MINUTES OF CONVOCATION

Thursday, 25th May, 2006
9:00 a.m.

PRESENT:

The Treasurer (Gavin MacKenzie), Alexander, Backhouse (by telephone), Banack, Campion, Carpenter-Gunn, Caskey, Chahbar, Cherniak, Chilcott, Coffey, Copeland, Crowe, Curtis, Dickson, Dray, Eber, Filion, Finkelstein, Finlayson, Gold, Gotlib, Gottlieb, Harris, Henderson, Lawrence, Legge, Manes, Martin, Minor, Pattillo, Pawlitza, Porter, Potter, Robins, Ross, Ruby, St. Lewis, Sandler, Simpson, Swaye, Symes, Topp, Wardlaw and Wright.

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Secretary: Katherine Corrick

The Reporter was sworn.

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IN PUBLIC

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TREASURER'S REMARKS

The Treasurer informed Convocation of the passing of Professor Peter Oliver who died of cancer on May 14, 2006.

Professor Oliver was a professor of history at York University concentrating mainly on nineteenth and twentieth century Ontario history. Professor Oliver was the Editor-In-Chief of the Osgoode Society for Canadian Legal History since it was established in 1979. Since then the Osgoode Society has published 66 books and has carried out the largest legal oral history programme in the world.

On behalf of Convocation the Treasurer expressed sincere condolences to Professor Oliver's partner Sandra Webster and his children and grandchildren. A celebration of Peter Oliver's life will take place on June 8th at 5:30 p.m. in the Donald Lamont Learning Centre at Osgoode Hall.

Congratulations were extended to Earl Cherniak who was presented with the Osgoode Hall Law School Alumni Gold Key Award for Achievement. Congratulations were also extended to former Treasurer, Justice Frank Marrocco who was honoured on May 18th by the Italian Advocates' Organization at their annual Judges Night and to life bencher Austin Cooper, Q.C. who will be the recipient of the Advocates' Society Medal at a dinner in his honour on May 30th.

The Treasurer reported on his activities over the last month. While in Belleville speaking to the Hastings Law Association' s annual meeting the Treasurer spoke to Ron Cass whose health has prevented him from attending Convocation in recent months. This month marks the 40th anniversary of Mr. Cass's first Convocation in 1966 when he was elected as a bencher and the Treasurer extended congratulations and best wishes on behalf of Convocation.

Congratulations were extended to Marisha Roman, Aboriginal Issues Co-ordinator who won the Tom Longboat Aboriginal Athlete of the Year Award for 2005.

The Treasurer announced that Karen Teasdale, the Law Society's Senior Reference Librarian retired on May 12th after 33 years of dedicated service.

DRAFT MINUTES OF CONVOCATION – APRIL 27, 2006

The Draft Minutes of Convocation of April 27, 2006 were confirmed.

MOTION – APPOINTMENT TO LAWPRO BOARD OF DIRECTORS

It was moved by Laurie Pawlitza, seconded by Abdul Chahbar, that James Caskey be appointed to the LAWPRO Board of Directors to replace John Campion, who was previously nominated by Convocation to the LAWPRO Board of Directors.

Carried

REPORT OF THE DIRECTOR OF PROFESSIONAL DEVELOPMENT & COMPETENCE

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

The Director of Professional Development and Competence reports:

B.

ADMINISTRATION

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

B.1.1. (a) Bar Admission Course

B.1.2. The following candidates have completed successfully the Bar Admission Course, filed the necessary documents, paid the required fee, and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, May 25th, 2006:

Michael Wayne Bauer	Bar Admission Course
Michael Joseph Bird	Bar Admission Course
Riad Brahimi	Bar Admission Course
Annie Marie Hélène Madeleine Durand-Brunet	Bar Admission Course
Stephen Roy Francispillai	Bar Admission Course
Tracey Ann Brown Gabbidon	Bar Admission Course
Jamie Maninder Kang	Bar Admission Course
Zahra Khedri	Bar Admission Course
Sangwa Bavon Lupika	Bar Admission Course
Michelle Lyn Packer	Bar Admission Course
Geoffroy Pavillet	Bar Admission Course
Kevin Joseph Pinsonneault	Bar Admission Course
Sandeep Prasad	Bar Admission Course

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

B.1.4. The following candidates have filed the necessary documents, paid the required fee and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, May 25th, 2006:

Sandra Martins Rodrigues	Province of Alberta
Demetris John Sirounis	Province of Saskatchewan

ALL OF WHICH is respectfully submitted

DATED this the 25th day of May, 2006

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

Carried

CALL TO THE BAR (Convocation Hall)

The candidates listed in the Report of the Director of Professional Development & Competence were presented to the Treasurer and called to the Bar with the exception of Sandeep Prasad.

The Treasurer adjourned Convocation. [Mr. Swaye then presented the candidates to Justice Gerald F. Day to sign the rolls and take the necessary oaths.]

Convocation reconvened.

ELECTION OF TREASURER

The Secretary announced that the only candidate nominated for the office of Treasurer was Gavin MacKenzie.

The Secretary declared Gavin MacKenzie elected as Treasurer.

REPORT OF THE INVESTIGATIONS TASK FORCE

Mr. Cherniak presented the Report to Convocation.

Final Report to Convocation
May 25, 2006

Investigations Task Force

Task Force Members
Earl Cherniak, Chair
Carole Curtis
Allan Gotlib
Laurie Pattillo
Heather Ross
Mark Sandler
Beth Symes

Purposes of Report: Decision

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

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INVESTIGATIONS TASK FORCE
MOTION

That Convocation approves the following recommendations of the Investigations Task Force:

Recommendation 1

That the directors of Professional Development and Competence and Professional Regulation prepare an issues paper for review by the Professional Regulation Committee and the Professional Development, Competence and Admissions Committee on co-ordinating conduct, competence and capacity processes. The purpose of this initiative would be to deal appropriately with both remedial and enforcement aspects of members' conduct, and to avoid parallel proceedings and information "walls" between departments that reduce the effectiveness of the Society's response to members' regulatory issues.

Recommendation 2

That Convocation revoke the Complainant's Protocol and the policy entitled "Investigation of Third Party Complaints Where Litigation is Pending" (at Appendix 1), and adopt the following Convocation policies that require staff to create and maintain express operational standards with respect to complaints handling and "third party" complaints:

a. That operational procedures for the investigation, determination and resolution of complaints be implemented to ensure a process that is

   i. timely and thorough,
   ii. informative, in which reasons are generally provided to the complainant and the member for the decisions made by the Society's staff in determining or resolving complaints, and
   iii. in keeping with the complainant's and the member's expectation of professionalism, courtesy, respect, candour and an appropriate level of communication on the part of the Law Society; and

b. i. That the investigation of a complaint about a member made by a complainant who is adverse in interest to the member's client when litigation is pending be handled in a manner that protects the client's privilege, protects the confidentiality of the relationship between the member and client and does not operate to prejudice the rights of a member's client in the litigation;
   ii. That the investigation of a complaint about a member made by a complainant who is adverse in interest to the member's client in an ongoing transaction be handled in a manner that protects the client's privilege, protects the confidentiality of the relationship between the member and client and does not operate to prejudice the rights of a member's client in the transaction;
   iii. That the investigation of a complaint about a member made by a complainant who is adverse in interest to the member when litigation is pending be handled in a manner the protects that member's rights in the litigation.

Recommendation 3

a. That to improve the accessibility of rules, by-laws, and other regulations for members and the public, a communications initiative be authorized to integrate all information connected to the regulatory processes.

b. That to improve information about the results of hearings or appeals for members and the public, the Tribunals Committee consider improvements that may be made to existing publication policies.

INVESTIGATIONS TASK FORCE
FINAL REPORT TO CONVOCATION
EXECUTIVE SUMMARY

1. On November 25, 2004, Convocation created the Investigations Task Force, with the following terms of reference:

    a. To review the current status and efficiency of the investigations process,
    b. To review performance and production targets,
    c. To identify issues which may inhibit timely production and completion of investigations, and
    d. To consider the necessary and available resources,

    and after conducting its review, to prepare a report including its recommendations for any policy, process or legislative changes required to improve the timeliness and the effectiveness of the process.

The Importance of Timely Investigations

2. In keeping with its mandate to govern lawyers in the public interest, the Law Society seeks to exercise its regulatory authority in a timely and effective manner. This responsibility includes responding to complaints of professional misconduct about the Society's members and investigating the allegations where appropriate, within a process that is fair to the member and effectively addresses the legitimate concerns of the complainant.

3. A conduct investigation under the *Law Society Act* is commenced on the basis of a reasonable suspicion of misconduct under section 49.3 of the Act. The investigation forms the basis for regulatory action that may be taken against a member, including formal disciplinary action commenced by a Conduct Application.

4. Timely investigations are critical to the effectiveness of the Law Society's regulatory process. The timely completion of an investigation is necessary to maintain the public's and the profession's confidence in the Law Society's regulation of lawyers.

The Task Force's Review

5. In this context, a first objective of the Task Force was to ensure that, given statistical analyses showing a large inventory of complaints cases within the various Professional

Regulation departments, if timeliness was an issue, the appropriate steps would be taken to deal with it.

6. The Task Force reviewed detailed information on the current status of the operations in the Professional Regulation Division, developments and recent changes aimed at improving the process and ongoing efforts to address issues that affect the timeliness and quality of investigations.

7. To an extent, since 2000, the impetus for certain changes within the Division came from the July 2000 report of The Hon. W. David Griffiths, who was appointed by the Law Society to review its complaints, investigation and discipline processes with a view to making recommendations, where appropriate, for improvement to these processes.

8. The Task Force also noted that the focus of many of the changes in the Division mirrored the direction of the Supreme Court of Canada in its 2004 decision in *Finney v. Barreau du Quebec*.[1] This case highlighted a number of key regulatory principles including timeliness, effective response to risk, effective communications with complainants, integration of information in the complaints and discipline history of a member, appropriate response to risks presented by a member, transparency and a fair process.

9. Upon her appointment in 2002, the Director of Professional Regulation ("the Director"), with staff and managers, undertook a series of assessments of the structure, productivity and quality of work of the Professional Regulation Division. Based on these assessments, the Director and the staff instituted structural and managerial changes to improve the Division's effectiveness, transparency, consistency and productivity. Many of the changes relate to Mr. Griffiths' recommendations and the concepts discussed in the *Finney* decision.

10. The Division now includes four departments, discussed below, responsible for complaints investigations and related matters.

11. The Task Force received comprehensive reports from the Director and the managers of the operational departments about the important changes that occurred as a result of the restructuring initiative. Through these reports, the Task Force learned that the timeliness of investigations has been a specific focus of the Professional Regulation Division for at the least the past three years. This informed the operational initiatives to redesign and improve processes and supports for investigations, ensure appropriate staffing levels and institute appropriate monitoring and assessment of the investigation. The major initiatives included the following:

    a. A regulatory Intake department was established to screen and stream cases to the two existing complaints handling departments, Complaints Resolution and Investigations. It also provides early resolution where appropriate. Intake established the Early Intervention Unit to handle complaints that are primarily minor in nature and typically do not require a lengthy investigation;
    b. A Monitoring and Enforcement Department was established to monitor disciplinary orders, undertakings and bankruptcies, and to assume responsibility for collecting costs;

[1] [2004] 2 S.C.R. 17

c. A Special Intervention Stream was begun to address the issue of members who have multiple complaints;
d. Templates were created for various Division reports and memoranda and training initiatives were established;
e. A file backlog reduction effort in Complaints Resolution effected a significant reduction in the median age of departmental files by the end of 2004;
f. The Case Plan was instituted in Investigations which establishes targets for stages in an investigation and ensures an early review of the case to determine the direction of the investigation;
g. The Case Conference was instituted in Investigations, which ensures that discipline counsel and other senior managers and counsel review any case advancing to the Proceedings Authorization Committee stage;
h. A standardized Investigations Report was instituted, which advises discipline counsel of the results of the investigation and assists in organizing the investigative work product;
i. Discipline counsel are now assigned to every Investigations case so that counsel can be further integrated in the work of Investigations;
j. Case management targets were established beginning in January 2004, aimed at reducing the median age of the inventory of complaints;
k. An analyst position was added to the Division which gave the Division the ability to retrieve better information from the database and construct reports that managers can use to analyze production;
l. A new case management system with flexible reporting capability went live in October 2005, and will greatly improve the ability of the Division to manage caseloads and improve access to information about a particular case.

12. To the extent that proposed changes in the Division required policy decisions by Convocation, these matters were referred through the Professional Regulation Committee to Convocation for decision, were approved and have been or are in the process of being implemented. For example,

a. In February 2005, Convocation approved an amendment to the test for an interlocutory suspension and restriction order (formerly called an interim suspension order) in s. 49.27 of the Act to require “a belief on reasonable grounds that there is a significant risk that members of the public would be harmed” before such an order is granted;
b. On June 22, 2005, Convocation approved a summary hearings process for certain “fail to” matters, supported by a summary investigations process. This enables single bencher hearings, which can be scheduled weekly if necessary, for matters involving members who fail to respond to inquiries from the Society, members who fail to co-operate with a person conducting an audit, investigation, review, search or seizure under Part II of the *Law Society Act*, and members who fail to maintain financial records as required by By-Laws 18 and 19;
c. On June 22, 2005, Convocation approved changes to the Law Society’s *Rules of Practice and Procedure* to permit motions without notice to the member for interlocutory suspension and restriction order and to provide more relaxed rules around evidence. This enhances the efficacy of this remedy, which is primarily meant to address urgent problems apparent before the conduct investigation is complete and the Society is ready to prosecute a member on the merits of a Conduct Application;

d. On December 9, 2005, Convocation approved the Professional Regulation Committee's recommendation for a new by-law that requires members to report to the Society the fact of criminal and other charges and the disposition of those charges. The Task Force supports this initiative, which should assist the Society in pursuing an interlocutory suspension and restriction order when appropriate.

13. In the Task Force's view, through these ongoing improvements to the investigative processes, the necessary steps have been or are being taken to support a fair and timely process.

The Recommendations

14. As such, few recommendations at the policy level have resulted from the Task Force's review. To the extent that some aspects of the investigations process could be improved, the Task Force is proposing three recommendations, set out below, each of which are followed by brief reasons for the recommendation.

Utilization Of Available Information and Tools

Recommendation 1

That the directors of Professional Development and Competence and Professional Regulation prepare an issues paper for review by the Professional Regulation Committee and the Professional Development, Competence and Admissions Committee on co-ordinating conduct, competence and capacity processes. The purpose of this initiative would be to deal appropriately with both remedial and enforcement aspects of members' conduct, and to avoid parallel proceedings and information "walls" between departments that reduce the effectiveness of the Society's response to members' regulatory issues.

15. The Society requires a more robust and co-ordinated approach to certain regulatory issues, particularly where the underlying issues could be serious and the Society is unable to investigate because of the member's failure to co-operate. While the summary investigations and hearing process noted above will help, some gaps continue to exist.

16. One gap is in the responses to some regulatory issues that illustrate concerns about a member's competence. While a practice review may be ordered, and in serious cases, a competence hearing authorized, there is a need for a tool that is more effective than the practice review in dealing with both the regulatory and competency issues but falls short of the severe remedy of a competency hearing.

17. The Task Force believes that there is a need to align conduct, competence and capacity processes. This will permit the Society to deal appropriately with both the remedial and enforcement aspects and avoid parallel proceedings and information "walls" between departments that reduce the effectiveness of the Society's response to members' regulatory issues. This is an issue that relates to the *Finney* decision and the ability of the Society to respond effectively to risk that members present to the public interest.

18. A number of tools could be employed to increase the scope of the Society's regulatory response through proactive measures. These include implementation of a random practice review program, integration of competence enforcement with capacity and

conduct investigations and prosecutions and improved alignment of practice review and spot audit with regulatory response, particularly with respect to sharing information.

19. To this end, the Task Force is recommending that the directors of Professional Development and Competence and Professional Regulation prepare an issues paper on this subject for review by their respective committees.

Changes To Operational Policies Established By Convocation

Recommendation 2

That Convocation revoke the Complainant's Protocol and the policy entitled "Investigation of Third Party Complaints Where Litigation is Pending"[2] and adopt the following Convocation policies that require to staff to create and maintain express operational standards with respect to complaints handling and "third party" complaints:

a. That operational procedures for the investigation, determination and resolution of complaints be implemented to ensure a process that is

   i. timely and thorough,
   ii. informative, in which reasons are generally provided to the complainant and the member for the decisions made by the Society's staff in determining or resolving complaints, and
   iii. in keeping with the complainant's and the member's expectation of professionalism, courtesy, respect, candour and an appropriate level of communication on the part of the Law Society; and

b. That the investigation of a complaint about a member made by a complainant who is adverse in interest to the member's client when litigation is pending be handled in a manner that protects the client's privilege, protects the confidentiality of the relationship between the member and client and does not operate to prejudice the rights of the member's client in the litigation;
c. That the investigation of a complaint about a member made by a complainant who is adverse in interest to the member's client in an ongoing transaction be handled in a manner that protects the client's privilege, protects the confidentiality of the relationship between the member and client and does not operate to prejudice the rights of the member's client in the transaction;
d. That the investigation of a complaint about a member made by a complainant who is adverse in interest to the member when litigation is pending be handled in a manner the protects that member's rights in the litigation.

20. From time to time, Convocation adopts policies that relate directly to the manner in which conduct investigations are undertaken.

21. While the policies are useful to a degree, the "downside" to some of these policies, in particular those which amount to directives or which are very specific, is that they may not provide the flexibility that is needed to address some situations to which the policies apply. As Convocation policies, they can be cumbersome to amend when there is a need to do so and in many respects, the policies are insufficient to support the

[2] These policies are in Appendix 1 to the Report.

investigative work. This means that, in some cases, observing the policies can affect the timeliness of an investigation.

22. The Task Force reviewed two examples of such policies that set operational investigative standards for staff: the Complainant's Protocol and the Third Party Complaints Policy. The Task Force believes that they should be replaced with general direction to staff from Convocation to have and maintain express operational standards, which staff would create and implement.

Ensuring A Fair and Transparent Process

Recommendation 3

a. That to improve the accessibility of rules, by-laws, and other regulations for members and the public, a communications initiative be authorized to integrate all information connected to the regulatory processes.
b. That to improve information about the results of hearings or appeals for members and the public, the Tribunals Committee consider improvements that may be made to existing publication policies.

23. Part of maintaining a fair investigative and adjudicative process is permitting the public and members access to information about the process.

24. The Task Force agreed that accessibility of rules, by-laws and other regulatory documents for members and for the public should be enhanced. This issue is largely a communications initiative that should integrate all information connected to those regulatory processes where the public and the membership intersect. The Task Force urges the Communications department to review its current initiatives and determine where enhancements can be made.

25. Public information about the results of hearings or appeals should also be enhanced. For example, the Law Society's web site does not include decisions where the application is dismissed. In the Task Force's view, this is a matter best dealt with by the new Tribunals Committee as an aspect of general publication policies.

Summary

26. The Task Force is encouraged by the leadership that the Director has brought to the Professional Regulation Division since 2002. Structural changes have been effected in the operations to support a timely process for complaints handling. Policy issues that relate to processes and procedures have been identified and addressed at the committee and Convocation levels to ensure that the Law Society's legislative and rule-based framework adequately supports the professional regulation of lawyers.

27. The Task Force believes that the Professional Regulation Division is well-equipped to deal with the matters within its jurisdiction and that the Director will continue to make operational improvements and suggestions for necessary policy changes as the work unfolds, and set realistic goals for the timely completion of investigations.

28. The Task Force also understands that increased timeliness in complaints handling will likely mean an increase in the number of matters that will be scheduled for hearing

before the Society's Hearing Panel. It is likely that increased human and financial resources will in time be required for the hearing stage to address this increase in cases.

29. The Task Force is confident that while the type of review it undertook is valuable, on an ongoing basis, the appropriate systems are in place institutionally to support the timeliness and quality of the Division's work, in order to fulfill the Society's regulatory mandate. The Task Force's recommendations are intended to support that work and the Division's goals and ultimately, make the Society a better regulator.

INVESTIGATIONS TASK FORCE
FINAL REPORT TO CONVOCATION

Introduction

1. On November 25, 2004, Convocation created the Investigations Task Force to examine the process of investigations of allegations of professional misconduct and conduct unbecoming, with a specific focus on the timeliness of investigations.

2. The Task Force's terms of reference required it to

   a. review the current status and efficiency of the investigations process,
   b. review performance and production targets,
   c. identify issues which may inhibit timely production and completion of investigations, and
   d. consider the necessary and available resources,

   and after conducting its review, prepare a report including its recommendations for any policy, process or legislative changes required to improve the timeliness and the effectiveness of the process.

3. A first objective of the Task Force was to ensure that, given statistical analyses showing a large and growing inventory of complaints cases within the Professional Regulation Division, if timeliness was becoming an issue, the appropriate steps would be taken to deal with it.

4. The Task Force was also mindful of a previous review of the Division's operations that focussed on timeliness and recent jurisprudence that commented on a regulator's responsibilities in investigating complaints of misconduct. In the decision of the Supreme Court of Canada in *Finney v. Barreau de Quebec*, [2004] 2 S.C.R. 17, the Court, after an examination of the Barreau's investigation of a member's conduct, enunciated some key principles about lawyer regulation. These developments led the Task Force to consider, in relation to the directives in its mandate, the progress made since the above-noted review and how the Supreme Court's findings related to the Law Society's processes.

5. The Task Force met on seven occasions since January 2005. It received detailed information on the current status of the operations in the Professional Regulation Division, developments in the last few years aimed at improving the process and ongoing efforts to address issues that affect the timeliness and quality of investigations.

Much of this information is included in this report as necessary background information to the three recommendations that the Task Force is making.

6. It became apparent to the Task Force that the timeliness of investigations has been a specific focus of the Professional Regulation Division for at least the past three years, from the time the new Director was hired. This resulted in numerous operational initiatives to redesign and improve processes and supports for investigations, ensure appropriate staffing levels and institute appropriate monitoring and assessment of the investigative product. To the extent that proposed changes in the Division required policy decisions by Convocation, these matters were referred through the Professional Regulation Committee to Convocation for decision, were approved and have been or are being implemented operationally.

7. In the Task Force's view, through these ongoing improvements to the investigative processes and recent developments, the necessary steps have been or are being taken to support a fair and timely process. As such, the bulk of this report details the information outlined above, including a discussion of why changes were needed in the Professional Regulation Division in 2002 and the consequent developments in the Division since then.

8. In terms of policy analysis, few recommendations at the policy level have resulted from the Task Force's review. To the extent that some aspects of the investigations process could be improved, the Task Force is recommending that the action reflected in the motion above be taken.

9. This report deals with the following:

    a. The context for the Task Force's review, including a discussion of self-regulation;
    b. Detailed information on the Professional Regulation Division. This includes an overview of the Division at the time of the new Director's arrival in 2002, and a description of Division-wide and departmental-specific developments since 2002 to improve timeliness;
    c. Recent policy initiatives to improve the timeliness of complaints handling; and
    d. The issues that relate to the recommendations in this report.

Context For The Task Force's Review

<u>The Need For Timely Investigations</u>

10. In keeping with its regulatory mandate to govern lawyers in the public interest, the Law Society seeks to exercise its regulatory authority in a timely and effective manner. This responsibility includes responding to complaints of professional misconduct about the Society's members and investigating the allegations where appropriate within a process that is fair to the complainant and the member.

11. A conduct investigation under the *Law Society Act* is commenced on the basis of a reasonable suspicion of misconduct under section 49.3 of the Act. Section 49.3 of the *Law Society Act* provides that the Society may investigate a member's conduct if it receives information suggesting that the member may have engaged in professional misconduct or conduct unbecoming a barrister or solicitor.

12. The investigation forms the basis for regulatory action that may be taken against a member, including formal disciplinary action commenced by a Conduct Application.

13. Timely investigations are critical to the effectiveness of the Law Society's regulatory process. The timely completion of an investigation is necessary to maintain the public's and the profession's confidence in the Law Society's regulation of lawyers. The regulatory process should be:

    a. Expeditious and meaningful in responding to complaints,
    b. Transparent and accessible,
    c. Principled and reasoned in its outcomes,
    d. Flexible in providing for alternative resolution options where appropriate, and
    e. Able to undertake necessary action to prevent harm in the public interest.

    These principles, which are effectively the goals of the Professional Regulation Division, informed the Task Force's review of the investigations processes and helped to frame the conclusions and recommendations resulting from the review.

The Self-Regulation Context

14. The Law Society's investigatory authority is part of its responsibility as a self-regulatory body, the privilege of which is granted by the provincial government.

15. The authority has been described as follows:

> …[S]elf-regulation is afforded to those professions that have demonstrated certain unifying and discrete characteristics that set them apart from other groups. The use of the word "self" in the term implies that though many people are in fact being regulated, the profession acts with one voice, borne of a common set of values and principles and a unifying educational experience. The body established to regulate the profession is able to do so because it presides over a unified entity, with an overarching vision of itself and its role in society.[3]

16. Self-regulation finds its basis in law as a profession. As members of the profession, lawyers are deemed to possess specialized knowledge that the public does not possess. When a member of the public (a client) engages a lawyer, a trust is established between the lawyer and client. This element of trust sets the lawyer and client relationship apart from other service provider/client relationships. The trust involves an assumption that because of his or her specialized knowledge, the lawyer is competent to serve the client's interests, and an assumption that as a fiduciary, the lawyer will protect and preserve the nature of the lawyer and client relationship to the exclusion of others. The nature of the relationship requires

    a. autonomy from the state, as the bar functions as a safeguard between the citizen and the power of government,
    b. autonomy in decision-making, which permits the lawyer to exercise independent judgment as a function of the trust relationship with the client, and

[3] "Self-Regulation and the Independence of the Legal Profession in Ontario", Sophia Sperdakos, Policy Secretariat, Law Society of Upper Canada, May 2003, at page 2.

c. autonomy in regulation, as the profession itself is best able to decide on the knowledge requirements, qualifications and discipline of its members who must honour the public trust in service to clients;

As the autonomy is central to the lawyer's ability to serve the client's interests, the profession is granted the right to self-regulate, provided that it does so in the public interest.

17. In the Task Force's view, the Society's self-regulatory authority in the public interest requires that the Society establish standards of professional conduct for lawyers and maintain an appropriate infrastructure to address breaches of those standards.

The Issue of Timeliness Within The Law Society's Operations

18. Many members of the public intersect with the Law Society through the complaints process. Complainants also include lawyers, judges and organizations or institutions. On the understanding that the Society is a self–regulating authority, a complainant is entitled to expect that the Society will make the appropriate inquiries into a complaint and, if necessary, pursue the matter to a resolution, investigate the matter to a conclusion or pursue disciplinary action against the member.

19. The other relevant constituency is the membership of the Law Society. All members are entitled to expect that the Society will perform its regulatory functions in a fair, efficient and cost effective way. The small subset of members who are the subject of complaints are entitled to expect that the regulatory process will be timely in addressing complaints and moving matters forward to conclusion, resolution or disciplinary action.

20. Timeliness of investigations is the responsibility of the Director of Professional Regulation, Zeynep Onen, who monitors the processes by which investigations are undertaken and, if necessary, implements changes to improve the processes. Some of these changes relate only to operational investigations processes. Some changes require policy decisions by Convocation and amendments to various legislative instruments that govern the regulatory process.

21. From time to time, timeliness of investigations has become a particular focus for the Law Society. The most recent substantive review on this subject was that of The Honourable W. David Griffiths, which resulted in a series of recommendations in his 2000 report to Convocation ("the Griffiths Report"). Timeliness was also an element of the decision of the Supreme Court of Canada in *Finney v. Barreau de Quebec*, noted earlier, in which the length and substance of the Barreau's investigation of a member's conduct were scrutinized and criticized.

22. In July 2000, Mr. Griffiths was appointed by the Law Society to review its complaints, investigation and discipline processes with a view to making recommendations, where appropriate, for improvement to these processes. The review was prompted by concerns about unreasonable delay at both the investigative and hearing stages of the Law Society's regulatory process.

23. The Griffiths Report resulted in a series of recommendations that he felt would generally improve the investigation and discipline processes. The Report's summary and

recommendations appear at Appendix 2, but in brief include the following with respect to Investigations:

a. Where the Proceedings Authorization Committee has authorized a disciplinary proceeding, but discipline counsel have declined to issue the Notice of Application until Investigations has provided all necessary material to support the charge, the investigators must give high priority to the completion of the investigation to support the charges;
b. Additional staff for Investigations should be hired;
c. Training for a significant number of inexperienced staff should be provided;
d. A closer liaison between Investigations and Discipline staff at an early stage in the investigation should be pursued;
e. Post-mortem discussions should occur between Discipline and Investigations staff on the results of a hearing;
f. Decisions of the Hearing Panel should be available to Investigations; and
g. Timelines for completion of investigations should be improved and older cases should be expedited to completion.

24. The decision of the Supreme Court of Canada in *Finney v. Barreau du Quebec* highlighted a number of key regulatory principles that are instructive for the Task Force's review. The *Finney* case was a suit in damages, in which the Barreau du Quebec was found liable to the client of the lawyer under investigation for the Barreau's failure to adequately address the issues of professional conduct.[4] The Court found that the Barreau, because of its failure, could not claim the protection of the immunity clause in its governing legislation, where acts done in good faith in the performance of the Barreau's duties could not be prosecuted. The Barreau was found to be negligent, indifferent and careless to the point where its actions amounted to bad faith.

25. An analysis of the decision disclosed some key regulatory lessons, mirroring the principles noted earlier, which include the following:

a. Timeliness:
All stages of the complaint process should be completed with diligence and in a timely manner. These steps would include, as appropriate, investigation/inspection, analysis and prosecution. In *Finney*, the Court found a number of instances where the Barreau could have acted much sooner. For example, the Barreau had determined at a preliminary stage that the member's competency was in question, and yet it took a year to obtain a "provisional disbarment".

b. Effective response to risk:
A law society must utilize the tools at its disposal to investigate and prosecute a member's conduct. Of the many issues raised by the lawyer in this case, some were based on complaints while others arose out of an assessment of his competence. The Barreau seemed to get caught up in a web of process that did not advance the public protection or complaints response mandates.

c. Effective communications with complainants:
Complainants must be kept up-to-date on the progress of their complaint;

[4] Mrs. Finney was awarded $25,000 and costs on a solicitor and client basis.

d. Integration of information in the complaints and discipline history of a member:
A member's entire disciplinary history is relevant, *inter alia*, to assess the risks that a lawyer poses to the public;

e. Appropriate response to risks presented by a member:
A law society can and must use its discretion in deciding whether or not to pursue a complaint, but it is unacceptable for a law society to do nothing;

f. Transparency:
A law society's decision to either discontinue or proceed with a complaint investigation must be communicated, with reasons, to the complainant. The complainant should be given the opportunity to have this decision reviewed or challenged. The Court found that the Barreau essentially did not respond to complaints, even when they were repeated, for long periods of time.

g. Fair process:
Diligence and timeliness must be measured against the self-imposed procedural requirements. However, the rights of a lawyer who is the subject of a complaint should not be sacrificed in favour of a quick outcome.

26. The Task Force reviewed the Society's progress on the recommendations arising from the Griffiths Report and assessed the impact of the Supreme Court's discussion of standards for investigations of complaints in the *Finney* decision. Presentations by Zeynep Onen and departmental managers from Intake, Complaints Resolution, Investigations and Monitoring and Enforcement assisted in this review. The Task Force also received a report on the development of new case management systems to support complaints work.

27. These reports included a detailed overview and analysis of the operations in the various departments in the Professional Regulation Division since 2002, including changes that relate to the Griffiths Report recommendations, and additional improvements to the structure and processes in the Division. The reports were very helpful in educating the Task Force on what occurs on a day-to-day basis in these departments and the challenges that the regulatory staff face in dealing with a significant number of inquiries and complaints about members.

28. The Task Force also noted the policy initiatives undertaken by Ms. Onen, through the Professional Regulation Committee. She has brought forward a number of proposals in 2004 and 2005 to improve the regulatory process, some of which relate to the timeliness of investigations. Some of these proposals have already been the subject of decision by Convocation. Others relate to some of the Task Force's proposals for change in this report.

The Professional Regulation Division - Developments Since the Griffiths Report, The Director's Initiatives Since 2002, Current Structure and Process, and Matters in Progress[5]

[5] Nothing in this report relates to or comments on the merits of any particular investigation currently in the pre-hearing or hearing stage, or the appropriateness of investigative procedures used in any particular investigation currently in the pre-hearing or hearing stage.

29. Significant changes and improvements in the structure and functions of the Regulatory Division have occurred since the Griffiths Report was released. The Task Force also noted that many of the issues arising in the *Finney* case have been or are being addressed before the Professional Regulation Committee or are the subject of suggested changes to the process that have been brought forward by Ms. Onen.

30. The following sections of the report describe in detail the recent history of the Division, developments to improve processes and a description of the current operations.[6]

Overview of the Professional Regulation Division Since 2002

31. In 2001 and 2002, the Law Society was involved in organizational restructuring through which the responsibilities of the Secretary as defined under the *Law Society Act*[7] and the by-laws were apportioned among several directors under By-Law 4[8] . As result of this change, the Director of Professional Regulation became responsible for complaints, investigations, discipline, trusteeships and the Lawyers' Fund for Client Compensation.

32. In 2002, the Professional Regulation Division consisted of five departments: Complaints Resolution, Investigations, Discipline, Trustee Services and the Lawyers' Fund for Client Compensation. The Division was emerging from a period of major reorganization as a result of Project 200 (P200), a Society-wide review of processes and procedures, but gaps and overlaps within the Division that had not been addressed through this reorganization remained. In particular, the Complaints Resolution, Investigations and Discipline departments performed work which was inter-related, but these tasks were not well integrated as part of a division with a single set of regulatory objectives.

33. Upon her arrival in June 2002, with staff and managers, Ms. Onen undertook a series of assessments of the structure, productivity and quality of work of the Professional Regulation Division. Based on these assessments, she and the staff instituted changes to improve the Division's effectiveness, transparency, consistency and productivity.

