MINUTES OF CONVOCATION

Thursday, 25th November, 2010
9:00 a.m.

PRESENT:

The Treasurer (Laurie H. Pawlitza), Aaron (by telephone), Anand, Backhouse, Banack, Boyd, Braithwaite, Bredt, Campion, Caskey, Conway, Crowe, Dickson, Dray, Elliott, Epstein, Eustace (by telephone), Falconer, Fleck, Furlong (by telephone), Gold, Gottlieb, Haigh, Hainey, Halajian (by telephone), Hartman, Heintzman, Hunter (by telephone), Krishna, Lewis, McGrath, Manes, Marmur, Minor, Murphy, Murray, Porter, Potter (by telephone), Pustina, Rabinovitch, Richer, Robins, Ross, Rothstein, Ruby, Sandler, Schabas, Silverstein, Simpson, C. Strosberg, Swaye, Symes, Tough and Wright.

…….

Secretary: James Varro

The Reporter was sworn.

…….

IN PUBLIC

…….

ELECTION OF BENCHERS

WHEREAS Paul J. Henderson, who was elected from the Central West Electoral Region on the basis of votes cast by electors residing in that electoral region, has been appointed a judge of the Superior Court of Justice of Ontario; and

WHEREAS upon being appointed a judge of the Superior Court of Justice of Ontario, Paul J. Henderson became unable to continue in office as a bencher, thereby creating a vacancy in the office of bencher elected from the Central West Electoral Region on the basis of votes cast by electors residing in that electoral region;

MOVED BY: Heather Ross

SECONDED BY: Thomas Heintzman

THAT under the authority contained in By-Law 3, Alan G. Silverstein, having satisfied the requirements contained in subsections 42 (2) and 45 (1) of the By-Law, and having consented to the election in accordance with subsection 45 (2) of the By-Law, be elected by Convocation to fill the vacancy in the office of bencher elected from the Central West Electoral Region on the basis of votes cast by electors residing in that electoral region.

WHEREAS Alan G. Silverstein, who was elected from the Province of Ontario "B" Electoral Region (the area in Ontario outside the City of Toronto) on the basis of the votes cast by all electors, has been elected by Convocation to fill a vacancy in the office of bencher elected from the Central West Electoral Region on the basis of votes cast by electors residing in that electoral region; and

WHEREAS Alan G. Silverstein's election to fill a vacancy in the office of benchers elected from the Central West Electoral Region on the basis of votes cast by electors residing in that electoral region has created a vacancy in the number of benchers elected from the Province of Ontario "B" Electoral Region (the area in Ontario outside the City of Toronto) on the basis of the votes cast by all electors;

MOVED BY: Heather Ross

SECONDED BY: Thomas Heintzman

THAT under the authority contained in By-Law 3, Susan Armatage Richer, having satisfied the requirements contained in subsections 43 (1) and 45 (1) of the By-Law, and having consented to the election in accordance with subsection 45 (2) of the By-Law, be elected by Convocation as bencher to fill the vacancy in the number of benchers elected from the Province of Ontario "B" Electoral Region (the area in Ontario outside the City of Toronto) on the basis of the votes cast by all electors.

Carried

The Treasurer introduced Ms. Richer and welcomed her to Convocation.

Mr. Robins paid tribute to Andrew Lawson, a former employee of the Law Society and the first Director of Legal Aid who passed away on November 17, 2010.

TREASURER'S REMARKS

The Treasurer noted the passing of Claude Thomson, Q.C. on November 24, 2010.

The Treasurer extended best wishes to Paul Henderson on his appointment to the Superior Court of Justice on October 29, 2010.

The Treasurer introduced Sophie Galipeau as the new Policy Counsel in the Policy Secretariat.

DRAFT MINUTES OF CONVOCATION

The draft minutes of Convocation of October 28, 2010 were confirmed.

SECRETARY'S REPORT TO CONVOCATION

Secretary's Report to Convocation
November 25, 2010

Correction to Minutes of Convocation, June 25, 2009

Purpose of Report: Decision

Prepared by: James Varro

FOR DECISION

Motion

1. That Convocation approve a correction to the portion of the Minutes of Convocation from Thursday, June 25, 2009 that address the appointment to the Ontario Justice Education Network Board of Directors (OJEN), as follows:

> The words "for a period of three years" be deleted from the following sentence in the Minutes: "That Avvy Go be appointed to the Ontario Justice Education Network for a period of three years to replace Janet Minor who has resigned." so that the sentence reads: "That Avvy Go be appointed to the Ontario Justice Education Network to replace Janet Minor who has resigned."

Explanation

2. On October 25, 2007, Janet Minor was appointed to the Board of Directors of OJEN for a three year term. On June 25, 2009, Avvy Go was appointed to replace Ms. Minor after she had served approximately two years of the term. Accordingly, Ms. Go's appointment was for the remaining period of the three year term, not for a period of three years.

3. A motion to re-appoint Ms. Go to the OJEN Board of Directors for a three year term will be before Convocation on November 25, 2010.

It was moved by Ms. Hartman, seconded by Mr. Hainey, that the minutes of June 25, 2009 be amended as follows:

The words “for a period of three years” be deleted from the following sentence in the Minutes: “That Avvy Go be appointed to the Ontario Justice Education Network for a period of three years to replace Janet Minor who has resigned.” so that the sentence reads: “That Avvy Go be appointed to the Ontario Justice Education Network to replace Janet Minor who has resigned.”

Carried

REPORT OF THE DIRECTOR OF PROFESSIONAL DEVELOPMENT AND COMPETENCE

To the Benchers of the Law Society of Upper Canada Assembled in Convocation

The Director of Professional Development and Competence reports as follows:

CALL TO THE BAR AND CERTIFICATE OF FITNESS

Licensing Process and Transfer from another Province – By-Law 4

Attached is a list of candidates who have successfully completed the Licensing Process and have met the requirements in accordance with section 9.

All candidates now apply to be called to the bar and to be granted a Certificate of Fitness on Thursday, November 25, 2010.

ALL OF WHICH is respectfully submitted

DATED this 25th day of November, 2010

CANDIDATES FOR CALL TO THE BAR

November 25, 2010

Cheri Rae Bocking
Stefano Guerrino Caprara
Farrah Carrim
Ryan Lane Gellings
Victoriya Matushenko
Natasha Danielle Ashman Morley
Charles Andrew Roy
Michael James Ruhl
Aaron David Sadka Schachner
Peter Johann Stephan
Craig Ian Stewart Tedford
Yao Yuan Xia

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

Carried

MOTION – APPOINTMENTS

It was moved by Ms. Ross, seconded by Mr. Heintzman, –

THAT Alan Silverstein be appointed to the Board of Directors of LibraryCo to replace Paul Henderson.

THAT Carl Fleck, Susan McGrath, Alan Silverstein and Gerald Swaye be reappointed to the Board of Directors of LibraryCo effective December 31, 2010.

THAT Susan McGrath be appointed to the Paralegal Standing Committee to replace Paul Henderson.

THAT Susan McGrath be appointed Chair of the Inter-Jurisdictional Mobility Committee to replace Paul Henderson.

THAT Alan Gold be reappointed to the Judicial Appointments Advisory Committee effective January 21, 2011.

THAT Susan Richer be appointed to the Law Society Hearing Panel for a term of two years pursuant to section 49.21 of the *Law Society Act*:

THAT Susan Richer be appointed to the Professional Regulation Committee.

That Avvy Go be reappointed to the Ontario Justice Education Network Board of Directors for a term of three years.

THAT Larry Banack be appointed to the Inter-Jurisdictional Mobility Committee.

THAT William Simpson be appointed Co-Chair of the Access to Justice Committee to replace Paul Henderson.

THAT the following benchers be appointed to the Law Society Medal/Lincoln Alexander/Laura Legge Award Committees:

Christopher Bredt
Glenn Hainey
Carol Hartman
Susan McGrath
Jack Rabinovitch

THAT the following benchers be appointed to the LL.D. Advisory Committee:

Christopher Bredt
Glenn Hainey
Carol Hartman
Susan McGrath
Jack Rabinovitch

Carried

FINANCE COMMITTEE REPORT

Ms. Hartman presented the Report.

Report to Convocation
November 25, 2010

Finance Committee

COMMITTEE MEMBERS
Carol Hartman, Chair
Linda Rothstein, Vice-Chair
Raj Anand
Larry Banack
Marshall Crowe
Paul Dray
Larry Eustace
Carl Fleck
Susan Hare
Janet Minor
Ross Murray
Judith Potter
Paul Schabas
Catherine Strosberg
Gerald Swaye
Brad Wright

Purpose of Report: Decision

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

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For Decision

COMMITTEE PROCESS

1. The Finance Committee ("the Committee") met on November 5, 2010. The Committee members met via teleconference and in attendance were: Carol Hartman, Chair, Linda Rothstein, Vice-Chair, Raj Anand, Marshall Crowe, Paul Dray, Carl Fleck, Ross Murray, Judith Potter, Catherine Strosberg, Gerald Swaye and Brad Wright.

2. Staff in attendance: Wendy Tysall, Fred Grady and Andrew Cawse.

FOR DECISION

2011 LAW SOCIETY BUDGET

Motion

3. That Convocation approve the 2011 Law Society budget including:
for lawyers, the amount of the annual fee of $1,785 comprising:

General Fee	$ 1,292
Compensation Fund	222
LibraryCo	196
Capital Levy	75
Total	$ 1,785

for paralegals, the amount of the annual fee of $957 comprising:

General Fee	$ 711
Compensation Fund	171
LibraryCo	0
Capital Levy	75
Total	$ 957

4. The Society's draft 2011 budget materials are presented in two books:

- Volume 1 - 2011 Draft Budget Summary (contains summaries for both lawyers and paralegals)

- Volume 2 - 2011 Draft Budget Detail (in camera) (contains more detail for both lawyers and paralegals)

5. The draft budget proposes an increase in the annual levy for lawyers of $49 from $1,736 to $1,785 or 2.8%

6. The budget proposes an increase in the annual levy for paralegals of $24 from $933 to $957 or 2.6%.

7. The major factors underlying the 2011 budget are:

   i. Total Full Fee Paying Lawyers estimated at 35,000, up from 34,000 in 2010

   ii. Total Full Fee Paying Paralegals estimated at 3,200, up from 2,800 in 2010

   iii. The lawyer Licensing Process fee maintained at $2,400

   iv. The paralegal Licensing Process fee maintained at $1,075

   v. Law Foundation of Ontario grants totalling $770,000 to support the licensing process for lawyers and paralegals

   vi. $1.5 million of the Compensation Fund balance has been used to mitigate increases in the Compensation Fund levy for lawyers. The fund balance is projected to be $22.5 million at the end of 2011

   vii. The paralegal Compensation Fund fee is decreasing as a result of growth in the number of paralegals and the favourable claims experience over its initial four years which has allowed a reduction in the provision for grants.

   viii. $3.4 million of the General Fund accumulated surplus has been used to mitigate increases in the general fee ($2.5 million for lawyers and $920,000 for paralegals)

   ix. $2.0 million of surplus E&O investment income has been used to mitigate increases in the general fee for lawyers

   x. Approximately $1.1 million, a 2% increase, has been provided for salary market and merit adjustments

   xi. The contingency allowance has been maintained at $225,000

   xii. Investment income is budgeted to decrease by $500,000, accounting for market conditions

   xiii. The Working Capital Reserve is budgeted to remain at $10.7 million in line with Convocation's policy of maintaining up to two months operating expenses.

8. The largest factor in the growth of the budget is Continuing Professional Development, approved by Convocation for 2011 implementation. With direct revenues of $5.4 million and total expenses of $5.8 million in the Professional Development and Competence department, CPD will have a net cost of approximately $400,000. There are also additional staff required in the Client Service Centre and Information Systems to develop monitoring infrastructure and support related administrative processes.

9. Professional Regulation requires increased resources as 2010 intake volumes have increased (20% higher than in 2007). The intake of mortgage fraud cases has levelled off but the backlog reduction strategy is still in place. A greater proportion of other regulatory complaints are not being resolved early, an indicator that the Society is receiving more serious and complex cases. Also, Trustees Services continues to deal with an increased volume.

10. The budget includes a 10% increase in Bencher remuneration rates to $550 per full day, $330 per half-day. The increase in per diems will add approximately $50,000 for a total bencher remuneration budget of $595,000.

11. Funding of other organisations for 2011 includes:

Federation of Law Societies	$905,000
CANLII	$1,070,000
Ontario Lawyers Assistance Program (OLAP) (matched by LAWPRO)	$380,000
CDLPA	$266,000
Law Commission of Ontario	$100,000
Pro Bono Law Ontario	$50,000

FOR DECISION

2011 LIBRARYCO INC. BUDGET

Motion:

12. That Convocation approve LibraryCo Inc.'s budget for 2011.

13. LibraryCo's budget process was similar to previous years in that all counties were requested to submit detailed budget requests. The board requested counties to provide explanations for increases in expenditures in excess of 1.5%. Materials were reviewed by staff and approved by the LibraryCo Board.

14. The draft 2011 budget increases expenditures before contingencies from $7.9 million to $8.2 million. This is a 3.0% increase. In particular:

- Law Library grants are budgeted to increase by 2.2% to $5.9 million
- The costs of electronic products are budgeted to increase by 11.8% to $916,000.

15. The increases are funded by:

- an increase of 1,000 in the number of lawyers
- the use of the General Fund and the Reserve. $250,000 of prior year surpluses in LibraryCo's General Fund has been allocated to finance operations in 2011. $385,000 of LibraryCo's Reserve Fund will finance operations in 2011[1] .

16. The other significant change is the grant from the Law Foundation of Ontario decreasing by $123,000 or 15% because of their low investment returns. The current version of the budget assumes the LFO grant will be $697,000 (2010 - $819,630) which is 85% of the actual cost of electronic products in 2010, a shortfall in the funding of electronic products of $220,000. The current draft budget estimates the cost of electronic products for 2011 at $917,000. This cost is set by contract and should not change. The balance of the costs of electronic products will be funded by the Law Society levy and use of the general fund and reserve funds.

17. The draft 2011 budget results in a per lawyer levy of $196, a decrease of $7 from 2010.

FOR DECISION

AMENDMENT TO BY-LAW 3 [BENCHERS, CONVOCATION AND COMMITTEES]

MOTION

18. That Convocation approve the amendment to By-Law 3 as set out in the motion following paragraph 20 of this report.

19. The amendment to By-Law 3 is being made to clarify the remuneration year for paralegal benchers and members of the Paralegal Standing Committee whose election is at a different date (end of March) than lawyer benchers.

20. A black-lined version of the By-Law is attached at Appendix 1.

The motion to amend the By-Law is as follows:

THAT By-Law 3 [Benchers, Convocation and Committees], made by Convocation on May 1, 2007 and amended by Convocation on June 28, 2007, September 20, 2007, November 22, 2007, June 26, 2008, April 30, 2009, September 24, 2009, February 25, 2010 and May 27, 2010, be further amended as follows:

1. Subsection 49 (1) of the English version of the By-Law is amended by adding "this section and in" after "In" at the beginning.

2. Subsection 49 (1) of the French version of the By-Law is amended by striking out "aux paragraphes" and substituting "au présent article et aux articles".

3. The definition of "bencher year" in subsection 49 (1) of the English version of the By-Law is revoked.

[1] This leaves projected balances at the end of 2011 of $350,000 and $500,000 in the General Fund and Reserve Fund respectively

4. The definition of “année d’exercice à titre de conseiller” in subsection 49 (1) of the French version of the By-Law is revoked.

5. Subsection 49 (1) of the English version of the By-Law is amended by adding the following definition:

“remuneration year” means,

(a) in the case of a payee other than an elected bencher licensed to provide legal services in Ontario and a person who is elected as a member of the Paralegal Standing Committee, as applicable,

(i) the period beginning on the day, in one calendar year, on which Convocation has its first regular meeting after an election of benchers licensed to practise law in Ontario as barristers and solicitors and ending, in the following calendar year, on May 31,

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

(iii) the period beginning on June 1 in one calendar year and ending, in the following calendar year, on the day before the day on which Convocation has its first regular meeting after an election of benchers licensed to practise law in Ontario as barristers and solicitors, and

(b) in the case of a payee who is an elected bencher licensed to provide legal services in Ontario or a person who is elected as a member of the Paralegal Standing Committee, as applicable,

(i) the period beginning on the day, in one calendar year, on which the Paralegal Standing Committee has its first regular meeting after an election to the Committee of five persons licensed to provide legal services in Ontario and ending, in the following calendar year, on May 31,

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

(iii) the period beginning on June 1 in one calendar year and ending, in the following calendar year, on the day before the day on which the Paralegal Standing Committee has its first regular meeting after an election to the Committee of five persons licensed to provide legal services in Ontario;

6. Subsection 49 (1) of the French version of the By-Law is amended by adding the following definition:

« année de rémunération »

a) Dans le cas d'une ou d'un prestataire qui n'est pas une conseillère élue ou un conseiller élu pourvu d'un permis l'autorisant à fournir des services juridiques en Ontario ni une personne élue membre du Comité permanent des parajuristes, selon le cas :

(i) la période qui débute le jour où le Conseil tient sa première réunion ordinaire à la suite de l'élection de conseillères et de conseillers autorisés à exercer le droit en Ontario en qualité d'avocats et qui se termine le 31 mai de l'année civile suivante,

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

(iii) la période qui débute le 1er juin et qui prend fin l'année civile suivante, la veille de la première réunion ordinaire tenue par le Conseil à la suite de l'élection de conseillères et de conseillers autorisés à exercer le droit en Ontario en qualité d'avocats;

b) dans le cas d'une ou d'un prestataire qui est une conseillère élue ou un conseiller élu pourvu d'un permis l'autorisant à fournir des services juridiques en Ontario ou une personne élue membre du Comité permanent des parajuristes, selon le cas :

(i) la période qui débute le jour où le Comité permanent des parajuristes tient sa première réunion ordinaire à la suite de l'élection au même Comité de cinq personnes pourvues d'un permis les autorisant à fournir des services juridiques en Ontario et qui se termine le 31 mai de l'année civile suivante,

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

(iii) la période qui débute le 1er juin et qui prend fin l'année civile suivante, la veille de la première réunion ordinaire tenue par le Comité permanent des parajuristes à la suite de l'élection au même Comité de cinq personnes pourvues d'un permis les autorisant à fournir des services juridiques en Ontario.

