

28<sup>th</sup> October, 2004

MINUTES OF CONVOCATION

Thursday, 28<sup>th</sup> October, 2004  
9:00 a.m.

PRESENT:

The Treasurer (Frank N. Marrocco, Q.C.), Alexander, Backhouse, Banack, Bobesich, Bourque, Boyd, Champion, Carpenter-Gunn, Caskey, Cass, Chahbar (by telephone), Cherniak, Chilcott, Coffey, Curtis, Doyle, Dray, Eber, Feinstein, Filion, Gold, Gotlib, Gottlieb, Harris, Hunter, Krishna, Lawrence, Legge, Millar, Murphy, Murray, O'Donnell (by telephone), Pattillo, Pawlitz, Porter, Potter, Ruby, St. Lewis, Silverstein, Simpson, Swaye, Symes, Topp (by telephone), Wardlaw, Warkentin and Wright.

Secretary: Katherine Corrick

The reporter was sworn.

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IN PUBLIC

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TREASURER'S REMARKS

The Treasurer welcomed former Treasurer, Dan Chilcott back to Convocation.

Congratulations were extended to Roger Yachetti who will receive the Emilius Irving Award from the Hamilton Law Association. This award, named in the memory of Emilius Irving, a former Treasurer of the Law Society and first President of the Hamilton Law Association, is given in recognition of a lawyer's outstanding contribution to the profession and the community.

The Treasurer expressed condolences to Susan Elliott and her family on the passing of her father Donald Boyd Good on October 13, 2004.

MOTION - TASK FORCE APPOINTMENTS

It was moved by Mr. Pattillo, seconded by Mr. Swaye:

Governance Task Force

That Richard Filion and Andrew Coffey be appointed as members to the Governance Task Force.

Tribunals Task Force

That Holly Harris be appointed as a member to the Tribunals Task Force.

Task Force for Employment Opportunities for Articling Students

That Kim Carpenter-Gunn be appointed Chair in place of Earl Cherniak and Joanne St. Lewis, Constance Backhouse and Laurie Pawlitza be added as members to the Task Force for Employment Opportunities for Articling Students.

Carried

REPORT OF THE FINANCE AND AUDIT COMMITTEERe: 2005 Budget

Mr. Ruby presented the Report of the Finance and Audit Committee.

Finance and Audit Committee  
October 28, 2004

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Report to Convocation

Purpose of Report:            Decision

Prepared by the Finance Department  
Andrew Cawse (947-3982)

## THE REPORT

1.        The Finance and Audit Committee (“the Committee”) met on October 14, 2004. Committee members in attendance were: Ross Murray (acting chair), Abdul Chahbar (v.c.), Peter Bourque, Andrew Coffey, Paul Dray, Allan Gotlib, Holly Harris, Allan Lawrence, Laurie Pattillo, Alan Silverstein, Gerry Swaye, Beth Symes and Bradley Wright.

Other Benchers attending were Bob Topp, and Abe Feinstein. Rich Wilson and Suzan Hebditch attended representing LibraryCo. Staff attending were Malcolm Heins, Wendy Tysall, Fred Grady, and Andrew Cawse.

2.        The Committee is reporting on the following matters:

For Decision

- 2005 LIBRARYCO INC. BUDGET

The Finance & Audit Committee recommends that Convocation approve LibraryCo Inc’s budget for 2005.

- 2005 LAW SOCIETY BUDGET

The Finance & Audit Committee recommends that Convocation approve the Law Society’s budget for 2005.

FOR DECISION:

2005 LIBRARYCO INC. DRAFT BUDGET

#### Request to Convocation

The Finance & Audit Committee recommends that Convocation approve LibraryCo Inc's budget for 2005.

3. The LibraryCo Inc. Board of Directors has submitted an operating budget for 2005 in compliance with the Unanimous Shareholders Agreement. This budget requests funding from the Law Society of \$6.24 million, a 6% increase from 2004. The draft budget (in camera) accompanies this report.
4. Management proposed that funding for LibraryCo be maintained at the 2004 level of \$5.9 million. The Committee considered the management proposal and supported the LibraryCo request of \$6.24 million.

#### FOR DECISION:

#### LAW SOCIETY 2005 DRAFT BUDGET

#### Request to Convocation

The Finance & Audit Committee recommends that Convocation approve the Law Society's budget for 2005.

5. The draft Law Society budget for 2005 is submitted under separate cover in two books. The Summary book\* is a public document providing an overview of the Society's budget in its major functional categories with summarized staffing, revenue and expense information. The Detail book (in camera) provides a detailed, divisional breakdown of staffing numbers, revenue analysis and expense breakdown, comparing 2004 budgeted and projected numbers with the draft 2005 budget. Departmental narratives are also included describing operations and performance.
6. The draft budget proposes that the total membership levy for 2005 be maintained at the 2004 level of \$1,441. The general membership fee is increased \$21 to \$960; the LibraryCo levy is increased \$9 to \$206; the Lawyers Fund for Client Compensation is decreased \$30 to \$200 and the Capital Fund remains at \$75.
7. Maintaining the total annual levy at \$1,441 has been the result of a combination of factors affecting revenues and expenses in addition to using some of the projected 2004 surplus.

#### General Membership Fee

#### Revenues

8. The budget contains significant changes in revenue projections from the 2004 budget. Two major revenue sources are budgeted to decrease: Errors and Omissions investment income by \$500,000 from \$3.0 million to \$2.5 million and royalties from the Ontario Reports by \$115,000 from \$1.740 million to \$1.625 million.
9. Tuition revenue from the Bar Admission Course (BAC) is budgeted to increase by \$700,000 in 2005 as a result of increasing numbers of students. This additional revenue is largely offset by additional operating costs of the BAC. Tuition fees per student will remain at \$4,400.

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\* In moving through the budget, page references are provided to assist the reader in viewing the information in greater detail if desired. For example, turning to the Summary book page 18, the Society's budget is divided into its various components: Professional Regulation, Professional Development & Competence etc. Across the top of each column is a page reference number that provides greater detail on each component. Looking at the Professional Regulation column there is a page reference to page 26. On page 26 Professional Regulation is divided into its various components: Investigation, Discipline etc. On pages such as 26, line 1 Total Employee/FTE shows two numbers at the top of each column. The first number is the number of employees in the department, the second number is the number of full time equivalents ("FTE"). If the FTE number is less than the number of actual employees, the department has staff that work part-time.

10. The Law Foundation of Ontario (LFO) contributes to the BAC via an annual grant. The LFO contributed \$1.3 million to the BAC in 2004 and the 2005 budget maintains funding at this level.
11. The 2005 budget projects membership growth of 1,000 full fee paying equivalent members. Increased membership increases revenue but, at the same time, increases the demands on the services and programs the Society provides and inevitably increases the costs of the Society's operations.

#### Expenses

12. Budgetary expenditures are increasing by \$3.4 million in 2005, primarily as a result of mortgage fraud investigations (\$1,000,000) and changes to the BAC (\$680,000).
13. In addition, an allowance for merit increases to staff salaries has been included in operational expenses throughout the budget. The total provided is \$600,000 based on 3.5% of total compensation and discounted for anticipated staff turn over. This discounted provision represents approximately 2% of total compensation expenses.
14. As well, a provision for Benchers remuneration has been included in the amount of \$200,000 based on estimates previously reported to Convocation.
15. The Communications Department has decreased costs by \$100,000 by reducing the number of issues of the Lawyers Gazette to four issues from the normal six.
16. Funding for the Great Library at \$3 million is essentially unchanged from 2004. Total Library spending including CanLii and LibraryCo amounts to \$9.8 million in 2005.
17. Paralegal regulation has not been factored into the expenses or revenues contained in this budget, relying on the undertaking that no financial burden will be placed upon the Law Society for this purpose.
18. The Society's general contingency account of \$1.2 million, unchanged from 2004, is available for the funding of projects or programs that come before Convocation after the approval of the current year budget. In the past this has been used to fund such activities as the small firm task force and the referendum on benchers remuneration. This contingency is vital to allow Convocation the flexibility to act on issues of importance that arise between annual budget processes. Finally, the election of a new Treasurer in mid-year, frequently signals a change in direction for Convocation. This is often accompanied by increased costs that again, must be borne by the Society's general contingency provision.

#### 2004 Surplus

19. The 2005 budget proposes that \$1,450,000 of a projected \$1.9 million 2004 surplus be applied to reduce the annual membership levy that would otherwise be required if the surplus was not available. The utilization of this surplus results in a \$48 reduction in the member fee. Without that use, the fee would have risen to \$1,489.
20. The Working Capital Reserve remains at \$7.95 million. The reserve was established in 2002 to provide working capital to ensure the ability of the Society to meet its current financial obligations. The reserve policy provides for the maintenance of a balance of up to two months of operating expenses. The current balance is slightly less than two months expenses but is adequate to support the operations of the Society. The 2005 budget does recommend a change in the balance of the Working Capital Reserve.

#### Lawyers Fund for Client Compensation

21. The Fund will end 2004 with a fund balance of approximately \$19 million. This strong fund balance and recent claims history make it possible to recommend establishing a lower claims provision in 2005 and eliminating claims insurance (current insurance coverage of \$10 million over \$15 million in claims costs approximately \$500,000).

22. The Compensation Fund Committee supports maintaining the levy at \$230, primarily to continue purchasing excess claims insurance. The Finance & Audit Committee reviewed the fund balance, claims history and opinion from the Compensation Fund's actuary.
- The fund balance has experienced a steady increase in recent years from a low of \$9 million in 1997 to a projected balance of around \$19 million at the end of 2004.
  - Since 1991 annual claims against the Fund have averaged \$3.8 million with a high in 1991 of \$8.8 million and a low in 2002 of \$2 million.
  - The Fund's actuary examined five scenarios based on claims in 2005 ranging from \$2.7 million (used in the draft budget and according to the actuary the most likely scenario for 2005) to \$21.4 million and inferred that the impact on the fund balance of the levy reduction recommended by the Committee was minor, and that there would be minimal impact from eliminating the insurance unless claims exceeded \$15 million.

The Committee concluded that the factors summarised in the above points and detailed in the attached memo from the actuary, Craig Allen Vice President of LawPro, provided appropriate support for its recommendation to reduce the levy by \$30 to \$200 and essentially to self insure.

#### Capital

23. The largest single capital project included in this year's budget is the development and implementation of a regulatory case management system. The estimated cost of the project is \$986,000. The system is expected to be implemented by the fall of 2005 and will provide the Regulatory Division the functionality it requires to ensure proper tracking and timely processing of complaints filed with the Society. The system is a critical element in the Society's continuing quest for service level improvements.
24. The renovation of the North Wing of Osgoode Hall has necessitated the deferral of several other capital projects planned for the historic South Wing. The deferral of these projects will allow for the final allocation of funding to the North Wing and minimize additional disruption to the operations of the Society during this major renovation project. Deferral of these projects will not eliminate the need for them to be completed at some time in the future. Therefore, this budget proposes that the remaining balance of the 2004 surplus, approximately \$500,000, be transferred to the Capital Allocation Fund to provide funding for these projects.

#### LAWPRO

TO: Lawyers' Fund for Client Compensation Committee

FROM: Craig Allen  
Vice President & Actuary

DATE: September 17, 2004

RE: Considerations Re Compensation Fund Levy 2005

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Beginning in 2001, the Compensation Fund undertook a sustained program to increase its Fund Balance (the net worth of the Fund net of amounts earmarked for claims in progress). In each year from 2001 through 2003, the Compensation Fund levy provided roughly \$2.6 million for smaller incidents and an additional amount for large-scale defalcations. In 2003, the additional amount was \$1.5 million, based on the average large-scale defalcation over the time since 1990. As there was no major defalcation during this period, the Fund Balance grew from \$9.3 million at December 2000 to \$17.4 million at December 2003.

The growth of the Fund Balance over that period created an opportunity to reduce the member levy from \$280 for 2003 to \$230 for 2004. With the lower levy, the provision for large-scale defalcations was reduced from \$1.5

million to \$400,000. Thus, the levy would roughly cover the Fund's costs for a year without a large-scale defalcation – however, if there were such a large-scale incident, its claims would reduce the Fund Balance. In the absence of a large-scale incident, the Fund Balance would remain at the same level.

Protection for worse-than-expected results is provided both by the Fund Balance and by the insurance of the Fund underwritten by LAWPRO. The insurance, to a maximum of \$10 million, attaches at a claims level of \$15 million.

Through June 30, 2004, the value of claims reported to the Fund in 2004 is roughly \$650,000, which is well below the \$1.5 million budgeted for the period. Furthermore, the claims experience through September 15 continues to be favourable. This favourable variance, along with better-than-expected investment results has increased the Fund Balance to \$18.8 million.

In light of the continued growth of the Fund Balance, the question arises whether the Fund Balance is high enough to justify

- eliminating the insurance, and/or
- subsidizing a reduction of the levy.

The following table presents the annual claims experience since 1991 for small-scale and large-scale defalcations. These claims are re-stated to the current limit of \$100,000 per claimant. For 2004, it is assumed that claims for the remainder of the year will equal the amount budgeted for those two quarters.

(\$000s)

Year	Small-Scale	Large-Scale	Total
1991	4,000	4,800	8,800
1992	4,400	0	4,400
1993	2,800	900	3,700
1994	2,500	1,600	4,100
1995	2,500	500	3,000
1996	2,400	3,800	6,200
1997	1,700	600	2,300
1998	1,500	2,200	3,600
1999	2,300	0	2,300
2000	1,700	4,000	5,800
2001	2,700	0	2,700
2002	2,000	0	2,000
2003	2,700	0	2,700
2004 (est.)	2,150	0	2,150

For the purpose of evaluating the consequences of continuing the insurance and reducing the levy, the following claims scenarios are presented. They are tested against four options with respect to the 2005 levy and the insurance coverage:

1. Levy \$200, without Insurance
2. Levy \$215, with Insurance
3. Levy \$230 (same as 2004), without Insurance
4. Levy \$230, with Insurance (status quo)

Scenario 1:

Under this scenario, claims for the year are valued at \$2.7 million. This is the level of claims experienced in 2003, and is roughly equal to an average year of claims (in the absence of a large-scale defalcation).

The current Fund Balance of \$18.8 million changes to the following, under each of the options, in this scenario:

Option	Fund Balance, Dec 2005
\$200, without Insurance	\$18.7 million
\$215, with Insurance	\$18.7 million
\$230, without Insurance	\$19.6 million
\$230, with Insurance	\$19.1 million

We see that, under all of these options, the Fund Balance increases slightly. This claims scenario is the most likely: results similar to this have appeared in seven of the last ten years.

Scenario 2:

Under this scenario, claims for the year are valued at \$5.7 million. This is the level of claims experienced in 2000, which is representative of a year in which a large-scale defalcation comes to light.

The current Fund Balance of \$18.8 million changes to the following, under each of the options, in this scenario:

Option	Fund Balance, Dec 2005
\$200, without Insurance	\$15.7 million
\$215, with Insurance	\$15.7 million
\$230, without Insurance	\$16.6 million
\$230, with Insurance	\$16.1 million

Under this scenario, the Fund Balance returns roughly to its March 2003 level of \$16.3 million. The insurance has little effect at this level.

Scenario 3:

Under this scenario, claims for the year are valued at \$11.5 million. This scenario is constructed by beginning with the value of claims experienced in 1991, \$7.5 million. This is the year where the Fund's claims reached their peak value.

While some of the claims reported in 1991 were limited by \$100,000 per-claimant limit now in place, many were limited to \$60,000. It is projected that the 1991 claims would have been valued at \$8.8 million had the \$100,000 limit been in place uniformly.

In addition, there were only 15,200 lawyers in private practice in Ontario in 1991, compared to the 20,000 currently in practice. If the count of 1991 claims were adjusted in line with the increased number of lawyers, the \$8.8 million of limits-adjusted claims would rise to \$11.5 million.

The current Fund Balance of \$18.8 million changes to the following, under each of the options, in this scenario:

Option	Fund Balance, Dec 2005
\$200, without Insurance	\$9.9 million
\$215, with Insurance	\$9.9 million
\$230, without Insurance	\$10.8 million
\$230, with Insurance	\$10.3 million

Under this scenario, the Fund Balance reaches a level slightly above its December 2000 level of \$9.3 million. It is notable that such an extreme scenario (a level of claims experienced only once in fourteen years) only returns the Fund back to its status at the time that the sustained program to increase the Fund Balance was started.

Scenario 4:

Under this scenario, claims for the year are valued at \$15.0 million. This is the highest level of claims at which the Fund is not indemnified by the insurance coverage.

The current Fund Balance of \$18.8 million changes to the following, under each of the options, in this scenario:

Option	Fund Balance, Dec 2005
\$200, without Insurance	\$6.4 million
\$215, with Insurance	\$6.4 million
\$230, without Insurance	\$6.8 million
\$230, with Insurance	\$6.3 million

Scenario 5:

Under this scenario, claims for the year are valued at \$21.4 million. This is the level of claims that would exhaust the Fund's financial resources, in the absence of insurance.

The current Fund Balance of \$18.8 million changes to the following, under each of the options, in this scenario:

Option	Fund Balance, Dec 2005
\$200, without Insurance	\$0
\$215, with Insurance	\$5.6 million
\$230, without Insurance	\$0.4 million
\$230, with Insurance	\$6.0 million

Inferences:

The impact on the Fund Balance of reducing the levy is minor, in comparison to the impact of various claims scenarios. In addition, there would be a minimal impact from eliminating the insurance, unless claims exceed \$15.0 million.

The attached chart shows the historical claims experience of the Fund since 1990, stated in probability format. This experience is shown in the context of a probability curve. It can be seen that in no year has the claims level exceeded \$7.5 million – this is well short of the \$15 million threshold at which the current insurance attaches. Furthermore, claims have not exceeded \$2.7 million since 2000. That said, the absence of a large-scale defalcation in the last four years does not indicate that there is no possibility of another such defalcation arising in the next year - the experience of other Canadian jurisdictions points to the continued threat.