34. Between November 2002 and March 2004, the Division underwent significant reorganization and change in both structure and staffing. New processes and departments were created to address the gaps and the overlaps in process and to focus on certain important functions. During this period, new managers were recruited to lead Complaints Resolution and Investigations. New positions of Assistant Manager were created in order to provide additional leadership and support to staff. The Intake department was created to perform the role of gatekeeper for regulatory matters, including a significant role in early resolution. The Monitoring and Enforcement Department was created to monitor formal orders and informal agreements to ensure compliance. The structural changes within the Division also included the addition of a Case Management Group within the Director's office to build tools to help staff manage

[6] See Appendix 3 for an organizational chart of the Professional Regulation Division and a chart showing the complaint process.
[7] Section 8(2) of the Act reads: "The Secretary shall carry out his or her duties under this Act, the regulations, by-laws and rules of practice and procedure, and such other duties as the Secretary may be instructed to undertake by the Chief Executive Officer."
[8] By-Law 4 (Office of Secretary) includes delegation authority, for various purposes, to Senior Counsel, Discipline, Professional Regulation Counsel, Senior Counsel, Legal Affairs, the Directors of Policy and Tribunals and Membership Services and the Chief Financial Officer.

and monitor case flow, and to work toward the implementation of a new case management system.

35. The Division also required a review of its processes in order to identify changes required to improve performance. This business process review was also a necessary first step to implement a new information system (IS) to support workflow. The review started in December 2002 and was completed in June 2003. The results provided significant additional information for the management of change within the Division. Included in the recommendations was the need to realign some departmental responsibilities, and to create new and improved tools to assist the staff in the performance of their work, including statistical and other reports and document templates.

36. The following describes the changes made and the current operations in Intake, Complaints Resolution, Investigations and Monitoring and Enforcement, the four departments in the Division dealing with complaints issues.

Departmental Improvements, Changes and the Current Operations

Intake

37. As explained above, the business process review disclosed the need to realign certain departmental responsibilities and tasks that were affecting efficiencies in Complaints Resolution and Investigations. A specific need was for a more unified and organized approach to intake case management processes within the Division. In response, Regulatory Intake, hereinafter referred to as Intake, was created.

38. Intake had a graduated start to its operations between April and June 2004. The department is currently staffed by one Manager, two full-time Counsel, one contract Counsel, two Resolution Officers and three administrative staff.

39. As the "gatekeeper" of all incoming matters for the Professional Regulation Division, Intake:

    a. Reviews all complaints received from the Law Society's Customer Service Centre (CSC) to determine if the issues fall within the Society's regulatory jurisdiction[9] ;
    b. Obtains relevant documentation, as required, from complainants to support their allegations of misconduct;
    c. Prepares instructions to investigate and opens all case files to ensure standardization within the Division;
    d. Closes complaints files that do not meet the threshold for investigation based on s. 49.3 of the *Law Society Act* [10];
    e. Refers files to Investigations for more complex matters and those in which it is likely, if the allegations can be proved, that disciplinary action will be required and to Complaints Resolution for minor breaches of conduct that appear to involve a straightforward investigation;

[9] In 2005, the Law Society received 8227 complaints, of which 4866 were within the Society's mandate to review. Intake receives approximately 30 new complaints from the CSC daily.
[10] In 2005, of the 4866 files received, Intake closed 2131 files.

f. Co-ordinates and tracks the activities of various Departments within the Division that may be involved with the member in question to ensure a consolidated approach [11];
g. Undertakes a risk analysis in streaming files, as complaints with higher risk factors are given a higher priority; and
h. Co-ordinates regulatory approaches in cases where members have multiple complaints made against them (e.g. the Special Intervention Stream, discussed below).

40. In an effort to accelerate its response to complaints that are amenable to resolution at the front-end of the complaints process, in the summer of 2004, Intake assumed responsibility for early resolution from Complaints Resolution, which had been handling this work. The Early Resolution Unit is staffed by two experienced Resolution Officers, and handles complaints that are primarily minor in nature and, typically, do not require a lengthy investigation.[12] The Task Force learned that this transfer of responsibility was very successful. The number of "hand-offs" of a file from staff to staff was reduced and the Unit closed 1290 files in first months of operation from July to December 2004.

41. Intake is also responsible for identifying and monitoring members for the Special Intervention Stream. This process was implemented to deal with the small percentage of members who generate a disproportionately large number of complaints, and whose complaints, even of a minor nature, may indicate a pattern of misconduct. The process relies on selection criteria similar to that used by the Law Society's Practice Review Program to determine whether multiple complaints against the member raise an overall regulatory issue. Intake will flag those members where a new complaint has been made and one or more of the following factors exist:

a. the member is currently in the Discipline process,
b. there are four or more open complaints against the member,
c. there have been four or more complaint files opened during the past six months, or
d. in the past five years, the Law Society has received 20 or more complaints against the member (even if they are closed).

42. Another important responsibility is the management of cases where there are concurrent and multiple complaints against the same member. These cases are not necessarily assigned to the same investigator or resolution officer. Management of members who have multiple complaints, either serially or at the same time, is a new and important process. The Griffiths Report identified Convocation's "member driven" policy, in which all complaints against a member were assigned to the same investigator, as one cause

[11] Intake's Case Management functions will be greatly enhanced with the implementation of the Case Management system, which was implemented October 2005. This system is discussed in more detail later in this report.

[12] These types of cases include:
a. Fail to pay a financial obligation
b. Fail to respond to communications from clients or other lawyers
c. Fail to provide a report on a transaction
d. Fail to provide an account
e. Fail to fulfill an undertaking
f. Termination of retainer issues/release of client file

for delay in case processing. That report recommended that the Law Society discontinue the practice of assigning all complaints against a member to a single member of staff.

43. The case management solution involves Intake assigning such complaints to different members of staff but co-ordinating the activity to ensure that regulatory issues concerning the member are effectively addressed. Intake monitors the cases in which there are multiple complaints against a member and assesses the issues to determine if there are competency issues as part of an organizational response to concerns about such member. In this way, the member becomes the focus of a specific regulatory or competency response.[13]

44. A primary objective of Intake is to ensure a focus on the overall regulatory responsibility of the Law Society with respect to the member. Intake's initiatives are part of a larger effort to ensure that the Society is responsive to emerging regulatory problems and has the tools to address them at an early stage.

Complaints Resolution

45. Complaints Resolution's primary role is to investigate and resolve less serious breaches of the *Rules of Professional Conduct*. These are breaches that, if proven true, are likely to result in an informal resolution. Complaints involving relations with clients, failure to communicate and quality of service represent almost 60% of all complaints handled by Complaints Resolution. The other 40% represents a broad range of complaint types, such as failure to fulfill financial obligations, inappropriate or uncivil behaviour, conflicts of interests and complaints about a lawyer from a third party (i.e. not the client).

46. Complaints Resolution works towards a voluntary resolution between the complainant and the member. The factual background for resolution is established by conducting a straightforward investigation, which is authorized under section 49.3 of the *Law Society Act*. This varies from the approach in Investigations which conducts more complex, resource-intensive investigations of allegations of serious professional misconduct focussed on supporting a discipline prosecution.

47. In 2002, Complaints Resolution had a very high volume of complaints activity. The department had a caseload of 1801[14] at the beginning of the year with an average age of 269 days. By the end of 2002, the department's caseload was 1363 complaints, with an average age of 191 days. Although the inventory was reduced, the remaining high volume of complaints coupled with other needs created difficulties in handling the work and affected the department's performance in the following ways:

    a. The department needed a strategy to deal with a minority of members with multiple minor complaints where a subsequent and new complaint was received

[13] The Division continues to design more effective methods to deal with these members, including early Case Conferences with all staff who have open files on the member, personal attendances at the member's office, securing undertakings to address the regulatory concerns, streaming to Discipline if a pattern of misconduct has been established, and referrals to Practice Review.

[14] This number included 1682 complaints, 73 bankruptcy matters, 43 discipline costs/panel orders/undertakings matters, and three practice wind-up matters.

as fast as the old one was closed. These few members generated a large number of complaints;

b. A significant number of members failed to co-operate with the Society, causing staff to spend long periods of time trying to encourage or persuade them to work with the Society. This resulted in delays in case process, adding time to the life of a complaint;

c. The department had too many competing responsibilities including order monitoring, bankruptcy monitoring, intake functions, including substantiating complaints, and early resolution of very minor matters, which meant that staff did not have enough time for their core activity of complaint resolution;

d. All staff work was assigned and checked by one manager, which delayed approvals and direction at numerous points in the investigation;

e. There was a need for better communication between Complaints Resolution and the Complaints Review Commissioner in order to improve productivity for both departments.

48. To resolve these issues, a number of initiatives were undertaken. The department underwent structural changes and now has a manager and assistant manager to ensure staff receives direction and support when required. In addition, numerous job levels were collapsed to include only two, with skills and expertise requirements geared to the types of cases in the department. Complaints Resolution now has the following permanent full time staff: the Manager, the Senior Counsel and Assistant Manager, five Complaints Resolution Counsel, six Complaints Resolution Officers and the three-member Administration Team.

49. Work processes were restructured, as the department required changes in its case process in order to achieve effectiveness, quality and timeliness. Changes implemented during 2002 through to 2004 included the following:

a. As described earlier, a separate Intake department was created to screen and stream cases and to provide early resolution where appropriate. This change means that files arriving in Complaints Resolution are well-organized, with information substantiated and the regulatory issues defined, which assists in a faster start to Complaints Resolution's investigations. Complaints Resolution staff are no longer distracted by the multiple tasks required of the complaint intake function;

b. A Monitoring and Enforcement department, discussed in detail later in this report, was established to assume the responsibility to monitor orders and bankruptcies. Again, this had the effect of reducing the number of added responsibilities for Complaints Resolution, allowing staff to focus on their core job of resolution;

c. The Special Intervention Pilot Project, discussed above, was begun to address the issue of members who have multiple complaints;

d. Staff guidelines were developed to be used by staff where a member fails to respond or fails to cooperate;

e. Templates for case handling were created, and staff were trained to write and use templates for such things as closing reports and memoranda for the Proceedings Authorization Committee. Staff also engaged in training for improved written communications;

f. Department staff participated in additional professional training opportunities, including divisional training and focused external training;

g. The department's mandate was reoriented to focus on regulatory responsibilities as well as complainant satisfaction.

50. In August 2003, the department embarked on a project to deal with a backlog of cases and reduce timelines. At that time, the department had an inventory of 1236 cases with an average age of 209 days. The successful backlog reduction effort had an almost immediate effect. In January 2004, median aging targets were set with an objective to achieve a median age of 90 days by December 2004. By the end of 2004, the inventory was reduced to 592 cases with a median age of complaints of 94 days. The average age in the department was approximately 130 days.[15] For 2005, the aging target was 110 days. A significant increase in new files in the latter part of the year, managerial changes and new case management system implementation all had an effect on aging, bringing the median age of files at the end of 2005 to 135 days. Appropriate steps are being taken to improve on this number.

51. Complaints Resolution generally closes complaints in one of three ways:

a. "Found": In these cases, the investigation discloses evidence of a breach of the *Rules of Professional Conduct* or other governance legislation. In these cases, the outcomes include:

i. The member rectifying the breach;
ii. An oral or written caution to the member from staff;
iii. The member's undertaking to the Law Society with respect to a particular issue;
iv. Providing best practice information to the member;
v. Referring the member to Practice Review;
vi. Referring the member to Spot Audit;
vii. Recommending to the Director that the matter be referred to the Proceedings Authorization Committee;

b. "Not found": In these cases, the investigation does not disclose evidence of a breach of the *Rules of Professional Conduct* or other governance legislation, or discloses that the allegation is outside Law Society jurisdiction (e.g. negligence or a fee dispute);

c. "Discontinued": In these cases, an investigation is not completed because:

[15] In terms of file administration, new complaint files are assigned to an officer or counsel within two business days of receipt of the matter from Intake. An acknowledgement letter is sent to the complainant within two business days of assignment of the file, and initial contact with member is made within two business days of assignment unless special circumstances exist. For example, in some sexual harassment cases, the Society may wish to gather certain information before contacting the member. In other cases, it may be appropriate for the Society to perform some investigative work to secure necessary evidence before contacting the member. Staff's initial contact with the complainant is made within 30 days of assignment, and no more than 45 days elapse without meaningful activity by staff on a complaint file. The target is to complete all files within six months of assignment.

i. The complainant withdraws the complaint, as result of an independent resolution or another reason, and there is no overriding issue that the Law Society is required to pursue;
ii. Evidence required to support the investigation is unavailable (i.e. documentation, a witness or other information);
iii. The member dies;
iv. There is concurrent litigation, either at the Law Society before the Hearing Panel, which is likely to result in disbarment or permission to resign, or in the courts, where the issue before the Society (e.g. conflict of interest) is also in issue before the court;
v. Refusal by the complainant to permit the Society to release information to the member.

52. In 2005, of the 4866 complaints received by the Law Society that were within its mandate, 1961 (40%) complaints were transferred to Complaints Resolution by Intake. In 2005, 1788 complaint matters were completed by Complaints Resolution staff.

53. As noted above, Complaints Resolution has made significant improvements to its processes in the last three years, which has improved timelines for case handling. It reduced its complaint inventory since 2002 by almost 40% to just over 800 files. Elimination of the backlog means that there is effectively no file in the inventory older than one year. Efforts to establish high quality, well-organized precedents and templates for the work of staff, organize training for all staff and offer advice, guidance and mentoring in an environment that values consultation, "brainstorming" and constructive innovation have all contributed to improved case handling.

54. New initiatives currently being implemented will assist the timeliness and effectiveness of the work of Complaints Resolution. They include implementation of the new case management system, continued development of the Special Intervention Stream, and expedited hearings through the summary hearing process for prosecuting cases involving a lawyer's failure to respond to or co-operate with the Law Society, discussed later in this report.

Investigations

55. The Investigations Department's primary responsibility is to investigate allegations concerning a member's conduct or capacity that are likely to lead to discipline proceedings. As with Complaints Resolution, investigations are authorized under section 49.3 of the *Law Society Act*. In 2005, almost 15% (722) of complaints within the Law Society's mandate were directed to Investigations.

56. Investigations is responsible for the investigation of a broad range of conduct issues. They include bankruptcy, misapplication and misappropriation, breach of confidentiality, quality of service, conflict of interests, financial issues including fees and financial obligations and failure to maintain books and records, inappropriate behaviour including sexual misconduct, criminal conduct including fraud, forgery, drug, possession and sexual assault, negligence, relations with client, relations with lawyers including undertakings and practicing under suspension, and issues arising from a lawyer's representative role in litigation such as incivility and sharp practice.

57. At the time Ms. Onen was hired, the primary concern within this department, from the perspective of staff and others, was the length of time it took to complete an investigation. Her assessment of the department also disclosed, among other things, that the management structure was not always aligned with the needs of the case load and its efficient management, and that discipline counsel were not integrated early enough in the investigative work, affecting the time and effort required to prepare a file for prosecution.

58. A review of the processes in place in 2002 and 2003 by Ms. Onen and staff led to solutions to these concerns, and the resulting changes within the department have now been largely implemented. The new measures which were implemented during 2003 and 2004 included the following:

a. The department and its management were restructured. The new structure includes a manager with two assistant managers and a senior investigation counsel. The old team structure, by which small groups of investigators were closely managed by team leads, was dismantled;
b. The Ottawa office was closed;
c. New staff was recruited with past experience in investigations, including retired police officers. The staffing ratios based on expertise were adjusted to reflect the requirements of work. In addition to the positions described above, the department is now staffed by five investigation counsel, one senior forensic auditor and six forensic auditors, one senior investigator and eleven investigators, and one law clerk;
d. Measures introduced during this period included new templates and staff guidelines to streamline the case process, including a formal case plan to establish targets for each case and to ensure an early review of the case to determine the direction of the investigation, a standardized investigation report which advises discipline counsel of the results of the investigation and assists in organizing the investigative work product, the introduction of a case conference for cases recommended for discipline which ensures that discipline counsel and other senior managers and counsel review any case advancing to the Proceedings Authorization Committee stage and the early assignment of discipline counsel so that counsel can be further integrated in the work of Investigations;
e. The creation of the Intake and the Monitoring and Enforcement departments also assisted Investigations by allowing staff to focus on the work of investigation rather than following up on discipline orders or completing initial work on and substantiating the complaint in its early stages.

59. These changes, directed ultimately at reducing case time lines, were significant for the department, and required time to implement. Until the new infrastructure was fully implemented, there were few indicators that the cases were being completed earlier. By June 2004, the department was fully staffed with all management in place and began its direct efforts to reduce inventory and case aging. The result was a significant reduction in the age of cases under investigation.

60. The Division's fourth quarter 2005 report shows that in December 2005, the median age of a complaint in the department was 233 days. By comparison, in June 2004, the department's median case age was 279 days. The department is currently working toward a departmental standard to have most cases completed within 10 months. Some

cases which are complex or take longer for reasons beyond the control of the Law Society will exceed the 10 month period, but it is expected that all other cases will close within this time line.

61. In summary, the restructuring instituted by Ms. Onen and the new manager has brought sharper prosecutorial focus to investigations that are likely to result in discipline and is helping to appropriately end investigations where allegations are not substantiated. The requirement for a case plan at the outset of each investigation, measurable targets and efficient procedures are contributing to a more efficient and focused effort. Guidelines and the case plan facilitate a clear and consistent focus of investigative efforts on what is required to achieve the appropriate regulatory result. Measurable targets ensure the timely completion of investigative steps. Efficient procedures, which involve regulatory managerial review, support timely investigations and give staff confidence that their decisions are supported. Investigative staff are also working more closely with others in the Division, through the case conference process and earlier assignment of discipline counsel to a matter. Beginning in 2002, the Department also undertook significant training initiatives, especially in investigative skills, which are ongoing.

62. Challenges remain for Investigations, and a number of factors continue to affect the ability of Investigations to achieve an even more current case load. Some of these factors are inherent in the process, some are being addressed by recent policy changes, and some remain to be remedied. The factors include the following:

a. Some investigations take longer due to the fact that a number of complaints against one member are received over time. This means that some earlier complaints await completion of investigations of later complaints since in many cases the allegations should to go the Proceedings Authorization Committee together. As a result, some complaints age in the investigation process past their completion date;
b. When cases are re-opened, for example, if the complainant has fresh evidence, the complaints system ages cases from first contact with the Law Society. This means that in reopened cases, the aging includes the period the case was closed. As a result, Investigations may not have full control over how many cases are in the older case categories, and the age of the case is not indicative of the time it took for Investigations to complete the work;
c. The department continues to have difficulty obtaining information or evidence from third parties. In some investigations there is considerable delay as staff seek the co-operation of third parties. The only remedy is an application to court under section 49.10 of the Act. This will also cause delay in case processing. Authority to demand production from third parties would assist in these investigations[16] ;
d. Members' failure to co-operate with the Law Society delays investigations. Even if the investigator takes a matter to the Proceedings Authorization Committee for failure to cooperate, this means the investigation on the subject of the complaint will remain open. Again, this will inflate the inventory numbers as the 'fail to' matter goes into discipline. The new summary investigations and hearing processes, the latter approved by Convocation in June 2005, should help to address these situations.

[16] This issue has been introduced at the Professional Regulation Committee.

e. The statutory test for interlocutory suspension and restriction orders remains high. The legislative amendment approved by Convocation for the test described later in this report will assist in this respect if it is implemented. The amended evidentiary standards for such motions, approved by Convocation through amendments to the *Rules of Practice and Procedure,* will also result in more timely public protection in extreme cases of member misconduct;

f. Mortgage fraud investigations continue to be extremely demanding on resources for a number of reasons. First, these are cases in which criminal activity is alleged, but the Law Society is the first agency to investigate, unlike other criminal allegations where generally the police have completed their investigation. In addition, a large number of property transactions are usually at issue, and staff must review them to determine the cases that should be the subject matter of more investigation. This exercise may require a review of 75 transactions, with a decision to proceed on 20. There are currently over 70 members under investigation for allegations of mortgage fraud by a specialized team that includes a senior lawyer, two investigators and a forensic auditor. Plans have been instituted for managing these cases, including specific targets for completion of investigations in 2006, obtaining expert evidence to assist in the prosecutions, and adding additional administrative resources to accelerate the rate at which investigations are completed and prepared for prosecution.

Monitoring and Enforcement

63. The new Monitoring and Enforcement department began operations in November 2003, and is responsible for monitoring all orders, undertakings and bankruptcies. It is also responsible for the collection of costs and the enforcement of other similar orders. The department is currently staffed by a manager and an administrator.[17]

64. Prior to the creation of the Monitoring & Enforcement Department, the monitoring and enforcement of judgments orders and undertakings was spread over a number of departments in the Professional Regulation Division. The Complaints Resolution, Investigations and Discipline Departments often secured undertakings from members, However, the undertakings were not monitored by the same department and the specific terms of an undertaking were not recorded on the member database.

65. This “gap” in monitoring and enforcing orders and undertakings was exacerbated by the fact that with the 1999 *Law Society Act* amendments, the Hearing Panel was given new and broader sentencing powers. Hearing Panels were making approximately 90 orders per year, two-thirds of which required some degree of monitoring. Some orders required

[17] The Department draws on the expertise of the Professional Regulation Division’s case management analyst and one of the Division’s discipline counsel. Arrangements have been made with the Practice Audit Department to use its auditors to review members’ books & records and trust reconciliations until an Officer/Examiner is hired, sometime in the next year, to perform reviews of members’ books and records and trust reconciliations and attend at the offices of members who are disbarred, suspended, who have been permitted to resign or who have given an undertaking not to practice to ensure those members are not practicing. In the longer term, with the anticipated increase in the number of Hearing Panel orders being made each year, the Department may expand to include a Counsel, who will ensure that writs of seizure and sale are obtained when a cost order, restitution order or other judgment is made in favour of the Law Society, and develop and review policy and procedure.

only the collection of costs awarded against the member to the Law Society. Some required monthly monitoring of a member's financial records. Other orders required the Secretary's approval of many aspects of a member's professional life. Many orders from the Hearing Panel were not time limited and required monitoring for the remainder of a member's career. On occasion, the terms of Hearing Panel orders were imprecise or vague. This meant that the process of monitoring orders and undertakings was sporadic.

66. In July 2002, the Team Leader in the Lawyers' Fund for Client Compensation began a review of practices in all departments within the Regulatory Division related to monitoring of orders and undertakings. That review resulted in a staff recommendation that a separate monitoring and enforcement unit or department within the Professional Regulation Division be created and staffed by individuals with the requisite skill set to carry out a proactive monitoring and enforcement mandate. As a result of this recommendation, the Monitoring & Enforcement Department, reporting to the Director, Professional Regulation, was created.

67. One of the first requirements was to create the Undertakings Database, which allows the Department to record and access the terms of undertakings electronically. The Database is accessible to other departments within the Professional Regulation Division and other relevant Law Society departments, such as Membership Services, Complaint Services and the Call Centre.[18]

68. The Department also created a process for approval of Plans of Supervision by the Secretary. Prior to the Department's creation, there was no standard process of obtaining the Secretary's approval when a plan of supervision was imposed by a Hearing Panel order. Monitoring & Enforcement developed standard forms for the Plan of Supervision and related Undertakings to be obtained from the member and the supervisor. A standard background check report and recommendation format was created to assist the Secretary in deciding whether to approve a supervisor.

69. Work continued into 2004 on establishing processes and procedures within the Department, which also:

    a. Developed and implemented standard letter templates for the department's files;
    b. Created opening criteria for its files;
    c. Developed and co-ordinated timelines with department staff for files;
    d. Defined scope of its matters requiring review and/or decision by the Proceedings Authorization Committee;
    e. Increased timeliness in processing of files; and
    f. Developed policies and procedures for:

        i. background checks for custodians of bankrupt member's trust accounts;
        ii. seeking instructions to investigate pursuant to s. 49.3 of the *Law Society Act*;

[18] Because Monitoring & Enforcement is the central repository for undertakings, it communicates the terms and restrictions contained in undertakings to other Law Society departments and to the public. Public requests for information about restrictions contained in undertakings are transferred to Monitoring & Enforcement through the Call Centre and Membership Services.

iii. seeking approval from Proceedings Authorization Committee for conduct applications and applications under s. 45 of the Act;
iv. tracking and reporting of incoming costs and fines by the Finance Department;
v. issuing, filing and renewing writs of seizure and sale to secure costs awards and orders in favour of the Lawyers' Fund for Client Compensation; and
vi. transferring files, through Intake, to Investigations, when investigation is warranted.

Monitoring Compliance with Discipline Orders

70. Monitoring discipline orders to ensure compliance with their terms involves:

a. Collecting costs from members;
b. Obtaining and reviewing books and records and monthly trust reconciliations;
c. Preparing Plans of Supervision and completing background checks on proposed supervisors for the Secretary's approval;
d. Obtaining authorization to receive medical records and reviewing medical and psychological reports;
e. Attending members' offices to ensure compliance and/or to obtain evidence of non-compliance;
f. Confirming that members have complied with terms requiring them to participate in the Law Society's Practice Review Program, the Licensing Process and continuing legal education courses; and
g. Ensuring compliance with any other term imposed by the Hearing Panel or the Appeal Panel.

71. Monitoring & Enforcement currently has approximately 200 open files to monitor compliance with orders made by the Hearing Panel and the Appeal Panel. In 2005, the Department collected $38,500.00 in costs, and a further $25,000.00 was collected to the end of February 2006.

Monitoring Bankruptcies

72. Member bankruptcies are monitored for the following:

a. A bankrupt member may not receive or handle trust funds or trust property (By-law 35, section 3(1));
b. A member's bankruptcy may disclose evidence that the member has borrowed money from current or former clients, which may be evidence of professional misconduct (Rule of Professional Conduct 2.06(4));
c. A member's bankruptcy may disclose evidence that the member has engaged in conduct unbecoming a barrister and solicitor; and
d. If the member owes money to the Law Society, the Law Society will participate in the bankruptcy for the purpose of obtaining a dividend from the member's estate in bankruptcy.

73. Monitoring & Enforcement opens a file to monitor a member bankruptcy when a member is petitioned into bankruptcy by creditors, makes an assignment in bankruptcy or makes

a proposal to creditors. In 2005, the Department opened files to monitor 24 member bankruptcies, and closed 36 files.

Monitoring Compliance with Undertakings

74. Undertakings are monitored to enforce compliance with their terms. Currently, the Department is monitoring over 500 member undertakings to the Law Society.

75. Upon receipt by the Department, an undertaking is entered in the database which records:

a. The member who gave the undertaking;
b. The date it was signed;
c. The department in the Regulatory Division which accepted the undertaking;
d. Whether the undertaking can be disclosed publicly;
e. A description of each term of the undertaking; and
f. Whether the undertaking restricts a member's ability to practice.

76. The Undertakings Database also records whether an undertaking or an individual term of an undertaking is active (an undertaking that requires active enforcement), dormant (an undertaking which binds the member, but which does not require active enforcement, expired (an undertaking which has been complied with or whose terms were time-limited) or unenforceable (an undertaking the terms of which can no longer be enforced).

Monitoring Compliance with Restitution Orders

77. Monitoring & Enforcement is responsible for the enforcement of Restitution Orders made in favour of the Law Society, arising from the involvement of the Lawyers' Fund for Client Compensation ("the Fund"), and court orders against members. Currently, the Department has writs of seizure and sale filed against 17 members or former members, securing a total of $3,180,217.98.[19] Since May 1, 2005, the department has collected $208,374.06 for the Fund.

78. With respect to longer term goals, the Department will be working to:

a. Complete development of standard templates and terms for Undertakings and make those available electronically to the Professional Regulation Division;
b. Develop a policy and process to file Hearing Panel orders with the Ontario Superior Court pursuant to the *Statutory Powers Procedure Act*, and then enforce those orders as permitted by the *Rules of Civil Procedure*;

[19] All but two of these orders are in favour of the Fund. As an example of the type of matters undertaken, in May 2005, the Department completed the sale of a property in Ottawa on behalf of the Fund. The Fund obtained assignments of two mortgages on the property as a result of its efforts to compensate clients of a disbarred lawyer who engaged in a mortgage fraud scheme. The property was sold under power of sale. The proceeds of the sale, which have been delivered to the Fund, were $129,816.28. An additional $3957.50 in legal fees was also recovered.

c. Codify a bankruptcy policy and a bankruptcy manual, revise processes for member bankruptcies and bankruptcy precedent materials, and amend the Guidelines for Undischarged Bankrupts to increase enforceability;
d. Improve communication to the Division about the Intake Department, including Intake's mandate, policies and procedures; and
e. Support the Division's Case Management initiatives.

Other Changes and Improvements Within the Division

Training

79. Training has already been mentioned in this report in relation to developments in the individual departments. In 2002, training was identified by both Ms. Onen and staff in the Division as an issue that needed to be addressed immediately in order to improve both the quality of the work and timeliness. This issue was also mentioned in the Griffiths Report.

80. In 2002, the Division established a training committee composed of staff and managers. It established two full days of annual training for all staff on professional and Law Society issues, first held October 2002. The training focused on describing the various departments and how they worked to the rest of the staff of the Division. It was a great success, and continues to be an important part of training.

81. The training committee also organizes smaller sessions on specific topics. For example, in early 2003, all staff participated in sessions led by an external consultant expert in investigations techniques, focusing on identifying, enhancing and documenting "best practices" in relation to timeliness, fairness and completeness of investigations.

82. As noted earlier, in Complaints Resolution, the department developed key templates for the use of staff, including closing reports and memoranda for the Proceedings Authorization Committee and also received extensive writing training. As a result, staff are more consistent and confident in their communications and the miscommunications that at times resulted in discontent from complainants or the Complaints Review Commissioners have been reduced.

83. In Investigations, in addition to the training described in paragraph 81, all staff participated in training in May 2004 in interview techniques with the Montrose Group, experts in investigations training. Other training initiatives have focused on special investigations, such as sexual misconduct complaints.

Establishing Production Targets

84. In 2003, Ms. Onen began the process of introducing production and aging targets in Complaints Resolution. Targets were introduced in Investigations in 2004. The purpose of the targets was to identify departmental benchmarks as goals for the timely completion of cases.

85. For 2005, the Complaints Resolution target was a median of 110 days by December. On December 31, 2005, the median was 135 days. The department's performance and productivity during 2005 were affected by several factors, including the appointment of

its manager, Deena Baltman, to the Superior Court of Justice in April 2005 and the receipt of approximately 300 more cases than anticipated in 2005. The department's structure and resources will be addressed during 2006 to ensure that they support the timely completion of cases in 2006.

86. The Investigations department aging target was a median of 240 days by December 2005. The department achieved an inventory median of 233 days, exceeding its target.

87. The median ages of the files in Complaints Resolution and Investigations above illustrate the impact of the changes and improvements in the Division since 2002 and the value of establishing and working towards targets.[20]

88. On a monthly basis, as part of her monitoring function, Ms. Onen obtains statistics for the projected and actual median targets for files in these two departments. On a quarterly basis, she reports the results, and other extensive data, in an information report on the Division's operations to the Professional Regulation Committee.

89. In the Task Force's view, Ms. Onen has set aggressive but realistic targets for the completion of these cases. The Task Force is encouraged by this effort, which will also provide the required focus on any older cases in the complaints inventory.

Improvements to Statistical Reporting and Analysis

90. Up to the fall of 2005, complaints were tracked on the Law Society's system, the AS400, in a case tracking system. This system was created many years ago, and although it was maintained over time, it did not provide the necessary flexibility or the types of reports for effective management of a large number of cases or for performance assessments.

91. The position of analyst was added to the Director's office in October 2002. With the analyst, the Division acquired the ability to retrieve better information from the system, and to construct reports that managers use to analyze production. One of the new tools is the ability to assemble information about a member's current and past status in one report. This report saved staff significant time in managing complaints. This focus on reporting also included the creation of the Director's Quarterly Reports to the Professional Regulation Committee, to provide timely information on the Professional Regulation Division's activities, achievements and file management.

92. Even with these improvements, however, the system was of limited use in supporting a complex case process. This led to the decision to develop a new case management system with a flexible reporting capability that will greatly improve the Division's managers' ability to manage caseloads and improve access to information about the status of a particular case. With the implementation of this system, the complaints handling, investigations and discipline processes are in a highly interactive electronic environment for their cases and staff are able to handle all documents electronically.

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[20] Even though medians, as opposed to averages, are only available as a statistic after December 2004, the improvements in case handling are apparent. As noted earlier in this report, the average age of files in Complaints Resolution at the beginning of 2002 was 269 days, and in Investigations, the average age was 327 days.

The interactive nature of the system will allow staff to process cases faster and with more effective results.

93. The Division implemented its new system in October 2005.

Staff Guidelines

94. In response to an absence of a centralized, comprehensive collection of applicable processes and policies, in the fall of 2002, the Division embarked on a project to collect and collate all applicable policies and rules into one manual for staff.

95. The first volume, which includes applicable Convocation policies, has been completed and distributed to all Division staff. Work has begun on the second volume of the manual which documents existing directions and guidelines for staff. This volume is available to staff as more material is added, and includes a comprehensive index.

Risk assessments

96. Investigations staff conduct risk assessments on all cases on a regular basis using the following criteria:

    a. risk of harm to the public, which is paramount, and includes the likelihood of recurrence or repetition of the conduct under investigations, the need to preserve evidence that might otherwise be disposed of and the severity of the consequences of the misconduct;
    b. risk of harm to the member, which includes assessment of possible damage to the member's reputation resulting from unsupportable or unproven allegations and preservation of potentially exculpatory evidence if there is a risk that it might be lost; and
    c. risk of harm to the Law Society and the legal profession, including the loss of public confidence, for example, that might result if there is a sense that a publicly-known high-profile case is being delayed.

97. In 2004, the manager of Investigations conducted a risk assessment of all cases older than one year. The result was that none of these cases presented an unacceptable risk based on the categories identified. The staff continue to monitor risk on this basis.

Improvements to Complaints Review Commissioner and Complaints Resolution Commissioner - Staff Processes

98. The Division's managers and counsel worked with the Complaints Review Commissioners to improve staff closing reports to better explain their conclusions. These efforts will continue with the new Complaints Resolution Commissioner, who began his work on April 1, 2005.