7. The definition of "work" in subsection 49 (1) of the English version of the By-Law is amended by,

(a) striking out "for benchers" and substituting "exclusively for all or any group of payees" in paragraph 4;

(b) striking out "benchers" and substituting "payees as such" in paragraph 5;

(c) striking out "bencher" and substituting "person" the first time it occurs in paragraph 11;

(d) striking out “a bencher” and substituting “that person” the second time it occurs in paragraph 11; and

(e) striking out “bencher” and substituting “payee” in paragraph 13.

8. The definition of “travail” in subsection 49 (1) of the French version of the By-Law is amended by,

(a) striking out “à l’intention des conseillères et des conseillers” and substituting “à l’intention exclusive de tout ou partie des prestataires” in paragraph 4;

(b) striking out “des conseillères et des conseillers” and substituting “des prestataires en cette même qualité” in paragraph 5;

(c) striking out “de conseillère ou de conseiller nommé” and substituting “de personne nommée” the first time it occurs in paragraph 11;

(d) striking out “de conseiller” and substituting “d’une telle personne” the second time it occurs in paragraph 11; and

(e) striking out “la conseillère ou le conseiller” and substituting “la ou le prestataire” in paragraph 13.

9. Subsection 50 (1) of the English version of the By-Law is amended by deleting “bencher year” and substituting “remuneration year” wherever it occurs.

10. Subsection 50 (1) of the French version of the By-Law is amended by deleting “d’exercice à titre de conseiller” and substituting “de rémunération” wherever it occurs.

11. Clause 51 (2) (b) of the English version of the By-Law is amended by,

(a) deleting “shall” at the beginning; and

(b) deleting “bencher” and substituting “remuneration” wherever it occurs.

12. Clause 51 (2) (b) of the French version of the By-Law is amended by deleting “d’exercice à titre de conseiller” and substituting “de rémunération”.

13. Section 52 of the English version of the By-Law is revoked and the following substituted:

Disbursements

52. Every bencher and every person who is elected as a member of the Paralegal Standing Committee is entitled to be reimbursed by the Society for reasonable expenses incurred by him or her in the performance of his or her duties for or on behalf of the Society.

14. Section 52 of the French version of the By-Law is revoked and the following substituted:

Déboursés

52. Les conseillers et les conseillères et les personnes élues membres du Comité permanent des parajuristes ont droit au remboursement des dépenses normalement occasionnées par l'exercice des fonctions qu'ils remplissent pour le Barreau ou pour son compte.

Attached to the original Report in Convocation, copies of:

(1) Copies of Draft 2011 Budget for LibraryCo. Inc.
(pages 8 – 11 (page 10 in camera)

(2) Copy of a black-lined version of By-Law 3.
(pages 17 – 21)

Re: Amendment to By-Law 3 Respecting Bencher Remuneration

It was moved by Ms. Hartman, seconded by Mr. Dray, that the amendment to By-Law 3 respecting bencher remuneration be approved.

Carried

Re: 2011 LibraryCo Inc. Budget

It was moved by Ms. Hartman, seconded by Ms. Rothstein, that the LibraryCo Inc., budget for 2011 be approved.

Carried

Re: 2011 Law Society Budget

It was moved by Ms. Hartman, seconded by Ms. Rothstein, that the Law Society budget for 2011 be approved.

Carried

AMENDMENTS TO BY-LAW 3 [Benchers, Convocation and Committees]

It was moved by Mr. Hainey, seconded by Mr. Wright, that the amendments to By-Law 3 respecting bencher elections be approved.

Carried

THE LAW SOCIETY OF UPPER CANADA

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

BY-LAW 3
[BENCHERS, CONVOCATION AND COMMITTEES]

THAT By-Law 3 [Benchers, Convocation and Committees], made by Convocation on May 1, 2007 and amended by Convocation on June 28, 2007, September 20, 2007, November 22, 2007, June 26, 2008, April 30, 2009, September 24, 2009, February 25, 2010, May 27, 2010 and October 28, 2010, be further amended as follows:

1. Clause 19 (1) (b) of the English version of the By-Law is amended by striking out "an election booklet," and substituting "a compilation of candidate information,".

2. Clause 19 (1) (b) of the French version of the By-Law is amended by striking out "brochure," and substituting "synthèse des renseignements sur les candidats,".

3. Subsection 19 (3) of the English version of the By-Law is amended by striking out "election booklet" and substituting "compilation of candidate information".

4. Subsection 19 (3) of the French version of the By-Law is amended by striking out "brochure" and substituting "synthèse des renseignements sur les candidats".

5. Subsection 19 (4) of the English version of the By-Law is amended by striking out "election booklet" and substituting "compilation of candidate information".

6. Subsection 19 (4) of the French version of the By-Law is amended by striking out "brochure" and substituting "synthèse des renseignements sur les candidats".

7. Clause 20 (3) (a) of the English version of the By-Law is amended by striking out "election booklet" and substituting "compilation of candidate information".

8. Clause 20 (3) (a) of the French version of the By-Law is amended by striking out "brochure" and substituting "synthèse des renseignements sur les candidats".

9. Subsection 20 (4) of the English version of the By-Law is amended by striking out "election booklet" wherever it occurs and substituting "compilation of candidate information".

10. Subsection 20 (4) of the French version of the By-Law is amended by striking out "brochure" wherever it occurs and substituting "synthèse des renseignements sur les candidats".

11. Section 21 of the English version of the By-Law is amended by,

(a) adding "and" at the end of clause (a);

(b) deleting "; and" and substituting a period at the end of clause (b); and

(c) revoking clause (c).

12. Section 21 of the French version of the By-Law is amended by,

(a) deleting the semi-colon and substituting a period at the end of clause (b); and

(b) revoking clause (c).

PROFESSIONAL REGULATION COMMITTEE REPORT

Mr. Hainey presented the Report.

Report to Convocation
November 25, 2010

Professional Regulation Committee

Committee Members
Glenn Hainey (Chair)
Carl Fleck (Vice-Chair)
Julian Falconer
Patrick Furlong
Avvy Go
Michelle Haigh
Gavin MacKenzie
Ross Murray
Julian Porter
Judith Potter
Sydney Robins
Baljit Sikand
William Simpson
Roger Yachetti

Purpose of Report: Decision and Information

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

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COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on November 11, 2010. In attendance were Glenn Hainey (Chair), Carl Fleck (Vice-Chair), Julian Falconer, Patrick Furlong, Michelle Haigh, Ross Murray and William Simpson. Tom Heintzman and Susan Richer also attended. Staff attending were Dan Abrahams, Cathy Braid, Naomi Bussin, Sophie Galipeau, Terry Knott, Janice LaForme, Diana Miles, Zeynep Onen, Elliot Spears and Jim Varro.

AMENDMENTS TO RULE 6.03(9) OF THE *RULES OF PROFESSIONAL CONDUCT*

Motion

2. That Convocation approve the proposed amendments to rule 6.03(9) of the *Rules of Professional Conduct,* as set out at Appendix 4.

Introduction and Background

3. During discussions at November 22, 2007 Convocation on amendments to rules 4.03 and 6.03, some benchers raised concerns about lawyers' compliance with rule 6.03(9)(b), which prohibits a lawyer from communicating with certain individuals at an organizational client opposed in interest to the lawyer's client, without the consent of the organization's lawyer.

4. Based on the concerns expressed, the Committee undertook a review of the rule, which included:

   a. considering the appropriateness of the prohibition in paragraph (b) and reviewing material on the initial development of the rule;

   b. preparing a draft of an amended rule, which was published for comment by lawyers and paralegals;

   c. striking a working group to assess the input received;

   d. preparing a revised version of the amended rule and an expanded commentary, for Convocation's consideration in February 2010;

e. deferring the February 2010 report in favour of obtaining comment on the revised version of the amended rule; and

f. making further revisions to the commentary to the rule.

5. The Paralegal Standing Committee also reviewed this matter, as the *Paralegal Rules of Conduct* include a very similar rule.

6. Convocation is requested to consider the Committee's proposed revised version of the amended rule and commentary and if it agrees with the Committee's recommendation, adopt the amended rule. The draft of the rule in this report has been reviewed by the Law Society's Rules drafter. The Paralegal Standing Committee in its report to November 25 Convocation is also recommending that Convocation amend the companion rule 4.02(3).

Summary of the Committee's Review

7. Rule 6.03(9) currently reads:

Communications with a represented corporation or organization

6.03(9) A lawyer retained to act on a matter involving a corporation or organization that is represented by a licensee shall not approach

(a) directors, officers, or persons likely involved in the decision-making process for the corporation or organization, or

(b) employees and agents of the corporation or organization whose acts or omissions in connection with the matter may expose the corporation or organization to civil or criminal liability,

in respect of that matter unless the licensee representing the corporation or organization consents or unless otherwise authorized or required by law.

Commentary

This subrule applies to corporations and "other organizations." "Other organizations" include partnerships, limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals, regulatory bodies, and sole proprietorships. In the case of a corporation or other organization (including, for example, an association or government department), this rule prohibits communications by a lawyer for another person or entity concerning the matter in question with persons likely involved in the decision-making process about the matter. If an agent or employee of the organization is represented in the matter by a licensee, the consent of that licensee to the communication will be sufficient for purposes of this rule. A lawyer may communicate with employees or agents concerning matters outside the representation.

A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances, the lawyer must comply with the requirements of rule 2.04 (Avoidance of Conflicts of Interest), and particularly subrules 2.04(6) through (10). A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of rule 2.04 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

Concerns About the Current Rule

8. Among the concerns expressed about the rule at Convocation on November 22, 2007 were the following:

a. Rule 6.03(9)(b) creates compliance issues for lawyers representing trade unions (and others). For example,

1. A lawyer is retained to represent three unions to respond to an application by the employer to remove certain positions from the three bargaining units. The employer is represented by counsel. The persons the employer is seeking to remove are the lawyer's clients' members, whose evidence is needed to prove the lawyer's case. Rule 6.03(9) would say that the lawyer could not contact his or her clients' own members without advising counsel for the employer and getting his or her permission.

2. A lawyer is retained by two different unions with respect to appeals in which the clients allege that the employer has breached health and safety legislation. The employers are represented by counsel. Rule 6.03(9) would say that the lawyer could not contact employees who have been affected by the employers' actions even though that evidence is necessary to establish the violations.

3. In every grievance, union-side labour lawyers call evidence from employees without obtaining the approval of counsel for the employer.

4. A lawyer is retained to represent a professional regulatory body (for nurses) in an inquest in which a doctor murdered a nurse in a recovery room. The hospital is represented by counsel and is opposed in interest to the regulatory body. Rule 6.03(9) would say that counsel could not contact nurses employed by the hospital without hospital counsel's approval, even though these nurses may be members of the regulatory body.

b. Rule 6.03(9)(b) may be contrary to the purpose of the statutory provisions that are found in labour legislation, health and safety laws and human rights codes that provide no reprisals for testifying in proceedings.

c. Given the language of the commentary, management-side labour lawyers may also be in violation of rule 6.03(9)(b) if they talk to an employee who is a member of a bargaining unit represented by a lawyer.

9. At Convocation's direction, the Committee undertook a review of the rule to determine if the concerns could be addressed.

The Committee's First Proposal

10. The Committee focused primarily on the prohibition in paragraph (b) of the rule. In this circumstance, a lawyer would be approaching a potential witness who is an employee of an opposite party that is a corporation or organization. If the employee's acts or omissions in connection with the matter may expose the corporation or organization to civil or criminal liability, the lawyer would be prohibited from making the contact.

11. The Committee considered whether the scope of this prohibition was appropriate. One view is that this could be seen as a significant contraction of a lawyer's access to witnesses. Another issue is the difficulty in some circumstances of determining when a person falls within the prohibited category. The Committee learned through research conducted on the approaches in some other Canadian jurisdictions that the prohibition was contrary to existing practice.

12. The Committee also reviewed the background to the development of this rule, which formed part of the new Rules adopted by Convocation in 2000. This material appears at Appendix 1. One source of information was an excerpt from Charles W. Wolfram's text, *Modern Legal Ethics*, on the issue, which read, in part:

> …[Anticontact] rules seek to prevent lawyers from gaining for their clients an unfair advantage over other represented persons and to protect the client against intrusions by an opposing lawyer into the confidential client-lawyer relationship. They are not meant to protect others who interests might be impaired by factual information willingly shared by the contacted employee. Contact by a lawyer with a corporate employee will typically do little, if anything, to impair the corporate lawyer's own ability to gather information about legal matters…. So an employee whose position in a matter is only that of a holder of factual information should be freely accessible to either lawyer.
>
> Application of the anticontact rule to corporate clients should be guided by the policy objective of the rule. The objective of the anticontact rule is to prevent improvident settlements and similarly major capitulations of legal position on the part of a momentarily uncounseled, but represented, party and to enable the corporation's lawyer to maintain an effective lawyer-client relationship with members of management. Thus, in the case of corporate and similar entities, the anticontact rule should prohibit contact with those officials, but only those, who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in a representation. And generally the anticontact rules should apply if an employee or other nonofficial person affiliated with an organization, no matter how powerless within the organization, is independently represented in the matter.

13. The Committee felt that the Wolfram excerpt stated the appropriate principles and that this should guide any revisions to the rule.

14. The Committee then prepared a proposed amended rule as follows:

> A lawyer retained to act on a matter involving a corporation or an organization that is represented by a licensee shall not approach a constituent of the corporation or organization
>
> (b) who has the authority to bind the corporation or organization,
>
> (c) who supervises, directs or regularly consults with the corporation's or organization's lawyer, or
>
> (c) whose own interests are directly at stake in the representation,
>
> in respect of that matter unless the licensee representing the corporation or organization consents or unless otherwise authorized or required by law.

15. The Committee thought that this draft would address the concerns expressed at Convocation, as it would provide a less restrictive standard for such communications without the consent of counsel for the corporation or organization while ensuring that confidential or privileged information is not disclosed by uncounselled individuals.

16. The Committee also determined that additional commentary would assist in providing guidance on the meaning of the amended rule, in particular, with respect to the meaning of the word "bind" and the phrases "regularly consults" and "interests are directly at stake". The proposed amended commentary (redline version) read as follows:

Commentary

This subrule applies to corporations and "other organizations." "Other organizations" include partnerships, limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals, regulatory bodies, and sole proprietorships. ~~In the case of a corporation or other organization (including, for example, an association or government department), t~~This rule prohibits communications by a lawyer for another person or entity concerning the matter in question with persons likely involved in the decision-making process about the matter. These individuals would have the authority to commit the organization to a position with regard to the subject matter of the representation, because of the person's authority as a corporate officer or because for some other reason the law cloaks him or her with authority, including making litigation decisions or whose duties include answering the type of inquiries posed. These individuals include those to whom the organization's lawyer looks for decisions with respect to the matter.

The individual who regularly consults with the organization's lawyer concerning the matter need not be a constituent who also directs the organization's lawyer. In some large organizations, some management constituents may direct or control counsel for some matters but not others. The mere fact that a constituent holds a management position does not trigger the protections of the rule. A constituent who is simply interviewed or questioned by an organization's lawyer about a matter does not "regularly consult" with the organization's lawyer.

The subrule also disallows contact with those members of the organization who are so closely tied with the events at issue that it would be unfair to interview them without the presence of counsel.

If an agent or employee of the organization is represented in the matter by a licensee, the consent of that licensee to the communication will be sufficient for purposes of this rule.

A lawyer may communicate with employees or agents concerning matters outside the representation.

A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances, the lawyer must comply with the requirements of rule 2.04 (Avoidance of Conflicts of Interest), and particularly subrules 2.04(6) through (10). A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of rule 2.04 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

Input from Lawyers and Paralegals

17. With Convocation's approval, the Committee sought input from lawyers and paralegals on the proposed rule amendments. When the rule was initially adopted in 2000, a number of interested parties expressed their views on the scope and content of the rule.

    As the Committee's proposals are more than superficial changes to the rule, it believed that Convocation would benefit from having external views before Convocation discussed whether to adopt the amendments.

18. The call for input was published in late 2008 in the *Ontario Reports* and on the Law Society's website, and was also included in Law Society informational e-mails to lawyers and paralegals. The Chair also wrote to three legal organizations (the Advocates Society, the OBA and the Ontario Trial Lawyers Association) requesting their comments on the proposal. Input from paralegals came through the Paralegal Society of Ontario and the Licensed Paralegal Association (Ontario). The deadline for responses was February 16, 2009 but some responses continued to arrive towards the end of February and into early March 2009.

19. The Law Society received over 50 written responses from lawyers who represent individual clients, corporations or organizations and municipalities, lawyers working for the federal and provincial governments, in-house counsel and from the legal organizations.

20. The responses represented a wide and somewhat divergent range of views. Several respondents were opposed to the amendments. Some thought that the *current* rule was not restrictive enough and would expand the scope of those within organizations who could not be contacted by a lawyer without consent of the organization's lawyer. The remaining respondents either agreed with the changes or agreed generally with the changes but suggested clarifying amendments or additions. A summary of the responses without attribution appears in Appendix 2.

21. At its May and June 2009 meetings, the Committee reviewed the responses and discussed the issues they raised. In June, the Committee determined that a small working group of the Committee should be struck to consider how best to move the matter forward. The working group was formed following the June meeting, and included Linda Rothstein as chair, Chris Bredt, Brian Lawrie and Bonnie Tough.

The Committee's Second Proposal

22. Based on its assessment of the feedback received on the proposed amendments, the working group reviewed options for revisions to the rule and provided the Committee with a revised draft of the amended rule and commentary for consideration.

23. The Committee discussed the draft and reported the matter to February 2010 Convocation. As noted earlier, the Paralegal Standing Committee also reviewed the draft and endorsed the position of the Professional Regulation Committee.

24. The revised amended rule follows paragraph 27. In this version, paragraphs (a) and (c) restated some provisions that appeared in the existing rule that were proposed to be deleted. This change was based on the views of some respondents that the substance of the original language should remain in the rule. In the Committees' view, the four paragraphs that describe who may not be contacted without the consent of counsel provided a reasonable and justifiable limit on those intended to be covered by the prohibition. Other changes incorporated suggestions by respondents that make the rule more comprehensive.

25. The commentary was also significantly expanded to provide clearer guidance on the purpose and scope of the rule. It includes language from the existing rule, new language added in the original proposed amendments and new language added following the call for input. In particular, the commentary makes clear that the purpose of the rule, in the context of informal discovery, is to protect the lawyer/paralegal-client relationship and prevent clients from making ill-advised statements without the advice of their lawyer, but not to protect a corporate or organizational party from the revelation of prejudicial facts.