Probabilities of Claims Outcomes  
Lawyers Fund for Client Compensation

(see graph in Convocation file)

LAW SOCIETY OF UPPER CANADA

2005 DRAFT BUDGET  
SUMMARY

October 14, 2004

2005 Budget Overview

Over the past three years management at the Law Society has focused on organizational restructuring and process redesigns that have successfully transformed the Society into a cost-effective, service-oriented organization with an annual budget that allows us to deliver effectively on our mandate to govern in the public interest, while providing members with value for their fees.

Over the same period, we have undertaken extensive planning and development to prepare for the implementation of the new licensing program intended to replace the Bar Admission Course (BAC) in 2006. Times to coordinate with this change in the BAC, is the renovation of the North Wing of Osgoode Hall scheduled to commence in the fall of this year with completion in early 2006.

In 2005 we are continuing the process of updating our systems so that they are adequate to meet the needs of the Society in its role as regulator. This budget dedicates funds for the development and implementation of a case management system. For Professional Regulation this system is crucial for the effective management of the complaints process.

In spite of the significant financial pressures, it is recommended that the 2005 levy remain unchanged from the 2004 levy at \$1,441. This will be the fourth consecutive year of no levy increases and a 19% reduction over this four year period.

What the 2005 Budget Achieves

It is evident from the performance measures provided in the budget materials that all areas of the Law Society are experiencing increased volumes and providing increased service levels. Examples of these increasing volumes are:

- The number of members is projected to increase to approximately 36,000 in 2005 (30,000 full fee paying equivalents),
- In the first eight months of 2004, the Regulatory Division opened 2,900 files, compared to 2,500 in the same period in 2003,
- The number of BAC students is projected to increase from 1,250 to 1,400,
- Policy development continues to expand with the addition of the Governance, Articling and Tribunal Task Forces,
- Traffic on the Law Society's web-site continues to increase. Prior to the revamp of the web-site there were approximately 3 million hits per month. The equivalent number is now 12 million.

The 2005 Budget has been structured to accommodate these increasing volumes while maintaining service levels without increasing the financial burden on Law Society members.

The 2005 Budget has also been tailored to deal with a number of specific new challenges at no extra cost to members. These specific challenges are:

- The Regulatory Division is in the midst of a number of large and complex mortgage fraud investigations. Additional resources of approximately \$1,000,000 are allocated to these investigations in 2005. This annual allocation is not expected to be repeated beyond the next few years.
- The implementation of the new regulatory case management system will require both direct and indirect resources from the Regulatory Division and Information Systems.
- The renovation of the North Wing is commencing in October 2004. There are no capital funding requirements for this in the 2005 budget as it is already substantially funded, but there are operating implications. The BAC and Continuing Legal Education (CLE) will incur additional off-site location costs totaling \$580,000 in 2005. This cost will not be repeated in subsequent years.
- Development of the BAC licensing regime recommended by the Continuum Task Force and approved by Convocation for implementation in 2006 has been allocated \$400,000 in 2005.
- The possibility of bencher remuneration, if approved by referendum, has required the provision of \$200,000 for the direct costs of remuneration.
- Library-related services consume 15% of total expenses. These resources are being increased by 3% in 2005 with \$9.8 million allocated to LibraryCo, the Great Library and CanLII.
- The significant progress made toward the regulation of paralegals continues at no additional cost to Law Society members. We expect incremental costs in 2005 and beyond will continue to be borne by paralegals or government funding.

#### Budgetary Impact

The 2005 budget therefore allows us to pursue a number of opportunities and meet a series of challenges. Although budgetary expenditures are increasing by \$3.4 million, we are able to meet most of these challenges without entrenching major increases into the Society's cost structure. The major one-time or temporary increases referenced above can be summarized as resources for mortgage fraud investigations - \$1,000,000, Professional Development and Competence (PD&C) off-site costs - \$580,000, BAC licensing regime - \$400,000 for a total of \$1,980,000.

The remainder of the \$3.4 million increase is composed primarily of a provision for bencher remuneration (\$200,000), salary merit adjustments (\$600,000), increased security and utility costs in Facilities (\$200,000) and an increase in Information Systems costs (\$200,000).

This increase in total expenses is offset by an increase of approximately \$228,000 in non-membership fee revenues despite a projected decrease in investment and other income totaling \$700,000. Investment income is decreasing primarily because transfers in 2005 from the Errors and Omissions Fund will decline to \$2.5 million from the \$3 million in 2004. Our results from operations for 2004 are projected to generate a surplus of \$1.9 million. The 2005 budget uses \$1.4 million of this surplus to offset the one-off costs described above.

The fee breakdown for 2005 is as follows:

• General Membership	\$ 960
• Lawyers Fund for Client Compensation	200
• LibraryCo	206
• Capital and Technology	<u>75</u>
<b>TOTAL:</b>	<b><u>\$1,441</u></b>

For students, the Bar Admission Course fees remain at \$4,400

Since 2001, management of the Law Society has been reviewing all aspects of the Law Society's operations and restructuring the organization. We have been doing so to change the Law Society into a more focused, cost-effective, service-oriented organization with an annual budget that allows us to deliver effectively on our mandate to govern in the public interest, while providing members with value for their fees.

## Budget Process

Our budget process involves a series of rotational operational reviews. Each year, operational areas are selected, the mandate or output of the area is defined and then resources to meet that output are assessed. For the 2005 budget process the Professional Regulation department and the Policy and Legal Affairs department underwent review.

As a result of these reviews over the past three years all of the Law Society's significant fiscal resources have undergone operational reviews or systems audits. We will continue to conduct similar reviews on a rotational basis over the next few years.

The format of the budget materials is organized according to function and does not follow organizational structure. The 2004 approved budget has been restated to conform to the 2005 presentation with allowance for salary merit adjustments allocated to all functions rather than aggregated under corporate expenses.

## Strategic Direction

The Law Society's annual budget is prepared based on the organization's core obligations, focusing the resources of the Law Society on professional regulation, professional development and competence, and policy development.

We have made significant improvements in these core areas achieving significant results in an effort to improve our service to members of the public and the legal profession.

Professional regulation has examined ways to address issues of timeliness, fairness, transparency and the effectiveness of the complaints processing throughout the entire process from the time a complaint comes into the Law Society to the final outcome of each matter, including divisional issues of enhanced support, training and expertise.

Continuing improvements in professional regulation timeliness, quality and effectiveness include:

- Implementation of aging targets
- Significantly reduced timelines in Complaints Resolution
- Implementation of professional training programs
- Development of casework tools including templates, forms and procedures
- Redesign of case processes and creation of process guides
- Improved case tracking system
- Organisational changes promoted greater integration and streamlining such as reorganization of management structure, centralization of investigation activities in Toronto

Professional development and competence continues to focus on the true needs of the profession, from acceptable practices through to excellence in practice, and to providing learning and information supports to assist members to meet competence goals. Priorities include:

- Providing supports to assist lawyers to achieve and maintain competence
- Filling the gaps in the education grid by designing and delivering new intermediate and advanced level programs
- Continuing to determine program, product and service priorities through needs analysis
- Continuing to explore and implement alternate delivery models developed for information and education products and services such as the popular Interactive Learning Network and supplementing traditional lecture formats with new small group discussions
- Promoting and marketing the new products and initiatives being offered
- Completing the implementation of the Education Administration System that for the first time will provide an integrated membership and services database.
- Launching the Best Practices Self Assessment Tool

- Integrating, wherever possible, equity-related information and resources into professional development and competence programs, products and services

The Policy Secretariat continues to provide support to Convocation in its policy development process.

#### Departmental Summaries

##### Professional Regulation

The budget request for Professional Regulation increases from approximately \$10.4 million to \$11.4 million in 2005 (not including the Compensation Fund). Increases are attributable to a number of factors including:

- marginal staffing level increases (ignoring temporary increases for the mortgage fraud investigations)
- higher outside counsel fees primarily directed at the ongoing mortgage fraud investigations which are extremely resource-intensive, but are viewed as not continuing beyond the next few years
- increased resources required by complaints intake
- salary adjustments

##### Professional Development and Competence

Professional Development and Competence represents the largest component in the Law Society's expense budget and provides a quarter of total revenues.

CLE revenues are projected to continue their increases of prior years but at a slower rate as significant product gaps have been filled and marketing programs have taken effect. Projected CLE revenues for 2005 are \$3.7 million a 6% increase from the 2004 budget.

The student tuition fee for the BAC is maintained at \$4,400 for the fourth year in succession but increased projected student enrolment from 1,250 to 1,400 means BAC tuition fees are projected at \$6.2 million in 2005.

The 2005 PD&C budget proposes total expenditures of \$17.3 million, as compared to the \$15.9 million budgeted expenditures in 2004. Approximately one-quarter of the proposed expenditure increase in PD&C relates to the costs of establishing the BAC off-site at Ryerson University and paying for rental of rooms for CLE programming during the renovation of the Lamont Lecture Hall. We anticipate total revenues to climb from \$11.3 million in 2004 to \$12.2 million in 2005 further explaining the increase in expenses as service levels are maintained in the face of higher business volumes.

The BAC accounts for a large portion of the PD&C expenditures coming in at approximately \$7.1 million compared to \$6.2 million in the 2004 budget. The continued achievement of efficiencies in core processes in the BAC will assist the Law Society in maintaining the budget for those core processes at a comparable level despite increases in activity in distance learning, increasing support to students, and market increases in expenditures for space rental, materials production and the development of online learning supports. However as a result of the North Wing renovation and for one year prior to the new licensing regime, the 2005 BAC in Toronto is moving offsite. This has resulted in a one-time increase in a number of expenses. For instance, facilities rental is increasing by \$380,000.

With the continued financial assistance of the Law Foundation of Ontario (LFO) the student tuition fee for the Bar Admission Course is maintained at \$4,400 for the fourth year in succession. Funding in this year's budget from the LFO of \$1.3 million is unchanged from 2004.

CLE will continue to focus on maintaining the many new delivery initiatives that have been introduced to the membership including the Interactive Learning Network, teleseminars, on-demand video streams and a variety of alternative options for the purchase of materials. Increased focus will be placed on publishing and promoting the CLE program materials as a unique current resource for members. It is important to note that increased accessibility has led to increased attendance in turn leading to increased variable costs. CLE accounts for approximately \$2.9 million in 2005 PD&C expenditures an increase of approximately \$300,000 primarily because of one-time off-site

course venue rental costs during the North Wing renovation. Offsetting expenditures are \$3.7 million in CLE revenues reflecting the significant growth in member response to CLE activities.

#### Policy and Convocation

Policy and Convocation is responsible for a number of functions important to the corporate interests of the Law Society, including policy development, Convocation support and government relations.

The Policy Secretariat is responsible for supporting the policy work of benchers. They act as secretaries to committees, task forces and working groups. Policy Advisors are responsible for developing policy ideas, including research, consultation with stakeholders, and writing reports. The Clerk to Convocation is also part of the Policy Secretariat.

The budget includes \$100,000 for policy development. These funds are used to pay for third party costs associated with Convocation's committees and task forces.

The Policy Secretariat was created in 1996 to support three standing committees - Admissions, Professional Regulation and Professional Development and Competence. The same number of Policy Advisors now support more than double that number of committees, along with numerous other Task Forces and Working Groups.

Government Relations anticipates, monitors and addresses regulations and legislation that affect access to and the quality of legal services in Ontario. The work of the Committee has increased due to the increased number of consultations by government with the Law Society.

Despite the increased level of support to Convocation, expenses have remained relatively static within Policy and Convocation, with the exception of a new \$200,000 provision for bencher remuneration to be used in the event bencher remuneration is approved in the referendum held after the 2005 budget is approved.

#### Other operational functions

The budget requirements developed for each Law Society department are based on what they need to support the strategic functions.

Operational areas such as Finance and Administration, Human Resources, Information Systems, the Client Service Centre and Communications and Public Affairs will continue to concentrate their efforts and resources in helping us achieve the goals we have set for professional development and competence and professional regulation for 2005.

#### Finance and Administration

The department provides the following services: general accounting, accounts payable and receivable processing, cash management and banking, payroll, insurance, central purchasing, billing of the annual membership fee and suspension for non payment of annual fees.

The department is responsible for ensuring the adequacy of internal financial controls intended to safeguard the financial assets of the Society and for ensuring the Society's books and records are in compliance with generally accepted accounting principles. Staff coordinate the Society's annual budget process and track the expenditures to budget throughout the year, assisting departments in managing their individual budgets.

To continue to provide these services, improve customer service and utilize the enhanced technological capabilities of the Society, the department proposes a budget, primarily for staffing costs, of \$2.6 million in 2005, a decrease of \$23,000 due to efficiencies and process reviews resulting in staffing decreases and reduced costs.

#### Facilities

The Facilities Department provides ongoing facility services, including planning, design, implementation and financial control. Services consist of housekeeping; building and grounds maintenance; event booking; security; fire

prevention; environmental and energy management; space and accommodation planning; building preservation; curatorial, and minor and major capital project services. The latter includes:

- Heritage restorations
- Renovations and re-configurations, including the large North Wing renovation
- Major equipment repairs and replacements
- Structural reinforcements and stabilization
- Energy conservation renovations and retrofits
- Accessibility alterations
- Security improvement upgrades

The department proposes an operating budget of \$3.3 million in 2005 up from \$3 million in 2004, a 7% increase. The budget increase is due to increases in salaries, and relatively large increases in leasing and utility costs. The Society is pursuing cold water cooling opportunities with Enwave as a means to reduce future energy costs.

Facilities capital projects are budgeted at \$600,000 in 2005 primarily related to mechanical and electrical upgrades.

#### Catering

The primary function of Catering is to provide food preparation services for Benchers needs and Society staff. An a la carte restaurant service in Convocation Hall during the lunch hour period is operated from 12:00 noon until 2:00 p.m. Lawyers, staff, Benchers and members of the public regularly patronize the restaurant. The restaurant is operational from Monday to Friday from September to June and, on a typical day, will provide service to about 200 patrons. The cafeteria serves approximately 300 patrons per day. In addition, the department caters events for outside organizations wishing to use the facilities at Osgoode Hall for their particular events.

The cafeteria is also used for the provision of meals for the Lawyers Feed the Hungry program. The site and its facilities are provided to the program free of charge. The program serves approximately 1,300 meals per week or some 65,000 meals per year.

In 2005, Catering expenditures are budgeted at \$1.3 million, compared to \$1.1 million in 2004, with a net cost of approximately \$200,000 (net of revenues) in 2005.

#### Equity Initiatives

Consistent with the Law Society's mandate to govern the profession in the public interest and to facilitate access to justice, the Equity Initiatives Department undertakes activities to help ensure that:

- the Law Society's services, programs and decision-making as well as membership are reflective of the Ontario population and accessible to diverse communities;
- there are no discriminatory barriers to participation in the legal profession in Ontario;
- the governance of the profession is guided at all times by goals of non-discrimination, equity and diversity.

The Department's activities are divided into the following main areas: Public Education; Research/Policy Development; and Equity and Diversity in Employment. The Department also supports the functions of the Discrimination/Harassment Counsel.

The Department's budget increases from \$785,000 in 2004 to \$837,000 in 2005 with consistent staffing levels.

#### Communications and Public Affairs

Communications & Public Affairs provides advice and support to all areas of the Law Society to promote and enhance the organization's profile and credibility among our many target audiences. Staff use a wide range of communications and public affairs tools to communicate and deliver key messages to members of the public, the profession and legal community, the government, the media and other stakeholders.

The budget proposal for 2005 is \$1.6 million unchanged from 2004, split between staff (12 people) and program expenses. Program expenses support the following key activity areas:

- Media Relations and issues management
- Corporate web site development, design and information management
- Internal communications
- Member communications
- Public communications
- Creative and publishing services

#### Human Resources

Human Resources (HR) plays a dual role in the organization. First, staff provide vital expertise and support in core people processes: recruitment and selection, performance management, compensation and recognition, employee services, retention and termination. However, in HR's equally important role - as strategic business partner - HR brings to the decision-making table essential skills in the areas of change management and organizational and educational development.

The HR budget requirement for 2005 is \$1.6 million compared to 2004 of \$1.5 million. This budget will enable HR to continue to offer this wide range of services, with a particular focus on the following key activities:

- Web site systems oriented to the public, members, students, and staff;
- Remote access to e-mail services for staff and students;
- Seminar and lecture content "streaming-on-demand" via the Internet and regional distributions, for Bar Admission and Continuing Legal Education audiences;
- Corporate database and information processing services by means of the secure IBM AS/400 computer systems;
- Central and remote access to secure and backed-up electronic files and documents, to assist staff in their day-to-day tasks;
- Developing and enhancing all application (business support) and operating systems that deliver the foregoing services; and
- Planning, operation and support of corporate telephone systems, and the telecommunication infrastructures that support these services.

The IS department budget request increases approximately \$209,000 in 2005 to \$2.4 million as the required support for further projects in the core operating departments such as case management systems is required. The requested increase will be applied to consulting fees and one more staff member.

The capital portion of IS Group's budget request reflects, and is in direct support of the key projects to be undertaken in 2005 such as the case management system, as well as a program of prudent replacement of desktop computers and software on an ongoing cycle. Total capital spending on information systems is budgeted at \$1,676,000.

#### Client Service Centre

The Client Service ("CSC") is the front line one-stop access point to the Law Society. Staff are equipped to effectively deal with a range of requests from both the public and the legal profession to provide services in other languages and formats.