99. A liaison position in Professional Regulation Counsel to manage these processes for the Division was also established. In this role, the Counsel acts as an intermediary between the investigators and the Commissioner on files which are scheduled for review. The Counsel

a. reviews and approves all files and material prepared for the review based on the file, and assists the investigators in ensuring the file is properly prepared for the Commissioner;
b. receives reports from the Commissioner following the review; and
c. liaises as required with Counsel to the Commissioner.

Recent Changes To Improve Timeliness Of Complaints Handling

100. Significant changes to certain regulatory processes, described below, have recently been made that will help to improve the Law Society's responsiveness to complaints and contribute to more timely disposition of matters

Responding to Members' Failure to Co-operate with the Law Society

101. Investigative delay results from a member's failure to co-operate with the Society. Members who fail to co-operate with the Society prevent the Society from taking required action. In many cases the Society is unable to investigate the underlying complaint if the member fails to co-operate.

102. Prosecution of these members must be conducted efficiently so that the Society is not delayed in its investigation of the underlying issues. In circumstances in which a member's action or inaction impedes the Society's ability to regulate the profession, the Society needs to take fast and effective action in a fair process. A member's failure to respond may signal a more widespread neglect of his or her practice that endangers members of the public.

103. Members' failure to co-operate with the Law Society in response to an investigation was a significant reason for delays in processing complaints. Staff spent long periods of time trying to obtain a response from members who partially or fully failed to respond.

104. A specific protocol is now followed where there is no co-operation, after which the failure to co-operate is a basis for a memorandum to the Proceedings Authorization Committee recommending prosecution. This policy has helped to reduce the amount of time spent on such files, although member co-operation remains an issue.

105. New developments that should enhance the responsiveness of the Society to this type of issue are the summary hearings process, approved by Convocation in June 2005, and the companion summary investigations process.

106. The summary hearings process will be used for certain "fail to" matters, supported by a summary investigations process. This enables single bencher hearings, which can be scheduled weekly if necessary, for the following matters:

a. Members who fail to respond to inquiries from the Society,
b. Members who fail to co-operate with a person conducting an audit, investigation, review, search or seizure under Part II of the *Law Society Act*, and
c. Members who fail to maintain financial records as required by By-Laws 18 and 19.

107. The Professional Regulation Division is now implementing operational changes for investigations that will support the summary hearings process. This will involve the following:

a. Defining the parameters of failure to co-operate;
b. Clarifying that the investigation of the substantive issues is to proceed concurrently with the investigation and prosecution of the failure to respond/co-operate if possible;
c. Setting out timelines for communication with members to ensure that members are given fair notice and deadlines for response and that the Society follows up in a timely and consistent manner; and
d. Clarifying expectations that matters are moved quickly to the Proceedings Authorization Committee once it is determined that the member is not co-operating.

108. In addition, regulatory staff will be provided with standard form letters and template Authorization Memoranda to ensure a consistent and streamlined approach.

109. In the Task Force's view, the new summary process, with expedited hearings and utilizing a single bencher, will be an effective process for these matters.

Improvements to the Society's Interlocutory Suspension and Restriction (Interim Suspension) Process

110. During 2003, as a result of the business process review discussed earlier in this report, the Division identified changes required to improve regulatory and case process effectiveness. A key issue was the inability to quickly and effectively respond, where there is a potential public protection issue, with an order for an interlocutory suspension.

111. Convocation recently approved changes to this process. In February, 2005, Convocation agreed to amend the test for an interlocutory suspension and restriction order (formerly called an interim suspension order) in s. 49.27 of the *Law Society Act* to require "a belief on reasonable grounds that there is a significant risk that members of the public would be harmed" before such an order is granted.

112. On June 22, 2005, Convocation adopted the Professional Regulation Committee's recommended changes to the Law Society's *Rules of Practice and Procedure* to permit motions without notice to the member for these orders and more relaxed rules around evidence. The former lengthy and complex process for an order for an interlocutory suspension and restriction order, given the purpose of the remedy, undermined the efficacy of this remedy, which is primarily meant to address urgent problems apparent before the conduct investigation is complete and the Society is ready to prosecute a member on the merits of a Conduct Application.

113. The changes include:

a. an amendment to provide for a motion for an interlocutory suspension and restriction order to be heard without notice to the member,
b. an amendment to permit the Hearing Panel to adjourn a motion without notice for the purpose of service if it concludes that the motion ought to have been served;

c. an amendment to provide the Hearing Panel with authority to vary or cancel the order; and
d. an amendment to permit the introduction of a broad range of evidence on such motions by incorporating s. 15 of the *Statutory Powers Procedure Act.*

Notice to the Law Society by Members Who are Charged Criminally

114. On December 9, 2005, Convocation approved a by-law that requires members to report to the Society the fact of criminal and other charges and the disposition of those charges.

115. This recommendation arose from the Professional Regulation Committee's review of circumstances in which it would be appropriate for the Law Society to apply for an interlocutory suspension of a member who has been charged with a criminal offence. The notice of the charges will permit the Society to decide if an interlocutory suspension is appropriate in the circumstances. This remedy would be pursued because the risk to the public, including the risk of a loss of faith in the administration of justice, may be too great to justify waiting for the member to be convicted in a criminal forum.

116. New By-Law 20 outlines the requirements, scope and timing of the reporting requirement, and in the Task Force's view, will assist the Society in pursuing an interlocutory suspension and restriction order in appropriate cases.

Proposed Changes To Improve Timeliness Of Complaints Handling

117. The Task Force's review has disclosed that the necessary steps are being taken to ensure a fair and timely process. What remains are a small number of issues that are the subject of the Task Force's recommendations to improve the process.

118. The improvements and enhancements to the regulatory process reflected in the recommendations are guided by four key issues:

a. The specific regulatory issue or issues that must be addressed;
b. The risk posed by the member's conduct to the public;
c. Managing the complainant;
d. Managing the member who is the subject of the complaint.

The following outlines the issues that the Task Force believes should be pursued.

Utilization Of Available Information and Tools

119. In the Task Force's view, the Society should make changes to its processes that will support a robust and co-ordinated approach to certain regulatory issues. This may mean identifying and closing gaps in these processes.

120. The summary investigations and hearing process is an example of a change that has been made to help address the gap in the Society's ability to respond more quickly where, particularly with respect to books and records matters, the underlying conduct issues could be serious but the Society is unable to investigate because of the member's failure to co-operate.

121. Other gaps continue to exist. One gap is in the response to some regulatory issues that illustrate concerns about a member's competence. While a practice review may be ordered, and in serious cases, a competence hearing authorized, there is a need for a tool that is more effective than the practice review in dealing with both the regulatory and competency issues but falls short of the severe remedy of a competency hearing.

122. The Task Force believes that there is a need to align conduct, competence and capacity processes to deal appropriately with both the remedial and enforcement aspects, and to avoid parallel proceedings and information "walls" between departments that reduce the effectiveness of the Society's response to members' regulatory issues. This is an issue that relates to the *Finney* decision and the ability of the Society to respond effectively to risk that members present to the public interest. It also relates to the Tribunals Task Force's recommendations on *in camera* and confidentiality issues respecting allegations about capacity and competence.[21]

123. A number of tools could be employed to increase the scope of the Society's regulatory response through proactive measures. These include implementation of a random practice review program, integration of competence enforcement with capacity and conduct investigations and prosecutions and improved alignment of practice review and spot audit with regulatory response, particularly with respect to sharing information. The Task Force agrees that use of these tools should be explored and if approved by the appropriate standing committee and Convocation, that the necessary processes be implemented.

124. To this end, the Task Force is recommending that the directors of Professional Development and Competence and Professional Regulation prepare an issues paper on this subject for review by their respective committees.

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[21] One of the recommendations of the Tribunals Task Force (May 26, 2005), approved by Convocation, was based on the following consideration of the confidentiality of competence and capacity processes:

> The different treatment within the tribunals process for conduct (in public) and competence and capacity (in the absence of the public) proceedings has possible implications for transparency, fairness and consistency. It has been held in the Supreme Court of Canada's decision in *Finney* that regulators cannot shield themselves from criticism by indicating that different streams of the regulatory structure have different goals or approaches. The Task Force is of the view that it may be important to re-examine the manner in which the competence and capacity streams of the Law Society's regulation operate.

The Tribunals Task Force's recommendation was as follows:

The Task Force recommends that Convocation direct the Professional Development and Competence Committee and the Professional Regulation Committee to re-examine the provisions in the *Rules of Practice and Procedure* respecting competence and capacity proceedings.

Changes To Operational Policies Established By Convocation

125. From time to time, Convocation adopts policies that relate directly to the manner in which conduct investigations are undertaken.

126. The policies are useful to a degree, but those that amount to directives may not provide the flexibility that is needed to address some situations to which the policies apply. Because they are Convocation policies, investigations staff will comply with the policies to the letter, and some are very specific. On occasion, complainants will take the Society to task for not following the policies to the letter. As the policies currently include some inaccuracies, this can create tension.

127. As Convocation policies, only Convocation can amend them, and the process can be cumbersome. In some respects, the policies are insufficient to support the investigative work. This means that, in some cases, observing the policies can affect the timeliness of an investigation.

128. The Task Force reviewed two examples of such policies that set operational investigative standards for staff: the Complainant's Protocol and the Third Party Complaints Policy, which appear at Appendix 1.

Complainant's Protocol

129. The Complainant's Protocol, developed by a working group of the Professional Regulation Committee, was adopted by Convocation in November 1997 and updated in June 2000.

130. The Protocol was intended to inform the public, in a more formal way, on the manner in which the Society deals with complainants in the investigative and hearing stages of a complaint. However, over time, it has lost its effectiveness as a guide for staff and as information to the public on what complainants should expect from the Society, for the following reasons.

131. First, as this report indicates, significant changes have occurred since 2000 in the departments that deal with complaints. Given the current structure, including the various processes, which has resulted in improved timeliness, the Protocol is now too broad as a staff guideline, and in some respects is inaccurate.[22] A more detailed policy, which could be adopted operationally, would be more beneficial to help achieve and maintain the complainant's expectation of a timely and comprehensive approach to complaints investigations.

132. The second problem with the Protocol flows from the above, and has already been noted. The existing Protocol requires some substantive and housekeeping changes.[23] The Protocol can only be amended by Convocation, but this process lacks the flexibility

[22] For example, the Protocol refers to lay benchers conducting complaints review, which is no longer the case.

[23] For example, the Protocol discusses convenient location of meetings with staff, but this has been interpreted by some complainants to be an entitlement to a meeting. Meetings are typically held at the discretion of the investigator.

to make this type of document a living document and more responsive to the needs of complainants, which evolve over time.

Third Party Complaints Policy

133. In October 1990, Convocation adopted the policy on investigation of third party complaints where litigation is pending, or "third party complaints" policy, based on a report of the Discipline Policy Committee.

134. The policy arose from complaints staff's request for guidelines in handling complaints about members who represent parties opposed in interest to the complainant where litigation is pending. Complaints staff would consider withholding correspondence from the complainant when the member complained about requested it or when prejudice to the member's client was obvious.

135. At the time, Bencher Phillip Epstein also raised this issue and asked that it be considered. His advice was that these types of complaints are often received in ongoing matrimonial proceedings, and create a concern on the part of the lawyer complained about. The lawyer is required to respond and provide information to the Law Society, even though there may be no *prima facie* evidence of misconduct, which information is passed on to the adverse party (the complainant) as part of the investigation process.[24]

136. Similar concerns arose where a member was the subject of a complaint and a lawsuit by the complainant in negligence, in that there was a risk that the Society's investigation process could be used to obtain production of documents which could not otherwise be obtained.

137. The Discipline Policy Committee recognized that special considerations arise where the Society receives information from a member that is privileged. In such cases, the Society cannot disclose this information to the complainant without the consent of the member's client.

138. Thus, the third party complaint policy was developed to address the above.

139. While the need for the policy has not changed, staff investigating such matters have found that the policy is problematic for the following reasons:

a. Certain terms are inaccurate, including reference to the Discipline Committee, which no longer exists;
b. For certain files, the policy indicates that the matter will be held in abeyance, but this no longer occurs; to manage the file inventory more appropriately, such files are closed with an invitation to the complainant to contact the Society, for example, at the end of the litigation;
c. The situations to which the policy applies are not clearly described or differentiated i.e. where the member represents a party opposed in interest, where the member is the party to the litigation with the client or third party, and where the member is representing a party on the opposite side of a transaction.

[24] In October 1986, Convocation approved procedures which require that a member's response to a complaint be sent, as a matter of course, to the complainant.

d. The policy does not address the situation where litigation to which the policy applies arises after the complaints investigation has begun.

140. As noted earlier, some complainants have cited the Society's non-compliance with the policy when current practice, not reflected in the policy, is followed.

141. The Task Force believes that these policies should be replaced with general direction to staff from Convocation to have and maintain express operational standards, which staff would create and implement. This would permit staff to design operational standards in keeping with Convocation's broad policy direction and to maintain the currency of the policies through changes or enhancements when the need arises. This is a more flexible approach than the current system, where any amendments to the policies require Convocation's approval.

142. The efficacy of the express operational standards, or the need to improve them, will be a matter of comment in the quarterly operational report Ms. Onen provides to the Professional Regulation Committee, which includes extensive information on the Professional Regulation Division's processes and progress in complaints handling. The Committee's discussion of these reports is an opportunity to provide Ms. Onen with input on regulatory and operational processes.

143. With respect to the Complainant's Protocol, Convocation's policy directive should include the following:

> That operational procedures for the investigation, determination and resolution of complaints be implemented to ensure a process that is timely and thorough, informative, in which reasons are generally provided for the decisions made by the Society's staff in determining or resolving complaints, and in keeping with the complainant's expectation of professionalism, courtesy, respect, candour and an appropriate level of communication on the part of the Law Society.

144. With respect to the third party complaints policy, Convocation's policy directive should include the following:

a. That the investigation of a complaint about a member made by a complainant who is adverse in interest to the member's client when litigation is pending be handled in a manner that protects the client's privilege, protects the confidentiality of the relationship between the member and client and does not operate to prejudice the rights of the member's client in the litigation;
b. That the investigation of a complaint about a member made by a complainant who is adverse in interest to the member's client in an ongoing transaction be handled in a manner that protects the client's privilege, protects the confidentiality of the relationship between the member and client and does not operate to prejudice the rights of the member's client in the transaction;
c. That the investigation of a complaint about a member made by a complainant who is adverse in interest to the member when litigation is pending be handled in a manner the protects that member's rights in the litigation.

Ensuring A Fair and Transparent Process

145. Part of maintaining a fair investigative and adjudicative process is permitting the public and members access to information about the process. The Task Force agreed that accessibility of rules, by-laws, etc. for members and for the public should be enhanced. This issue is largely a communications initiative that should integrate all information connected to those regulatory processes where the public and the membership intersect. The Task Force urges the Communications department to review its current initiatives and determine where enhancements can be made.

146. Information about the results of hearings or appeals for members and the public should also be enhanced. Of particular interest to members and their counsel who appear before the Hearing and Appeal Panels are the reasons for decision in the conduct cases. These cases form the Panels' body of jurisprudence and are instructive on matters of findings of misconduct and penalty. There are gaps in the information available in this respect. For example, the Law Society's web site does not include notice of decisions where the Conduct Application is dismissed.

147. In the Task Force's view, this is a matter best dealt with by the new Tribunals Committee as an aspect of hearing publication policies.

Summary

148. The Task Force is encouraged by the leadership that the Director of Professional Regulation has brought to the Professional Regulation Division since 2002. Structural changes have been effected in the operations to support a timely process for complaints handling. Policy issues that relate to processes and procedures have been identified and addressed at the committee and Convocation levels to ensure that the Law Society's legislative and rule-based framework adequately supports the professional regulation of lawyers.

149. While much of this report details the Division's activities and accomplishments in the last three years at the operational level, the Task Force found this information gathering to be an instructive and useful exercise, and in the context of the Task Force's mandate, necessary to determine what recommendations should be made.

150. The Task Force acknowledges that the trend is to more complaints and more complex complaints. Mortgage fraud is an example. The Task Force believes that the Professional Regulation Division is well-equipped to deal with these matters and that the Director will continue to make operational improvements and suggestions for necessary policy changes as the work unfolds, and set realistic goals for the timely completion of investigations.

151. The Task Force also understands that increased timeliness in complaints handling will likely mean an increase in the number of matters that will be scheduled for hearing before the Society's Hearing Panel. As the mandate of the Task Force did not extend to an examination of this phase of the complaints process, the Task Force's comment in this respect is that it is likely that increased human and financial resources will in time be required for the increasing number of cases at the hearing stage, which may include some cases that will be older in aging than the current median targets, for the reasons described in this report.

152. Looking forward, the Task Force supports the efforts of the Director to provide the Professional Regulation Committee with her quarterly operational reports, which include extensive information on the Division's processes and progress in complaints handling. Through its review of these reports, the Committee is able to perform an oversight role of the regulatory function linked to its mandate[25] , not with respect to operational issues but in aid of being informed of matters that may require assessment of professional regulation policy issues that lead to recommendations to Convocation for change.

153. As such, the The Task Force is confident that while the type of review it undertook is valuable, on an ongoing basis, the appropriate systems are in place institutionally to support the timeliness and quality of the Division's work, in order to fulfill the Society's regulatory mandate. The Task Force's recommendations are intended to support that work and the Division's goals and ultimately, make the Society a better regulator.

APPENDIX 1

INVESTIGATION OF THIRD PARTY COMPLAINTS
WHERE LITIGATION IS PENDING
Convocation, October 1990

a. Where, in the course of on-going litigation or a continuing transaction, a complaint is received from a third party opposed in interest to the solicitor against whom the complaint is brought, the Law Society will defer its investigation until the completion of the litigation or the conclusion of the transaction.

b. The expectation is that where, in the course of litigation, a complaint is brought against a solicitor opposed in interest, the matter will be pursued in the courts, rather than before the Law Society.

c. Notwithstanding paragraph (a) above, the Law Society may proceed with the investigation of a complaint where:

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[25] By-Law 9.
Mandate
15. (1) The mandate of the Professional Regulation Committee is to develop for Convocation's approval,

(a) policy options on all matters relating to regulation of the profession in the areas of professional conduct and fitness to practise; and

(b) policies and guidelines for the prosecution of unauthorized practice.

Rules of professional conduct
(2) Except when Convocation has established a committee other than a standing committee to prepare rules of professional conduct, subject to the approval of Convocation, the Professional Regulation Committee may prepare rules of professional conduct.

Authority of Convocation
(3) Despite subsection (2), Convocation may at any time adopt rules of professional conduct.

(i) The solicitor against whom the complaint is laid consents to the investigation proceeding; or
(ii) The chair of the Discipline Committee or a Bencher designated by the Chair certifies that the circumstances are exceptional and authorizes the Law Society to proceed with its investigation.

d. Where, as provided for by paragraph (c) above, the Law Society proceeds to investigate a complaint received during the course of on-going litigation or a continuing transaction from a third party opposed in interest to the solicitor against whom the complaint is brought, the following procedure is to be observed:

(i) The lawyer against whom the complaint is brought shall be advised by the Law Society that he or she has a right to request that specified items not be disclosed to the complainant.
(ii) Where, despite receiving a request for non-disclosure, the Law Society decides to disclose to the complainant items which the solicitor has requested not be disclosed, the solicitor shall first be informed of the decision to disclose and shall be given a reasonable time within which to appeal the decision.

e. In all cases, the lawyer against whom the complaint is laid should be required to provide the Law Society with a full and frank response.

f. In appropriate cases, on the basis of such response, staff should advise the complainant that the complaint does not warrant further investigation and that the file will be closed.

g. Where further investigation appears to be warranted, the normal policy should be to hold such investigation in abeyance until the litigation is concluded.

h. Where the staff consider that immediate investigation is required, but where the lawyer objects, the investigation may proceed only with the approval of the Chair, Vice-Chair or a designated member of the Discipline Committee.

i. Where an investigation is to proceed during the course of litigation, the lawyer is to be notified of the right to request that all or part of the information supplied in response to the complaint not be disclosed to the complainant. Where such a request is made, the Law Society will not disclose the information.

PROTOCOL FOR COMPLAINANTS

(adopted by Convocation November 28, 1997; amended May 29, 1998 and June 22, 2000)

In this protocol,
"complainant" means a person who has made a complaint to the Society regarding a member or student member, but where an application has been commenced, it means a person who has made a complaint to the Society regarding a member or student member that remains open and that is relevant to the application.

"member" means a member of the Law Society and includes a law student registered in the Law Society's pre-call program

Generally

1. A Complainant should at all times be treated professionally and with courtesy, respect and candour by Law Society staff, outside investigators and counsel engaged by the Law Society.
2. A Complainant should be provided with information about the Law Society's regulatory processes.
3. The Law Society should communicate with a Complainant in "plain language".
4. The Law Society should communicate with a Complainant, if the Complainant so requests, in French, and use its best efforts to communicate with a Complainant in the language of his or her choice.
5. The location of meetings at the Law Society with a Complainant, as much as practicalities permit, should be comfortable and convenient for a Complainant.

Intake, Resolution and Investigation of Complaints

6. The Law Society should assist a complainant, where necessary, in recording a complaint about a lawyer. As a rule, complaints are requested to be made in writing, but the Law Society will accept complaints recorded on audiotapes or videotapes.

7. A Complainant has a right to be regularly informed of the status of the complaint with which he or she is involved. A status report should be provided at least every 90 days, unless otherwise agreed upon by the Complainant and the Law Society's staff handling the complaint.

8. The Complainant should be reasonably accommodated with his or her requests for meetings about the complaint to the Law Society as required for pursuit of the complaint, and in the scheduling of meetings with the Complainant as requested by the Law Society.

9. All written (including facsimile) or electronic communications from a Complainant that require a response should be acknowledged within 14 days of receipt by the Law Society. Telephone messages from a Complainant should be returned at the latest by the next business day.

10. Where a complaint matter is closed based on Law Society staff's or outside counsel's view of the matter, as the case may be, reasons for not taking further action on a complaint should be provided to a Complainant.

11. A Complainant shall be given the opportunity to have his or her complaint reviewed by a lay bencher of the Law Society, in accordance with the complaints review by-law and policies.

12. A Complainant should be advised of:

    a. the referral of a matter to the Proceedings Authorization Committee within 14 days after the fact of the referral is communicated to the member;
    b. the decision of the Proceedings Authorization Committee, including the type of proceeding authorized, if any, within 14 days after the decision is communicated to the member.

Institution of Proceedings

13. Unless a Complainant advises that he or she does not wish to be kept informed, Law Society counsel should inform a complainant in writing that an application has been issued for a conduct, competence or capacity proceeding based on his or her complaint, as soon as is reasonably possible after the member has been served with the application, together with a brief explanation of the hearing process and advice on whether the Complainant has a right to be present at the hearing.

Hearing Stage

14. Law Society counsel should make themselves available to respond to a Complainant's reasonable inquiries or requests for information at any stage of the hearing process.

15. In conduct proceedings, Law Society counsel should:

    a. At an early stage in the prosecution of an application, seek the views of a Complainant on his or her expectations of the outcome of the proceedings against the member arising out of the Complainant's complaint;
    b. Once a hearing date is set, advise the Complainant of this date and any subsequent changes in this date;
    c. Where practicable, advise the Complainant of significant decisions regarding the withdrawal or amendment of particulars with which that Complainant is involved;
    d. Where practicable, advise the Complainant of any joint submissions as to penalty;
    e. If the Complainant does not attend at the hearing, write to the Complainant advising of the final disposition of the application and provide a copy of written reasons of the hearing panel, if any;
    f. In the event of an appeal, advise the Complainant of the appeal, the hearing date of the appeal and the outcome.

16. In competence or capacity proceedings, Law Society counsel should:

    a. Whether or not the hearing is in public, once a hearing date is set, advise the Complainant of this date and any changes in this date;
    b. Whether or not the hearing is in public, write to the Complainant advising:

        i. whether a finding of incapacity or incompetence was made or whether the application was dismissed;
        ii. of the resulting order of the hearing panel as may be permitted by the rules governing practice and procedure at Law Society proceedings.

    c. Provide a copy of any written reasons of the hearing panel, as may be permitted by the rules governing practice and procedure at Law Society proceedings;
    d. Whether or not the hearing is in public, in the event of an appeal, advise the Complainant of the appeal, the hearing date of the appeal and the outcome.

17. The use of "victim impact statements" at conduct hearings will continue to be dealt with by the existing policy attached to this Protocol, amended to provide for videotaped statements from Complainants where the Complainant and the parties to the proceeding

agree. The policy should be brought to the attention of Complainants so that they are aware of the opportunity to provide a victim impact statement to the Hearing Panel.

POLICY ON VICTIM IMPACT STATEMENTS AND REPRESENTATION OF COMPLAINANTS AT DISCIPLINE HEARINGS[26]

(adopted by Convocation May 29, 1992)

1. Discipline hearing panels and, where applicable, Convocation should consider evidence tendered concerning the effect of lawyers' professional misconduct on victims of that misconduct in formulating recommendations and decisions as to penalty.

2. The appropriate stage of disciplinary proceedings at which such evidence should be received is the penalty phase of hearings before discipline hearing panels. Convocation should not as a rule receive such evidence.

3. The Law Society's counsel should decide after consulting with victims and their counsel whether the hearing panel should be asked to receive such evidence.

4. Where such evidence is led, it should be confined to factual statements by victims, without argument, describing the effects of the solicitor's misconduct.

5. The evidence may be introduced in the form of a written statement agreed upon by the solicitor's counsel and the Society's counsel (who will consult with victims and their counsel in the preparation of the statement). Where counsel cannot agree on a written statement, the Society's counsel may lead evidence as to the effect of the solicitor's misconduct on victims *viva voce*. Where *vice voce* evidence is introduced, it should be subject to cross-examination and rebuttal.

6. In their capacity as witnesses, victims who give evidence about the effects of a solicitor's misconduct are entitled under Section 11 of the *Statutory Powers Procedure Act* to be advised by counsel as to their rights, but their counsel are not entitled to take any other part in the hearing without leave of the discipline hearing panel. Carriage of the proceeding should remain throughout with the Society's counsel, who should lead victims' evidence in chief in cases in which victims testify.

7. Where evidence is introduced in either written form or *viva* voce, the discipline hearing panel should consider that evidence in formulating its decision or recommendation as to penalty and should report upon the evidence to Convocation in the usual fashion in cases in which a reprimand in Convocation or a harsher penalty is recommended.

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[26] This policy uses the terms "discipline" and "disciplinary" as it was adopted during the currency of the *Law Society Act* prior to the February 1999 amendments. A "discipline" hearing under the amended *Act* is known as a conduct hearing. In addition, references are made to Convocation's consideration of discipline hearing panels' decisions, a process which has been ended under the amended *Act*. The procedure now involves hearing panels and appeal panels.

APPENDIX 2

RECOMMENDATIONS OF THE GRIFFITHS REPORT

Summary of Report, Recommendations and Conclusions

The following is a summary of my principal recommendations and conclusions with reference to the pages in the Report.

General

1. Outside counsel are currently rarely retained in matters of Investigations and only occasionally to prosecute. As a matter of policy, outside counsel should only be retained where there is conflict, or a matter requiring special expertise, or the workload of the staff Discipline Counsel requires that they be given some outside assistance with a prosecution. (p.7).

2. The clear direction provided by Rule 6 and the present policy of Discipline Counsel, ensures that protracted proceedings on the nature and extent of privilege are not likely to occur.(p.10).

The Advisory & Complaints Service Department

3. With the establishment of a special unit in the Client Service Centre to screen complaints, there appears to be very little lapse time in providing responses to the Complainants. The Advisory & Service Department seems to be functioning reasonably well and I see little potential for any problems in that Department affecting the Discipline process. (p. 16).

The Investigation Department

4. The present practice of having the Authorization to investigate under Section 49.2 or 49.3 of the Act, prepared in the form of a Memorandum clearly stamped and signed by the Secretary, eliminates the likelihood of a challenge to the Authority of the nature raised in Codina. (p.19).

5. The recent change in practice requiring that the Investigation Team Leader report to the Manager of Investigations on any outstanding requests from Discipline for additional investigation, should provide some control to ensure that the requests are followed up. (p.25)

6. There is the potential for serious problems to develop with Discipline cases in those situations where PAC has authorized a prosecution against a Member but Discipline Counsel have declined to issue a Notice of Application until Investigations has provided all necessary material to support the charges. I have made the obvious recommendation that in circumstances where Authorization has been granted by PAC, that the Investigators must give high priority to the completion of the investigation to support the charges. (pp. 25-26)

7. One has to accept the fact that there is a significant backlog of cases under investigation. The delay in completing cases generally can be attributed to a number of

factors including complexity, the number of complainants, the effect of Project 200, the Member-Driven Approach, the case loads and experience of the investigation staff. (p.26)

8. Project 200 in particular had a serious disruptive effect on Investigations in causing a loss of seasoned staff and through the process of amalgamating Investigations with other departments. All of this has resulted in a substantial increase in the workload of Investigations. Happily, I can report that some of the problems created by Project 200 have been resolved and others will resolve in the course of the next few months. (p.29) The workload of the staff, however, will remain high, with each Investigator carrying a large number of cases.

9. The Member-Driven Approach which has resulted in Investigations being saddled with the investigation of many service related problems has seriously affected the ability of the Investigators to deal with the more serious Discipline cases in a timely fashion. I have recommended the addition of staff, ideally six new members with one assigned to each Investigation Team. Scott Kerr in his report to which I have made reference, suggested two additional staff members and this would be minimal. (pp. 31-32)

10. One of the major factors contributing to delay is the fact that 60% of the present investigation staff is inexperienced. (pp. 32-33) I have recommended a number of programs for the training of the investigation staff to increase their competence. The fact is however that the present investigative staff is inadequate both in numbers and in experience to cope with a case load ranging from 140 to 180 cases per year.

11. I have recommended a closer liaison between the Investigators and the Discipline Department wherein the Investigator should understand that he or she is at liberty within reason to consult with Discipline Counsel and Discipline Counsel should be ready to respond, within reason, at an earlier stage in the investigation to assist in the resolution of legal problems. (pp. 38-39)

12. Following a Discipline Hearing, Discipline Counsel should meet with the Investigation Team responsible for the particular investigation and conduct a post-mortem on the proceedings and this should be continued on a monthly basis as a regular feature.

13. The decisions of Discipline Panels and Convocation and any resolutions that have been passed relative to Discipline matters should be made available to Investigations on a monthly basis. (p. 40)

14. The long term goal of Project 200 to have 95% of all investigations complete within four months of intake is unrealistic. A more realistic goal would be ten months with some increase in staff and improvement in competence. (pp. 33-34)

15. There are 18 cases in Investigations (not including those in which Authorization has been granted but the investigation incomplete) where the investigation has been ongoing for more than a year. I recommended that these cases be reviewed and a status report submitted to the Chair of The Professional Regulation Committee at the end of November 2000. (pp. 35-36)

The Discipline Department

16. One immediate and pressing problem is to replace the two senior members of Discipline who have just resigned. Their workload will probably have to be assigned to outside counsel. (p. 43)

17. I have recommended against a time limit for prosecution of Discipline on the basis that such a time limit would only place additional pressure on Discipline staff and may well provide grounds for an Application for Stay. (p.45)

18. As of September 14th, 2000, Discipline had a total of 47 cases in which Notice of Application had been served and the cases in the prosecution process. Of those, 10 cases are more than two years old. Based on my review of those cases, I have concluded that the delay in each instance is justifiable. (p.48)

19. As of August 31st, 2000 there were 34 cases under the wing of Discipline on which Authorization had been granted by PAC but Notice of Application had been held in abeyance. Those cases cause me concern, particularly the 16 that have been in abeyance for more than one year. In my recommendations I can only stress the importance of resolving these cases as soon as possible. A number of these cases were under the control of senior counsel who recently retired and these cases must be sent to outside counsel to process. (pp.47-49)

20. To alleviate to some extent the problem involved in the delay of issuing the Notice of Application, following Authorization by PAC, I have recommended that a new staff member be added to Investigations, a lawyer whose sole function would be to vet the Discipline material and to prepare the Authorization for submission to PAC with a view to having the supporting investigation material available when the matter is submitted to PAC for authorization. (pp.49-50)

21. In my view, it is important that the Chair of The Professional Regulation Committee be advised at an early date of any problem in Investigations & Discipline. I have therefore recommended that the Manager of Investigations and Senior Counsel in Discipline report monthly to the Chair advising of the workload of each department and outlining any cases that may give rise to a particular problem. (p.50)

22. Convocation should recognize that a major reason for the delay in prosecution of current cases has been the frequent adjournments readily granted by Hearing Committees. I recommend that Convocation give consideration as to whether the present policy of readily granting adjournments is in the best interest of the public and the administration of justice. I recommend a more rigid and less flexible attitude towards adjournments. (p.53)

23. The obvious solution with respect to the backlog in Discipline is to provide a favourable and early response to Discipline's request for more permanent Discipline Counsel with appropriate back-up staff. In my view, the suggestion of Lesley Cameron that Discipline requires nine permanent counsel and one contract counsel to provide the competent service expected is sound. (p. 53)

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED AT TORONTO, THIS 25th DAY OF SEPTEMBER, 2000.

THE HON. W. DAVID GRIFFITHS, Q.C. LL.D.

APPENDIX 3

ORGANIZATIONAL CHART OF THE PROFESSIONAL REGULATION DIVISION

AND

THE COMPLAINTS PROCESS
(DIAGRAM)

(see charts in Convocation Report – pages 75 and 76)

It was moved by Mr. Cherniak, seconded by Ms. Curtis, that the motion set out at pages 3 and 4 of the Report be approved.

A friendly amendment proposed by Mr. Wright to Recommendation 2 was accepted. Paragraph b.iii of Recommendation 2 will now read as follows:

b. iii That the investigation of a complaint about a member made by a complainant who is adverse in interest to the member when litigation is pending or a transaction is ongoing be handled in a manner that does not prejudice the rights of the member in the litigation or transaction.

The main motion as amended was adopted.

Carried

Ms. Ross did not participate in the debate on the Investigations Task Force Report and abstained from voting.