26. The Committees thank Janet Minor for seeking and offering comments from the government perspective on the commentary on that subject.

27. The following was the proposed revised draft of the amended rule and commentary.

PROPOSED REVISED RULE 6.03(9) AND COMMENTARY

A licensee retained to act on a matter involving a corporation or organization that is represented by a licensee in respect of that matter shall not, without that licensee's consent, communicate or facilitate communication with, approach or deal with a person

(a) who is a director or officer, or another person who is authorized to act on behalf of the corporation or organization,

(b) who is likely involved in decision-making for the corporation or organization or who provides advice in relation to the particular matter,

(c) whose act or omission may be binding on or imputed to the corporation or organization for the purposes of its liability, or

(d) who supervises, directs or regularly consults with the corporation's or organization's lawyer and effectuates the advice of that lawyer with respect to the matter,

unless otherwise authorized or required by law.

Commentary

This subrule sets out the appropriate conduct for lawyers who engage in informal discovery methods, such as information-seeking interviews with individuals in corporations or organizations, that have the potential to streamline discovery and foster the prompt resolution of claims.

The purpose of the subrule is to protect the lawyer-client relationship and prevent clients from making ill-advised statements without the advice of their lawyer, not to protect a corporate party from the revelation of prejudicial facts. The subrule is intended to advance the public policy of promoting efficient discovery and favors the revelation of the truth by addressing the circumstances in which a corporation or organization is allowed to prevent the disclosure of relevant evidence.

The subrule applies to corporations and organizations, the latter of which include partnerships, limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals, regulatory bodies, and sole proprietorships. The manner in which the subrule applies in some of these contexts is discussed later in this commentary. Generally, the subrule precludes contact only with actors, not mere witnesses. Further, communications with corporate employees are not barred merely by virtue of the possibility that their information might constitute "admissions" in the evidentiary sense. The subrule does not proscribe a lawyer's contact with all or virtually all employees on the ground that any employee might conceivably make statements that might be admissible in evidence against the employer. Such an interpretation is inconsistent with the intent of the subrule and would effectively prohibit the questioning of all employees who can offer information helpful to the litigation. This would be overly protective of the organization and too restrictive of an opposing counsel's ability to contact and interview employees of an adversary organization.

Fairness to the organization does not require the presence of a lawyer every time an employee may make a statement admissible in evidence against his or her employer.

This subrule prohibits communications by a lawyer for another person or entity concerning the matter in question with persons likely involved in the decision-making process about the matter. These individuals are so closely identified with the interests of the corporation or organization as to be indistinguishable from it. They would have the authority to commit the organization to a position with regard to the subject matter of the representation. This person would have such authority as a corporate officer or because for some other reason the law cloaks him or her with authority, including making litigation decisions, or because his or her duties include answering the type of inquiries posed. These individuals include those to whom the organization's lawyer looks for decisions with respect to the matter.

Thus, the subrule would prohibit contact, without consent, with those employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation.

A lawyer is not prohibited from communicating with a person unless the person's act or omission is believed to be so central and obvious to a determination of corporate liability that the person's conduct may be imputed to the corporation. If it is not reasonably likely that the person may be a central actor for liability purposes, nothing in the subrule precludes informal contact with such an employee.

The individual who regularly consults with the organization's lawyer concerning the matter will not necessarily be a person who also directs the organization's lawyer. In some large organizations, some management personnel may direct or control counsel for some matters but not others. The mere fact that a person holds a management position does not trigger the protections of the rule.

A person who is simply interviewed or questioned by an organization's lawyer about a matter to gather factual information does not "regularly consult" with the organization's lawyer. While a person's duties within a corporation or organization may include answering litigation-related inquiries, this rule does not prohibit an inquiry of this person by opposing counsel that is related to the person's knowledge of the historical aspects leading up to the alleged injury or damage which give rise to the subject matter of the representation.

If an agent or employee of the organization is represented in the matter by a licensee, the consent of that licensee to the communication will be sufficient for purposes of this subrule.

The prohibition on communications with a represented corporation or organization applies only where the lawyer knows that the entity is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances. This inference may arise where it is reasonable to believe that the entity with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by closing his or her eyes to the obvious.

A lawyer may communicate with employees or agents concerning matters outside the representation.

As a practical matter, to avoid eliciting privileged or confidential information and ensure that the communications are proper, the lawyer should identify himself or herself as representing an interested party in the matter when approaching a potential witness. The lawyer should also advise the person whom he or she is hoping to interview that they are free to decline to respond. See also rule 4.03 (Interviewing Witnesses).

A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances, the lawyer must comply with the requirements of rule 2.04 (Avoidance of Conflicts of Interest), and particularly subrules 2.04(6) through (10). A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of rule 2.04 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

Unions – The subrule is not intended to prohibit a lawyer for a union from contacting employees of a represented corporation or organization in circumstances where proper representation of the union's interests requires communication with certain employees who are the holders of information. For example, a lawyer retained by a union with respect to an appeal in which the union alleges that the employer, who is represented, has breached health and safety legislation, is not prohibited from contacting employees who have been affected by the employer's actions to obtain information necessary to establish the violations.

Similarly, a management-side labour lawyer would not offend the subrule if the lawyer contacted an employee who is a member of a bargaining unit represented by a lawyer.

Government –The concept of the individual who may "bind the organization" may not apply in the government context in the same way as in the corporate environment. For government departments, ministries and similar groups, the rule is intended to cover individuals who participate in a significant way in decision-making or who provide advice in relation to a particular matter.

In government, because of its complexity and despite its hierarchy, it may not always be clear to whom a lawyer is authorized to communicate on a particular matter and who is involved in the decision-making process. The roles of these individuals may not be discrete, as different officials at different levels in different departments provide advice and recommendations. For example, in a contract negotiation, employees from one ministry may be directly involved, but those from another ministry may also have sensitive information relevant to the matter that may require protection under the subrule.

In addition, the legal branch at the particular ministry is usually considered to always be "retained". There may be circumstances where the only appropriate action is to contact the legal branch. In all cases, appropriate judgment must be exercised

In general, the subrule is not intended to:

a. constrain lawyers who wish to contact government officials for a discussion of policy or similar matters on behalf of a client;
b. affect access to information requests under such legislation as the *Freedom of Information and Protection of Privacy Act* (Ontario) or the federal Access to Information Act, including situations where a litigant has named the provincial or federal Crown, respectively, as a defendant; or
c. affect the exercise of the duties of public servants under the *Public Service of Ontario Act, 2006* with respect to disclosure of information.

Municipalities – Similar to government, in the municipal context, it is recognized that no one individual has the authority to bind the municipality. Each councillor is representative of the entire council for the purposes of decision-making. The subrule, for example, would not permit the lawyer for an applicant on a controversial planning matter that is before the Ontario Municipal Board to contact individual members of council on the matter without the consent of the municipal solicitor.

The subrule is not intended to:

a. prevent lawyers appearing before council on a client's behalf and making representations to a public meeting held pursuant to the Planning Act;
b. affect access to information requests under such legislation as the Municipal *Freedom of Information and Protection of Privacy Act*, including situations where a litigant has named the municipality as a defendant; or
c. restrain communications by persons having dealings or negotiations, including lobbying, with municipalities with the elected representatives (councillors) or municipal staff.

28. As noted earlier, the Committee's February 2010 report was not considered by Convocation as it was determined that Convocation's review should await a further brief request for input on the revised amended draft. The proposed amended rule and commentary were then sent to 14 individuals or organizations, who included respondents to the first call for input, requesting input.

29. Four responses were received and are summarized in Appendix 3 without attribution.

The Committee's Final Proposal

30. The Committee considered the comments received in the second round of the call for input and determined that no changes were necessary to the rule itself. However, the Committee decided that the commentary could be improved with some clarifying amendments. These amendments appear in the redlined version of the Committee's final proposal, below.

31. The Committee is recommending that Convocation adopt this draft of the rule and commentary, which appears in final form at Appendix 4.

Communications with a represented corporation or organization

6.03(9) A lawyer retained to act on a matter involving a corporation or organization that is represented by a legal practitioner in respect of that matter shall not, without the legal practitioner's consent or unless otherwise authorized or required by law, communicate, facilitate communication with or deal with a person

(a) who is a director or officer, or another person who is authorized to act on behalf of the corporation or organization,

(b) who is likely involved in decision-making for the corporation or organization or who provides advice in relation to the particular matter,

(c) whose act or omission may be binding on or imputed to the corporation or organization for the purposes of its liability, or

(d) who supervises, directs or regularly consults with the legal practitioner and who makes decisions based on the legal practitioner's advice.

(9.1) If a person described in subrule (9) (a), (b), (c) or (d) is represented in the matter by a legal practitioner, the consent of the legal practitioner is sufficient to allow a lawyer to communicate, facilitate communication with or deal with the person.

(9.2) In subrule (9), "organization" includes a partnership, limited partnership, association, union, fund, trust, co-operative, unincorporated association, sole proprietorship and a government department, agency, or regulatory body.

Commentary

The purpose of subrules 6.03 (9), (9.1) and (9.2) is to protect the lawyer-client relationship of corporations and other organizations by specifying persons with whom a lawyer may not communicate, facilitate communication or deal if the lawyer represents a client in a matter involving a corporation or organization and the corporation or organization is represented by a legal practitioner. <u>They apply to litigation as well as to transactional and other non-litigious matters</u>. A lawyer may communicate with a person in a corporation or other organization, other than those referred to in subrule (9), even if the corporation or organization is represented by a legal practitioner. These subrules are intended to advance the public policy of promoting efficient discovery and favours the revelation of the truth by addressing the circumstances in which a corporation or organization is allowed to prevent the disclosure of relevant evidence. They are not intended to protect a corporation or organization from the revelation of prejudicial facts.

Generally, subrule 6.03 (9) precludes contact only with ~~actors~~ <u>those actively involved in a matter. For example, in a litigation matter, it does</u> not <u>preclude contact with</u> mere witnesses. Further, communications with persons within the corporation or organization are not barred merely by virtue of the possibility that their information might constitute "admissions" in the evidentiary sense. To proscribe contact with any person within a corporation or organization on the basis that he or she may make a statement that might be admitted in evidence against the corporation or organization would be overly protective of the corporation or organization and too restrictive of an opposing counsel's ability to contact and interview potential witnesses. Fairness does not require the presence of a corporation's or organization's legal practitioner whenever a person within the corporation or organization may make a statement admissible in evidence against it.

Subrule 6.03 (9) prohibits communications by a lawyer for another person or entity concerning the matter in question with persons likely involved in the decision-making process about the matter. These individuals are so closely identified with the interests of the corporation or organization as to be indistinguishable from it. They would have the authority to commit the corporation or organization to a position with regard to the subject matter of the representation. This person would have such authority as a corporate officer or because for some other reason the law cloaks him or her with authority, including making decisions affecting the outcome of the matter, including litigation decisions, or because his or her duties include answering the type of inquiries posed. These individuals include those to whom the organization's legal practitioner looks for decisions with respect to the matter.

Thus, subject to the exceptions set out in it, subrule 6.03 (9) would prohibit contact with those persons who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation.

A lawyer is not prohibited from communicating with a person in a litigation matter unless the person's act or omission is believed, on reasonable grounds, to be so central and obvious to a determination of liability that the person's conduct may be imputed to the corporation or organization. If it is not reasonably likely that the person ~~may be a central actor~~ is an active participant for liability purposes or a decision-maker respecting the outcome of the matter, nothing in subrule 6.03 (9) precludes informal contact with such a person.

~~The~~ An individual who regularly consults with the corporation's or organization's legal practitioner concerning ~~the~~ a matter will not necessarily be a person who also directs the legal practitioner. In some large corporations and organizations, some management personnel may direct or control counsel for some matters but not others. The mere fact that a person holds a management position does not trigger the protections of the rule.

A person who is simply interviewed or questioned by a corporation's or organization's legal practitioner about a matter to gather factual information does not "regularly consult" with the legal practitioner. While a person's duties within a corporation or organization may include answering litigation-related inquiries, this rule does not prohibit an inquiry of this person by opposing counsel that is related to the person's knowledge of the historical aspects leading up to the alleged injury or damage which give rise to the subject matter of the representation.

The prohibition on communications with a represented corporation or organization applies only where the lawyer knows that the entity is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances. This inference may arise where it is reasonable to believe that the entity with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by closing his or her eyes to the obvious.

Subrule 6.03 (9) does not prevent a lawyer from communicating with employees or agents concerning matters outside the representation.

As a practical matter, to avoid eliciting privileged or confidential information and ensure that the communications are proper, the lawyer should identify himself or herself as representing an interested party in the matter when approaching a potential witness or other person in the corporation or organization. The lawyer should also advise the person whom he or she is hoping to interview that they are free to decline to respond. See also rule 4.03 (Interviewing Witnesses).

A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances, the lawyer must comply with the requirements of rule 2.04 (Avoidance of Conflicts of Interest), and particularly subrules 2.04(6) through (10). A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of rule 2.04 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

If the representation by the legal practitioner described in subrule (9.1) is only with respect to the personal interests of the individual, consent of the corporation's or organization's counsel would be required with respect to the corporation's or organization's interests.

Unions – Subrule 6.03 (9) is not intended to prohibit a lawyer for a union from contacting employees of a represented corporation or organization in circumstances where proper representation of the union's interests requires communication with certain employees who are the holders of information. For example, a lawyer retained by a union with respect to ~~an appeal~~ a termination grievance in which the union alleges that the employer, who is represented, has breached ~~health and safety legislation~~ the collective agreement, is not prohibited from contacting employees who may ~~have been affected by the employer's actions to obtain~~ information ~~necessary to establish the violations~~ on the termination or events leading up to the termination.

Similarly, a management-side labour lawyer would not offend the subrule if the lawyer contacted an employee who is a member of a bargaining unit represented by a legal practitioner.

Governments –The concept of the individual who may "bind the organization" may not apply in the government context in the same way as in the corporate environment. For government departments, ministries and similar groups, the rule is intended to cover individuals who participate in a significant way in decision-making or who provide advice in relation to a particular matter.

In government, because of its complexity and despite its hierarchy, it may not always be clear to whom a lawyer is authorized to communicate on a particular matter and who is involved in the decision-making process. The roles of these individuals may not be discrete, as different officials at different levels in different departments provide advice and recommendations. For example, in a contract negotiation, employees from one ministry may be directly involved, but those from another ministry may also have sensitive information relevant to the matter that may require protection under subrule 6.03 (9).

In addition, the legal branch at the particular ministry is usually considered to always be "retained". There may be circumstances where the only appropriate action is to contact the legal branch. In all cases, appropriate judgment must be exercised

In general, the subrule is not intended to:

a. constrain lawyers who wish to contact government officials for a discussion of policy or similar matters on behalf of a client;

b. affect access to information requests under such legislation as the *Freedom of Information and Protection of Privacy Act* (Ontario) or the federal *Access to Information Act,* including situations where a litigant has named the provincial or federal Crown, respectively, as a defendant; or

c. affect the exercise of the duties of public servants under the *Public Service of Ontario Act*, 2006 with respect to disclosure of information.

Municipalities – Similar to government, in the municipal context, it is recognized that no one individual has the authority to bind the municipality. Each councillor is representative of the entire council for the purposes of decision-making. Subrule 6.03 (9), for example, would not permit the lawyer for an applicant on a controversial planning matter that is before the Ontario Municipal Board to contact individual members of council on the matter without the consent of the municipal solicitor.

The subrule is not intended to:

a. prevent lawyers appearing before council on a client's behalf and making representations to a public meeting held pursuant to the *Planning Act*;

b. affect access to information requests under such legislation as the *Municipal Freedom of Information and Protection of Privacy Act*, including situations where a litigant has named the municipality as a defendant; or

c. restrain communications by persons having dealings or negotiations, including lobbying, with municipalities with the elected representatives (councillors) or municipal staff.

APPENDIX 1

THE DEVELOPMENT OF RULE 6.03(9)

(ORIGINALLY ADOPTED IN JUNE 2000)

The first draft of the rule, then numbered 4.03(3), and its commentary was prepared in January 1999 by Gavin MacKenzie, co-chair of the Rules Task Force. It read as follows:

4.03 INTERVIEWING WITNESSES

Interviewing Witnesses

4.03 …

(3) A lawyer shall not approach or deal with directors, officers, or management personnel of a corporation or other organization that is professionally represented by another lawyer save through or with the consent of that party's lawyer.

Commentary:

This rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates. A lawyer may communicate with a represented person, or an employee or agent of such a person, concerning matters outside the representation. Also parties to a matter may communicate directly with each other.

The prohibition on communications with a represented person applies only in circumstances in which the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. Such an inference may arise where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

In the case of a corporation or other organization (including for example an association or government department), this rule prohibits communications by a lawyer for another person or entity concerning the matter in question with persons having managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization in represented in the matter by his or her counsel, the consent of that counsel to a communication will be sufficient for purposes of this rule.

A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances the lawyer must comply with the requirements of rule 2.03 (avoidance of conflicts of interest), and particularly subrules 2.03 (5) through (9). A lawyer must not represent that he or she acts for an employee of a client unless the requirements of rule 2.03 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

In his explanatory information on the draft, Mr. MacKenzie indicated to the Task Force that the first three paragraphs of commentary were based on the ABA Model Rules, and that the last paragraph was new, reflecting discussions at the Task Force meetings. He referenced an excerpt from Charles Wolfram's text, *Modern Legal Ethics*, on the issue, which read, in part:

> …[Anticontact] rules seek to prevent lawyers from gaining for their clients an unfair advantage over other represented persons and to protect the client against intrusions by an opposing lawyer into the confidential client-lawyer relationship. They are not meant to protect others who interests might be impaired by factual information willingly shared by the contacted employee. Contact by a lawyer with a corporate employee will typically do little, if anything, to impair the corporate lawyer's own ability to gather information about legal matters…. So an employee whose position in a matter is only that of a holder of factual information should be freely accessible to either lawyer.
>
> Application of the anticontact rule to corporate clients should be guided by the policy objective of the rule. The objective of the anticontact rule is to prevent improvident settlements and similarly major capitulations of legal position on the part of a momentarily uncounseled, but represented, party and to enable the corporation's lawyer to maintain an effective lawyer-client relationship with members of management. Thus, in the case of corporate and similar entities, the anticontact rule should prohibit contact with those officials, but only those, who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in a representation. And generally the anticontact rules should apply if an employee or other nonofficial person affiliated with an organization, no matter how powerless within the organization, is independently represented in the matter.

