005 and has been working as a paralegal since then, does not meet the requirements for 'grandparent status' discussed above.

11. The Committee is of the view that, while it would not be fair to require such persons to complete an accredited college programme, criteria are required for considering these applicants on a case-by-case basis, to determine if it is appropriate for them to sit the licensing examination.

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[2] The provision of legal services in areas within the permitted scope of practice must have been the applicant's predominate activity; *on average* the applicant must have spent a minimum of 30 hours per week providing those legal services.

[3] The applicant must have provided such legal services for 3 years out of the last 5 years except where the person requires accommodation under one of the grounds in the *Ontario Human Rights Code*, in which case the requirement is 3 years within the last 7 years.

[4] This referee must attest to having direct knowledge of the applicant's activities as a legal services provider during the required three-year minimum period.

12. The Committee has developed the criteria at APPENDIX 2, for Convocation's consideration. They were approved at the meeting on January 24th. The criteria permit consideration of a combination of educational and professional experience, unlike the criteria for applicants for 'grandparent status', which are based entirely on work experience.

13. The Committee is of the view that use of these criteria will provide access to the licensing programme for deserving applicants while maintaining consumer protection. All applicants will be required to be of good character and to pass the licensing examination.

14. The criteria require paralegal work experience in Ontario and/or education at approved Ontario colleges. While this could be regarded as restrictive, there would be significant difficulties in assessing work experience or educational qualifications from other jurisdictions.

15. To clarify the categories of applicants for a paralegal licence, a chart setting out the different categories is attached at APPENDIX 3.

Appendix 2

Criteria for Paralegal Applicant
('Transitional': Less than three years' experience)

The eligibility of applicants with less than three years work experience as paralegals in areas within the permitted scope of practice[1] , either independently or in employed positions, to write the entry examination will be considered on a case-by-case basis.
Applicants who do not precisely satisfy the equivalency criteria but who wish to write the entry examination will be requested to submit a written request for special consideration, including a detailed justification for the request.

To be eligible to apply for a licence, applicants with less than three years work experience as a paralegal must:

1. be of good character.

2. have provided paralegal legal services[2] in Ontario, in areas within the permitted scope of practice, including a minimum of 10 appearances representing a client before a

[1] The scope of permissible paralegal practice will be set out in a By-law.

[2] The experience in paragraph 2 must be supported by two references, one of which must be from a judge, JP, deputy judge or lawyer, or a member or senior employee of a tribunal, agency, small claims court, provincial offences court or summary convictions court before which the applicant has appeared, or an instructor in a legal services program. The referee must attest to the experience and/or ability of the applicant before the above-noted courts or tribunals including the nature of the work experience, the recentness and duration of the applicant's experience.

tribunal, agency, small claims court, provincial offences court or summary convictions court, and have completed the equivalent of 9 courses in a legal services education program in Ontario[3] ; OR

3. If they lack the work experience in paragraph 2, have graduated, within the three years prior to the application, from a legal services education program in Ontario[4] , approved by the Ministry of Training, Colleges and Universities, that contains at least 18 courses, the majority of which must cover areas within the permitted scope of practice and include a course on professional responsibility and ethics, and a field placement component of no less than 120 hours.

Appendix 3

APPLICANTS FOR A PARALEGAL LICENCE

IN CHRONOLOGICAL ORDER

1. GRANDPARENTS/MORE THAN 3 YEARS EXPERIENCE:

   a. Intended to accommodate those who are already established in their career
   b. Must apply between May 1st and October 31st, 2007
   c. Eligibility to apply will be evaluated on the basis of work experience only – no academic requirements
   d. Must have worked three years full time as a professional paralegal
   e. Must be of good character
   f. Must sit the licensing examination – earliest sitting will be January 2008
   g. Will start receiving licences in about March 2008
   h. After October 31st, there will be no more applicants in this category

2. TRANSITIONAL GRANDPARENT/LESS THAN 3 YEARS EXPERIENCE:

   a. For those who have some training and have started work
   b. Must apply between May 1st and October 31st, 2007
   c. Eligibility to apply will be evaluated on the basis of work experience and academic background – case-by-case consideration
   d. Applicants will be considered eligible if they,
      i. have taken 9 appropriate courses (although they have not received a diploma) and have 10 appearances as a professional paralegal, or
      ii. have graduated from an MTCU-approved programme.
   e. Must be of good character
   f. Must sit the licensing examination – earliest sitting will be January 2008

The other referee may be from the list above, or may be a client, and must attest to the experience and/or abilities of the applicant and the context within which the applicant's experience and abilities were applied (client issue).

[3] The legal services education program must be accompanied by an official transcript.

[4] The legal services education program must be accompanied by an official transcript.

g. Will start receiving licences in about March 2008
h. After October 31st, there will be no more applicants in this category

3. GRADUATES OF NON-ACCREDITED COURSES:

a. If they apply by October 31st, they follow the process in Category 2. (Students will normally apply during their last year of college, even if they won't graduate for almost a year).
b. If they miss the deadline, they must apply directly to the Professional Development Department, using a different form (currently under development). They will not sit examination until August 2008 at the earliest.
c. Will not be able to work independently until licensed (most graduates do not in fact intend to start by working independently)
d. Will be evaluated on basis of academic background only, case-by-case consideration against Law Society criteria.
e. If the courses they have taken are insufficient, they will be asked to complete additional training.
f. Must be of good character.
g. Must sit the licensing examination.
h. Will start receiving licences in about September 2008
i. There will continue to be applicants in this category until the first graduates apply from colleges courses that have been accredited

4. GRADUATES OF ACCREDITED COURSES/PERMANENT MODEL:

a. Will not come on-stream until 2009 or 2010
b. Case-by-case consideration will no longer be required, as criteria will be objectively set out.

PARALEGAL START-UP BUDGET

(Submitted jointly with the Finance Committee)

MOTION

16. That Convocation approve the paralegal start-up budget shown in the Finance Committee Report to Convocation.

17. At the meetings on January 24th and February 8th, the Committee considered the proposed budget for the start-up costs of paralegal regulation, as prepared by the Finance Department. The Committee approved the proposed budget at the meeting on February 8th.

Re: Criteria for Grandparent Applicants

It was moved by Mr. Dray, seconded by Ms. Warkentin, that Convocation approve the criteria attached at Appendix 1 for use in consideration of applicants for "grandparent status' in the introduction of paralegal regulation.

Carried

Re: Draft Criteria for 'Transitional" Applicants

It was moved by Mr. Dray, seconded by Ms. Warkentin, that Convocation approve the criteria attached at Appendix 2 for use in consideration of 'transitional' applicants for "grandparent status' in the introduction of paralegal regulation.

Carried

ITEMS FOR INFORMATION
Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones Report
- Report of the Activities of the Discrimination and Harassment Counsel July 1 to December 31, 2006
- Public Education Series 2007

Report to Convocation
February 22, 2007

Equity and Aboriginal Issues Committee/
Comité sur l'équité et les affaires autochtones

Committee Members
Joanne St. Lewis, Chair
Paul Copeland, Vice-Chair
Marion Boyd
Richard Filion
Avvy Go
Holly Harris
Tracey O'Donnell
Mark Sandler

Purposes of Report: Decision and Information

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

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Public Education Series 2007

COMMITTEE PROCESS

1. The Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones ("the Committee") received materials for information and decided to meet only on the request of Committee members. Committee members did not request a meeting in February 2007.

FOR INFORMATION

REPORT OF THE ACTIVITIES OF THE
DISCRIMINATION AND HARASSMENT COUNSEL, JULY 1, 2006
TO DECEMBER 31, 2006

BACKGROUND

46. Subsection 5(1) (a) of By-Law 36 – *Discrimination and Harassment Counsel* provides that, unless the Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones (the "Committee") directs otherwise, the Discrimination and Harassment Counsel (the "DHC") shall make a report to the Committee 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.

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

48. The DHC Program presents to the Committee, pursuant to Subsection 5(1)(a) of By-Law 36, the *Report of the Activities of the Discrimination and Harassment Counsel for the Law Society of Upper Canada* for the period July 1, 2006 to December 31, 2006 (Appendix 4).

SUMMARY OF REPORT

49. During the report period, 75 individuals contacted the DHC with new matters.

50. During the reporting period, 6 individuals communicated with the DHC in French. One caller spoke Russian and communicated with the DHC through an interpreter.

51. Thirty (30) individuals raised specific complaints of discrimination or harassment by a lawyer, law firm, legal department or legal clinic in Ontario. Of the 30 new complaints against lawyers or law firms, 16 were from the public and 14 were from members of the legal profession.

52. Of the 14 complaints made by the legal profession, 4 students made complaints. Ten women and 4 men made complaints. Ten complaints arose in the context of the complainant's employment.

53. The complaints were based on the following prohibited grounds of discrimination: race (5 complaints), disability (4 complaints), sex (4 complaints), sexual orientation (1 complaint), age (1 complaint), ethnic origin (1 complaint) and place of origin (1 complaint).

54. Of the 16 members of the public who contacted the DHC, 11 were women. The number of public complaints can be summarized under the following grounds: sex (7 complaints), disability (6 complaints), race (2 complaints), place of origin (2 complaints), age (1 complaint), ancestry (1 complaint), family status (1 complaint) and sexual orientation (1 complaint).

55. No formal mediation was conducted during this reporting period. However, the DHC informally intervened and communicated with respondents in several cases. These interventions were successful in achieving resolutions of issues raised by the complainants.

PUBLIC EDUCATION SERIES 2007

56. The schedule of the Public Education Series 2007 is presented at Appendix 5.

Appendix 4

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

(for the period from July 1 to December 31, 2006)

Prepared by:
Cynthia Petersen

Discrimination and Harassment Counsel

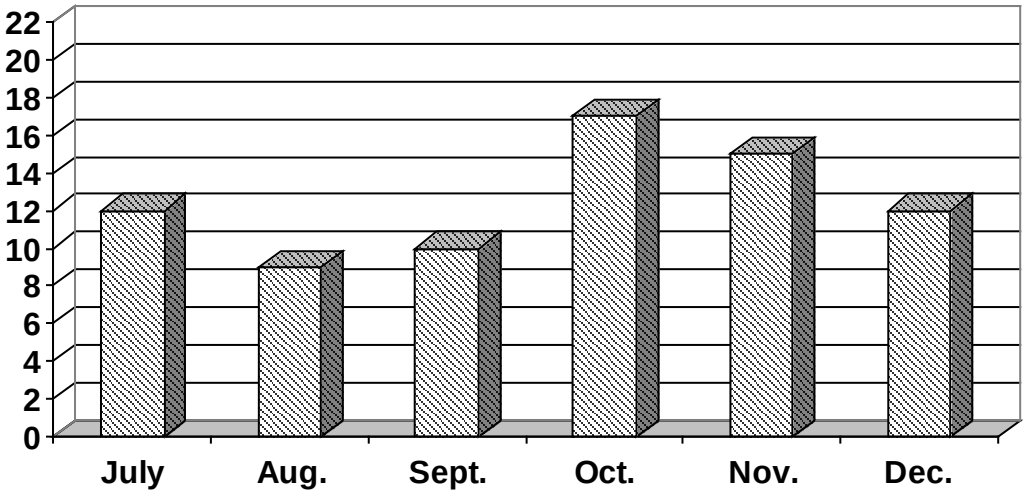
OVERVIEW OF NEW CONTACTS WITH THE DHC PROGRAM

Number of New Contacts

1. During this reporting period (July 1 to December 31, 2006), 75 individuals contacted the DHC Program with a new matter[1] .

2. The volume of new contacts was distributed as follows:

[1] Individuals who had previously contacted the Program and who communicated with the DHC during this reporting period with respect to an ongoing matter are not counted in this number.



3. The average number of complaints (12.5/month) received in the last reporting period represents a decrease relative to the average (16.1/month) over the period from January 2003 and June 2006.

Method of Communication

4. The DHC toll-free telephone line remains the most common way in which individuals initiate contact with the Program.

5. In this reporting period, 55 individuals (73%) used the telephone to make their initial contact with the program, 19 people (26%) used email, and 1 used a fax.

Language of Communication

6. During this reporting period, the DHC communicated with 6 individuals in French (5 callers and one email contact).

7. All of the remaining contacts with the Program were in English, with the exception of one complainant who communicated in Russian (via an interpreter).

SUMMARY OF DISCRIMINATION AND HARASSMENT COMPLAINTS

Number of Complaints

8. Of the 75 new contacts with the DHC Program, 30 individuals raised specific complaints of discrimination or harassment by a lawyer, law firm, legal department or legal clinic in Ontario.[2]

[2] This number includes only complaints against lawyers that are based on prohibited grounds of discrimination enumerated in the *Ontario Human Rights Code* and LSUC's *Rules of Professional Conduct*.

Public / Profession Ratio

9. Of the 30 new discrimination and harassment complaints, 16 were from the public and 14 were from members of the legal profession.

COMPLAINTS FROM MEMBERS OF THE LEGAL PROFESSION

Student Complaints

10. Four (4) of the 14 complaints from within the legal profession were made by students. One of the students was in law school; the others were articling.

Male / Female Ratio

11. Of the 14 complaints from within the legal profession, 10 were made by women and 4 were made by men.

12. All four student complainants were women.

Context of Complaints

13. Ten (10) of the 14 complaints from members of the legal profession arose in the context of the complainants' employment.

14. The remaining four complaints from members of the profession arose in the following contexts:
    a. one lawyer complained about a mediator;
    b. one lawyer complained about opposing counsel in a case;
    c. one law student complained about the Dean of her Faculty;
    d. one lawyer complained about information that another lawyer had posted on an internet website.

Nature of Complaints

15. The 14 complaints from members of the legal profession were based on one or more of the following prohibited grounds of discrimination: race, ethnic origin, place of origin, disability, sex, age, and sexual orientation.

16. Five of the complaints from members of the profession were based (in whole or in part) on <u>race</u>:

    a. four women (three lawyers and one articling student – two Black, one Filipino, and one South Asian) complained about racial harassment at work; one complained about management's failure to protect her from harassment by a staff member; the others complained about racial harassment by senior lawyers in their workplaces; and
    b. a male lawyer complained about hateful racist comments posted by another male lawyer on an internet website.

17. Four of the complaints from members of the profession were based (in whole or in part) on <u>disability</u>:

a. a female law student complained about the Dean of her Faculty and his failure to accommodate her hearing disability;
b. a woman lawyer complained that a female partner at her former firm discriminated against her based on her psychiatric disability (in an employment reference context);
c. a male lawyer working in government complained that his employment was terminated based on his physical disability; and
d. a female lawyer working in a legal clinic complained that her employer was refusing to accommodate her psychiatric disability.

18. Four of the complaints from members of the profession were based (in whole or in part) on sex:

a. a female South Asian lawyer complained about sexual harassment by a senior male partner in her firm;
b. a woman litigator complained about sexual harassment by a male mediator;
c. a male lawyer complained about sexist remarks posted by another male lawyer on an internet website; and
d. a woman lawyer working in a clinic complained about harassment and discrimination based on sex / pregnancy.

19. One of the complaints from within the legal profession was based on sexual orientation. A lesbian articling student reported that her employment at a law firm was terminated shortly after she disclosed that she was in a same-sex relationship.

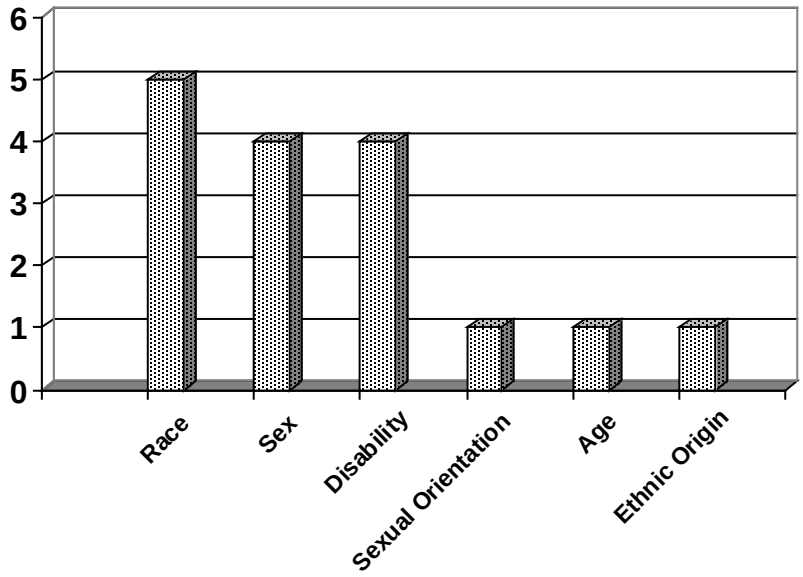
20. One of the complaints from within the legal profession was based on age. A male lawyer in his fifties (a recent call to the bar) complained that he was being denied job opportunities as an associate because of his age.

21. One of the complaints from within the legal profession was based on ethnic origin and place of origin. A male lawyer complained that another male lawyer (opposing counsel in a case) had made inappropriate and derogatory comments about his Dutch clients.

22. In summary, the number of complaints[3] (from members of the legal profession) in which each of the following prohibited grounds of discrimination was raised are as follows:

a.	race	5
b.	disability	4
c.	sex	4
d.	sexual orientation	1
e.	age	1
f.	ethnic origin	1
g.	place of origin	1

[3] The sum of these numbers is greater than the total number of complaints because several complaints were based on more than one prohibited ground of discrimination.



PUBLIC COMPLAINTS

Male / Female Ratio

23. Of the 16 members of the public who contacted the DHC Program with a complaint of discrimination or harassment during this reporting period, 11 were women (69%) and 5 were men (31%).

Context of Public Complaints

24. Of the 16 complaints from members of the public:

a. 9 were clients complaining about their own lawyer or a lawyer they had attempted to retain;
b. 5 were litigants complaining about counsel for the opposing party in their case;
c. 1 individual complained about a lawyer who was her employer; and
d. 1 woman complained about a lawyer who she met in a social context.

25. Thus, during this reporting period, 56% of public complaints involved clients and 31% involved litigants complaining about opposing counsel.

26. In previous reporting periods since January 2003, at least 1/3 of public complaints have arisen in the context of the complainants' employment, and complaints from litigants have been relatively infrequent. Complaints from clients consistently constitute a significant proportion of public complaints.

Nature of Public Complaints

27. The 16 public complaints were based on one or more of the following prohibited grounds of discrimination: race, ancestry, ethnic origin, place of origin, disability, sex, sexual orientation, age and family status.

28. Seven (7) of the public complaints were based (in whole or in part) on sex:

    a. a Pakistani woman complained that her own male lawyer was harassing her based on sex;
    b. two women litigants complained that male opposing counsel in their cases called them sexist names;
    c. two women clients complained that their own male lawyers had treated them in a sexist manner;
    d. a woman employed as a secretary in a law firm complained about sexual harassment by her male boss; and
    e. a woman complained about a sexual assault by a male lawyer who she had met in a social context.

29. Six (6) of the public complaints were based (in whole or in part) on disability:

    a. four female clients complained that their own male lawyers were failing or refusing to accommodate their disabilities; one of the women had a psychiatric disability, three had multiple chemical sensitivities and other environmental allergies and related syndromes, and one of those three also had a cognitive impairment;
    b. a man with HIV/AIDS complained that a legal clinic was discriminating against him in the provision of legal services; and
    c. a self-represented male litigant complained that opposing counsel in his case was harassing him based on his disability.