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FEDERATION OF LAW SOCIETIES OF CANADA

Mr. Campion reported on the Federation's meeting in Charlottetown on May 4 - 6, 2006.

EQUITY AND ABORIGINAL ISSUES COMMITTEE/Comité sur léquité et les affaires autochtones REPORT

Re: Human Rights Monitoring Group – Mandate

Mr. Copeland presented the Report to Convocation.

Report to Convocation
May 25, 2006

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
Holly Harris
Thomas Heintzman
Tracey O'Donnell
Mark Sandler

Purpose of Report: Decision and Information

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

TABLE OF CONTENTS

For Decision

Equity Public Education Series - 2006

Workforce Census of the Law Society of Upper Canada

COMMITTEE PROCESS

1. The Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones (the Committee) met on May 11, 2006. Committee members Joanne St. Lewis (Chair), Paul Copeland (Vice-Chair), Marion Boyd, Dr. Richard Filion, Holly Harris, Thomas Heintzman, Mark Sandler and Tracey O'Donnell participated. Milé Komlen (Chair of the Equity Advisory Group (EAG)) also participated. Staff members Josée Bouchard, Anne-Katherine Dionne, Sudabeh Mashkuri, Marisha Roman and Rudy Ticzon also attended.

FOR DECISION

HUMAN RIGHTS VIOLATIONS AGAINST MEMBERS OF THE LEGAL PROFESSION AND THE JUDICIARY MONITORING GROUP - MANDATE

MOTION

17. That Convocation approves the following mandate for the Human Rights Violations Against Members of the Legal Profession and the Judiciary Monitoring Group (the Monitoring Group):

    a. The mandate of the Monitoring Group is to,

        i. review information that comes to its attention about human rights violations that target members of the profession and the judiciary, here and abroad, as a result of the discharge of their legitimate professional duties;
        ii. determine if the matter is one that requires a response from the Law Society; and
        iii. prepare a response for review and approval by Convocation.

Background

18. In March 2006, Convocation approved a policy, presented by the Emerging Issues Committee, to systematically respond to human rights violations that target members of the legal profession and the judiciary as a result of the discharge of their legitimate professional duties.[1]

19. Convocation also approved the establishment of a group of benchers to be responsible for monitoring these human rights violations.

20. On April 27, 2006, Convocation adopted the following motion:

    a. That the following benchers be responsible for monitoring human rights violations that target members of the legal profession and judiciary, here and abroad, as a result of the discharge of their legitimate professional duties

        i. Paul Copeland (Chair)
        ii. Anne Marie Doyle
        iii. Heather Ross
        iv. Joanne St. Lewis
        v. Mark Sandler

    b. And that this group of benchers report to Convocation through the Equity and Aboriginal Issues Committee.

21. Convocation requested that the Monitoring Group develop its mandate and bring a motion for its approval, through the Equity and Aboriginal Issues Committee, to Convocation. On May 11, 2006, the Equity and Aboriginal Issues Committee considered the mandate of the Monitoring Group. The Monitoring Group, through the Equity and Aboriginal Issues Committee, recommends that Convocation adopt its mandate.

22. The Monitoring Group also developed Process Guidelines, which are presented for information at Appendix 1.

APPENDIX 1

MONITORING GROUP - PROCESS GUIDELINES
(FOR INFORMATION)

Criteria for Intervention

1. The Monitoring Group will consider the following factors when deciding whether to recommend a Law Society response to human rights violations that target members of the legal profession and the judiciary as a result of the discharge of their legitimate professional duties ("human rights violations"),

    a. whether the incident involves human rights violations against members of the profession or the judiciary;

[1] The relevant excerpt of the Emerging Issues Committee Report to Convocation is attached at Appendix 2.

b. whether the human rights were violated as a result of the discharge of a legitimate professional duty;
c. whether the issue relates to the governance of the legal profession or the Law Society's mandate;
d. whether the Law Society is an appropriate organization to address the issue; and
e. the Law Society's resources.

Process for monitoring human rights violations

2. When the Law Society receives information about human rights violations, staff will bring the information to the Monitoring Group's attention.

3. The Monitoring Group shall base its determination of whether or not a Law Society response is warranted on the criteria set out in the Process Guidelines.

4. The Monitoring Group may,

a. recommend that the Law Society not respond; or
b. recommend that the Law Society respond and prepare a response.

5. Where the Monitoring Group determines that a Law Society response is warranted, it will present the response to Convocation through the Equity and Aboriginal Issues Committee.

Types of intervention

6. The types of interventions that the Monitoring Group may recommend to Convocation include,

a. letters of indignation;
b. letters in support of others' advocacy;
c. letters urging other organizations (such as, but not limited to, the Federation of Law Societies, the Canadian Bar Association or the federal government) to respond; and/or
d. partnering with advocacy organizations.

APPENDIX 2

EXCERPT OF THE EMERGING ISSUES COMMITTEE REPORT TO CONVOCATION ON MARCH 23, 2006
(FOR INFORMATION)

Policy on Law Society Responses to Human Rights Violations Involving Lawyers and Judges

MOTION

1. That Convocation approves:

a. a policy to systematically respond to human rights violations that target members of the legal profession and judiciary in retribution for the discharge of their legitimate professional duties, and;
b. that a group of benchers be charged with monitoring human rights violations that target members of the legal profession and judiciary in retribution for the discharge of their legitimate professional duties, the composition of the group and particulars of its mandate to be determined following Convocation's approval of this proposal.

Background

2. At the Committee's March 2005 meeting, a new issue was raised concerning the Law Society's role in the global community, and in particular, whether the Society should develop a policy for responding in an organized fashion to international crises and human rights abuses as an alternative to approaching these issues on a case-by-case basis, and what the scope of that policy should be.

3. From time to time, Convocation has formally responded to certain events in the international community. For example, in January 2005, Convocation approved assistance to victims of the December 2004 South and Southeast Asian tsunami by facilitating the provision of pro bono legal services to Ontarians who had been affected by the disaster and organizing legal information sessions within the affected communities. Convocation has also approved responses to events in which lawyers have been targeted for their activities as lawyers and have suffered tragic consequences as a result. The following are two examples:

a. Rosemary Nelson

In March 1999, Convocation unanimously adopted a motion calling for an immediate independent and international inquiry into the murder of lawyer Rosemary Nelson, who was killed by a car bomb outside her home in Northern Ireland on March 15, 1999. Ms. Nelson's clients included those who had been arrested under emergency laws for questioning about politically motivated offences.

b. Igbal Raad, Asthma Jahangir and Hina Jilani

Convocation adopted a similar approach in April 2000 in responding to the case of a lawyer murdered and threats in a separate incident to two other lawyers in Pakistan. Mr. Raad was one of two senior lawyers defending Nawaz Sharif, Pakistan's deposed Prime Minister, against a possible death sentence. Mr. Raad was shot dead in his office by three assailants who also killed his office assistant and a guest, the son of a High Court Justice. Death threats were made against Asthma Jahangir and Hina Jilani, two human rights lawyers who were assisting a client in obtaining a divorce from her abusive husband. The client herself was shot dead in the lawyers' offices by a gunman who had accompanied her family to the meeting. In response, Convocation decided to convey to the appropriate authorities in Pakistan its dismay over the murders and the death threats directed at the two lawyers and the murder of their client in their office. Convocation also conveyed its hope that the Pakistani authorities would take necessary steps to protect lawyers in the carrying out of their duties, and to reaffirm the

commitments of the Pakistani government to the rule of law, to the United Nations Declaration on Human Rights Defenders and to the United Nations Basic Principles on the Role of Lawyers.

4. The Committee focussed on the merits of a more formalized structure for preparing responses to these events. After directing research on the issue, the Committee struck a working group[1] at its May 2005 meeting to study the issue and, in considering a policy, how to frame the scope and content of the policy.

5. At its November 2005 meeting, the Committee considered the working group's report, which formed the basis for the proposals in this report. The Committee also asked the Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones (EAIC) to review the working group's report and provide feedback on the proposals.

6. EAIC reviewed the report at its January 12, 2006 meeting, discussed later in this report, and endorsed the proposals.

The Committee's Review

7. In examining this subject, the Committee considered a number of issues.

<u>The Law Society's Mandate and the Independence of the Bar</u>

8. The Law Society's mandate, as articulated in its Role Statement, is as follows:

> The Law Society of Upper Canada exists to govern the legal profession in the public interest by,
> - ensuring that the people of Ontario are served by lawyers who meet high standards of learning, competence and professional conduct; and
> - upholding the independence, integrity and honour of the legal profession,
>
> for the purpose of advancing the cause of justice and the rule of law.

9. The language of the Role Statement suggests that the scope of the mandate would appropriately include responding generally to situations in which members of the legal profession and judiciary are subjected to persecution as a result of the discharge of their legitimate professional duties.

10. The primary responsibility of the Law Society is to govern, a privilege granted to the Society by statute for the purposes of self-regulation of the legal profession. The Commentary to the Role Statement, however, acknowledges that "Governance can also be a useful limiting concept. We can ask in respect of every program and activity of the Law Society (actual or proposed): "Does it qualify as *governance* of the profession?" or "Is it an essential function of *governing* the profession?""[2]

11. The scope of governance, and the activities that properly fall within it, are informed by the purposes of governance. As Commentary 6.1 states: "The role statement declares

[1] Working Group members were Paul Copeland (Chair), Anne Marie Doyle and Tom Heintzman.
[2] Commentary 1.3 to the Role Statement.

that the Law Society is to govern the legal profession in the public interest by upholding the *independence* of the legal profession." Commentary 6.2 goes on to explain:

> The role of the Law Society in maintaining the essential independence of the profession was stated by Henry J. (dissenting, but not on this point) in *Re Klein and the Law Society of Upper Canada, (supra* par. 2.1) at 143:
>
> > Society as a whole needs the legal profession to assist the citizen in his dealing with others and with the state. The role of the Law Society is to ensure that that service is available through the profession, and that it will be seen as a body of professionals acting with competence, integrity and independence.[3]

12. Human rights abuses, whether here or abroad, resulting in the persecution of lawyers for discharging their legitimate professional duties may directly or indirectly threaten the independence of the bar and the freedom of lawyers to make their services available to those who need them. Statements of concern by the Society in response to threats or incursions to the profession's independence would appear to fall within the scope of the Society's activities.

<u>The Law Society and Other Organizations</u>

13. A policy that the Society systematically address human rights violations against lawyers and the judiciary might include, where appropriate, joining with other organizations in responding to matters within the scope of the policy. On occasion, the Society may find it appropriate to review the sufficiency of other organizations' activities in terms of addressing issues that arise. It may be that other organizations are well-placed to respond effectively and this may determine whether or not or to what extent the Law Society should respond.

14. The Committee reviewed the work of advocacy organizations on behalf of persecuted lawyers and the work of other Canadian law societies in this area:

    a. Lawyers' Rights Watch Canada (LRWC) is a committee of Canadian lawyers dedicated to protecting human rights advocates and promoting the rule of law and human rights internationally. The organization monitors cases of lawyer persecution and conducts letter writing campaigns, trial observations and rights advocacy training. In 2005, LRWC was granted Special Consultative Status with the United Nations, which allows it to participate in U.N. human rights policy development. Bencher Paul Copeland is on LRWC's Board of Directors.
    b. The Law Society of England and Wales' International Human Rights Committee and staff organizes a letter writing campaign through which members and the public can download, sign and send to the appropriate foreign government authorities a letter outlining the fact of the human rights violation, commenting on the relevant law(s) being violated and demanding immediate action.

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[3] Note that this reference to the role of the Law Society touches not only on independence but also on other elements of the role statement: the public availability of legal services, competence and integrity.

c. In 2002, Richard Gibbs, Q.C., then Vice-President of the Law Society of British Columbia, went to Malaysia to monitor and report on the trial of lawyer, Karpal Singh. Mr. Singh was charged with sedition for words spoken in defense of his client who was in custody, facing criminal charges. Mr. Gibbs represented the Law Society of British Columbia, Lawyers' Rights Watch Canada and the Federation of Law Societies of Canada. The Law Society indicated that the Malaysia trial observation was a one-time project and that at present the Law Society does not engage in international human rights advocacy.
d. The Barreau du Québec's Comité sur les droits de la personne is responsible for advising the equivalent of the Treasurer and Convocation whenever a public position on human rights violations is warranted.

15. The Committee also considered whether a national group, such as the Canadian Bar Association, might be better suited to respond to human rights violations that target members of the legal profession and judiciary. National organizations have the ability to mobilize members across the country, which may have greater impact than a response from a provincial law society. However, it was recognized that with approximately 35,000 members, a response from the Law Society might carry significant weight.

16. The Committee also contemplated that there may be occasions in which the only appropriate response available is one that can be effected immediately, without the constraints of relying on another organization's timetable.

Factors Relevant to a Response

17. In considering a method of systematic response to address human rights abuses involving the legal profession, it is suggested that building in a threshold by which to measure the need for a response based on certain considerations would be appropriate. These considerations include

a. the Law Society's mandate and how the issue relates to governance of the profession;
b. the best 'voice' to address the issue;
c. the perspective the Law Society can bring to the issue;
d. the persuasiveness of the Law Society's position;
e. how the Law Society might be distinguished from other organizations; and
f. the Law Society's resources.

The Committee's Proposals

Rationale For and Scope of Responses to Human Rights Abuses

18. The Committee recognized that any proposal to address this issue should be informed by the Law Society's Role Statement, noted earlier.

19. In the Committee's view, the following warrant a policy that the Society should monitor human rights abuses that involve persecution of lawyers and the judiciary, here and abroad, for the purposes of advising Convocation of the need for a response:

a. in keeping with the Role Statement, the cause of justice and the rule of law are promoted when members of the public have access to meaningful legal representation and an independent bar and judiciary;
b. these basic tenets of a fair and accountable justice system are achieved when members of the legal profession and judiciary are free to discharge their legitimate professional duties without threat of persecution;
c. justice is denied where lawyers are persecuted for performing their professional duties;
d. the legal profession is becoming globalized, and the erosion of respect for the rule of law elsewhere threatens its tenuous position even in the most democratic societies; as Martin Luther King, Jr. observed, “A threat to justice anywhere is a threat to justice everywhere”;
e. governing in the public interest requires that the Law Society ensures access to lawyers who can meet the public’s legal needs by preserving and promoting access to justice, the rule of law and an independent bar; as one Canadian lawyer put it, "We are the only profession referred to in our country's constitution. The judges must be drawn from our ranks. With these privileges go great responsibilities. One of these is to maintain not only the independence of the bar but the independence of all individual lawyers to do their professional duty."[4]

20. These factors informed the previous responses the Society approved on an *ad hoc* basis, noted earlier in this report and as such, in the Committee’s view, they support establishing a structure to facilitate a more systematic approach to framing such responses.

21. With respect to scope, responses should be limited to cases in which members of the legal profession and judiciary are threatened or persecuted as a result of the discharge of their legitimate professional duties.[5] While many human rights abuses are politically complex and ‘double-edged’, responding in cases in which lawyers have been murdered or incarcerated for discharging their professional duties is readily justifiable. In other cases in which the circumstances of the threat or persecution are less obvious, it may be appropriate for the Law Society to conduct research and determine whether a response is warranted.

22. Suggestions for possible responses include:

a. Letters of indignation;
b. Letters in support of others’ advocacy;
c. Letters urging responses from other organizations, such as the Federation of Law Societies, the Canadian Bar Association or the federal government; and/or
d. Partnering with advocacy organizations such as Lawyers’ Rights Watch Canada.

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[4] Giles, Jack. “Why Multi-Disciplinary Practices Should Be Controlled by Lawyers” (2000) *58 The Advocate* 695 at 697

[5] The Committee determined that a Law Society response to general humanitarian crises and human rights abuses, as opposed to those directly involving lawyers and members of the judiciary, does not fall within the narrow scope of the Law Society’s mandate as a regulator of the legal profession in the public interest. However, this would not preclude interested benchers from bringing general egregious abuses to the attention of Convocation for review on a case-by-case basis.

Forming a Group of Interested Benchers to Monitor Human Rights Abuses

23. The Committee believes that a group of interested benchers should be formed to monitor on an on-going basis human rights abuses, including threats and persecution, of lawyers and the judiciary. Once the group is established, it would be for the group to bring definition to its structure and determine such details as the frequency of reporting, the range of responses, including those outlined in paragraph 22, and the particulars of the action required in a specific case for the approval of Convocation, with regard to the considerations in paragraph 18.

24. The Committee anticipates that staff support will be required to assist the group with on-going monitoring, research into the circumstances of alleged cases of lawyer persecution, where necessary, and the preparation of materials for the group and Convocation's review. The Committee considers this support essential to permit Convocation to make effective, informed and timely responses.

25. The Committee determined that an initiative of this nature might best be implemented by the Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones (EAIC), given the relationship of this issue to the work done in that committee. One option would be to constitute the group of benchers as a working group of this standing committee.

26. The Committee referred its report to EAIC for comment on the proposal, and EAIC considered the report at its January 12, 2006 meeting. EAIC agreed with the Committee's approach and supports establishing the group of benchers under its leadership. Upon approval of the policy discussed in this report, EAIC is prepared to consider in detail the composition of the working group and the matters noted in paragraph 23.

27. While the working group will define its work more precisely, it is suggested that its broadly-stated mandate would be to review information that comes to its attention about human rights abuses of lawyers and judges here and abroad, determine if the matter is one that requires a response from the Law Society, instruct research if necessary on the issue and prepare a response for review first by the EAIC and then by Convocation.

Financial Implications of the Proposal

28. The working group discussed above would be supported primarily by staff in the Equity Initiatives Department, under the leadership of the Equity Advisor, Josée Bouchard.

29. Currently, Equity staff receive information from various sources and, if relevant, will note developments in society that relate to the Law Society's equity focus. This would include from time to time information generally about the profession and developments or events in other countries involving the legal profession that are newsworthy, matters that raise concerns from the equity perspective or issues that otherwise relate to the Department's interests. Some of this information may relate to human rights issues.

30. To facilitate the work of the proposed working group, the responsibilities of the Equity staff can be expanded, without any increase in financial resources, by establishing regular channels of communication with groups such as Lawyers Rights Watch Canada. While it is not the expectation that Equity staff would be able to identify and/or monitor all

incidences of human rights abuses involving lawyers or judges, this information channel would provide sufficient information to the staff to assist the working group in its monitoring function. The Equity staff are also well-equipped and have the necessary resources to undertake research when warranted.

Summary of the Proposed Policy

31. The Committee recommends that Convocation adopt and implement a policy to systematically respond to national and international human rights violations that result in the persecution of members of the legal profession and judiciary in retribution for the discharge of their legitimate professional duties. These responses are justified on the basis that the events that prompt them generally relate to matters of the independence of the bar and access to justice, referenced in the Role Statement and its commentary, and that a threat to a lawyer anywhere is a threat to the legal profession as a whole.

32. The Committee further recommends that Convocation charge a group of benchers with responsibility to monitor human rights violations and persecution experienced by members of the legal profession and judiciary as a result of the discharge of their legitimate professional duties. The particulars of the mandate of this group and its composition should be determined after Convocation has approved this proposal.

FOR DECISION

LAW SOCIETY SURVEY ON IMPACT OF LAW SCHOOL TUITION FEE INCREASES IN ONTARIO

MOTION

23. That Convocation approves the allocation of $45,000 from the contingency fund in 2006 to enable the Equity and Aboriginal Issues Committee (the Equity Committee) to conduct a survey with candidates in the 2006 Licensing Process and lawyers called to the bar in 2004 and 2005 to,

    a. determine the debt load of law school students;
    b. study the effectiveness of bursaries, financial support programs and back end debt relief programs;
    c. consider whether the increase in tuition fees has an impact on students' career choices;
    d. identify strategies to alleviate the burden of increasing tuition fees;
    e. track changes over time.

Background

24. In a letter dated January 4, 2006 (Appendix 1), Clayton Ruby, then Acting Treasurer, asked Paul Copeland, Vice-Chair of the Equity Committee, whether the Law Society could follow up on the *Study of Accessibility to Ontario Law Schools* (the *Accessibility Study*) undertaken by five Ontario law schools (all but the University of Toronto, Faculty of Law) in 2004 (Executive Summary of the *Accessibility Study* presented at Appendix 2). More specifically, the Acting Treasurer wondered whether it is appropriate to analyze

that study and do some follow up work to see if law school debt is as predicted and whether the bursary programs are in fact proving to be useful in the way in which the law schools have asserted.

25. On February 9, 2006, the Equity Committee considered various options and resource implications to undertake follow up work on this issue. The Equity Committee decided that the Law Society should proceed with a follow up survey as described in this report.

26. The 2006 Demographic Analysis and Research budget of the Equity Initiatives Department is already allocated to two projects, a consultation with Aboriginal members of the bar and a consultation with students seeking articling positions. Therefore, on May 11, 2006, the Equity Committee requested that the Finance and Audit Committee allocate a budget of $45,000 from the contingency fund to enable the Equity Committee to conduct a survey with candidates in the 2006 Licensing Process and lawyers called to the bar in 2004 and 2005.

27. The Finance and Audit Committee approved the request and recommends that Convocation approve the allocation of $45,000 from the contingency fund. The Finance Committee also suggests developing the initial survey into an annual survey of Licensing Process students so that longitudinal data on the effect of changes in tuition fees is accumulated.

28. This report provides a brief history of tuition fee increases, outlines information about the *Accessibility Study*, proposes methodology for a Law Society study, and assesses costs to undertake follow up work.

History of Tuition Fees

29. Deregulation of tuition fees for university professional programs began in 1997. Since the 1997-1998 academic year, tuition fees at the five Ontario law schools in the *Accessibility Study* have risen by between $5,000 and $14,000. In 2002, the Faculty of Law of the University of Toronto announced that it would incrementally increase its tuition fees to $22,000 per year by 2005. Other law schools also announced that they would increase their tuition fees.

30. Significant tuition fee increases occurred in most law schools between 2001 and 2004.

Tuition fees at the six law schools between 1997 and 2004 were as follows[1] :

University	Year	1997-98	1998-99	1999-00	2000-01	2001-02	2002-03	2003-04
Osgoode	1st	3,228	3,874	4,649	8,000	8,000	8,000	12,000
	2nd	3,228	3,874	4,649	4,649	8,000	8,000	8,000
	3rd	3,228	3,874	4,649	4,649	4,649	8,000	8,000
Ottawa	1st	3,135	3,450	4,088	5,500	7,200	8,000	8,500
	2nd	3,135	3,450	3,742	4,286	5,665	8,000	8,500
	3rd	3,135	3,450	3,742	3,928	4,415	5,773	8,500
Queen's	1st	3,228	3,874	4,648	5,903	7,084	7,792	8,961

[1] *Accessibility Study*, at 39.

	2nd	3,228	3,874	4,648	5,903	7,084	7,792	8,961
	3rd	3,228	3,874	4,648	5,903	7,084	7,792	8,961
Toronto	1st	3,808	5,904	8,000	10,000	12,000	14,000	16,000
	2nd	3,808	4,570	7,085	8,400	10,500	12,600	14,700
	3rd	3,808	4,570	5,484	8,000	8,820	11,025	13,230
Western	1st	3,182	3,500	4,198	6,000	6,300	7,500	9,255
	2nd	3,182	3,500	4,198	6,000	6,300	7,500	9,255
	3rd	3,182	3,500	4,198	6,000	6,300	7,500	9,255
Windsor	1st	3,182	3,500	4,198	6,000	6,300	7,500	8,500
	2nd	3,182	3,500	3,928	4,390	6,000	6,423	7,697
	3rd	3,182	3,500	3,928	4,060	4,424	6,234	6,542

31. In September 2004, the provincial government imposed a two-year freeze on tuition fees.

32. In 2005-2006, the tuition fees at the six Ontario law schools were as follows (excluding incidental/ancillary fees)[2] :

    a. Toronto: $16,000
    b. Osgoode: $13,000
    c. Western: $9,750
    d. Queen's: $8,961
    e. Windsor: $9,316
    f. Ottawa (common law French and English): $8,500.

33. On March 8, 2006, the Ontario government announced a lift to the two-year freeze on tuition fee increases (see press release at Appendix 3). Under the new tuition framework applicable from 2006 to 2010, governing boards of universities will be allowed to increase tuition fees by no more than a maximum overall average of five per cent at each institution. For most programs, tuition fees may be increased by up to 4.5 per cent or $100 whichever is greater in the first year of study and four percent for each year after that. High demand college programs, university graduate programs and some undergraduate professional programs, including law school programs, may increase their tuition fees by up to a maximum of eight per cent in the first year of study and four per cent in other years, but only if the institutional average is five per cent or less.

34. The University of Toronto[3] and Osgoode Hall Law School[4] have announced increases in tuition fees for the academic year 2006-2007 and it is anticipated that other Ontario law schools will raise their tuition fees.

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[2] Information gathered from fees posted on-line by universities.

[3] The Faculty of Law of the University of Toronto has announced an increase in tuition fees for entering students by 8%, to $17,280 (excluding incidental/ancillary fees). It has also announced that once a student is in the J.D. Program, the second and third year tuition fees will not be raised by more than 5%. In 2006-2007, tuition fees for continuing students will be $16,640 (excluding incidental/ancillary fees), which represents a 4% increase.

[4] Osgoode Hall Law School's tuition for 2006-2007 has been set at $13,500 and, for 2007-2008, at $15,000.

Background of Accessibility Study

35. In 2002, when most law schools announced their intention to increase tuition fees, they also decided to study the impact of tuition fee increases on the student population.

36. The *Accessibility Study* was commissioned by the Law Deans from five Ontario universities, and funded by the Law Society of Upper Canada ($100,000) and the Law Foundation of Ontario ($100,000). The five law schools engaged in the study were Osgoode Hall at York University and the faculties of law at the University of Ottawa (French and English common law programs), Queen's University, the University of Western Ontario and the University of Windsor. The Social Program Evaluation Group at Queen's University conducted the study. The Faculty of Law at the University of Toronto did not participate in the *Accessibility Study* because the university had recently completed its own internal study, *The Provost's Study of Accessibility and Career Choice in the Faculty of Law (The Provost's Study)*, released on February 24, 2003.

37. The purpose of the *Accessibility Study* was to,

    a. describe the demographic characteristics of law school students in the five Ontario law schools;
    b. determine whether the demographic characteristics of law students had changed since tuition deregulation;
    c. determine whether there had been changes in the types and amounts of student financial support since tuition deregulation; and
    d. examine the amount of debt incurred by students in law school and the impact of debt on their lives.

38. The study was not intended to identify barriers to entry for prospective applicants to Ontario Bachelor of Law programs.

39. Although the Law Society provided substantial funding for the *Accessibility Study,* the initiative was led by the five Ontario law schools and aimed mostly at examining the characteristics of law students, the amount of debt incurred by students in law school and the impact of debt on their lives while at law school. The study included very limited information about the relationship between high debt loads and the composition of the legal profession, and the effectiveness of back end debt relief programs. The Law Society, as a member of the Project Advisory Committee of the *Accessibility Study*, had some input into the project and survey design. However, law schools conducted the study to gather useful information for the law schools.

Methodology of Accessibility Study

40. The *Accessibility Study* was designed to simulate a longitudinal analysis of change over a seven-year period. It involved graduates from the years 2000 to 2003 (alumni) who reported retrospectively on their law school experience, as well as the three classes of law students who graduated in 2004 and 2005 and those graduating in 2006.

41. The study relied on the following sources of information:

    a. financial assistance programs available to students such as OSAP and university and law school financial aid programs;

b. Ontario Law School Application Service data files and yearly reports;
c. Statistics Canada data;
d. a survey of students from years 1, 2 and 3 in five law schools by means of questionnaires – 2,260 respondents;
e. an online or mailed survey of law graduates (years 2000 to 2003) – 966 respondents;
f. student focus group sessions held in each of the five law schools;
g. interviews with key informants from each law school about admissions and financial aid programs; and
h. an extensive literature review.

42. The findings included information about,

a. the diversity of student population;
b. differences in the characteristics between students at the five Ontario law schools;
c. changes in the characteristics of law students since tuition deregulation;
d. major sources of financial support for law school students and changes since tuition deregulation;
e. the impact of debt on students;
f. aspects of students' lives that are affected by their debt load.

43. The *Accessibility Study* conducted by the Social Program Evaluation Group was designed to reflect the pre and post-tuition deregulation periods. Surveys of students were conducted in November 2003. At that time, students in first year law school (class graduating in 2006) entered law schools with very high tuition fees, and paid significant tuition fees throughout law school. Graduates of 2005 and 2004 paid slightly lower tuition fees.

44. Students entering the Law Society Licensing Process in May 2006 will have paid the increased tuition fees as outlined above for their duration of law school. Information about the impact of tuition fee increases on them would provide useful information about the impact of tuition fee increases on students and career choices.

Reasons to Conduct a Law Society Study

45. There are a number of compelling reasons for the Law Society to conduct its own study:

a. Candidates in the Licensing Process in 2006 have paid high tuition fees throughout law school. The University of Toronto's *Provost's Study* and the *Accessibility Study* were both conducted during a period of increasing law school tuition fees, but before significant increases occurred at the law schools. Since the release of these reports, increases to tuition fees have been significant. Therefore, undertaking a study today may reveal more information about the impact of tuition fee increases on students and their career opportunities than the *Accessibility Study* or the *Provost's Study* revealed. Candidates in the Licensing Process in 2006 will have paid high tuition fees throughout law school and information about their debt load and the impact on career choices and areas of legal practice would be valuable information for the Law Society. Further, some law schools have adopted new bursary programs and back end debt relief programs since the release of the *Provost's Study* and the *Accessibility Study.* The effectiveness of these programs can now be measured.

b. The *Accessibility Study* does not focus on the impact of increased tuition fees on the legal profession and areas of practice. The *Accessibility Study* is an extensive and valuable study, which focuses on the impact of increased tuition fees on the characteristics of law students and on the law school experience. It does not focus on the impact of increased tuition fees on the legal profession and areas of practice. While the *Accessibility Study* notes that "overall, about one-quarter of all students indicated that debt impacted to a great extent on the type of law they planned to practice"[5] , it does not provide much information about areas of law and types of practice that will be affected by the high debt loads. Also, a number of students indicated in the *Accessibility Study* that their debt load would force them to seek a Bay Street articling position, even if they had not wanted to article on Bay Street otherwise. The *Accessibility Study* notes that a number of questions were left unanswered, including the pattern of law school graduates' debt repayment, and to what extent does debt incurred while in law school affect career-related decision making? The Law Society has the mandate to regulate the legal profession in the public interest. The potential impact of high debt load on the composition of the profession and career distortion in the profession is an issue of great importance and relevance to the Law Society.

c. Graduates from all law schools could be included in the Law Society study. The Law Society maintains a database with the relevant contact information of members of the Law Society and candidates in the Licensing Process. Although the *Accessibility Study* did not study the impact of increased tuition fees on students at the University of Toronto, if the Law Society were to undertake a study with students in the Licensing Process and recent calls to the bar, the study would comprehensively include graduates from all law schools.

d. The Law Society would monitor change over time. As suggested by the Finance Committee, it is anticipated that the initial survey would be developed into an annual survey of Licensing Process students so that longitudinal data on the effect of changes in tuition fees is accumulated.

e. Urgency and importance of conducting survey. The importance and urgency of conducting a survey of students and recent calls to identify the impact of high tuition fees on their career choices have increased since the Ontario government's decision, announced on March 8, 2006, to lift the freeze on increasing tuition fees. It is expected that most law faculties will soon announce increases in their tuition fees for law students beginning in the 2006-2007 academic year, and increases will continue until 2010. The impact of such increases may be considerable on the legal profession and on legal services offered to the public. The study falls within the mandate of the Law Society to regulate the legal profession in the interest of the public.

Methodology and Anticipated Costs

46. Consultants were informally approached to discuss possible options to follow up on the *Accessibility Study*. The following methodology and costs are proposed. Of course, without a proper request for proposals, costing for such study is based on a rough estimate.

47. The Committee proposes that the Law Society design a survey instrument based on its own objectives outlined below. Although the Committee requests a budget allocation to undertake one survey with 2006 Licensing Process candidates and 2004 and 2005 calls to the bar, it is anticipated that the initial survey will be developed into an annual survey

[5] *Accessibility Study*, at p. 146.

of Licensing Process students so that longitudinal data on the effect of changes in tuition fees is accumulated. This would allow the Law Society to identify trends over time. The Law Society could also, with the consent of the law schools and the Social Program Evaluation Group, design a survey instrument that allows for some comparative analysis with the *Accessibility Study* and/or the *Provost Study.*

Objective of Study

48. The project will have the following key objectives:

a. determine the debt load of law school students;
b. study the effectiveness of bursaries, financial support programs and back end debt relief programs;
c. consider whether the increase in tuition fees has an impact on students' career choices;
d. identify strategies to alleviate the burden of increasing tuition fees;
e. track changes over time.

Research Design

49. In order to meet the objectives outlined above, a survey instrument would be developed, using a series of close-ended questions to identify the profile of participants to the survey, their debt load and whether they benefited from bursary, financial assistance and debt relief programs. Open-ended questions would also be designed to provide an opportunity for participants to describe in their own words the impact of their debt load on career choices.

Methodology

50. There are two possible ways of administering the survey: by mail or internet. Telephone surveys are not included as a recommended method because of the high number of participants, which would make the survey prohibitively expensive.

<u>Mail</u>

51. Mail surveys have the advantages of being cost effective and allow respondents to complete the questionnaire at their convenience. Mail surveys may take between six and eight weeks from the date of the mail out of the survey to completion of data analysis.

<u>Internet</u>

52. Internet surveys allow participants to complete the questionnaire at their own pace and convenience. Internet surveys typically require less time than mail surveys for full completion from the date of original email to data analysis (approximately 3 to 4 weeks). Internet is sometimes less expensive than mail surveys, as there are no printing and postage costs.

Target Groups

53. It is recommended that the Law Society survey a target group composed of survey candidates in the Licensing Process and those called to the bar in 2004 and 2005 (approximately 5,000 participants).

54. The advantage of choosing a large target group is the extent of information that could be gathered from using a large cohort of participants that have paid increasing tuition fees over time. The Law Society could collect valuable in depth information about the impact of tuition fee increases on career developments. The Law Society has the contact information for all those participants.