The Client Service Centre includes:

- Call Centre, whose service standard includes answering most calls within 20 seconds
- Lawyer Referral Service
- Membership Services
- Complaints Services
- Administrative Compliance Processes (ACP)

The proposed 2005 budget request is \$4 million, as compared to \$3.9 million budgeted in 2004. Apart from salary adjustments, increased volumes have led to this increase requiring the addition of a customer service representative and increased overtime.

On average, each year the Law Society admits approximately 1,100 to 1,200 new members into the profession, which impacts on the workload of the CSC, particularly Membership Services and in ACP.

#### Library Services

Ontario lawyers continue to support three types of library-related services: County and District Law Libraries (through LibraryCo Inc.), the Great Library and Canadian Legal Information Institute (CanLII). In 2005 it is proposed that Ontario lawyers fund a total of \$9.8 million through the annual membership fee at a cost per lawyer of \$328 (2004 budget: \$330) for these combined services.

This budget fulfils LibraryCo's request for an increase in funding from \$5.9 million in 2004 to \$6.2 million in 2005 as price increases from legal publishers are expected to rise by an average of 5% in 2005.

The Great Library and CanLII are two important services that also support member professional development and competence. In total, the Great Library budget requirement for 2005 is \$3 million (2004 budget: \$3 million), with an additional \$610,000 (2004 budget: \$616,000) allocated for CanLII.

#### Legal Affairs

Legal Affairs is responsible for providing "in house" legal counsel services to the organization, and is also responsible for managing and supporting the Litigation Committee and the organization with respect to litigation matters. The proposed budget for 2005 is \$734,000 (2004 budget: \$718,000).

#### Tribunals

The Tribunals staff provide support for hearing panel members, provide legal research, assist with the drafting of orders and arrange for the publication of Law Society decisions and their distribution to benchers. The proposed budget for 2005 is \$646,000 (2004 budget: \$638,000).

#### The Lawyers Fund for Client Compensation

The member fee for 2005 has declined to \$200 from \$230 in 2004.

The Lawyers Fund for Client Compensation will end 2004 with a Fund balance of approximately \$19 million as claims experience remains very favourable for the Fund. As a result of this trend, the budget for 2005 proposes to set the allowance for claims at \$2.7 million, down from the \$3 million budgeted in 2004. The level of claims experience is consistent with average claims level over the past ten years and the projected claims of \$2.1 million for 2004.

Since 2001 the Compensation Fund has purchased excess insurance while the fund balance was built up from the \$12.4 million at the beginning of that year. In 2004 coverage was \$10 million for claims in excess of \$15 million with an annual premium of \$494,000. The 2005 budget does not include the purchase of this insurance based on the increased fund balances and the actuarial most likely scenarios.

The strong fund balance and the persistent low level of claims make it a prudent decision to reduce the levy by \$30.

#### Capital requirements

An important component of the annual membership fee is the capital levy of \$75 per member. The levy is tracked in the Capital Allocation Fund and is intended to ensure adequate funding is available to meet the capital requirements of the Law Society. This levy has been utilized to upgrade the Society's property and buildings, as well as its information systems.

In 2004 Convocation approved the renovation of the North Wing at a cost of \$9 million. Funding for the project totaling \$7.5 million has been allocated in the Capital Allocation Fund from surpluses in prior years. Funding of the balance will be available from the existing balance of the Capital Allocation Fund.

For the duration of the North Wing renovation, it is our intention to limit facilities capital projects in the rest of the building to reduce disruption, ensure adequate funding and allow us to properly focus on the major renovation. It is proposed that only \$600,000 be allocated for high priority facilities capital projects in 2005. This will result in a deferral of \$1.3 million in planned work to future periods. To assist with funding to complete these deferred projects in the future, it is proposed that any operating surplus not otherwise utilized in 2004 (estimated to be \$500,000) be transferred to the Capital Allocation Fund.

#### Conclusion

This is the fourth consecutive budget to provide appropriate funding to enable us to continue fulfilling our mandate and provide additional programs and services, while at the same time reducing or holding the line on total fees.

The Law Society is on solid financial footing with strong reserves and a sustainable fee level.

Over the past four years we have been able to reduce the overall member fee by \$341 or 19%. Our financial position has been strengthened, significant funds have been dedicated for the renovation of the Osgoode Hall North Wing and the Law Society is a much more focused, cost-effective, service-oriented organization.

#### THE LAW SOCIETY OF UPPER CANADA

##### Draft Budget

For the year ending December 31, 2005

##### 2005 Budget Assumptions

- Membership fee based on 30,000 full fee paying equivalent members, increased by 1,000 members from last year.
- Funding from the Law Foundation of Ontario for the Bar Admission Course maintained at 2004 level of \$1,300,000 and funding for Archives maintained at \$100,000.
- Investment income surplus from the Errors and Omissions fund decreased to \$2,500,000 (2004: \$3,000,000).
- The tuition for the Bar Admission course is maintained at \$4,400 unchanged from the fee level established in 2001.
- Student enrollment increased to 1,400 from 1,250 estimated in 2004.
- BAC program being moved to Ryerson, increasing costs by \$380,000 for BAC as result of construction in the North Wing.
- CLE costs increased due to move offsite as a result of North Wing construction.
- Provision for salary merit adjustments set at 3.5% of compensation costs. (Approximately \$1.2 million reduced to \$600,000 to compensate for anticipated staff turnover).
- The budget contains a general contingency of \$1.2 million, unchanged from 2004.
- LibraryCo per member levy of \$206 (2004: \$197) increases total payments to LibraryCo to \$6.2 million from \$5.9 million in 2004 (reduced by the anticipated balance in the Law Society's county library fund at the end of 2004, \$50,000).
- Funding for CANLII of \$21 per member is provided for core operations.
- \$200,000 provided for Bencher remuneration.
- Unrestricted fund surplus for 2004 estimated at \$1.97 million with \$1.4 million to be applied to reduce 2005 membership levy.
- Working Capital Reserve for 2005 maintained at 2004 level (\$7.975 million).
- The Capital levy remains at \$75.
- Compensation Fund levy reduced \$30 to \$200 as a result of continued positive performance in the growth of the fund balance.
- Insurance for major claims on the Compensation Fund eliminated.
- No provision for potential costs associated with the implementation of paralegal regulation.

Enclosed in Convocation file, copies of :

- (1) Copy of the bound in camera Proposed LibraryCo Inc. 2005 Budget.
- (2) Copy of the bound in camera 2005 Draft Budget Detail.

REPORT OF THE DIRECTOR OF PROFESSIONAL DEVELOPMENT & COMPETENCE

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The Director of Professional Development and Competence asks leave to report:

B.

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ADMINISTRATION

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

B.1.1. (a) Bar Admission Course

B.1.2. The following candidates have completed successfully the Bar Admission Course, filed the necessary documents, paid the required fee, and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, October 28th, 2004:

Shahen Armen Alexanian	Bar Admission Course
Johnson Temitope Babalola	Bar Admission Course
Rishi Bandhu	Bar Admission Course
William Robert Bankiner	Bar Admission Course
Goldie Gurpreet Bassi	Bar Admission Course
Jennifer Patricia Louise Beelich	Bar Admission Course
Andrea Carska	Bar Admission Course
Danya Cohen-Nehemia	Bar Admission Course
Steven James Dickson	Bar Admission Course
Emmy Galit Dotan	Bar Admission Course
Shanti Kishu Harjani Williams	Bar Admission Course
Alan Trevor Howarth	Bar Admission Course
Jason Huang	Bar Admission Course
Robyn Eimer Hurley	Bar Admission Course
Kevin James Inwood	Bar Admission Course
Elaine Iris Kramer	Bar Admission Course
Julie Alberta Lavigne	Bar Admission Course
Robert Adam Levy	Bar Admission Course
Zaheer Ahmad Malik	Bar Admission Course
Felix Mazer	Bar Admission Course
Timothy John Meadowcroft	Bar Admission Course
Archana Arun Medhekar	Bar Admission Course
Jeffrey Michael Minicucci	Bar Admission Course
John Leonard Lee Mallowney	Bar Admission Course
Juliette Claire Nicolet	Bar Admission Course
Brent Michael Pearce	Bar Admission Course
Saro Sarmazian	Bar Admission Course
Stafania Scarpato	Bar Admission Course

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

B.1.4. The following candidates have filed the necessary documents, paid the required fee and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, October 28th, 2004:

Terrance Paul Edward Douglas	Province of British Columbia
Patrick Gerald Duffy	Province of Alberta
Lawrence Mark Kwinter	Province of Alberta
Aileen Marie La Borie	Province of British Columbia
Justin Kenneth Louie	Province of Alberta
Dianne Eileen Prupas	Province of British Columbia
Leanne Shafir	Province of British Columbia
Brian Earl Winsor	Province of Newfoundland

B.1.5. (c) Transfer from another Province - Section 4.1

B.1.6. The following candidates have completed successfully the transfer examinations or the academic phase of the Bar Admission Course, filed the necessary documents, paid the required fee and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, October 28th, 2004:

André de Maurivez	Province of Quebec
Pascale Denis	Province of Quebec
Marc-André O'Rourke	Province of New Brunswick
Josée Turcotte	Province of Quebec
Monika L.M. Zauhar	Province of New Brunswick

ALL OF WHICH is respectfully submitted

DATED this the 28th day of October, 2004

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It was moved by Mr. Hunter, seconded by Mr. Simpson that the Report of the Director of Professional Development & Competence setting out the candidates for Call to the Bar be adopted.

Carried

CALL TO THE BAR (Convocation Hall)

The following candidates listed in the Report of the Director of Professional Development & Competence were presented to the Treasurer and called to the Bar. Mr. Swaye then presented them to Madam Justice Jean L. MacFarland to sign the rolls and take the necessary oaths.

Shahen Armen Alexanian	Bar Admission Course
Johnson Temitope Babalola	Bar Admission Course
Rishi Bandhu	Bar Admission Course
William Robert Bankiner	Bar Admission Course
Goldie Gurpreet Bassi	Bar Admission Course

Jennifer Patricia Louise Beelich	Bar Admission Course
Andrea Carska	Bar Admission Course
Danya Cohen-Nehemia	Bar Admission Course
Steven James Dickson	Bar Admission Course
Emmy Galit Dotan	Bar Admission Course
Shanti Kishu Harjani Williams	Bar Admission Course
Alan Trevor Howarth	Bar Admission Course
Jason Huang	Bar Admission Course
Robyn Eimer Hurley	Bar Admission Course
Kevin James Inwood	Bar Admission Course
Elaine Iris Kramer	Bar Admission Course
Julie Alberta Lavigne	Bar Admission Course
Robert Adam Levy	Bar Admission Course
Zaheer Ahmad Malik	Bar Admission Course
Felix Mazer	Bar Admission Course
Timothy John Meadowcroft	Bar Admission Course
Archana Arun Medhekar	Bar Admission Course
Jeffrey Michael Minicucci	Bar Admission Course
John Leonard Lee Mallowney	Bar Admission Course
Juliette Claire Nicolet	Bar Admission Course
Brent Michael Pearce	Bar Admission Course
Saro Sarmazian	Bar Admission Course
Stafania Scarpato	Bar Admission Course
Terrance Paul Edward Douglas	Transfer, Province of British Columbia
Patrick Gerald Duffy	Transfer, Province of Alberta
Lawrence Mark Kwinter	Transfer, Province of Alberta
Aileen Marie La Borie	Transfer, Province of British Columbia
Justin Kenneth Louie	Transfer, Province of Alberta
Dianne Eileen Prupas	Transfer, Province of British Columbia
Leanne Shafir	Transfer, Province of British Columbia
Brian Earl Winsor	Transfer, Province of Newfoundland
André de Maurivez	Transfer, Province of Quebec
Pascale Denis	Transfer, Province of Quebec
Marc-André O'Rourke	Transfer, Province of New Brunswick
Josée Turcotte	Transfer, Province of Quebec
Monika L.M. Zauhar	Transfer, Province of New Brunswick

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IN CAMERA

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**IN CAMERA Content Has Been Removed**

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CONTINUATION OF THE REPORT OF THE FINANCE AND AUDIT COMMITTEE

Re: 2005 Budget

It was moved by Mr. Wright, seconded by Mr. Gottlieb that the excess insurance in the Lawyers Fund for Client Compensation be maintained for one more year at an expense of \$16.00 per member.

Lost

ROLL-CALL VOTE

Alexander	For	Hunter	Against
Backhouse	Against	Krishna	Against
Banack	For	Legge	For
Bobesich	Against	Millar	Against
Bourque	Against	Murray	Against
Campion	For	O'Donnell	Abstain
Carpenter-Gunn	Against	Pattillo	Against
Caskey	Against	Pawlitza	Against
Chahbar	Against	Porter	Against
Cherniak	Against	Potter	Against
Chilcott	Abstain	Ruby	Against
Coffey	For	St. Lewis	Against
Curtis	Abstain	Silverstein	Against
Doyle	Against	Simpson	Against
Dray	Against	Swaye	Against
Eber	Against	Symes	Against
Feinstein	For	Topp	For
Filion	Against	Warkentin	Against
Gold	Against	Wright	For
Gottlib	Against		
Gottlieb	For		
Harris	Against		

Vote: 29 Against, 9 For, 3 Abstentions

It was moved by Mr. Ruby, seconded by Mr. Murray that Convocation approve the 2005 budget as set out in the Finance & Audit Committee Report.

Carried

ROLL-CALL VOTE

Alexander	For	Hunter	For
Backhouse	For	Krishna	For
Banack	For	Legge	For

Bobesich	For	Millar	For
Bourque	For	Murray	For
Campion	For	O'Donnell	For
Carpenter-Gunn	For	Pattillo	For
Caskey	For	Pawlitza	For
Chahbar	For	Porter	For
Cherniak	For	Potter	For
Chilcott	For	Ruby	For
Coffey	For	St. Lewis	For
Curtis	For	Silverstein	For
Doyle	For	Simpson	For
Dray	For	Swaye	For
Eber	For	Symes	For
Feinstein	For	Topp	For
Filion	For	Warkentin	For
Gold	For	Wright	For
Gotlib	For		
Gottlieb	Against		
Harris	For		

Vote: 40 For, 1 Against

#### DRAFT MINUTES OF CONVOCATION

The Draft Minutes of Convocation of September 23, 2004 were confirmed.

#### REPORT OF THE PROFESSIONAL REGULATION COMMITTEE

##### Re: 2004 Member's Annual Report (MAR)

Ms. Curtis presented the Report of the Professional Regulation Committee.

Professional Regulation Committee  
October 28, 2004

Report to Convocation

Purposes of Report: Decision

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

#### OVERVIEW OF POLICY ISSUES

##### AMENDMENT TO BY-LAW 17 RESPECTING THE 2004 MEMBER'S ANNUAL REPORT

##### Request to Convocation

1. Convocation is requested to amend By-Law 17 by prescribing an amended version of the Member's Annual Report (MAR) (Form 17A) for the filing year 2004.

#### Summary of the Issue

2. The Member's Annual Report (MAR) is prescribed as Form 17A under By-Law 17 – Filing Requirements, and if changes are made to the form, Convocation is required to prescribe the form anew.
3. A number of changes to the MAR, discussed in the material at page 7 and following are being proposed. The revised MAR, included in a motion to amend the By-Law, appears at page 12.

#### PROPOSED AMENDMENTS TO RULE 2.04 ON CONFLICTS OF INTEREST RESPECTING A LAWYER'S PERSONAL AND SEXUAL OR INTIMATE PERSONAL RELATIONSHIP WITH A CLIENT

##### Request to Convocation

4. Convocation is requested to approve the addition of two new commentaries to rule 2.04(3) of the *Rules of Professional Conduct* that highlight conflicts of interest when a lawyer represents an individual with whom the lawyer has a personal relationship or a sexual or intimate personal relationship. The proposed new commentaries appear at pages 29 through 31.

#### Summary of the Issue

5. Based on a report of its working group, the Committee originally proposed that new rules and commentary on a lawyer's professional obligations when involved in a sexual relationship with a client be added to the *Rules of Professional Conduct*. The rules and commentary were in the context of conflicts of interest in rule 2.04. The proposals, reported to Convocation in January 2004 for information, were published for a call for input from the Law Society's membership.
6. As a result of feedback received from the profession and the Committee's reconsideration of the proposals, the Committee is now proposing that two new commentaries be added to rule 2.04 to comment on conflicts arising from a lawyer's personal relationship with a client and from a sexual or intimate personal relationship with a client.

#### PROPOSED AMENDMENTS TO RULE 2.08(3) TO (5) AND COMMENTARY ON CONTINGENCY FEES

##### Request to Convocation

7. Convocation is requested to amend rules 2.08(3) to (5) of the *Rules of Professional Conduct* on contingency fees as a result of amendments to the *Solicitors Act* and a new regulation under that Act on contingency fees and contingency fee agreements.

#### Summary of the Issue

8. Amendments to the Law Society's *Rules of Professional Conduct* on contingency fees are required to make the Rules consistent with new legislation on contingency fees.
9. On October 1, 2004, amendments to the *Solicitors Act* and a new regulation on contingency fees and contingency fee agreements came into force. Because of the detail in the regulation on contingency fee arrangements, much of what is in the Law Society's rules and commentary is redundant. The Committee agreed that the text of the rules should be reduced to the necessary guidance.

## THE REPORT

### Terms of Reference/Committee Process

10. The Committee met on October 14, 2004. Committee members in attendance were Carole Curtis (Chair), Mary Louise Dickson and Laurie Pattillo (Vice-chairs), Anne Marie Doyle, Sy Eber, Patrick Furlong, Allan Gotlib, Ross Murray and Mark Sandler. Staff attending were Naomi Bussin, Terry Knott, Malcolm Heins and Jim Varro.