30. Two (2) of the public complaints were based (in whole or in part) on race:

    a. a Pakistani woman complained that her own male lawyer harassed her based on her race; and
    b. a male litigant complained that opposing counsel made false and vexatious allegations of race discrimination against him because he is white.

31. Two (2) of the public complaints were based (in whole or in part) on place of origin:

    a. a Russian man complained that a lawyer refused to represent him because of his place of origin; and
    b. a female litigant complained that opposing counsel engaged in offensive name-calling based on her place of origin (which was not disclosed) and the fact that she is a recent immigrant.

32. One of the public complaints was based on sexual orientation. A gay man complained that a legal clinic discriminated against him in the provision of services.

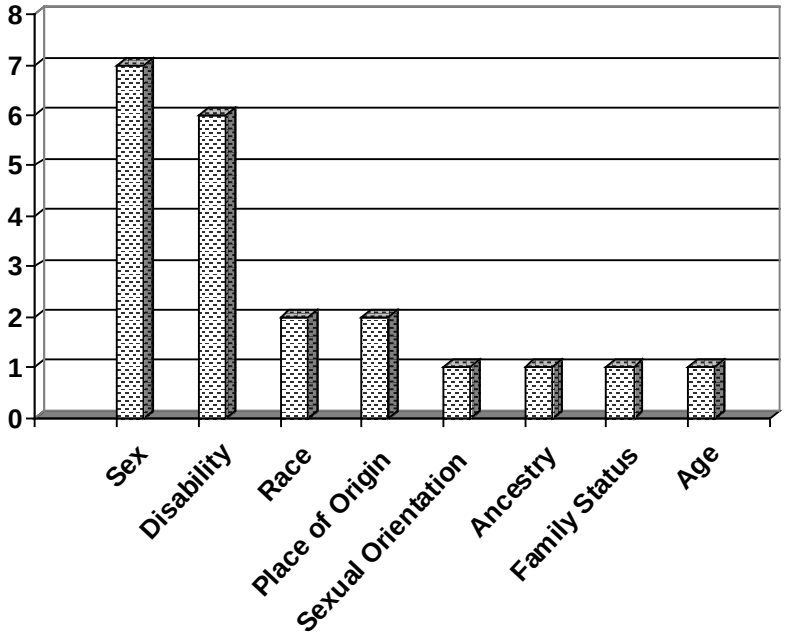
33. One of the public complaints was based on ancestry. A male litigant complained that opposing counsel in his case was harassing him because of his German ancestry.

34. One of the public complaints was based on family status. A man complained that he was denied legal services because of who his daughter is and the fact that his daughter has a psychiatric disability.

35. One of the public complaints was based on age. An elderly man complained that he was denied legal services because of his age.

36. In summary, the number of public complaints[4] in which each of the following grounds of discrimination were raised are as follows:

a.	sex	7
b.	disability	6
c.	race	2
d.	place of origin	2
e.	age	1
f.	ancestry	1
g.	family status	1
h.	sexual orientation	1



EXAMPLES OF RECENT COMPLAINTS

37. The following are examples of some of the elements of the discrimination and harassment complaints received by the DHC during this reporting period:

a. a disabled male litigant reported that opposing counsel called him a “psycho”;

[4] The sum of these numbers is greater than the total number of complaints because several complaints were based on more than one prohibited ground of discrimination.

b. a female Filipino articling student reported that a female partner in her law firm swore at her, verbally abused her, and suggested that she work as a "nanny" for one of the other partners in the firm;
c. a disabled woman reported that her own male lawyer refused to accommodate her disabilities (multiple chemical sensitivities and other environmental allergies), spoke to her condescendingly about her disabilities, and called her "sweetie";
d. a woman with a psychiatric disability reported that a female lawyer at her former firm, who agreed to provide her with an employment reference, disclosed the fact of her disability to a prospective employer, thereby violating her privacy and jeopardizing her job prospects;
e. a Black woman lawyer working in a government office reported that her manager was refusing to intervene to protect her from ongoing workplace harassment by a member of her staff; although she did not believe that the harassment was racially motivated, she felt that the manager would not have ignored the situation if she were white ("no white lawyer would have to put up with this");
f. a male lawyer complained that opposing counsel in one of his cases (another male lawyer) had made derogatory remarks about his clients' Dutch ancestry (including, "wooden shoes, wooden heads");
g. a 52 year old male lawyer, recently called to the bar, complained that he was not given a job interview for a position for which he was highly qualified; he had previous work experience related to the position and high grades in law school; he felt that his age was the reason why he was not considered for the job;
h. a woman reported that she was sexually assaulted by a male lawyer in a bar (who touched her buttocks and grabbed her breasts); the lawyer gave her his business card after the assault;
i. a woman lawyer working in a legal clinic reported that she was harassed and discriminated against at work because she took two maternity leaves in rapid succession;
j. a woman lawyer working in a legal clinic reported that her employer was refusing to accommodate her psychiatric disability and was threatening to terminate her employment if she could not complete her duties without accommodation;
k. a South Asian junior female associate reported that a senior white male partner in her firm sexually harassed her;
l. a male lawyer complained that his employer refused to accommodate his disability, saying "we are not a rehab clinic", and terminated his employment shortly after he requested the accommodation; and
m. a woman litigator reported that a male mediator suggested that she might achieve "better outcomes" for her clients if she engaged in a sexual relationship with him.

DEMOGRAPHIC SURVEY OF COMPLAINANTS

38. Individuals who communicated with the DHC by telephone about specific complaints of discrimination or harassment were asked to participate in a short demographic survey to enable the DHC to record anonymous statistical data about them. During this reporting period, 12 surveys were conducted. Six (6) members of the public and 6 members of the Law Society (including 1 student member) were surveyed and they self-identified as follows:

Gender/Sex	9	female
	3	male
Age	5	were 25-34 years old
	6	were 35-49 years old
	1	was over 65 years of age
Race / Ethnicity	2	South Asian
	1	Filipino
	9	white / caucasian
Sexual Orientation	1	lesbian / gay
	9	heterosexual
	2	undisclosed
First Language	10	English
	1	French
	1	Russian
Disability	4	identified as disabled
Region of Residence	8	Greater Toronto Area
	1	Southwestern Ontario
	2	National Capital Region
	1	undisclosed

SERVICES PROVIDED TO COMPLAINANTS

Advice and Counsel

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

    a. reporting to the police (where alleged criminal conduct is involved);
    b. filing an internal complaint or a grievance within their workplace (including, where appropriate, contacting their union or employee association for assistance);
    c. filing a complaint with a human rights commission (usually the Ontario Human Rights Commission, but sometimes the Canadian Human Rights Commission);
    d. making a complaint to the Law Society; and
    e. contacting a lawyer for advice regarding other possible legal actions (e.g. wrongful dismissal, defamation).

40. Complainants were also provided with information regarding each of the applicable options, including:

    a. what (if any) costs might be involved in pursuing an option;
    b. whether legal representation is required to pursue an option;

c. how to file a complaint or make a report (e.g. whether it can be done electronically, by telephone, or in writing; whether particular forms are required, etc.);
d. the process involved in each option (e.g. investigation, conciliation, hearing, etc.);
e. what remedies might be available in different fora (e.g. compensatory remedies in contrast to disciplinary penalties, reinstatement to employment versus monetary damages, etc.); and
f. the existence of time limits for each avenue of redress (complainants were typically advised to immediately seek legal advice regarding the applicable statutory time limits in their circumstances).

41. Complainants were given information about who to contact in the event that they decided to pursue any of their options. They were advised that the avenues of recourse are not mutually exclusive.

42. In some cases, strategic tips were provided on how to handle a situation without resort to a formal complaints process (eg. confronting the offender, speaking to a mentor, writing a letter of complaint to the managing partner of the law firm in question).

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

44. In some cases, complainants were referred to support services, such as a sexual assault crisis centre, crisis counselling service, OBAP (the Ontario Bar Assistance Program) or LINK (short term professional counselling for lawyers).

Mediation Services

45. In addition to being advised of the above-noted options, where appropriate, complainants were offered the mediation services of the DHC Program.

46. Where mediation was offered, the nature and purpose of mediation were explained, including that it is a confidential and voluntary process, that it does not involve any investigation or fact finding, and that the DHC acts as a neutral facilitator to attempt to assist the parties to reach a mutually satisfactory resolution of the complaint.

47. No formal mediations were conducted during this reporting period, but in several cases, at the request of the complainant, the DHC intervened informally and communicated with the respondent in an effort to resolve the complaint. These interventions were successful in achieving resolutions of issues raised by the complainants.

48. Of the 75 new contacts with the DHC during this reporting period, 15 involved general inquiries.[5] These inquiries included:

[5] Thirty (30) of the new contacts with the DHC during this reporting period related to matters outside the mandate of the DHC Program. Typically, such contacts involved individuals complaining about harassment or discrimination by someone other than a lawyer (eg. the police, their employer, their landlord). Some complaints were about judges or masters, whose conduct is not regulated by the LSUC . Some complaints were about lawyers but did not involve any equity issues (i.e., complaints were not based on human rights grounds but rather involved billing disputes, alleged conflicts of interest, etc.)

a. questions from the public and from lawyers and law students about the scope of the DHC Program's mandate;
b. inquiries from lawyers about the confidentiality of the DHC program and whether communications with the DHC are privileged;
c. calls from members of the public who had suffered discrimination or harassment by a lawyer and were seeking a referral to support services (e.g. depression or crisis counseling);
d. questions from lawyers about the mediation service offered by the DHC;
e. inquiries from the public and from law firms about educational workshops provided by the LSUC and/or the DHC;
f. requests from the public for promotional materials regarding the DHC Program;
g. law students seeking access to data collected by the DHC; and
h. inquiries about the LSUC *Rules of Professional Conduct* and equity issues.

PROMOTIONAL ACTIVITIES

49. No new promotional activities for the Program were undertaken during this reporting period. However, French, English, Chinese and braille brochures for the Program continued to be circulated to legal clinics, community centres, law firms, government legal departments, and faculties of law. The DHC Program website was also maintained.

50. Given the decrease in new contacts with the DHC Program during this reporting period, I recommend that some new promotional activities be undertaken in the near future.

EDUCATIONAL ACTIVITIES

51. The DHC worked throughout this reporting period with the Law Society's Equity Advisor (Josée Bouchard) to offer workshops to law firms on the prevention of harassment and discrimination in the workplace.

EVALUATION OF THE DHC PROGRAM

52. An on-line survey was developed to enable the LSUC to obtain feedback from users about the services provided by the DHC. The survey has just recently been posted on the internet (linked to the DHC website), so it is too early to gather meaningful data yet.

Appendix 5

EQUITY PUBLIC EDUCATION SERIES –2007

Access Awareness - Mental Health and the Criminal Law

The Law Society of Upper Canada and ARCH Disability Law Centre are hosting their fourth annual forum on disability and the law. This year's program is presented in collaboration with the Criminal Lawyers Association.

Criminal justice professionals, clinicians and psychiatric consumer survivors will discuss issues in mental health and criminal law. There will also be a presentation of services delivered by the

Toronto Mental Health and Justice Network, a major new initiative funded by the Ontario government through an inter-ministerial agreement.

Date: Wednesday, February 21, 2007
Time: 4:30 p.m. – 7:30 p.m.
Location: The Law Society of Upper Canada, Museum Room

Speakers:

- Dr. Howard Barbaree – Clinical Director, Law and Mental Health Program, Centre for Addiction and Mental Health

- Toronto Mental Health and Justice Network

    - Mohamed Badsha – Director, Community Support Services, Canadian Mental Health Association, Toronto
    - Lana Frado – Executive Director, Sound Times Support Services
    - Frank Sirotich – Team Leader, Mental Health Court Support Program, Canadian Mental Health Association, Toronto
    - Jennifer Zosky – Program Director, Reconnect Mental Health Services

- Hon. Richard D. Schneider – Ontario Court of Justice, Toronto Mental Health Court

- Ted Kelly – Barrister and Solicitor

International Women's Day – Gender, Law and Legal Professionalism: How Women Have Shaped Justice

The Law Society of Upper Canada, the Barbra Schlifer Commemorative Clinic, the Feminist Legal Analysis Section of the Ontario Bar Association, the Women's Future Fund and the Women's Law Association of Ontario are pleased to invite members of the legal profession and the public to a special presentation and reception to celebrate International Women's Day. The discussion will examine the contributions of women lawyers to jurisprudence, the legal profession and legal culture, and the role of lawyers in society.

Date: March 7, 2007
Time: 4:00 p.m. – 6:00 p.m., reception at 6:00 p.m.

Speakers:

- Hon. Madame Justice Claire L'Heureux-Dubé – Judge of the Supreme Court of Canada (retired)
- Mary Jane Mossman – Professor of Law, Osgoode Hall Law School and author of The *First Women Lawyers: A Comparative Study of Gender, Law and the Legal Professions,* Hart Publishing (2006)
- Fiona Sampson – Director of Litigation, Women's Legal Education and Action Fund
- Joanne St. Lewis – Bencher, The Law Society of Upper Canada

International Day for the Elimination of Racial Discrimination

Topic: The Rule of Law and Activism

Date: March 28, 2007
Time: 4:00 p.m. – 6:00 p.m., reception at 6:00 p.m.

National Holocaust Memorial Day

Date: April 16, 2007
Time: 4:00 p.m. – 6:00 p.m., reception at 6:00 p.m.

Asian Heritage Month

Date: May 24, 2007
Time: 4:00 p.m. – 6:00 p.m., reception at 6:00 p.m.

National Aboriginal Day

Date: June 14, 2007
Time: 4:00 p.m. – 6:00 p.m., reception at 6:00 p.m.

Pride Week

Date: June 20, 2007
Time: 4:00 p.m. – 6:00 p.m., reception at 6:00 p.m.

Louis Riel Day

Date: November 15, 2007
Time: 4:00 p.m. – 6:00 p.m., reception at 6:00 p.m.

REPORTS NOT REACHED
Governance Task Force Report
Professional Development, Competence and Admissions Committee Report
- Certified Specialist Program

Governance Task Force
February 22, 2007

Second Report to Convocation

Task Force Members
Thomas Heintzman (Chair)
Vern Krishna (Vice-Chair)
Sy Eber
Abraham Feinstein
Janet Minor
William Simpson

Purposes of Report: Decision

Prepared by the Policy Secretariat
(Julia Bass - 416-947-5228 and Jim Varro – 416-947-3434)

GOVERNANCE TASK FORCE RECOMMENDATIONS

1. Motion

RECOMMENDATION 1

That Convocation approve the following with respect to planning and prioritizing matters for Convocation's policy agenda:

a. Convocation shall institute a full review of Convocation's priorities for achieving strategic objectives for the Law Society, to be held at a meeting of benchers soon after each bencher election and as appropriate during the bencher term; and

b. Convocation shall establish a standing committee called the Priority Planning Committee to assist Convocation in planning its priorities. In particular,

   i. The Treasurer shall recommend members of the Committee for Convocation's approval, in accordance with the By-Laws;
   ii. Convocation shall appoint the chair and any vice-chairs of the Committee, in accordance with the By-Laws;
   iii. In addition to the bencher members of the Committee, the Chief Executive Officer shall be a non-voting member of the Committee;
   iv. The mandate of the Committee is to

      A. recommend for Convocation's consideration and approval the priorities for policy objectives and submit those recommendations to Convocation in the process described in a. above,
      B. periodically review the priorities previously established by Convocation, and new policy issues that may arise, and recommend to Convocation on an ongoing basis the priorities to be considered and approved by Convocation in the future, and
      C. report annually to Convocation on the status of Convocation's priorities.

RECOMMENDATION 2

That Convocation establish a standing committee called the Audit Committee which shall replace and include the mandate of the existing Audit Subcommittee of the Finance and Audit Committee and such other matters as Convocation may direct.

RECOMMENDATION 3

That Convocation replace the existing Finance and Audit Committee with a Finance Committee whose mandate will be to continue the functions of the present Finance and

Audit Committee that are not assigned to the Audit Subcommittee, including the following:

a. to review the plans and projections of the annual budget of the Society, including the Lawyers Fund for Client Compensation, or any special or extraordinary budget required for the purpose of the Society, including the Lawyers Fund for Client Compensation, to provide comments and advice to Convocation thereon, and to recommend approval of the annual budget or any special or extraordinary budget item;
b. to review the plans for any expenditure arising during a financial year that was not included in the annual budget or other budget approved by Convocation for that year, to provide comments and advice to Convocation thereon and to recommend approval of the expenditure by Convocation; and
c. to undertake such other responsibilities of a financial nature assigned to the Finance Committee by Convocation.

RECOMMENDATION 4

That Convocation implement the following measures for benchers whose rights and privileges as a member of the Law Society are suspended:

a. A bencher whose rights and privileges as a member of the Society are suspended, or in future whose license is suspended, following a finding of professional misconduct or conduct unbecoming a barrister and solicitor or paralegal ceases to be a bencher as of the date of the order suspending the rights and privileges or license, or as of the date of the unsuccessful appeal order with respect to the suspension;
b. A bencher whose rights and privileges as a member of the Society are suspended, or in future whose license is suspended, as a result of an interlocutory suspension order is not permitted to act as a bencher as of the date of the order and for the duration of the suspension;
c. A bencher whose rights and privileges as a member of the Society are suspended, or in future whose license is suspended, as a result of a summary order under sections 46 to 49 inclusive of the *Law Society Act* is not permitted to act as a bencher as of the date of the order. If the bencher fails within three months of the date the suspension begins to take the action that will end the suspension, he or she ceases to be a bencher.

GOVERNANCE TASK FORCE
SECOND REPORT TO CONVOCATION

A. INTRODUCTION, OVERVIEW OF GOVERNANCE PRINCIPLES AND SUMMARY OF RECOMMENDATIONS

The Task Force's Mandate

2. In accordance with its terms of reference[1] , the Governance Task Force has been meeting since May 2006 to review a number of issues relating to the Society's governance structure and processes, including:

[1] See Appendix 1 for the terms of reference.

a. the effectiveness of Convocation as a board;
b. the methods of priority-setting for Convocation; and
c. efficient and effective co-ordination of corporate governance with the operational management of the Law Society under the leadership of the Chief Executive Officer.

3. As requested by Convocation, the Task Force has also been considering specific issues related to

a. the Treasurer's election process, including certain provisions of By-Law 6, and
b. procedural issues relating to Committee recommendations and motions before Convocation.

4. The Task Force has met on fourteen occasions to date. It has provided one report to Convocation in the fall of 2006, dealing with

a. certain procedures for the Treasurer's election in By-Law 6, and
b. matters relating to the setting of Convocation's agenda.

These issues related to paragraph 2 of the terms of reference at Appendix 1.

5. This report includes recommendations that relate to paragraph 1 of the terms of reference.

The Relationship Between The Law Society, Corporate Governance and the Public Interest

6. Good governance results from institutionalizing best practices. Institutionalizing best practices makes those who govern accountable for observing and applying them. Consistent application of these practices will demonstrate to the public, in whose interests the Society governs, that its governance is sound.