55. The estimated cost to undertake this study is based on the assumption that the survey will have approximately 50 questions with 3 open ended questions, and a response rate of 20%:

    a. Mail: $30,000 to $45,000
    b. Internet: $25,000 to $35,000.

FOR INFORMATION

EQUITY PUBLIC EDUCATION SERIES - 2006

67. National Aboriginal Day topic: *Access to Aboriginal Justice: Process, Challenges and Costs*
Event date: June 7, 2006
Location:

    2:00 p.m. – 5:45 p.m.: Panel discussion, Donald Lamont Learning Centre
    6:00 p.m. – 7:30 p.m.: Reception, Law Society Convocation Hall

68. Pride Week Event topic: *Current Issues in Health Law Affecting Lesbian, Gay, Bisexual, and Transgender Communities*
Event date: June 20, 2006
Location:

    4:00 p.m. – 6:00 p.m.: Panel discussion, Donald Lamont Learning Centre
    6:00 p.m. – 8:00 p.m.: Reception, Law Society Convocation Hall

69. Access Awareness topic: TBD
Event date: New date: October 25, 2006
Location:

    4:00 p.m. – 6:00 p.m.: Panel discussion, Donald Lamont Learning Centre
    6:00 p.m. – 8:00 p.m.: Reception, Law Society Convocation Hall

70. Louis Riel Day
Event date: November 16, 2006
Topic: TBD
Location:

4:00 p.m. – 6:00 p.m.: Panel discussion, Donald Lamont Learning Centre
6:00 p.m. – 8:00 p.m.: Reception, Law Society Convocation Hall

WORKFORCE CENSUS OF THE LAW SOCIETY OF UPPER CANADA

Background

71. The *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession*[1] makes the following recommendation: "The Law Society should continue to set and monitor equity standards for its own staff that will make it a model for the profession as an employer".[2]

72. On January 22, 2004, the Bicentennial Report Working Group proposed that the CEO "compile data on the diversity of the workforce of the Law Society and develop strategies to promote equality in the workplace".[3]

73. Further to the proposal, the Equity Initiatives Department and the Human Resources Department retained a consultant to conduct focus groups with employees to obtain input into the development of a workforce diversity census methodology and communications strategy.

74. Three focus groups were held (management, professional and administrative and support groups) to obtain direct employee input to the content, design, administration methodology and communication of the workforce diversity census.

75. Participants in all focus groups said that the Law Society has equitable employment practices and a diverse workforce. Employees noted with pride the Law Society's inclusion in the top 100 employers.

76. Focus group participants were informed that the survey would be voluntary, and the data collected would be confidential and accessible only to a handful of individuals directly responsible for diversity in the organization. However, the data would not be anonymous because the Law Society wished to update and track the data to produce periodic progress reports, review trends (hiring, promotion, termination data) and assess how trends compare with internal representation within the Law Society and external data.

77. However, concerns about confidentiality resulted in many employees indicating that they would not answer the survey if the Law Society conducted a non-anonymous survey. Most employees and senior managers favoured an anonymous survey.

The Census

78. Based on the focus group results, the Law Society decided to conduct an anonymous voluntary survey of its workforce. The census (attached as Appendix 1) was modeled on

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[1] (Toronto: Law Society of Upper Canada, 1997).
[2] Recommendation 15 – Law Society as Employer.
[3] *Bicentennial Report Implementation Status and Strategy* (Toronto: Law Society of Upper Canada, 2004).

the categories listed in the *Employment Equity Act*[4] which aim at correcting the conditions of disadvantage in employment experienced by women, Aboriginal peoples, persons with disabilities and members of visible minorities[5] . Studies by Statistics Canada and employers have found that these groups are more likely to have higher levels of unemployment, higher levels of underemployment and lower pay. This is true in general but not necessarily in all workplaces.

79. The Law Society decided to limit the census to these four categories, as they are the only categories on which employment-relevant and reliable data on the workforce is available.

Census Results

80. The census was conducted between February 20, 2006 and March 3, 2006. The participation rate from staff was very high at 63% of the workforce.

81. The results show that the law Society's efforts to promote a workforce that is reflective of Ontario's diversity are working.

82. Of the respondents in the census,

a. 73 per cent are women;
b. 1 per cent self-identified as Aboriginal;
c. 25 per cent self-identified as a visible minority;
d. 6 per cent self-identified as having a disability.

83. In comparison, the Statistics Canada 2001 census reveal the following information about the demographics of Ontario's labour force:

a. 47 per cent are women;
b. 1 per cent are Aboriginal;
c. 18 per cent are visible minorities.

84. Numbers collected by the Participation and Activity Limitation Survey, which tracks statistics related to disability in Ontario, indicate that 6 per cent of Ontario's labour force is persons with disabilities – the same as respondents in the Law Society census.

85. In conclusion, not only is the Law Society's workforce representative in each category, it exceeds provincial labour force diversity demographics in two categories: women and visible minorities.

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

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[4] 1995, c. 44.

[5] The Law Society decided to use the term "visible minorities" instead of "racialized" because focus group results indicated that employees were more familiar and preferred the term visible minorities. The term visible minorities is the term used in the *Employment Equity Act* and in the Canadian Census.

(1) Copy of a letter dated January 4, 2006 from Clayton Ruby, Acting Treasurer to Paul Copeland, Vice-Chair of the Equity Committee.

(Appendix 1, page 44)

(2) Copy of the Executive Summary of the Accessibility Study dated October 2004.

(Appendix 2, pages 45 – 52)

(3) Copy of a press release dated March 8, 2006 re: Ministry of Training, Colleges and Universities, McGuinty Government Plan to Improve Quality and Access in Postsecondary Education.

(Appendix 3, pages 53 – 66)

(4) Copy of the Workforce Diversity Census.

(Appendix 1, pages 71 – 75)

It was moved by Mr. Copeland, seconded by Ms. Ross, that Convocation approve the following mandate for the Human Rights Violations Against Members of the Legal Profession and the Judiciary Monitoring Group (the Monitoring Group):

a. The mandate of the Monitoring Group is to,

i. review information that comes to its attention about human rights violations that target members of the profession and the judiciary, here and abroad, as a result of the discharge of their legitimate professional duties;

ii. determine if the matter is one that requires a response from the Law Society; and

iii. prepare a response for review and approval by Convocation.

Carried

Re: Funding of Law Society Survey on the Impact of Law School Tuition Fee Increases in Ontario

It was moved by Mr. Copeland, seconded by Ms. Symes, that Convocation approve the allocation of $45,000 from the contingency fund in 2006 to enable the Equity & Aboriginal Issues Committee to conduct a survey with candidates in the 2006 Licensing Process and lawyers called to the bar in 2004 and 2005 to,

a. determine the debt load of law school students;

b. study the effectiveness of bursaries, financial support programs and back end debt relief programs;

c. consider whether the increase in tuition fees has an impact on students' career choices;

d. identify strategies to alleviate the burden of increasing tuition fees; and

e. track changes over time.

Carried

ROLL-CALL VOTE

Alexander	For	Legge	Against
Backhouse	For	Manes	For
Banack	For	Martin	Against
Carpenter-Gunn	For	Minor	For
Caskey	Against	Pattillo	Against
Chahbar	Abstain	Pawlitza	For
Cherniak	Against	Porter	Against
Chilcott	For	Potter	For
Coffey	Against	Ross	Against
Copeland	For	Ruby	For
Crowe	For	St. Lewis	For
Curtis	For	Sandler	For
Dickson	Against	Simpson	For
Dray	For	Swaye	Against
Eber	For	Symes	For
Filion	For	Topp	Against
Gold	Against	Wright	For
Gotlib	Against		
Gottlieb	For		
Harris	For		
Henderson	For		

Vote: 24 For; 13 Against; 1 Abstention

Item for Information

- Workforce Census of the Law Society of Upper Canada

HERITAGE COMMITTEE REPORT

Ms. Alexander presented the Heritage Committee Report.

Report to Convocation
May 25, 2006

Heritage Committee

Committee Members
Constance Backhouse (Chair)
Andrea Alexander (Vice Chair)
Robert Aaron
Gordon Bobesich

Andrew Coffey
Patrick Furlong
Allan Lawrence
Laura Legge

Purpose of Report: Decision

Prepared by the Policy Secretariat
(Sophia Sperdakos 416-947-5209)

COMMITTEE PROCESS

1. The Committee met on May 11, 2006. Committee members Constance Backhouse (Chair), Andrea Alexander (Vice Chair), Gordon Bobesich, Andrew Coffey and Allan Lawrence attended. Staff members Terry Knott, Susan Lewthwaite, Deidré Rowe-Brown and Sophia Sperdakos attended.

PROPOSAL TO MARK THE 175TH ANNIVERSARY OF THE FIRST CONVOCATION IN OSGOODE HALL

Motion

2. That Convocation approves the Committee's proposal, set out at Appendix 1, to mark the 175th anniversary in 2007 of the first Convocation in Osgoode Hall.

Introduction and Background

3. On February 6, 2007 the Law Society will celebrate the 175th anniversary of the official opening of Osgoode Hall in 1832. On that date Convocation held its first meeting in the building.

4. The Law Society has previously organized events and activities to celebrate the 100th anniversary and the 150th anniversary of Osgoode Hall. These activities and events have included the publication of brochures on the building's history, special calls to the bar, concerts and celebratory dinners.

5. The legal profession in Ontario has a number of unique features among which are,

   a. the length of time the profession has existed as a self-regulating entity; and

   b. the existence, for much of the profession's history, of Osgoode Hall as a symbol of the profession and its place in Upper Canadian and Ontario society.

6. The Heritage Committee's mandate is to highlight the Law Society's and the legal profession's long and significant role in Ontario society. The history of the profession and the history of Osgoode Hall are inextricably linked to the growth of Upper Canada and

the province of Ontario and, in the Committee's view, should be marked in an appropriate fashion.

7. The Committee has considered a number of possible initiatives the Law Society could undertake to commemorate the 175th anniversary of Osgoode Hall. In doing so it has taken into account the following:

    a. The events should highlight the building and grounds, but as well the history of the profession, to reflect their inter-relationship.

    b. Events should be well publicized and members should be encouraged to visit the building during 2007.

    c. There should be some permanent commemoration of the anniversary.

    d. Where possible the Law Society should partner with other organizations to develop initiatives.

    e. The initiatives should be such that they can be developed using current Law Society staff, without additional contract staff being required.

8. Keeping these factors in mind the Committee has developed a proposal of initiatives, set out at APPENDIX 1.

9. The Committee has developed a proposed budget in the amount of $74,160, set out at APPENDIX 2. Given that most of the budget is required for 2007 the Committee is first seeking Convocation's approval of its proposal. If Convocation approves it, the budget request will form part of the 2007 budget.

10. A small portion of the budget, in the amount of $5,185, is required in 2006. If Convocation approves the Committee's overall proposal to mark the 175th anniversary, the Committee will seek the Finance and Audit Committee's approval for allocation of $5,185 in 2006. This will cover the cost of the banners and postcards, the special design of the call to the bar lapel pins, and the postage cancellation stamp and special letterhead, all of which should be designed and produced in 2006 to be ready for the beginning of the anniversary year in 2007.

APPENDIX 1

PROPOSAL TO MARK THE 175TH ANNIVERSARY

VIRTUAL EXHIBITION / OSGOODE HALL GROUNDS EXHIBITION/PROPOSED INVITATION TO LIEUTENANT -GOVERNOR

The launch of the 2007 celebration will highlight Osgoode Hall (building and grounds).

In partnership with the Archives of Ontario, the Law Society will present a virtual exhibit of the historic architectural drawings of Osgoode Hall. This is an on-line exhibition. The exhibition will be accessible on the Archives of Ontario website. The Archives of Ontario has assumed responsibility for developing the exhibit content. The goal is to "launch" the exhibit in February

2007 with a reception in Convocation Hall. It will be possible to run the on-line exhibit on a CD-Rom and projector so the attendees can see it during the reception.

This event will also be combined with the opening of the Osgoode Hall Grounds Exhibition that is currently in development. It will be set up in Exhibition Hall and attendees at the reception can take in that exhibit as well.

It is proposed to extend an invitation to the Lieutenant Governor to open the event. Given his direct connection to Ontario and his interest in Ontario history, it is hoped that his schedule will permit him to attend. It is proposed that a dinner for the Lieutenant Governor and invited guests take place following the reception.

The two events will work well together to showcase Osgoode Hall. Informational postcards will highlight the website for the virtual exhibit and promote the grounds exhibition.

LEGAL HISTORY SYMPOSIUM

A one-day “history of the legal profession” symposium is proposed for the fall of 2007. The symposium will take place on site in the Lamont Learning Centre (holds 200-250 people).

There will be a call for papers. It is hoped that the symposium can be done in collaboration with the Osgoode Society, which will be invited to participate in the editorship and publication of papers from the conference.

The celebration of the history of the legal profession is a logical extension of the celebration of Osgoode Hall, as discussed above.

COMMEMORATIVE PLAQUE

A plaque commemorating the 175th anniversary of the first Convocation will be placed in the bencher wing.

MEMENTO FOR CANDIDATES CALLED TO THE BAR IN 2007

Candidates for call to the bar will receive a memento to recognize the 175th anniversary. Candidates currently receive a lapel pin. There will be a special design for the 175th anniversary.

BANNERS/POSTCARDS

There will be banners (2 ft. by 5 ft. weather resistant) on the lampposts of the building (7-10), on the entrance gates (8-10) and extras for other locations (5-10). The design will be done in-house. Postcards will be printed to outline the events and the anniversary.

BRANDING FOR THE YEAR ON POSTAGE CANCELLATIONS, LETTERS AND OTHER MATERIALS

There will be a special postage cancellation stamp and special letterhead to commemorate the 175th anniversary. These will be used throughout the year.

COMMUNICATION AND MARKETING

The Communications department will publicize the anniversary. Rather than trying to define it as the 175th anniversary of the first Convocation in Osgoode Hall, the anniversary may be more easily understood as the 175th anniversary of the official opening of Osgoode Hall.

TOURS AND TAKING GRADE NINE STUDENTS TO WORK

There will be additional effort to encourage more visitors, including members of the Law Society, to tour the building and to focus greater attention in the tours on "noteworthy" Treasurers and the 175th anniversary.

Law firm members will be encouraged to send their Grade Nine children to Osgoode Hall for the annual "Take Your Child to Work" event. The session will include some recognition of the special anniversary. This is already in the planning stages.

THE HISTORY MOMENTS

The Treasurer's history moments for 2007 will focus on the building.

GENERAL LAW SOCIETY EVENTS MARKETING BROCHURE

The Law Society's events marketing brochure will be revised to focus on the anniversary and encourage people to hold their events at Osgoode Hall. This is already in development.

APPENDIX 2

PROPOSED BUDGET FOR 175TH ANNIVERSARY PROPOSAL

VIRTUAL EXHIBITION / OSGOODE HALL GROUNDS EXHIBITION/INVITATION TO LIEUTENANT-GOVERNOR

Reception	Cost
Staff, security, maintenance	$ 2300.00
Food and drink	$ 5700.00
Dinner	$ 7320.00

LEGAL HISTORY SYMPOSIUM

Travel, accommodation for presenters	$ 25000.00
Refreshments	$ 300.00
Reception	$ 8000.00
Dinner	$ 6555.00
Publication subvention	$ 7000.00

PLAQUE	$ 1900.00

LAPEL PINS special design	$ 1200.00*
BANNERS/POSTCARDS	$ 3855.00*
SPECIAL POSTAGE AND LETTERHEAD	$ 130.00 *
COMMUNICATION INITIATIVES	$ 4900.00
TOTAL	$ 74160.00

*required in 2006

It was moved by Ms. Alexander, seconded by Professor Backhouse, that Convocation approve the proposal set out at Appendix 1 to mark the 175th anniversary in 2007 of the first Convocation held in Osgoode Hall subject to the approval of Convocation on the recommendation of the Finance Committee insofar as the expenditures are to be included in the 2007 budget.

It was moved by Mr. Wright, but failed for want of a seconder, that the motion be tabled.

The Alexander/Backhouse motion was approved.

ROLL-CALL VOTE

Alexander	For	Legge	For
Backhouse	For	Manes	For
Banack	For	Martin	For
Carpenter-Gunn	For	Minor	For
Caskey	Against	Pattillo	For
Chahbar	For	Pawlitza	For
Cherniak	For	Porter	Against
Chilcott	For	Potter	For
Coffey	For	Ross	For
Copeland	For	Ruby	For
Crowe	For	St. Lewis	For
Curtis	For	Sandler	For
Dickson	For	Simpson	For
Dray	For	Swaye	Against
Eber	For	Symes	For
Filion	Abstain	Topp	Against
Finlayson	Against	Wright	Against
Gold	For		
Gotlib	For		
Gottlieb	For		
Harris	For		
Henderson	For		

Vote: 32 For; 6 Against; 1 Abstention

GOVERNANCE TASK FORCE REPORT

Mr. Simpson presented the Report to Convocation.

Report to Convocation
May 25, 2006

Governance Task Force - Terms of Reference

Task Force Members
Thomas Heintzman (Chair)
Vern Krishna (Vice-Chair)
Sy Eber
Abraham Feinstein
Janet Minor
William Simpson

Purpose of Report: Decision

Prepared by the Policy Secretariat
(Julia Bass - 416-947-5228 and Jim Varro – 416-947-3434)

GOVERNANCE TASK FORCE
TERMS OF REFERENCE

Motion

1. That Convocation approve the following terms of reference of the Governance Task Force, created by Convocation on March 23, 2006:

   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.

Background

4. On March 23, 2006, Convocation approved the creation of the Governance Task Force, in recognition of the importance of continued enhancements to the Law Society's corporate governance. At its first meeting on May 11, 2006, the Task Force agreed on terms of reference for its work, which appear at paragraph 1.

5. The terms of reference are broadly stated to permit the Task Force to examine a number of issues relating to governance, including but not limited to:

a. the effectiveness of Convocation as a board;
b. effective coordination between Convocation and the management of the Law Society's operations under the leadership of the Chief Executive Officer;
c. the office of Treasurer and its intended role in governance;
d. the means for and methods of priority-setting for Convocation including budgetary considerations.

6. The Task Force expects to conduct research and consultation on the issues that fall within the terms of reference, and bring recommendations to Convocation from time to time, as they are prepared.

It was moved by Mr. Simpson, seconded by Ms. Minor, that Convocation approve the following terms of reference of the Governance Task Force, created by Convocation on March 23, 2006:

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 consideration.

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.

Carried

ONTARIO LAWYERS ASSISTANCE PROGRAM

Mr. Pattillo reported that two organizations – LINK and the Ontario Bar Assistance Program have merged into a new organization known as the Ontario Lawyers Assistance Program.

PROFESSIONAL REGULATION COMMITTEE REPORT

- Emeritus Status for Retired Lawyers
- Retired Lawyers as Estate Trustees

Report to Convocation
May 25, 2006

Professional Regulation Committee

Committee Members
Clayton Ruby, Chair
Laurence Pattillo, 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

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

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COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on May 11, 2006. In attendance were Clayton Ruby (Chair), Lawrence Pattillo and Heather Ross (Vice-chairs), Anne-Marie Doyle, George Finlayson, Allan Gotlib, Ross Murray, and Robert Topp. Staff attending were Naomi Bussin, Lesley Cameron, Terry Knott, Zeynep Onen and Jim Varro. Lynn Burns, Director of Pro Bono Law Ontario, attended part of the meeting.

"EMERITUS" MEMBERSHIP STATUS FOR RETIRED LAWYERS PROVIDING PRO BONO LEGAL SERVICES THROUGH PRO BONO LAW ONTARIO (JOINT REPORT WITH THE ACCESS TO JUSTICE COMMITTEE)

Motion

2. That Convocation

   a. approve in principle a new membership category referred to as the "emeritus" lawyer and the regulatory requirements set out in this report for the new membership category, and
   b. review the emeritus lawyer membership category three years after implementation.

Introduction and Background

3. In the late spring of 2005, Lynn Burns, Director of Pro Bono Law Ontario (PBLO)[1] , began discussions with the Law Society about the possibility of creating an "emeritus

[1] PBLO is a non-profit organization with a mandate to improve access to justice by providing strategic guidance, training and tailored technical assistance to law firms, law associations, legal departments and other groups that are dedicated to addressing the legal needs of low income

status" for retired lawyers that would permit them to provide legal services *pro bono* through PBLO programmes, without paying Law Society fees.

4. This proposal is based on similar initiatives now in operation in some American jurisdictions.[2] These programmes permit lawyers who have retired from the practice of law and who no longer maintain offices or support staff to provide legal services to low income individuals or charitable organizations who are unable to afford legal services and whose legal matters are not eligible for legal aid funding. The *pro bono* legal services are provided through approved legal services programmes. In Ontario, these programmes operate under the auspices of PBLO.

5. In facilitating *pro bono* legal services in Ontario, PBLO identifies and attempts to address significant barriers that impede lawyer participation. One class of lawyers that faces a barrier to *pro bono* participation is retired lawyers. The Law Society's current regulatory scheme requires lawyers who continue to practice law, even though eligible for retirement under By-Law 15 [3], to pay the full annual fee and LawPRO insurance premium.

6. In PBLO's view, permitting retired lawyers to undertake *pro bono* legal work, within an appropriate regulatory scheme, can provide retired lawyers with a purpose in their retirement, a way to keep their skills up-to-date and a way to continue to serve the public by making legal services accessible to the poor or disadvantaged.

7. A written proposal for the "emeritus" status lawyer was submitted to the Law Society by PBLO later in 2005, and was discussed at the Access to Justice Committee in September and October 2005. The Access to Justice Committee approved the concept in principle, but recognized that it raised several implementation issues. That Committee asked Law Society staff to prepare a more detailed proposal for consideration by both the Access to Justice and Professional Regulation Committees.

8. The Society's senior managers, legal counsel and policy staff discussed the proposal's implications and suggested regulatory enhancements to the proposal for review by the Committees. The Committees agreed with the enhanced regulatory proposals and are satisfied that the proposal would facilitate the provision of *pro bono* services in a way that meets both PBLO's and the Society's objectives.

9. In this report, the term "emeritus lawyer" is used to describe lawyers in this category.

The PBLO Proposal

10. The PBLO proposal is set out in the document at Appendix 4. The following outlines the key features of the model:

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and disadvantaged individuals and the communities and charitable organizations that serve them.

[2] A summary of these programmes appears at Appendix 1. British Columbia also has special rules for retired lawyers doing *pro bono* work, although not under the term "emeritus". Information on the British Columbia policy is at Appendix 2.

[3] By-Law 15 appears at Appendix 3.

a. Emeritus lawyers would be permitted to provide *pro bono* services through an "approved legal assistance organization". An "approved legal assistance organization" for these purposes is a PBLO registered programme or a Legal Aid Ontario Community Legal Clinic that follows PBLO's Best Practices for *pro bono* Programs. PBLO's Best Practice Manual is extensive and organizations that are found not to have followed its requirements are removed from PBLO's approved organizations list;
b. Emeritus lawyers would not be required to pay the Law Society's annual fee, but would pay a $300 administrative fee to cover costs related to the application for emeritus status;
c. An emeritus lawyer is any person who is admitted to practise law in Ontario, who is retiring or has retired from the active practice of law, and who intends to provide at least 50 hours per year of *pro bono* legal services;
d. Am emeritus lawyer must have been engaged in the active practice of law for a minimum of 10 out of the 15 years immediately preceding the application for emeritus status;
e. The active practice of law, for the purposes of this rule, includes private practice, in-house counsel work, public employment as a lawyer, or full-time teaching at a recognized law school;
f. At the time of requesting emeritus status, the lawyer must be a member in good standing with the Law Society and must not have been disciplined for any reason by the law society of any jurisdiction within the past 15 years;
g. The emeritus lawyer must sign a statement that he or she has read and will comply with the *Rules of Professional Conduct* and will submit to the continuing jurisdiction of the Law Society for regulatory purposes;
h. The emeritus lawyer must agree to neither ask for nor receive any compensation of any kind, except for out-of-pocket expenses incurred in connection with the legal service rendered;
i. Emeritus lawyers would not be permitted to practise law except in the form of *pro bono* services through the approved legal assistance organization. The services would be restricted to such things as appearances before courts and tribunals with the consent of the party being represented, preparation and signing of pleadings and other documents to be filed with courts or tribunals, legal opinions and mentoring and training other lawyers;
j. An emeritus lawyer must perform all activities authorized by this rule under the supervision of a *pro bono* programme coordinator, supervising lawyer or Executive Director of an approved legal assistance organization, and
k. The application and certification of emeritus lawyers would be completed through the Law Society.

11. With respect to insurance coverage, LawPRO currently provides coverage to exempt lawyers who provide approved *pro bono* legal services associated with PBLO, including retired lawyers. The limit is the same as that provided through the standard run-off insurance coverage, which is $250,000 per claim/aggregate for approved *pro bono* services, even though the services are provided while exempt under the insurance program. This programme is limited to the provision of services for individuals with limited means.

Enhancements to the Proposal to Meet PBLO's and the Society's Objectives

12. The Committees generally agreed with the PBLO proposal. However, the Committees determined that in addition to the features of the proposal set out at paragraph 10, the following enhancements should be made to facilitate PBLO's objectives and to meet the regulatory obligations of the Society:

    a. Eligibility for emeritus status should be restricted to retired lawyers as defined in By-Law 15 who are permanently retired from the practice of law. These are lawyers who fall within Category C in By-Law 13[4] (Members) ("Every member who is exempt from the payment of the annual fee under section 4 of By-Law 15, or who is exempt from the requirement to file an annual report under section 2 of By-Law 17, is a category C member"). This is intended to be an initial restriction, with the possibility of expanding the availability of emeritus status to lawyers at other points in their careers (e.g. lawyers on extended parental leave). Lawyers in this latter category enter a "retired or not working" status, and this group may include lawyers who have been unable to sustain a full time practice, who may raise quality control concerns and possible regulatory issues for the Society if eligible for emeritus status. At this stage, the Committees thought it appropriate to limit the availability of emeritus status to retired lawyers as defined in the By-Law;
    b. As the proposal includes lawyers who have been practising for a minimum of 10 of the last 15 years, the question of the professional competence of lawyers who have not practised for the last five years arises. The Committees concluded that prospective emeritus lawyers should be subject to the requirements of the Law Society's Private Practitioner Refresher Program (PPRP) set out in By-Law 13[5] . The PPRP will require lawyers who have not been in private practice for five years or more to undergo a refresher programme prior to entering private practice. The PPRP will come into effect in early 2002, but will not affect lawyers until 2007. The requirements of the PPRP involve completing various modules to ensure lawyers have the practice skills required, and include time management, file management, financial management, client relationships/communication, technology and equipment, professional management, personal management and professional responsibility. In the case of lawyers moving from Category C to Category A, the program would apply if, for 80 percent or more of the five years immediately preceding the date of the application for the change in status, the lawyer has been a category C member. This approach is proposed for applicants for emeritus status who fit this time frame, to address any issues about the competency of emeritus lawyers. The requirements of the PPRP would be tailored to the individual circumstances of the applicant;
    c. Related to b., the Committees determined that an emeritus lawyer who only practices for a few hours in a year may lose practice skills. The Committees agreed that these lawyers should be subject to a cyclical review of the requirements for the PPRP on an individual basis, based on the number of hours practiced, if the emeritus lawyer remains in that status for longer than two years;
    d. As the emeritus lawyers will be practising law, even if in a limited fashion, they should be expected to complete a minimum number of hours of professional development, in keeping with the general expectation of practising lawyers. The

[4] By-Law 13 appears at Appendix 5.
[5] See the By-Law, section 2.3 at Appendix 5.

minimum expectation for professional development, currently set at 50 hours self-study and 12 hours of CLE for full time lawyers, should be set at three hours per year for emeritus lawyers, acknowledging that these lawyers will be providing at least 50 hours per year of *pro bono* legal services. PBLO offers free CLE for lawyers providing *pro bono* services, but the Committee agreed that a reduced price for emeritus status lawyers for CLE programmes beyond those offered by PBLO should be considered;

e. The Society would have an interest in tracking the activities of the emeritus lawyers for regulatory purposes. Lawyers aged over 65 and retired from practice are normally exempt from the requirement to complete and file the Member's Annual Report (MAR). Lawyers granted emeritus status should be required to file the relevant portions of the MAR, and consideration should be given to including a specific question on emeritus status activities;

f. The Committee agreed with PBLO's proposal that the prospective emeritus lawyer must not have been disciplined for any reason by the law society of any jurisdiction within the past 15 years. However, discipline is not the same as a record of complaints. A lengthy complaints history is a concern even where it has not resulted in discipline. In the case of articling principals, the Law Society conducts a review of a lawyer's complaints history and other issues. All relevant information, including but not limited to records maintained by the Law Society in connection with claims, professional standards, investigation, audit, compensation fund and discipline, may be considered. Prospective principals with negative history in these areas may be denied the privilege of acting as an articling principal for a period of time. The Committees agreed that the review of matters undertaken with respect to approval of an articling principal should also be performed for those members seeking emeritus status. As with articling principals, applicants with a negative history in these areas *may* be denied emeritus status;

g. Proper supervision of the emeritus lawyer providing *pro bono* services is a key element of the proposal from the Society's perspective. The Committees agreed that the emeritus lawyer should be supervised by a lawyer. This general requirement for supervision is necessary as range of individuals with varying degrees of capabilities and expertise are likely to form the emeritus membership class, and will be servicing clients the majority of whom are likely to be vulnerable or disadvantaged. Particulars of the supervision need not be specified, but the level of supervision should be geared to the individual and the circumstances under which he or she is providing *pro bono* services. The Committees also agreed that the Law Society should approve all supervisors of emeritus lawyers;

h. The emeritus lawyer should not be permitted to handle trust funds or have access to a trust account.

13. The Committees obtained confirmation from LawPRO that its coverage for lawyers providing *pro bono* services through PBLO programmes, described earlier in this report, would be available to emeritus lawyers

Implementation and Review of the Emeritus Status

14. With respect to implementation and review of the program:

a. By-Law amendments will be required to implement this proposal. The Committee will bring forward the required amendments at a later date if Convocation approves the proposal;
b. The Committee proposes that three years after implementation, Convocation review the emeritus status membership category, based on an analysis to be completed on its use, effectiveness and any regulatory issues that have arisen. This will also provide the Society with an opportunity to address the advisability of expanding the availability of emeritus status to lawyers in other non-practising membership categories.

APPENDIX 1

ABA STANDING COMMITTEE ON PRO BONO & PUBLIC SERVICE

State Bar Emeritus Rules Encourage Pro Bono

Stephanie Edelstein ABA Commission on Legal Problems of the Elderly
(202) 662-8694 sedelstein@staff.abanet.org

Across the nation, lawyers whose careers have ranged from solo to large firms, from corporate to government work, from the judiciary to the academic world, are contributing their time and talent to the provision of legal services to low income and older persons in their communities. However, unlike lawyers who engage in traditional *pro bono*, retired lawyers may face some additional challenges, which state bar rules have been attempting to address. In traditional *pro bono* representation, requests for assistance are screened by the local bar association or legal services program's *pro bono* coordinator. If the prospective client meets eligibility guidelines and the case is within the program's priorities, the matter is referred to a volunteer lawyer practicing in the community, who assumes full responsibility for the case from beginning to end. The volunteer utilizes his or her own office and support staff, and is covered by his or her own malpractice insurance.

Many senior lawyers are unable to participate in traditional *pro bono* activities because they no longer have an office or support staff, they have not maintained active bar status, or they have retired to a state in which they are not licensed. Recognizing this, several states have modified their practice rules to permit retired lawyers to engage in *pro bono* activities under certain circumstances. Emeritus rules allow retirees who are not active members of the bars of those states to practice law, on condition that they only do *pro bono* work, usually under the auspices of an approved legal services program. States with *pro bono* Emeritus rules include Arizona, California, Delaware, Florida, Georgia, Idaho, South Carolina, Texas, and Washington. Other states are considering such a rule.

True Emeritus rules are intended to promote *pro bono* practice by retired lawyers. Their goals are different from *pro hoc vice* rules that permit lawyers to enter their appearance in single cases, in jurisdictions in which they are not licensed. And they are significantly more expansive than rules that simply waive mandatory dues or client security trust fund fees for lawyers who have retired from practice (see, e.g., Nebraska, New York, or Wisconsin rules). Emeritus rules may have a common goal, but they vary somewhat from state to state. For example, California, Delaware, and Georgia limit eligibility to those who are licensed in the particular state, while Arizona, Florida, Idaho, South Carolina and Texas apply also to lawyers licensed in other states. States may limit the program to lawyers who meet age and practice requirements. Some states waive mandatory dues; others simply reduce the obligation. The following chart provides basic information about *pro bono* Emeritus rules in effect as of March 2001.

This chart is a work in progress. Please let me know by e-mail at sedelstein@staff.abanet.org, of any changes, additions of which you are aware. Thank you. Stephanie Edelstein

Pro Bono Emeritus Rules* as of July 2003.
*Rules may be termed Pro Bono Emeritus, Active Emeritus, Inactive Pro Bono, Pro Bono Publicus

State	Minimum Age	Required years of practice	Admitted in state?	Bar dues waived?	MCLE waived?	Court or Bar Certification?
Arizona 17A A.R.S. Sup.Ct Rules, Rule 39	No	10 of last 15	No	Yes	Yes	Yes
California CA St. Bar Rules Art.1 §12	No	10; 3 of last 8 in Cal.	Yes	Yes	No; fees waived	No
Delaware DE R S CT Rule 69	No; two levels - inactive or retired	Yes	I-reduced R-waived	Yes	Yes	No
Dist. Columbia Ct App. Rule 49(c)(9)	No	No	No	Yes		Yes, case by case
Florida FL Bar Rule 12-1	No	10 of last 15	No	Yes	No	Yes
Georgia GA R Bar Rule 1-202	70	25	Yes	Yes	Yes	No; confirm status annually

Hawaii RSCH 20	No	15	Yes	Reduced	No MCLE	Yes
Idaho ID Bar Rule 223	No	10 of last 15	No	Reduced	Yes	No
Montana Rule adopted by Bar 4/12/02	No	10 of last15	Yes?	Yes	No; fees waived	No
Oregon OSB BOG 15.7 BR 8.14; 3.2	No	Active Pro Bono 15; Active Emeritus 40, not Oregon	Yes?	Reduced	Yes	Active Pro Bono - 40 hours service per year
South Carolina SC R A CT Rule 415	No	10 of last 15	No	Yes	Yes	Yes; rules include form
Texas TX St. Bar Rules Art.13	No	5 of last 10	No	Yes	Yes	Yes
Utah UT Code II,Ch. 16 and USB Rules	No	No	Yes	Reduced	Yes	Yes
Washington WA R ADMIS APR 8 (e)	No	5 of last 10; 10 of 15 out-of-state	No	Reduced	Yes; but a training course	Yes; one year status may be renewed

Last Updated: 12/2/03

APPENDIX 2

PRO BONO SERVICES
INFORMATION SHEET

Background

The Law Society of British Columbia (the "Law Society") offers professional liability insurance to its members. The insurance is provided through the B.C. Lawyers' Compulsory Professional Liability Insurance Policy (the "Policy"). Although lawyers in private practice must pay a fee and buy the Policy, lawyers who are not in private practice (retired, non-practising, or practising on an in-house basis) are exempt from this otherwise compulsory obligation.