11. The Committee is reporting on the following matters:

#### For Decision

- Proposed amendments to By-Law 17 respecting the 2004 Member's Annual Report
- Proposed amendments to rule 2.04 of the *Rules of Professional Conduct* to add commentaries highlighting conflicts of interest that may arise when a lawyer represents an individual with whom the lawyer has a personal or sexual or intimate personal relationship
- Proposed amendments to rules 2.08(3) to (5) of the *Rules of Professional Conduct* and commentary on contingency fees

### PROPOSED AMENDMENT TO BY-LAW 17 RESPECTING THE 2004 MEMBER'S ANNUAL REPORT

#### A. BACKGROUND AND NATURE OF THE AMENDMENTS

12. By-Law 17 governs the filing of the annual information report by members with respect to their law practices, including trust account holdings, employment and related activities.

13. Section 2 of the By-Law reads:

2. (1) Every member shall submit a report to the Society, by March 31 of each year, in respect of the member's practice of law and other related activities during the preceding year.

(2) The report required under subsection (1) shall be in Form 17A [Member's Annual Report].

14. In an effort to improve the efficacy of the Member's Annual Report, the integrity of the information sought through the form and the "user-friendly" component of the form, staff review the MAR annually and bring forward to the Committee suggested changes to the MAR.

15. The Committee discussed and approved the proposed changes to the MAR for the 2004 filing year. The amended MAR, which includes date-specific references for the 2004 filing year, is at Appendix 1. The next section of the report describes in detail the changes to the MAR for 2004. The prescribed form (Form 17A), which for the purposes of the By-Law is not date specific with respect to the filing year, follows the motion to make the amendments at page 11.

#### B. CHANGES TO THE 2004 MAR

##### Front Page/Section A

16. The Words "DO NOT STAPLE" are added to save time when reviewing the form and to prevent damage for scanning purposes.

17. The eform link is changed from [www.lsuc.on.ca](http://www.lsuc.on.ca) to <https://eforms.lsuc.on.ca> to be consistent with how the webpage address appears on other MAR related materials.

18. A box with an arrow pointing to the member information in Section A is added to fill in the space that some members were using to write their updated contact information instead of using the Change of Information form.

#### Inside Front Cover Page

19. Non-mandatory (survey) questions are added regarding the Provision of Legal Services in French, Continuing Legal Education and Electronic Fee Invoices & Fee Payment, as follows:
  - a. “Provision of Legal Services in French”, previously question 1 in Section F, is moved to this location so that all survey questions are on one page.
  - b. “Continuing Legal Education” is a new survey question designed by Professional Development & Competence to assist it in determining what formats of CLE are of interest to members.
  - c. “Electronic Fee Invoices & Payment” is a new survey question designed by the Finance department to determine the feasibility of offering future annual fee invoices via email.

#### Section B

20. The following are added:
  - a. “As at December 31, 2004” is added to reinforce that members are to identify their status only as at 31 December.
  - b. “choose one” is added to clarify that members must choose only one status as at 31 December.
  - c. “employed by Legal Aid Ontario or a community legal clinic” is added to capture the status of Legal Aid employees in Ontario and to direct these members to the appropriate sections of the report.
  - d. The words “or unemployed” are added to the “not working” status in an effort to clarify that “not working” means not working or unemployed in any capacity.
21. Members are now directed to each section of the report so they can determine if a particular section applies to them. Asterisks and an explanatory note are added for this purpose.

#### Section E: 2c

22. “Did not participate in any CLE programs” is added as a new option to the list of CLE programs that members may access.
23. Minor formatting changes are also made to the Section.

#### Section F

24. Q.2 This question is expanded to clarify what constitutes the handling of or responsibility for clients’ trust fund or valuables, and will clarify responsibilities for associates and Legal Aid employees with respect to clients’ trust funds and valuables.
25. Q.3 This question is expanded for reasons similar to those above in question 2. The member now has the option of stating if he or she acted as a sole estate trustee or exercised a Power of Attorney, or both. More importantly, this question is redesigned to determine if the information the member is reporting relates to clients or relatives.
26. Q.3c) “GICs” is expanded to “guaranteed investment certificates” for clarity and consistency with the other terms.
27. Q.4 “Subrule 4 of Rule 2.06” is changed to “subrule 2.06 (4)” as the correct expression.
28. The sub-questions of questions 2, 3 & 6 are now highlighted for emphasis, and to assist members in completing all questions.

#### Section G

29. The title description is updated by adding “those who are responsible for client trust accounts” for notice of this section’s application to members who are not in private practice but remain responsible for trust accounts.

#### Section G, Part 1

30. The initial instructions are updated to clarify that Part 1 applies only to members who are not responsible for providing financial information.

31. The joint filing instructions are updated to emphasize that the joint filing member either signs the form or submits a Joint Filing Declaration (or letter on firm letterhead). A new line (3) "NAME OF FIRM" is also added to mimic the Joint Filing Declaration, and all lines are now numbered to assist the member in providing all required information.
  32. The arrow and instructions beneath line 4 are added to inform the member that the Joint Filing Member must either sign the member's form in Part 1 of Section G or submit a Joint Filing Declaration (or letter on firm letterhead). This change will emphasize that it is the member's responsibility to ensure that his or her Joint Filing Member exercises one of those options.
  33. An additional note is added at the bottom of the page to highlight that the report will not be considered complete without either the Joint Filing Member signature on the report or a Joint Filing Declaration (or letter on firm letterhead).
- Section G, Part 2
34. The initial instructions are updated to include Legal Aid lawyers responsible for trust accounts. This will inform those members that part 2 of Section G applies to them.
  35. The instruction, "Complete this schedule only if..." is moved between question 1 and the chart to make the instruction more visible. Additional wording is added to instruct members who answer "yes" to proceed to question 2.
  36. Q.2 Format changes are made to the number boxes. The sub-total and adjustment boxes are moved to the left, leaving the total and grand-total boxes to the right. This draws attention to the "Reconciled Bank Balance" and "Total Client Trust Liabilities" boxes, which are often overlooked in this section. This format change is also consistent with accounting and bookkeeping layouts.
  37. Q. 3 Format changes to the question are made by added "a), b), and c)" to distinguish each sub-question, and by relocating the instructions to complete the schedule.

#### Section H

38. Minor changes are made to the certification wording.

### THE LAW SOCIETY OF UPPER CANADA

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

#### BY-LAW 17 [FILING REQUIREMENTS]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON OCTOBER 28, 2004

MOVED BY

SECONDED BY

THAT By-Law 17 [Filing Requirements] made by Convocation on January 28, 1999 and amended by Convocation on February 19, 1999, May 28, 1999, October 29, 1999, January 27, 2000, June 22, 2000, October 19, 2000, April 26, 2001, October 25, 2001, October 31, 2002 and September 25, 2003 be further amended by revoking Form 17A and substituting the following:

PROPOSED AMENDMENTS TO RULE 2.04 ON  
CONFLICTS OF INTEREST RESPECTING A  
LAWYER'S PERSONAL AND SEXUAL OR INTIMATE  
PERSONAL RELATIONSHIP WITH A CLIENT

*A. INTRODUCTION AND BACKGROUND*

39. On January 22, 2004, the Committee reported to Convocation for information on proposed rules and commentary dealing with conflicts of interest arising from a lawyer's sexual relationship with a client, which appear at Appendix 2. The report was the result of a Committee working group's lengthy and comprehensive review of the professional conduct issues arising from a lawyer's consensual sexual relationship with a client.<sup>1</sup>
40. Following the report to Convocation, the Society issued a call for input from the profession on the proposals. The Society received nearly 30 submissions in response to the call for input. The majority of respondents opposed the rule on the basis that it is unnecessary regulation of personal relationships and was too broad an approach to the issue.
41. As a result of the profession's input on the proposals, the Committee reconsidered the proposals. It determined that rather than recommending new rules that prohibit sexual relationships between lawyers and clients, new commentaries identifying conflicts of interest that may arise from the lawyer's personal relationship or sexual or intimate personal relationship with a client matter should be adopted.

*B. OVERVIEW OF THE ORIGINAL PROPOSALS*

42. Based on the working group's report, the Committee originally proposed a rule that addressed a lawyer's professional obligations when involved in a sexual relationship with a client. While the proposal was a prohibition on sexual relationships between a lawyer and client, it was not absolute, in that it permitted the continuation of pre-existing relationships.
43. The focus of the proposed new rules, which were prepared on the Committee's instruction by Rules drafter Paul Perell, was the conflict of interest that a sexual relationship presents to a lawyer and client relationship. The proposed new rules were placed within rule 2.04 (Avoidance of Conflicts of Interest) as subrules 2.04(3.1) and (3.2).
44. The following summarized the original proposals:
- a. If a client has a pre-existing consensual sexual relationship with a lawyer, the lawyer must still satisfy the conflict of interest rules by obtaining an informed consent from the client. The presence of a sexual relationship would not diminish the normal rules about conflicts of interest.
  - b. Rule 2.04(3.1) was intended to regulate the significance of a sexual relationship to the lawyer and client relationship. Rule 2.04(3.2) was intended to regulate the significance of a lawyer and client relationship to a sexual relationship. The first rule focuses on regulating when a sexual relationship may interfere with proper legal representation. The second rule focuses on regulating a lawyer and client relationship that may be misused to exploit the client sexually.
  - c. Under the new rules, a lawyer handling the work would have a conflict if he or she has a sexual relationship with the client. The firm would still have a conflict if its client has a sexual relationship with a lawyer of the firm handling the work, but the firm's conflict would be removed if another lawyer in the firm (without a sexual relationship with the client) were to take over and handle the work. As a corollary, there would be no conflict if a lawyer not handling the work has a sexual relationship with a client. A firm would not have a conflict of interest if a lawyer has a sexual relationship with a potential client, although sexual relationships with a potential client would still fall under the regulation of 2.04 (3.2).

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<sup>1</sup> The January 2004 policy report was based on extensive research undertaken by former Law Society discipline counsel Glenn Stuart, who was a member of the working group. Material reviewed in the research phase is listed in Appendix 3.

*C. THE RESPONSE TO THE CALL FOR INPUT*

45. As noted earlier, the Law Society received a number of responses to the call for input. Most were thoughtful opinions about the merits of the proposed rules. It was clear that the respondents had read the report and proposals in detail. Although some respondents supported the proposals, the majority of respondents had concerns about them.
46. The following are some of the themes running through the responses:
- a. Conflicts arising from other non-sexual relationships (i.e. parents, siblings, children) are not dealt with. The fact of a sexual relationship appears to be singled out.
  - b. Zero tolerance does not work. The validity for a case must rest on the facts.
  - c. Sexual relationships are deemed to be a conflict even where it is obvious that there is no actual conflict and no one would view the dual roles as improper. The proposals will result in sanctions against members whose only misconduct is violating the rule rather than causing harm or potential harm to clients.
  - d. There is no distinction made between areas of law where clients may be more vulnerable and those areas where vulnerability is not an issue.
  - e. How will the rule be enforced?
  - f. Certain definitions are lacking (e.g. “sexual relationship”, “lawyer”, “client” (i.e. when does a person cease to be client)).
  - g. The rule would prohibit a lawyer from ever acting for his or her spouse if a legal relationship led to a consensual sexual relationship and then marriage.
  - h. The decision should be left with the lawyer and his or her professional judgment as to whether the lawyer and client relationship can continue where a sexual relationship develops.

*D. THE COMMITTEE’S PROPOSALS*

47. At the Committee’s April 2004 meeting, there was a sense among Committee members that the proposed rules and commentary should not be adopted, based on the views of the respondents to the call for input who saw the rules as too sweeping a prohibition.<sup>2</sup>
48. At the Committee’s May and June 2004 meetings, as result of substantive discussion on the proposals, the Committee decided that the proposed rules should not be pursued but that consideration be given to an addition to the Rules to address conflicts that may arise from a lawyer’s sexual or other personal relationship with a client.
49. After further discussion, the Committee decided that commentaries to the Rules on these issues would be appropriate. Policy and regulatory staff prepared drafts that were approved by the Committee in September 2004 for review by Paul Perell, who drafted the original proposals. Mr. Perell made some helpful changes to the draft and the Committee thanks him for his drafting expertise and his willingness to participate in this initiative.
50. Two separate amendments to the commentary in rule 2.04 are proposed. The first proposal is to add commentary to rule 2.04(1) that addresses conflicts that may arise from a lawyer’s personal relationship with a client. The Committee acknowledged the views of several respondents to the call for input that personal relationships with clients, apart from sexual relationships, can also give rise to conflicts. The new commentary focuses on the fact that a personal relationship yields a personal interest that may compromise the lawyer’s ability to provide objective, disinterested professional advice to the client.
51. The second proposal is to add commentary to rule 2.04(3) highlighting conflicts of interest that may arise when a lawyer represents a client with whom the lawyer has a sexual or intimate personal relationship.

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<sup>2</sup> The Committee noted that the only other current initiative relating to this issue was that of the Canadian Bar Association (CBA). At the CBA Annual Meeting this past summer, delegates rejected both a rule and an alternative commentary on the subject.

This commentary is based on the commentary drafted under the original proposed rule. Its focus is not on whether the lawyer should have or continue to have a sexual or intimate personal relationship with a client but whether a lawyer involved in a sexual or intimate personal relationship with a client should act or continue to act as the lawyer. This focus is also consistent with the exception noted at the end of the commentary that another lawyer in the lawyer's firm could act for the client.

52. The two proposed commentaries are as follows, shown on the following pages in the context of rule 2.04:

#### 2.04 AVOIDANCE OF CONFLICTS OF INTEREST

##### Definition

2.04 (1) In this rule

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

- (a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or
- (b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.

##### Commentary

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

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

*[Amended - May 2001, March 2004]*

##### Avoidance of Conflicts of Interest

- (2) A lawyer shall not advise or represent more than one side of a dispute.
- (3) A lawyer shall not act or continue to act in a matter when there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents.

Commentary

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

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

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

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

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

- a. The vulnerability of the client, both emotional and economic;
- b. The fact that the lawyer and client relationship may create a power imbalance in favour of the lawyer or, in some circumstances, in favour of the client;
- c. Whether the sexual or intimate personal relationship will jeopardize the client's right to have all information concerning the client's business and affairs held in strict confidence. For example, the existence of the relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship;
- d. Whether such a relationship may require the lawyer to act as a witness in the proceedings;
- e. Whether such a relationship will interfere in any way with the lawyer's fiduciary obligations to the client, his or her ability to exercise independent professional judgment, or his or her ability to fulfill obligations owed as an officer of the court and to the administration of justice.

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

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

[Amended – March 2004]

#### PROPOSED AMENDMENTS TO RULES 2.08(3) TO (5) AND COMMENTARY ON CONTINGENCY FEES

53. As a result of the coming into force of the amendments to the *Solicitors Act* and a new regulation on contingency fees and contingency fee agreements, amendments to the Law Society's *Rules of Professional Conduct* on contingency fees are required.
54. Rules 2.08(3) – (5) were adopted in the fall of 2002 in the absence of any other regulation on contingency fee arrangements. Since that time, amendments to the *Solicitors Act* and a new regulation under that Act (O. Reg. 195/04) have received Royal Assent and were proclaimed in force October 1, 2004.<sup>3</sup>
55. Because of the detail in the legislation on contingency fee arrangements, much of the rule and commentary, which deal with a number of matters covered in the legislation, can be deleted without affecting the guidance that should appropriately be offered through the Rules. The regulation in particular provides significant detail on the form and content of contingency fee agreements.
56. For the purposes of the amendments, certain language used in the legislation is reflected so that there is consistency between the rules and the legislation. For example, "contingency" is proposed in place of "contingent" and the phrase "the successful disposition or completion of the matter" in proposed amended subrule 2.08(3) is the language used in s. 28.1(2) of the *Solicitors Act* to describe the contingency on which the fee is based.
57. The following are the proposed amendments to rules 2.08(3) to (5) which have been reviewed and revised by Rules drafter Paul Perell. The amendments are shown in the context of rule 2.08. A housekeeping amendment to the last paragraph of commentary following rule 3.01 (Making Legal Services Available) is also required to change the reference to rule 2.08(8) to rule 2.08(6).

#### 2.08 FEES AND DISBURSEMENTS

##### Reasonable Fees and Disbursements

- 2.08 (1) A lawyer shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion.
- (2) A lawyer shall not charge a client interest on an overdue account save as permitted by the *Solicitors Act* or as otherwise permitted by law.

##### Commentary

What is a fair and reasonable fee will depend upon such factors as

- (a) the time and effort required and spent,

<sup>3</sup> Appendix 4 contains the relevant portion of the *Solicitors Act*, showing amendments related to contingency fees and the new regulation.

- (b) the difficulty and importance of the matter,
- (c) whether special skill or service has been required and provided,
- (d) the amount involved or the value of the subject-matter,
- (e) the results obtained,
- (f) fees authorized by statute or regulation,
- (g) special circumstances, such as the loss of other retainers, postponement of payment, uncertainty of reward, or urgency.

The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees. No fee, reward, costs, commission, interest, rebate, agency or forwarding allowance, or other compensation related to professional employment may be taken by the lawyer from anyone other than the client without full disclosure to and the consent of the client or, where the lawyer's fees are being paid by someone other than the client, such as a legal aid agency, a borrower, or a personal representative, without the consent of such agency or other person.

Breach of this rule and misunderstandings about fees and financial matters bring the legal profession into disrepute and reflect adversely upon the general administration of justice. A lawyer should try to avoid controversy with a client about fees and should be ready to explain the basis for the charges (especially if the client is unsophisticated or uninformed about how a fair and reasonable fee is determined). A lawyer should inform a client about his or her rights to have an account assessed under the *Solicitors Act*.