7. The Law Society's public interest governance mandate, previously in the Society's Role Statement, is now reflected in the *Law Society Act*, which was recently amended by Bill 14, the *Access to Justice Act, 2005*.[2] Section 4.1 and 4.2 of the Act state:

> 4.1 It is a function of the Society to ensure that,
>
> (a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and
>
> (b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario.
>
> Principles to be applied by the Society

[2] This legislation received Royal Assent on October 19, 2006.

> 4.2 In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:
>
> 1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
>
> 2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
>
> 3. The Society has a duty to protect the public interest.
>
> 4. *The Society has a duty to act in a timely, open and efficient manner.*
>
> 5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.
>
> (Emphasis added)

8. In the Task Force's View, the duty expressed in paragraph 4 above means that the Law Society as an organization must implement and adhere to an internal structure that ensures timely, open and efficient governance by Convocation.

9. The Task Force sought an articulation of general principles of good corporate governance to inform its review. The Task Force drew on research already completed on governance at the Society and found some of the objectives of good governance identified in the May 15, 1996 Report of the Committee on Governance Restructuring ("A New Architecture for Law Society Governance") to be instructive. They are as follows:

   a. Vision. Convocation should be focused on outward vision rather than internal administrative detail, and on the results it wishes to achieve for clearly defined groups or constituencies rather than on the minutiae of operations and program details.
   b. Direction. Convocation should focus on setting policies and long-term strategic goals for the Law Society. Benchers should turn their attention regularly to setting the overall purpose and agenda for the Society--why it exists and who it should serve.
   c. Definition of roles and responsibilities. Bencher and staff roles must be clearly distinguished and appropriate accountability defined.
   d. Sound management. Convocation must ensure that the Society and all programs for which it is responsible are managed efficiently and effectively.
   e. Effective self-management (of Convocation). Convocation must ensure that the structures and procedures it adopts will allow it to function effectively, e.g. committee structure, bencher conduct guidelines, meeting rules, role of benchers, Treasurer, etc.

10. These objectives helped the Task Force to focus on the issues that its mandate directed for review. For example, the second objective directly addresses the need for priority planning, which receives extensive treatment in this report.

11. With the above standards and principles in mind, the Task Force examined ways to improve the Law Society's corporate governance.

12. The examination is necessary because increased scrutiny by the public of the way in which Convocation governs its affairs is inevitable. As a result of media attention to the affairs of governments, corporations and regulating bodies, the public at large has a heightened expectation that directors of corporations and other persons occupying fiduciary and regulatory positions will effectively and diligently discharge their responsibilities.

13. This expectation is even greater in the context of a self-governing profession. In the Task Force's view, good corporate governance is a key factor in successful self-regulation of the legal profession. Weaknesses in corporate governance can ultimately affect the integrity of regulation and could jeopardize the privilege of self-regulation. Moreover, as the Law Society assumes the role as the regulator of paralegals, its capacity to fulfil its full regulatory responsibilities will be under additional stresses. For all these reasons, the credibility and effectiveness of Convocation as a governing body is of utmost importance.

The Task Force's Review and Recommendations

14. The Task Force's broadly-stated terms of reference allowed it to focus on governance issues that it considered of present importance. The Task Force's work was informed by the results of previous governance studies at the Society, concerns about the Society's governance identified by benchers and others and the Task Force's own views on the current issues facing Convocation as a board.

15. The Task Force reviewed a number of issues, including:

    a. Priority planning as a function of strategic planning;
    b. The structure for financial oversight and budget preparation.
    c. Convocation's relationship with the Chief Executive Officer as it relates to co-ordination of governance and operations;
    d. The size of Convocation as a board and how Convocation is constituted;
    e. The frequency of Convocation; and
    f. How a change in the licensed status of a lawyer or paralegal who serves as a bencher affects his or her governance role.

16. In this second report, the Task Force focuses on three ways in which Convocation can maintain and enhance its credibility and effectiveness. These include:

    a. A structure for planning Convocation's priorities (Recommendation 1 and section B of the report beginning on page 10) through the establishment of a priority planning process whereby Convocation identifies and decides on the issues which are of highest priority to the Law Society. A Priority Planning Committee will assist Convocation both at the front end, in helping benchers to identify priorities and to assist Convocation in enunciating those priorities, and at the back end by reviewing Convocation's success in meeting its priorities;
    b. A standing committee, reporting directly to Convocation, that will have responsibility for the Finance and Audit Committee's Audit Subcommittee functions (Recommendations 2 and 3 and section C of the report beginning on

page 26). In this way, Convocation will give importance and visibility to maintaining the highest standards of financial reporting and financial practices;

c. A means to deal with benchers whose license with the Society is suspended for disciplinary or other reasons (Recommendation 4 and the last part of section D of the report beginning on page 33). Benchers who are suspended will be disqualified from being benchers, emphasizing the importance of the bencher's role as a fiduciary.

B. SETTING CONVOCATION'S PRIORITIES

17. Priority-setting for Convocation has been discussed on a number of occasions within the past few years by committees, task forces and Convocation. These discussions are usually linked to the goal, at the highest level, of ensuring that the Law Society's self-governance of the legal profession is sound and continues to focus on the public interest. At a practical level, benchers realize that the Law Society's effectiveness as a regulator is linked to its effectiveness at the board (Convocation) level, and from time to time this prompts a review of how Convocation assesses and deals with priorities for its policy agenda.

18. While this subject appears at regular intervals on Convocation's agenda, the need exists within organizations like the Law Society, especially in times of change, to assess their structure and determine if improvements can be made for more efficient and effective governance. Organizations are not static, and change, whether prompted from within and from external sources, can be seen as an opportunity for renewal at the board level.

19. The Law Society is entering a period of significant change. It is now preparing to regulate paralegals, which will have an effect – perhaps a profound effect – on the Society's operations and on Convocation's role in setting policy that directs the operational initiatives.

20. In terms of the public constituency, paralegal regulation may be one of the most significant challenges for the Society. This new role for the Society will place greater scrutiny on the way in which the Society operates. That scrutiny is likely to extend to the manner in which it governs itself. In terms of governance, the Society's new role will also impose new and substantial costs on the Society, including financial costs and the time of its operational staff.

21. Generally, as the Society's Chief Executive Officer has recently noted, unless the Law Society can better manage its priorities, it may be required to increase its budget to fulfill Convocation's directives. This would mean a corresponding increase in the fees required to be paid by its licensees. As one observer who reviewed the Society's governance indicated, Convocation from time to time approves more initiatives than staff has the resources to work on.[3] In the Task Force's view, good governance promotes economic efficiency, and ineffective governance has a cost.

22. For these reasons, an assessment of the manner in which Convocation establishes and carries out its policy agenda is timely. In addition, no crises exist that might cause the Society to address a governance issue with a focused but perhaps narrow solution. This

[3] See the reference to Tim Plumptre's report at paragraph 28.

permits the Society to engage in some broader thinking about its governance policies and the specific issue of priority-setting.

23. As noted in the introductory section of this report, the Task Force reflected on a number of principles of good governance. The second principle is especially important when discussing priority setting: "Direction: Convocation should focus on setting policies and long-term strategic goals for the Law Society. Benchers should turn their attention regularly to setting the overall purpose and agenda for the Society--why it exists and who it should serve."

Priority-Setting and Current Governance Policies

24. Past consideration of processes for planning priorities for Convocation date from the early 1990s, and focused on using an executive or advisory committee as a way to assist Convocation in effectively and efficiently sorting out priorities and planning a policy agenda.[4]

25. A concerted effort to address Law Society governance in the mid-1990's resulted in Convocation's adoption of written Governance Policies, including processes to establish the priorities for the Law Society's policy objectives.[5] In Part II of the Governance Policies, entitled 'Governance Process', the following is stated:

> A. Governance Commitment
>
> 1. Convocation will govern as a self-regulating body so as to ensure that the Law Society of Upper Canada is *accountable to the Ontario public and the legal profession by establishing and delivering appropriate goals* and avoiding unacceptable outcomes.
>
> B. Governing Approach
>
> 1. In governing, the benchers will emphasize strategic leadership, policy making, and the creation of effective accountability mechanisms. They will define values, and plans, looking outward and forward.
>
> C. The Role of Convocation
> …
> 3. Convocation shall
> a) Govern the affairs of the Society effectively and *efficiently, guided by long term objectives*.

[4] Research and Planning Committee reports in 1991 and 1992 referenced a subcommittee report's findings on the idea of an executive committee responsible for determining the political and financial priorities of the Law Society. This initiative was not pursued, but the issue was picked up again, following the adoption of Governance Policies as discussed in this report, in 2000, with the 2000 Strategic Plan, noted later in this report.

[5] These Policies arose from adoption of the Carver Model of Corporate Governance, in which Convocation sets it missions and "ends" as the benefits to be achieved or results the Law Society wishes to accomplish, and "means" as the processes and procedures (programs) that will fulfill or implement the ends.

…

d) Focus on long term goals rather than the methods of achieving them.

(emphasis added)

26. In fact, the Governance Policies specifically require Convocation, and the benchers, to establish its and their priorities annually, and to do so in advance of, and not as part of, the budget process. Part II. H. Governance Process of the Governance Policies states as follows:

H. Annual Bencher Planning Cycle

1. *To accomplish its job to govern with a long term strategic perspective,* Convocation shall on an annual basis,
   a) *re-examine its Ends policies;* and
   b) set a *twelve month* agenda for its deliberations and policy development;
2. *These activities shall precede the creation of the budget for the following year.*

(emphasis added)

27. Accordingly, while Convocation adopted the above policies as a method for considering and determining priorities, it has not taken the next logical step, which would be to institute a strategic planning cycle. It is the Task Force's view that the time has come to recommend ways to carry this into effect, as Convocation has already mandated that it will establish its priorities, in accordance with the Policies, on a yearly basis.

Views on Law Society Governance That Informed the Task Force

<u>The Plumptre Report</u>

28. The Task Force reviewed a report prepared in September 2003 for the Chief Executive Officer by Tim Plumptre of the Institute on Governance[6] . Mr. Plumptre's report offered a critique of the Society's current governance structure, based on his research, including interviews with benchers. After noting the historical studies on governance at the Society, Mr. Plumptre had this to say about priority planning:

> Among the issues most commonly raised are the lack of any manner of setting priorities, and the need for some kind of mechanism to help guide the work of Convocation. A salient development, now more than two decades old (1981), was a decision by Convocation to adopt an Executive Committee with the

[6] *Governance At The Law Society Of Upper Canada: Report*, Tim Plumptre, Institute On Governance, September 25, 2003. This report was included with the May 2006 Convocation Material.

> apparently anodyne role to help set priorities, direct work to the right place and ensure implementation of Convocation decisions. This arrangement remained in place until 1983 when the then Treasurer decided to disband it because she believed it was causing too much divisiveness.
> …
> Interviewees stressed the lack of a process to set priorities systematically. "We start the year with ten ideas and we wind up with sixty. We can't possibly cover all this material. So the result is that *de facto*, staff wind up setting the priorities, which is not the way it should be." A related problem is that Convocation approves more initiatives than staff has the resources to work on.
> The timing of a motion tends to determine its precedence or priority rather than its substance: "earlier motions get more attention even if they are not very important. If everyone wants to speak for one minute we'll spend an hour on it. There's no discipline or party process."
> Similarly, "once an issue is studied, there is no process for determining its ripeness for debate" other than the Treasurer's personal judgement.
> The process of agenda-setting was criticized as undemocratic as well as inefficient: "under the present system if a Treasurer does not want to put an issue on the agenda of Convocation he can just stop it." One interviewee's impression was that many Benchers resented this kind of autocratic behaviour. The ability of the Treasurer, if so inclined, to manipulate the system to his or her own ends sometimes leads to "a very unhappy group of Benchers."
> …
> When it comes to reform, the Society is a victim of its own governance system: reform runs into the sand due to considerations such as the size and unwieldy nature of Convocation and the lack of an effective priority-setting process, (coupled with the apparent disinterest of many lawyers in the procedures and policies that support what is actually the central role of the Society - governance).

29. The Task Force, while acknowledging that Mr. Plumptre's critique was based in part on anecdotal evidence, felt that the concerns he raised have merit.

Other Law Societies

30. As a matter of interest, the Task Force reviewed the governance structures in other law societies in Canada and noted a number of differences between many of the law societies and the Law Society of Upper Canada. Most other law societies have an executive committee and some have a "ladder" to the equivalent position of Treasurer. For example, at the Law Society of British Columbia, the second vice-president is elected by the membership at the annual general meeting and eventually moves to the position of president, who serves for a one-year term.[7] Unlike the presidential terms of most other law societies, the Law Society of Upper Canada's Treasurer effectively serves a two-year term. The Treasurer by tradition is re-elected by acclamation, following his or her year in office, for a second year. Some Treasurers have been elected for more than two consecutive years.

31. The Task Force also learned through communications with the other law societies that they have from time to time been required to address the question of priority setting and

[7] A chart at Appendix 2 includes information on the other law societies.

how best to organize a policy agenda. The following are some of the comments offered by the other law societies:

a. There is no simple way to set priorities, and this is a systemic problem for all regulatory bodies. The reality is that organizations like the Law Society cannot avoid having to react to both long term policy objectives and issues that arise unexpectedly. The key is to try to manage the process.
b. Managing the process starts with the highest level of governance. A manageable board and committee structure is important in this respect. The committees, not the board, should focus on the details. The board should focus on policy.
c. Priority-setting by benchers is at a high level, arising from planning retreats every few years on longer term objectives

Sy Eber's Contributions

32. The Task Force was also assisted in its consideration of priority planning by one of its members, Sy Eber. As a member of the Emerging Issues Committee during its review of governance issues two years ago, he focused on the influences on priority setting, the principles that should guide the setting of priorities and ideas for a structure to support priority setting.

33. Of particular interest to the Task Force were Mr. Eber's comments on the process for setting priorities. His view was that, first, longer-term vision was required of Convocation. Second, as a matter of process, he believes that the current priority-setting typically occurring within the "silos" of individual committees should be replaced by a matrix approach that would permit benchers to see what is occurring across these silos, as one aspect of determining priorities.

34. Mr. Eber recommended that Convocation apply some evaluative criteria by which to set priorities as well as measure and evaluate current policies and programs. This would, for example, utilize such tools as gap and risk analyses. He recognized that some of this work is already being done, but could be more structured and universally applied throughout Convocation and its committees.

35. In addition, his view is that an organizational structure for priority planning should be formalized to reflect much of what is already happening with the Law Society, and would involve institutionalizing current practices. For example, the chairs of committees are consulted individually, and, in some instances, collectively, to review priorities in isolation or in comparison. Rather than meetings and discussions being held on an *ad hoc* basis, he suggested that the committee chairs could be gathered on a more regular and formal basis together with the Treasurer and the Chief Executive Officer to consider the determination of priorities to be engaged by the Society. This group would be charged with providing thoughtful insight and suggestions to Convocation from an agreed-upon analytical framework, which would involve all benchers at an initial stage. This would support his view is that priority setting must be relevant to the body and people involved in it.

36. The Task Force found Mr. Eber's contribution of great value in determining how to address the question of improving priority planning.

Previous Efforts Relating to Priority Planning

37. As noted earlier, the Society has in the past explored establishing a committee for the purpose of planning and setting priorities for Convocation. The most recent comprehensive treatment given to the issue was in the 2000 Strategic Plan, which recommended that an executive committee be formed "for managing and streamlining Convocation's agenda and advising the Treasurer".

38. By the time of the Strategic Planning Committee's January 2001 report to Convocation, the proposal had evolved into a recommendation for a Treasurer's Advisory Committee. The recommendation aimed at addressing what the Strategic Planning Committee saw as gaps in priority planning, including a lack of co-ordination of policy issues between committees, overlap of issues among committees, little or no financial assessment of the issues and a lack of planning for implementation. The Treasurer's Advisory Committee would essentially oversee and co-ordinate the work of committees, task forces and working groups for the purpose of ensuring the Treasurer and ultimately Convocation could deal with policy matters in a more structured way. Convocation did not approve this recommendation.

39. While significant improvements have been made since 2001 to remedy the gaps noted by the Strategic Planning Committee, what remains lacking is a formal mechanism to plan and prioritize Convocation's agenda.

Consultation with the Chief Executive Officer

40. The Task Force discussed with the CEO Malcolm Heins the policy-making responsibility of Convocation on the one hand, and the operational responsibility of the CEO on the other.

41. Mr. Heins noted that within their regular reports to Convocation, the Society's various standing committees often provide reports that relate to programs that have been implemented as a result of Convocation's policy direction. Through his quarterly reports to Convocation, the CEO provides updates on how the policy objectives of Convocation are met and implemented, and the relative merits and progress of the various initiatives and programs undertaken during the course of the year. In this way, Convocation is kept apprised of how its policy decisions are realized operationally.

42. A comprehensive system of program review linked to the budget is also in place. This allows for a focused cost analysis, increased discipline in budget development, increased bencher understanding of a number of specific activities each year and increased accountability of management for the programs underlying the financial information contained in the annual budget. As part of the 2007 budget process, for example, the Finance and Audit Committee requested a survey of the resources allocated to each major program over the last ten years.

43. Mr. Heins expressed the view that in terms of dealing with policy issues that are reported to Convocation, for the most part Convocation has been consistent in following the model whereby it determines policy and operational staff implements the policy. The

reports referred to above provide Convocation with information on policy initiatives on a fairly regular basis.

44. Planning Convocation's policy agenda is a different issue, according to Mr. Heins. In this respect, he offered three observations.

45. First, in the absence of some group or committee of Convocation designated to do an annual review of Convocation's policy agenda and assess priorities for Convocation, it is difficult to determine how satisfactorily this aspect of governance is working. Part of the CEO's role is to assist in the strategic planning for the Society and implementation of the plan, but the challenge is to do so in the absence of a structure for priority planning. The fact that there is no sub-delegation from Convocation or the Treasurer to deal with governance issues creates a gap.

46. Second, priority setting of a type occurs but it is neither structured nor transparent. It occurs a result of the dynamic within the Treasurer's election process. As a campaign issue, Treasurer candidates typically propose some priorities for Convocation's consideration. The candidates build support among members of Convocation – including agreement on the priorities – and this helps to establish the policy issues that will be pursued in the coming term. In this way, the benchers' choice for Treasurer effectively results in a decision by Convocation – or a majority of it - to address those priorities. This constitutes a de facto priority-setting process and establishes a strategic platform from which a strategic plan may flow. Following the election, based on the Treasurer's discussion of issues with his or her supporters, the Treasurer will choose chairs and certain members of committees. On this basis, the Treasurer fulfills commitments made to benchers and support for the policy agenda will be reflected at the committee level.

47. Third, information on operational issues flows from the CEO and senior managers to the committee chairs (and to the Treasurer). This results in a prioritization within the committees of issues that are of concern to policy and operational staff and that require policy decisions by Convocation.

48. As the above illustrates, the issues for Convocation come both from benchers and operations. What is missing is a forum to identify all these issues in a timely way, including after a bencher election, so that decisions about the policy agenda and priorities can be made. Mr. Heins' view was that the Task Force's Priority Planning Committee proposal, referred to below, would address this missing element. In particular, a bencher meeting following each bencher election, for the purpose of priority planning, would fill the gap that has existed to date, namely, the lack of a formalized, more transparent strategic planning function for Convocation.