This information sheet explains the coverage available under the Policy for lawyers interested in providing pro bono legal services. The information about the Policy is intended only as a guide, as the wording of the Policy governs any claim or potential claim arising. Please feel free to contact the Lawyers Insurance Fund with any questions regarding the Policy generally, or coverage for pro bono legal services.

Coverage under the Policy for pro bono legal services

Lawyers who buy the Policy enjoy coverage for any claims arising out of their provision of legal services, including legal services provided on a pro bono basis. In addition, the Policy extends coverage to certain pro bono legal services provided by lawyers who are members in good standing of the Law Society, but who do not buy the Policy. These lawyers enjoy coverage for claims arising out of their performance of "sanctioned services" (a defined term in the Policy).

Services are "sanctioned services" if:

1. they are provided by a lawyer to an individual solely through a pro bono legal services program;

2. they are not for the benefit of a person previously known to the lawyer, including a family member, friend or acquaintance; and

3. both the services and the program are approved by the Law Society.

If you are a lawyer interested in more information about the approved services and programs, including program contact information, please log on to the "Lawyers and Law Firms" section of Pro Bono Law of BC's website: www.probononet.bc.ca.

Although the Policy provides coverage for both pro bono legal services and "sanctioned services", please note that there are other terms and conditions in the Policy that may limit that coverage. All lawyers will want to familiarize themselves with the Policy terms, and are reminded of their obligation under the Policy to report claims or potential claims promptly.

The consequences of a paid claim arising from a lawyer's provision of "sanctioned services"

Generally, when the insurer makes an indemnity payment under the Policy - that is, pays a settlement or judgment on behalf of a lawyer - a number of consequences follow:

• the lawyer pays a deductible of $5,000 (first paid claim) or $10,000 (subsequent paid claims within three years of the report date of the first paid claim);

• the lawyer is surcharged $1,000 per annum for five years, when they apply to renew their Practice Certificate, although the surcharge can't exceed the amount paid in indemnity; and

• the lawyer loses eligibility for the part-time discount (lawyers who work only a certain number of hours per week on average receive a 50% discount in their insurance premium).

However, if a claim arises out of the lawyer's provision of "sanctioned services", these consequences will be waived. The waiver applies whether the lawyer has purchased the Policy, or is enjoying coverage without payment of the insurance fee. Lawyers who buy the Policy and are claiming the part-time discount need not include any of the hours spent engaged in sanctioned services in their calculation of hours for the part-time discount.

General information for lawyers who do not buy the Policy

The provision of legal services, if not performed for or in the expectation of a fee, gain or reward, direct or indirect, from the person for whom the acts are performed, is specifically excluded from the *Legal Profession Act's* definition of the "practice of law". As a result, lawyers who do not buy the Policy are still entitled to provide pro bono legal services that do not meet the requirements of "sanctioned services". Such lawyers are at liberty to, for example, provide free advice to a friend, or to a child's daycare, but the lawyer (and, indirectly, the lawyer's client) will not be protected by liability insurance.

Finally, please note that this extended insurance coverage under the Policy does not affect what a non-practising or retired lawyer is not permitted to do - for example, only practising lawyers are entitled to exercise the powers of a Notary, take affidavits, or act as officers for the purpose of witnessing Land Title Office documents.

APPENDIX 3

BY-LAW 15

ANNUAL FEE

Interpretation: "Society official"
0.1 In this By-Law, a "Society official" means an officer or employee of the Society assigned by the Chief Executive Officer the responsibility of administering and enforcing the provisions of this By-Law.

Requirement to pay annual fee
1. (1) Every year, a member shall pay an annual fee, in accordance with sections 2 and 3, unless the member is exempt from payment of an annual fee.

Exemption from requirement to pay annual fee: life members and honorary members
(2) Life members and honorary members are not required to pay an annual fee.

Same: retired and incapacitated member
(3) A member whose application to be exempt from payment of an annual fee is approved under section 4, is not required to pay an annual fee.

Amount and payment of annual fee
2. (1) The amount of the annual fee for a year shall be determined by Convocation.

Levy for Lawyers Fund for Client Compensation
(2) An annual fee shall include a Lawyers Fund for Client Compensation levy.

Payment due
(3) Payment of an annual fee is due on January 1 every year.

Amount payable
(4) Subject to subsections (5) and (6), a member shall pay the full amount of an annual fee and any taxes that the Society is required to collect from the member in respect of the payment of an annual fee.

Same
(5) A member who does not practise law, including a member employed in education, in government or in a corporation in a position where he or she is not required to practise law, shall pay fifty percent of an annual fee and any taxes that the Society is required to collect from the member in respect of the payment of an annual fee.

Same
(6) The following members shall pay twenty-five percent of an annual fee and any taxes that the Society is required to collect from the member in respect of the payment of an annual fee:

1. A member who does not engage in any remunerative work, including the practice of law, in or outside of Ontario.

2. A member who is in full-time attendance at a university college or designated educational institution within the meaning of the Income Tax Act (Canada) and does not practise law.

3. A member who is on a maternity, paternity or adoption leave and does not practise law.

Interpretation: practising law
(7) For the purposes of subsections (5) and (6), a member practises law if the member gives any legal advice respecting the laws of Ontario or Canada or provides any legal services.

Application of subss. (3) to (6)
(8) Subsections (3) to (6) apply only to persons who are members on January 1.

Persons admitted, etc. after January 1
(9) A person who after January 1 is admitted or readmitted as a member, or whose membership after January 1 is restored, shall pay, in respect of the year in which he or she is admitted or readmitted as a member, or in which his or her membership is restored, an amount of an annual fee determined by the formula,

$(A \div 12) \times B$

where,

A is the amount of the annual fee the person would have been required to pay under subsection (4), (5) or (6) if he or she were a member on January 1, and

B is the number of whole calendar months remaining in the year beginning with the second month following the month in which the member is admitted or readmitted or in which the person's membership is restored.

Same: payment due
(10) Payment of an annual fee by a person to whom subsection (9) applies is due on the first day of the second month following the month in which the person is admitted or readmitted as a member or in which the person's membership is restored.

Change in status
3. (1) If a member who is required to pay the full amount, or fifty percent, of an annual fee becomes entitled to pay fifty percent, or twenty-five percent, of an annual fee, the member shall pay,

(a) an amount determined by the formula

$(A \div 12) \times B$

where

A is the full amount, or fifty percent, of an annual fee, and

B is the number of whole or part calendar months during which the member is required to pay the full amount, or fifty percent, of an annual fee; and

(b) an amount determined by the formula

$(C \div 12) \times D$

where

C is fifty percent, or twenty-five percent, of an annual fee, and

D is the number of whole calendar months during which the member is required to pay fifty percent, or twenty-five percent, of an annual fee.

Same
(2) If a member who is required to pay fifty percent, or twenty-five percent, of an annual fee becomes required to pay the full amount, or fifty percent, of an annual fee, the member shall pay, in respect of the period of time during which he or she is required to pay the lesser amount of an annual fee and the period of time during which he or she is required to pay the higher amount of an annual fee,

(a) an amount determined by the formula

(E ÷ 12) × F

where

E is fifty percent, or twenty-five percent, of an annual fee, and

F is the number of whole calendar months during which the member is required to pay fifty percent, or twenty-five percent, of the annual fee; and

(b) an amount determined by the formula

(G ÷ 12) × H

where

G is the full amount, or fifty percent, of an annual fee, and

H is the number of part or whole calendar months during which the member is required to pay the full amount, or fifty percent, of an annual fee.

Same
(3) If a member who is required to pay the full amount, fifty percent or twenty-five percent of an annual fee becomes exempt from payment of an annual fee, the member shall pay an amount determined by the formula

(I ÷ 12) × J

where

I is the full amount, fifty percent or twenty-five percent of an annual fee, and

J is the number of whole or part calendar months during which the member is required to pay the full amount, fifty percent or twenty-five percent of an annual fee

When payment due
(4) If under this section, a member is required to pay, in respect of a year, an amount that is greater than the amount required to be paid under section 2, the difference between the amount that the member is required to pay under this section and the amount that the member is required to be pay under section 2 shall be due on a date to be specified by a Society official.

Application for refund
(5) If under this section, a member is required to pay, in respect of a year, an amount that is less than the amount required to be paid under section 2, subject to subsections (6) and (7), the member is entitled to a refund of the difference between the amount that the member is required to pay under section 2 and the amount that the member is required to be pay under this section.

Application for refund
(6) A member shall apply to the Society to claim an entitlement to a refund under subsection (5).

Time for making application
(7) An application to the Society under subsection (6) shall be made before the end of the year in respect of which the member claims an entitlement to a refund under subsection (5).

No entitlement to refund
(8) A member who does not comply with subsection (7) is not entitled to receive a refund.

Retired and incapacitated members
4. (1) A member may apply to the Society for an exemption from payment of an annual fee if he or she,

(a) is over sixty-five years of age and is permanently retired from the practice of law in Ontario; or

(b) is permanently disabled and, as a result, is unable to practise law.

Application form
(2) An application under subsection (1) shall be in a form provided by the Society.

Consideration of application
(3) A Society official shall consider every application made under subsection (1) and if the official is satisfied that the requirements described in clause (1) (a) or (1) (b) have been met, the official shall approve the application.

Effective date of exemption
(4) A member whose application is approved is exempt from payment of the annual fee beginning on the first day of the first month after the month in which the member submits an application form completed to the satisfaction of a Society official.

Interpretation: practising law
(5) For the purposes of subsection 4 (1), a member practises law if the member gives any legal advice respecting the laws of Ontario or Canada or provides any legal services

Period of default
5. (1) For the purpose of subsection 46 (1) of the Act, the period of default for failure to pay an annual fee is 120 days after the day on which payment of the annual fee is due.

Payment plan: deemed date of failure to pay
(2) Where the Society arranges or permits a schedule for the payment of an annual fee by instalments or otherwise and a required payment is not made by a scheduled date, failure to pay an annual fee will be deemed to have occurred on January 1.

Reinstatement of rights and privileges
(3) If a member's rights and privileges have been suspended under subsection 46 (1) of the Act for failure to pay an annual fee in a given year, for the purpose of subsection 46 (2) of the Act, the member shall pay an amount equal to the amount of the annual fee which the member is required to pay in respect of that year and a reinstatement fee in an amount determined by Convocation from time to time.

Commencement
6. This By-Law comes into force on February 1, 1999.

APPENDIX 4

PRO BONO LAW
ONTARIO

DRAFT

PROPOSED EMERITUS RULES

Purpose

The purpose of the Emeritus category of active membership in the Law Society of Upper Canada is to facilitate and encourage the provision of pro bono legal services to persons of limited means as well as the charitable organizations that serve them by retired lawyers who otherwise may choose inactive status or even resign from membership in the Law Society of Upper Canada.

Emeritus Members - Those persons who are admitted to practice law in Ontario may, upon request to the Law Society of Upper Canada with the supporting materials specified, become emeritus members and provide pro bono legal services to the poor, working poor and charitable organizations that serve them through an approved legal assistance organization as emeritus members subject to the terms and conditions outlined below. They shall pay no dues, save for a $300 administrative fee, and may not practice law except in the limited manner stated below:

Definitions

(A) Active practice of law, for the purposes of this rule, means that a lawyer has been engaged in the practice of law, which includes private practice, in-house counsel, public employment as a lawyer, or full-time teaching at a recognized law school.

(B) Emeritus member is any person who is admitted to practice law in Ontario, who is retiring or has retired from the active practice of law, and who intends to provide at least 50 hours per year of pro bono legal services, and

- Has been engaged in the active practice of law for a minimum of ten out of the fifteen years immediately preceding the application to become an emeritus member; and
- Is at the time of requesting emeritus member status, a member in good standing with the Law Society of Upper Canada and has not been disciplined for any reason by the Law Society of any jurisdiction within the past fifteen years; and
- Signs a statement that he or she has read and will comply with the Rules of Professional Conduct and as an emeritus member submits to the continuing jurisdiction of the Law Society for continuing regulatory purposes; and
- Agrees to neither ask for nor receive any compensation of any kind, except for out-of-pocket expenses for the legal service to be rendered

(C) Approved legal assistance organization for the purposes of this rule is a Pro Bono Law Ontario (PBLO) registered program or a Legal Aid Ontario Community Legal Clinic that follows PBLO's Best Practices for Pro Bono Programs and pays special attention to the unique needs of emeritus lawyers. This includes:

- Ensuring that emeritus lawyers are engaged in appropriate pro bono activities (see below);
- Ensuring that emeritus lawyers receive appropriate support for their pro bono activities including

    i. Appropriate management and supervision
    ii. Access to CLE programs related to the pro bono legal service they are providing;
    iii. Access to office space, support staff, law libraries and legal research tools related to the pro bono legal service they are providing;

- Ensuring that appropriate case management exists to track emeritus lawyer activity from referral to conclusion, including a review mechanism and/or client feedback tool to ensure that high-quality legal services have been rendered.
- Ensuring that malpractice coverage is extended to emeritus lawyers either through coverage extended to PBLO registered programs or through independent insurance programs.

Activities

An emeritus member, in association with an approved legal assistance organization may perform only the following activities:

- The emeritus member may appear in any court or before an administrative tribunal or arbitrator in Ontario on behalf of a client of an approved legal assistance organization if the person on whose behalf the emeritus lawyer is appearing has consented in writing to the appearance and has given written approval to the pro bono program manager.
- The emeritus member may prepare and sign pleadings and other documents to be filed in any court or with any administrative tribunal or arbitrator in Ontario in any matter in which the emeritus lawyer is involved.
- The emeritus lawyer may engage in such other preparatory activities as are necessary for any matter in which he or she is properly involved.
- The emeritus lawyer may provide legal opinions.
- The emeritus lawyer may provide summary advice in areas of law with which he or she is familiar.
- The emeritus lawyer may train or mentor other lawyers in areas of law with which he or she is familiar.
- The emeritus lawyer may write articles and draft and present public legal education workshops or seminars in areas of law with which he or she is familiar.

Supervision and Limitations

- An emeritus member must perform all activities authorized by this rule under the supervision of a pro bono program coordinator, supervising lawyer or Executive Director of an approved legal assistance organization.
- Emeritus members permitted to perform services under this rule are not and shall not represent themselves to be active members of the Law Society of Upper Canada licensed to practice law generally in Ontario.

- The prohibition against compensation for the emeritus member contained in this rule shall not prevent the approved legal assistance organization from reimbursing the emeritus member for actual expenses incurred while rendering services[6] .

Application & Certification

Authorization for an emeritus member to perform services under this rule shall become effective upon,

- The lawyer's filing the necessary application with the Law Society, and
- Confirmation by the Law Society of Upper Canada that the emeritus member has fulfilled the requirements of such membership and has a clear disciplinary record;
- A certification by an approved legal assistance organization stating that the emeritus member is currently associated with that approved legal assistance organization.

Withdrawal of Certification

Authority to perform services under this rule shall cease immediately upon the filing with the Law Society of Upper Canada of either:

- A notice from the approved legal assistance organization that the emeritus lawyer has ceased to be associated with the organization;
- A notice from the approved legal assistance organization that it has withdrawn certification
- A notice by the Law Society of Upper Canada, at any time, stating that permission to perform service under this rule has been revoked. The Law Society of Upper Canada will provide this notice in writing to the approved legal services organization and the emeritus lawyer.

If an emeritus member's certification is withdrawn, for any reason, the program manager, supervising lawyer or Executive Director shall promptly file a notice in the official file of each matter pending before any court or tribunal in which the emeritus member was involved.

Change of Membership Status

An emeritus member may petition the Law Society of Upper Canada for reinstatement to active membership in accordance with the rules and regulations in force at the relevant time.

APPENDIX 5

By-Law 13

[6] The Law Society recognizes that some clients may try to insist on compensating emeritus lawyers for their pro bono services. Emeritus lawyers will encourage those clients to make a donation directly to approved legal services organizations instead. Likewise approved legal services organizations are entitled to all court awarded fees for any representation rendered by an emeritus member.

MEMBERS

HONORARY MEMBERS

Authority to make persons honorary members
1. Convocation may make any person an honorary member.

LIFE MEMBERS

Life member: eligibility
2. (1) Every member of the Society who has been entitled to practise law in Ontario as a barrister, as a solicitor or as a barrister and solicitor for a period of fifty years is a life member.

Period of fifty years
(2) The following periods of time may be counted towards the period of fifty years required by subsection (1):

1. A period of time during which the member's membership is in abeyance under section 31 of the Act.

2. A period of time during which the member's membership is interrupted by war service.

3. Subject to subsection (3), a period of time during which the member's entitlement to practise law in Ontario as a barrister, as a solicitor or as a barrister and solicitor is suspended for failure to pay a fee or levy.

4. In the absolute discretion of the standing committee of Convocation responsible for admissions matters, a period of time during which the member's entitlement to practise law in Ontario as a barrister, as a solicitor or as a barrister and solicitor is suspended for a reason other than failure to pay a fee or levy.

Period of suspension for non-payment: limit on time that may be counted
(3) The total amount of time that may be counted under paragraph 3 of subsection (2) towards the period of fifty years required by subsection (1) is one year.

Period of suspension for non-payment: exception to limit
(4) Despite subsection (3), in appropriate circumstances, the committee may permit a period of time in excess of one year to be counted under paragraph 3 of subsection (2) towards the period of fifty years required by subsection (1).

Exercise of powers by committee
(5) The performance of any duty, or the exercise of any power, given to the standing committee of Convocation responsible for admissions matters under this section is not subject to the approval of Convocation.

CATEGORIES OF MEMBERS

Categories of members
2.1 (1) The following are the categories of members:

1. Category A members.

2. Category B members.

3. Category C members.

Category A members
(2) Every member who is required to pay, and is not exempt from the payment of, insurance premium levies under By-Law 16 is a category A member.

Category B members
(3) Every member who is not a category A member or a category C member is a category B member.

Category C members
(4) Every member who is exempt from the payment of the annual fee under section 4 of By-Law 15, or who is exempt from the requirement to file an annual report under section 2 of By-Law 17, is a category C member.

Member by Transfer
(5) A person who becomes a member by transferring from a jurisdiction outside Ontario under section 4 or 4.1 of By-Law 11 is, immediately the person becomes a member, a category A, category B or category C member, as the case may be, if immediately before the person became a member, the person had in the jurisdiction from which the person transferred to Ontario the rights and privileges of that category of member.

Interpretation: "order"
2.2 (0.1) In subsections (1) and (2), "order" means,

(a) an order under the Act; and

(b) if a person becomes a member by transferring from a jurisdiction outside Ontario under section 4 or 4.1 of By-Law 11, an order by a tribunal of the governing body of the legal profession in the jurisdiction from which the person transferred to Ontario.

Category A members: rights and privileges
(1) Subject to any order made against the member, a category A member may practise law without any restrictions.

Category B members: rights and privileges
(2) Subject to any order made against the member, a category B member may practise law subject to the following restrictions:

1. The member is not permitted to practise law through a partnership.

2. The member is not permitted to practise law through a professional corporation.

3. The member is not permitted to practise law through a sole proprietorship.

4. The member is not permitted to practise law through any arrangement which permits two or more members to share all or certain common expenses but to practise law as independent practitioners.

Category C members: rights and privileges
(3) A category C member is not permitted to practise law.

Interpretation: "Private Practice Refresher Program"
2.3. (1) In this section, "Private Practice Refresher Program" means the program, administered by the Society for the purposes of ensuring that category B and category C members have the practice skills necessary to become category A members, consisting of the following modules:

1. Time management.

2. File management.

3. Financial management.

4. Client relationships/communication.

5. Technology and equipment.

6. Professional management.

7. Personal management.

8. Professional responsibility

Interpretation: "Society official"
(2) In this section, "Society official" means an officer or employee of the Society assigned by the Chief Executive Officer the responsibility of administering and enforcing the provisions of this section.

Changing status: from category B or category C to category A
(3) A category B member or a category C member may become a category A member by applying to the Society for a change in status.

Immediate change in status
(4) An application for a change in status made under subsection (3) shall be considered by a Society official and the Society official shall grant the change in status unless, for 80 percent or more of the five years immediately preceding the date of the application, the member has been a category B member or a category C member.

Member by transfer
(4.1) For the purposes of determining the entitlement to a change of status under subsection (4) of a person who became a member by transferring from a jurisdiction outside Ontario under section 4 or 4.1 of By-Law 11, the Society official shall consider the period of time that the member was a category B or category C member and the period of time that the person had the rights and privileges of that category of member in the jurisdiction from which the person transferred to Ontario.

Change in status upon successful completion of program
(5) If the Society official cannot grant the change in status under subsection (4), the Society official shall grant the change in status after the member has successfully completed the required modules of the Private Practice Refresher Program.

Conditional change in status
(6) Despite subsections (4) and (5), the Society official may grant the change in status conditional on the member successfully completing the required modules of the Private Practice Refresher Program within a specified period of time and practising only as an employee or partner of, and under the supervision of, a category A member approved by the Society official.

Same
(7) If a category B member or a category C member, who is granted a conditional change in status under subsection (6), breaches any condition to which the change in status is subject, the change is status is revoked and, despite subsection (6), the Society official shall grant no further conditional change in status to the member

Private Practice Refresher Program: required modules
(8) If a category B member or a category C member, who applies to the Society for a change of status under subsection (3), is not entitled to be granted the change in status under subsection (4), the Society official shall determine the modules of the Private Practice Refresher Program that must be successfully completed by the member.

Information to be provided by member
(9) For the purposes of assisting the Society official to make the determination under subsection (8), the member shall provide the official with information on the activities engaged in by the member during the five years immediately preceding the date of the member's application for a change in status and such other information relating to the member's practice skills as may be required by the official.

Redetermination by bencher
(10) A member who is dissatisfied with a Society official's determination under subsection (8) may apply to an elected bencher appointed for the purpose by Convocation for a redetermination of the modules of the Private Practice Refresher Program that must be successfully completed by the member.

Procedure on redetermination
(11) Subject to subsection (12), the procedure applicable to a redetermination under subsection (10) shall be determined by the bencher and, without limiting the generality of the foregoing, the bencher may decide who may make submissions to him or her, when and in what manner.

Written submissions
(12) Unless the bencher permits a person to make oral submissions to him or her, all submissions to the bencher shall be in writing.

Commencement
3. This By-Law comes into force on February 1, 1999.

RETIRED LAWYERS AS ESTATE TRUSTEES

Motion

15. That Convocation approve the following:

    a. A member of the Society who is over 65 years of age and permanently retired from the practice of law in Ontario who has been appointed or acts as an estate trustee, as a trustee for an inter vivos trust or who is an attorney for property may be exempt from payment of the Law Society's annual fee on condition that the member,

        i. declares to the Society such trusteeships or powers of attorney upon retirement,
        ii. continues to file the Member's Annual Report,
        iii. continues to be subject to the Spot Audit Program, and
        iv. files the appropriate exemption forms each year with LawPRO to confirm the member's continued status as exempt from payment of insurance premium levies.

    b. A member of the Society who changes from a practising membership status to a non-practising membership status who has been appointed or acts as an estate trustee, as trustee for an inter vivos trust or who is an attorney for property must

        i. declare to the Society such trusteeships or powers of attorney at the time of the change to a non-practising membership status, and
        ii. file the appropriate exemption forms each year with LawPRO to confirm the member's continued status as exempt from payment of insurance premium levies.

Introduction and Background

16. Several members of the Law Society who are estate trustees have made application for exemption from payment of the Law Society's annual fee under By-Law 15[7] , on the basis that they are retired from the practice of law. The Law Society's policy is that lawyers who otherwise qualify for the exemption under By-Law 15 are not permitted an exemption (effectively are not permitted to retire from the practice of law) if they act as an estate trustee. Generally, members who wish to cease practicing must wind up any trusts or estates before retiring. If members wish to continue as estate trustees, they are not permitted to retire. They are required to pay annual fees (which may only be 50% of the full fee if they are not practicing law but engage in remunerative work) or risk administrative suspension.

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[7] See Appendix 1 for a copy of By-Law 15. Section 4 of the By-Law reads:
4.(1) A member may apply to the Society for an exemption from payment of an annual fee if he or she,
(a) is over sixty-five years of age and is permanently retired from the practice of law in Ontario; or
(b) is permanently disabled and, as a result, is unable to practise law.

17. The lawyers who have applied for but have been denied the exemption have raised concerns about the Law Society's interpretation of By-Law 15. They are of the opinion that it is unfair to require the payment of the annual fee (even at a reduced rate) in these circumstances. In all of these cases, the solicitor's work, if any, has been turned over to practicing members. The lawyers seeking exemption continue to act only as trustees. They rely on the law applicable to a trustee, not on the fact of their status as a practising lawyer and members of the Society, to define their duties in connection with the estate.[8]

18. As a consequence of the above policy, in some cases, lawyers who are trustees who otherwise meet the exemption requirements and wish to cease practicing, change their status to a non-practicing member category (for example, paying 25% of the annual fee). In order to change their status to non-practicing, members must merely notify the Society. Non-practicing members are generally not required to maintain professional liability insurance once their status has changed, as they are not actively engaged in the practice of law.

19. The definition of practicing law in By-law 15 does not specifically include trusteeships. Subsection 2(7) of the By-law provides that a member practices law if the member gives any legal advice respecting the laws of Ontario or Canada or provides any legal services. There is no definition in the By-law for "legal services".

20. The Committee reviewed this issue to determine whether these members should continue to pay the annual fee, and if not, what, if anything, the Law Society should require them to do.

Particulars of the Committee's Review

21. This matter has a long history with the Committee. The following outlines the information considered by the Committee, the efforts it took to obtain input from the profession on the issue in the early stages of its review and its proposal to address the matter.

<u>What the Change in Status Means</u>

22. Generally, lawyers who are retired from the practice of law are at least 65 years of age and

    a. do not engage in the practice of law,
    b. remain subject to the Society's regulatory jurisdiction (i.e. complaints, discipline)
    c. are not required to maintain LAWPRO coverage (run-off coverage is available for claims in the period prior to retirement),
    d. are exempt from payment of the annual fee under By-Law 15 and the levy for the Lawyers' Fund for Client Compensation ("the Compensation Fund"), and
    e. are not required to file the Member's Annual Report (MAR).

23. Lawyers in the 25% and 50% annual fee-paying categories (non-practicing status)

[8] Eleven members have made inquiries about why they must pay the annual fee if they can retire under By-law 15 but are estate trustees, and whose status with respect to retirement is pending with the Society.

a. do not engage in the practice of law (in the 50% category) and do not engage in the practice of law or any remunerative work (in the 25% category),
b. pay a percentage of the Compensation Fund levy in the same percentage as the annual fee,
c. are exempt from payment of the LAWPRO levy, with run-off coverage, as applicable, continuing (these members may purchase full insurance coverage if they wish), and
d. are required to file the MAR.

Information on LAWPRO Coverage

24. The definition of "Professional Services" under the LAWPRO policy includes services for which the insured is responsible as a lawyer arising out of trustee, administrator, or executor activities. specific nature of each of the individual tasks performed.

25. A lawyer who is appointed as an estate trustee is covered in the ordinary course for errors and omissions occurring when he or she performs functions that are his or her responsibility as estate trustee, on the assumption that the lawyer is acting as estate trustee as part of his or her law practice.

26. The fact that a lawyer continues as an estate trustee after winding down the rest of his or her practice does not change the nature of service. Essentially, the service would continue to be seen by LAWPRO as a legal service. As such, under the current program, it would be open to the lawyer to continue to maintain his or her on-going practice coverage, and the policy would respond to claims arising out of these services in the ordinary course.

27. Where the lawyer concludes his or her role as estate trustee when winding down the rest of his or her law practice, claims subsequently arising out of these services would be covered in the ordinary course under the run-off coverage.

Alternatives to the Current Insurance Products

28. Given the cost of LAWPRO coverage for lawyers who are retired and only continue to act as estate trustees, inquiries were made of LawPRO in 2003 about other insurance products on the market for estate trustees. The Committee learned that of seven E&O insurers contacted by LawPRO, only one offers coverage to estate trustees. The minimum premium was approximately $3000 annually for a $2,000,000 limit. For fidelity bonds, the cost was $3.50 per $1000 subject to a minimum $375 premium per year for two years. In the Committee's view, these costs would be prohibitive for most estates.

29. The Committee also inquired of LawPRO about the possibility of LawPRO creating insurance coverage for lawyers who retire or discontinue practice while continuing to act as estate trustees. LawPRO advised that one possibility would be to provide a product whereby lawyers electing an option to limit their work to that of estate trustee would be provided with a premium discount equal to 60% of the base premium, subject to individual underwriting review. The lawyer would be provided with the full $1million per claim/$2 million aggregate limit practice coverage.

Information on Compensation Fund Claims

30. The Committee considered the possible exposure to the Compensation Fund of lawyers retired from the practice of law.

31. Payments from the Fund are always discretionary. If the lawyer performs trustee duties as a practising member and a claim is made, it will be treated as any other claim arising from the lawyer's practice of law and assessed accordingly. If the trustee duties are performed by a lawyer retired from the practice of law and a theft occurs, considerations of whether the activity was connected to or arose from the practice of law come into play, and the possibility exists that the claim arising from the theft may be denied.

Consequences of Resignation as Estate Trustee

32. The Committee requested information from staff on the practicality of a retired lawyer resigning as estate trustee upon retirement.

33. The Committee learned that there are costs and complications associated with resignation as estate trustee, if a member chooses not to pay an annual fee to the Society and wishes to resign the trusteeship.

34. If the member is the sole trustee, he or she cannot simply resign. The member must make an application to the court under the *Trustee Act*. This will result in a fairly large expense, which would likely be borne by the estate. The issue becomes more complex if there is no one willing or able to assume these duties, and the Public Guardian and Trustee must be enlisted to assume the role. The courts have historically been reluctant to interfere with a testator's or donor's choice of trustee, and will only do so in limited circumstances (i.e. where there is negligence, misconduct, a conflict of interest or a failure to maintain an even hand).

35. Unless the new trustee is himself or herself a member, the LAWPRO and Compensation Fund protections would be unavailable to beneficiaries in any event. An example would be where a member is the sole (or last surviving) trustee and dies with a will that appoints the member's spouse (a non-member) as trustee of the member's estate. Under Ontario law, in the absence of a specific clause in the will to the contrary, the spouse would also become the trustee of the estate for which the member had been acting as trustee.

36. It is possible that a member wishing to transfer signing authority over estate accounts may be found to have improperly delegated trustee powers, thereby breaching the trust position. As a general rule, trustees have a duty not to delegate responsibilities entrusted to them to others. This principle has been statutorily relaxed to permit limited powers of delegation in s. 20 of the *Trustee Act*, but it appears that delegation in respect of trust property is only permitted for short periods of time in order to facilitate the completion of specific transactions.

Estate Trustee Compensation

37. As a matter related to the costs to a retired member associated with paying the annual fee as an estate trustee, the Committee requested general information from staff on estate trustee compensation.

38. The Committee learned that compensation appears to be related entirely to the number of estates being administered and the value of the estate assets subject to administration, coupled with the complexity of the estate.

39. Information on how estate trustee compensation is determined was obtained from the 1997 text, *Compensation for Estate Trustees*, by Jennifer J. Jenkins. A Court of Appeal decision also provided helpful information on the tests the court will apply when determining compensation.

40. The statutory backdrop is the Ontario *Trustee Act*, which permits for estate trustees " a fair and reasonable allowance for care, pains and trouble and time expended in or about the estate". (s. 61.1(1)). The Act also provides that "where a lawyer is a trustee, guardian or personal representative, and has rendered necessary professional services to the estate, regard may be had in making the allowance to such circumstance, and the allowance shall be increased by such amount as may be considered fair and reasonable." (s. 61(4)).

41. Percentage guidelines, or tariff guidelines as they are called, have developed in almost every Canadian jurisdiction. In Ontario, they are not sanctioned by statute or regulation but were developed by the estates bar and judges of the former Surrogate Court. Since 1975, the practice has been to award compensation on the basis of 2.5% against the four categories of capital receipts, capital disbursements, revenue receipts and revenue disbursements, along with a management fee of two-fifths of 1 percent per annum on the gross value of the estate in appropriate cases. In her book, Ms. Jenkins advises that while the courts consistently emphasize that the usual percentages are guidelines only, as a matter of practice, the guidelines have generally been relied upon.

42. The Ontario Court of Appeal discussed the factors that will determine the level of estate trustee compensation. In *Logan v. Hines*, (1998), 41 O.R. (3d) 571, the court dealt with the principles to be applied in determining fair and reasonable compensation under the Trustee Act. The court adopted the approach in *Re Jeffrey Estate* (1990), 39 E.T.R. 173. That case held that compensation claims should be tested against the percentages approach described above. The result should then be "cross-checked" or confirmed against the five factors set out in *Re Toronto General Trusts and Central Ontario* Railway, which are

    a. the magnitude of the trust,
    b. the care and responsibility springing therefrom,
    c. the time occupied in performing its duties,
    d. the skill and ability displayed, and
    e. the success which has attended its administration.