Where possible to do so, a lawyer should give the client a fair estimate of fees and disbursements, pointing out any uncertainties involved, so that the client may be able to make an informed decision. This is particularly important concerning fee charges or disbursements that the client might not reasonably be expected to anticipate. When something unusual or unforeseen occurs that may substantially affect the amount of a fee or disbursement, the lawyer should forestall misunderstandings or disputes by giving the client an immediate explanation.

It is in keeping with the best traditions of the legal profession to provide services pro bono and to reduce or waive a fee where there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. A lawyer should provide public interest legal services and should support organizations that provide services to persons of limited means.

#### ~~Contingent~~ Contingency Fees and ~~Contingent~~ Contingency Fee Agreements

2.08 (3) Subject to subrules (1), ~~(4) and (5)~~, except in family law or criminal or quasi-criminal matters, a lawyer may enter into a written agreement in accordance with the Solicitors Act and the regulations thereunder ~~signed by the lawyer and his or her client, or where the client is under a disability, by the client's litigation guardian or other duly appointed representative,~~ that provides that the lawyer's fee is contingent, in whole or in part, on a specified the successful disposition or completion of the matter for which the lawyer's services are to be provided.

~~(4) — An agreement under subrule (3) shall contain:~~

- ~~(a) — a statement of the method by which the fee is to be determined, including the percentage that may accrue to the lawyer in the event of settlement, trial or appeal, and~~
- ~~(b) — a statement that the client may apply to the Superior Court of Justice for a determination of whether the contingent fee is fair and reasonable.~~

~~(5) — Except as permitted by the Class Proceedings Act, 1992, or any order made under it, an agreement under subrule (3) shall not:~~

- ~~(a) — require the lawyer's consent if the client decides to discontinue or settle his or her claims, or~~

- (b) ~~include a term that prevents the client from changing lawyers or ending the lawyer and client relationship at any time.~~

[Amended – November 2002]

<p>Commentary</p> <p><del>THE CONTINGENT FEE AGREEMENT</del></p> <p>A contingent fee agreement should:</p> <p>a. <del>be signed by a witness, and set out the name, address, and phone number of the witness;</del>  b. <del>briefly describe the nature of the client's claim;</del>  c. <del>contain a simple example of how the fee will be calculated;</del>  d. <del>contain a statement that the lawyer's fee may be lesser or greater than fees charged by other lawyers for similar claims and that before signing the agreement the client has the right to consult with and retain another lawyer;</del>  e. <del>contain a statement that the client has the right to decide whether to accept an offer to settle his or her claim;</del>  f. <del>contain a statement of who will be responsible for paying costs and disbursements, and</del>  g. <del>contain a statement setting out the circumstances in which the agreement may be terminated by the lawyer or by the client and the consequences of termination, including how the lawyer's fee is to be determined in such circumstances.</del></p> <p><del>Immediately after the signing of a contingent fee agreement, the lawyer should deliver a copy to the client.</del></p> <p><del>THE PERCENTAGE OF THE AWARD AND TREATMENT OF COSTS</del></p> <p>In determining the appropriate percentage or other basis of the <del>contingent</del> <u>contingency</u> fee, the lawyer and the client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. <del>If</del> The lawyer and client <u>may</u> agree that <u>in addition to the fee payable under the agreement, the costs award any amount arising as a result of an award of costs or costs obtained as a part of a settlement is to be paid to the lawyer, which agreement under the Solicitors Act must receive judicial approval.</u> In such circumstances, a smaller percentage of the award than would otherwise be agreed upon for the <del>contingent</del> <u>contingency</u> fee, after considering all relevant factors, will generally be appropriate. The test is whether the fee in all of the circumstances is fair and reasonable.</p>
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[New - October 2002]

#### Statement of Account

- (4) ~~(6)~~ In a statement of an account delivered to a client, a lawyer shall clearly and separately detail the amounts charged as fees and as disbursements.

#### Joint Retainer

- (5) ~~(7)~~ Where a lawyer is acting for two or more clients, the lawyer shall divide the fees and disbursements equitably between them, unless there is an agreement by the clients otherwise.

#### Division of Fees and Referral Fees

- (6) ~~(8)~~ Where the client consents, fees for a matter may be divided between lawyers who are not in the same law firm, provided that the fees are divided in proportion to the work done and the responsibilities assumed.

~~(7)~~ ~~(9)~~ Where a lawyer refers a matter to another lawyer because of the expertise and ability of the other lawyer to handle the matter and the referral was not made because of a conflict of interest, the referring lawyer may accept and the other lawyer may pay a referral fee provided that

- (a) the fee is reasonable and does not increase the total amount of the fee charged to the client, and
- (b) the client is informed and consents.

~~(8)~~ ~~(40)~~ A lawyer shall not

- (a) directly or indirectly share, split, or divide his or her fees with any person who is not a lawyer, or
- (b) give any financial or other reward to any person who is not a lawyer for the referral of clients or client matters.

Commentary

This rule does not prohibit an arrangement respecting the purchase and sale of a law practice when the consideration payable includes a percentage of revenues generated from the practice sold.

[New - May 2001]

Exception for Multi-discipline Practices and Interprovincial and International Law Firm

~~(9)~~ ~~(41)~~ Subrule ~~(8)~~ ~~(40)~~ does not apply to

- (a) multi-discipline practices of lawyer and non-lawyer partners where the partnership agreement provides for the sharing of fees, cash flows or profits among members of the firm, and
- (b) sharing of fees, cash flows or profits by lawyers who are
  - (i) members of an interprovincial law firm, or
  - (ii) members of a law partnership of Ontario and non-Canadian lawyers who otherwise comply with this rule.

[Amended - May 2001]

Commentary

An affiliation is different from a multi-discipline practice established in accordance with the by-laws under the *Law Society Act*, an interprovincial law partnership or a partnership between Ontario lawyers and foreign lawyers. An affiliation is subject to subrule 2.08 ~~(8)~~ ~~(40)~~. In particular, an affiliated entity is not permitted to share in the lawyer's revenues, cash flows or profits, either directly or indirectly through excessive inter-firm charges, for example, by charging inter-firm expenses above their fair market value.

[New - May 2001]

Appropriation of Funds

~~(10)~~ ~~(42)~~ The lawyer shall not appropriate any funds of the client held in trust or otherwise under the lawyer's control for or on account of fees except as permitted by the by-laws under the *Law Society Act*.

### 3.01 MAKING LEGAL SERVICES AVAILABLE

Making Services Available

3.01 Lawyers shall make legal services available to the public in an efficient and convenient way that commands respect and confidence and is compatible with the integrity and independence of the profession.

**Commentary**

It is essential that a person requiring legal services be able to find, with a minimum of difficulty or delay, a lawyer qualified to provide such services.

The lawyer may assist in making legal services available by participating in the Legal Aid Plan and lawyer referral services, by engaging in programmes of public information, education or advice concerning legal matters, and by being considerate of those who seek advice but are inexperienced in legal matters or cannot readily explain their problems.

**Right to Decline Representation** - The lawyer has a general right to decline a particular representation (except when assigned as counsel by a tribunal), but it is a right to be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation. Generally, the lawyer should not exercise the right merely because a person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the lawyer's private opinion about the guilt of the accused. A lawyer declining representation should assist in obtaining the services of another lawyer qualified in the particular field and able to act.

In a relatively small community where lawyers are well known, a person seeking a lawyer will usually be able to make an informed choice and select a qualified lawyer in whom to have confidence. However, in larger centres, these conditions will often not occur, and as the practice of law becomes increasingly complex and the practice of many individual lawyers becomes restricted to particular fields of law, the reputations of lawyers and their competence or qualification in particular fields may not be sufficiently well known to enable a person to make an informed choice. Thus, one who has had little or no contact with lawyers or who is a stranger in the community may have difficulty finding a lawyer with the special skill required for a particular task. Telephone directories, legal directories, and referral services may help find a lawyer, but not necessarily right one for the client's need.

When a lawyer offers assistance to a client or prospective client in finding another lawyer, the assistance should be given willingly and, except where a referral fee is permitted by rule 2.08 (6) ~~(8)~~, without charge.

*[Amended – May 2001]*

APPENDIX 1

PROPOSED 2004 MEMBER'S ANNUAL REPORT  
(WITH DATE REFERENCES)

(see Report in Convocation file)

APPENDIX 2

PROFESSIONAL REGULATION COMMITTEE

JANUARY 22, 2004

PROPOSED AMENDMENTS TO RULE 2.04

## 2.04 AVOIDANCE OF CONFLICTS OF INTEREST

### Definitions

2.04 (1) In this rule

a “conflict of interest” or a “conflicting interest” ~~means~~ includes ~~an interest~~

- (a) an interest that would be likely to affect adversely a lawyer’s judgment on behalf of, or loyalty to, a client or prospective client, ~~or~~
- (b) an interest that a lawyer might be prompted to prefer to the interests of a client or prospective client, or
- (c) a sexual relationship between a client and a lawyer handling the client’s work.

“sexual relationship” means a relationship between a lawyer and a client or prospective client where

- (a) there is sexual intercourse,
- (b) a lawyer touches the client’s or prospective client’s sexual or other intimate parts for the purpose of arousing or satisfying the sexual desire of the lawyer, client, or prospective client, or
- (c) a client or prospective client touches the lawyer’s sexual or other intimate parts for the purpose of arousing or satisfying the sexual desire of the lawyer, client or prospective client.

### Avoidance of Conflicts of Interest

- (2) A lawyer shall not advise or represent more than one side of a dispute.
- (3) A lawyer shall not act or continue to act in a matter where there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents.

### Sexual Relationships between Lawyer and Client

- (3.1) Where there is a sexual relationship between a client and a lawyer handling the client’s work, the lawyer shall not act or continue to act in a matter unless,
  - (a) the sexual relationship came before any lawyer and client relationship, and
  - (b) after disclosure adequate to make an informed decision, the client or prospective client consents.
- (3.2) A lawyer shall not have a sexual relationship with a client or prospective client unless the sexual relationship came before any lawyer and client relationship.

### Commentary

A sexual relationship combined with a lawyer and client relationship is always problematic, even when the sexual relationship is consensual, loving, and caring. The lawyer’s devotion and emotional involvement with the client may interfere with the lawyer’s fiduciary duties, independent professional judgment, ability to provide competent legal services, and responsibilities to the courts, the public, and other lawyers. The sexual relationship creates an interest that conflicts with and potentially undermines, a lawyer’s duty to provide objective, disinterested advice. (It should be noted, however, that there is no conflict of interest if another lawyer of the firm who does not have a sexual relationship with the client is the lawyer handling the client’s work.) The existence of a sexual relationship may interfere with the lawyer’s obligation to hold in strict confidence all information concerning the client’s business and affairs, since the sexual relationship obscures whether the information was acquired in the course of the professional relationship, which is a factor in determining whether the information is confidential and protected by lawyer and client privilege. Conversely, the existence of a lawyer and client relationship frequently creates circumstances where the lawyer may have considerable power over a client, who may be vulnerable and dependent, and these circumstances may be abused by the lawyer taking advantage of the client for the purposes of initiating or agreeing to a sexual relationship. In some circumstances, the power imbalance may undermine the client’s ability to truly consent to a sexual relationship.

The definition of conflict of interest in rule 2.04 (1) and rules 2.04 (3.1) and (3.2) recognize that a sexual relationship is a type of conflict of interest. These rules regulate this conflict of interest by differentiating two situations. The first situation is where the sexual relationship is in existence before the lawyer and client relationship begins. An example of the first situation would be a retainer where a lawyer is retained by his or her spouse with whom there is a consensual sexual relationship. The lawyer may act in this situation provided that the client provides an informed consent to the lawyer acting notwithstanding the lawyer's conflict of interest.

The second situation is where there is no pre-existing sexual relationship between the lawyer and his or client. In the second situation, rule 2.04 (3.2) prohibits a lawyer from initiating or agreeing to a new sexual relationship with a client or prospective client. However, should a sexual relationship develop, then, pursuant to rule 2.04 (3.1), the lawyer handling the client's work cannot act or continue to act. It may be noted that where there is no pre-existing sexual relationship, a client cannot consent to a lawyer acting or continuing to act if a sexual relationship develops.

Where the client is an organization, which includes corporations, partnerships, limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals, regulatory bodies, and sole proprietorships, the rules about sexual relationships between a client or prospective client apply as between the lawyer handling the client's work and any representative of the organization who instructs or could instruct the lawyer on behalf of the organization.

### APPENDIX 3

#### PROFESSIONAL REGULATION COMMITTEE WORKING GROUP ON LAWYER'S SEXUAL RELATIONSHIPS WITH CLIENTS

##### MATERIAL REVIEWED

#### A. Ontario

##### 1. Law Society of Upper Canada Policy Reports

Professional Regulation Committee Working Group Report, March 12, 1998 "Standards for the Authorization of Sexual Impropriety Complaints and Related Issues"

##### 2. Law Society of Upper Canada Discipline Cases

a. Re the Law Society of Upper Canada and Michael Elliott Chodos, Report and Decision of the Discipline Committee dated October 28, 1986, Order of Convocation dated November 27, 1986.

b. Re the Law Society of Upper Canada and Karla Kathleen Gower, Report and Decision of the Discipline Committee February 14, 1992

c. Alan Murray Zuker  
 · transcript of hearing  
 · Law Society Factum  
 · Factum of the member  
 · Joint Record Book  
 · recent press report on the Zuker case

d. James William Orme

##### 3. Court Cases

a. *Szarfer v. Chodos*, (1986) 54 O.R. (2d) 663 (C.A.)

- b. *R. v. Matheson*, (1999) 44 O.R. (3d) 557 (C.A.)

B. Other Canadian Law Societies

1. Rules of Conduct

Staff canvassed the other Law Societies in Canada that have rules dealing with the subject or which have applied existing rules to such situations, based on previous information received from these jurisdictions

- a. British Columbia, Chapter 2 (Integrity) rule 1 footnote
- b. Nova Scotia Barristers' Society, Rule 7(a) and Commentary 7.5
- c. New Brunswick Law Society (no rule reference)
- d. Law Society of Alberta Rules of Professional Conduct Rule 8 of Chapter 6 (Conflict of Interest)

2. Discipline Cases

- a. *Re The Law Society of Alberta and Ashraf S. Attia*, Report of the Hearing Committee dated April 2, 1993.
- b. *Nova Scotia Barristers' Society v. Rose* [1996] L.S.D.D. No.108.

C. American Jurisdictions

1. Rules

- a. ABA Rule 1.8
- b. State Bar of California, including rule 3-320 on relationships between lawyers who represent adverse/other parties
- c. State Bar of Minnesota
- d. Oregon State Bar Code of Professional Responsibility
- e. New York State Bar Association Proposed Amendments and Discipline Rule DR 5-111 (June 30, 1999)

2. Opinions

- a. Standing Committee on Ethics and Professional Responsibility of the American Bar Association, "Formal Opinion 92-364: Sexual Relations with Clients" (July 6, 1992)
- b. Commentary - a commentary on a discipline case from Ohio involving sexual activity between a lawyer and client

3. Discipline cases

- a. *In Re: D. Warren Ashby* , Supreme Court of Louisiana, Lawyer Disciplinary Proceedings
- b. *In Re: Robert B Schambach*, Supreme Court of Louisiana, Attorney Disciplinary Proceedings

D. Other Professions

1. Ethical Principles of Psychologists and Code of Conduct - Rule 4.05 (American Psychological Association)
2. National Association of Social Workers - Rule 1.09
3. CPSO's guidelines on physician-patient dating
4. Information from Institute of Chartered Accountants (ICAO) on Issues Respecting Sexual Relations Between Lawyers and Clients
5. *Norberg v. Wynrib*, [1992] 2 S.C.R. 226.

E. Various Articles and Reports

Excerpts from "Breach of Trust in Sexual Assault", a report from the Ontario Women's Directorate and Metro Action Committee on Public Violence Against Women and Children (the "Report") (1992)

"Future of the Legal Profession"<sup>4</sup>

"The Law of Lawyering"<sup>5</sup>

"Claims Against Attorneys Based on Sexual Misconduct"

"Sexual Exploitation of Divorce Clients: The Lawyer's Prerogative?"<sup>6</sup>

"Women, Sexual Abuse by Professionals, and the Law: Changing Parameters"<sup>7</sup>

"Sex and the Divorce Lawyer: Is the Client off Limits?"<sup>8</sup>

"Investigating Sexual Abuse of Patients: The Ontario Experience" (based on a lecture by the chair of the Task Force on Sexual Abuse of Patients commissioned by the College of Physicians and Surgeons)

The Committee on Sexual Exploitation in Professional Relationships - Highlights from the Preliminary Report

The Committee on Sexual Exploitation in Professional Relationships - The Final Report

Legislative Reform: The Health Professions Act and Procedural Code

"Professional Responsibility", A. Craig Fleishman, *The National Law Journal*, May 25, 1998, page B04

"Indecent Proposals", September 1998 *ABA Journal*

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<sup>4</sup> "Future of The Legal Profession", (1994) 44:53 *Case Western Reserve Law Review* at 559.

<sup>5</sup> Geoffrey Hazard Jr., et al, *The Law of Lawyering: A Handbook on The Model Rules of Professional Conduct*, (2d) (1990) v.1 at 246.

<sup>6</sup> Thomas Lyon, "Sexual Exploitation of Divorce Clients: The Lawyer's Prerogative?" (1987) 10 *Harvard Women's Law Journal* 159.

<sup>7</sup> Patricia Hughes, "Women, Sexual Abuse by Professionals, and the Law: Changing Parameters", (1993) 21 *Queen's L.J.* 297.

<sup>8</sup> Lawrence Dubin, "Sex and the Divorce Lawyer: Is the Client off Limits?", (1988) 1 *Georgetown J. of Legal Ethics* 585.