49. After reviewing this background information and the opinions expressed above, the Task Force considered the merits of institutionalizing priority planning, and the best vehicle through which to accomplish it.

Reasons for a Priority Planning Committee

50. The Task Force concluded that a more structured approach to planning and prioritizing the Society's policy agenda is required if Convocation is to become more efficient and effective in fulfilling its mandate. The Task Force believes that this type of structure would help to address problems in the Society's governance, including the following:

a. It is difficult, if not impossible, to determine at a given point in time Convocation's top priorities. This situation is exacerbated by the fact that the work of Convocation and its Committees generates many projects that may be underway at any one time. Historically, there has been no defined way of assessing these activities against appropriate criteria;
b. In these circumstances, it is difficult to determine whether Convocation is effectively and efficiently managing its priorities, which would include establishing attainable goals and creating effective accountability mechanisms. While benchers may be able to identify the major issues which concern the Society as an organization, it is more difficult to identify where each issue lies in terms of priority or how that issue should be assessed against other issues as a matter of priority;
c. Further, it is difficult to rationalize what Convocation does at the policy level against financial expenditures. In the Task Force's view, this situation approaches a paradox when the Finance Committee, which prepares the draft annual budget for Convocation's approval and must authorize all expenditures outside of those allocated in the budget, is often seen as the body that really determines priorities. This situation is contrary to Convocation's Governance Policies which, as above-noted, contemplate an Annual Bencher Planning Cycle and mandate that Convocation set a long term strategic perspective and then create a budget for the following year.
d. As noted earlier, there is an informal process by which Convocation's agenda is set: consultations occur among the chairs of committees, and among senior staff, who bring issues forward as required to the Treasurer and the CEO. The Task Force believes this informal process should be enhanced and institutionalized with a more formal structure in the form of a priority planning committee.

51. In the Task Force's view, a formalized priority planning process will allow Convocation to refocus and integrate priority planning with the budget process, which would then be linked to and co-ordinated with pre-established policy planning. At a practical level, this means that Convocation must "get ahead" of budget planning and determine its priorities in advance of the budget. Once this happens, any new initiatives that arise can be assessed against the priorities. The creation of a Priority Planning Committee will address this gap in the Society's strategic planning function and determination of its priorities.

52. The result of the Priority Planning Committee's work, which would be reported to Convocation for approval, is in effect a strategic plan for the Society. The Committee's ongoing responsibility to review the progress of the policy agenda and determine the place of new matters as a matter of priority when they arise means that financial planning and budgeting must be linked to the priority planning process. In this way, budget planning would be wedded to the policy agenda for the bencher term.

Features of the Proposed Priority Planning Committee

53. The following are the Task Force's proposals for the Committee:

a. As a standing committee, the members of the Committee would be approved by Convocation based on the Treasurer's recommendation.[8] The committee should be composed of those members of Convocation whom the Treasurer believes have the necessary experience and knowledge for the work to be carried out by the Committee. The Committee's focus will be on priorities related to the core functions of the Society. It is likely that the membership would reflect significant knowledge of these functions and the policy considerations related to them.
b. As with other standing Committees, Convocation should appoint the chair and any vice-chair(s) of the committee.[9]
c. The Chief Executive Officer should be a non-voting member of the Committee. The Task Force's view is that the operations of the society must be realistically considered in planning priorities, and the CEO's perspective in this respect would be valuable.
d. Other benchers would be invited to attend committee meetings for specific issues.
e. The Committee should have no decision-making authority, but can only recommend matters to Convocation.

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[8] The following excerpt from By-Law 9 (Committees) describes the membership of standing committees of Convocation:

Composition

3. (1) Each standing committee shall consist of at least six persons appointed by Convocation.

Benchers

(2) Each standing committee must include at least five benchers.

Appointment of persons to standing committees

(3) Convocation may appoint persons to a standing committee at any time.

Treasurer's recommendations for appointment

(4) The Treasurer shall recommend to Convocation all persons for appointment to standing committees.

Treasurer

4. The Treasurer is a member of every standing committee.

[9] By-Law 9 reads:

Chairs and vice-chairs

7. (1) For each standing committee, Convocation shall appoint,

(a) one bencher, who is a member of the standing committee, as chair of the standing committee; and

(b) one or more benchers, who are members of the standing committee, as vice-chairs of the standing committee.

f. The Committee would review its work on a yearly basis and assess the status of the policy agenda Convocation has adopted. This review would also inform the work of the Law Society's Audit Committee, discussed later in this report, in its oversight responsibility regarding finances, accounting and operational controls.

Key Features of the Priority Planning Process

54. As noted above, the Committee proposed by the Task Force, in supporting and assisting Convocation in fulfilling its responsibility for priority planning, may only make recommendations to Convocation. The Committee would not be an executive committee with decision-making power.

55. The Task Force believes that all benchers should participate in determining Convocation's priorities. To that end, the Task Force proposes the following process, which defines the responsibilities of Convocation and also the mandate of the Priority Planning Committee:

a. Near the beginning of each bench (that is, following the Bencher Election), a full bencher meeting should be devoted to considering Convocation's priorities. This meeting should be institutionalized as part of Convocation's priority planning function. The meeting could be held at a regular Convocation, arranged for a special Convocation, or held at a bencher retreat.
b. At this meeting, which would likely be held in the fall of each bencher election year, benchers would be given the opportunity to bring forward matters for consideration as strategic objectives to be addressed within the next three and a half years at the Law Society. This meeting would also be an occasion to review the existing priorities identified by the prior bench, and to assemble and review all of the projects and proposed projects on the agenda of the committees.
c. The strategic objectives would be informed by the role statement and the benchers' vision for the society, and thus, would be at a high level. In subsequent bencher terms, the statements of priorities by the previous bench would be available as a foundation for discussion.
d. The job of the Priority Planning Committee would be to assemble all of the relevant information, to assess all of these objectives and recommend for Convocation's approval a smaller number of the priorities for that period. Thus, the Committee would help organize the initial priority planning meeting of Convocation, and once that meeting is held, help organize the results of that meeting for final consideration by Convocation. The objective would be to recommend appropriate priorities for Convocation's approval.
e. For continuity purposes, budget planning relating to the policy agenda would be wedded to the three and a half year period. The regular annual budget planning cycle would continue and would include any issues that arise annually from the prioritized objectives. As noted above, this is consistent with Governance Policy II H. which contemplates an Annual Bencher Planning Cycle in which the budget is based on a priority planning process.
f. The Priority Planning Committee would identify the recommended priorities no later than December of the bencher election year, for Convocation's consideration and approval. It would be Convocation that would set the priorities assisted, but not governed, by the Priorities Planning Committee. Convocation would ensure that the issues arising from the strategic objectives are already being undertaken by the appropriate committee or administrative group within the

Law Society, or that they would be assigned by Convocation to the appropriate committee, task force or working group. This process would also involve determination of operational strategies for implementation of the priorities.

g. As priorities may change over time, the Priority Planning Committee would address additional issues to be brought to Convocation to be assessed against Convocation's priorities. In this way, Convocation will be able to identify those issues that, at any particular time, are the most pressing ones on its agenda.

56. The end result of this process is a "rolling" priority statement by benchers on their primary policy objectives. That statement can also stand as both a stated "legacy" of policy objectives and accomplishments over the term of a particular bench, and an updated priority statement to be passed on to a new bench. Moreover, upon referral by Convocation of the issues to the appropriate committee, task force or working group, a second level of priorities to achieve the policy outcomes would be determined. Thus, priority setting would be accomplished by the following hierarchy:

a. An objective informed by the functions of the Society in the *Law Society Act;*
b. A vision on how the policy objective should be realized;
c. Operational strategy to determine the route to implementation; and
d. Operational tactics to implement the decision based on the policy objective.

The Priority Planning Committee's Additional Responsibilities

57. It is proposed that the Priority Planning Committee have the following additional responsibilities:

a. when new issues are raised by benchers or presented to Convocation, to assist Convocation in determining whether those issues relate to identified priorities, so that Convocation may channel them to the appropriate committee or task force;
b. when new issues are raised which do not relate to identified priorities, to consider whether some urgency from a regulatory/governance perspective warrants immediate action on them, and to assist Convocation in determining what appropriate action should be taken to have the matter dealt with, or otherwise determine a response to the issue; and
c. to act as the body to which new policy issues may be referred in the context of their consideration by Convocation, so that Convocation may be assisted with respect to the import of those issues in relation to Convocation's existing priorities.

58. It is anticipated that the Priority Planning Committee would, as required, provide the new proposed Audit Committee, discussed later in this report, with information to assist the latter Committee in its responsibilities. This entails a review of the Society's controls regarding finances, accounting and use of assets, including in respect of activities and expenditures authorized by Convocation as a result of priority planning. As priority setting would become a formalized function of Convocation, the results of which are implemented by management, it would appear appropriate for the Audit Committee to engage in this activity as part of its oversight responsibility respecting finances and the integrity of management's controls.

C. HIGHLIGHTING THE FINANCIAL REPORTING SYSTEMS AND INTEGRITY OF THE LAW SOCIETY

The Role of the Audit Subcommittee

59. The Audit Subcommittee of the Finance and Audit Committee generally performs three of the five functions presently found in the mandate of the Finance and Audit Committee pursuant to By-Law 9 (Committees). The mandate of the Committee in the By-Law is as follows:

> 12. The mandate of the Finance and Audit Committee is,
> (a) to receive and review interim and annual financial statements for the Society and the Lawyers' Professional Indemnity Company;
> (b) to review the integrity and effectiveness of policies regarding the financial operations, systems of internal control and reporting mechanisms of the Society;
> (c) to recommend the appointment of the external auditor and to review the proposed audit scope, audit fees and the annual auditor's management letter;
> (d) to review the plans and projections of the annual budget of the Society, including the Lawyers Fund for Client Compensation, or any special or extraordinary budget required for the purpose of the Society, including the Lawyers Fund for Client Compensation, to provide comments and advice to Convocation thereon, and to recommend approval of the annual budget or any special or extraordinary budget item; and
> (e) to review the plans for any expenditure arising during a financial year that was not included in the annual budget or other budget approved by Convocation for that year, to provide comments and advice to Convocation thereon and to recommend approval of the expenditure by Convocation.

60. The Audit Subcommittee, in reference to paragraphs (a) through (c) above, reviews the published year-end financial statements and discusses these statements with the Law Society's management and the auditors. These statements include the Law Society's General Fund, Lawyers Fund for Client Compensation and LibraryCo. Statements.[10] The Subcommittee discusses and reviews specific issues with the Society's auditor and reviews the auditor's management letter and any other communications form the auditor which comment on the Society's systems and internal controls.

61. The Subcommittee's Charter, at Appendix 3, starts with its Mission Statement:

> To enhance effectiveness in the oversight of financial reporting by optimising the quality, not just the acceptability of financial reports. To oversee the process of identifying, measuring and prioritizing business and financial reporting risks.

[10] LawPRO (Lawyers' Professional Indemnity Company) financial statements continue to be reviewed by the Finance and Audit Committee.

62. The Task Force understands that the Finance and Audit Committee has delegated these three functions to the Audit Subcommittee, which then reports these matters to the full Committee. The full Committee then reports relevant matters to Convocation.[11]

63. As the Subcommittee's terms of reference reflect, it plays an important oversight role with respect to the Society's finances. At one point, a proposal for an independent audit committee of non-bencher experts was required for the Society became the subject of a motion by benchers Richmond Wilson and George Hunter at the November 2002 Convocation:

> WILSON/HUNTER MOTION - ESTABLISHMENT OF AN INDEPENDENT AUDIT COMMITTEE
>
> Whereas the Law Society of Upper Canada is a corporation which collects and administers an annual budget in excess of $50,000,000,
>
> And Whereas it has been brought to the attention of the Benchers that 'for profit' corporations of this size are at least encouraged to provide outside oversight on their Board of Directors in the area of financial management,
>
> Be it resolved that an independent audit committee consisting of non-bencher experts be established to advise Convocation as required and to report to Convocation annually.

64. At the January 2003 Convocation, the Finance and Audit Committee presented an information report on this issue. The report concluded that a separate Audit Committee should not be established, and that the existing structure with an Audit Committee as a working group of the Finance and Audit Committee should continue. In a memorandum referenced in report, questions about the structure of the Audit committee were raised. These included whether the Audit Committee should be made a standing committee of Convocation with a separate mandate, and if so, whether the remaining mandate of the Finance and Audit Committee will be sufficient to fulfill the function of a committee of Convocation. The following are relevant excerpts from the January 2003 report.

> AUDIT COMMITTEE
> …
> 15. The Committee was of the view that the scope of the Audit Committee's responsibility is appropriate and fulfills that obligation effectively at present. When we compare our functioning to that of other organizations, it is apparent that we meet the 'best practices' standard in every significant aspect. We are far ahead of most organizations with any similarity at all to us.
>
> 16. …Each Bencher has a right to be here independent of any other Bencher; their tenure cannot be threatened. The opportunities for financial impropriety by the governing body and its members is low. Thus, the alternative of appointing external members of the Audit Committee is unnecessary. If retained, as mere officials, or mere appointees, the necessary independence would not approach

[11] Information on some other law societies' finance and audit committee structures appears at Appendix 4.

> that of a Bencher. And there are problems associated with having non-Benchers appropriately represented in Convocation.
>
> 17. In short, we do not think that the present system is broken and we do not think any general review is required.
>
> …
> 21. The Committee noted that all Benchers were independent of management as defined by all regulatory definitions, and that there was sufficient financial expertise amongst the pool of benchers. Under the mandate of the current Audit Committee external experts beyond the auditors could be retained when required.

65. The Finance and Audit Committee agreed with the Audit Committee's conclusion on bencher independence.

66. The Task Force acknowledges the necessary role that the Audit Subcommittee performs and is not suggesting any changes to its mandate. It is, however, proposing a change to its structure.

Rationalizing the Structure of the Finance and Audit Committee and the Audit Subcommittee

67. Structurally, the Task Force strongly believes that the Audit Subcommittee should be made a standing committee of Convocation, called the Audit Committee, and report directly to Convocation.

68. Members of the Audit Committee should have the skills required to provide independent and objective oversight of the Society's accounting and financial reporting processes and audits of its financial statements, and have some financial competence in the area of not-for-profit organizations and fund accounting. These skills would be found among benchers through their professional qualifications, experience in practice or education. Ongoing education and information would be provided to Audit Committee members to supplement their knowledge about the appropriate financial standards for non-profit organizations such as the Law Society.

69. There are many reasons why the Audit Committee should be a separate standing committee reporting directly to Convocation.

70. While a finance committee reviews investment policies and monitors the funds of an organization on a regular basis, an audit committee provides independent oversight into the organization's accounting and financial reporting and oversees the organization's annual audits. This includes oversight responsibilities for the integrity of the relevant financial statements, proper authorization for activities and expenditures relating to the organization's operations, accuracy of records and reports presented to the board and the performance of the organization's internal financial controls and independent auditor.

71. In the Task Force's view, it is simply not acceptable in today's corporate governance environment to have the Law Society's Audit Committee situated as a subcommittee of the Finance Committee. The Finance and Audit Committee, as presently constituted, has duties with respect to the budget approval process, which are at the "front end" of the expenditure of monies by the Law Society. It does not give the Audit Committee the

sufficient appearance of independence for it to be a subcommittee of another committee which is involved in the budgetary process.

72. The Audit Subcommittee's role is of vital importance to the financial integrity of the Law Society. In today's world of closer scrutiny of corporate governance, the Task Force believes that it is absolutely essential that the Audit Committee has a separate status and separately undertakes its important scrutiny of the Law Society's financial policies and financial statements. That separate status and scrutiny is required to demonstrate to the public and the profession that Convocation takes the role and functions of this Committee seriously.

73. Moreover, the scrutiny the Audit Committee must apply to the financial policy and financial reporting practices requires that its members have undistracted time to engage in that activity. In this way, the Audit Committee will be seen by the public and the profession to be focusing on that activity, without regard to the budget process.

74. Finally, the Audit Committee needs standing committee status to give it the necessary visibility and accountability, consistent with the high priority Convocation places on the correctness of the Law Society's financial statements and the strength of the Society's financial systems.

75. For all of these reasons, it is the Task Force's view that the Audit Committee must be established as a separate committee reporting directly to Convocation. Its mandate should include that of the existing Audit Subcommittee. The Task Force anticipates that Convocation would ask the new Audit Committee to come forward with a new mandate, which may include, for example, responsibility to review executive compensation and such other matters as Convocation may direct.

The Other Functions of the Finance and Audit Committee

76. The Task Force understands that if the Audit Committee is made a standing committee, the remaining mandate of the renamed Finance Committee, based on By-Law 9, would be the budget review functions and assessing the resources available for programs. These functions are set out in the By-law as follows:

> 12. The mandate of the Finance and Audit Committee is,
> …
> (d) to review the plans and projections of the annual budget of the Society, including the Lawyers Fund for Client Compensation, or any special or extraordinary budget required for the purpose of the Society, including the Lawyers Fund for Client Compensation, to provide comments and advice to Convocation thereon, and to recommend approval of the annual budget or any special or extraordinary budget item; and
>
> (e) to review the plans for any expenditure arising during a financial year that was not included in the annual budget or other budget approved by Convocation for that year, to provide comments and advice to Convocation thereon and to recommend approval of the expenditure by Convocation.

77. The Task Force noted the apparent overlap in the mandates of the Finance and Audit Committee and its Subcommittee, although as noted earlier the audit functions have effectively been delegated to the Subcommittee.

78. This means that the only responsibilities exclusive to the existing Finance and Audit Committee, according to its mandate, are the review, approval and presentation of the budget and review and approval of additional expenditures that arise between budgets.[12] The Task Force understands that the Finance and Audit Committee also attends to certain responsibilities that have been assigned to it by Convocation. Two examples are recommendations for grants from the J. Shirley Denison Fund and preparing for Convocation's approval the Society's investment policy statements for the General Fund and the Errors & Omissions Insurance Fund.

79. In the new model envisaged by the Task Force, Convocation sets its priorities prior to budget planning with the assistance of the Priority Planning Committee. The new Audit Committee would examine and report to Convocation on the Law Society's financial statements and financial systems at the "back" end. There is, however, a role for a Finance Committee in the middle. This role includes the following:

    a. Continuing to act as the committee which initially reviews the operational budge prepared by the CEO and provide the CEO with feedback before the Committee presents the budget to Convocation;
    b. Reviewing plans for new expenditures during the financial year, not from a priority setting standpoint, but from a financial standpoint;
    c. Undertaking some of the present work of the Finance and Audit Committee which is not linked to its legislative mandate. Two examples are noted above.

80. The Task Force considered alternative structures. One would involve the elimination of the Finance Committee and the presentation of the budget to Convocation by the CEO. However, the Task Force determined that maintaining the Finance Committee has the advantage of preserving the expertise that is presently on the Finance and Audit Committee, to assist Convocation when the budget is presented and review new expenditures from a costs standpoint alone.

81. Another alternative structure would involve "grafting" the remaining Finance and Audit Committee functions on to the Priority Planning Committee's responsibilities, so that budget planning would occur within the ambit of that Committee's work. However, the Task Force determined that at this stage, it is preferable to maintain discrete committees for budget planning and for determining Convocation's priorities for its policy agenda. While budget considerations and impact are a component of planning priorities, the focus of the Priority Planning Committee is to develop priorities strategically for a policy agenda over a specific term. Moving the budget planning function currently performed by the Finance and Audit Committee to the Priority Planning Committee may dilute its focus and function. With experience, it may be that this idea can be revisited.