43. The court in *Re Jeffrey Estate* also found that the audit judge should also consider whether an extra allowance should be made for management, based on special circumstances. Overall, the court said that "it is a search for an award which reflects fairness to the executor: in a real sense, the search is for an appropriate *quantum meruit* award in a unique setting."

44. The court in Logan said the approach in *Re Jeffrey Estate* "achieves the appropriate balance between the need to provide predictability while, at the same time, tailoring compensation to the circumstances of each case".

Call For Input And The Results

45. In the fall of 2001, the Committee decided that input from the profession should be sought before a policy position is developed for Convocation's consideration. A notice requesting input from the profession was published in the *Ontario Reports*, in the *Ontario Lawyers Gazette* and on the Society's web site. At the time, two options were included for discussion, as indicated in the following notice:

> [The issue is] whether non-practising lawyers who continue to act as estate trustees must pay the Law Society's annual fee. Under By-Law 15, only lawyers who are permanently retired from the practice of law and 65 years of age or over, or permanently disabled, and therefore unable to practice law, are exempt from the fee payment. The Committee considered two options. Option 1 would require members who otherwise meet the criteria for exemption to pay the fee if they continue to act as estate trustees, permitting beneficiaries to continue to have the protection of the lawyer's professional liability insurance through LPIC and access to the Lawyers' Fund for Client Compensation. Option 2 would permit an exemption if members acting as estate trustees give notice to the beneficiaries of the intention to retire, the consequences of retirement, and options available to them, such as buying excess run off insurance coverage.

46. Responses were received from twenty-six members or member groups.[9]

47. One respondent agreed with the proposals, calling them "reasonable". Ten respondents disagreed with both options for a number of reasons, including the following:

a. Law Society fees will often exceed the compensation a trustee will receive from an estate;
b. Option 1 will cause many lawyers to cease acting as trustees, putting an estate to considerable expense to replace the trustee;
c. Compensation Fund payments are discretionary, and LAWPRO coverage would not be available for those acting as trustees only, as the view is that this is not the practice of law;
d. the proposals do not distinguish between lawyers who are trustees before and after retirement;
e. the *Trustee Act* will protect beneficiaries.

48. Eleven respondents agreed with Option 2 (no payment of the fee with advice to the beneficiaries of the effect of retirement). Many of these respondents raised the same issues about LAWPRO insurance coverage and Compensation Fund claims noted above. Other respondents within this group suggested that the proposal should be clarified as applicable to lawyers who are trustees of *inter vivos* trusts.

[9] A summary of the responses, without attribution, appears at Appendix 2.

Questions The Committee Considered

49. In considering whether the annual fee should be paid by members in these circumstances, the Committee considered the following questions:

    a. Is a retired/non-practising lawyer practising law when acting as an estate trustee?
    b. Does the Society have an obligation to ensure that public protections are in place for beneficiaries of estates administered by retired/non-practising lawyer trustees?
    c. Is it appropriate or fair for retired/non-practising lawyer trustees to pay fees and levies, given the nature of many estates and the amount of compensation from such duties?
    d. Is it appropriate that retired/non-practising lawyer trustees not pay fees and levies when they are still subject to and may actively engage the Law Society as regulator (i.e. complaints investigation and discipline, Compensation Fund claims)?
    e. Should lawyers who are appointed trustees of inter vivos trusts and under powers of attorney be subject to the same treatment as estate trustees?
    f. Should lawyers who have no solicitor/client connection with a testator but who are named in a will as estate trustee be subject to the requirements that may ultimately be decided on this issue?

50. In the course of its deliberations the Committee, as it was formerly and is currently constituted, discussed various options, which evolved to two choices.

51. The first was the current practice of requiring lawyers to pay the fee if they continue to act as estate trustees. This would permit beneficiaries to continue to have the protection of the lawyer's professional liability insurance through LAWPRO and access to the Compensation Fund. Implicit in this view is recognition of a connection between the member's status as a practising lawyer and the fact of his or her appointment as a trustee in a client's will. It would also assure the lawyer's financial contribution to the Society's regulatory operations. A major part of the Society's operations, funded by the annual fee, are devoted to regulatory compliance and enforcement. Although a lawyer may be retired or not practising, he or she may be subject to complaints or disciplinary action.[10]

52. The second option was to exempt such lawyers from payment of the fee but impose certain requirements on the member. This option acknowledges that many estates administered by lawyers that arise from the lawyer's professional or personal relationships have few assets, with correspondingly small remuneration for the trustee. As some respondents to the call for input indicated, the expense of paying the annual

[10] Statistical information on complaints involving retired or non-practicing lawyers acting as estate trustees shows that since 1985 there have been between 50 and 60 complaints about members in the wills/estates category who are retired or not working, life members/retired, or retired (By-Law 15) in Ontario. While this information does not provide detail on the allegations of lawyer misconduct in these complaints, it indicates that very few complaints have been made in circumstances in which a retired (non-practicing) lawyer is involved in estates work.

fee and insurance would often exceed the remuneration received from the estate for trustee duties. The need for regulatory controls remains, as a matter of protecting the public interest. The Society's regulatory requirements associated with the exemption would include declaring the trusteeships to the Society upon retirement, filing the MAR and continuing to be subject to the Spot Audit program.

The Committee's Proposal

53. Based on its review, the Committee concluded that a lawyer who qualifies for retirement and acts as an estate trustee should not be required to pay the annual fee, but should be subject to certain regulatory requirements. The Committee also felt that lawyers who are trustees of *inter vivos* trusts or who are given powers of attorney should be subject to the same requirements.

54. Similarly, as in practical terms, retirement and change to a non-practising status are identical for the purposes of this situation, those practising members who enter a non-practising status and act as trustees or who are given powers of attorney should be subject to the applicable requirements.

55. The recommendation agreed upon by the Committee is as follows:

a. While the members in question are retired from practice, they should continue to be subject to the regulatory oversight of the Law Society, given that an estate matter that arises out of a lawyer and client relationship is residual work from the former law practice, and as such would be seen by the public as a matter falling within the Society's regulatory public protection responsibility for as long as the lawyer continues to be a member.[11] The Law Society's responsibilities in this respect include:

i. Obtaining information about the member and his or her activities through the Member's Annual Report (MAR);
ii. Monitoring the member's record-keeping and handling of client (i.e. estate) property through the Spot Audit program;
iii. Responding to complaints of professional misconduct of or conduct unbecoming a member;
iv. Responding to claims to the Lawyers' Fund for Client Compensation.[12]

b. The policy would apply to

i. members who are retired or retire from practice within the meaning of By-Law 15 (i.e. over 65 and permanently retired from practice or disabled and unable to practice) and who are estate trustees, powers of attorney or trustees under *inter vivos* trusts, and

[11] An estate matter that occurs after the lawyer is retired or changes to a non-practising status (i.e. the lawyer is named as trustee in a will years after he or she has retired) would not be considered to have arisen from a lawyer and client relationship.

[12] Subsection 51(5) of the Law Society Act states that "Convocation in its absolute discretion may make grants from the Fund in order to relieve or mitigate loss sustained by any person in consequence of dishonesty on the part of any member in connection with such member's law practice or in connection with any trust of which the member was or is a trustee..."

ii. members who do not fall within the above category but are in a non-practising status or enter a non-practicing status and who are estate trustees, powers of attorney or trustees under *inter vivos* trusts.

c. Trusteeships of estates for members of a retired or non-practising lawyer's family are generally not considered to have arisen from the member's practice of law. Lawyers who have never been in practice can and do also become trustees of estates of their family members. A trusteeship of a family member's estate should not be considered a matter to which the proposal is applicable.[13]

d. The requirements include:

i. Requirement to Declare: The members described above would be required to declare to the Law Society their trusteeships or powers of attorney at retirement or upon change to a non-practicing status;
ii. Continuing Obligation to File the MAR: Retired members who continue to act as estate trustees, powers of attorney or trustees would continue to be required to file the MAR[14] ;
iii. Spot Audit: Retired members who continue to act as estate trustees, powers of attorney or trustees would continue to be subject to spot audit;
iv. Insurance: With respect to insurance, the program would be structured to provide an exemption from payment of the insurance premium levies for retired members or members in a non-practicing status who continue to act as estate trustees, powers of attorney or trustees. They would be required to file exemption forms each year to advise LAWPRO of the continuation of the exemption, to ensure that members provide the required insurance information annually.

56. The Committee was advised that subject to its board's approval, LAWPRO would arrange an exemption from the insurance requirement. LAWPRO would also arrange an insurance product on a voluntary basis for retired and non-practising status members who act as estate trustees, powers of attorney and trustees of *inter vivos* trusts, referenced earlier in this report. As the insurance product would be created to cover errors only, claims that arise from the dishonesty of the member would continue to flow to the Compensation Fund for assessment.

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[13] As noted above, the Society may have a responsibility to consider Compensation Fund claims that arise from family estates or trusteeships, given the language in section 51 of the Act.

[14] By-Law 17, under which the MAR is authorized, does not permit a lawyer age 65 or older who no longer practices but continues to act as estate trustee to be exempt from filing the MAR. Subsection 2(3) reads: Exemption from requirement to submit annual report
(3)The following members may apply to the Society for an exemption from the requirement to submit a report under subsection (1):
l. A member who is over sixty-five years of age and who,
i. does not practise law in Ontario,
ii. is not an estate trustee, and
iii. does not act as an attorney under a power of attorney for property given by a client or former client.
2. A member who is incapacitated within the meaning of the Act.

The Nature and Timing of the By-Law Amendments

57. To implement the above proposal, amendments would be required to By-Law 15, 16 and 17.

58. With respect to the amendments to By-Law 16, the LAWPRO insurance program for the year 2007 will be determined over this summer, and its report will be provided to September 2006 Convocation. If Convocation approves the Committee's proposal, the request can be made to LAWPRO to include in its 2007 program the exemption and to make arrangements for the optional insurance coverage described above. Thereafter, appropriate amendments to By-Laws 15, 16 and 17, can be prepared for Convocation's review. Their adoption and effective dates can be co-ordinated with the effective date of LAWPRO's insurance program (January 1, 2007).

APPENDIX 1

BY-LAW 15

ANNUAL FEE

Interpretation: "Society official"
0.1 In this By-Law, a "Society official" means an officer or employee of the Society assigned by the Chief Executive Officer the responsibility of administering and enforcing the provisions of this By-Law.

Requirement to pay annual fee
1. (1) Every year, a member shall pay an annual fee, in accordance with sections 2 and 3, unless the member is exempt from payment of an annual fee.

Exemption from requirement to pay annual fee: life members and honorary members
(2) Life members and honorary members are not required to pay an annual fee.

Same: retired and incapacitated member
(3) A member whose application to be exempt from payment of an annual fee is approved under section 4, is not required to pay an annual fee.

Amount and payment of annual fee
2. (1) The amount of the annual fee for a year shall be determined by Convocation.

Levy for Lawyers Fund for Client Compensation
(2) An annual fee shall include a Lawyers Fund for Client Compensation levy.

Payment due
(3) Payment of an annual fee is due on January 1 every year.

Amount payable
(4) Subject to subsections (5) and (6), a member shall pay the full amount of an annual fee and any taxes that the Society is required to collect from the member in respect of the payment of an annual fee.

Same
(5) A member who does not practise law, including a member employed in education, in government or in a corporation in a position where he or she is not required to practise law, shall pay fifty percent of an annual fee and any taxes that the Society is required to collect from the member in respect of the payment of an annual fee.

Same
(6) The following members shall pay twenty-five percent of an annual fee and any taxes that the Society is required to collect from the member in respect of the payment of an annual fee:

1. A member who does not engage in any remunerative work, including the practice of law, in or outside of Ontario.

2. A member who is in full-time attendance at a university college or designated educational institution within the meaning of the Income Tax Act (Canada) and does not practise law.

3. A member who is on a maternity, paternity or adoption leave and does not practise law.

Interpretation: practising law
(7) For the purposes of subsections (5) and (6), a member practises law if the member gives any legal advice respecting the laws of Ontario or Canada or provides any legal services.

Application of subss. (3) to (6)
(8) Subsections (3) to (6) apply only to persons who are members on January 1.

Persons admitted, etc. after January 1
(9) A person who after January 1 is admitted or readmitted as a member, or whose membership after January 1 is restored, shall pay, in respect of the year in which he or she is admitted or readmitted as a member, or in which his or her membership is restored, an amount of an annual fee determined by the formula,

$(A \div 12) \times B$

where,

A is the amount of the annual fee the person would have been required to pay under subsection (4), (5) or (6) if he or she were a member on January 1, and

B is the number of whole calendar months remaining in the year beginning with the second month following the month in which the member is admitted or readmitted or in which the person's membership is restored.

Same: payment due
(10) Payment of an annual fee by a person to whom subsection (9) applies is due on the first day of the second month following the month in which the person is admitted or readmitted as a member or in which the person's membership is restored.

Change in status
3. (1) If a member who is required to pay the full amount, or fifty percent, of an annual fee becomes entitled to pay fifty percent, or twenty-five percent, of an annual fee, the member shall pay,

(a) an amount determined by the formula

(A ÷ 12) × B

where

A is the full amount, or fifty percent, of an annual fee, and

B is the number of whole or part calendar months during which the member is required to pay the full amount, or fifty percent, of an annual fee; and

(b) an amount determined by the formula

(C ÷ 12) × D

where

C is fifty percent, or twenty-five percent, of an annual fee, and

D is the number of whole calendar months during which the member is required to pay fifty percent, or twenty-five percent, of an annual fee.

Same
(2) If a member who is required to pay fifty percent, or twenty-five percent, of an annual fee becomes required to pay the full amount, or fifty percent, of an annual fee, the member shall pay, in respect of the period of time during which he or she is required to pay the lesser amount of an annual fee and the period of time during which he or she is required to pay the higher amount of an annual fee,

(a) an amount determined by the formula

(E ÷ 12) × F

where

E is fifty percent, or twenty-five percent, of an annual fee, and

F is the number of whole calendar months during which the member is required to pay fifty percent, or twenty-five percent, of the annual fee; and

(b) an amount determined by the formula

(G ÷ 12) × H

where

G is the full amount, or fifty percent, of an annual fee, and

H is the number of part or whole calendar months during which the member is required to pay the full amount, or fifty percent, of an annual fee.

Same
(3) If a member who is required to pay the full amount, fifty percent or twenty-five percent of an annual fee becomes exempt from payment of an annual fee, the member shall pay an amount determined by the formula

$(I \div 12) \times J$

where

I is the full amount, fifty percent or twenty-five percent of an annual fee, and

J is the number of whole or part calendar months during which the member is required to pay the full amount, fifty percent or twenty-five percent of an annual fee

When payment due
(4) If under this section, a member is required to pay, in respect of a year, an amount that is greater than the amount required to be paid under section 2, the difference between the amount that the member is required to pay under this section and the amount that the member is required to be pay under section 2 shall be due on a date to be specified by a Society official.

Application for refund
(5) If under this section, a member is required to pay, in respect of a year, an amount that is less than the amount required to be paid under section 2, subject to subsections (6) and (7), the member is entitled to a refund of the difference between the amount that the member is required to pay under section 2 and the amount that the member is required to be pay under this section.

Application for refund
(6) A member shall apply to the Society to claim an entitlement to a refund under subsection (5).

Time for making application
(7) An application to the Society under subsection (6) shall be made before the end of the year in respect of which the member claims an entitlement to a refund under subsection (5).

No entitlement to refund
(8) A member who does not comply with subsection (7) is not entitled to receive a refund.

Retired and incapacitated members
4. (1) A member may apply to the Society for an exemption from payment of an annual fee if he or she,

(a) is over sixty-five years of age and is permanently retired from the practice of law in Ontario; or

(b) is permanently disabled and, as a result, is unable to practise law.

Application form
(2) An application under subsection (1) shall be in a form provided by the Society.

Consideration of application
(3) A Society official shall consider every application made under subsection (1) and if the official is satisfied that the requirements described in clause (1) (a) or (1) (b) have been met, the official shall approve the application.

Effective date of exemption
(4) A member whose application is approved is exempt from payment of the annual fee beginning on the first day of the first month after the month in which the member submits an application form completed to the satisfaction of a Society official.

Interpretation: practising law
(5) For the purposes of subsection 4 (1), a member practises law if the member gives any legal advice respecting the laws of Ontario or Canada or provides any legal services

Period of default
5. (1) For the purpose of subsection 46 (1) of the Act, the period of default for failure to pay an annual fee is 120 days after the day on which payment of the annual fee is due.

Payment plan: deemed date of failure to pay
(2) Where the Society arranges or permits a schedule for the payment of an annual fee by instalments or otherwise and a required payment is not made by a scheduled date, failure to pay an annual fee will be deemed to have occurred on January 1.

Reinstatement of rights and privileges
(3) If a member's rights and privileges have been suspended under subsection 46 (1) of the Act for failure to pay an annual fee in a given year, for the purpose of subsection 46 (2) of the Act, the member shall pay an amount equal to the amount of the annual fee which the member is required to pay in respect of that year and a reinstatement fee in an amount determined by Convocation from time to time.

Commencement
6. This By-Law comes into force on February 1, 1999.

APPENDIX 2

SUMMARY OF RESPONSES TO CALL FOR INPUT ON THE ISSUE OF RETIRED LAWYERS ACTING AS ESTATE TRUSTEES

1. Option 2 is better. Where relatively small life interests requiring continued involvement of the trustee, the Society fees might exceed the executor's compensation. In large estates, other forms of insurance or bonding would be preferable to the LPIC coverage.

2. Neither option is acceptable.

   · Option 1 would result in such lawyers ceasing to act as trustees - they could not command sufficient compensation to justify the fee. This would mean that the wishes of the clients would be thwarted, with significant costs to have a replacement trustee appointed. As compensation fund

payments are discretionary, there may be no payment even though the lawyer has paid the fee, and this would only lower the profession in the public's eyes. How would lawyers have access to LPIC coverage if only the annual fee is paid? How would the lawyer only acting as trustee (in no legal capacity) have access to LPIC coverage that only covers lawyers in the practice of law?

- For Option 2, in many estates, the beneficiaries want to get rid of the trustee (not necessarily for the best motive) as the trustee stands between them and the money. If the trustee is forced to retire, the beneficiaries could thwart the reason the trustee was appointed (i.e. judgment in the management of and access to the capital) by compelling the trustee's resignation and nominating someone of their own choosing. The option does not address the question of incapacitated beneficiaries or disagreements among beneficiaries (it would appear that all would have to agree to the trustee continuing).

Both options signal to the public that lawyers are untrustworthy. Presumably, LPIC fears exposure from claims of beneficiaries who were dealing with lawyers who are supposed to be covered by insurance.

3. Neither option 1 or 2 should be implemented - they are inherently arbitrary and designed to address an issue more perceived than real. The proposal does not distinguish between lawyers who are trustees at the time of retirement and who become trustees after retirement, or lawyers who are trustees in an *inter vivos* trust or pursuant to a power of attorney for property. The policy will result in an undue burden on lawyers. Where lawyers act for friends or family members, these cannot be situations in which a lawyer should continue to pay the annual fee. In option 2, notice to beneficiaries who are unascertained or under a legal disability would be ineffective. Requiring a lawyer to pay fees for many years, e.g. where there is a life interest, is onerous. The fees could be larger than the trustee's compensation. The lawyer has all the fiduciary duties of a trustee and there are sufficient remedies and protections available.

4. LPIC run-off coverage does not cover embezzlement nor errors or omissions arising after retirement - thus, there would seem to be no protection to the beneficiaries in compelling the retiree to purchase additional insurance. Paying the fee to maintain a trusteeship for a life estate would be more than what is received as compensation. Who is going to pay for the process of the trustee applying to be removed? The proposal is grossly unfair, and depends on the timing of the death of the testator. Trying to drag retired members who become trustees after retirement would be an administrative nightmare. The best course of action would be to require the trustee retiring as a lawyer to notify the beneficiaries, advising that he or she can no longer act as lawyer for the estate but can continue as trustee unless the majority of beneficiaries object.

5. I am opposed to the proposal. Reasons include

- expensive and time consuming (to the estate) to change trustees
- in smaller estates, the fee would exceed the trustee's compensation
- beneficiaries would fight over deciding on a successor
- the Children's Lawyer is involved (to protect unborn children) and accounts must be considered by her and passed

There must be some other reasonable way to protect beneficiaries from unscrupulous lawyers without charging the fee for doing something at times almost non-compensatory or requiring them to resign.

6. If a lawyer retires when a trustee, under option 1, estates would be put to considerable expense to appoint another trustee, who would have to post a bond. The better option is to have the trustee inform the beneficiaries that their services are not covered by LPIC and that another lawyer in practice act as solicitor for the estate. An acknowledgement to this effect should be sought from all beneficiaries.

7. The assumption that a lawyer who has retired resumes practising law when acting as an estate trustee is fallacious. An estate trustee need not be a lawyer - as an estate trustee, a permanently retired lawyer will not be practising law. Professional liability is irrelevant because by definition the trustee is not practising law.

8. Agree with option 2.

9. To expect a retired member to continue to pay any fees out of retirement income is an unfair financial burden. Upon retirement, lawyers who are estate trustee should be able to arrange for a lawyer colleague to continue to hold and oversee the administration of the estate funds, where the practising member has some responsibility to insure that the instructions from the trustee are proper, and where the beneficiaries would appear to be protected by LPIC of the compensation fund if the practising member fails to meet obligations to prevent any impropriety.

   The report does not address members who may be suspended for non-payment of the fee or retired members who later become estate trustees.

   The rules are not necessary, given the minimal risk of a member mishandling or misappropriating estate funds after many years in practice.

10. If the policy is pursued, it should apply as well to non-practising lawyers who are trustees of inter-vivos trusts or directors of corporations where shares are owned by those estates or trusts. Insurance coverage should exist for retired members acting as estate trustees (reference is to By-Law 16, s. 8(2)) but it would not be fair to charge the full premium, but a reasonable proportion of the premium.

11. The proposal is not satisfactory because it does not affect existing retired lawyers who are trustees or who will become trustees after retirement, administrators of estates, nor does it require lawyers to explain to makers of wills the consequences of retirement. Further, the notice to the beneficiary is predicated on the assumption that a retiring lawyer can find good reason for “maintaining in place the additional safeguards”. The explanation and advice referred to above should include:

    - LPIC coverage does not cover honest mistakes nor dishonest conduct, whether retired or not
    - a beneficiary has no claim against or likelihood of an *ex gratia* payment from the compensation fund
    - the maker of a will can require as a term of the will that the trustee purchase a bond of indemnity, but no bond can be purchased to eliminate the risk of loss

While it is desirable that out of an abundance of caution, a trustee clarify the risks associated with administration of an estate by a retired lawyer, there is no merit to a beneficiary requesting from a retired lawyer as trustee that he or she purchase excess run-off coverage, which will not cover legal services after retirement or indemnify the lawyer for any loss as a result of negligent performance , whether before or after retirement.

12. Favour option 2. There should be no obligation to pay the annual fee once retired, even if a trustee, as any other non-member has no such obligation.

13. If estate trustees who are not lawyers are not paying fees, why should a former lawyer be treated differently? Possibly because the Society wants to find a way to get some money and have some say over people's lives?

14. Retired members as trustees should not have to pay the fee. A beneficiary is protected by the Trustee Act and has recourse under that legislation should something happen to the estate funds through the trustee. Because the trustee is a fiduciary, neither LPIC or the compensation fund will reimburse his clients because the liability did not arise through the law practice but through the fiduciary relationship.

15. Requiring a retired lawyer as trustee to pay thousands of dollars in LPIC levies and the annual fee is ludicrous. Advising the beneficiaries of intention to resign as executor because there is no insurance coverage and requiring them to obtain a court order for removal is an undo worry on the beneficiaries and an undo expense, given the minor insurance or Society exposure.

16. For option 1, on the understanding that LPIC does not cover liability for a lawyer acting as an estate trustee, the annual fee payment would only provide access to the compensation fund. For option 2, this would require payment of the fee or resignation. In small estates where no one would want to be appointed, and there is effectively no trustee compensation, it should be sufficient to inform the beneficiaries of the retirement and the meaning of this for their protection and the alternatives available.

17. The role of a trustee is not that of a lawyer and provided the non-practising lawyer is not providing legal advice, there should be no requirement for fee or liability insurance premium payment.

18. Two other options should be considered:

- the lawyer advises the principal beneficiaries that he or she is not in practice and is not covered by LPIC
- the lawyer should be able to obtain on a case by case basis E and O coverage

19. Option 2 is more appropriate. Lawyers are not always named as executor because of their legal role and the work is predominantly not legal work. The beneficiaries are sufficiently protected by being informed of alternate sources for such insurance. The same rules should probably apply to a lawyer acting as trustee of an *inter vivos* trust.

20. Estate trustees are bound by the *Trustee Act* and need not be lawyers, nor has the writer considered that estate administrative tasks are work done in the capacity of a lawyer. LPIC and compensation fund coverage would not apply. Should there be a distinction between being named in a will as trustee prior to retirement and named in a will not prepared by the lawyer after his retirement? Should there be a difference between a retired lawyer being an estate trustee with someone else (multiple trustees would have some control over a retired lawyer trustee)?

21. The wording may require clarification. It appears to only apply to cases where one is first appointed executor and then some time later retires.

22. The proposals are too broad, as they place an onerous requirement on someone who was not appointed a trustee because of professional status and who never had a lawyer client relationship with any of the testators (the writer is in legal education and has not practised law since 1980, but has been named as trustee in several wills for friends and relatives). The solution is to create an exemption for members whose trustee position has no relation to being a member of the Society.

23. Option 2 should be modified to allow the beneficiaries to consent to the continued action of a non-practising lawyer as trustee, provided the beneficiaries are advised of the consequences. Beneficiaries should be given the option so there is less disruption to the estate. The option fails to consider the wishes of the deceased in appointing the lawyer which may have had nothing to do with insurance coverage.

24. The options present a reasonable approach. If LPIC covers lawyers as executors, it is reasonable to expect a lawyer to pay the fees or get clear instructions from the beneficiaries to the contrary.

25. Lawyers are asked to act when literally there is no one else to do the job, and the writer cannot recall a case where the client wished the lawyer to act because he had insurance or because a compensation fund was in place. The office of estate trustee is separate and apart from that of solicitor, and this is recognized in law and in the tariffs of fees provided by the courts. With respect to the amount of the fee, many estates do not generate enough by way of trustee compensation to cover it. With respect to LPIC, run-off coverage was only available for five years. Further, the proposed rule does not consider the situation where testators die after the lawyer has retired, or a retired lawyer acting as attorney under a power of attorney that comes into effect after retirement.

    Is there a problem with the status quo? Nothing in the report discloses a need, based on the proportion of the problem, to do this. It may be an attempt to kill a fly with a sledgehammer.

26. Option 2 is favoured. It would not be appropriate to force a member to continue to pay full LSUC fees if the member had for all intents and purposes stopped practising. Perhaps a clause could be inserted in the will which would in effect show that the testator had turned his mind to the fact that the lawyer might at some time retire, but despite that fact would want the lawyer to continue on as estate trustee. Such a clause would have to be carefully drafted however to ensure that it would not effect LPIC coverage for trustee work which would normally be in place if the trustee work was performed in the course of the lawyer's practice.

PROPOSED CHANGES TO POLICY REQUIRING COMPETENCE AND CAPACITY PROCEEDINGS TO BE HELD IN THE ABSENCE OF THE PUBLIC

(JOINT REPORT WITH THE PROFESSIONAL DEVELOPMENT, COMPETENCE AND ADMISSIONS COMMITTEE)

Motion

59. That Convocation

a. rescinds its current policy that competence proceedings and capacity proceedings be held in the absence of the public;
b. applies the current policy applicable to conduct hearings to competence and capacity hearings;
c. directs that amendments to the Rules of Practice and Procedure to reflect this change in policy be provided to Convocation for its approval.

60. Please see Tab 10 of the Convocation Materials for the report on this matter.

The Professional Regulation Committee Report was deferred to the June 2006 Convocation.

PROFESSIONAL DEVELOPMENT, COMPETENCE & ADMISSIONS COMMITTEE REPORT

- Confidentiality of Competence & Capacity Proceedings

Report to Convocation
May 25, 2006

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
Laura Legge
Daniel Murphy
Judith Potter
Bonnie Warkentin

Purpose of Report: Decision

Policy Secretariat
(Sophia Sperdakos 416-947-5209
and James Varro 416-947-3434)

COMMITTEE PROCESS

1. The Committee met on May 11, 2006. Committee members Laurie Pawlitza (Chair), Mary Louise Dickson (Vice Chair), Robert Aaron, Kim Carpenter-Gunn, James Caskey, Carole Curtis, Laura Legge, Judith Potter and Bonnie Warkentin attended. Staff members Diana Miles, and Sophia Sperdakos also attended. A portion of the meeting was held jointly with the Professional Regulation Committee. Professional Regulation Committee members Clayton Ruby (Chair), Laurence Pattillo (Vice Chair), Heather Ross (Vice Chair) Anne Marie Doyle, George Finlayson, Allan Gotlib, and Ross Murray attended. Staff members Naomi Bussin, Lesley Cameron, Zeynep Onen, and James Varro attended.

FOR DECISION

PROPOSED CHANGES TO POLICY REQUIRING COMPETENCE AND CAPACITY PROCEEDINGS TO BE HELD IN THE ABSENCE OF THE PUBLIC

Joint Motion of the Professional Development, Competence and Admissions Committee and the Professional Regulation Committee

Motion

2. That Convocation

   a. rescinds its current policy that competence proceedings and capacity proceedings be held in the absence of the public;
   b. applies the current policy applicable to conduct hearings to competence and capacity hearings;
   c. directs that amendments to the Rules of Practice and Procedure to reflect this change in policy be provided to Convocation for its approval.

THE ISSUE

3. The Law Society's Rules of Practice and Procedure provide that conduct proceedings are generally open to the public, but competence and capacity proceedings are held in the absence of the public. The current rules are set out at Appendix 1.

4. In keeping with its mandate to regulate its members in the public interest, the Law Society periodically reviews its regulatory processes to ensure they continue to reflect that mandate.

5. A number of Task Forces have identified as an issue for discussion whether competence and capacity proceedings should continue to be conducted in the absence of the public.

Convocation approved the Tribunals Task Force's recommendation that the Professional Development, Competence and Admissions Committee and the Professional Regulation Committee discuss the issue and make recommendations for Convocation's consideration and decision.

6. To ensure a consistent discussion of the issue across the two committees the committees met together to discuss the issue. They make joint recommendations to Convocation reflected in the motion set out above.

BACKGROUND

Discipline Proceedings

7. Until February 1986 conduct proceedings (then known as discipline proceedings) were generally held in the absence of the public. The exception to this was in circumstances in which the member who was the subject of the proceeding requested a public hearing.

8. In February 1986 Convocation reconsidered the policy and determined that discipline proceedings should be held in public. The exception to this would be where a panel was of the view that,

   a. matters involving public security might be disclosed; or

   b. intimate financial or personal matters might be disclosed of such a nature that the desirability of avoiding disclosure in the interests of any person affected or the public interest outweighed the desirability of adhering to the policy of open hearings.[1]

9. Convocation made it clear that panels were not to make an order to proceed in the absence of the public lightly and that the onus of establishing by credible evidence that the order was warranted would be on the party or parties seeking the order.

10. In considering such applications the 1986 Report stated that panels were to balance the following interests:

   a. The interest of the public at large in an open disciplinary process as expressed by the general principle that hearings be open to the public;

   b. The interest of the Society in making it known to the public and the profession that the Society takes its disciplinary responsibilities seriously, and that it operates a fair and effective disciplinary process;

   c. The right of the 'news media' and of members of the public to report on and be informed with respect to public events and institutions, in keeping with guarantees of freedom of expression in section 2 of the Charter;

[1] Minutes of Convocation, vol. 65, February 27, 1986, Discipline Committee Report, Appendix, p.1.

d. The interest of members who are subject to disciplinary proceedings or who are called as witnesses or otherwise referred to in the proceedings to protection of their professional reputations which may be caused by public disclosure or publication of their involvement in the proceedings.[2]

11. In deciding both whether an order should be made and the scope of any order, the 1986 Report stated that panels were to consider, *inter alia*, the following specific matters:

a. Whether the matters which may be disclosed are privileged as between the solicitor and his client;

b. The likelihood that matters involving public security or intimate financial or personal matters will be disclosed in such a way that they will be broadcast to the public and will cause substantial harm and embarrassment to clients, the complainant, the solicitor or any other person;

c. The existence of any special public interest in the proceedings;

d. Whether the matters have already been published in the news media or in public documents, or involve conduct which took place in public;

e. Whether disclosure is likely to prejudice any person in respect of pending criminal proceedings;

f. Alternatives to ordering that the hearing in its entirety be held in camera, including,

i. limiting distribution of and access to documents, including psychiatric reports, which are tendered in evidence in a public hearing;

ii. making non-publication orders, either to prohibit any publication or to prohibit publication of names and other identifying information;

iii. exclusion of the public from portions of the hearing.[3]

12. It is important to note that until 1999 when amendments were made to the *Law Society Act* allegations of competence-related deficiencies were addressed in discipline proceedings and, accordingly, were generally heard in public.

Competence Provisions

13. In 1992 the second Report of the Reforms Implementation Committee made recommendations to seek statutory amendments to the *Law Society Act* for the regulation of professional standards of competence of the legal profession.

14. The Report stated that its proposals reflected two policies: “The Law Society should have the statutory authority to inquire into the competence of members of the profession” and “concerns about competence should generally be dealt with through

[2] Ibid. Appendix, p. A-23.
[3] Ibid. Appendix, p. A-24.

remedial rather than disciplinary procedures, provided that such an approach will adequately protect the interest of clients."

15. The Report recommended the introduction of a definition of standards of professional competence and two types of practice review: *focused* where concerns have been raised about a member's competence and *random* to be initiated through the administration of a questionnaire. A member could either agree with the recommendations emerging from the focused review or the matter would proceed to a hearing with one elected bencher and two other members of the Law Society.

16. The Report proposed that notwithstanding section 9 of the *Statutory Powers Procedure* Act, which requires hearings to be open to the public, professional competence hearings should be held in the absence of the public.