This draft rule remained in the form appearing above (except for revised references to rule 2.04 in the commentary) in the Task Force's report to April 1999 Convocation, which introduced the new Rules. In that report, the new rule was explained in the following way:

> …a new rule was added, appearing at rule 4.03(3), dealing with the circumstances in which it is permissible for counsel to interview witnesses who are employees of a corporate party that is represented by a lawyer. In the Task Force's view, this fills a gap in the rule and provides valuable guidance on the issue. The rule provides that a person acting for a corporation cannot claim to professionally represent an employee as a witness unless he or she is in fact acting for that employee, and commentary is added to the effect that this is designed to prevent corporate counsel from sheltering factual information from another party;

In commenting on the draft rule at Convocation, Mr. MacKenzie said:

> …it should permissible, for, say, an individual plaintiff suing a corporate defendant to interview lower level employees who have knowledge about the matters in issue without going through the corporate defendant's lawyer, and that's a distinction, as I say, which is observed in the case law generally and also in Rules of Professional Conduct with other jurisdictions.

In response to a request for comments on the proposed Rules before they were adopted, the Task Force received input from lawyers and law firms on this rule, including comments relevant to the subject of employees and agents, as follows:

a. The rule does not specifically deal with employees and agents, even though the commentary references employees and agents. The right of a party to have its employees shielded from direct interrogation by counsel for an opposing party remains an important part of the adversary system, and there is no danger in continuing with the present arrangement.[1] At present, opposing counsel may still, through counsel, direct relevant questions to employees of an opposing party in the discovery process;

b. To date, these obligations have been defined by the common law test which requires the consent of counsel only where the witness is likely involved in the decision-making process of the party (as opposed to merely carrying out the direction of others). The common law test should be incorporated in the rule, and that the rule should go no further;

c. The prohibition is all too frequently ignored. As an example, a lawyer may attempt to interview a nurse who was involved in health care matters in issue, was employed by the subject health care institution whose conduct was in issue, and whose conduct may be imputed to the institution for purposes of civil liability. The rule should apply to this type of situation and an amendment should be made that would add "other employees of a corporation or other organization or any other person whose act or omission in connection with the matter is in issue or may be imputed to the organization for purposes of civil or criminal liability" who are represented by counsel.

These comments informed the next draft of the rule. In particular, revisions made to the rule included a division between directors and officers in paragraph (a), and employees and agents in paragraph (b).

In advance of Convocation's consideration of the rules in the spring of 2000, further comments were received from a number of individuals and organizations, including then bencher Earl Cherniak. He commented on rule 4.03(3) as follows:

> …I am not certain that it should be impermissible to interview an employee of a corporation or organization as long as those employees are not in a fiduciary relationship with the corporation, such as a director or officer would be. For instance, why shouldn't a lawyer be entitled to interview a whistle-blower, or an employee who is a witness, not a participant and is willing to talk to the lawyer?

The draft that was eventually adopted at Convocation in June 2000 read as follows:

> (3) Where a corporation or other organization has retained a lawyer on a matter, another lawyer seeking information about that matter shall not, without the consent of the lawyer representing the corporation or organization, approach or deal with

[1] The reference is to former Rule 10 commentary 14 which read: "The lawyer may properly seek information from any potential witness (whether under subpoena or not) but should disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way. An opposite party who is professionally represented should not be approached or dealt with save through or with the consent of that party's lawyer."

(a) directors, officers, or persons likely involved in the decision-making process concerning that matter; or

(b) employees and agents of the corporation or organization whose acts or omissions in connection with the matter are in issue or whose acts or omissions may expose the corporation or organization to civil or criminal liability.

The commentary to the rule was not changed substantially.

Reconsideration of the Rule After June 2000

Following adoption of the new Rules in June 2000, effective November 2000, comments were received from the profession on its experience with the new Rules. One of these rules was rule 4.03(3). The following is an excerpt from the Professional Regulation Committee's report to May 2001 Convocation with suggested amendments to the rule based on comments received.

Rule 4.03(3) - Advocacy - Interviewing Witnesses

27. New rules and commentary were added in the 2000 Rule revisions to deal with the circumstances in which a lawyer may interview employees of a corporate party that is represented by a lawyer.

28 Lawyers who prosecute provincial offences and who appear before tribunals such as the Ontario Securities Commission raised a concern that a literal interpretation of the rule may prevent them from adopting certain investigative measures specifically authorized by their governing statutes, and may also prevent them from interviewing and preparing for trial certain witnesses who are employees of corporate defendants. An unrelated concern that was raised was that the new rule may prevent a plaintiff's counsel from speaking with a "whistleblower" who approaches the plaintiff's counsel to disclose corporate wrongdoing.

29. The Committee concluded that the most effective way of addressing these legitimate concerns would be to revise the rule as follows:

a. By adding language making it clear that communications with employees of corporate parties that would otherwise be proscribed are permissible if they are otherwise authorized or required by law;
b. By deleting the prohibition against communications with corporate employees whose acts or omissions are "in issue", while maintaining the prohibition against communicating with employees whose acts or omissions may expose the corporation to civil or criminal liability; and
c. By deleting the prohibition against "dealing with" employees whose acts or omissions may expose the corporation to liability, while maintaining the prohibition against "approaching" such employees.

30. The Committee proposes the following new subrule 4.03(3):

(3) A lawyer retained to act on a matter involving a corporation or organization that is represented by another lawyer shall not approach

(a) directors, officers, or persons likely involved in the decision-making process for the corporation or organization, or

(b) employees and agents of the corporation or organization whose acts or omissions in connection with the matter may expose the corporation or organization to civil or criminal liability,

unless the lawyer representing the corporation or organization consents or unless otherwise authorized or required by law.

These changes were adopted by Convocation.

Through these developments, the rule evolved into the form appearing above. The rule was renumbered as rule 6.03(9) in November 2007 following amendments to the rule addressing communication with a represented individual (then rule 4.03(3) and now rule 6.03(7))

APPENDIX 2

RESULTS OF CALL FOR INPUT ON RULE 6.03(9)
(Without Attribution)

The following is the version of the amendments that was submitted for comment:

A licensee retained to act on a matter involving a corporation or organization that is represented by a licensee shall not approach a constituent of the corporation or organization

(a) who has the authority to bind the corporation or organization,

(d) who supervises, directs or regularly consults with the corporation's or organization's lawyer, or

(c) whose own interests are directly at stake in the representation,

~~(a) directors, officers, or persons likely involved in the decision-making process for the corporation or organization, or~~

~~(b) employees and agents of the corporation or organization whose acts or omissions in connection with the matter may expose the corporation or organization to civil or criminal liability,~~

in respect of that matter unless the licensee representing the corporation or organization consents or unless otherwise authorized or required by law.

Commentary

This subrule applies to corporations and "other organizations." "Other organizations" include partnerships, limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals, regulatory bodies, and sole proprietorships. ~~In the case of a corporation or other organization (including, for example, an association or government department)~~, tThis rule prohibits communications by a lawyer for another person or entity concerning the matter in question with persons likely involved in the decision-making process about the matter. These individuals would have the authority to commit the organization to a position with regard to the subject matter of the representation, because of the person's authority as a corporate officer or because for some other reason the law cloaks him or her with authority, including making litigation decisions or whose duties include answering the type of inquiries posed. These individuals include those to whom the organization's lawyer looks for decisions with respect to the matter.

The individual who regularly consults with the organization's lawyer concerning the matter need not be a constituent who also directs the organization's lawyer. In some large organizations, some management constituents may direct or control counsel for some matters but not others. The mere fact that a constituent holds a management position does not trigger the protections of the rule. A constituent who is simply interviewed or questioned by an organization's lawyer about a matter does not "regularly consult" with the organization's lawyer.

The subrule also disallows contact with those members of the organization who are so closely tied with the events at issue that it would be unfair to interview them without the presence of counsel.

If an agent or employee of the organization is represented in the matter by a licensee, the consent of that licensee to the communication will be sufficient for purposes of this rule.

A lawyer may communicate with employees or agents concerning matters outside the representation.

A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances, the lawyer must comply with the requirements of rule 2.04 (Avoidance of Conflicts of Interest), and particularly subrules 2.04(6) through (10). A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of rule 2.04 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

General Comments From Respondents

Support for the amendments

1. The amendments to the current rule are appropriate for the following reasons:

a. There has been a continual erosion of lawyer's behavior relative to the wording of the rule; it should be wider in application than "micro" so that technical interpretations cannot be made to frustrate its purpose;
b. The rule was not intended to shield corporations from liability and the current original wording does just that;
c. Precluding access to those who are not involved in instructing corporate counsel and who are not involved in decision-making can deprive a party adverse in interest to the organization of evidence that is critical to the prosecution of claims against the organization; this is exacerbated by the ambiguity of current clause (b), which requires considerable judgment.
d. The rule in the context of provisions in the Ontario *Securities Act* can impose "insuperable" obstacles to the plaintiff;[2]
e. Not all directors, officers or persons likely involved in decision-making have the ability to bind the corporation or regularly consult with counsel – as such, there is no need to provide blanket protection of these people, as they may be holders of factual information;
f. Current paragraph (b) is subject to overly broad interpretation to the degree that no corporate employee who could expose the corporation to liability could be approached;
g. The proposed rule provides more reasonable restrictions;
h. The amendments add clarity to the rule and commentary. The writer, as a federal government lawyer, has encountered situations where counsel have inappropriately contacted officials within the client department; it will help to have a clear and detailed rule to reference in discussions with outside counsel;
i. The rule is much improved;
j. The original rule gave an unfair advantage to corporate defendants, and prevented counsel from speaking with employees whose interests were not necessarily consistent with the corporation's, and whose input could often be said to be more objective than interested parties;
k. There will be situations where it is beneficial to employees, and to the cause of justice, to have the veil drawn back somewhat, as the changes propose, such that facts and information are more readily available to the parties; more openness and availability of information will enhance access to and the administration of justice.

2. One respondent "wholeheartedly" supports the amendments for the reasons stated in the report.

<u>Suggested revisions to improve the rule (from those who support the amendments)</u>

3. The rule could be reorganized to have clearer meaning, as follows:

[2] Reference is to s. 138.8 of the Act by which a plaintiff must obtain leave of the court before commencing an action for misrepresentations in the secondary market, and must show that the claim has a reasonable possibility of success. This means obtaining evidence that is often non-public and only in the possession of current employees of the corporation.

A licensee retained to act on a matter involving a corporation or organization that is represented by a licensee shall not **directly or indirectly communicate or facilitate communication with** ~~approach~~ a constituent of the corporation or organization

(a) who has the authority to bind the corporation or organization,

(b) who supervises, directs or regularly consults with the corporation's or organization's lawyer, or

(c) whose ~~own interests are directly at stake in the~~ representation **is related to the subject matter of the communication,**

~~(a) directors, officers, or persons likely involved in the decision-making process for the corporation or organization, or~~

~~(b) employees and agents of the corporation or organization whose acts or omissions in connection with the matter may expose the corporation or organization to civil or criminal liability,~~

4. As the rule applies to both litigation and transactions, some clarification from a transactional perspective is need to deal with situations where consent is explicitly or implicitly given at the outset for direct communication between counsel and another licensee, and subsists unless clearly revoked.

5. The rule should be rewritten in plain language.

6. The proposed amended rule should be revised as follows:

A licensee retained to act on a matter involving a corporation or organization that is represented by a licensee shall not, without the other licensee's consent approach a constituent of the corporation or organization

(a) who has the authority to bind the corporation or organization,

(b) who supervises, directs or regularly consults with the corporation's or organization's lawyer, or

(c) whose own interests are directly at stake in the representation,

in respect of that matter ~~unless the other licensee consents~~ or unless otherwise authorized or required by law.

7. The phrase "unless otherwise authorized or required by law" is so far adrift from the related noun (is it the licensee or the retained organization counsel?) that the writer recommends adding both a repeated noun and verb from to the phrase for clarification.

The scope of the rule should be broadened (i.e. more restrictive)

8. The rule should be broadened to make it clear that all employees, whether senior management or others, may not be consulted by a third party lawyer without the consent of the in-house legal department or outside counsel. The information the employee has belongs to the company and should only be disclosed through an appropriate representative in a discovery process or as otherwise permissible to protect the integrity of confidential information. If there were two individual parties to a lawsuit, contact would be impermissible – why should it be different for a corporation, which acts through many people?

9. Would it not be simpler to state that a lawyer is prohibited from communicating with any person within the organization or its concerning a matter in question without first obtaining the consent of the lawyer acting for them or unless otherwise authorized or required by law?

10. The rule uses "a licensee shall not approach" while the commentary uses "This rule prohibits communication…" which are different standards. For example, under the first standard, the lawyer may communicate with employees as long as they initiate the communication, but under the second standard, no communication is permitted subject to consent, apart from "who approaches who." In the writer's view, no communication should be permitted, subject to the conditions and exceptions noted, to avoid contentious and disputable fact-finding associated with "who approached who."

The scope of the rule should be narrowed (i.e. less restrictive)

11. The amendments are too stringent. The rule should allow the other lawyer to deal with an organization if the shares are publicly-traded or if it is or appears to be sophisticated in legal matters, and the organization allows him or her to be involved in the dealing.

The unique government context [3]

12. For the purposes of this rule, the structure of government branches, divisions and ministries is unique and does not parallel the corporate world in form or function. That said, the writer supports the creation (with some comments about the amended rule that are included in this summary).

13. It would be inappropriate for licensees to approach people in government when the parties are actually or potentially adverse in interest. Legal work including litigation, advisory services, sensitive negotiations and contract management may all require protection of the rule.

[3] More comments from the government perspective appear later in this summary with respect to specific parts of the rule and commentary.

14. Public servants are required to take an oath or affirmation of office under the *Public Service of Ontario Act, 2006*. If the employee divulges any information to a licensee, the employee may fact sanctions by the employer. There is also public interest immunity protection for a significant number of Crown documents, since access to such documents is provided to public servants at varying levels.

15. Might it be preferable to have a separate rule or commentary that addresses the unique issues in government?

16. From the government perspective, the rule should not operate to constrain lawyers who wish to contact government officials for a discussion of policy matters on behalf of a client. This is a valuable mechanism to address issues that may move up to the political level, and allows those who wish to speak to an issue to do so freely.

17. Is the Society proposing with Rule 6.03(9) to attempt to deny the availability of Access to Information Requests (ATIP) to litigants who have named the Federal Crown as a defendant? The proposed Rule purports to do just that. The rules of paramountcy would appear to dictate that the current proposed formulation of this Rule that disallows contact with 'government departments and agencies' is in direct conflict with, *inter alia*, the *Access to Information Act* and is thus clearly *ultra vires* the power of the LSUC. Quite apart from the obvious conflict with federal statutes, it is not for the Society to attempt to lead the courts in this matter. An amendment with respect to the Crown in general that allows contact 'in the ordinary course of business' and specifically excludes ATIP requests from the ambit of the Rule might be more appropriate.

<u>The municipal context</u>

18. The revisions to not adequately address situations that municipalities encounter that should fall within the scope of the rule.

19. In the municipal context, lawyers can appear as a delegation before council on a client's behalf and can make representations to a public meeting held pursuant to the *Planning Act*. Lawyers can also utilize the *Municipal Freedom of Information and Protection of Privacy Act* to obtain factual information.

20. Legal counsel retained by persons having dealings or negotiations or disputes with municipalities must not be restrained from communicating with the elected representatives of their clients i.e. councillors; the same can be said of municipal staff. Such communication is vital to effective representation by legal counsel of the public bodies' constituencies, in particular when there are so many diverse opportunities for this type of communication, including lobbying and social encounters.

<u>Disagreement with the proposals</u>

21. One respondent disagrees with the proposed amendments, and believes that the current rule should continue to apply.

22. There is no mischief that justifies amendment of the rule.

23. A federal government lawyer writes that the amendments increase the scope of government officials who may be approached. As such the amendments are neither desirable nor necessary, and are vague and unworkable:

    a. Individuals in the prohibited categories may not be readily identifiable to someone outside government;
    b. Narrowing the restriction by the amendments would undermine the respect that the profession routinely expects between counsel, as it does not respect the right of an employee to seek the advice of his or her employer's counsel and invites an unseemly chase to get to the witness first;
    c. The amendments will not further public respect for the law or lawyers, as witnesses could feel pressured to make statements not made if they had received legal advice – their careers or employment could be negatively affected;
    d. Formal and informal mechanisms exist to facilitate access to witnesses (e.g. Rule 53.07, Rule 39.03, exchange of will-say statements at case conferences, interviewing witnesses upon request to the counsel).

24. The report appears to indicate that the change is labour, not civil litigation, related. Clarification of that issue could be pursued rather than a significant revamping of the rule.

25. The rule appears to be designed to remedy a potential problem in one or two areas of practice (trade unions and whistleblowers) at the cost of creating significant problems in others, including insurance defence litigation. The exiting rule could be preserved but altered to create exceptions in the trade union or whistleblower or similar situations (for example, allowing an employee to speak with opposing counsel if the employee voluntarily approaches opposing counsel).

26. The amendments open a host of practical problems in this area of practice. Approaching an employee, who may not have the benefit of legal counsel, may result in the unwitting provision of information directly affecting the legal position and strategy of the organization. It is not a situation of preventing factual disclosure (through the examination for discovery process) but a misuse or misinterpretation of information. The current rule protects the employee and the organization – the amendments would erase that. The proposed amendments may undermine one of the purposes of the rule – to foster the prevention of major capitulations of legal position on the part of a momentarily uncounselled but represented party.

27. One respondent expresses concern that the amendments would permit opposing counsel to communicate with personnel of organizations about their involvement in the very subject matter of the litigation, whereas the current rule would not. The broad access would give opposing counsel an unfair advantage, allowing communication with those within an organization who are most intimately involved in the issues being litigated, and would tend to undermine the general purpose of the rule. This will leave lawyers with two classes of represented persons: individuals to whom other lawyers are denied access and organizations where lawyers are permitted access.

28. The rule will adversely affect a lawyer's ability to properly defend a client and will infringe on solicitor-client privilege.

29. A clear and straightforward rule is proposed to be replaced with one that is inordinately complicated, obscure and dependent upon a commentary which muddies rather than clarifies. This respondent suggests the Society "stick with what you have."