82. As a final matter, given that the proposed Priority Planning/Audit Committees structure may take some time to implement, there is a need to retain a committee that fulfills the responsibilities noted above.

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[12] As noted earlier, the Committee continues to review the LawPRO financial statements.

D. EFFICIENT AND EFFECTIVE CORPORATE GOVERNANCE

Frequency of Convocation Meetings

Convocation's Meeting Schedule

83. Regular Convocation is scheduled every month, two weeks after standing committee meetings, except in the summer months and December. This schedule is reflected in By-Law 8 (Convocation). The meetings require careful organization and involve consultations on the agenda between the Treasurer, committee or task force chairs and senior staff. The meetings also involve costs to the Society, largely attributed to bencher travel and related expenses. Added to this expense is bencher remuneration for those who choose to claim it. These expenditures form part of the Society's budget.[13]

84. The standing committee meeting schedule has evolved to the point where committees no longer meet every month, but on an as-needed basis depending on what business must be addressed. Task Forces meet when required and do not typically follow a regular schedule. This is already having an impact by making Convocation's agendas in some months lighter.

85. In addition, the procedures in the new licensing process have eliminated the frequent monthly calls to the bar at Convocation, which necessitate a monthly Convocation.

86. The question for the Task Force was whether it is necessary for Convocation to meet every month, having regard to both the expense of those meetings and need for Convocation to properly deal with all matters on its agenda. In addressing this matter, the Task Force noted that there may be a link between the size of the board and the frequency of its meetings. A smaller board, because it should be more efficient in moving through its agenda, may not be required to meet as often as a larger board. Other factors, such as setting priorities and adopting rules of procedure may also reduce either the length of, or the number of, meetings.

87. If the business of Convocation could be dealt with in fewer meetings, the Task Force considered that it would be worth examining in more detail how this might be achieved. The Task Force contemplated, for instance, a revised schedule for Convocation, such meetings held in September, November, January, March, May and June.

88. Ultimately, the Task Force decided that reducing the frequency of Convocation should not be the subject of a specific recommendation at this time. If the recommendations in the Report are adopted, they will, it is hoped, result in improvements in the way in which

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[13] The Society's Finance Department estimates that a regular Convocation can cost anywhere from $50,000 to $75,000, depending on how many out of town benchers attend. This includes travel fares, hotels, meals, the Court Reporter and an allowance for bencher remuneration. For the bencher year 2005 –2006 (September to June), the total paid for bencher remuneration was $76,200. For 10 regular Convocations in the period December 2005 to December 2006, the total expenses were approximately $300,000, excluding bencher remuneration.

Convocation operates. If this occurs, then fewer meetings of Convocation may be necessary.

89. In addition, the rules of procedure for Convocation in By-Law 8 should help to improve the manner in which business is dealt with. By-Law 8 leaves ultimate discretion with the Treasurer to vary the schedule of meetings.[14]

90. The Task Force concluded that the control of Convocation's schedule should continue to rest with the Treasurer. He or she is well-informed in the pre-Convocation consultations on what is required to be addressed in a given month. The Task Force sees this management of Convocation's agenda as an important part of the Treasurer's responsibility.

91. In summary, the Task Force does not make any recommendation at this time that Convocation adopt a schedule that reduces the number of meetings in a year. The Task Force anticipates that as experience is gained with the formalized priority planning it is recommending, Convocation will find it can meet less frequently with greater efficiency, and with a sharper focus on its policy agenda.

Suspension of a Bencher

92. Sections 15 and 16 of the *Law Society Act* say that benchers are elected in accordance with the by-laws.[15]

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[14] By-Law 8 includes the following:

Convocation conducted in accordance with By-Law

2. (1) Convocation shall be conducted in accordance with this By-Law.

Waiving compliance, *etc.*

(2) Despite subsection (1), the Treasurer may waive compliance with any requirement, alter any requirement and abridge or extend any time period mentioned in this By-Law in respect of Convocation.

…

Convocation: when held

4. Convocation shall be held on the fourth Thursday of each month, except the months of July, August and December, unless otherwise directed by the Treasurer.

Convocation: special meetings

5. (1) The Treasurer may convene Convocation at any time by giving at least twenty-four hours notice, or by directing the Secretary to give such notice, to each bencher.

[15] Bill 14, the *Access to Justice Act, 2005*, amended the *Law Society Act* to provide that two paralegals are to be elected as benchers in accordance with the by-laws. The Bill also amends the Act to make lawyers and paralegals licensees. Subsection 15(4) of the amended Act provides that an elected bencher who ceases to be licensed to practice law ceases to be a bencher. A similar provision applies to paralegal benchers.

93. By-Law 5 (Election of Benchers), provides as follows:

> 9. Every member, other than a temporary member, is qualified to be a candidate in an election of benchers if, at the time of signing a nomination form containing his or her nomination as a candidate, the member resides in Ontario and the member's rights and privileges are not suspended.[16]

There are no other qualifications for bencher candidates.[17]

94. Convocation turned its attention to what is expected of a bencher by adopting certain provisions in the Governance Policies, as follows:

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[16] This language will be amended to refer to licensees.

[17] Some other Canadian law societies have more detailed qualifications. The following example is from the Alberta's *Legal Profession Act:*

Eligibility for election

13(1) Only an active member resident in Alberta is eligible for nomination and election as a Bencher.

(2) A member is eligible for nomination, election and re-election as a Bencher in accordance with the rules.

(3) A member is ineligible for nomination or election as a Bencher if at any time before the date of the election the member was disbarred.

(4) A member is ineligible for nomination or election as a Bencher if, within the 5-year period immediately before the date of the election,

(a) the member was found guilty of conduct deserving of sanction without an order being made for the member's disbarment as a result of the finding, unless the Hearing Committee, the Benchers or the Court of Appeal, as the case may be, made an order directing that the member is not ineligible by reason of the finding,

(b) an order of the Benchers was made under section 83(4) for the suspension of the membership of the member for a fixed period,

(c) an order of the Benchers was made under section 84(3) for the suspension of the membership of the member for a fixed period, unless the Benchers made an order directing that the member is not ineligible by reason of the suspension order, or

(d) the membership of the member was under suspension at any time during that 5-year period by virtue of section 83(7).

(5) A member is not ineligible because of subsection (3) or (4)(a) if the disbarment order or finding of guilt was successfully appealed.

E. Bencher Job Description

…

8. Benchers must be familiar with,
   1) Law Society structure, mission and governance policies; and
   2) relevant legislation and jurisprudence.

F. Bencher Code of Conduct

1. The benchers commit themselves to ethical conduct.
2. Benchers must declare conflicts of interest and act in accordance with Convocation's policy on conflicts of interest.
3. Benchers must not use their positions to obtain employment or preferential treatment for themselves, family members, friends or associates.
4. No bencher shall purport to speak for Convocation or the Law Society unless designated by the Treasurer.
5. When exercising adjudicative powers, benchers shall behave in a judicial manner.
6. Benchers shall observe Convocation's policy regarding confidentiality.
7. Benchers sitting as members of the hearing panel must adhere to the provisions set out in the guidelines for applications to proceed in camera and must strictly maintain the confidentiality of all matters subsequently heard in camera.

95. The Task Force is not proposing that additional criteria be adopted for qualifications for bencher candidates. However, the Task Force believes there is a need to address the circumstances in which, currently, the rights and privileges of a lawyer who serves as a bencher are suspended, or in future, the license of a lawyer or paralegal who serves as bencher is suspended (formerly, it was the rights and privileges as a member that were suspended). If a bencher candidate whose rights and privileges are suspended is ineligible to run for bencher, there should be some response from the Society if a suspension occurs after the candidate is elected a bencher.

96. The fact that a bencher may be suspended as a result of discipline or for non-payment of a fee or levy is the reason this issue, from the public interest perspective, must be addressed. The Task Force believes that the Society should have the authority to act should this event occur.

97. The Task Force views this issue from two interrelated perspectives. First, the integrity of the board is compromised if a board member, who is a fiduciary of the organization, is involved in policy decisions for the profession's governance and adjudicates matters of professional conduct, continues to sit as a board member while suspended as a member of the Society. Second, on a broader basis, the reputation of the Law Society among its constituencies, including the public, is affected if no consequences flow to the bencher who continues to enjoy the rights and privileges of being a bencher while his or her rights and privileges as a member are suspended.

98. The Task Force differentiated between suspensions arising from disciplinary proceedings and "administrative" suspensions, such as those arising from failure to pay fees or levies or to file the Member's Annual Report.

99. For disciplinary suspensions, given the seriousness of the issue that led to the suspension, the Task Force's view is that the bencher should no longer remain as a bencher. A finding of professional misconduct or conduct unbecoming against a bencher that results in a suspension requires a response from the Society that will protect the integrity of the organization and Convocation. If the bencher appeals the order of suspension, the termination of his or her bencher status should occur on the date of the order of an unsuccessful appeal.

100. The Task Force does not believe that bencher status should be restored following the end of the suspension of the lawyer or paralegal who served as a bencher. In the normal course, a new bencher would be elected by Convocation to fill the position left vacant by the lawyer or paralegal who loses bencher status as a result of the suspension. Further, the suspended bencher who is no longer a bencher is free to run as a bencher in the next bencher election.

101. It is also possible that a bencher may be subject to an interlocutory suspension order. In such cases, the Task Force's view is that the bencher should be ineligible to act as a bencher as of the date of the order and for the duration of the suspension.

102. For administrative suspensions as a result of summary orders under the *Law Society Act*, the Task Force's view is that the bencher should be ineligible to act as a bencher during the suspension. The ineligibility to act as a bencher should end when the bencher takes the appropriate action to pay the fee or file the form, for example. However, if the bencher fails to take this action within three months of the start of the suspension, he or she should cease to be a bencher. The Task Force believes this result is fair, given the lengthy process that follows notice of default prior to a suspension order.[18]

103. To summarize, the Task Force is proposing the following:

    a. A bencher whose rights and privileges as a member of the Society are suspended, or in future whose license is suspended, following a finding of professional misconduct or conduct unbecoming should cease to be a bencher as of the date of the suspension, or an unsuccessful appeal. Status as a bencher should not be restored when the member' rights and privileges are restored.

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[18] The process includes the following:

- notice of the deadline for payment or filing with the invoice or filing package
- following the deadline, allowing typically a 120 day (four month) default period
- during this default period, mailing a first default notice one month after the deadline
- mailing a second default notice two months after the deadline
- during the final 30 to 60 days of the default period, telephone calls (two if necessary) to the member
- mailing the notice of summary order for suspension after the default period, with notice to the member that the suspension will take place five business days from the date of the order.

b. A bencher rights and privileges as a member of the Society are suspended, or in future whose license is suspended, as a result of an interlocutory suspension order should not be permitted to act as a bencher during the suspension;
c. A bencher whose rights and privileges as a member of the Society are suspended, or in future whose license is suspended, as a result of a summary order under sections 46 through 49 of the *Law Society Act* should not be permitted to act as a bencher as of the date of and for the duration of the suspension. If the bencher fails within three months of the date of the suspension to take the action that will end the suspension, he or she should cease to be a bencher.

These proposals would require amendments to the *Law Society Act*.

E. SUMMARY

104. The Law Society's effectiveness as a regulator is linked to its effectiveness at the board level. The Task Force has focused on whether changes to improve the Society's corporate governance to make if more effective are needed, and if so, what the changes should be.

105. In the Task Force's view, as the Law Society's governance structure is a functional response to its legislative mandate, any changes to the structure must be informed by and consistent with this mandate. In this respect, the *Law Society Act* requires the Society to act in a timely, open and efficient manner. For Convocation as a board, this means taking steps to

a. establish a strategic planning process that enables Convocation to identify priorities for a policy agenda and link the budget process to priorities that Convocation has identified;
b. ensure the integrity of the Law Society's financial management; and
c. ensure that the credibility of Convocation by excluding suspended members from participating as benchers.

106. Good governance does not happen by accident. It results from institutionalizing best practices. Moreover, institutionalizing best practices makes those who govern accountable for observing and applying them. This will demonstrate to the public, in whose interests the Society governs, that its governance is sound. The Task Force believes that its proposals support and will help the Law Society to better achieve this objective.

Appendix 1

GOVERNANCE TASK FORCE TERMS OF REFERENCE
(Approved May 25, 2006)

1. The Task Force will consider and recommend to Convocation improvements to the corporate governance of the Law Society to fulfill its mandate through:

a. efficient and effective corporate governance;

b. co-ordination of corporate governance with the operational management of the Law Society, and
c. effective priority setting, including budgetary considerations.

2. In addition, The Task Force will study the following two specific issues referred to it by Convocation:

a. the Treasurer's election process, including certain provisions of By-Law 6, based on the Secretary's report to Convocation of March 23, 2006;
b. procedural issues relating to Committee recommendations and motions before Convocation, arising from adoption of Rules of Procedure for Convocation (amendments to By-Law 8) on March 23, 2006;

3. The Task Force expects to report to Convocation from time to time with specific recommendations throughout 2006 and 2007, completing its work by April 2007.

Appendix 2

OTHER LAW SOCIETIES GOVERNANCE

Appendix 3

LAW SOCIETY OF UPPER CANADA
AUDIT SUB-COMMITTEE
CHARTER

Mission Statement

To enhance effectiveness in the oversight of financial reporting by optimising the quality, not just the acceptability of financial reports. To oversee the process of identifying, measuring and prioritizing business and financial reporting risks.

Membership Requirements

Under the Law Society's Governance Policies, the Audit Sub-Committee has been set up as a Working Group of the Finance and Audit Committee.

Members of the Audit Sub-Committee should be able to maintain an independent mind, and be financially literate, particularly in the area of not-for-profits and fund accounting.

Committee Structure

- The Audit Sub-Committee should comprise at least three members.
- A majority of members being physically or electronically present, constitutes a quorum for the purposes of the transaction of business.
- Committee members can be elected, non-elected or lay benchers or independents at the discretion of the Treasurer.
- The Committee Chair is to be a Bencher, and is appointed by the Treasurer

- Membership of the Audit Sub-Committee should turnover once every three years so that a balance of institutional knowledge and new ideas is maintained.
- Members of the Audit Sub-Committee should educate themselves through bencher orientation and with the assistance of management, auditors and third party sources, concerning the knowledge and skills required to fulfill the committee's mandate.

Committee Process

- The continuous disclosure procedures of the Law Society do not mandate quarterly or other periodic meetings unless required. Any Audit Sub-Committee member, member of senior management, or the auditor can request a meeting of the Audit Sub-Committee.

- The Committee should meet at least once to review the published year end financial statements, and to discuss these statements with management and the auditors. This meeting should precede the relevant Finance and Audit Committee meeting, Convocation and Annual General Meeting by sufficient time to allow processing of any actions requested by the Audit Sub-Committee.

Scope of Audit Sub-Committee's Responsibilities

The Audit Sub-Committee is not a decision-making body, but a fact-finding one. It reports findings to the Finance and Audit Committee, and onwards to Convocation and the members.

The Audit Sub-Committee's duties concerning the Law Society's General Fund, Compensation Fund and LibraryCo Inc. are not limited to year-end financial reports, but are facilitated by continuous disclosure resources. At the Law Society, continuous disclosure resources primarily take the form of unaudited, quarterly financial reports and management's related discussion and analysis.

The Audit Sub-Committee is responsible for the oversight, but not the management of:
- The preparation, integrity consistency and fair presentation of financial statements in accordance with generally accepted accounting principles
- The design and implementation of an effective system of internal control
- Other matters of financial consequence such as insurance coverage, significant non-recurring items, actuarial calculations, related party transactions or equivalents, subjective items such as accruals, provisions, estimates etc.

The Audit Sub-Committee should understand the nature and the extent of the work performed by the independent auditor and actuary, and make additional requests if desired. The Audit Sub-Committee should discuss and review specific issues with the auditor, such as ensuring their audit approach maximised opportunities to add value, and recommendations for improving the Law Society's performance.

The Audit Sub-Committee should review the Management Letter from the auditor, and any other communications from the auditor which comments on the Law Society's systems and internal controls, and obtain management's representations and intended course of action to address any concerns of the auditor.

The Audit Sub-Committee should consider any other matter that in its judgment should be taken into account in reaching its recommendations to the Finance and Audit Committee concerning the approval of the financial statements.

The Audit Sub-Committee should review the auditor's engagement letter. The Audit Sub-Committee is responsible for the evaluation of the auditor, and is responsible for recommending a change in auditor, or the retention of the existing auditor to Convocation, and ultimately the members at the Annual General Meeting

The Audit Sub-Committee should ensure that the auditor submits a formal written statement regarding relationships and services which may effect objectivity and independence.

The Audit Sub-Committee should communicate Committee expectations and the nature, timing, and extent of committee information needs to management, auditors, and others.

The Audit Sub-Committee does not have primary responsibility for the implementation and policing of the Law Society's Business Conduct Policy, as the CEO reports directly to Convocation on this matter.

Scope of Independent Auditor's Responsibilities

The auditor is ultimately accountable to Convocation and the Audit Sub-Committee.

The auditor's basic responsibility it to express an independent opinion on the Law Society's annual financial statements.

In addition to the auditor's responsibility under generally accepted auditing standards the auditor will:

- Discuss with the Audit Sub-Committee, the auditor's judgments about the quality (relevance, reliability, comparability, understandability), not just the acceptability of the Law Society's accounting principles, and lead discussion on the subjective issues reflected in the financial reports.
- Discuss such matters as:
  - illegal acts;
  - significant transactions that are inconsistent with the ordinary course of business;
  - unusual actions which significantly increase the risk of loss to the Law Society;
  - actions which might cause serious embarrassment to the Law Society.

Scope of Management's Responsibilities

Management has primary responsibility for:

- The preparation, integrity consistency and fair presentation of financial statements in accordance with generally accepted accounting principles;
- The design and implementation of an effective system of internal control;
- The management of the Law Society's affairs in compliance with applicable laws, regulations and standards of conduct;
- Acting as a resource for the Audit Sub-Committee. The Chief Financial Officer will provide the primary support to the Audit Sub-Committee.

Appendix 4

OTHER LAW SOCIETIES' FINANCE AND AUDIT COMMITTEE STRUCTURES

The following is information on Audit or Finance Committees in the Law Societies of British Columbia, Alberta, Saskatchewan and Nova Scotia.

1. Law Society of British Columbia

British Columbia's Audit Committee does not appear to be a committee required by the governing statute or authorized under the Rules (equivalent to our By-Laws). The Act contains authority for the benchers to create committees for the purposes under the Act. The Audit Committee's description on the Society's website is as follows:

> The Audit Committee assists the Benchers in determining that the financial affairs of the Society are properly managed by Law Society staff. This includes reviewing quarterly financial statements of the General, Liability Insurance and Special Compensation Funds prior to submission to the Benchers, providing an annual Audit Committee report to the Benchers and reviewing with the Law Society auditors their approach, the scope of the their audit and the audit issue results.

2. Law Society of Alberta

Alberta has an Audit Committee and a Finance Committee. The following is from the Law Society's Rules (equivalent to LSUC By-Laws) on the mandates of these Committees.