## APPENDIX 4

## SOLICITORS ACT

## Agreements Between Solicitors and Clients

## Definitions

15. In this section and in sections 16 to 33,

“client” includes a person who, as a principal or on behalf of another person, retains or employs or is about to retain or employ a solicitor, and a person who is or may be liable to pay the bill of a solicitor for any services; (“client”)

Note: On a day to be named by proclamation of the Lieutenant Governor, section 15 is amended by the Statutes of Ontario, 2002, chapter 24, Schedule A, section 1 by adding the following definition:

“contingency fee agreement” means an agreement referred to in section 28.1; (“entente sur des honoraires conditionnels”)

See: 2002, c. 24, Sched. A, ss. 1, 5.

“services” includes fees, costs, charges and disbursements. (“service”) R.S.O. 1990, c. S.15, s. 15.

## Agreements between solicitors and clients as to compensation

16. (1) Subject to sections 17 to 33, a solicitor may make an agreement in writing with his or her client respecting the amount and manner of payment for the whole or a part of any past or future services in respect of business done or to be done by the solicitor, either by a gross sum or by commission or percentage, or by salary or otherwise, and either at the same rate or at a greater or less rate than that at which he or she would otherwise be entitled to be remunerated. R.S.O. 1990, c. S.15, s. 16 (1).

## Definitions

(2) In this section,

“commission” and “percentage” apply only to non-contentious business and to conveyancing. R.S.O. 1990, c. S.15, s. 16 (2).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (2) is repealed by the Statutes of Ontario, 2002, chapter 24, Schedule A, section 2 and the following substituted:

## Definition

(2) For purposes of this section and sections 20 to 32,

“agreement” includes a contingency fee agreement.

See: 2002, c. 24, Sched. A, ss. 2, 5.

...

20. (1) Such an agreement does not affect the amount, or any right or remedy for the recovery, of any costs recoverable from the client by any other person, or payable to the client by any other person, and any such other person may require any costs payable or recoverable by the person to or from the client to be assessed in the ordinary manner, unless such person has otherwise agreed. R.S.O. 1990, c. S.15, s. 20 (1).

## Idem

(2) However, the client who has entered into the agreement is not entitled to recover from any other person under any order for the payment of any costs that are the subject of the agreement more than the amount payable by the client to the client’s own solicitor under the agreement. R.S.O. 1990, c. S.15, s. 20 (2).

Note: On a day to be named by proclamation of the Lieutenant Governor, the Act is amended by the Statutes of Ontario, 2002, chapter 24, Schedule A, section 3 by adding the following section:

#### Awards of costs in contingency fee agreements

20.1 (1) In calculating the amount of costs for the purposes of making an award of costs, a court shall not reduce the amount of costs only because the client's solicitor is being compensated in accordance with a contingency fee agreement.

#### Same

(2) Despite subsection 20 (2), even if an order for the payment of costs is more than the amount payable by the client to the client's own solicitor under a contingency fee agreement, a client may recover the full amount under an order for the payment of costs if the client is to use the payment of costs to pay his, her or its solicitor.

#### Same

(3) If the client recovers the full amount under an order for the payment of costs under subsection (2), the client is only required to pay costs to his, her or its solicitor and not the amount payable under the contingency fee agreement, unless the contingency fee agreement is one that has been approved by a court under subsection 28.1 (8) and provides otherwise.

See: 2002, c. 24, Sched. A, ss. 3, 5.

...

#### Solicitors not to purchase any interest in litigation or to make payment dependent upon success

28. Nothing in sections 16 to 33 gives validity to a purchase by a solicitor of the interest or any part of the interest of his or her client in any action or other contentious proceeding to be brought or maintained, or gives validity to an agreement by which a solicitor retained or employed to prosecute an action or proceeding stipulates for payment only in the event of success in the action or proceeding, or where the amount to be paid to him or her is a percentage of the amount or value of the property recovered or preserved or otherwise determinable by such amount or value or dependent upon the result of the action or proceeding. R.S.O. 1990, c. S.15, s. 28.

Note: On a day to be named by proclamation of the Lieutenant Governor, section 28 is repealed by the Statutes of Ontario, 2002, chapter 24, Schedule A, section 4 and the following substituted:

#### Purchase of interest prohibited

28. A solicitor shall not enter into an agreement by which the solicitor purchases all or part of a client's interest in the action or other contentious proceeding that the solicitor is to bring or maintain on the client's behalf.

See: 2002, c. 24, Sched. A, ss. 4, 5.

Note: On a day to be named by proclamation of the Lieutenant Governor, the Act is amended by the Statutes of Ontario, 2002, chapter 24, Schedule A, section 4 by adding the following section:

#### Contingency fee agreements

28.1 (1) A solicitor may enter into a contingency fee agreement with a client in accordance with this section.

#### Remuneration dependent on success

(2) A solicitor may enter into a contingency fee agreement that provides that the remuneration paid to the solicitor for the legal services provided to or on behalf of the client is contingent, in whole or in part, on the successful disposition or completion of the matter in respect of which services are provided.

#### No contingency fees in certain matters

(3) A solicitor shall not enter into a contingency fee agreement if the solicitor is retained in respect of,  
 (a) a proceeding under the Criminal Code (Canada) or any other criminal or quasi-criminal proceeding; or  
 (b) a family law matter.

#### Written agreement

(4) A contingency fee agreement shall be in writing.

#### Maximum amount of contingency fee

(5) If a contingency fee agreement involves a percentage of the amount or of the value of the property recovered in an action or proceeding, the amount to be paid to the solicitor shall not be more than the maximum percentage, if any, prescribed by regulation of the amount or of the value of the property recovered in the action or proceeding, how ever the amount or property is recovered.

#### Greater maximum amount where approved

(6) Despite subsection (5), a solicitor may enter into a contingency fee agreement where the amount paid to the solicitor is more than the maximum percentage prescribed by regulation of the amount or of the value of the property recovered in the action or proceeding, if, upon joint application of the solicitor and his or her client whose application is to be brought within 90 days after the agreement is executed, the agreement is approved by the Superior Court of Justice.

#### Factors to be considered in application

(7) In determining whether to grant an application under subsection (6), the court shall consider the nature and complexity of the action or proceeding and the expense or risk involved in it and may consider such other factors as the court considers relevant.

#### Agreement not to include costs except with leave

(8) A contingency fee agreement shall not include in the fee payable to the solicitor, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as part of a settlement, unless,

- (a) the solicitor and client jointly apply to a judge of the Superior Court of Justice for approval to include the costs or a proportion of the costs in the contingency fee agreement because of exceptional circumstances; and
- (b) the judge is satisfied that exceptional circumstances apply and approves the inclusion of the costs or a proportion of them.

#### Enforceability of greater maximum amount of contingency fee

(9) A contingency fee agreement that is subject to approval under subsection (6) or (8) is not enforceable unless it is so approved.

#### Non-application

(10) Sections 17, 18 and 19 do not apply to contingency fee agreements.

#### Assessment of contingency fee

(11) For purposes of assessment, if a contingency fee agreement,

- (a) is not one to which subsection (6) or (8) applies, the client may apply to the Superior Court of Justice for an assessment of the solicitor's bill within 30 days after its delivery or within one year after its payment; or
- (b) is one to which subsection (6) or (8) applies, the client or the solicitor may apply to the Superior Court of Justice for an assessment within the time prescribed by regulation made under this section.

#### Regulations

(12) The Lieutenant Governor in Council may make regulations governing contingency fee agreements, including regulations,

- (a) governing the maximum percentage of the amount or of the value of the property recovered that may be a contingency fee, including but not limited to,
  - (i) setting a scale for the maximum percentage that may be charged for a contingency fee based on factors such as the value of the recovery and the amount of time spent by the solicitor, and
  - (ii) differentiating the maximum percentage that may be charged for a contingency fee based on factors such as the type of cause of action and the court in which the action is to be heard and distinguishing between causes of actions of the same type;
- (b) governing the maximum amount of remuneration that may be paid to a solicitor pursuant to a contingency fee agreement;
- (c) in respect of treatment of costs awarded or obtained where there is a contingency fee agreement;
- (d) prescribing standards and requirements for contingency fee agreements, including the form of the agreements and terms that must be included in contingency fee agreements and prohibiting terms from being included in contingency fee agreements;

- (e) imposing duties on solicitors who enter into contingency fee agreements;
  - (f) prescribing the time in which a solicitor or client may apply for an assessment under clause (11) (b);
  - (g) exempting persons, actions or proceedings or classes of persons, actions or proceedings from this section, a regulation made under this section or any provision in a regulation.
- See: 2002, c. 24, Sched. A, ss. 4, 5.

## Solicitors Act

### ONTARIO REGULATION 195/04

#### No Amendments

#### CONTINGENCY FEE AGREEMENTS

Notice of Currency:\* This document is up to date.

\*This notice is usually current to within two business days of accessing this document. For more current amendment information, see the [Table of Regulations – Legislative History Overview](#).

Note: This Regulation comes into force on October 1, 2004. See: O. Reg. 195/04, s. 11.

#### CONTENTS

1. Signing and dating contingency fee agreement
2. Contents of contingency fee agreements, general
3. Contents of contingency fee agreements, litigious matters
4. Matters not to be included in contingency fee agreements
5. Contingency fee agreement, person under disability
6. Contingency fee excludes costs and disbursements
7. Contingency fee not to exceed damages
8. Settlement or judgment money to be held in trust
9. Disbursements and taxes
10. Timing of assessment of contingency fee agreement

#### Signing and dating contingency fee agreement

1. (1) For the purposes of section 28.1 of the Act, in addition to being in writing, a contingency fee agreement,

- (a) shall be entitled “Contingency Fee Retainer Agreement”;
  - (b) shall be dated; and
  - (c) shall be signed by the client and the solicitor with each of their signatures being verified by a witness.
- O. Reg. 195/04, s. 1 (1).

(2) The solicitor shall provide an executed copy of the contingency fee agreement to the client and shall retain a copy of the agreement. O. Reg. 195/04, s. 1 (2).

#### Contents of contingency fee agreements, general

2. A solicitor who is a party to a contingency fee agreement shall ensure that the agreement includes the following:

1. The name, address and telephone number of the solicitor and of the client.
2. A statement of the basic type and nature of the matter in respect of which the solicitor is providing services to the client.
3. A statement that indicates,

- i. that the client and the solicitor have discussed options for retaining the solicitor other than by way of a contingency fee agreement, including retaining the solicitor by way of an hourly-rate retainer,
  - ii. that the client has been advised that hourly rates may vary among solicitors and that the client can speak with other solicitors to compare rates,
  - iii. that the client has chosen to retain the solicitor by way of a contingency fee agreement, and
  - iv. that the client understands that all usual protections and controls on retainers between a solicitor and client, as defined by the Law Society of Upper Canada and the common law, apply to the contingency fee agreement.
4. A statement that explains the contingency upon which the fee is to be paid to the solicitor.
  5. A statement that sets out the method by which the fee is to be determined and, if the method of determination is as a percentage of the amount recovered, a statement that explains that for the purpose of calculating the fee the amount of recovery excludes any amount awarded or agreed to that is separately specified as being in respect of costs and disbursements.
  6. A simple example that shows how the contingency fee is calculated.
  7. A statement that outlines how the contingency fee is calculated, if recovery is by way of a structured settlement.
  8. A statement that informs the client of their right to ask the Superior Court of Justice to review and approve of the solicitor's bill and that includes the applicable timelines for asking for the review.
  9. A statement that outlines when and how the client or the solicitor may terminate the contingency fee agreement, the consequences of the termination for each of them and the manner in which the solicitor's fee is to be determined in the event that the agreement is terminated.
  10. A statement that informs the client that the client retains the right to make all critical decisions regarding the conduct of the matter. O. Reg. 195/04, s. 2.

#### Contents of contingency fee agreements, litigious matters

3. In addition to the requirements set out in section 2, a solicitor who is a party to a contingency fee agreement made in respect of a litigious matter shall ensure that the agreement includes the following:
  1. If the client is a plaintiff, a statement that the solicitor shall not recover more in fees than the client recovers as damages or receives by way of settlement.
  2. A statement in respect of disbursements and taxes, including the GST payable on the solicitor's fees, that indicates,
    - i. whether the client is responsible for the payment of disbursements or taxes and, if the client is responsible for the payment of disbursements, a general description of disbursements likely to be incurred, other than relatively minor disbursements, and
    - ii. that if the client is responsible for the payment of disbursements or taxes and the solicitor pays the disbursements or taxes during the course of the matter, the solicitor is entitled to be reimbursed for those payments, subject to section 47 of the *Legal Aid Services Act, 1998* (legal aid charge against recovery), as a first charge on any funds received as a result of a judgment or settlement of the matter.
3. A statement that explains costs and the awarding of costs and that indicates,
  - i. that, unless otherwise ordered by a judge, a client is entitled to receive any costs contribution or award, on a partial indemnity scale or substantial indemnity scale, if the client is the party entitled to costs, and

- ii. that a client is responsible for paying any costs contribution or award, on a partial indemnity scale or substantial indemnity scale, if the client is the party liable to pay costs.
- 4. If the client is a plaintiff, a statement that indicates that the client agrees and directs that all funds claimed by the solicitor for legal fees, cost, taxes and disbursements shall be paid to the solicitor in trust from any judgment or settlement money.
- 5. If the client is a party under disability, for the purposes of the Rules of Civil Procedure, represented by a litigation guardian,
  - i. a statement that the contingency fee agreement either must be reviewed by a judge before the agreement is finalized or must be reviewed as part of the motion or application for approval of a settlement or a consent judgment under rule 7.08 of the Rules of Civil Procedure,
  - ii. a statement that the amount of the legal fees, costs, taxes and disbursements are subject to the approval of a judge when the judge reviews a settlement agreement or consent judgment under rule 7.08 of the Rules of Civil Procedure, and
  - iii. a statement that any money payable to a person under disability under an order or settlement shall be paid into court unless a judge orders otherwise under rule 7.09 of the Rules of Civil Procedure. O. Reg. 195/04, s. 3.

Matters not to be included in contingency fee agreements

4. (1) A solicitor shall not include in a contingency fee agreement a provision that,

- (a) requires the solicitor's consent before a claim may be abandoned, discontinued or settled at the instructions of the client;
- (b) prevents the client from terminating the contingency fee agreement with the solicitor or changing solicitors; or
- (c) permits the solicitor to split their fee with any other person, except as provided by the Rules of Professional Conduct. O. Reg. 195/04, s. 4 (1).

(2) In this section,

“Rules of Professional Conduct” means the Rules of Professional Conduct of the Law Society of Upper Canada. O. Reg. 195/04, s. 4 (2).

Contingency fee agreement, person under disability

5. (1) A solicitor for a person under disability represented by a litigation guardian with whom the solicitor is entering into a contingency fee agreement shall,

- (a) apply to a judge for approval of the agreement before the agreement is finalized; or
- (b) include the agreement as part of the motion or application for approval of a settlement or a consent judgment under rule 7.08 of the Rules of Civil Procedure. O. Reg. 195/04, s. 5 (1).

(2) In this section,

“person under disability” means a person under disability for the purposes of the Rules of Civil Procedure. O. Reg. 195/04, s. 5 (2).

Contingency fee excludes costs and disbursements

6. A contingency fee agreement that provides that the fee is determined as a percentage of the amount recovered shall exclude any amount awarded or agreed to that is separately specified as being in respect of costs and disbursements. O. Reg. 195/04, s. 6.

Contingency fee not to exceed damages

7. Despite any terms in a contingency fee agreement, a solicitor for a plaintiff shall not recover more in fees under the agreement than the plaintiff recovers as damages or receives by way of settlement. O. Reg. 195/04, s. 7.

Settlement or judgment money to be held in trust

8. A client who is a party to a contingency fee agreement shall direct that the amount of funds claimed by the solicitor for legal fees, cost, taxes and disbursements be paid to the solicitor in trust from any judgment or settlement money. O. Reg. 195/04, s. 8.

Disbursements and taxes

9. (1) If the client is responsible for the payment of disbursements or taxes under a contingency fee agreement, a solicitor who has paid disbursements or taxes during the course of the matter in respect of which services were provided shall be reimbursed for the disbursements or taxes on any funds received as a result of a judgment or settlement of the matter. O. Reg. 195/04, s. 9 (1).

(2) Except as provided under section 47 of the Legal Aid Services Act, 1998 (legal aid charge against recovery), the amount to be reimbursed to the solicitor under subsection (1) is a first charge on the funds received as a result of the judgment or settlement. O. Reg. 195/04, s. 9 (2).

Timing of assessment of contingency fee agreement

10. For the purposes of clause 28.1 (11) (b) of the Act, the client or the solicitor may apply to the Superior Court of Justice for an assessment of the solicitor's bill rendered in respect of a contingency fee agreement to which subsection 28.1 (6) or (8) of the Act applies within six months after its delivery. O. Reg. 195/04, s. 10.

11. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 195/04, s. 11.

.....

It was moved by Ms. Curtis, seconded by Mr. Pattillo that Convocation approve Form 17A (MAR) for the 2004 filing year as set out on pages 12 to 23 of the Report and as amended in the memorandum distributed.

Carried

Re: Proposed Amendments to Rule 2.08(3) to (5) and Commentary on Contingency Fees

It was moved by Ms. Curtis, seconded by Mr. Pattillo that the proposed amendments set out on pages 34 and 35 of the Report be approved.

Carried

Amendments to Rule 2.08(3) to (5) and Commentary - Contingency Fees

~~Contingent~~ Contingency Fees and ~~Contingent~~ Contingency Fee Agreements

2.08 (3) Subject to subrules (1), ~~(4)~~ and ~~(5)~~, except in family law or criminal or quasi-criminal matters, a lawyer may enter into a written agreement in accordance with the *Solicitors Act* and the regulations thereunder signed by the lawyer and his or her client, or where the client is under a disability, by the client's litigation guardian or other duly appointed representative, that provides that the lawyer's fee is contingent, in whole or in part, on a ~~specified~~ the successful disposition or completion of the matter for which the lawyer's services are to be provided.