30. One respondent is "very opposed" to the proposed changes (and another law firm wrote to support this view entirely). The respondent uses as an example a motor vehicle accident on a snowy, icy highway that results in serious injury (where he represents the municipality) and where the people approached are the municipality's roads superintendent/plowmen:

    a. Not contacting "directors or officers" (authority to bind) is irrelevant in this example (e.g. the mayor and councillors);
    b. It would be rare for there to be an employee whose own interests are directly at stake in such a situation;
    c. The plaintiff's lawyer, under the amended rule, would be permitted to contact the roads supervisor/plowmen, as they do not fall within a prohibited category (they do not supervise or direct counsel, or regularly consult with counsel);
    d. The fact that these people would usually be the witness for the municipality on examination for discovery does not enter the analysis under the rule and serves to show how wrong the amendments are. The municipality's lawyer could attend at the examination and find out that the witness has already been interviewed and "statementized" by plaintiff's counsel.
    e. In the interview, there is no protection against privileged material being disclosed and no protection against defence assessments, tactics and strategies being disclosed.
    f. Why is it deemed necessary to allow plaintiff's counsel an opportunity to interview the primary personification of the defendant corporation in the absence of counsel of record for the defendant corporation?

31. The proposed rule will give an unfair and substantial advantage to the client of the adverse lawyer where liability is an issue.

<u>Other comments</u>

32. Should the same rule apply to non-profit/charitable organizations and public/for profit organizations?

33. Contact with former employees should be permitted pursuant to the principle that there is no property in a witness. The rule should make clear whether such contact is permitted (based on the amended rule, it appears contact with them would not be prohibited). This respondent made reference to the case of *Anderson v. City of Niagara Falls* which deals with the rule in question. In Anderson, the plaintiff was rendered a quadriplegic as a result of a motor vehicle accident on an icy highway. The action against the City included allegations of negligence in failing to adequately salt and sand

roads where the collision occurred. The City failed to fulfill undertakings on discovery to provide the names and contact information for certain employees and one former employee for *subpoena* purposes, arguing that do so would breach rule 4.03(3) (now 6.03(9)). The plaintiff sought leave to appeal the motions judge's decision to decline to compel fulfillment of the undertaking, and was successful, for the reason, *inter alia*, that there was no evidence that the purpose of seeking the information in question was to interview employees. Further, the judge said in a footnote that

> I do not think that the wording of subrule 4.03(3) of the *Rules of Professional Conduct* or of the Commentary to rule 4.03 supports a finding that it applies to former employees of a corporation, as is implicit in the decision of the motions judge. Therefore, I would regard this finding as an additional error.

34. There is a "grey area" around communications between plaintiff's counsel and the no fault accident benefits adjuster, i.e. the plaintiff's own insurer for Statutory Accident Benefits (SABS), *after* the plaintiff has failed a FSCO Mediation and elected to add the no fault accident benefit insurer in lieu of electing to pursue a FSCO arbitration application. Suppose that there is a tacit agreement between the adjuster, who is usually the insurer's corporate representative at discovery and the instructing client of the insurer corporation, the insurance defence counsel, the plaintiff and the plaintiff's counsel that matters in the action will only be discussed by counsel whereas matters at issue, i.e. accident benefits and treatment plans being applied for and/or denied but not yet mediated or litigated can be discussed directly by the plaintiff (the insured) or the plaintiff's counsel and the no fault insurance adjuster on an ongoing basis without the need to include the defence counsel or seek his or her consent or approval. (To do otherwise would require that the adjuster not be the corporate rep at discovery, or that a different corporate rep of the no fault insurer, who will have no knowledge of the day to day handling of the claim, would have to produced for discovery.) This practice may offend the letter and, possibly, the spirit of the amended rule. It remains an open question whether an exception exists in the *Insurance Act's* regulation regarding this corporate representative/claims adjuster and plaintiff's counsel direct post-litigation communication.

Specific Issues Raised by Respondents

Meaning of "constituent"

35. Confusion was expressed about the word "constituent". Some respondents said that it should be replaced with "individual".

36. Some questioned who a constituent of a partnership or government department would be. For example, one respondent (with government) said that the individuals falling within "constituent" may be significantly different between a private corporation and a municipality. In the latter, it would include elected officials, department heads, consultants, full time staff, and even summer students, depending on the circumstances.

37. Others said that the rule or commentary should include a definition of "constituent". One suggested definition was "directors, officers, employees, agents or others who act on behalf of the corporation or organization."

38. Using "who has authority to bind" assumes that the roles and responsibilities of such individuals are discrete. In government, there could be different officials at different levels in different departments providing advice and recommendations. An outside lawyer may only determine whether someone is caught by the rule after unintentionally violating it.

Paragraph (a) of the proposed rule

39. This paragraph should be revised to read "who has authority, either individually or as part of a group, to bind…". In the municipal context, no one individual member has the authority to bind. As worded, the paragraph may allow an applicant's lawyer to contact individual members of Council on a controversial planning matter that is before the Ontario Municipal Board without the consent of the municipal solicitor.

40. In government, because of its complexity and despite its hierarchy, it is difficult to conclude who a licensee is authorized to approach on a particular matter, who is involved in the decision-making process or who has authority to "bind." The legal, policy and finance branches may all have individuals who are directly related to a decision. "Binding" is somewhat of a misnomer in government – it is expected that the rule is intended to cover individuals who participate in a significant way in decision-making or who provide advice in relation to a particular matter, and not merely the individual who can "bind" the government.

41. In the context of a law firm's representation of individual school principals in some level of disagreement or dispute with their employer Boards, while each Board has a unique organization structure, and some have counsel that a lawyer may know will be assigned to and are eventually retained for a matter, absent notice of the lawyer's involvement, the question is at what point does the entity become a represented organizational client on a matter? A lawyer may not assume that because the Board has in-house counsel, that counsel will be necessarily involved in a matter. A lawyer might deal directly with non-lawyers to resolve issues or settle matters. A modification to (a) is suggested:

> A licensee retained to act on a matter involving a corporation or organization that is represented by a licensee in respect of that same matter shall not, upon being advised of such representation, approach a constituent… (and remove "in respect of that matter" from the last part of the rule).

42. The commentary relating to this paragraph (and paragraph (b)) uses the words "persons likely involved in the decision-making", where as the rule uses "persons who have authority" or "who supervise or direct." The suggestion is that "likely" be deleted from the commentary or the "likely" concept reintroduced into the rule (it was in the original rule). The latter suggestion is preferable as that would prohibit contact with anyone with apparent authority.

43. Three points:

a. Does the licensee need to know that organization is represented *in the matter* or is the fact that he or she is aware that the organization is represented by a licensee *in other matters* sufficient?

b. Should not that representation be inferred where the organization has in-house counsel, even though not expressly stated to be represented in the matter?
c. If representation is only inferred in circumstances where a licensee has had previous dealings with the organization where in-house counsel was involved, should the representation be inferred again, particularly where the matter is similar?

The rule/commentary should be clarified to indicate whether the licensee needs to have knowledge of representation in relation to a matter and the circumstances where such representation might reasonably be inferred in the absence of express communication to the licensee.

44. A new paragraph (d) should be added to maintain the intent of the present rule by including those persons involved in decision-making:

"who, by nature of his or her position, may provide advice or recommendations to those in the corporation or organization charged with the responsibility of making a decision in respect of the matter."

Paragraph (b) of the current rule ("acts or omissions" exposing the organization to liability)

45. Original paragraph (b) should not be deleted. A person not having "authority to bind" (the new concept) may still possess information or opinion which should be afforded the protection of "right to counsel" oversight. In such cases, it is the information and not the authority to bind that exposes the entity to liability. The following paragraph should be added to the amended rule as (d):

> (d) who is an employee, agent or contractor of the corporation or organization whose own, or knowledge of any other constituents', acts, omissions or duties in connection with the matter may expose the corporation or organization to civil or criminal liability

46. This paragraph (deleted paragraph (b)) should remain. The individuals described deserve the benefit of representation to ensure they are aware of their rights and the implications of information they provide, even if they cannot bind the corporation. Employees won't become inaccessible if this paragraph remains, as they can still be questioned during the discovery process.

47. An insurance defence lawyer, with support from the firm's public entity insurer clients, strongly opposes the elimination of this paragraph. In a municipality, for example, individual employees may not know the full picture or how their communications may impact on litigation. Statements that are obtained "off the cuff" without reference to underlying business records can be both unfair to the employee and to the entity in defence of the action. Allowing direct contact with municipal employees without the involvement of counsel constitutes an invasion of the employees' privacy rights (by demanding disclosure of direct contact information) and a potentially highly prejudicial

act to a defendant. Disclosure can properly be made through the discovery process – there is no evidence that this process is unfair or has worked an injustice in the preparation of a plaintiff's case against corporate defendants. The rule changes will sanction unfair behavior.

48. The original rule protects the corporation from a procedural standpoint (decision-makers) and substantive standpoint (those exposing the corporation to liability) whereas the amendment only protects it from a procedural standpoint (binding the corporation and the role of consulting with corporate counsel). However, both interests ought to be protected through the advice of corporate counsel. All employees, agents, etc. in a position to influence the outcome of a proceeding either from procedural or substantive perspectives ought to benefit from the advice of corporate counsel before communicating with an opposing lawyer.

Paragraph (b) of the proposed rule

49. The phrase "regularly consults with" should be removed as it does not reduce or eliminate and may in fact only increase the potential for compliance issues. If it remains, the words "with respect to the matter" should be added to the relevant commentary.

50. Some rationale is needed for this paragraph. The original paragraph is not limited to those who supervise, direct or regularly consult with the organization's lawyer. How often must an employee consult to meet the regularly "consult test" and how is a lawyer supposed to know?

51. As a practical matter, the writer is not sure how counsel would know without asking opposing counsel which employees are caught by this paragraph – the thought is that opposing counsel would take a very broad view.

52. While for government there is agreement generally that a licensee should not approach those who supervise, etc. the organization's counsel, due to the nature of government, it may be problematic for a licensee to approach an employee who does not appear to be directly related to the matter (an example is a contract negotiation, where employees from one ministry would be directly involved but those from other ministries may also have sensitive information that may require protection under the rule).

53. Licensees must be aware that in government, even if there is no named lawyer on the file, the legal branch at the ministry is considered to always be "retained". There may be circumstances where the only appropriate action is to contact the legal branch. Further, instructions provided to a ministry's lawyer may come from a variety of sources, meaning that it is not necessarily one person who is supervising, etc. a government lawyer.

Paragraph (c) of the proposed rule

54. The Ministry of the Attorney General is in agreement with this limitation.

55. The word "directly" is highly interpretive and subjective.

56. It is not clear who is caught by this paragraph. The commentary suggests that unfairness is the test. But would it apply to any employee who is a witness in a proceeding? Most organizations would consider it unfair for opposing counsel to interview an employee who is a witness, and whose evidence could harm the organization's case, without the knowledge or consent of corporate counsel.

57. The intent of the "so closely tied" language in the commentary is not sufficiently captured by new paragraph (c). The paragraph should be worded as follows:

> …whose own interests or course of conduct are directly at stake…

This may help preserve the distinction between an employee who is a witness and one who is a participant.

58. What does it mean for an employee or agent's own interest to be "directly at stake?" This is not clear and may lead to compliance issues.

59. This paragraph is so wide reaching that it could apply to anyone, including a shareholder not even involved in decision-making. More clarity is needed.

60. With respect to "those who own interests are directly at stake", this suggests that the approval for contact must come from both corporate counsel and the individual's counsel - in effect, double approval. However, the commentary is confusing on this point, as one part says

> The subrule also disallows contact with those members of the organization who are so closely tied with the events at issue that it would be unfair to interview them without the presence of counsel.

and another part says

> If an agent or employee of the organization is represented in the matter by a licensee, the consent of that licensee to the communication will be sufficient for purposes of this rule.

and eliminates the approval of corporate counsel. As individual and corporate identities may operate seamlessly, it is proper that the opposing lawyer obtain the consent of both counsel for the individual and the corporation prior to approaching the employee.

61. The following amendment would help to clarify the categories of individuals with whom contact is prohibited:

> The subrule also disallows contact with those members of the organization who are so closely tied with the events at issue that I would be unfair to interview them without the presence of counsel for the member personally or for the organization.

This will make it clear that counsel are not in position to close their eyes to the obvious when attempting to communicate with the organization.

62. With respect to paragraph (c) of the rule, cross-reference should be made to the rule dealing with unrepresented persons (2.04(14)).[4]

Proposed new commentary

63. The commentary corresponding to paragraph (b) of the rule is ambiguous. Does the proposal capture only those who supervise, direct etc. the counsel on the specific matter or everyone in the organization who does so, including for other non-related matters? Clarification is required.

64. The amendments must clearly state that they do not derogate from protection of solicitor-client privilege, and that all constituents who supervise, direct etc. counsel, whether or not for the specific matter, are "off limits" for an approach by the licensee without consent.

65. The last sentence of paragraph two of the commentary should be qualified to include "interviewed or questioned to gather factual information".

66. The commentary needs to be tightened up. The writer suggests that the rule should permit contacted with those who are knowledgeable but have no responsibility over the litigation. As worded, it could be taken to exclude anyone with knowledge, and would, for example, immunize a government bureau from facing evidence of wrongdoing by those frontline workers who actually know about it firsthand. The commentary should be expanded to include the following (after the word "posed"):

---

[4] **Unrepresented Persons**

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

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

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

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

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

> But with respect to the latter group, those only excluded because their duties include answering litigation related inquiries of the type posed, this rule does not preclude an inquiry that is related to the person's knowledge of the historical aspects leading up to the alleged injury or damage which give rise to the subject matter of the representation. The individuals with whom communication is prohibited include those to whom the organization's lawyer looks for decisions with respect to the matter.

67. The commentary would be improved by adding bracketed definitions for the two types of licensees mentioned ("institutional licensee" and "retained licensee") and the "organizational constituents."

68. For consistency sake, use the word "prohibit" in the sentence "The subrule also prohibits ~~disallows~~ contact…"

69. The sentence "The individual who regularly consults…" might be clearer if "need not be" were replace with "will not necessarily be."

70. The paragraph beginning with the sentence noted above is somewhat unclear – using "regularly consults" with "in respect of the matter." The commentary might be clarified to make clear that while someone in management may consult regularly with the entity's lawyers, if they don't consult in respect of this matter they are not off-limits.

71. The part of the paragraph discussing "who regularly consults…" is confusing, as it does not appear to match the language of the rule. It seems to draw a distinction between "regularly consults' and "directs" which is not included in paragraph (b) of the rule. The writer assumes that the rule is triggered in either case where the individual is a constituent of the organization.

72. The sentence in the commentary "These individuals would have the authority to commit…" does not appear to read correctly. It could be amended to say

> "These individuals would have the authority to commit the organization to a position with regard to the subject matter of the representation, because of the person's authority as a corporate officer or because for some other reason the law cloaks him or her with authority, including making litigation decisions or because his or her duties include answering the type of inquiries posed."

73. The addition of the paragraph about members of the organization "so closely tied" would be cold comfort to public entities. This is open to interpretation. For example, would it include a municipal employee at an accident cleanup who has relevant information which might impact on the municipality's liability but who was not directly involved in the events?

74. The meaning of "so closely tied" is not clear. When will a lawyer know that this is the case? And what does it mean to be "unfair?" This should be made clearer or removed.

APPENDIX 3

RESPONDENTS' COMMENTS
(Post-February 2010 Call for Input)

Respondent 1

1. This respondent consulted with lawyers at his firm at the time who indicated that they are content with the proposal, and support the amendments to the rule and commentary as indicated in the draft.

Respondent 2

2. This respondent offered the following comments:

   a. Paragraph 6.03(9)(d) is redundant as all decision-makers – even those with only apparent authority – are caught by paragraph (b);
   b. Subrule (9.1) may create a problem. If an officer at the organization is personally represented by counsel and consents to a communication with a lawyer, but the organization's own counsel does not consent, whose decision governs? The officer would likely only have counsel if the officer had a personal interest in the matter. It would seem appropriate that the officer's lawyer's consent would only go to matters relating to the officer's interests, but with respect to purely organizational issues, only the organization's own counsel could give effective consent for that communication. This should be clarified;
   c. While the commentary refers to discovery and evidentiary issues affecting litigators, the rule also applies to transactional lawyers, although its impact on transactions is unclear (e.g. it would be unusual for a seller's lawyer to call the purchaser corporation – including a call to speak with those in the corporation who have no decision-making or managerial authority - about the transaction without the corporation's lawyer's consent). Should the rule be confined to potential witnesses for discover/litigation and not apply to transactions?
   d. The word "actors" in the commentary is not a term of art and might be defined, or replaced with "those who act for or can bind the corporation."

Respondent 3

3. This respondent agreed with the proposed amendments subject to the following comments:

   a. For clarity, the introductory line should be amended to read: "A lawyer retained to act on a matter involving another party that is a corporation …";
   b. The commentary subtitled "Unions" should use a more generic example relevant to labour and employment law than that relating to an *Occupational Health and Safety Act* issue, as follows:

> For example, a lawyer retained by a union with respect to a termination grievance ~~an appeal~~ in which the union alleges that the employer, who is represented, has breached the collective agreement ~~health and safety legislation,~~ is not prohibited from contacting employees who may have information on the termination or events leading up to the termination. ~~have been affected by the employer's actions to obtain information necessary to establish the violations.~~

c. With respect to paragraph 6.03(9)(c), if it is correct that a lawyer retained by the union may not contact a bargaining unit employee involved in a workplace accident because his or her information on how the accident occurred may result in charges against a corporation, this may conflict with the commentary, which indicates that a lawyer retained by a union may contact "employees who have been affected by the employer's actions to obtain information necessary to establish the violations";

d. In a termination grievance, the lawyer retained by a union may work closely with the employee, although that lawyer does not, in the strict sense, represent the employee. Is the rule intended to protect the employee from contact, communication or facilitated communication by the lawyer for the corporation? If so, this may interfere with the corporation's workplace investigations. This should be clarified in the rule or commentary so that the rule can be properly applied.

Respondent 4

4. A corporation's or organization's lawyer should be present whenever a person currently or formerly within the corporation or organization may make a statement admissible in evidence against it. As such, the commentary that reads

> Fairness does not require the presence of a corporation's or organization's legal practitioner whenever a person within the corporation or organization may make a statement admissible in evidence against it.

should be amended to read

> Fairness requires the presence of a corporation's or organization's lawyer or legal practitioner whenever a person currently or formerly within the corporation or organization may make a statement admissible in evidence against it.