AUDIT COMMITTEE
…
Responsibilities
35.2(1) The Audit Committee will assist the Benchers in fulfilling their financial oversight responsibilities for the Society and for the Alberta Lawyers Insurance Association, including:
(a) overseeing and reviewing;

> (i) the financial reporting process,
> (ii) the system of internal control and management of financial risks,
> (iii) the audit process, and
> (iv) the process for monitoring compliance with rules and policies of the Law Society of Alberta and applicable laws and regulations;

(b) regularly reporting to the Benchers about Committee activities and making appropriate recommendations;

(c) ensuring that the Benchers and the Finance Committee are aware of matters which may significantly impact the financial condition or affairs of the Society.

(2) In addition to the matters set out under subrule (1), the Audit Committee will review the draft financial statements of the Society and of ALIA for each fiscal year and, on completion of the review:

> (a) will submit the financial statements of the Society to the Benchers for their approval with any changes recommended by the Committee; and

(b) will submit the financial statements of ALIA to the Benchers for their recommendation for approval to the Board of Directors of ALIA, with any changes recommended by the Committee.

Authority

35.3 Within the scope of its responsibilities, the Audit Committee is authorized to:

(a) seek any information it requires from:

(i) any employee (all employees being obligated to cooperate with any request made by the Audit Committee);
(ii) external parties;

(b) obtain outside legal or other professional advice; and
(c) ensure the attendance of Society officers, management and employees at meetings as appropriate.

Composition

35.4 The composition of the Audit Committee must meet the following requirements:
(a) at least five members;
(b) the majority of the members must be neither members of the Finance Committee, nor Benchers;
(c) exactly one or two members (no more or less) must be members of the Finance Committee;
(d) the Chair of the Finance Committee must not be a member of the Audit Committee;
(e) all members of the Committee must be independent of the management of the Society; and
(f) the Executive Director of the Society is an ex-officio member of the Committee.

Privacy

35.5 The information acquired by the Audit Committee, the proceedings of the Committee, and any reports issued by the Committee are private, except where the Committee determines otherwise.

…

FINANCE COMMITTEE

…

Responsibilities

36.1 In addition to adjudicating Assurance Fund claims, fulfilling other functions noted in these Rules, and performing other functions as requested by the Benchers, the Finance Committee will assist the Benchers in fulfilling their financial oversight responsibilities by:

(a) overseeing and reviewing;

(i) the financial affairs and operations of the Society,
(ii) the budget process, and
(iii) the administration of the investments of all funds of the Society and of ALIA in accordance with policies determined by the Benchers.

(b) recommending to the Benchers,

(i) an annual budget,

(ii) financial policy respecting the Society, and
(iii) financial administration policy respecting the Alberta Lawyers Insurance Association,

(c) regularly reporting to the Benchers about Committee activities and making appropriate recommendations; and

(d) ensuring that the Benchers are aware of matters which may significantly impact the financial condition or affairs of the Society.

Authority

36.2 Within the scope of its responsibilities, the Finance Committee is authorized to:

(a) seek any information it requires from;

(i) any employee (all employees being obligated to cooperate with any request made by the Finance Committee),
(ii) external parties

(b) obtain outside legal or other professional, management advice; and

(c) ensure the attendance of Society officers, management and employees at meetings as appropriate.

Annual Budgets

37(1) Prior to the fiscal year end, the Treasurer shall prepare and present to the Finance Committee a budget for the Society for the next fiscal year.
(2) Prior to the fiscal year end, the Director of Insurance shall prepare and present to the Insurance Committee a budget for the Alberta Lawyers Insurance Association for the next fiscal year.
(3) The Finance Committee will review the Society's budget as presented by the Treasurer and make a recommendation or recommendations to the Benchers in Convocation with respect to the adoption of the budget.
(4) The Insurance Committee will review ALIA's budget as presented by the Director of Insurance and make a recommendation or recommendations to the Benchers in Convocation with respect to the adoption of the budget.
(5) The Benchers in Convocation shall:
(a) prior to the commencement of each fiscal year consider the budgets for the Society and ALIA for the next fiscal year as recommended respectively by the Finance Committee and the Insurance Committee;
(b) approve the budget of the Society before or as soon as possible after the commencement of the fiscal year; and
(c) make a recommendation or recommendations to the Board of Directors of ALIA with respect to the adoption of the budget.

3. Law Society of Saskatchewan

Saskatchewan's Finance Committee's mandate is set out in the following Rule:

Finance Committee

131. The Finance Committee:

(a) shall supervise management of the finances of the Society;
(b) shall supervise management of all matters referred to it by the Benchers relating to the resources and expenditures of the Society;
(c) shall supervise administration of the Unclaimed Trust Funds program in accordance with section 14 of the Act and Part 16 of these Rules;
(d) shall supervise administration of the Special Fund in accordance with sections 12 and 13 of the Act and Part 11 of these Rules; and
(e) may cancel, reduce, refund or extend the time for payment for any fee, penalty or costs payable to the Society, which does not come within the jurisdiction of another Committee.

4. Nova Scotia Barristers' Society

The Regulations under the governing act in Nova Scotia provide for a number of committees, including the Finance Committee, whose mandate is as follows:

FINANCE COMMITTEE, to oversee the finances of the Society, to make recommendations thereon to the Council, to submit to Council in each year an estimate of the receipts and expenditures of the Society for the year, and to oversee the annual audit;

OTHER ONTARIO REGULATORS

1. Architects and Engineers

Under the by-laws made pursuant to the *Architects Act*, the Vice-President and Treasurer, an elected official, appears to have the responsibility that would otherwise be that of a finance committee. Section 5 of the By-Law reads:

It shall be the duty of the Vice-President and Treasurer to supervise and report to the Council on the financial affairs of the Association at such times and in such manner as the Council may require.

No finance committee is authorized under the Act or the by-laws, although the Act permits the Council to create committees "as the Council from time to time considers necessary."

Under By-Law 1 made pursuant to the *Professionals Engineers Act*, the Council is authorized to create a Finance Committee. The Committee includes members and non-members, with the president and the president-elect as ex-officio members. The by-law does not include a description of the duties of the Finance Committee.

2. Chartered Accountants

Under By-Law 268 of the By-Laws under *The Chartered Accountants Act*, 1956 the Audit Committee is authorized in the following language:

The audit committee shall carry out such responsibilities as are prescribed in the terms of reference adopted from time to time by the Council, including reviewing financial statements of the Institute and reporting there on to the Council.

3. Physicians and Surgeons

The College of Physicians and Surgeons has a Finance Committee constituted pursuant the College's General By-law. The Council appoints the committee members, who are members of the College. The relevant excerpt from the By-Law is as follows:

Finance Committee

43.(1) The finance committee shall review and report to the council regarding the financial affairs and position of the College.

(2) In order to fulfill its duty under subsection (1), the finance committee shall,
(a) meet with the auditor each year,
(i) before the audit to review the timing and extent of the audit and to bring to the attention of the auditor any matters to which it considers the auditor should pay attention; and
(ii) as shortly before the annual financial meeting as practical in order to review and discuss with the auditor the financial statements, the auditor's report and the management letter;
(b) review the draft budget before it is presented to the executive committee, and report to the executive committee and the council arising from its review of,
(i) the assumptions in the draft budget;
(ii) the steps taken to maximize efficiency and minimize cost in relation to the quality of goods and level of service; and
(iii) any other issue which the committee considers may affect the financial affairs and position of the College; and
(c) review from time to time,
(i) the expenditures of the College in relation to the budget;
(ii) the performance and administration of the College's pension plans;
(iii) the investment strategies and performance of the College's non-pension investments; and
(iv) the security of the College's assets generally.

(3) Except where the council or the executive committee directs otherwise by resolution, no significant expenditure shall be made that is not authorized by the budget without an opportunity for the finance committee to consider the implications of the unbudgeted expenditure and provide to the executive committee a revised budget.

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

A chart entitled "Other Law Societies Governance".

(Appendix 2, pages 43 – 49)

Report to Convocation
February 22, 2007

Professional Development, Competence & Admissions Committee

Committee Members
Laurie Pawlitza (Chair)
Constance Backhouse (Vice-Chair)
Mary Louise Dickson (Vice-Chair)
Robert Aaron
Kim Carpenter-Gunn
James Caskey
Carole Curtis
Paul Henderson
Vern Krishna
Laura Legge
Daniel Murphy
Judith Potter
Bonnie Warkentin

Purposes of Report: Decision

Prepared by the Policy Secretariat
(Sophia Sperdakos 416-947-5209)

COMMITTEE PROCESS

1. The Committee met on February 8, 2007. Committee members Laurie Pawlitza (Chair), Constance Backhouse (Vice Chair), Mary Louise Dickson (Vice Chair), Kim Carpenter-Gunn, James Caskey, Paul Henderson, Vern Krishna, Laura Legge, Judith Potter and Bonnie Warkentin attended. Bencher Gerry Swaye also attended the meeting. Staff members Diana Miles, Nancy Reason and Sophia Sperdakos attended.

FOR DECISION

CERTIFIED SPECIALIST PROGRAM REVIEW AND OPTIONS

MOTION

2. That Convocation approve one of the following options:

    a. That,

        i. the Certified Specialist Program be terminated effective January 1, 2008;

ii. effective immediately, no new specialists be certified; and

iii. currently certified specialists be entitled to continue to use the designation only until December 31, 2008; or

b. That,

i. the current Certified Specialist Program continue, but with the addition of a "C.S." designation for certified specialists;

ii. the impact of this addition be reviewed in two years to determine its effect on the program and whether the program meets the goals approved by Convocation in 2002; and

iii. during this two year period the program should continue to be subsidized; or

c. That,

i. the current Certified Specialist Program continue, but with the addition of a "C.S." designation for certified specialists;

ii. the impact of this addition be reviewed in two years to determine its effect on the program and whether the program meets the goals approved by Convocation in 2002; and

iii. the program should become self-sustaining through an increase in certified specialist fees beginning in January 2008.

Summary

3. A redesigned Certified Specialist Program was part of the Competence Model approved by Convocation in March 2001.

4. In the business plan for the new program that Convocation approved in 2002, the performance goals for the new program were set at 6% of the practising membership by December 2004 and 10% by December 2006. The program was to be self-funding by December 2004 with a 10% profit margin by December 2006.

5. As of December 31, 2006 the program has met neither of the 2006 performance goals. Certified specialists constitute only 3.6% of the practising bar. The program continues to be subsidized by the membership. In 2006, the program saw a marginal net profit of less than $8,000. The 2006 result represents a profit margin of less than 1% (.35%).

6. In its 2001 recommendations to Convocation the Professional Development and Competence Committee stated:

> Any competence model adopted by the Law Society must involve an evaluation component to assess its effectiveness and monitor implementation issues. Without such an evaluation component future informed refinement of the model

> would be precluded. At the design stage, therefore implementation tools must also be developed.[1]

7. This report is a review of the Certified Specialist Program. It addresses the factors that have contributed to the program's failure to meet the 2002 performance goals. Convocation is requested to consider options for the program's future.

Introduction and Background

8. In March 2001 Convocation approved a competence model consisting of five components.[2] One of these components was a reformulated specialist designation that was intended to change the approach to specialist certification that had been in place since 1988.

9. In 2001 when the Professional Development and Competence Committee's[3] recommendations for change to the program were approved there were 617 certified specialists in Ontario. At that time the program had already been in existence for thirteen years. With so few members of the profession certified it could not be said that the program had had a meaningful impact either on the profession or the public. The Committee was of the view that there was little point in trying to "fix" the program as it then existed.

10. The Committee's recommendation was that a reformulated program should replace what had in essence been a "recognition" program that was structured to recognize those applicant lawyers who by experience and training had become de facto specialists, with a "developmental" program that provided pathways or supports for the development of specialists.

11. The Committee was of the view that changes were needed that would make the program part of a continuum of competence for the profession. It stated,

> A broadly based specialist designation program would function as a QI component of the Law Society's competence model. As a voluntary developmental program, it could be designed as a staged process in which members continue to self-elect to pursue the designation of "specialist" advancing along a continuum of requirements with increasing levels of required expertise, until all requirements are met to gain the final specialist designation credential. This approach could encourage lawyers, at an early stage of their careers, to seek to develop expertise in identified areas of the law in a systematic

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[1] *Implementing the Law Society's Competence Mandate: Report and Recommendations* (March 2001), p.24.

[2] Practice guidelines, practice enhancement (voluntary self-assessment and peer assessment), continuing legal education (minimum expectations for CLE and requalification), specialist designation, and remedial components (focused practice review and competence hearings).

[3] Previous name of the current Professional Development, Competence and Admissions Committee.

> way by pursuing relevant accredited continuing legal education designed to promote "best practices" in legal work settings.[4]

12. It anticipated that such a reformulated program would attract greater numbers of the profession and at an earlier stage in their careers and would assist both the profession and the public they serve. Situated within a professional development competence model it would benefit from an integrated approach to the regulation of competence.

13. In June 2002 Convocation approved the design for the reformulated program. The redesign adopted the philosophical underpinnings in the 2001 Report. The business plan for the reformulated program stated, as the program's objective:

> To establish a Specialist Certification Program that promotes the development of skills through supported stages of learning and complements the Competence Mandate of the LSUC. The program should allow all lawyers who so desire to incorporate certification into their career plans and to obtain certification after meeting specific standards achieved through a combination of practice experience, legal education and peer review.[5]

14. An extensive redesign of the original certification program was undertaken over 18 months. The new program was launched in 2004.

15. In its 2001 recommendations to Convocation the Professional Development and Competence Committee stated:

> Any competence model adopted by the Law Society must involve an evaluation component to assess its effectiveness and monitor implementation issues. Without such an evaluation component future informed refinement of the model would be precluded. At the design stage, therefore implementation tools must also be developed.[6]

16. In keeping with the 2001 Report's commitment to ongoing evaluation of the components of the competence model, the Committee is providing Convocation with an analysis of the Certified Specialist program and with options for Convocation's consideration.

The Development of a Redesigned Program

17. In 2002 Convocation endorsed the business plan created to implement the goals of the 2001 report that, broadly stated, were,

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[4] *Implementing the Law Society's Competence Mandate: Report and Recommendations* (March 2001), pp. 44-45.

[5] Specialist Certification Business Plan, Professional Development and Competence Committee Report to Convocation, June 2002, p. 187 (Appendix 2)

[6] *Implementing the Law Society's Competence Mandate: Report and Recommendations* (March 2001), p.24.

a. that the program be designed as a continuum with identified staged requirements intended to promote the increasing accumulation of expertise and knowledge leading ultimately to a specialist designation; and

b. the practice categories identified as eligible for designation should be increased.

18. In evaluating the current program it is first important to consider whether the plan has been implemented as designed. The key components of the plan are set out below, with a discussion of their implementation:

a. Specialty Committees, which exist for each practice area that is eligible for designation, were to undertake a detailed analysis of their specialty area and to,

i. update standards to reflect the current nature of the practice;
ii. revise the specialty standards to reflect a staged learning process;
iii. determine the experiential requirements at each stage;
iv. determine the educational requirements at each stage;
v. develop criteria for learning modules.

This was done over 18 months as the approximately 289 practitioner members of the committees painstakingly approached the task.

b. Each Specialty Committee was to develop its program in three parts or stages of learning to reflect essential, intermediate and advanced practice levels and was to consider learning activities within these stages.

A thorough development process was followed for each specialty area, with standards and stages of learning. The Law Society's website includes the standards for each specialty at,

http://mrc.lsuc.on.ca/jsp/csp/applicationMaterials.jsp.

c. Specialty Committees were asked to re-consider the appropriate practice focus that would support specialist certification in each area. It was noted that more members would be eligible for certification if the required focus were 30% of a member's practice rather than 50%. Committees were asked to set the focus between 30 and 50 per cent.

Only two specialty areas, Estates and Corporate, have practice thresholds below 50%, at 30% and 40% respectively. Estates petitioned the Certified Specialist Board to increase all practice areas, including their own, to 50%. The Board rejected the proposal and required Estates to maintain the 30% threshold. This was because there were so few members in the specialty and any increase would likely further diminish any chance of increasing applications. It appears that the Specialty Committees do not consider a 30% practice concentration sufficiently rigorous to underpin specialist certification.

d. CLE programming was to be made available at the three stages of learning, with each Specialty Committee to identify gaps in training that would need to be filled. If CLE providers would not fill those gaps, the Law Society was to hire an

instructional design consultant to assist the specialty groups to develop the modules required.

Accreditation of CLE is an integral part of the program and in the last two and a half years over 1200 programs have been accredited in support of the various areas of specialties. Overall, providers such as the Ontario Bar Association, Advocates' Society, Criminal Lawyers' Association, etc. have not been interested in "gap"- type programming as it tends to be for smaller numbers of participants. The Law Society has used its in-house expertise to develop relevant CLE in this area with the establishment of such programs as the "Advanced" roundtables and the case file and practice gems series at the "essential" and "intermediate" levels.

e. There was to be an expansion of specialty areas.

Extensive work was done to determine which practice areas would lend themselves successfully to certification. This included determining whether there was a certain threshold of interest among practitioners in those areas in becoming certified.

As a result of this work, five new specialty areas have been inaugurated: Corporate and Commercial Law, Estates and Trust Law, Health Law, Municipal Law, and Real Estate Law.

Extensive work has been done to develop a competency-based approach in each specialty area, with meaningful pathways for development and appropriate CLE.

f. To demonstrate the commitment to the program members on the specialty committees were themselves to be certified as specialists. Members involved in the development of new specialties were to become certified within three years of the introduction of the specialty.

There has been mixed success on this point.

g. The program was to be promoted with the membership and the public.

Appendix 1 sets out the various ways in which the program has been and continues to be publicized, keeping within budgetary limitations.

h. The performance goals for the new program were set at 6% of the practising membership by December 2004 and 10% by December 2006. The program was to be self-funding by December 2004 with a 10% profit margin by December 2006.

These goals have not been met. As of December 31, 2006 only 3.6% of members in private practice are certified specialists. The program continues to be subsidized by the membership. In 2006, the program saw a marginal net profit of less than $8,000. The 2006 result represents a profit margin of less than 1% (.35%).

19. In large measure the components of the business plan that Convocation endorsed have been put in place, but would not appear to have had the intended result. The evaluation of the program that follows provides both the statistical progress of the program and an analysis reflecting upon whether the program has reached its objectives and the factors influencing its progress.

Program Results

20. Following the launch of the new Certified Specialist Program, the number of practitioners applying for and obtaining certification increased 12%. This was the highest number of new specialists joining the program in one annual period and was due predominantly to the establishment of the first three of the new specialties, which accounted for 45 of the 73 new specialists.

21. Juxtaposed against applications to the new specialty areas was the decision of a number of senior certified specialists (who had become specialists under the earlier regime) to drop out of the redesigned program. In large part they did so because they were unwilling or unable to fulfill the requirements, particularly the requirement for 18 hours of CLE in the specialty area, including 6 hours of live interactive CLE as an attendee, and an annual report on CLE participation.

22. In 2005, the second full year of implementation of the new program, with no new specialties added to the roster, there were only 38 newly certified members, but 20 certified specialists left the program, resulting in an increase of only 18 specialists year to year.[7] As of December 31, 2006, with five more specialty areas than there were in 2001, there were only 102 more specialists.