17. The amendments to the *Law Society Act* ultimately included a different approach to competence hearings. The Act does not require that competence proceedings be held in the absence of the public, however in its Rules of Practice and Procedure the Law Society adopted the recommendations set out in the 1992 Report respecting the *in camera* nature of competence hearings.

18. Moreover, the fact that the Proceedings Authorization Committee has authorized a competence proceeding will only be disclosed outside the Law Society to the complainant.

19. The in camera nature of the proceeding reflects an approach in which the public's right to know about the existence of competence proceedings and their outcome is strictly limited. The focus on the confidential nature of competence proceedings is reflected in the *Rules of Practice and Procedure* in which a distinction is made between hearing outcomes in which a member's rights are "suspended" or "limited" and those in which they are not. In the former case "the decision and order are a matter of public record." In the latter the decision and order are not a matter of public record. The rationale for the policy is that competence proceedings are remedial in nature and correction of the member's deficiencies is best accomplished, to the ultimate benefit of both the member and the public, in a confidential remedial setting.

Capacity Provisions

20. In October 1990, Convocation adopted in principle the recommendations in the final report of the Special Committee on Discipline Procedures dealing with a member's "incapacity" to practise law. The proposed model provided for a one-member bencher panel to determine whether an investigation into a member's capacity to practise is warranted. After reviewing the investigation, the panel "if warranted, may refer the matter to the chair of the Professional Standards Committee for a hearing." The chair would appoint a three-member fitness to practise panel, "who may, [upon reasonable grounds] order that member to undergo a medical or psychiatric examination." After conducting a hearing and making a finding that the member is incapacitated, the panel "may by order limit or suspend the member's rights and privileges…"

21. The report's rationale for the new model was described as follows:

The current practice of treating questions of incapacity as matters to be dealt with in the discipline stream is no longer acceptable or appropriate. The goal of the proposals outlined above is to create a new process whereby questions of a member's capacity to practise law are treated exactly as that, and not as a matter for discipline. This is accomplished in part by transferring the responsibility of determining capacity to a panel appointed by the Chair of the Professional Standards Committee, a more appropriate Committee to determine this issue. The responsibility of the Society to protect the public is here coupled with the Society's obligation to locate those members demonstrating an incapacity to carry on the practice of law due to some form of infirmity. Further, those dispositions available to a Fitness to Practice Panel are meant to afford the Panel flexibility and creativity in assisting a member found to be working under an incapacity.

22. Convocation referred the Special Committee's report to the Special Committee on Reforms Implementation. In May 1991 that Committee reported to Convocation that it had studied the capacity issue, as outlined in the 1990 report, and submitted a proposal to Convocation "predicated on the assumption that the Law Society's interest in a member's capacity is limited to protecting the member's clients and the public, and that intervention on the basis of incapacity should be narrowly designed to achieve those purposes." The Reforms Implementation Report, which was adopted by Convocation, elaborated on the model in the 1990 Report, and included the following provision:

> 4. (1) Notwithstanding section 9 of the Statutory Powers Procedure Act, R.S.O. 1980, c. 484, a hearing held with respect to the capacity of the member to practise law shall be held in camera, but if the member requests that the hearing be public, it shall be open to the public, except as provided in subsection (2).
> (2) Where the panel is of the opinion that intimate financial or personal matters pertaining to the member's clients may be disclosed at the hearing, and that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of disclosure, the panel may hold the hearing concerning any such matter in camera.
>
> …
>
> 12. The fact that a member is the subject of an inquiry pursuant to this part shall not be made public by the Society, except to the extent provided in section 4. Where a hearing into a member's capacity has been open to the public, the findings, order and reasons of the panel shall be made public. Where a hearing has been held in camera, and a member's rights and privileges have been suspended or limited, the Society shall make public the order of the panel of benchers, but not the findings or reasons with respect thereto.

23. The reforms with respect to capacity, as the language in s. 4(2) above indicates, borrowed from the policy decision made in 1986 with respect to the exception to public discipline hearings. The reforms also mirror those on competence to the extent that capacity proceedings were to be distinguished from disciplinary proceedings and given a more remedial focus.

24. As with the competence provisions, the Reforms Implementation Committee's proposals on capacity formed the basis for amendments to the *Law Society Act*. Section 40 of the Act includes the Society's authority, subject to the Rules of Practice and Procedure, to make a number of different orders when the Hearing Panel determines that a member has been incapacitated. They include suspension orders, orders for treatment or counseling, orders restricting practice and orders that the member report on compliance with any of the above orders.

25. The Act does not require that hearings dealing with capacity be held in the absence of the public, but the hearings are subject to the Rules of Practice and Procedure, which include procedural rules on hearings in the absence of the public and reflect Convocation's policy decision to hold capacity proceedings *in camera.* As with competence proceedings, there are Rules that determine what is and is not a matter of public record. Pending the outcome of the hearing, even the fact of the hearing is not public. Where the hearing has been held *in camera*, and an order has been made suspending or limiting the member's rights and privileges, the order, but not the reasons, is a matter of public record. This varies somewhat from competence proceedings, in which the decision and order resulting in a suspension or limitation on practice are a matter of public record, but the reasons are not to be made public.

26. Similar to the competence provisions, the Rules also provide that following an in camera capacity hearing, the Society must, where practicable, inform a complainant of the decision as to whether the capacity application was established. The Hearing Panel then determines which aspects of the order are to be disclosed to a complainant.

REGULATORY TRANSPARENCY

27. Public attitudes to self-regulation have changed since the Reforms Implementation Committee report in 1992 and the introduction of the amendments to the *Law Society Act* in 1999. Traditionally, there has been little government or consumer scrutiny of professions' approach to self-regulation, whether law or other professions. In recent years, however, it has become clear that public perception of a regulator's actions affects a government's continued support of self-regulation. The importance of public and governmental perceptions can be illustrated by noting the attitudes to self-regulation of the legal profession in other parts of the world where there has been a loss of confidence.

28. A catalyst for the radical reduction of self-regulation in England and Wales and Australia was regulators' inability to effectively and efficiently handle consumer complaints,[4] but these law societies had already had their discipline tribunals severed from their operations years earlier. The decision of the Law Society of England and Wales' Council some years ago to limit funds to be spent on its complaints system has been cited as indicative of a governance system that placed lawyers, not consumers, first.

29. In both England and Wales and jurisdictions in Australia the loss of consumer confidence in law society operations contributed to governments' willingness to

[4] It may not always be the case that a crisis is what motivates external interference or that a crisis can necessarily be foreseen. Imposed change does not have to be draconian, but can be significant nonetheless. The *Regulated Health Professions Act* imposes much greater government oversight on the health professions than lawyers face.

significantly reduce the role of regulators in governing the profession. Inadequate law society handling of complaints in those jurisdictions was a flashpoint for consumer and government discontent. These inadequate complaints processes raise larger questions about the way in which a self-regulating profession should operate. Moreover, government perceptions that the law societies crossed the line from self-regulation in the public interest to aggressive advocacy on behalf of the profession, which undermines the public interest, affected their faith in self-regulation.

30. In the final report of his review of the regulatory framework for legal services in England and Wales Sir David Clementi noted, "there is an issue about whether systems for complaints against lawyers, run by lawyers themselves, can achieve consumer confidence. A large number of responses to the Consultation Paper expressed dissatisfaction with the current arrangements."[5]

31. Although Canadian professions have not engendered the disillusionment with self-regulation that has been observed elsewhere, they have not been free of occasionally critical scrutiny.

32. The College of Physicians and Surgeons of Ontario has recently been the subject of media and public attention over its secrecy in dealing with numerous complaints against one physician spanning many years. The case was the subject of a Fifth Estate documentary entitled "First Do No Harm." (See Appendix 2 for more information).

33. The Minister of Health for Ontario announced in 2005 that he would seek advice from the Health Professions' Regulatory Advisory Council on possible legislative reform that will address issues related to the handling of complaints, the speed with which problems are addressed, the confidentiality of investigations and other issues. The Council has a year to report. It is clear, however, that the media has become interested in stories about incompetent physicians who continue to practise without the public knowing they are subject to complaints, investigations and remedial requirements that may or may not be sufficient to resolve their competence issues. Appendix 3 contains two articles from the *Toronto Star* that criticize the CPSO for the secrecy of its processes and for seeming to protect members of the profession rather than the public.

34. *The Ontario government has recently introduced Bill 78, An Act to amend the Education Act, the Ontario College of Teachers Act, 1996 and certain other statutes relating to education,2006*. Among other provisions the Bill,

    a. prescribes, by regulation, conflict of interest rules that will govern the conduct of Council members. The Bill eliminates the Council's current authority to make by-laws respecting conflict of interest rules for members of the Council;

    b. requires every person elected or appointed to the Council to swear an oath or affirm in a manner and form prescribed by the regulations. In addition, it provides that every member of Council shall, in carrying out his or her duties, serve and protect the public interest, and act in accordance with such conflict of interest rules as may be prescribed by regulation; and

[5] Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales Final Report*, p.2.

c. establishes a Public Interest Committee, the members of which are to be appointed by the Minister. The members of this committee may not be members of the College of Teachers. Section 53 of the Bill provides that "the Committee shall advise the Council with respect to the duty of the College and the members of the Council to serve and protect the public interest in carrying out the College's objects; and perform such other duties as may be prescribed by regulations."

35. The Bill demonstrates government's ability to impose conditions on self-regulated professions when it feels they are not acting in the public interest.

36. In *Finney v. Barreau du Quebec* [2004] 2 SCR 19 the appellant sued the Barreau du Québec in damages for breach of its obligation to protect the public in handling complaints against a member of the Barreau. The Barreau took the position that officers and staff were protected from such suits for acts engaged "in good faith in the performance of their duties." The Supreme Court held that,

> the conduct of the Barreau, when considered in its entirety, constitutes a fault for which it cannot claim immunity…Exceptional though the case may have been, the conduct of the Barreau was not up to the standards imposed by its fundamental mandate, which is to protect the public…The attitude exhibited by the Barreau, in a clearly urgent situation in which a practising lawyer represented a real danger to the public was one of such negligence and indifference that it cannot claim the immunity conferred by s.193. In spite of the necessary administrative separation between discipline and professional inspection, the Barreau had knowledge of everything [the lawyer] had done and of his record of professional misconduct. Neither the need to adhere to the statutory and procedural discipline framework and act with care and caution nor the complexity inherent in any administrative process can explain the slowness and lack of diligence in this case.[6]

37. Throughout Canada, law societies have begun to take note of the shifting attitudes to self-regulation and to consider ways to ensure that their approach to self-regulation has adapted to changing views of what is in the public interest.

38. Every branch of a law society's operation affects the public interest. The manner in which the Law Society of Upper Canada discharges its conduct, capacity and competence responsibilities is critically important to how the public perceives it. The adjudicative process is an essential component of the Law Society's responsibilities.

39. The Law Society continuously engages in discussions about the processes by which it fulfills its regulatory mandate. In April 2002 Convocation made some changes to the confidentiality of practice review operations, in particular removing the barriers to communication between staff in the practice review department and other regulatory staff. Competence hearings continue, however, to be held in the absence of the public.

40. The Law Society has made some changes to its processes to enhance both the transparency of the tribunals process and the separation of the tribunals administration from that of investigations and prosecution. These have included,

[6] [2004] 2 SCR 19, pp. 3, 18

a. establishing a Tribunals Office;

b. providing staff dedicated to the adjudicative process;

c. locating tribunals staff in offices within Osgoode Hall separate from those of investigative and prosecutorial department staff;

d. shifting the reporting function for tribunals from the Secretary to the Counsel-Legal Affairs and then, on further consideration, to the Director of Policy and Tribunals;

e. providing that the Chairs of the Hearing and Appeals Panels are available for assistance to tribunals staff on issues related to tribunals operations; and

f. establishing the Tribunals Committee as a standing Committee to address tribunal issues.

41. Most recently through its Tribunals Task Force, Convocation approved changes to its processes with a view to ongoing openness, transparency and accountability to the public. In particular, the Tribunals Task Force made a number of recommendations, which Convocation approved, designed to enhance the transparency of its adjudicative processes.

42. In this vein the Tribunals Task Force recommended, and Convocation approved, a review of the *in camera* nature of competence and capacity proceedings. The Task Force noted:

> The different treatment within the tribunals process for conduct (in public) and competence and capacity (in the absence of the public) proceedings has possible implications for transparency, fairness and consistency. It has been held in the Supreme Court of Canada's decision in Finney that regulators cannot shield themselves from criticism by indicating that different streams of the regulatory structure have different goals or approaches. The Task Force is of the view that it may be important to re-examine the manner in which the competence and capacity streams of the Law Society's regulation operate.

43. The Investigations Task Force has been considering the importance of such a reexamination well. The Task Force will be recommending that conduct, competence and capacity processes be aligned to deal appropriately with both the remedial and enforcement aspects to enhance the Society's ability to respond effectively to risk that members present to the public interest.

THE REMEDIAL FOCUS OF COMPETENCE AND CAPACITY STREAMS

The Competence Stream

44. The amendments to the *Law Society Act* recognized the importance of the Law Society's competence mandate by providing for both focused practice reviews and for competence hearings. By focusing on addressing deficiencies in service to clients the dual goals are to provide opportunities for the member to improve his or her skills, while

at the same time giving the Law Society authority to restrict or limit a member's rights where necessary to protect the public.

45. The practice review program has a remedial focus. Its structure and philosophy, the training of practice reviewers, the staff approach to members, the locating of the program within the responsibility of the Professional Development and Competence department, rather than the Professional Regulation department, the focus of reviews on improving practice management skills, and the wide range of remedies available to assist the member to improve, all clearly point to the remedial nature of the program. Given that the Law Society is not required by the Act to conduct a practice review *before* it seeks authority to commence a competence hearing, the fact that its emphasis is on practice reviews, not hearings, demonstrates its commitment to the remedial approach.[7]

46. The practice review program and the competence stream are not, however, outside the regulatory structure that exists to protect the public. The regulatory features of the practice review program are illustrated by the fact that,

    a. there is legislative authority to require a member to participate in a practice review;

    b. practice reviews are treated as part of the regulatory structure, in the same manner as investigations and audits, with respect to such features as,

        i. the obligation on the member to provide documents and information; and

        ii. the Law Society's ability to seek an order for search and seizure;

    c. a formal procedure is set out in the legislation that must be followed;

    d. once entered, a proposal order is enforceable in the same way as any other Law Society order, including the provisions that a Hearing Panel may suspend a member where there is a breach of the terms; and

    e. where a member refuses to consent to a proposal order it is open to the Law Society to seek the authorization of the Proceedings Authorization Committee to commence a competence proceeding.

47. Convocation's initial view was that the remedial nature of the competence stream made it necessary that competence hearings be heard in the absence of the public. The implication was that there was no difference between the practice review process and competence hearings. This initial view has not been reviewed or reconsidered since it was approved. As indicated above, in making its recommendation that such a re-assessment of the policy be done, the Tribunals Task Force emphasized the possible implications of this approach for the Law Society's reputation respecting transparency, fairness and consistency.

[7] To date the Law Society has held only one competence hearing. See footnote 10.

The Capacity Stream

48. Based on the 1990 report discussed earlier, the Society recognized that an alternative to the discipline stream for members whose circumstances affected their capacity to practise law was needed so that appropriate remedies to assist the member could be applied. The implementation of the capacity stream defined these remedies more precisely, and pursuant to the amendments to the *Law Society Act* the Hearing Panel can now make a variety of orders that are intended to address the particular issue facing the member who is subject to a capacity proceeding.

49. The remedial measures, however, are coupled with public protection measures to ensure that the interests of clients and others with whom the lawyer has dealt are addressed. These include suspension of the member's right to practise, if warranted, and orders restricting the member's practice. While these sanctions are applied to deal with any risks that the member poses to the public because of his or her incapacity, they are necessary as a part of the broader remediation process. For example, a suspension order, which is effective until certain terms and conditions are met, may incorporate terms and conditions for a particular treatment or remedy focusing on the issue that caused the member's incapacity.

50. The definition of incapacity states "a member is incapacitated…if by reasons of physical or mental illness, other infirmity or addiction to or excessive use of alcohol or drugs, he or she is incapable of meeting obligations as a member."[8] Rarely is there a bright line between capacity and conduct issues. At the time the Proceedings Authorization Committee considers which hearing stream is appropriate, it is not always possible to know the extent to which capacity issues were causative of the misconduct. Absent consent, there is no ability to force a member to participate in a medical assessment before a capacity application is issued. This issue may remain unclear even after hearing.

51. As a result, the misconduct and the capacity issues of some members, taken together, fall into an area of overlap in which a member might reasonably be the subject of either a conduct or a capacity application. Similarly, some members who are the subject of a conduct proceeding might have been the subject of a capacity proceeding, and *vice versa*, if all of the information had been available to the Society at an early stage.

52. The introduction of psychiatric or other medical evidence concerning incapacity is not limited to capacity proceedings. Such evidence is frequently led by the defence in conduct proceedings and may or may not be the subject of an *in camera* order under Rule 3.01, which permits a Hearing Panel to protect intimate personal matters, following a balancing of the desirability of avoiding disclosure in the interests of the member or the public and the desirability of adhering to the principle that hearings be open to the public.

53. It may be that greater transparency around how the Society deals with capacity issues is warranted. If capacity hearings were open to the public, the Hearing Panel would still have the discretion under Rule 3.01 to protect intimate personal matters. Alternatively, a decision might be made to hold the hearings *in camera*, but make the fact of the application and the decision and order a matter of public record.

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[8] Section 37(1).

OPERATIONAL IMPLICATIONS OF DUAL STREAM REGULATORY PROCESSES

54. From the public's perspective, the Law Society is a single entity that regulates in the public interest. Although the *Law Society Act* addresses conduct, capacity and competence as separate categories of regulatory behaviour, it is unlikely that members of the public categorize their complaints against lawyers in this way. From the public perspective, the issues are whether they are protected from lawyers who fall below acceptable standards, regardless of the reason, and whether the Law Society deals effectively with those lawyers.

55. Beyond the importance of transparency in the Law Society's dealings with specific complaints and complainants it is also important for the general public, including the media, to understand and observe that the Law Society's processes are open, transparent and reflective of its public interest mandate.

56. The current approach to competence proceedings raises a number of issues for the Law Society as regulator both in terms of transparency and effectiveness, including,

    a. the public is unlikely to accept or understand any rationale the Law Society might have for why conduct proceedings are public and competence proceedings are not. This could make the Law Society vulnerable to a perception that it favours the member over the public;

    b. the approach does not conform with the *Statutory Powers Procedure Act;*

    c. the Law Society cannot make the reasons for decision in a competence hearing public, even if the member's rights are limited or he or she is suspended. In cases where the member is suspended or his or her rights are limited, only the decision and order can be made public. Where there is a lesser penalty not even the order or decision is public;

    d. in general, the approach inhibits the development of jurisprudence in this area since members of the defence bar are not automatically entitled to the reasons for decision;[9]

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[9] In 1999 Convocation adopted a policy respecting the treatment of *in camera* decisions in conduct matters. At that time staff member, Steven Traviss, prepared compilations of decisions. Convocation's policy stated: *a. If a synopsis of the case which was held in camera in whole or in part is recorded in Steven Traviss' compilation, it may be provided to counsel or a member for the purposes of precedent relating to the issues arising in a current case; b. If a synopsis is not available and the public part of the report is not adequate, the Law Society may, if practicable, provide a copy of the entire report or reasons, including the blue pages containing the in camera portion of the hearing with all identifying words or language deleted; c. If a. or b. are not satisfactory to counsel, the member, the Law Society or the Hearing Panel, a motion may be made to the Hearing Panel, with appropriate notice to the parties to the original hearing and persons affected, for disclosure of the requested in camera information, but the information shall be heard in camera if it is to be considered.* It is not clear, given the restrictive language in the Rules for competence and capacity proceedings, that this policy would apply to those proceedings. Even if the policy does apply it is cumbersome and the compilations are no longer prepared.

e. despite the Law Society's general inability to make the reasons for decision public, the member is not restricted from speaking about the proceeding and characterizing the outcome as he or she chooses. If the description is inaccurate, the Law Society cannot correct it, because at most only the decision and order are public;[10]

f. because conduct proceedings are held in public and competence proceedings are held in the absence of the public the Law Society cannot deal with a member against whom it alleges both misconduct and failure to meet standards of professional competence in a single proceeding. This may have negative implications for the Society, the complainants, and the member;

g. having made a commitment to transparency and openness for its conduct proceedings, including publishing information on hearings and findings, the Law Society cannot even indicate that a hearing is being held respecting a member's competence. The public may be left with the impression that the Law Society is doing nothing to address a problematic member unless and until an order is made that can be made public;

h. in certain circumstances, the Law Society must retain outside counsel to prosecute competence hearings to ensure the separation of certain information between the practice review program and professional regulation;

i. the confidentiality provisions create issues as to how to treat in camera evidence, submissions and reasons in the event a member, who is subject to a competence hearing order breaches the order. In such cases the non-compliance or conduct hearing is presumptively held in public. This illustrates the difficulty in trying to maintain a seamless regulatory process.

57. Nearly all the same issues arise in the capacity stream. The issues described in paragraph 56 are all relevant to capacity proceedings. The publication issue varies slightly, in that in cases where the member is suspended or his or her rights are limited, only the order can be published.

58. In considering whether it is appropriate for competence hearings to continue to be held in the absence of the public, the following factors are relevant:

a. Unlike a practice review, the competence hearing is not an investigation. Rather, it is the consequence of an investigation and has only come about because the Proceedings Authorization Committee, the members of which are all benchers, is satisfied that there is sufficient evidence to go forward to a hearing.

b. By and large, a competence proceeding would be authorized not because of a single incident but because of a course of continuing behaviour that demonstrates serious and ongoing competence-related deficiencies and an inability or unwillingness to rectify the problems. In all likelihood the proceeding

[10] Following the Law Society's only competence hearing to date, the member spoke with the media inaccurately setting out the facts. The Law Society was not able to rebut the description because of the Rules of Practice and Procedure provisions.

would follow a practice review process in which efforts to implement remedial solutions have been exhausted without positive result.

c. It may be argued that the remedial character of competence proceedings is illustrated by pre and post-hearing features, not by the hearing *per se*. The practice review process has important remedial features designed to assist a member to improve his or her practice and thereby avoid a competence hearing. Then, once a hearing is authorized and the Hearing Panel finds that the member is failing or has failed to meet standards of professional competence, the remedies available to the Panel are broad and largely remedial rather than disciplinary in nature.

d. If a competence proceeding were held in public, it would still be possible to hold part of the hearing in the absence of the public and to designate part of the reasons *in camera*, given the sensitive nature of some material relevant to a determination of a member's competence.

e. A member's reputation is not potentially less harmed by the fact of a conduct proceeding being made public as opposed to a competence proceeding. No finding against the member has yet been made in the conduct hearing, yet the proceeding is nonetheless a public matter. Moreover, the Law Society regularly posts on its website information about upcoming conduct hearings and the conduct allegations against members long before any finding of guilt has been made.

59. In considering whether it is appropriate for capacity hearings to continue to be held in the absence of the public, the following factors are relevant:

a. A capacity proceeding in many cases results from conduct that meets the threshold requiring a disciplinary response from the Society. There is an area of overlap between capacity and conduct hearings and the "mix" of capacity and conduct issues may call for both remedial measures and disciplinary sanctions.

b. Capacity issues are frequently raised in conduct proceedings, in which panels have the power to impose remedial terms.

c. Similar to competence proceedings, the remedial character of capacity proceedings may be illustrated by post-hearing features, not by the hearing per se. The scope of the orders available to Hearing Panels is broad and largely remedial rather than disciplinary in nature.

d. If a capacity proceeding were held in public, it would be possible to hold part of the hearing in the absence of the public and to designate part of the reasons *in camera*, given the sensitive nature of some material relevant to a determination of a member's capacity.

e. As with competence proceedings, a member's reputation is not potentially less harmed by the fact of a conduct proceeding being made public as opposed to a capacity proceeding. No finding against the member has yet been made in the conduct hearing, yet the proceeding is nonetheless a public matter. Moreover, the Law Society regularly posts on its website information about upcoming

conduct hearings and the conduct allegations against members long before any finding of guilt has been made.

CONCLUSION

60. In 1986 Convocation weighed competing interests when it assessed whether to change its policies and begin to hold discipline hearings in public. Although it decided that in the interests of transparency, discipline hearings would generally speaking be held in public, it did not ignore the importance of reserving to a panel the right to determine otherwise in certain circumstances. Paragraphs 9, 10 and 11, above, set out the process Convocation put in place at that time. A similar approach could be adopted for competence and capacity hearings to ensure that in appropriate circumstances and based on credible evidence a competence or capacity hearing or some portion of it could be held in the absence of the public.

61. The Professional Development Competence and Admissions Committee and the Professional Regulation Committee agree that the current policy that competence and capacity proceedings be held in the absence of the public should be rescinded and the current policy applicable to conduct hearings should be applied to them.

Appendix 1

EXCERPT FROM THE RULES OF PRACTICE AND PROCEDURE

Proceedings other than Capacity and Professional Competence Proceedings

3.01 Subject to rules 3.04 and 3.04.1, hearings shall be open to the public except where the tribunal is of the opinion that,
(a) matters involving public security may be disclosed;
(b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public; or
(c) it is necessary to maintain the confidentiality of a privileged document or communication.

Reasons and Order of the Tribunal

3.02 (1) Subject to subrule (2), the order and reasons of a tribunal, including any written disposition, are a matter of public record.

(2) Where a proceeding, or part of a proceeding, before a tribunal has been held in the absence of the public, the tribunal may order that all or part of its reasons, except for those referred to in subrule (3), are not to be made public.

(3) Where a proceeding, or part of a proceeding, before a tribunal has been held in the absence of the public, the tribunal shall issue with its decision a written statement of the reasons for holding the proceeding, or applicable part of the proceeding, in the absence of the public but shall do so without disclosing any matters which, in the opinion of the tribunal, ought not to be disclosed.

…

Capacity Proceedings

3.04 (1) A proceeding shall, subject to subrules (2), (5) and (6), be held in the absence of the public if it is a proceeding in respect of a determination of incapacity.

(2) At the request of the person subject to the proceeding, the tribunal may order that the proceeding be open to the public.

(3) Unless the proceeding before the tribunal is open to the public as provided by subrule (2), an application for a determination of incapacity shall not be made public by the Society except as required in connection with a proceeding, except as provided for in the Act and except as provided for in subrule (3.1).

(3.1) After the member or student member is served with the application, the Society shall, where practicable, inform a complainant of the fact of the application.

(4) Where the hearing of an application for a determination of incapacity has been open to the public in accordance with subrule (2), the decision, order and reasons of the tribunal are a matter of public record.

(5) Subject to subrule (6), where the hearing of an application for a determination of incapacity has been closed to the public, and where the tribunal has made an order suspending or limiting the member or student member's rights and privileges, the order is a matter of public record but the tribunal's reasons shall not be made public.

(6) Where the hearing of an application for a determination of incapacity has been closed to the public, the Society shall, where practicable, inform a complainant of the tribunal's decision as to whether the application was established and the tribunal shall determine which aspects of the order shall be made available to a complainant.

Professional Competence Proceedings

3.04.1 (1) A proceeding shall, subject to subrules (2), (5) and (6), be held in the absence of the public if it is a proceeding in respect of a determination of whether a member is failing or has failed to meet standards of professional competence.

(2) At the request of the person subject to the proceeding, the tribunal may order that the proceeding be open to the public.

(3) Unless the proceeding before the tribunal is open to the public as provided by subrule (2), an application for a determination of professional competence shall not be made public by the Society except as required in connection with a proceeding except as provided for in the Act, and except as provided for in subrule (3.1).

(3.1) After the member is served with the application, the Society shall, where practicable, inform a complainant of the fact of the application.

(4) Where the hearing of an application for a determination of professional competence has been open to the public in accordance with subrule (2), the decision, order and reasons of the tribunal are a matter of public record.

(5) Where the hearing of an application for a determination of professional competence has been closed to the public and where the tribunal has made an order suspending or limiting the member's rights and privileges, the decision and the order of the tribunal are a matter of public record.

(6) Where the hearing of an application for a determination of professional competence has been closed to the public and where the decision and order of the tribunal are not otherwise a matter of public record, the Society shall, where practicable, disclose to a complainant the decision of the tribunal and the parts of the order permitted to be disclosed by the tribunal.

Appendix 2

The Fifth Estate – First Do No Harm

Extract from web site

In March, 2004 the Ontario College of Physicians and Surgeons of Ontario announced that it was revoking the license of Dr. Errol Wai-Ping, a gynecologist accused of mistreating, misdiagnosing and castrating dozens of women who were his patients.

DEFINITION OF AN ADVERSE EVENT
An adverse event is an unintended injury or complication that results in disability at the time of discharge, death or prolonged hospital stay and that is caused by health care management rather than by the patient's underlying disease process.

This announcement signaled the end of one of Canada's most serious and longest running cases of medical error.

It came on the heels of the Canadian Adverse Events Study which revealed one in thirteen Canadians is harmed by the medical care that is supposed to help them.

The fifth estate's documentary *First, Do No Harm* examines the story of Dr. Wai-Ping, the cases of some of his patients, and investigates the official process that allowed Dr. Wai-Ping to continue practicing almost a decade after complaints had first been made about his competence as a surgeon. "Clearly this wasn't a good doc having a bad day. This was a pattern of conduct that frightened me because knowing what I know, the little I know about infection, I wonder what could possibly happen to somebody else that didn't know." - Nicole Harder

One of those patients is Nicole Harder of Cobourg, Ontario. In 1995, when Nicole was 31, she complained to both the Ajax-Pickering hospital and the College of Physicians and Surgeons of Ontario about Dr. Wai-Ping, claiming that he performed an unnecessary hysterectomy and causing a potentially life-threatening infection.

For seven years, Nicole Harder fought the Ontario College of Physicians and Surgeons and the hospital where he worked to reveal what, if any, measures were being taken to investigate her complaint or discipline Dr. Wai-Ping.

She learned that the College referred her complaint to a confidential committee called Quality Assurance. Although the proceedings of this committee are kept secret, Harder obtained

documents that showed the QA committee determined there were "significant" breaches in Dr. Wai-Ping's standard of care. For that, he was ordered to take a remedial communications course. Eventually Harder settled a malpractice suit against Dr. Wai-Ping.

In the past serious complaints about a doctor's clinical care usually went to a disciplinary board, which has the power to take a doctor's license away. In most provinces disciplinary hearings are open to the public.

FIRST, DO NO HARM

It is a widely held misconception that "First, Do No Harm" comes from the Hippocratic Oath. Although the oath expresses a similar sentiment it does not contain those words. In fact, Hippocrates came closest to issuing this directive in his treatise Epidemics, in an axiom that reads, *"As to diseases, make a habit of two things -- to help, or at least, to do no harm."*

The fifth estate's investigation reveals that across Canada there is a new trend to retrain doctors, not blame them. In Ontario it's called Quality Assurance. The disturbing thing is, everything that happens in Quality Assurance is secret.

The College received at least 12 complaints about Dr. Wai-Ping between 1994 and 2001. In all of that time he had a spotless record so far as any patients could find out and there were no restrictions on his surgery.
Dr. Wai-Ping continued to perform surgery until a Toronto Star investigation made the matter public in 2001. Weeks later, the College finally referred the case to the Disciplinary Committee and Dr. Wai-Ping was forced to resign.

More than 300 of Dr. Wai-Ping's patients are now launching a class action lawsuit against the doctor, the College of Physicians and Surgeons and Rouge Valley Ajax-Pickering Hospital.

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

(1) Copies of articles from the Toronto Star dated May 29, 2005 re: “Doctors are failing at Self-Regulation” and June 1, 2005 re: “Doctors Support Change in Rules”.
(Appendix 3, pages 29 – 32)

The Professional Development, Competence & Admissions Committee Report was deferred to the June 2006 Convocation.

REPORTS FOR INFORMATION ONLY

FINANCE & AUDIT COMMITTEE REPORT
- Law Society Auditor
- 2007 Budget – Operational Reviews

ACCESS TO JUSTICE COMMITTEE REPORT

Access to Justice Committee

Committee Members
Marion Boyd, Co-Chair
Judith Potter, Co-Chair
Andrea Alexander
Paul Dray
Tracey O'Donnell
Laurence Pattillo

Purposes of Report: For Information

Prepared by the Policy Secretariat
Julia Bass 416 947 5228

COMMITTEE PROCESS

1. The Committee met on May 10th, 2006. Members in attendance were Marion Boyd (Co-Chair), Andrea Alexander and Laurence Pattillo (by telephone). Staff in attendance were Josée Bouchard and Julia Bass.

FOR INFORMATION

BRIEFING ON THE ONTARIO JUSTICE EDUCATION NETWORK

2. The Committee was joined by Ms Sarah McCoubrey, the Executive Director of the Ontario Justice Education Network (OJEN), who provided a briefing on OJEN's current activities and future plans. Further information on OJEN is attached at Appendix 1.

'INTO THE FUTURE' CONFERENCE ON CIVIL JUSTICE

3. The conference of the Canadian Forum on Civil Justice (CFCJ) entitled 'Into the Future' took place in Montreal on May 1st and 2nd. This large public conference will be followed by a smaller invitation-only event in Toronto on December 8th and 9th. The Law Society is a sponsor of both events. The December event will take place at the Ontario Bar Association. Papers from the conference will be posted on the website of the CFCJ.

MEETING WITH THE BRITISH *CIVIL JUSTICE COUNCIL*

4. On March 8, 2006, Law Society staff and other invited guests met with Robert Musgrove, Chief Executive of the *Civil Justice Council* of Britain, to discuss various issues pertaining to access to justice on both jurisdictions, including contingent fees, litigation financing and *pro bono* services.

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

(1) Copy of the Ontario Justice Education Network's (OJEN) briefing on OJEN's current activities and future plans.

(Appendix 1, pages 3 – 4)

CONVOCATION ROSE AT 12:45 P.M.

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IN CAMERA

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IN CAMERA Content Has Been Removed

Confirmed in Convocation this 22nd day of June, 2006.

Treasurer