5. In the alternative, this paragraph should read:

> Fairness requires the presence of a corporation's or organization's lawyer or legal practitioner whenever a person currently within the corporation or organization may make a statement admissible in evidence against it.

6. If the Law Society is not of the view that after litigation has begun at a minimum the corporation's or organization's counsel must be present when a person who is currently with the corporation or organization is interviewed and may make a statement admissible in evidence against it, the lawyer making the contact should make full disclosure, including:

a. That he or she represents a party adverse in interest;
b. The nature of the legal proceeding and the relief sought;
c. That the corporation or organization is represented;
d. The name, address and phone number of the corporation's or organization's counsel; and
e. That the person may decline to respond.

7. As such, at bare minimum, the commentary should be amended to read:

> ~~As a practical matter~~, To avoid eliciting privileged or confidential information and ensure that the communications are proper, the lawyer, or any other person acting on the lawyer's instructions, must, before interviewing a person currently or formerly within a corporation or organization, advise them:
>
> a. That they are free to decline from engaging in all communication with the lawyer or person acting on the lawyer's instructions;
> b. That they represent a party adverse in interest to the corporation or organization,
> c. The nature of the legal proceeding and the relief sought; that the corporation or organization is or may be presented by a lawyer or legal practitioners, and
> d. Provide the name, address and phone number of the corporation or organization's lawyer of record or legal practitioner, if known.
>
> ~~.should identify himself or herself as representing an interested party in the matter when approaching a potential witness. The lawyer should also advise the person whom he or she is hoping to interview that they are free to decline to respond. See also rule 4.03 (Interviewing Witnesses).~~

8. A similar amendment should be made to rule 4.03. The concern is that as the commentary under rule 4.03 was deleted some years ago, there is no guidance for lawyers who are seeking to interview a person, before litigation is commenced, who is currently or formerly within a corporation or organization. Rule 4.03 deals with a time before litigation.[5]

[5] Current rule 4.03 (which has no commentary) is reproduced below. The rule was amended in 2007 to move subsections that deal with communication with represented parties to rule 6.03. The rule on communicating with a represented individual became rule 6.03(7) and the commentary that was relevant to that subsection in rule 4.03 was also moved to rule 6.03(7). There was no commentary even before the 2007 amendments that dealt only with the subject matter of current rule 4.03. The relevant part of the 2007 report to Convocation on these amendments is at **Appendix 2**.

4.03 INTERVIEWING WITNESSES

Interviewing Witnesses

4.03 Subject to the rules on communication with a represented party set out in subrules 6.03(7),(8) and (9), a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer shall disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.

[Amended – November 2007]

9. The following amendments should be to the definitions and commentary:

a. A new subrule (9.3) to read “corporation” includes a municipal corporation;
b. An amended subrule (9.2) to read “In subrule (9), “organization” includes a partnership, limited partnership, association, union, fund, trust, co-operative, unincorporated association, sole proprietorship, school board, tribunal and a government department, agency, or regulatory body;
c. Add to the commentary “persons within a corporation or organization includes current officers, directors, employees and appointed or elected officials such as councillors, aldermen, trustees, ombudsmen and mayors”.

APPENDIX 4

PROPOSED AMENDED RULE 6.03(9) OF THE *RULES OF PROFESSIONAL CONDUCT* AND COMMENTARY

Communications with a represented corporation or organization

6.03(9) A lawyer retained to act on a matter involving a corporation or organization that is represented by a legal practitioner in respect of that matter shall not, without the legal practitioner’s consent or unless otherwise authorized or required by law, communicate, facilitate communication with or deal with a person

(a) who is a director or officer, or another person who is authorized to act on behalf of the corporation or organization,

(b) who is likely involved in decision-making for the corporation or organization or who provides advice in relation to the particular matter,

(c) whose act or omission may be binding on or imputed to the corporation or organization for the purposes of its liability, or

(d) who supervises, directs or regularly consults with the legal practitioner and who makes decisions based on the legal practitioner’s advice.

(9.1) If a person described in subrule (9) (a), (b), (c) or (d) is represented in the matter by a legal practitioner, the consent of the legal practitioner is sufficient to allow a lawyer to communicate, facilitate communication with or deal with the person.

(9.2) In subrule (9), “organization” includes a partnership, limited partnership, association, union, fund, trust, co-operative, unincorporated association, sole proprietorship and a government department, agency, or regulatory body.

Commentary

The purpose of subrules 6.03 (9), (9.1) and (9.2) is to protect the lawyer-client relationship of corporations and other organizations by specifying persons with whom a lawyer may not communicate, facilitate communication or deal if the lawyer represents a client in a matter involving a corporation or organization and the corporation or organization is represented by a legal practitioner. They apply to litigation as well as to transactional and other non-litigious matters. A lawyer may communicate with a person in a corporation or other organization, other than those referred to in subrule (9), even if the corporation or organization is represented by a legal practitioner. These subrules are intended to advance the public policy of promoting efficient discovery and favours the revelation of the truth by addressing the circumstances in which a corporation or organization is allowed to prevent the disclosure of relevant evidence. They are not intended to protect a corporation or organization from the revelation of prejudicial facts.

Generally, subrule 6.03 (9) precludes contact only with those actively involved in a matter. For example, in a litigation matter, it does not preclude contact with mere witnesses. Further, communications with persons within the corporation or organization are not barred merely by virtue of the possibility that their information might constitute "admissions" in the evidentiary sense. To proscribe contact with any person within a corporation or organization on the basis that he or she may make a statement that might be admitted in evidence against the corporation or organization would be overly protective of the corporation or organization and too restrictive of an opposing counsel's ability to contact and interview potential witnesses. Fairness does not require the presence of a corporation's or organization's legal practitioner whenever a person within the corporation or organization may make a statement admissible in evidence against it.

Subrule 6.03 (9) prohibits communications by a lawyer for another person or entity concerning the matter in question with persons likely involved in the decision-making process about the matter. These individuals are so closely identified with the interests of the corporation or organization as to be indistinguishable from it. They would have the authority to commit the corporation or organization to a position with regard to the subject matter of the representation. This person would have such authority as a corporate officer or because for some other reason the law cloaks him or her with authority, including making decisions affecting the outcome of the matter, including litigation decisions, or because his or her duties include answering the type of inquiries posed. These individuals include those to whom the organization's legal practitioner looks for decisions with respect to the matter.

Thus, subject to the exceptions set out in it, subrule 6.03 (9) would prohibit contact with those persons who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation.

A lawyer is not prohibited from communicating with a person in a litigation matter unless the person's act or omission is believed, on reasonable grounds, to be so central and obvious to a determination of liability that the person's conduct may be imputed to the corporation or organization. If it is not reasonably likely that the person is an active participant for liability purposes or a decision-maker respecting the outcome of the matter, nothing in subrule 6.03 (9) precludes informal contact with such a person.

An individual who regularly consults with the corporation's or organization's legal practitioner concerning a matter will not necessarily be a person who also directs the legal practitioner. In some large corporations and organizations, some management personnel may direct or control counsel for some matters but not others. The mere fact that a person holds a management position does not trigger the protections of the rule.

A person who is simply interviewed or questioned by a corporation's or organization's legal practitioner about a matter to gather factual information does not "regularly consult" with the legal practitioner. While a person's duties within a corporation or organization may include answering litigation-related inquiries, this rule does not prohibit an inquiry of this person by opposing counsel that is related to the person's knowledge of the historical aspects leading up to the alleged injury or damage which give rise to the subject matter of the representation.

The prohibition on communications with a represented corporation or organization applies only where the lawyer knows that the entity is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances. This inference may arise where it is reasonable to believe that the entity with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by closing his or her eyes to the obvious.

Subrule 6.03 (9) does not prevent a lawyer from communicating with employees or agents concerning matters outside the representation.

As a practical matter, to avoid eliciting privileged or confidential information and ensure that the communications are proper, the lawyer should identify himself or herself as representing an interested party in the matter when approaching a potential witness or other person in the corporation or organization. The lawyer should also advise the person whom he or she is hoping to interview that they are free to decline to respond. See also rule 4.03 (Interviewing Witnesses).

A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances, the lawyer must comply with the requirements of rule 2.04 (Avoidance of Conflicts of Interest), and particularly subrules 2.04(6) through (10). A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of rule 2.04 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

If the representation by the legal practitioner described in subrule (9.1) is only with respect to the personal interests of the individual, consent of the corporation's or organization's counsel would be required with respect to the corporation's or organization's interests.

Unions – Subrule 6.03 (9) is not intended to prohibit a lawyer for a union from contacting employees of a represented corporation or organization in circumstances where proper representation of the union's interests requires communication with certain employees who are the holders of information. For example, a lawyer retained by a union with respect to a termination grievance in which the union alleges that the employer, who is represented, has breached the collective agreement, is not prohibited from contacting employees who may have information on the termination or events leading up to the termination.

Similarly, a management-side labour lawyer would not offend the subrule if the lawyer contacted an employee who is a member of a bargaining unit represented by a legal practitioner.

Governments –The concept of the individual who may "bind the organization" may not apply in the government context in the same way as in the corporate environment. For government departments, ministries and similar groups, the rule is intended to cover individuals who participate in a significant way in decision-making or who provide advice in relation to a particular matter.

In government, because of its complexity and despite its hierarchy, it may not always be clear to whom a lawyer is authorized to communicate on a particular matter and who is involved in the decision-making process. The roles of these individuals may not be discrete, as different officials at different levels in different departments provide advice and recommendations. For example, in a contract negotiation, employees from one ministry may be directly involved, but those from another ministry may also have sensitive information relevant to the matter that may require protection under subrule 6.03 (9).

In addition, the legal branch at the particular ministry is usually considered to always be "retained". There may be circumstances where the only appropriate action is to contact the legal branch. In all cases, appropriate judgment must be exercised

In general, the subrule is not intended to:

a. constrain lawyers who wish to contact government officials for a discussion of policy or similar matters on behalf of a client;

b. affect access to information requests under such legislation as the *Freedom of Information and Protection of Privacy Act* (Ontario) or the federal *Access to Information Act,* including situations where a litigant has named the provincial or federal Crown, respectively, as a defendant; or

c. affect the exercise of the duties of public servants under the *Public Service of Ontario Act, 2006* with respect to disclosure of information.

Municipalities – Similar to government, in the municipal context, it is recognized that no one individual has the authority to bind the municipality. Each councillor is representative of the entire council for the purposes of decision-making. Subrule 6.03 (9), for example, would not permit the lawyer for an applicant on a controversial planning matter that is before the Ontario Municipal Board to contact individual members of council on the matter without the consent of the municipal solicitor.

The subrule is not intended to:

a. prevent lawyers appearing before council on a client's behalf and making representations to a public meeting held pursuant to the *Planning Act*;

b. affect access to information requests under such legislation as the *Municipal Freedom of Information and Protection of Privacy Act*, including situations where a litigant has named the municipality as a defendant; or

c. restrain communications by persons having dealings or negotiations, including lobbying, with municipalities with the elected representatives (councillors) or municipal staff.

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FOR INFORMATION

PROFESSIONAL REGULATION DIVISION
QUARTERLY REPORT

68. The Professional Regulation Division's Quarterly Report (third quarter 2010), provided to the Committee by Zeynep Onen, the Director of Professional Regulation, appears on the following pages. The report includes information on the Division's activities and responsibilities, including file management and monitoring, for the period July to September 2010.

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

(1) Copy of the Federation of Law Societies of Canada – Final Report re Advisory Committee on Conflicts of Interest June 2, 2010 Appendix "A".
(Appendix 1, pages 71 – 105 (in camera))

(2) Copy of the Canadian Bar Association Response to Federation of Law Societies of Canada Advisory Committee on Conflicts of Interest Final Report August 2010.
(Appendix 2, pages 107 – 125 (in camera))

(3) Copy of the relevant chapter from the 2008 CBA Task Force report.
(Appendix 3, pages 127 -176 (in camera))

(4) Copy of the Professional Regulation Division's Quarterly Report for the period July to September 2010.
(pages 178 – 211)

Re: Amendments to Rule 6.03(9) of the *Rules of Professional Conduct*

It was moved by Mr. Hainey, seconded by Mr. Fleck, that the amendments to Rule 6.03(9) of the *Rules of Professional Conduct*, as set out at Appendix 4 in the Report, be approved.

Carried

Mr. Hainey addressed an issue arising from the Professional Regulation Division Quarterly Report respecting the aging of cases raised by Mr. Banack at September 29, 2010 Convocation.

PARALEGAL STANDING COMMITTEE REPORT

Ms. Corsetti presented the Report.

Report to Convocation
November 25, 2010

Paralegal Standing Committee

Committee Members
Cathy Corsetti, Chair
William Simpson, Vice-Chair
Marion Boyd
Robert Burd
James R. Caskey
Paul Dray
Seymour Epstein
Michelle Haigh
Glenn Hainey
Douglas Lewis
Kenneth Mitchell
Baljit Sikand

Purpose of Report: Decision and Information

Prepared by the Policy Secretariat
Julia Bass 416 947 5228

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COMMITTEE PROCESS

1. The Committee met on November 11th, 2010. Committee members present were Cathy Corsetti (Chair), William Simpson, Vice-Chair, Marion Boyd, Robert Burd, Paul Dray, Seymour Epstein, Michelle Haigh, Glenn Hainey, Douglas Lewis, and Kenneth Mitchell. Bencher Susan McGrath also attended. Staff members in attendance were Zeynep Onen, Diana Miles, Roy Thomas, Sheena Weir, Sophie Galipeau and Julia Bass.

FOR DECISION

AMENDMENT TO RULE 4.02 (3) OF THE PARALEGAL RULES

Motion

2. That Convocation approve the amendment to Rule 4.02 (3) of the Paralegal Rules of Conduct shown at paragraph 5.

Issue

3. The Professional Regulation Committee is presenting proposed changes to the lawyers' *Rules of Professional Conduct* governing communications with represented corporations and organizations.

4. The review by the Professional Regulation Committee involved a call for input on the proposed amendments. Paralegal organizations and paralegals were also consulted as to their views on the proposal for analogous changes to the *Paralegal Rules* to ensure they remain consistent with the lawyers' Rules. Comments from paralegals were taken into account when the draft was prepared.

5. As the rules for both lawyers and paralegals on this issue should continue to be the same, the proposed new wording of the *Paralegal Rules* is as follows:

Rule 4.02
(3) A paralegal retained to act on a matter involving a corporation or organization that is represented by a legal practitioner in respect of that matter shall not, without the legal practitioner's consent or unless otherwise authorized or required by law, communicate, facilitate communication with or deal with a person
(a) who is a director or officer, or another person who is authorized to act on behalf of the corporation or organization,
(b) who is likely involved in decision-making for the corporation or organization or who provides advice in relation to the particular matter,
(c) whose act or omission may be binding on or imputed to the corporation or organization for the purposes of its liability, or
(d) who supervises, directs or regularly consults with the legal practitioner and who makes decisions based on the legal practitioner's advice.
(3.1) If a person described in subrule (9) (a), (b), (c) or (d) is represented in the matter by a legal practitioner, the consent of the legal practitioner is sufficient to allow a paralegal to communicate, facilitate communication with or deal with the person.
(3.2) In subrule (9), "organization" includes a partnership, limited partnership, association, union, fund, trust, co-operative, unincorporated association, sole proprietorship and a government department, agency, or regulatory body.

The Committee's Deliberations

6. The Committee considered the proposed wording and recommends that it be adopted.

FOR INFORMATION

BILL C-35 RESPECTING IMMIGRATION CONSULTANTS

7. On June 8th 2010, the Minister of Immigration, Jason Kenney, introduced Bill C-35, with the objective of improving the regulation of immigration consultants and specifically to reform, or replace, the Canadian Society of Immigration Consultants, (CSIC). On November 1st 2010, the Law Society presented the submission shown at Appendix 1 to the House of Commons Standing Committee on Citizenship and Immigration.

Appendix 1

Submission to the Standing Committee on Citizenship and Immigration
November 1, 2010

For information contact:
Malcolm Heins, Chief Executive Officer (416) 947-3309
Sheena Weir, Manager, Government Relations (416) 947-3338
Osgoode Hall, 130 Queen Street West, Toronto, Ontario M5H 2N6

1. Bonjour, thank you, Mr Tilson. My name is Laurie Pawlitza and I am the Treasurer of the Law Society of Upper Canada. I am accompanied today by our Chief Executive Officer, Malcolm Heins and our Manager of Government Relations, Sheena Weir. May I start by saying that we welcome the government's interest and action in introducing Bill C-35, *An Act to amend the Immigration and Refugee Protection Act.*

2. We are here today to request that you consider an amendment to the bill, to accommodate the paralegal licensees of the Law Society of Upper Canada.

3. The Law Society of Upper Canada, founded in 1797, is Canada's oldest regulating authority. The Law Society is created by the *Law Society Act*, an Ontario statute and is responsible for the regulation of legal service providers in Ontario in the public interest. Today, the Law Society licenses forty two thousand lawyers and over three thousand paralegals. Our primary functions are governing the requirements for entry to either of these professions, and the professional regulation and, where necessary, discipline of

our members. (I note that the functions of a Law Society can be contrasted with those of a Bar Association, such as the Canadian Bar Association. Bar Associations lobby in their members' interest and put forward the view of the profession on issues of the day – they have no regulatory mandate and are not statutorily required to operate in the public interest).

4. As some members of the Committee may recall, the Law Society appeared at the committee hearings on the regulation of immigration consultants in April 2008. At that time, we discussed some of the problems that we perceived, and indeed which were generally perceived, with the attempted regulation of immigration consultants when the Canadian Society of Immigration Consultants was established. I will touch on some of the points we made at that time, before commenting on Bill C-35 and our views of a principled, public interest approach to regulation of those practising this field.

5. CSIC was the creation of Citizenship and Immigration Canada, even though it is a private corporation. Citizenship and Immigration amended the Immigration and Refugee Protection Regulations to provide that only CSIC members, together with lawyers regulated by Canadian law societies or notaries regulated by the *Chambre des Notaires,* can represent individuals in immigration proceedings before the Immigration and Refugee Appeal Board. This mandate means that not all aspects of the client relationship are covered.