Certified Specialist Program Key Indicators

	2001	2002	2003	2004[8]	2005	End April 2006	End of Dec. 2006
Number of Specialists	617	611	609	682	700	692	719
Number of applications in process	-	-	-	-	15	19	16
Specialists in Toronto Area[9]	349	344	341	384	387	390	408
Specialists outside Toronto	268	267	268	298	312	302	311

[7] Municipal Law and Health Law were not added until January 31, 2006.
[8] The Certified Specialist Program redesign was effective January 2004.

[9] See Appendix 2 for a further breakdown of specialists by geographic location.

Number of Specialty Areas	10	10	10	13	13	15	15

Evaluating the Program

a) Numbers of Participants

23. Because certification is a voluntary program its success depends in large measure upon lawyers' willingness to participate in it. By framing the reformulated program as a developmental one that would allow young lawyers to develop their careers along a path that would naturally lead to certification Convocation believed that significantly more lawyers would pursue certification. The view was that a coherent underpinning to the program, based on an objective development of competencies necessary for certification, would remove what had been perceived as an arbitrary approach to the designation. Moreover, it was intended that in this format the program would contribute to the Law Society's commitment to a competence-based learning continuum, with certification representing the high end of that continuum.

24. The previous certification program had a reputation of being a system that applied somewhat arbitrary criteria in a manner that resulted in only very senior, well-known lawyers seeking and achieving the designation. It was perceived, at least by some, as a program whose brand could be summed up as "it is who you know, not what you know."

25. It would appear that despite the goals of the new program, the previous program's reputation survives, affecting at least some lawyers' decision whether to apply to the program.

26. An even more important factor negatively affecting the program is the continuing view among the profession, persistent under the previous program, that there is little meaningful benefit to the program. Recently, each of the Specialty Committees was asked to submit a list of names of members considered to be obvious candidates for immediate certification. A total of 151 practitioners' names were provided. Between April 20 and May 15, 2006 fifty-one were contacted for input on the program and their interest in it. The list of survey questions and the responses are set out at Appendix 3.

27. One hundred per cent of the members polled were aware of the Certified Specialist Program. Thirty-five of 51 members surveyed, or 69%, had previously considered applying for certification, but had not done so. In the case of members who had considered certification, but did not pursue the process their reasons or explanations generally fell into two themes:

    a. lack of time/procrastination; and
    b. of no benefit personally or for clients.

28. For the 16 out of 51 members, or 31%, who had not considered certification, the majority indicated that they could see no benefit or value to becoming a specialist.

29. When these same members were asked if they felt that certification would benefit them and/or their practice, the results were more evenly distributed. Twenty-one out of 37 members answering the question, or 57%, felt that it would not be a benefit, and 16 out

of 37, or 43%, felt that it would be a benefit – with the reasons and range of perceived benefits or the lack of benefits varying among the group from "meaningless designation" to "can help in court." However, the positive responses about the program do not appear to have translated into applications.

30. Finally, with respect to improvements to the program that might make it more appealing, the members surveyed indicated that the application and ongoing certification maintenance requirements should be less onerous. They also noted that unless the "big names" joined, the program would continue to have no value or meaning in the profession.

31. Although 47% asked that an application be sent to them, this has not translated into actual filed applications for certification.

32. Perhaps the most significant factor in the continued low interest in the program is the reality of the structure of the legal profession. Unlike medicine in which limited licensing and specialty designations underpin the profession and are effectively mandatory, the legal profession calls its members to the bar as generalists, entitled to practise in whatever areas they choose and free to develop into *de facto* specialists without the requirement for regulatory approval. The reality of *de facto* specialization has proven extremely resistant to change.

33. Given that many of the profession's most respected lawyers are simply uninterested in the program, it has continued to prove difficult to persuade younger lawyers that the path to expertise is only, or even preferably, through the program. Marketing the program in the face of this reality is a significant challenge.

34. The Committee is of the view that without a significant shift in members' belief that the program is to their benefit and that of their clients, the program will continue to suffer from the limitations described above.

b) Application of Objective Criteria

35. A great deal of work was devoted to establishing detailed criteria upon which to establish each specialty area. The purpose was to ground the program in a competency based approach that could be applied objectively and provide greater credibility to the decisions made.

36. Although the criteria have been thoughtfully developed and have had a positive influence both on the process for assessing certification applications and on the professional development that supports lawyer learning, it appears that subjectivity has not been entirely removed from the process. It appears that some subjective personal opinions and observations continue to have an effect on the decision-making process and it is likely that this reality will continue despite any further systemic approach to remove it. Name recognition still has a greater impact on the decision-making in some cases than was anticipated, despite guidance to Specialty Committees to avoid this approach.

c) Benefits of a Competence Continuum

37. As has been discussed elsewhere, a central goal of the redesign was to further the Law Society's commitment to competence. A certified specialist program developed with

competence based standards and assessment would benefit both the profession and the public. The belief was that such a program was an essential piece of regulating the profession in the public interest, because through the increasing numbers of specialists the public would come to be more and more familiar with the value of seeking legal advice from someone who had met standards of excellence.

38. While this was a laudable purpose, the Committee is concerned that the viability of the program should not continue to be assessed based on an unattained goal. If there is little evidence that the program is steadily moving toward its goal, it is questionable whether it should continue to be included in the Law Society's approach to competence simply in the hope it may one day attract greater interest.

39. As at December 31, 2006 there were approximately 20,069 lawyers in private practice. As at that date there were 719 certified specialists. This represents only 3.6% of members in private practice.

40. It is worth noting that no other law society in Canada has adopted this or a similar program. Nothing in the Law Society's experience with the program after almost 20 years has convinced other governing bodies that their commitment to competence is undermined by the absence of such a program.

41. It is also important to note that the Law Society and the profession's commitment to developmental competence goes beyond the Certified Specialist Program. Continuing legal education continues to be developed to instruct at the essential, intermediate and advanced levels. Competency based standards for practice areas are of use for CLE and practice guidelines and other programs that support member competence. Lawyer associations for individual practice areas continually examine how best to represent the public and this information is disseminated among other members in particular practice areas. Developmental competence naturally exists as a fundamental component of the profession with or without the Certified Specialist Program.

d) Financial Goals

42. When Convocation approved the program redesign it did so on the basis that while developmental costs should be borne by the entire membership, the program itself should be self-funding with certified specialist application and re-certification fees supporting the ongoing administration. Convocation did not accept arguments that if the program was a competency-based endeavour, the entire profession should underwrite it. Despite the goal of self-sufficiency, the program has never achieved cost recovery nor is there a likelihood that it will do so in the future as currently structured.

43. The revenues generated from applications and re-certification fees, despite the increase in those fees when the program was revised, are insufficient to support all of the direct and indirect expenditures related to the administrative activities required to sustain the service.

44. Currently, the program has two full-time equivalent staff assigned to it. In reality, at any given time, there is also the equivalent of one or more full-time professional staff working to ensure that the learning criteria are updated, that any new specialties are supported by articulated developmental and experiential objectives, that marketing and promotion occurs with reasonable frequency within budget parameters, and supporting the work of

the Specialty Committees, the Certified Specialist Board, and the Professional Development, Competence & Admissions Committee.

45. At the time of the launch of the new system, the Director of Professional Development & Competence chose to assign lawyers and professionals from the professional staff of the Professional Development & Competence Department to assist with certification as necessary. The salary and benefits for these individuals has been allocated to the Director's Office and the Practice Management unit. This allowed the Society to leverage staff skills and avoid having the costs assessed against the Certified Specialist Program until the new program was fully developed and had established a stronger footing in the market.

46. In 2004, the first year of the new program, the result was a net profit of approximately $13,000 in keeping with the goal to break even in the first year of the new competence based system as approved by Convocation. In 2005, the program suffered a net loss of approximately $34,000. In 2006, the program saw a marginal net profit of less than $8,000. The 2006 result represents a profit margin of less than 1% (.35%) as compared to Convocation's approved margin for this program of 10% by the end of fiscal 2006.

47. Now in its fourth year of operation and to address Convocation's assessment of the costs of the program, the allocation of the staff expenditures has been assessed against the program for 2007. This reallocation of resources directly to the Certified Specialist Program has increased direct expenditures by 75% and will result in greater losses expected to be in excess of $150,000 unless the number of specialists applying increases significantly in the year.

48. The program's underperformance has other indirect consequences. It had been hoped that modest profits in the program could be re-invested into line items such as marketing to increase the program's visibility. It would be difficult to justify any increase in the program budget for such things as advertising, given the limitations described above.

49. Given the realities set out above, it is difficult to envision greater achievement of the program's goals. The initial flurry of applicants that followed the introduction of new specialties has stopped, suggesting a stagnant market of interest. Moreover, there have been few new members in the longer established specialty areas. Given the age of many of the specialists who have been in the program for almost two decades, the program numbers may soon begin to drop further.

50. The average age of certified specialists is 55. Over 75% of the specialists are 50 years of age or more. They have, on average, been in practice for 20 years.[10]

51. New lawyers and younger lawyers appear not to see this program as beneficial to their practices. After two years of the Law Society promoting the program[11] as a continuum of learning with the 'reward' of designation at the end of the path to cater to more recently called lawyers, there has been no change in the demographic analysis.

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[10] See Appendix 2.

[11] See Appendix 1.

52. The program continues to have no meaningful impact on the public, for the reasons described above. The public does not recognize or understand the notion of a certified specialist, and the membership does not believe that the designation is any more meaningful than the original law degree.

53. In many respects, receiving honours such as the Law Society Medal for contributions to the profession, being listed in one of the national or international "Top Lawyers" listings produced by various publishers, or being asked to speak at a continuing education program for peers or clients, appears to have much more caché and impact both personally and professionally than does a certified specialist designation.

OPTIONS FOR CONSIDERATION

54. The Certified Specialist Program has not met the goals it was to have achieved by 2006, namely,

    a. participation of 6% of the practising membership in the program by December 2004 and 10% by December 2006; and
    b. self-funding status by December 2004 with a 10% profit margin by December 2006.

55. As at December 2006 only 3.6% of the practicing bar are certified specialists and the program continues to be subsidized by the membership. In 2006, the program saw a marginal net profit of less than $8,000. The 2006 result represents a profit margin of less than 1% (.35%).

56. Given this reality, the Committee has developed option for Convocation's consideration in determining how to proceed in respect of the Certified Specialist Program.

END THE PROGRAM

57. The redesigned Certified Specialist Program has adopted the philosophical underpinnings of the 2001 Report. A concerted effort has been made to improve the program and attract new participants, but it would appear that the efforts have not been successful in any meaningful way.

58. The Law Society has expended almost two decades of time, energy, and money on the Certified Specialist Program without being able to make it a meaningful component of the legal landscape.

59. At this stage, one of Convocation's options is to terminate the program, based on the following reasons:

    a. The program has been given ample opportunity to achieve its goals and has been unable to do so.

    b. The profession, including those most familiar with the program, is not convinced of the benefits of the program. This is evident by how few members of the profession have become specialists both under the old and reformulated programs.

c. The public continues to have little understanding of the program and it is difficult, given that the program is not mandatory, to define the true value of the program to them.

d. The reality of *de facto* specialization will continue to impede the program's success.

60. In considering this option the Committee considered the implications for the Law Society's commitment to developmental competence. It is satisfied that regardless of whether the program continues, the Society's commitment to professional competence has never been stronger or better positioned. The 2001 report that created the competence model established a professional development and competence department that for the first time approaches competence as a developmental process, with components for every part of a lawyer's career. The developmental work undertaken for the redesign of the certified specialist program is of ongoing assistance to the department's implementation of its mandate. The developmental standards continue to play a role in the professional development of the profession, with or without the program.

61. If the severe limitations of the program cannot be meaningfully addressed, terminating the program reflects a responsible willingness to make difficult but necessary decisions. In such case, terminating the program would not mean an end to developmental competence programs, but only recognition that this approach is not the right one.

62. Evaluation of the Certified Specialist Program was built into the 2001 Report. To be meaningful, evaluation must contemplate not only minor, but significant change, when the objective evaluation of a program necessitates it. The option to terminate the program would be chosen if Convocation is satisfied that the objective analysis of the certified specialists program, set out above, justifies this option.

The Certified Specialist Board

63. The Certified Specialist Board's responsibility is to oversee and regulate the Certified Specialist Program. The Board is to have four elected bencher members, one lay bencher member and two certified specialist members who are not benchers.[12] All Specialty Committee recommendations go to the Board for approval. It is the Board that certifies the applicant. The Board may accept or reject recommendations from Specialty Committees or request further consideration of an application.

64. The Board has advised the Committee that in its view that the option to terminate the program is premature.

65. Among its main concerns is the fact that the Committee has not consulted sufficiently with third parties, such as the profession or the public to determine,

a. why the program has not attracted greater participation; or

[12] Currently, the Board members are benchers Gerry Swaye, Larry Banack, Kim Carpenter-Gunn, and Bill Simpson. The lay bencher is Ab Chahbar. The non-bencher member of the Board is Alf Mamo. There is one vacancy.

b. whether the public appreciates the nature of the program.

66. The Board expressed the view to the Committee that such consultation is the minimum that should be undertaken to try to determine how the program's goals might be met or at least to better understand why it has not worked.

67. The Committee undertook to seek a preliminary assessment of the nature and cost of a survey. Strategic Council, a public survey firm that has done other survey work with and for the Law Society provided a proposal, set out at Appendix 4.

68. The Committee has considered the proposal, with an estimated cost of between $64,000 and $84,000 depending upon the methodology chosen for the survey of lawyers. While the Committee has no difficulty with the proposed methodology, it continues to have serious concern about the necessity or wisdom of undertaking such a survey.

69. The Committee remains satisfied that based on 18 years of evidence about lawyers' lack of commitment or interest in the program despite efforts to reform it and based on answers the Law Society has received to less formal surveys of lawyers, additional consultation would be unlikely to provide greater insight into the issues. With respect to the public component of the survey, the Committee remains unconvinced that a public survey would provide sufficient data to provide the key to a successful program. Moreover, given that certification will remain a voluntary program and that *de facto* specialization will continue, the Law Society could not and should not represent specialist certification as essential for competent service.

70. Given the reality about the program, fully described in this report, the Committee feels it would not be responsible to spend between $64,000 and $84,000 on a survey. It is of the view that consideration of the option to terminate can be meaningfully done based on the information set out in this report.

The Transitional Period

If the program is to be terminated

71. The Committee has not provided the option of termination without consideration of the implications for those members of the profession who are certified specialists. Ending the program would, of course, have the greatest impact on them. For those who most recently entered the program, this option might be difficult to understand and the Committee appreciates the disappointment and perhaps frustration they might feel. Staff would need to deal with all these members in a sensitive and helpful manner.

72. The Committee is of the view that if Convocation were to approve the option to terminate the program current specialists must be given a reasonable amount of time to re-arrange their affairs to reflect the program's end. While the Committee recommends against allowing those currently certified to maintain that designation indefinitely, the Committee does believe that they should be entitled to maintain the designation until the December 31, 2008. This would allow them to,

a. use up the business cards, stationary and other advertising materials (e.g. Yellow Pages advertisement) that note their specialist designation; and

b. alert their clients and anyone else they deem appropriate to the removal of the designation. (To this end the Law Society should provide all certified specialists with a letter confirming the end of the program.)

73. During this transitional period these specialists should not be required to pay for renewal of their designation nor have to meet their Certified Specialist CLE or other requirements.

74. Clearly, no new applications for certification would be accepted in the transitional period. The transitional period should also include the following steps:

a. Amend the Certification By-law (By-law 38) to reflect the transitional provisions.

b. Repeal By-law 38 upon the completion of the transitional period.

c. Reallocate staff to other areas of the department affected.

d. Develop a communications strategy to,

i. notify members of Specialty Committees, Certified Specialist applicants in process; Certified Specialists; Accredited CLE providers; members; and

ii. develop information and/or talking points to address queries from Certified Specialists; members; government; and the public.

75. There is one other very important transitional issue that would need to be addressed, namely amendments to the Rules of Professional Conduct, specifically Rule 3.05 (Advertising the Nature of Practices) and commentary. The Professional Regulation Committee would be requested to consider necessary changes to the Rules to come into effect on January 1, 2009. In particular, it would be important to consider what Rules were in existence prior to the Certified Specialist Program's introduction in 1988. These amendments would be necessary to ensure that the public is protected from lawyers calling themselves "specialists" once the prohibition against using this language unless certified as such by the Law Society were no longer in place.

If Convocation were to approve a Survey

76. If Convocation were to decide that before any decision on the option to terminate could be made a survey should be undertaken, it would be important to consider how to address this with specialists and applicants.

77. During the period any survey were to be conducted staff handling inquiries from potential applicants should,

a. advise callers and others that the program is being reviewed by Convocation and applications are being held in abeyance pending decision;

b. advise applicants in process that their completed application is being held in abeyance pending a decision by Convocation; and

c. advise new applicants that Convocation will be reviewing and determining the future of the program by a date to be determined, and until then their application will be held in abeyance.

b) CONTINUE WITH THE CURRENT PROGRAM WITH AN ADDED INCENTIVE TO SEEK CERTIFICATION

78. Some suggestion was made to the Committee that one of the difficulties the program may have had in attracting participants is that there is insufficient incentive to seek certification. It has been suggested that if certified specialists were given the right to add a designation after their names, this would come to be recognized as a symbol of expertise. The analogy was drawn to the Q.C. designation.

79. It has been suggested that the appropriate designation would be "C.S." (standing for "certified specialist"), possibly with the appropriate area of law indicated.[13] Such a symbol would be more likely to have meaning for the public and the profession than the current approach, which is a statement on letterhead or business cards that the Law Society of Upper Canada has certified a lawyer as a specialist.

80. Such a designation would become part of an individual's signature and would likely result in greater awareness of the certified status and its meaning. The suggestion is that this additional incentive would result in more lawyers seeking to become certified specialists.

81. The idea of a C.S. designation was considered in 2002 as part of the original business case for the redesigned program, but was not undertaken.

82. To determine whether such a designation would have an impact on the program a period of time to undertake the new approach would be established. Under this option, the C.S. designation would be introduced and marketed for a period of two years while the current program continues. This would provide a reasonable opportunity to assess its effect and whether the program has been able to meet the performance goals approved by Convocation in 2002.

83. If this designation were to be introduced for a two year period it could be done in one of two ways as follows:

a. The current program has not met its goal of becoming self-sustaining, as discussed above. For the period of the two-year pilot testing of the C.S. designation, subsidization of the program would continue. This would allow the incentive to be pursued without placing a new burden on the program of increased fees and would allow the incentive to be assessed on its merits rather than in conjunction with the possible impact of those increased fees. (It is possible, that if the C.S. designation proved to be the incentive suggested, the program could become self-sustaining during that period.); or

[13] In French the designation would be "S.A." for "spécialiste agréé".

b. Convocation could require that the program become self-sustaining, which would necessitate a fee increase of between $250 and $350 annually to current certified specialists beginning with their fees for 2008. (They have already paid their fees for 2007.)

84. If Convocation wishes to pursue the C.S. designation advertising for the designation would be incorporated into the current marketing material. It is important to note that if Convocation approves this option, but ultimately decides in two years to terminate the program, it will have to address how to phase out the designation as part of the transitional approach.