(4) — An agreement under subrule (3) shall contain:

- (a) — a statement of the method by which the fee is to be determined, including the percentage that may accrue to the lawyer in the event of settlement, trial or appeal, and
- (b) — a statement that the client may apply to the Superior Court of Justice for a determination of whether the contingent fee is fair and reasonable.
- (5) — Except as permitted by the Class Proceedings Act, 1992, or any order made under it, an agreement under subrule (3) shall not:
- (a) — require the lawyer's consent if the client decides to discontinue or settle his or her claims, or
- (b) — include a term that prevents the client from changing lawyers or ending the lawyer and client relationship at any time.

[Amended – November 2002]

Commentary

~~THE CONTINGENT FEE AGREEMENT~~

A contingent fee agreement should:

- a. — be signed by a witness, and set out the name, address, and phone number of the witness;
- b. — briefly describe the nature of the client's claim;
- e. — contain a simple example of how the fee will be calculated;
- d. — contain a statement that the lawyer's fee may be lesser or greater than fees charged by other lawyers for similar claims and that before signing the agreement the client has the right to consult with and retain another lawyer;
- e. — contain a statement that the client has the right to decide whether to accept an offer to settle his or her claim;
- f. — contain a statement of who will be responsible for paying costs and disbursements, and
- g. — contain a statement setting out the circumstances in which the agreement may be terminated by the lawyer or by the client and the consequences of termination, including how the lawyer's fee is to be determined in such circumstances.

Immediately after the signing of a contingent fee agreement, the lawyer should deliver a copy to the client.

~~THE PERCENTAGE OF THE AWARD AND TREATMENT OF COSTS~~

In determining the appropriate percentage or other basis of the ~~contingent~~ contingency fee, the lawyer and the client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. ~~¶~~ The lawyer and client may agree that in addition to the fee payable under the agreement, the costs award any amount arising as a result of an award of costs or costs obtained as a part of a settlement is to be paid to the lawyer, which agreement under the *Solicitors Act* must receive judicial approval. In such circumstances, a smaller percentage of the award than would otherwise be agreed upon for the ~~contingent~~ contingency fee, after considering all relevant factors, will generally be appropriate. The test is whether the fee in all of the circumstances is fair and reasonable.

[New - October 2002]

REPORT ON THE REFERENDUM ON BENCHER REMUNERATION

The Treasurer explained the reason for having the Referendum Report heard in camera.

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IN CAMERA

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RESUMPTION OF THE REPORT OF THE PROFESSIONAL REGULATION COMMITTEE

Re: Proposed Amendments to Rule 2.04 on Conflicts of Interest Respecting Personal Relationships with Clients

It was moved by Ms. Curtis, seconded by Mr. Pattillo that Convocation approve the proposed amendments to Rule 2.04 and Commentary as set out on pages 29 to 31 of the Report.

Carried

Dr. Gotlib opposed the motion.

Amendments to Rule 2.04 Commentaries

2.04 AVOIDANCE OF CONFLICTS OF INTEREST

Definition

2.04 (1) In this rule

a “conflict of interest” or a “conflicting interest” means an interest

- (a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or
- (b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.

Commentary

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

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

*[Amended - May 2001, March 2004]*

Avoidance of Conflicts of Interest

- (2) A lawyer shall not advise or represent more than one side of a dispute.
- (3) A lawyer shall not act or continue to act in a matter when there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents.

Commentary

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

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

As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf should not be subject to other interests, duties, or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's

unfamiliarity with the client and the client's affairs. In some instances, each client's case may gather strength from joint representation. In the result, the client's interests may sometimes be better served by not engaging another lawyer, for example, when the client and another party to a commercial transaction are continuing clients of the same law firm but are regularly represented by different lawyers in that firm.

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

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

- a. The vulnerability of the client, both emotional and economic;
- b. The fact that the lawyer and client relationship may create a power imbalance in favour of the lawyer or, in some circumstances, in favour of the client;
- c. Whether the sexual or intimate personal relationship will jeopardize the client's right to have all information concerning the client's business and affairs held in strict confidence. For example, the existence of the relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship;
- d. Whether such a relationship may require the lawyer to act as a witness in the proceedings;
- e. Whether such a relationship will interfere in any way with the lawyer's fiduciary obligations to the client, his or her ability to exercise independent professional judgment, or his or her ability to fulfill obligations owed as an officer of the court and to the administration of justice.

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

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

*[Amended – March 2004]*

## REPORT OF THE PROFESSIONAL DEVELOPMENT, COMPETENCE & ADMISSIONS COMMITTEE

Mr. Hunter presented the Report of the Professional Development, Competence & Admissions Committee.

Professional Development, Competence & Admissions Committee  
October 28, 2004

Purpose of Report:        Decision  
                                 Information

Policy Secretariat  
(Sophia Sperdakos 416-947-5209)

### AMENDMENTS TO BY-LAW 38 (SPECIALIST CERTIFICATION)

#### Request to Convocation

1. That Convocation approves the proposed amendments to By-law 38 (Specialist Certification) set out at Appendix 2.

#### Summary of the Issue

2. In April 2003 Convocation approved By-law 38 (Specialist Certification) implementing the improved specialist certification program it approved in June 2002. In June 2003 it approved the French version of the By-law.
3. The by-law has now been in effect for over a year and a number of adjustments to it are necessary to ensure the program runs as efficiently and fairly as possible.
4. The proposed amendments are set out at Appendix 2.

### THE REPORT

#### Terms Of Reference/Committee Process

5. The Committee is reporting on the following matters:

#### Policy – For decision

- Proposed Amendments to By-law 38 (Specialist Certification)

#### Information

- Director’s Quarterly Benchmark Report: Professional Development & Competence Department

### AMENDMENTS TO BY-LAW 38 (SPECIALIST CERTIFICATION)

6. In April 2003 Convocation approved By-law 38 (Specialist Certification), which implemented the terms of the improved program it approved in June 2002. In June 2003 it approved the French version of the by-law. The original by-law is set out at Appendix 1.
7. By-law 38 has been in effect for over a year and a number of adjustments to it are necessary to ensure the program runs as efficiently and fairly as possible. The proposed amendments are set out at Appendix 2.
8. The first proposed amendment is to the name of the program, changing it from the “specialist certification program” to the “certified specialist program”. This change requires a number of housekeeping amendments to the English version of the by-law. (paragraphs 1-4 of Appendix 2)
9. The second proposed amendment is a housekeeping amendment to reflect changes made elsewhere in the by-law. (paragraph 5 of Appendix 2)

10. The third proposed amendment concerns the amount of time within which members of a newly established specialty committee must themselves become certified, reducing the time from within three years of certification in the area of law being available to one year. It is important in promoting a new specialty area that members of the committee be certified as soon as reasonably possible. (paragraph 6 of Appendix 2)
11. The fourth proposed amendment concerns the professional development hours for each specialty. Currently, the by-law provides that the specialty committees make this determination. In fact, the required hours were established as part of the program design at the outset of the program (18 hours of CLE and 50 hours of self-study, annually). The specialty committees have played no role in determining the requirement. The Professional Development Competence & Admissions Committee is the appropriate body to make any changes to the requirement to ensure consistency across the specialty areas. The proposed amendment corrects an inconsistency in the by-law. (paragraphs 7 and 8 of Appendix 2)
12. The fifth proposed amendment corrects errors in the number formatting of one section of the by-law and contains one proposed addition in clause 17(3)(b)(iii) of the by-law to preclude an individual who is counsel to an applicant, the applicant's employer or the applicant's firm or company from providing a reference in support of the application for certification. (paragraph 9 of Appendix 2)
13. The sixth proposed amendment concerns the role of the Specialist Certification Board. Pursuant to By-law 38, on an original application for certification the Board is required to grant certification if a Specialty Committee recommends it (ss.21 (a)(i) and required to deny certification if the Specialty Committee does not recommend it (ss. 21(b)(i).
14. Currently, the Board may only make a decision different from a Specialty Committee's recommendation if the applicant has been denied certification in the first instance and has re-applied to the Board within 30 days of the decision (s.22). At that time the Board is authorized to consider whether or not the applicant meets all the conditions for certification.
15. The Specialty Committees play a vital role in the determination of which applicants have the experience and credentials to warrant certification as specialists in a particular branch of law. The by-law grants the Specialty Committees important authority to do their work and will continue to do so.
16. The Board has become concerned, however, that it should have the authority to reject a Specialty Committee's recommendation in the first instance, where it believes the Specialty Committee has not properly addressed the by-law criteria in reaching its decision on an application. The proposed amendments reflect the Board's proposed approach. (paragraphs 10-11 of Appendix 2)
17. The seventh proposed amendment harmonizes the program's administrative reporting and payment requirements with other Law Society requirements. Specifically,
  - a. the January 1 date for payment of the certification annual fee is amended to January 31 to match other Law Society reporting requirements; and
  - b. the March 31 date for submitting the annual specialist certification report is amended to January 31 to match other Law Society filing requirements. (paragraphs 12 and 13 of Appendix 2)
18. The final proposed amendment introduces administrative flexibility in re-admitting those whose certificates have been revoked. Subsection 32(3) provides that a certified specialist whose certificate has been revoked may only apply for certification again after 12 months from the date of revocation. This has proven to be onerous, particularly where the revocation is for administrative rather than substantive reasons. The recommendation is that the mandatory waiting period be discontinued. Subsection 32(3) would no longer be required. (paragraph 14 of Appendix 2)
19. In summary, the proposed amendments described above are set out as follows:
  - i. Paragraphs 1-4 reflect the proposed name amendments for the program and Board;
  - ii. Paragraph 5 is a housekeeping amendment to reflect changes elsewhere in the by-law;

- iii. Paragraph 6 reflects the change to the time period within which a specialty committee member must become certified;
- iv. Paragraphs 7 and 8 reflect changes to the by-law to accurately identify who determines professional development requirements;
- v. Paragraph 9 reflects the proposal that an individual who is counsel to an applicant or his or her employer or firm or company should not provide a reference for the applicant;
- vi. Paragraphs 10 and 11 reflect the changes to the Board's authority regarding approval of applications;
- vii. Paragraphs 12 and 13 harmonize reporting dates with other Law Society requirements;
- and
- viii. Paragraph 14 removes a mandatory waiting period for re-application for certification after revocation.

#### Request to Convocation

20. That Convocation approves the proposed amendments to By-law 38 set out at Appendix 2.

### INFORMATION

#### DIRECTOR'S QUARTERLY BENCHMARK REPORT

21. Appendix 3 contains the Director of Professional Development & Competence's quarterly benchmark report, for Convocation's information.

### APPENDIX 1

#### BY-LAW 38

Made: April 25, 2003

#### SPECIALIST CERTIFICATION

##### PART I GENERAL

#### Definitions

1. In this By-Law,

"Board" means the Specialist Certification Board;

"certification staff" means employees of the Society assigned by the Chief Executive Officer the responsibility of supporting the work of the Board and the specialty committees; and

"Committee" means the standing committee of Convocation responsible for professional competence matters.

#### Exercise of powers by Committee

2. The performance of any duty, or the exercise of any power, given to the Committee under this By-Law is not subject to the approval of Convocation.

##### PART II SPECIALIST CERTIFICATION BOARD

#### Board to be established

3. (1) There is established the Specialist Certification Board.

#### Composition of Board

- (2) The Board shall consist of seven persons appointed by the Committee as follows:

1. Four benchers who are not lay benchers.
2. One lay bencher.
3. Two persons who are certified specialists who are not benchers.

#### Term

(3) Subject to subsection (4), a person appointed to the Board shall hold office for a term not exceeding three years and is eligible for reappointment.

#### Appointment at pleasure

(4) A person appointed to the Board holds office as a member of the Board at the pleasure of the Committee.

#### Chair

4. (1) The Committee shall appoint one member of the Board as chair of the Board.

#### Term of Office

(2) Subject to subsection (3), the chair holds office for a term not exceeding three years and is eligible for reappointment.

#### Appointment at pleasure

(3) The chair holds office at the pleasure of the Committee.

#### Function of Board

5. It is the function of the Board,

- (a) to establish specialty committees;
- (b) to oversee the work of the specialty committees;
- (c) subject to section 12, to establish standards for the certification of members as specialists;
- (d) to determine the areas of law in respect of which members may be certified as specialists;
- (e) to make, subject to this By-Law, rules of practice and procedure with respect to the consideration by the specialty committees and the Board of an application under section 17 and the consideration by the Board of an application under section 22, subsection 31 (3), subsection 31 (5), subsection 31 (6) or section 33 and the exercise by the Board of its discretion under subsection 31 (2) or subsection 32 (2);
- (f) to develop for the Committee's approval policies relating to the certification of members as specialists;
- (g) to recommend to the Committee the amount of the fees payable by applicants for specialist certification and certified specialists under this By-Law; and
- (h) to certify members as specialists.

#### Quorum

6. Four members of the Board constitute a quorum for the purposes of the transaction of business.

#### Meeting

7. (1) The Board shall meet at the call of the chair and in no case shall the Board meet less often than twice a year.

Meeting by telephone conference, etc.

(2) Any meeting of the Board may be conducted by means of such telephone, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other instantaneously and simultaneously.

Annual report to Committee

8. Not later than March 31 in each year, the Board shall make a report to the Committee upon the affairs of the Board of the immediately preceding year.

Confidentiality

9. (1) A member of the Board shall not disclose any information that comes to his or her knowledge as a result of the performance of his or her duties under this By-Law.

Exceptions

(2) Subsection (1) does not prohibit,

- (a) disclosure required in connection with the administration of the Act, the regulations or the by-laws;
- (b) disclosure required of a member of the Board under the Society's Rules of Professional Conduct;
- (c) disclosure of information that is a matter of public record; and
- (d) disclosure with the written consent of all persons whose interests might reasonably be affected by the disclosure.

### PART III SPECIALTY COMMITTEES

Board to establish committees

10. (1) The Board shall establish a specialty committee for each area of law in respect of which a member may be certified as a specialist.

Composition of specialty committee

(2) A specialty committee shall consist of at least five and not more than nine members appointed by the Board.

Eligibility for appointment

(3) Only the following members may be appointed to a specialty committee:

- 1. If there are members certified as specialists in the area of law in respect of which a specialty committee has been established, a member certified as a specialist in the area of law.
- 2. If there are no members certified as specialists in the area of law in respect of which a specialty committee has been established, a member who practises law in the area of law and undertakes to become certified as a specialist in the area of law within three years of certification in the area of law being available.

Term

(4) Subject to subsection (5), a member appointed to a specialty committee shall hold office for a term not exceeding three years and is eligible for reappointment.

Appointment at pleasure

(5) A person appointed to a specialty committee holds office as a member of the specialty committee at the pleasure of the Board.

#### Chair and vice-chair

11. (1) For each specialty committee, the Board shall appoint,
- (a) one member of the specialty committee as chair of the committee; and
  - (b) one member of the specialty committee as vice-chair of the committee.

#### Term of Office

- (2) Subject to subsection (3), the chair and vice-chair hold office for a term not exceeding three years and are eligible for reappointment.

#### Appointment at pleasure

- (3) The chair and vice-chair hold office at the pleasure of the Board.

#### Function of specialty committee

12. It is the function of a specialty committee,
- (a) to develop for the Board's approval standards for the certification of members as specialists;
  - (b) to review and accredit continuing legal education programs for purposes of sections 16 and 29;
  - (c) to specify the number of hours of self study and accredited continuing legal education programs to be completed by applicants and certified specialists;
  - (d) to review applications from members for certification as specialists; and
  - (e) to recommend to the Board members for certification as specialists.

#### Quorum

13. The majority of the members of a specialty committee constitute a quorum for the purposes of the transaction of business.

#### Meeting

14. (1) A specialty committee shall meet at the call of the chair and in no case shall the committee meet less often than twice a year.

#### Meeting by telephone conference, etc.

- (2) Any meeting of a specialty committee may be conducted by means of such telephone, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other instantaneously and simultaneously.

#### Confidentiality

15. (1) A member of a specialty committee shall not disclose any information that comes to his or her knowledge as a result of the performance of his or her duties under this By-Law.

#### Exceptions

- (2) Subsection (1) does not prohibit,
- (a) disclosure required in connection with the administration of the Act, the regulations or the by-laws;
  - (b) disclosure required of a member of a specialty committee under the Society's Rules of Professional Conduct;
  - (c) disclosure of information that is a matter of public record; and

- (d) disclosure with the written consent of all persons whose interests might reasonably be affected by the disclosure.

PART IV  
SPECIALIST CERTIFICATION

Requirements for certification

16. (1) A member may be certified as a specialist in an area of law in respect of which certification is available if the member meets the following conditions:

1. The member has engaged in the practice of law for at least seven years immediately before the day on which the member applies for certification.
2. The member has practised in the area of law for at least five of the seven years mentioned in paragraph 1 as follows:
  - i. Two years immediately before the day on which the member applies for certification.
  - ii. Any other three years.
3. The member has comprehensive knowledge of the substantive law and the practices and procedures in the area of law.
4. In each of the five years in which the member practised in the area of law, the member has completed in the area of law,
  - i. the number of hours of self-study specified by the specialty committee established in respect of the area of law, and
  - ii. the number of hours of accredited continuing legal education programs specified by the specialty committee established in respect of the area of law.
5. The member is not the subject and has no record, within the five year period immediately before the day on which the member applies for certification, of any order made against the member by a tribunal of the governing body of the legal profession in any jurisdiction.
6. The member has and has had, within the five year period immediately before the day on which the member applies for certification, no terms, conditions, limitations or restrictions imposed on the member's authorization to practise law in any jurisdiction in which the member is authorized to practise law.
7. The member is not, in any jurisdiction in which the member is authorized to practise law, the subject of a review of the member's practice for the purpose of determining if the member is meeting standards of professional competence.
8. The member has and has had, within the five year period immediately before the day on which the member applies for certification, no serious claims or substantial number of claims made against the member in the member's professional capacity or in respect of the member's practice in any jurisdiction in which the member is authorized to practise law.