6. We congratulate the Minister on moving forward with legislation addressing the urgent need to improve consumer protection in this area. Bill C-35 is aimed at increasing the regulatory powers of CSIC (or of another regulator, if responsibility is transferred to a body other than CSIC).

7. Section 91 would prohibit unauthorized persons from advising a person in connection with a proceeding or application under the Act. The objective of this new provision is welcome.

Paralegal Regulation at the Law Society of Upper Canada

8. I would now like to discuss the regulatory model developed in the Law Society of Upper Canada's recent introduction of paralegal regulation. It is our submission that, given the comprehensive regulatory model that I will set out for you, Bill C-35 should be amended to recognize holders of a paralegal licence from the Law Society of Upper Canada as legitimate providers of legal services in the field of immigration consulting.

9. The Law Society's model of paralegal regulation has been in operation for over two years, with great success. This new initiative was developed by the Law Society in collaboration with the government of Ontario to address a glaring need – proper consumer protection from unlicensed, unregulated and, in some instances, incompetent or criminal paralegals.

10. There are now over 3,000 licensed paralegals in Ontario. The Law Society has worked hard over the last decade to develop this successful regulatory model, including the holding of public consultation meetings all over Ontario to ensure that the needs of the public were understood and addressed. It may be helpful to you to review some of the main features of this important new regulatory initiative.

Legislative Authority

The Law Society Act was amended by the *Access to Justice Act* of 2006, giving the Law Society authority to regulate all legal services in Ontario. Key to this initiative was the inclusion on the statute of a definition of the 'provision of legal services'. This gives the Law Society jurisdiction over all legal activities, such as the provision of advice, opinions and the preparation of documents, not only the provision of advocacy services.

11. Under these new provisions, the Law Society started a 'grandparenting' programme in 2007 and issued the first of the new 'P1' paralegal licences in 2008. To apply as a 'grandparent', a person was required to,
    a. have a minimum of three years full time experience,
    b. be of good character,
    c. carry insurance, and
    d. provide at least three references from approved categories of persons.

Scope of Practice

12. The permitted scope of practice for Ontario paralegals is set out in the Law Society's By-law 4, and is limited to the provision of advocacy services in,
    a. Small Claims Court,
    b. the Ontario Court of Justice on *Provincial Offences Act* matters,
    c. summary conviction matters under the *Criminal Code*,
    d. provincial and federal tribunals, and
    e. claims under sections 280, 280.1, 282, 283 or 284 of the *Insurance Act.*

13. Work on immigration matters fits well with this scope of practice, and in fact some of our current licensees provide legal services on immigration matters in addition to other areas. At present, they are required to be members of both the Law Society and CSIC, which is unnecessary. A number of our licensees have raised this duplication with us.

Educational Accreditation

14. The start-up phase of paralegal licensing was accompanied by development of a definition of appropriate paralegal competencies, leading to the creation of accredited paralegal courses at community colleges. There are now 21 approved programmes at 18 accredited colleges. After the close of the grandparenting phase, only graduates of colleges accredited by the Law Society are able to apply for entry to the paralegal licensing process.

Good character

15. Persons applying for a paralegal licence are subject to the same requirement to be of "good character" as are lawyers in Ontario. The introduction of our system of paralegal regulation has included the denial of licences to a number of unscrupulous and unqualified operators formerly active in this area. This has been of benefit to judges, tribunal members and justices of the peace, who have noted the improvement in the quality of persons appearing before them. This is an important aspect of the consumer protection provided by paralegal regulation.

Competence

16. All licensed paralegals have passed a licensing examination and are required to abide by *Paralegal Rules of Conduct*. These rules provide, among other things, that licensed paralegals may not accept files for which they lack the necessary knowledge and skills.

17. Our Professional Development & Competence Department conducted extensive research into the necessary competencies for the provision of paralegal services, and has developed twofold competency criteria:
    a. a competency profile that directs the establishment of the paralegal college programmes and is very extensive (23 pages of very detailed requirements) and
    b. a separate competency profile for the licensing examinations that focuses on professional responsibility, ethics, practice management and procedural matters - all of which use practice situations to relay the testing questions in context.

18. Paralegals are required to maintain a trust account if they hold client funds, and are subject to audits of their books and records, including any records of accounts in which client funds are held. If they exhibit problems in their competency, they may be subject to a review of their practice and an order to remedy the lack of competency. Starting in January 2011, all licensed paralegals must take 12 hours of Continuing Professional Development per year, of which 3 hours must be in the area of professional responsibility, ethics and practice management including client service. In addition, paralegals can avail themselves of our many practice management support services.

Professional Regulation

19. Any client, member of the public or fellow licensee may complain to the Law Society if they have concerns about a paralegal's professional misconduct, competence or capacity to practise law and the Law Society will investigate. Paralegals are subject to the same regulatory processes as lawyers, leading where appropriate to discipline and licence revocation. This effective regulatory approach is designed to protect the public interest.

Insurance and compensation

20. All paralegals are required to carry professional liability insurance, in a form approved by the Law Society, with a minimum of $1m. per claim and $2m. annual aggregate. This protects consumers who may be harmed by the negligence of a paralegal. In addition, the Law Society operates a Compensation Fund to which all paralegals contribute, which is used to compensate any clients who have suffered a loss due to paralegal dishonesty.

Report to the Attorney General

21. The *Law Society Act* required us to present a report to the Attorney General of Ontario on the completion of two years of paralegal regulation, presented on March 31st 2009. A copy is enclosed for your information. It indicates that the original programme design for paralegal regulation was faithfully and successfully implemented by the Law Society.

Public Interest

22. Given the Law Society's proven track record, we believe this effective system of paralegal licensing should be recognized for the purposes of immigration work. We believe that the Law Society paralegal licensing regime provides effective consumer protection in the public interest. We accordingly respectfully submit that Bill C-35 should be amended to permit the provision of immigration consulting services by paralegals licensed by the Law Society of Upper Canada, as is already the case for lawyers. We would be happy to help with suggestions for possible drafting.

23. Thank you very much for your attention; I would be pleased to answer any questions you may have.

Re: Amendment to Rule 4.02(3) of the *Paralegal Rules of Conduct*

It was moved by Ms. Haigh, seconded by Mr. Simpson, that the amendment to Rule 4.02(3) of the *Paralegal Rules of Conduct* be approved.

Carried

Mr. Caskey advised Convocation that on November 18, 2010 the government passed an amendment to Bill C-35 to exempt licensed paralegals from the prohibition in the *Immigration and Refugee Protection Act* against representation or advice relating to a proceeding or application under the Act.

REPORTS FOR INFORMATION

AUDIT COMMITTEE REPORT

Mr. Bredt presented the Law Society Financial Statements for the third quarter of 2010, and the Compliance Statements for the General Fund, Compensation Fund and Errors & Omissions Insurance Fund Portfolios as at September 30, 2010.

Report to Convocation
November 25, 2010

Audit Committee

Committee Members
Chris Bredt (Chair)
Susan Elliott
Seymour Epstein
Glenn Hainey
Vern Krishna
Doug Lewis
Jack Rabinovitch
Heather Ross
William Simpson

Purpose of Report: Information

Prepared by the Finance Department
Wendy Tysall, CFO, 416-947-3322

COMMITTEE PROCESS

1. The Audit Committee ("the Committee") met on November 10, 2010. Committee members in attendance were Chris Bredt (c), Susan Elliott, Seymour Epstein, Glenn Hainey, Doug Lewis, Heather Ross and William Simpson.

2. Also in attendance were Paula Jesty, Sam Persaud and Trevor Ferguson from Deloitte & Touche LLP.

3. Law Society staff attending were Wendy Tysall, Zeynep Onen, Elliot Spears, Fred Grady, Brenda Albuquerque-Boutilier and Andrew Cawse.

FOR INFORMATION

LAW SOCIETY FINANCIAL STATEMENTS FOR THE NINE MONTHS ENDED SEPTEMBER 30, 2010

4. Convocation is requested to receive the Law Society's financial statements for the third quarter of 2010.

Law Society of Upper Canada Financial Statements
For the nine months ended September 30, 2010

The Society's operational results are presented as a single set of entity statements that include the General Fund, the Compensation Fund, the Errors & Omissions Insurance Fund ("E&O Fund") and other restricted funds.

Fund Descriptions

General Fund

- The General Fund is the Society's operating fund representing the bulk of its revenues and expenses relating to the licensing and regulation of lawyers and paralegals.

Restricted Funds

- The Compensation Fund is restricted by statute. The Fund exists in order to mitigate losses sustained by clients as a result of the dishonesty of a lawyer or paralegal. The fund is financed primarily through annual levies on lawyers and paralegals, investment income and recoveries for grants previously paid. The annual Compensation Fund levy for the 2010 year was set at $257 for lawyers and $183 for paralegals. The respective figures for the 2009 year were $226 and $145.

  At September 30, 2010 the lawyer Compensation Fund balance was $27.4 million and the paralegal fund balance was $126,000.

- The Errors and Omissions Insurance (E&O) Fund accounts for the mandatory professional liability insurance program of the Society which is administered by LAWPRO. Insurance premiums and expenses, as well as related levies and income from their investment are tracked within this fund. The Society is insured for lawyers' professional liability and recovers annual premium costs from lawyers through a combination of annual base levies and additional levies that are charged based on a lawyer's claims history, status, and real estate and transaction levies.

  The current composition of the E&O Fund balance is:

Investment in LawPRO	$35,642,000
Cumulative excess investment income (available for use by General Fund - $2.0 million utilized in 2011 budget)	3,790,000
Backstop for Endorsement Retention	15,000,000
Contribution to 2010 LawPro insurance premium (25% of $3.5 million - three months remaining)	875,000
Available for future fund operating expenses, transaction levy shortfalls and insurance premium contributions. (2011 LawPro insurance program utilizes $2.5 million)	9,453,000
TOTAL	$64,760,000

- The Capital Allocation Fund is the source of funding for the Society's acquisition of major capital assets and the repair and upgrade of Osgoode Hall. The fund is replenished by a dedicated annual levy, on all lawyers and paralegals of $65 in 2010, increased from $45 in 2009.

- The Invested in Capital Assets Fund represents the net book value of the Society's physical assets. Additions to the fund are made by the capitalization of assets acquired through the Capital Allocation Fund. Additions are recorded annually by means of an inter-fund transfer on the Statement of Changes in Fund Balances. Amortization is reported as an expense of the fund.

- The County Libraries Fund reports the transactions between LibraryCo Inc. and the Law Society. The Law Society levies an amount on lawyers as approved by Convocation in the annual budget: $203 in 2010 and $220 in 2009. This levy is reported as income of the fund and payments to LibraryCo Inc. are reported as expenses of the fund.

- The Working Capital Reserve is maintained by policy of Convocation to ensure cash is available to meet the operating needs of the Society. By policy, the fund is maintained at a balance of up two months operating expenses.

- Other Restricted Funds:

    - Under the Parental Leave Assistance Plan, which commenced in March 2009, the Law Society provides sole and small firm practitioners a fixed sum of $750 per week for up to twelve weeks to cover, among other things, expenses associated with maintaining practice expenses during a maternity, parental or adoption leave. For 2010, as of September 30, $370,500 has been expensed for 52 approved parental leaves, and four applications are being processed. In 2009, the last nine months of the year saw 48 parental leaves completed. Funding of $540,000 is budgeted for 2010.

    - The Repayable Allowance Fund is used to provide financial assistance to those enrolled in the Society's Lawyer Licensing Process. The fund is replenished annually through the budget process by a $100,000 annual contribution from the lawyer general fund.

    - The Society's Endowment Fund is the J. Shirley Denison Fund, administered under the terms of Mr. Denison's will by Convocation for the relief of poverty for lawyers and licensing process lawyer candidates and their spouses.

    - The Special Projects Fund is used to carry forward funding to a future fiscal period for a program or activity yet to be completed, for which funding is not provided in the future year's budget. For 2010, the fund is primarily comprised of funding for the Civil Needs Project, Data Management and Heritage First. Also included is a contribution from Canada Life for the ongoing maintenance of the Society's lawns, gardens and trees.

Financial Statement Highlights

The Financial Statements are prepared under Generally Accepted Accounting Principles for Canadian not-for-profit organizations using the restricted fund method of accounting. Revenues are recognized when earned and expenses are recognized when incurred.

The Financial Statements for the nine months ended September 30, 2010 comprise the following statements with comparative numbers for September 30, 2009:

- Balance Sheet
- Statement of Revenues and Expenses. Detailed results of operations for lawyers and paralegals are combined on the Statement of Revenue and Expenses. Summarized results for both lawyers and paralegals are reported on the Statement of Changes in Fund Balances. Supplementary schedules comparing actual results to budget are also provided for lawyers and paralegals.
- Statement of Changes in Fund Balances

Supplemental schedules include Schedules of Revenues and Expenses for the Lawyer and Paralegal General Funds, the Compensation Fund and the Errors and Omissions Insurance Fund.

Balance Sheet

- Current assets at the end of September 2010 have increased to $77.8 million compared to $70.3 million in 2009. Included in current assets are prepaid expenses of $25 million. Most of the prepaid expense balance relates to annual E&O Fund insurance premiums paid or payable for the year, which are expensed over the full year.

- The Investment in LAWPRO totaling $35.6 million is made up of two parts. The investment represents the share capital of $4,997,000 purchased in 1991 when LAWPRO was established plus contributed capital of $30,645,000 accumulated between 1995 and 1997 from a special capitalization levy by the Law Society.

- Portfolio investments are shown at fair value of $74.1 million compared to $85.0 million in 2009. The decline is largely attributable to the funding of insurance transactions in 2009, partly offset by the $8 million recovered through settlement of the E&Y/Tillinghast litigation. Investments are held in the following funds:

Fund ($ 000's)	**2010**	**2009**
Errors & Omissions Insurance	$33,074	$46,685
Compensation Fund	28,430	26,460
General Fund	12,551	11,884
Total	**$74,055**	**$85,029**

Current liabilities have increased from a total of $58.6 million to $61.4 million primarily because:

- o Deferred revenue has increased to $35.5 million from $31.6 million. This relates to annual E&O Fund insurance premiums and Law Society annual fees received or receivable for the year, recognized over the full fiscal year.

- The amount due to LAWPRO from the E&O Fund has decreased to $19.7 million from $22.9 million. The payable will decline by year-end as insurance premiums and levies collected are paid to LAWPRO. Any balance owing to LAWPRO at year end is paid by March 31 of the following year.

The provision for unpaid grants / claims comprises the provision for unpaid grants – Compensation Fund and the provision for unpaid claims – E&O Fund with balances at the end of September 2010 of $7.9 million and $654,000 respectively.

- The provision for unpaid claims – E&O Fund represents claims liabilities for 1995 and prior. Effective 1995, 100% of the risk above the individual member deductible was insured through LAWPRO so the E&O Fund is in run-off mode.

- The provision for unpaid grants – Compensation Fund represents the estimate for unpaid claims and inquiries against the Compensation Fund, supplemented by the costs for processing these claims. The reserve for Compensation Fund grants has decreased to $7.9 million in September 2010 from $14.4 million in September 2009 in line with the net decrease in open claims and inquiry files over the period.

- The Compensation Fund had 144 potential claims against one lawyer open from 2008. These potential claims were denied and closed in September of this year resulting in a reduction of $2.7 million in the provision for unpaid grants. This is also reflected on the Compensation Fund Schedule of Revenues and Expenses and Change in Fund Balances in the provision for unpaid grants and is a major contributor to the large surplus and growth in the fund balance.

- Excluding the potential claims against the lawyer mentioned above, actual claims and inquiries (potential claims) against lawyers have declined from 296 at December 31, 2009, to 236 at September 30, 2010.

- At the end of September 2010, the estimated paralegal claim liabilities totaled $131,000. Since September 2009, the method of valuing the Compensation Fund's Reserve for Unpaid Grants has changed from an actuarial basis to an internal valuation based on historic claim levels.

- The Law Society Act permits a member who has dormant trust funds, to apply for permission to pay the money to the Society. Money paid to the Society is held in trust in perpetuity for the purpose of satisfying the claims of the persons who are entitled to the capital amount. At the end of September, unclaimed money held in trust amounts to $2.1 million.

- Fund Balances have decreased slightly to $131.5 million from $131.9 million with 2010 activity analyzed on the Statement of Changes in Fund Balances.

Statement of Revenues and Expenses

- The General Fund incurred a deficit of $1.7 million at the end of the third quarter of 2010, compared with a deficit of $133,000 in 2009. This is due to an increase in net expenses of $3.3 million partly offset by an increase in revenues of $1.8 million. The 2010 budget incorporated the use of $5.8 million in funding from the General Fund balance and $920,000 from the Paralegal Fund balance.

- The Society's restricted funds report a surplus of $12.1 million for the period. The surplus is primarily in the E&O Fund ($7.4 million) and in the Compensation Fund ($6.8 million). Partly offsetting these balances is the capital asset amortization of $2 million.

- The E&O Fund surplus is largely due to the settlement of the E&Y/Tillinghast litigation matter for $8 million, reported as other revenue under restricted funds.

- The surplus in the Compensation Fund is primarily due to the lower than budgeted provision for unpaid grants as a result of favorable developments for previously reserved inquiries and grants.

- General Fund annual fee revenue is recognized on a monthly basis. Annual fees recognized for the first three quarters of the year have increased to $31.1 million in 2010 from $29.8 million in 2009, with a fee decrease of $1 per lawyer and $25 per paralegal, offset by an increase in the number of lawyers and paralegals billed.

- Restricted fund annual fees comprising county library, Compensation Fund and capital allocation levies increased by a total of $34 per lawyer in 2010 contributing to the increase in restricted fund annual fees from $13.5 million in 2009 to $14.3 million in 2010.

- Premiums and levies have increased to $68.1 million from $53.4 million. This increase is primarily a result of the increase in base premiums charged to lawyers in 2010. The base premium in 2010 is $2,950 compared to $2,450 in 2009.

- Professional development and competence revenues have increased to $9.0 million from $7.8 million in 2009. This is due to increased continuing education course and materials revenue and an increase in paralegal licensing candidates.

- Total investment income has decreased from $6.3 million to $4.1 million. Total realized and unrealized gains have decreased from $3.6 million to $1.9 million reflecting capital market conditions. The interest and dividend income component has decreased from $2.7 million to $2.2 million. This change is mainly due to timing of E&O Fund investment activity. In 2009, a $1.6 million loss was realized when the sale of investments was required to fund operations. Improved market conditions in the third quarter of 2010, combined with the need to sell investments to bring the portfolio in line with the investment objectives of a shorter term horizon have resulted in realized gains of $1.1 million.