APPENDIX 1

Certified Specialist Program Marketing and Communication Initiatives Since the Program's Redesign in January 2004

New Program Initiatives

- In January 2004, value-added resources were developed for current and new Specialists to assist them in marketing themselves. These resources included:
  a) a ready-to-hang frame for Certified Specialist certificates
  b) A program CD-ROM, which includes:
    - a do-it-yourself news release template for the Specialists to fill in and submit to his/her community newspaper or industry trade papers
    - a sample client letter outlining Certified Specialist designation requirements
    - *Certified Specialist Designation and Your Clients* article, which lists several ways to inform clients, potential clients and colleagues of the designation
    - New Certified Specialist logos in electronic format for Specialists' use on letterhead, website, etc.

Direct Mail Initiatives

- The Certified Specialist Program (CSP) was the focus product in December 2003, January 2004, February 2004, December 2004, January 2005 and April 2005. In each of these months, CSP was marketed by:
  - Product sheets are inserted, if appropriate, in targeted CLE program and/or publication mailings
  - Product sheets are distributed to staff for inclusion in any outgoing Member communication
  - Two or three full-page advertisements in *Ontario Reports*

- Product sheets are inserted with CLE Publication order fulfillment
- Product sheets are placed at the Law Society reception area
- Product sheets are displayed at CLE programs
- Product is focused for one week on the home page of the Law Society Web site

· CSP product flyers were included in literature stand mailer to all county and district law libraries in October 2003. New CSP flyers were produced in 2005 and sent to each of the libraries for stocking in their Law Society literature stands.

· Creation of a 3-panel pamphlet describing the new program, which was distributed to all existing Specialists and was inserted in the *Ontario Reports* on January 23, 2004. A new pamphlet was printed in October 2004 and inserted in the *Ontario Reports* on January 21, 2005.

· The Law Society's *e*-Bulletin Resources for Lawyers is an electronic newsletter that is e-mail to all members of the Law Society and Directors of Professional Development at large law firms. Since the e-mailing of the first e-Bulletin in October 2004, the Certified Specialist Program has been featured in the several issues:

- November 2004
- January 2005
- February 2005 (Directory of Certified Specialist)
- March 2005
- April 2005
- November 2005
- January 2006

· Since April 2004, CSP flyers are included in materials at select CLE programs

Advertising

· Full-page advertisement in The *Globe & Mai*l on January 21, 2004 congratulating the Specialists.

· Full-page advertisement in The *National Post* on January 26, 2005 congratulating the Specialists.

· *Law Times* 1/3 page 2-colour advertisement in January 26, 2004, January 19, 2005 and January 16, 2006 issues.

· The *Lawyers' Weekly* 1/3 page 2-colour advertisement in February 13, 2004, January 21, 2005, and January 13, 2006 issues.

· Monthly full-page *Ontario Reports* advertisements announcing and congratulating new Certified Specialists are placed, dependant on approvals for that month.

· Outside back cover advertisement in the Winter 2004 *Ontario Lawyers Gazette*

- Member Recruitment ads in the *Ontario Reports* and e-Bulletin and on the website for the Certified Specialist Board and for new and existing specialty committees

- CLE accreditation – programs accredited for/by this program are indicated by a CSP logo on the website and program materials and CSP flyers are inserted with CLE materials. Ninety percent (90%) of the Law Society's CLE programs were accredited in 2005

- In 2005, a total of 666 CLE programs, by the Law Society and other providers, were accredited for the Certified Specialist Program.

- CSP pamphlets are included in the call to the Bar package

Media Relations

Quarterly news release

- A news release is distributed to all mainstream and community print and electronic media in the communities of new Specialists.

- Where there is a Francophone Specialist, or a Specialist who can provide legal services in French, the release is also translated and distributed to all French mainstream and community print and electronic media in the community of that Specialist.

- The release is distributed on a quarterly basis (as justified by the numbers of new Specialists certified by the Board).

- The news release is also distributed to the marketing and communications departments at the firms of new Specialists. The information can be further distributed, posted to their websites and pitched to the media.

- In 2004, releases announcing new Specialists were distributed in April, July and November. In 2005, releases were distributed in February, May, July and November. So far in 2006, releases were distributed in March and May.

Fact sheets

- A fact sheet about the Certified Specialist Program was distributed to reporters in attendance at our first-ever reception for ethno-cultural media in June 2005. Information about the program was provided in a fact sheet about ways to find a lawyer. That fact sheet was distributed at the media reception and to almost 400 media serving ethno-cultural communities in Toronto and the Greater Toronto Area. The fact sheet is also included in media kits for the Call to the Bar ceremonies.

Media Inquiries/Coverage

- Information about the redesigned program was pitched in advance of the launch to Law Times. Law Times did a full-page story in November 2003.

- Reporters who contact the Law Society looking for a Specialist to interview are often directed to the online Directory of Certified Specialists, if the inquiry relates to an area of law that is certified by the program.

- In 2005, we received media inquiries about the program from the *Globe and Mail* and *Perth Courier*, and more recently from *The National.*

- Since the launch of the redesigned program, there has been coverage in:

    - *Law Times*
    - *The Lawyers Weekly*
    - *Orillia Packet & Times*
    - *North Bay Nugget*
    - *Thunder Bay Chronicle-Journal*
    - *Windsor Star*
    - *Perth Courier*
    - *St. Catharines Standard*
    - *The National*
    - Windsor radio station CKLW AM

Print Publications

Public Brochures

- Information about the CSP has been added to the brochure *What the Law Society Can Do For You,* which is being updated for distribution in 2006. The brochure has been translated and is being produced in English, French, Chinese, Spanish, Farsi and Tamil. Thousands of copies will be distributed to community agencies, clinics and other organizations serving the public by summer 2006. The brochures will also be distributed at Law Society events for the public and posted to our website.

Ontario Lawyers Gazette

- The *Ontario Lawyers Gazette* has consistently provided information related to CSP since its redesign and helped to promote certification, accreditation, working group and committee recruitment, and the Directory of Certified Specialists.

- The Fall/Winter 2003 issue dedicated the Focus section to the launch of the redesigned program. The issue featured interviews with several Specialists who discussed the process and the benefits of certification.

- Five issues of the *Ontario Lawyers Gazette* in 2004 featured news about the program:

    - The January/February 2004 issue included information on the launch of the accreditation of CLE programs.
    - The March/April issue included the list of new Specialists.
    - The July/August issue included the list of new Specialists.

- The September/October issue included a promo for the Directory of Certified Specialists
- The November/December issue included a call for lawyers to apply for working groups and promotion of Health Law and Municipal Law as new specialties. There was also a listing of new Specialists.

· Each issue in 2005 included an announcement of new Specialists and the Winter 2005 issue also included promotion of the launch of the new interactive Directory of Certified Specialists.

· The Winter 2006 issue included a call for applications for specialty committees and promotion of the new specialty areas: Health Law and Municipal Law.

Annual Report

· Information about the Certified Specialist Program is included in the Annual Report Performance Highlights. The report is distributed to approximately 3,000 people on our stakeholder list and also posted online.

External Publications

· Information about the launch of the Real Estate Law specialty area was included in the newsletter *TitlePLUS Times*, September 2004 edition.

· Information also appeared in the University of Western Law School *Communiqué,* October 2004 edition.

Online Communications

· The new Member Resource Centre website has a prominent section devoted entirely to the Certified Specialist program. Program information is available in French and English on the website.

· e-Transactions, the Law Society's e-commerce website contains a page for the Certified Specialist Program, which lists all upcoming accredited programs. Also, all the programs that have been accredited for the Certified Specialist Program are identified by the Certified Specialist logo on the program calendar.

· All information that is distributed to the media and to the membership is also posted on the Law Society's main website including news releases for the Certified Specialist Program and other program news and announcements.

· In 2004 the following items related to the program were posted:

- Updated, detailed program information including application materials
- News highlight announcing redesigned program
- News releases announcing Certified Specialists (3)
- News highlights announcing Certified Specialists (3)
- News highlights seeking applicants for Certified Specialist Board (2)

- News highlight seeking member input in working groups
- News in online version of the *Ontario Lawyers Gazette* (6)

· In 2005 the following items related to the program were posted:

- News releases announcing Certified Specialists (4)
- News highlights announcing Certified Specialists (4)
- News highlight to announce launch of new Directory of Certified Specialists
- Announcements in online version of the *Ontario Lawyers Gazette* (4)

· In 2006 the following items have been posted:

- News highlight to encourage lawyers to consider specialization
- News releases announcing Certified Specialists (2)
- News highlights announcing Certified Specialists (2)
- Announcements in online version of the *Ontario Lawyers Gazette* (1)

· Broadcast messages are distributed to a stakeholder list alerting recipients to visit the Law Society website for updated news. The distribution list includes lawyers, media, community groups and other legal partners, as well as benchers, judges and government officials.

Expenses

Initiative	Cost
Press releases - 9 @ $650.00 each	$5,850
Product flyers 30,000 @ $35.93 per 1,000	$1,077
Advertisements in Lawyer's Weekly (3)	$3,750
Advertisements in Law Times (3)	$3,750
Reprints of 2004 Globe & Mail advertisement (650)	$340.00
Ready-to-hang frames (1,000)	$11,500
Program CD-ROMs (1,000)	$1,200
Pamphlets printing (twice)	$5,000
Insert of pamphlet in *Ontario Reports* (twice)	$9,400
2004 Newspaper ad in Globe & Mail	$50,000
2005 Newspaper ad in National Post	$35,000
Total marketing and communication expense for this program since December 2003	$124,367.00

Demographic Analysis: Certified Specialist Program, as at May 2006

Bankruptcy and Insolvency Law

Total Number of Members Certified: 9
Average age: 51
Year of call average: 1979
Geographic distribution: Toronto[14] : 6 Ottawa: 3

Citizenship and Immigration Law

Total Number of Members Certified: 38
Average age: 51
Year of call average: 1988
Geographic distribution: Burlington: 1, Fort Erie: 1 Hamilton: 1 London: 1 Toronto: 32 Ottawa: 1 Windsor: 1

Construction Law

Total Number of Members Certified: 34
Average age: 51
Year of call average: 1983
Geographic distribution: Brampton: 1, Burlington: 1, Concord: 1, Hamilton: 1, London: 1, Mississauga: 2, Oakville: 1, Ottawa: 2, St. Catharines: 2, Toronto: 22

Corporate and Commercial Law

Total Number of Members Certified: 13
Average age: 57
Year of call average: 1977
Geographic distribution: Barrie: 2, London: 2, Oakville: 1, Ottawa: 1, Richmond Hill: 1, St. Catharines: 1, Thunder Bay: 1, Toronto: 4

Criminal Law

Total Number of Members Certified: 86
Average age: 53
Year of call average: 1977
Geographic distribution: Barrie: 4, Bracebridge: 1, Brampton: 1, Guelph: 1, Hamilton: 3, Kingston: 2, Kitchener: 2, London: 2, Mississauga: 2, Newmarket: 2, Niagara Falls: 1, Oakville: 1, Oshawa: 3, Ottawa: 13, Owen Sound: 1, Simcoe: 1, St. Catharines: 3, Sudbury: 1 Thunder Bay: 3, Toronto: 33, Windsor: 3

Civil Litigation

[14] Toronto includes: Agincourt, East York, Etobicoke, Islington, Scarborough, York, West Hill, Weston and Toronto.

Total Number of Members Certified: 313
Average age: 57
Year of call average: 1976
Geographic distribution: Ajax: 1, Barrie: 7, Belleville: 3, Brampton: 3, Burlington: 2, Goderich: 1, Hamilton: 24, Kapuskasing: 1, Kingston: 2, Kirkland Lake: 1, Kitchener: 8, London: 13, Markham: 1, Midland: 1, New Liskeard: 1, Newmarket: 1, Niagara Falls: 1, North Bay: 1, Oakville: 1, Oshawa: 2, Ottawa: 24, Owen Sound: 2, Pickering: 1, Point Edward: 1, Prescott: 1, Sarnia: 1, Sault Ste. Marie: 2, Simcoe: 1, St. Catharines: 6, Sudbury: 1, Thornhill: 1, Thunder Bay: 3, Timmins: 1, Toronto: 182, Vaughn: 1, Waterloo: 1, Whitby: 2, Windsor: 7

Estates and Trusts Law

Total Number of Members Certified: 19
Average age: 50
Year of call average: 1981
Geographic distribution: Hamilton: 1, Oakville: 1, Ottawa: 2, Perth: 1, Toronto: 13, Windsor: 1

Environmental Law

Total Number of Members Certified: 30
Average age: 49
Year of call average: 1985
Geographic Distribution: Brampton: 1, Guelph: 2, Markham: 2, Toronto: 25

Family Law

Total Number of Members Certified: 57
Average age: 54
Year of call average: 1978
Geographic distribution: Ancaster: 1, Barrie: 1, Hamilton: 4, Kanata: 1, Kapuskasing: 1, Kingston: 1, Kitchener: 3, London: 4, Mississauga: 3, Ottawa: 6, Sudbury: 1, Thunder Bay: 2, Toronto: 24, Windsor: 5

Intellectual Property Law

Total Number of Members Certified: 29
Average age: 53
Year of call average: 1982
Geographic distribution: Ottawa: 10, Toronto: 19

Labour Law

Total Number of Members Certified: 23
Average age: 53
Year of call average: 1978
Geographic distribution: Hamilton: 1, Kingston: 1, Ottawa: 3, Thunder Bay: 2, Toronto: 16

Real Estate Law

Total Number of Members Certified: 25

Average age: 57
Year of call average: 1975
Geographic distribution: Barrie: 1, Concord: 1, Hamilton: 1, Kingston: 2, Kitchener: 1, London: 2, Midland: 1, Orillia: 1, Ottawa: 1, Sault Ste Marie: 1, Thunder Bay: 1, Toronto: 11, Windsor: 1

Workplace Safety and Insurance Law

Average age: 52
Year of call average: 1982
Geographic distribution: Ottawa: 1, Toronto: 4, Windsor: 2

Overall Program Statistics

Total Number of Members Certified: 686
Average Age: 55
Average year of call: 1977
Total Number of Specialists in their 80's: 5
Total Number of Specialists in their 70's: 39
Total Number of Specialists in their 60's: 169
Total Number of Specialists in their 50's: 309
Total Number of Specialists in their 40's: 152
Total Number of Specialists in their 30's: 12

These numbers are based on a single certification for each member. If a member is dually certified they are only listed in one of the two specialty areas. The age statistics are based on the age of members as of January 1, 2007.

Location of Certified Specialists

Ajax	1
Ancaster	1
Barrie	14
Belleville	3
Bracebridge	1
Brampton	7
Burlington	2
Concord	2
Detroit	1
Don Mills	1
Fort Erie	1
Goderich	1
Guelph	3
Hamilton	36
Kanata	1
Kapuskasing	2
Kingston	8
Kitchener	13
London	24
Markham	3

Midland	2
Mississauga	10
New Liskeard	1
Newmarket	2
Niagara Falls	2
North Bay	1
North York	7
Oakville	5
Orillia	1
Oshawa	5
Ottawa	69
Owen Sound	3
Perth	1
Pickering	1
Point Edward	1
Prescott	1
Richmond Hill	1
Sarnia	1
Sault Ste. Marie	3
Simcoe	2
St. Catharines	1
Sudbury	3
Thornhill	1
Thunder Bay	12
Timmins	1
Toronto	390
Vaughn	1
Waterloo	3
Whitby	2
Willowdale	1
Windsor	20

Total Outside of GTA: 302

Toronto: 390

Size of Firm

Sole Practitioners	=112
Firm 2-5 lawyers	=143
Firm 6-10 lawyers	=112
Firm 11-25 lawyers	=117
Firm 26 lawyers and up	=208

APPENDIX 3

Survey Responses

At the request of the Certified Specialist Board, the members of eight specialty committees provided staff with 151 names of potential candidates for certification. The committee members were asked to base their selection on their personal perception that the individual would be an obvious candidate for certification.

Staff contacted 65 members from across all eight specialty areas and spoke with 51 members directly.

The practice breakdown for the fifty-one members is as follows:

Citizenship and Immigration Law	2
Civil Litigation	2
Construction Law	6
Environmental Law	9
Estates and Trusts Law	10
Intellectual Property Law	3
Labour Law	9
Real Estate Law	10

Each survey participant was asked 4 questions with respect to the Certified Specialist Program. A statistical breakdown of the results along with a collection of comments from each question follows.

1. Are you aware of the Certified Specialist Program?

100% (51/51) of survey participants were aware of the program.

Comments:

"The Law Society has done a good job to market it."

"I am very aware of the program as I have been a reference more than once."

2. Are you aware that the Certified Specialist Program was redesigned in January 2004?

49% (25/51) of survey participants were aware of the redesign.

Comments:

"Yes, I have heard the application has improved."

"I was on the OBA committee that worked on the criteria."

3. Have you considered applying for certification?

a) 69% (35/51) of participants have considered applying for certification in their practice area. From this group:

- 68% (24/35) identify procrastination and not enough time as the reason for not filing an application
- 25% (9/35) of this group felt that the program had no benefit for them
- 7% (2/41) have not filed due to concerns with their ability to meet the annual CLE requirements of the program.

Comments:

"I completed 98% of the application and then stopped. My staff did a lot of the work and when it got to me it stopped."

"I just haven't gotten around to it."

"My application is sitting on my desk."

"I was thrown off as they would not grandfather me into the program."

b) The members that have not considered applying have cited the following reasons for their decisions:

- 69% (11/16) of members see no benefit in the program
- 25% (4/16) procrastination
- 6% (1/16) other

Comments:

"I have enough clientele. I have been practicing in Estates for 18 years."

" I don't see the value. If it was easier to apply I might do it."

"My clients will not benefit from this."

"I have not gotten around to it."

"The courts will hold a specialist to a higher standard."

"The reasons behind not applying are philosophical. I never accepted the LSUC program and will not be applying."

"The Society grand fathered a lot of stiffs into the program."

4. Do you think that becoming a certified specialist would benefit you and your practice?

57% (21/37) of members identify that the program would not benefit their practice
43% (16/37) of members identify that the program would benefit their practice

Comments:

“Meaningless designation in the marketplace.”

“There is not value for a sole practitioner.”

“No marketing needed for my practice.”

“Institutional clients assess your expertise over time not by a designation.”

“My patent designation is sufficient.”

“Most of my business comes by word of mouth.”

“Possible benefits in American marketing initiatives.”

“I had a client ask if I was a specialist.”

“It is a profile thing; can be used in marketing, can help in court, provides instant credibility. I have dealt with the specialization issue in court, because I said I was specialized but the court questioned why I was not certified.”

Conclusion

The survey participants were also asked to provide recommendations for changes to the Certified Specialist Program. The proposed recommendations were to make the application process less onerous, waive application fees for legal aid lawyers and “go out and get all of the big names to buy into the program otherwise there is no meaning to the program at all”.

In addition to the above, 47% (24/51) of survey participants requested that an application be sent to them.

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

Copy of a Memo from W. Hugh Anderson of The Strategic Counsel dated November 9, 2006 re: Certified Specialist Program.

(Appendix 4, pages 41 – 47)

CONVOCATION ROSE AT 1:30 P.M.

Confirmed in Convocation this 29th day of March, 2007

Treasurer