- Other income in the restricted funds has increased to $8.5 million from $316,000 due to the settlement of E&Y/Tillinghast litigation in the first quarter of 2010.

- Regulatory expenses of $14.7 million are higher than the same period in 2009 by $1.4 million. The 2010 budget envisaged these expenses increasing for the year in response to the increasing number of complaints and the requirement for additional intake resources dedicated to paralegal regulation. Year-to-date, the increase in actual expenses is concentrated in budgeted staffing increases in Investigations and in Complaints Resolution and paralegal good character hearings where temporary staff were hired later in 2009.

- Professional development and competence expenses are $1 million higher than for the same period in 2009 ($13.1 million versus $12.1 million). Increases were budgeted in Spot Audit and Practice Review, where additional staffing is required to meet the goal of auditing all Ontario law firms once every five years and to support the increased number of revisits to sole and small firm lawyers. During the third quarter, staffing levels reached the full budgeted complement. Further contributing to the increase is the cost for integration of the paralegal exempt categories approved by Convocation. As at September 30, 2010, $130,000 has been incurred for this initiative against an approved budget of $170,000.

- Administrative expenses are $507,000 more than the same period in 2009, consistent with budgeted increases.

- Other expenses include bencher related payments, payments to the Federation of Law Societies, insurance, catering costs and other miscellaneous expenses and total $5.6 million for the nine months ended September 30, 2010, an increase of $1.2 million over 2009. The increase is largely due to increases in termination payments of $500,000, bencher remuneration and expenses of $200,000, Federation of Law Societies litigation expenses of $126,000 and the payment to the Law Commission of Ontario of $100,000.

- Expenses in the E&O Fund have increased to $70.5 million from $62.6 million. This is largely due to the increase in insurance premiums.

- Compensation Fund expenses have decreased to $2.2 million from $8.2 million. The main contributor to this decrease has been the reduction in the provision for unpaid grants, compared to an increase in the prior year. The provision is adjusted monthly based on the number of new inquiries and open claims and cases closed. In September 2010, 144 inquiries regarding a single lawyer were closed resulting in the reversal of $2.7 million in the provision for unpaid grants. The closure of further inquiries and claims without payment during the third quarter has resulted favorable developments in the provision for unpaid grants. Costs for spot audit, investigations and discipline allocated from the General Fund have increased over 2009, as budgeted.

- County Libraries Fund expenses are $395,000 less than for the same period in 2009 ($5.2 million versus $5.6 million). This change is mainly due to the use of LibraryCo reserves as budgeted to reduce the portion of annual lawyer fees required to support ongoing operations.

- Expenses for the Parental Leave Assistance Plan were $371,000 in the first three quarters of 2010 for fifty-two parental leaves. The budget for the whole of 2010 is $540,000 equating to sixty parental leaves. Comparatives for 2009 of $200,000 represent two quarters activity only as the program was implemented in March 2009.

Statement of Changes in Fund Balances

- This statement reports the continuity of the Society's various funds from the beginning of the year to the end of the current period. Details related to the revenues, expenses and interfund transfers summarized on this statement are reported in detail in the accompanying Statement of Revenues and Expenses as well as supporting schedules relating to the Lawyer and Paralegal General Funds, the Compensation Fund and the Errors and Omissions Insurance Fund.

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Compensation Fund – Schedule of Revenues and Expenses & Change in Fund Balance

- Total annual fee revenue has increased by $916,000 primarily as a result of an increase in the lawyer and paralegal levies from $226 to $257 and from $145 to $183 respectively.

- Expenses have decreased by $6 million primarily as a result of favorable developments in the provision for unpaid grants. The decrease was slightly offset by increased costs for spot audits approved in the 2010 budget. The expanded spot audit program was the primary driver in the increase in the annual levy for the lawyers' compensation fund

Errors and Omissions Insurance Fund – Schedule of Revenues and Expenses & Change in Fund Balance

- Insurance premiums and levies have increased $14.7 million primarily due to the increased base premium for Ontario lawyers. Premium revenue comprises base premiums and claims history surcharges prorated for the year and transaction levies.

- Other income includes $8 million from the settlement of outstanding E&Y/Tillinghast litigation.

- Administrative expenses have increased by $414,000 over 2009 due to the final litigation expenses incurred in relation to the above-noted settlement.

- The trend in insurance expenses is in line with premium revenues as the E&O Fund acts as a conduit to LAWPRO for this funding. The insurance expense represents the prorated annual policy premium set up in LAWPRO's insurance report to Convocation last September. At September 2010 there were no additional / returned premiums.

LAWPRO and LibraryCo Interim Financial Statements

- LAWPRO and LibraryCo's financial statements for the third quarter of 2010 were not reviewed by their Boards until after the Law Society's Audit Committee meeting in November.

FOR INFORMATION

INVESTMENT COMPLIANCE REPORTING

5. Convocation is requested to receive the Compliance Statements for the General Fund, Compensation Fund, and Errors & Omissions Insurance Fund portfolios as at September 30, 2010.

FOR INFORMATION

OTHER COMMITTEE WORK

6. The Committee also conducted other business as summarized below.

   a) The Committee reviewed management's anti-fraud programs.

   b) Deloitte & Touche LLP presented their audit service plan for the financial year ending December 31, 2010.

   c) The Committee reviewed bencher expense and remuneration summaries and a summary of the Treasurers' expenses.

d) The Committee reviewed the outside counsel retention process as presented by the Director of Professional Regulation, Zeynep Onen and the Senior Counsel Legal Affairs, Elliot Spears.

e) The Committee reviewed the Audit Committee and Finance Committee Mandates and items for the Audit Committee work plan.

f) Mr. Bredt advised that he had met with Ms. Hartman, Chair of Finance, and the Treasurer to discuss the roles of the Finance and Audit Committees. It was agreed that a joint sub-committee of Audit and Finance should be formed to review this issue. Mr. Hainey and Mr. Lewis have agreed to join Mr. Bredt as the Audit Committee's representatives on the sub-committee. It is anticipated that the Finance Committee would determine its representatives shortly and the sub-committee would have its initial meeting in January.

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

(1) Copy of Law Society Financial Statements for the nine months ended September 30, 2010.

(pages 14 - 21(17 - 19 in camera))

(2) Copy of Investment Compliance Statements as at September 30, 2010.

(pages 23 – 27)

FEDERATION OF LAW SOCIETIES OF CANADA REPORT

Mr. Conway thanked Mr. Campion for his considerable contributions to the Federation as President during the past year.

Mr. Campion addressed Convocation.

The Treasurer thanked Mr. Campion for his work at the Federation.

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GOVERNMENT RELATIONS AND PUBLIC AFFAIRS COMMITTEE REPORT

Mr. Caskey addressed the information item on the External Appointments Process.

Report to Convocation
November 25, 2010

Government Relations & Public Affairs Committee
In Camera

Committee Members
James R. Caskey, Co-Chair
Douglas Lewis, Co-Chair
Julian Porter, Vice Chair
Marion Boyd
Thomas Conway
Michelle Haigh
Glenn Hainey
Carol Hartman
Susan McGrath
Bill Simpson

Purposes of Report: Decision and Information

Prepared by the Policy Secretariat
Julia Bass 416 947 5228

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COMMITTEE PROCESS

1. The Committee met on November 10th 2010. Members of the Committee in attendance were: Douglas Lewis - Co-Chair, James Caskey - Co-Chair, Marion Boyd, Thomas Conway (by telephone), Michelle Haigh, Glenn Hainey, Carol Hartman (by telephone), Susan McGrath, and Bill Simpson. Staff members in attendance were Malcolm Heins, Jim Varro and Sheena Weir.

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FOR INFORMATION

EXTERNAL APPOINTMENTS PROCESS

16. The Law Society has adopted a new process in response to the requirement that the Law Society recommend appointments to the board of Legal Aid Ontario, the Justices of the Peace Appointments Advisory Committee and the Justices of the Peace Review Council.

Creation of a Resumé Bank

17. The Law Society has established a resumé bank, with the following features:
    a. Advertisements soliciting applications to be added to the bank will be placed once a year at the same time each year, to ensure a constant refreshment process. The first such advertisement, running in the Ontario Reports edition of November 19th, is shown at Appendix 2.
    b. Other names will be added during the year as they come to the Law Society's attention;
    c. Names will also be solicited from legal and paralegal related bodies such as the County & District Law Presidents' Association, Ontario Bar Association, Paralegal Society of Ontario, etc.;
    d. A standard application has been developed, with applications to be accepted electronically only. The draft content of the online application form is shown at Appendix 3;
    e. Each application will remain in the bank for three years from the date it is submitted;
    f. Applicants will be notified in writing that the application has been placed in the bank and advised that they will not be notified when their application expires, but will be expected to re-apply if interested, and
    g. The acknowledgment sent to applicants will indicate the date on which the application will expire. (The electronic nature of the applications will facilitate re-submission).

18. This process is similar to those used in other contexts where interest in appointments is sought.

Policy on Appointments

19. The Law Society has also adopted the following general policy for appointments to bodies such as the board of Legal Aid Ontario and the Justices of the Peace Appointments Advisory Committee:

a. Where the Law Society is to forward recommended names to the Attorney General, three names should be forwarded for each vacancy, with consideration being given to the importance of diversity, and other priorities in which the Law Society believes the organization can be strengthened

b. Appointments may be for two terms, unless there is a compelling reason otherwise.

Review

20. The new appointments process will be reviewed after three years.

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

(1) Copy of the advertisement in the November 19, 2010 Ontario Reports edition.
(Appendix 2, pages 12 – 13)

(2) Copy of the electronic standard application.
(Appendix 3, pages 14 – 18)

Convocation adjourned and reconvened as a Committee of the Whole in camera.

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EQUITY AND ABORIGINAL ISSUES COMMITTEE/COMITE SUR L'EQUITE ET LES AFFAIRES AUTOCHTONES REPORT

Mr. Schabas presented the Report.

Report to Convocation
November 25, 2010

Equity and Aboriginal Issues Committee/
Comité sur l'équité et les affaires autochtones

Committee Members
Janet Minor, Chair
Raj Anand, Vice-Chair
Constance Backhouse
Paul Copeland
Avvy Go
Susan Hare
Thomas Heintzman
Dow Marmur
Judith Potter
Heather Ross
Mark Sandler
Paul Schabas
Baljit Sikand
Beth Symes

Purpose of Report: Decision and Information

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

TABLE OF CONTENTS

For Decision

For Information.....TAB B

Equity Public Education Series Calendar (2010 – 2011)

COMMITTEE PROCESS

1. The Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones ("the Committee") met on November 10, 2010. Committee members Janet Minor, Chair, Raj Anand, Vice-Chair, Constance Backhouse, Avvy Go, Judith Potter, Heather Ross, Paul Schabas and Beth Symes participated. Milé Komlen, Chair of the Equity Advisory Group, also participated. Staff members Josée Bouchard, Sophie Gallipeau, Susan Tonkin, Aneesa Walji and Mark Wells attended.

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FOR INFORMATION

PUBLIC EDUCATION EQUALITY AND RULE OF LAW SERIES
2010 - 2011

BLACK HISTORY MONTH
February 8, 2011
Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 8:00 p.m.)

INTERNATIONAL WOMEN'S DAY
March 2, 2011
Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 8:00 p.m.)

RULE OF LAW SERIES
March 29, 2011
Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 8:00 p.m.)

HOLOCAUST MEMORIAL DAY
April 27, 2011
Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 8:00 p.m.)

ASIAN AND SOUTH ASIAN HERITAGE MONTH
May 24, 2011
Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 8:00 p.m.)

ACCESS AWARENESS - DISABILITY ISSUES AND LAW FORUM
June 8, 2011
Lamont Learning Centre (4:00 p.m. – 8:00 p.m.)

NATIONAL ABORIGINAL DAY
June 16, 2011
Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 8:00 p.m.)

PRIDE WEEK
June 23, 2011
Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 8:00 p.m.)

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REPORTS FOR INFORMATION

EQUITY AND ABORIGINAL ISSUES COMMITTEE/COMITE SUR L'EQUITE ET LES AFFAIRES AUTOCHTONES REPORT

- Public Education Series Calendar

Tribunals Committee Report

- Tribunals Office Quarterly Statistics
- Update on Hearing Panel Appointees

Report to Convocation
November 25, 2010

Tribunals Committee

Committee Members
Mark Sandler (Co-Chair)
Linda Rothstein (Co-Chair)
Alan Gold (Vice-Chair)
Raj Anand
Jack Braithwaite
Christopher Bredt
Paul Dray
Jennifer Halajian
Tom Heintzman
Heather Ross
Paul Schabas
Beth Symes
Bonnie Tough

Purposes of Report: Information

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

COMMITTEE PROCESS

1. The Committee met on November 11, 2010. Committee members Mark Sandler (Co-Chair), Linda Rothstein (Co-Chair), Alan Gold (Vice Chair), Jack Braithwaite, Christopher Bredt, Paul Dray, Jennifer Halajian and Beth Symes attended. Staff members Sophie Galipeau, Grace Knakowski, Lisa Mallia, Denise McCourtie, and Sophia Sperdakos also attended.

INFORMATION

a) TRIBUNALS OFFICE QUARTERLY STATISTICS

2. The Tribunals Office's Third Quarter Report for the period July 1, 2010 -September 30, 2010 is set out Appendix 1.

b) UPDATE on HEARING PANEL APPOINTEES

Background

3. In April 2007 Convocation approved a number of the recommendations of the Tribunals Composition Task Force, including,

> Recommendation 1
> That Convocation approve the eligibility of,
> a. four non-bencher lawyers, and
> b. four non-bencher non-lawyer persons
> to be members of the Law Society's Hearing Panel.
>
> Recommendation 2
> That if Convocation approves recommendation 1, all Hearing Panel members be remunerated on the same basis, except that the non-bencher lawyer and non-bencher non-lawyer members are not required to donate 26 days to the Law Society before being eligible for remuneration.
>
> Recommendation 3
> That Convocation budget annually an amount not exceeding $100,000 for the remuneration and expenses associated with adding non-bencher lawyers and non-bencher non-lawyer persons to the Hearing Panel.

Recommendation 4
That if Convocation approves Recommendation 1, two years after implementing the recommendation, Convocation authorize a review of the manner in which the non-bencher lawyers and the non-bencher non-lawyer persons have served as adjudicators on the Law Society's Hearing Panel, the results of which are to be reported to Convocation.

4. It is important to note, as well, that separate from the four non-bencher lawyer appointee and the four non-bencher lay appointee system, the Law Society on occasion appoints "temporary" panelists (lawyer and lay) to sit on French language hearings and temporary paralegal panelists to sit on paralegal good character or appeal hearings. The Law Society has authority to do this pursuant to section 49.24.1 of the *Law Society Act*. This need has arisen because of insufficient French speaking panelists or paralegal panelists available from Hearing or Appeal Panel sources.

5. The non-bencher lawyers and non-bencher lay adjudicators approved under the Tribunals Composition Task Force recommendations, above, were appointed in January 2009. The Committee is in the process of preparing information for the two-year review referred to in Recommendation 4 and will report to Convocation early in 2011.

Recommendation 3

6. The Committee is providing information to Convocation on the $100,000 remuneration and expenses budget referred to in Recommendation 3. That figure does not include expenses or remuneration for temporary panelists.

7. The $100,000 figure that the Task Force recommended was based on a rough guess of how much funding might be necessary. At the debate in Convocation in April 2007 the Chair of the Task Force noted:

> The Task Force Report reflects how that budget was arrived at. In essence what we've done is projected from the number of days that typically Benchers spend on adjudicative to the number of days that non-Benchers would spend on this work. The idea being that we would not be offloading the work of Bencher adjudicators – no way, we wouldn't be offloading that work simply to non-Bencher adjudicators but recognizing that our first source of adjudicative work is right here in this room. And that is why the recommendation has been proposed in the way that it has.

8. In 2009 the total expenses and remuneration for non-bencher lawyer and non-bencher lay appointees and temporary paralegal appointees was $88,621.38, representing the use of five lay people, two temporary paralegals and three lawyers.

9. As at the end of September 2010,

   a. the expenses and remuneration for lawyer appointees is $31,048.78 ($7,857.71 of which is for French language hearings);

   b. the expenses and remuneration for lay appointees is $83,438.07 ($5,425.66 of which is for French language hearings); and

c. the expenses and remuneration for "temporary" lay and lawyer adjudicators for French language matters and temporary paralegal adjudicators panelists is $14,385.87.

10. It is likely that additional funds will have to be expended before the end of 2010. Based on this year's experience it is realistic to expect a similar experience and needs in 2011.

11. As paragraph 14 (a) and (b) indicate, total expenses and remuneration to September 30, 2010 applicable to non-bencher lawyer and non-bencher lay appointees has exceeded the $100,000 amount by $14,486.85. Of the $114,486.85, however, $91,295.78 has been for,

a. lay appointees; and/or

b. to meet the needs of French language hearings, as there are only a few lawyer benchers and no lay benchers who can preside over a French language hearing.

12. Given the requirements of Regulation 167/07 respecting lay representation on hearings and the Law Society's own commitment to having lay benchers on all hearings and given a licensee's right to a French language hearing, the Law Society has assigned non-bencher lawyer and non-bencher lay appointees to ensure these requirements and policies are met.

13. When an assignment to a hearing is made it is impossible to know the exact length of time that will be involved. Once the hearing begins adjudicators are seized regardless of how long it takes to complete a matter. In some hearings there are numerous motions and continuation dates.

14. The 2011 budget includes a request in the Tribunals budget for additional funds for the use of non-bencher lay and non-bencher lawyer appointees and temporary appointees. Based on current and projected 2010 expenses and remuneration the estimated requirement for 2011 is $175,000. This amount can be accommodated within the Policy and Tribunals 2011 budget.[1]

[1] The amount originally included in the budget was $136,500. Based on projections for 2011 the amount required is $175,000. The additional requirement of $38,500 can be accommodated through a reallocation of funds within the Policy and Tribunals budget for 2011.

15. The Committee supports the allocation of $175,000 to non-bencher lawyer and non-bencher lay appointees for 2011 to ensure the Law Society meets its obligations for transparent, fair and efficient hearings.

CONVOCATION ADJOURNED AT 12:30 P.M.

Confirmed in Convocation this 27th day of January, 2011.

Treasurer