Same

(2) Despite subsection (1), if a member is the subject of a conduct, capacity or competence proceeding in any jurisdiction in which the member is authorized to practise law, the member may not be certified as a specialist in an area of law in respect of which certification is available unless to certify the member as a specialist would not be contrary to the public interest.

Interpretation: practice in area of law

(3) In this section, in any year, a member practises in an area of law if in that year the member practises in the area of law for the time specified by the Board from time to time.

Application for certification

17. (1) A member who wishes to be certified as a specialist shall apply to the certification staff.

Application form

(2) An application under subsection (1) shall be contained in a form provided by the certification staff.

Accompanying documents, etc.

(3) An application under subsection (1) shall be accompanied by,

(a) a certificate of standing from the governing body of the legal profession in each jurisdiction of which the applicant is or was a member issued during the three month period immediately before the day on which the applicant makes the application;

(b) written references from four members not one of whom is,

i. a person whose membership is in abeyance under subsection 31 (1) of the Act,

ii. a partner, an associate, a co-worker, an employer or an employee of the applicant,

iii. a relative of the applicant,

iv. a member of a specialty committee established in respect of the area of law in which the applicant wishes to be certified as a specialist;

v. a member of the Board,

vi. a bencher, or

vii. an employee of the Society; and

(c) an application fee in an amount determined by Convocation from time to time.

Documents, explanations, releases, etc.

(4) For the purpose of assisting the specialty committee and the Board to consider an application under subsection (1), the applicant shall provide,

(a) to the certification staff, such documents and explanations as may be required; and

(b) to a person named by the certification staff, such releases, directions and consent as may be required to permit the person to make available to the certification staff such information as may be required.

Application to be considered by specialty committee

18. Every application under section 17, to the extent that the application deals with the conditions set out in paragraphs 1 to 4 of subsection 16 (1), shall be considered by the specialty committee established in respect of the area of law in which the applicant wishes to be certified as a specialist and the committee shall,

(a) if satisfied that the applicant meets the conditions set out in paragraphs 1 to 4 of subsection 16 (1), recommend to the Board that the applicant be certified as a specialist; or

(b) if not satisfied that the applicant meets the conditions set out in paragraphs 1 to 4 of subsection 16 (1), recommend to the Board that the member not be certified as a specialist.

## Interview

19. (1) Prior to making a recommendation to the Board, a specialty committee may require an applicant to attend an interview.

## Same

- (2) An interview under subsection (1) shall be conducted by,
- (a) three members of the specialty committee selected by the chair of the committee; or
  - (b) three members who are certified as specialists selected by the specialty committee.

## Report to committee

(3) If an interview is conducted by three members who are certified as specialists, the members shall prepare a written report on the interview and submit the report to the specialty committee.

## Notice

20. If a specialty committee intends to recommend to the Board that the applicant not be certified as a specialist, before making the recommendation the committee shall give the applicant the opportunity,

- (a) to withdraw the application; or
- (b) to submit additional information to the committee.

## Application to be considered by Board

21. Every application under section 17 shall be considered by the Board and the Board shall,

- (a) certify the applicant as a specialist if,
  - (i) the specialty committee recommends that the applicant be certified as a specialist;
  - (ii) the Board is satisfied that the applicant meets the conditions set out in paragraphs 5 to 8 of subsection 16 (1); and
  - (iii) the Board is satisfied that,
    - i. the condition set out in subsection 16 (2) is not present; or
    - ii. it would not be contrary to the public interest to certify the applicant as a specialist; or
- (b) not certify the applicant as a specialist if,
  - (i) the specialty committee does not recommend that the applicant be certified as a specialist;
  - (ii) the Board is not satisfied that the applicant meets the conditions set out in paragraphs 5 to 8 of subsection 16 (1); or
  - (iii) the Board is satisfied that,
    - (A) the condition set out in subsection 16 (2) is present; or
    - (B) it would be contrary to the public interest to certify the applicant as a specialist.

#### Notice

22. (1) If the Board does not certify the applicant as a specialist under clause 21 (b), the Board shall notify the applicant in writing of its decision.

#### Re-determination of application

(2) If the Board does not certify the applicant as a specialist under clause 21 (b), the applicant may apply to the Board for a determination as to whether the applicant should be certified as a specialist.

#### Timing

(3) An application under subsection (2) shall be commenced by the applicant notifying the Board in writing within thirty days after the day on which the applicant receives notice of the Board's decision not to certify the applicant as a specialist.

#### Determination

- (4) The Board shall consider the application made under subsection (2) and the Board shall,
- (a) certify the applicant as a specialist if,
- (i) the Board is satisfied that the applicant meets the conditions set out in subsection 16 (1); and
  - (ii) the Board is satisfied that,
    - (A) the condition set out in subsection 16 (2) is not present; or
    - (B) it would not be contrary to the public interest to certify the applicant as a specialist; or
- (b) not certify the applicant as a specialist if,
- (i) the Board is not satisfied that the applicant meets the conditions set out in subsection 16 (1), or
  - (ii) the Board is satisfied that,
    - (A) the condition set out in subsection 16 (2) is present; or
    - (B) it would be contrary to the public interest to certify the applicant as a specialist.

#### Decision final

- (5) The decision of the Board on an application under subsection (2) is final.

#### Issuance of certificate

23. The Board shall issue to an applicant certified as a specialist a certificate of specialty stating the area of law in which the applicant has been certified as a specialist.

#### Continuation of certification

24. A member certified as a specialist shall continue to be certified as a specialist so long as the member,
- (a) practises in the area of law in which the member has been certified as a specialist within the meaning of subsection 16 (3);
  - (b) maintains comprehensive knowledge of the substantive law and the practices and procedures in the area of law in which the member has been certified as a specialist;

- (c) is not the subject and has no record of any order made against the member by a tribunal of the governing body of the legal profession in any jurisdiction;
- (d) has and has had no terms, conditions, limitations or restrictions imposed on the member's authorization to practise law in any jurisdiction in which the member is authorized to practise law;
- (e) is not, in any jurisdiction in which the member is authorized to practise law the subject of a review of the member's practice for the purpose of determining if the member is meeting standards of professional competence;
- (f) has and has had no serious claims or substantial number of claims made against the member in the member's professional capacity or in respect of the member's practice in any jurisdiction in which the member is authorized to practise law; and
- (g) fulfils all requirements under this By-Law.

#### PART V CERTIFIED SPECIALISTS

##### Definition

25. In this Part,

“certified specialist” means a member who is certified as a specialist by the Board under Part IV.

##### Specialist designation

26. (1) A certified specialist may use the following designation:  
Certified Specialist [area of law in which certified as specialist]

##### Same

(2) A member who is not a certified specialist shall not use any designation from which a person might reasonably conclude that the member is a certified specialist.

##### Requirement to pay annual fee

27. (1) Every year a certified specialist shall pay to the Society an annual fee in the amount determined by Convocation from time to time and any taxes that the Society is required to collect from the certified specialist in respect of the payment of the annual fee.

##### Payment due

(2) Payment of the annual fee is due on January 1 of each year.

##### Certified specialists

(3) Subsection (2) applies only to members who are certified specialists on January 1.

##### Members certified after January 1

(4) A member who is certified as a specialist after January 1 shall pay, in respect of the year in which the member is certified as a specialist, an amount of the annual fee as determined by the formula,

$$(A \div 12) \times B$$

where,

A is the annual fee, and

B is the number of whole calendar months remaining in the year after the month in which the member is certified as a specialist.

Payment due

(5) Payment of the amount of the annual fee specified in subsection (4) is due on the day on which the member is certified as a specialist.

Requirement to submit annual report

28. (1) A certified specialist shall submit a report to the certification staff by March 31 of each year in respect of the certified specialist's compliance with this By-Law during the immediately preceding year.

Report form

(2) The report required under subsection (1) shall be in a form provided by the certification staff.

Continuing legal education requirements

29. Every year a certified specialist shall complete in the area of law in which the specialist is certified,

- (a) the number of hours of self-study specified by the specialty committee established in respect of the area of law, and
- (b) the number of hours of accredited continuing legal education programs specified by the specialty committee established in respect of the area of law.

Proof of compliance

30. (1) A certified specialist shall, upon the request of the certification staff and by not later than the day specified by the staff, provide proof to the satisfaction of the staff of the certified specialist's compliance with this By-Law.

Deemed failure to comply

(2) A certified specialist who fails to provide proof to the certification staff by the day specified by the staff of the certified specialist's compliance with this By-Law, the certified specialist shall be deemed not to be in compliance with this By-Law.

Notice to Society

(3) A certified specialist shall notify the Society immediately the certified specialist is not in compliance with this By-Law.

Automatic abeyance

31. (1) A certified specialist's specialist certification is in abeyance while,

- (a) the certified specialist's membership is in abeyance under subsection 31 (1) of the Act;
- (b) the certified specialist has terms, conditions, limitations or restrictions imposed on the certified specialist's authorization to practise law in any jurisdiction in which the certified specialist is authorized to practise law;
- (c) the certified specialist is, in any jurisdiction in which the certified specialized is authorized to practise law, the subject of a review of the certified specialist's practice for the purpose of determining if the certified specialist is meeting standards of professional competence; or
- (d) the certified specialist has serious claims or substantial number of claims made against the certified specialist in the certified specialist's professional capacity or in respect of the certified specialist's practice in any jurisdiction in which the certified specialist is authorized to practise law.

Abeyance by Board: discretion

(2) The Board may place a certified specialist's specialist certification in abeyance if the certified specialist is the subject of a conduct, capacity or competence proceeding in any jurisdiction in which the certified specialist is authorized to practise law and to not do so would be contrary to the public interest.

Abeyance by Board: mandatory

(3) The Board shall place a certified specialist's specialist certification in abeyance if the certified specialist applies to the Board to have the specialist certification placed in abeyance.

Restoration

(4) If the conditions mentioned in subsection (1) are no longer present and the certified specialist's specialist certification has not been revoked under subsections 32 (1) or (2), upon notice to the certification staff of the change in conditions, the certified specialist's specialist certification shall be restored.

Same

(5) If the condition mentioned in subsection (2) is no longer present and the certified specialist's specialist certification has not been revoked under subsections 32 (1) or (2), on the application of the certified specialist, the Board may restore the specialist certification if to do so would not be contrary to the public interest.

Same

(6) If the Board placed a certified specialist's specialist certification in abeyance under subsection (3) and the certified specialist's specialist certification has not been revoked under subsections 32 (1) or (2), on the application of the certified specialist the Board shall restore the specialist certification if,

- (a) none of the conditions in subsection (1) are present; and
- (b) the condition in subsection (2) is not present, or if they are, the Board is satisfied that it would not be contrary to the public interest to restore the specialist certification.

Revocation

32. (1) A certified specialist's specialist certification is automatically revoked immediately,

- (a) the certified specialist ceases to practise law in Ontario;
- (b) the certified specialist ceases to practise in the area of law in which the certified specialist has been certified as a specialist within the meaning of subsection 16 (3);
- (c) the certified specialist is the subject of any order made against the certified specialist by a tribunal of the governing body of the legal profession in any jurisdiction;
- (d) the certified specialist fails to pay an annual fee or submit an annual report;
- (e) the certified specialist fails to meet the requirement set out in section 29; or
- (f) the certified specialist's specialist certification has been in abeyance for more than 12 months.

Same

(2) The Board may revoke a certified specialist's specialist certification if the certified specialist does not maintain comprehensive knowledge of the substantive law and the practices and procedures in the area of law in which the certified specialist has been certified as a specialist.

Application for certification after revocation

(3) A certified specialist whose specialist certification has been revoked may apply under section 17 for specialist certification only after 12 months from the day on which the certification was revoked.

Surrender of certification

33. (1) A certified specialist who wishes to surrender his or her specialist certification shall submit a request to surrender in writing accompanied by the applicable certificate of specialty to the Board and the Board shall approve the request.

Same

(2) A member ceases to be certified as a specialist immediately the Board approves the member's request to surrender his or her specialist certification under subsection (1).

## PART VI TRANSITION

Existing certified specialists

34. (1) Despite sections 16 and 17, if, on the day immediately before the day this By-Law comes into force, a member was certified as a specialist by the Society, the member shall be deemed to be certified as a specialist by the Board under this By-Law on the day on which this By-Law comes into force.

Annual fee

(2) Despite section 27, the amount of the annual fee payable by a member referred to in subsection (1) in respect of 2003 shall be \$200.00 and any taxes that the Society is required to collect from the member in respect of the payment of the annual fee less any amount of any annual renewal fee paid by the member in respect of 2003 under the policies and procedures for specialist certification in place before this By-Law came into force.

Due date 2003

(3) Despite section 27, payment of the annual fee by a member referred to in subsection (1) in respect of 2003 is due on the day in 2003 on which the member would be required to pay an annual renewal fee under the policies and procedures for specialist certification in place before this By-Law came into force.

Existing applicants

35. (1) If before the day this By-Law comes into force a member applied to the Society to be certified as a specialist, the application shall be considered in accordance with the policies and procedures for specialist certification in place before this By-Law came into force.

Certification of existing applicants

(2) If a member referred to in subsection (1) is certified as a specialist, the member shall be deemed to be certified as a specialist by the Board under this By-Law.

APPENDIX 2

## THE LAW SOCIETY OF UPPER CANADA

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

#### BY-LAW 38 [SPECIALIST CERTIFICATION]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON OCTOBER 28, 2004

THAT By-Law 38 [Specialist Certification], made by Convocation on April 25, 2003 and amended on June 26, 2003, be further amended as follows:

1. The title of the By-Law is renamed "Certified Specialist Program".
2. The By-Law is amended by deleting "Specialist Certification Board" wherever it appears and substituting "Certified Specialist Board".

3. The By-Law is amended by deleting “specialist certification” / “agrément des spécialistes” wherever it appears and substituting “certification” / “agrément”.
4. Section 1 of the By-Law is amended by adding the following:  
 “certification” means certification as a specialist;  
 «agrément» L’agrément d’un membre comme spécialiste. («certification»)
5. Clause 5 (e) is amended by deleting “section 22,” / “de l’article 22,”.
6. Paragraph 2 of subsection 10 (3) is amended by deleting “three years” / “trois ans qui suivent” and substituting “one year” / “l’année qui suit”.
7. Subsection 12 of the By-Law is deleted and the following substituted:  
 Function of specialty committee  
 12. It is the function of the specialty committee,
  - (a) to develop for the Board’s approval standards for the certification of members as specialists;
  - (b) to review and accredit continuing legal education programs for purposes of sections 16 and 29;
  - (c) to review applications from members for certification as specialists; and
  - (d) to recommend to the Board members for certification as specialists.
 Fonctions des comités de spécialisation  
 12. Les comités de spécialisation ont les fonctions suivantes :
  - a) élaborer les normes d’approbation du Conseil d’agrément aux fins de l’agrément des membres à titre de spécialistes;
  - b) examiner et agréer les programmes de formation professionnelle pour l’application des articles 16 et 29;
  - c) étudier les demandes d’agrément à titre de spécialiste présentées par les membres;
  - d) recommander au Conseil d’agrément les membres à agréer à titre de spécialistes.
8. Subparagraphs i and ii of paragraph 4 of subsection 16 (1) and clauses 29 (a) and (b) of the By-Law are amended by deleting “specialty committee established in respect of the area of law” / “comité de spécialisation constitué à l’égard du domaine” and substituting “Committee” / “Comité”.
9. Clause 17 (3) (b) of the By-Law is deleted and the following substituted:
  - (b) written references from four members not one of whom is,
    - (i) a person whose membership is in abeyance under subsection 31 (1) of the Act,
    - (ii) a partner, an associate, a co-worker, an employer or an employee of the applicant,
    - (iii) an individual who is counsel to the applicant, to the applicant’s employer or to the applicant’s firm or company;

- (iv) a relative of the applicant,
  - (v) a member of a specialty committee established in respect of the area of law in which the applicant wishes to be certified as a specialist;
  - (vi) a member of the Board,
  - (vii) a bencher, or
  - (viii) an employee of the Society; and
- b) des références écrites données par quatre membres dont aucun n'est une des personnes suivantes :
- (i) une personne dont la qualité de membre est en suspens en application du paragraphe 31 (1) de la Loi,
  - (ii) un associé, un collègue, un employeur ou un employé de l'auteur de la demande,
  - (iii) une personne qui est conseillère juridique pour l'auteur de la demande, pour son employeur ou pour son cabinet ou sa compagnie,
  - (iv) un parent de l'auteur de la demande,
  - (v) un membre du comité de spécialisation constitué à l'égard du domaine du droit dans lequel l'auteur de la demande souhaite être agréé à titre de spécialiste,
  - (vi) un membre du Conseil d'agrément,
  - (vii) un conseiller élu ou une conseillère élue,
  - (viii) un employé ou une employée du Barreau;

10. Section 21 of the By-Law is deleted and the following substituted:

**Application to be considered by Board**

21. Every application under section 17 shall be considered by the Board.

**Recommendation to certify and determination by Board**

21.1 (1) If the specialty committee recommends to the Board that the applicant be certified as a specialist, the Board may,

- (a) certify the applicant as a specialist if,
  - (i) the Board is satisfied that the applicant meets the conditions set out in paragraphs 5 to 8 of subsection 16 (1); and
  - (ii) the Board is satisfied that,
    - (A) the condition set out in subsection 16 (2) is not present; or
    - (B) it would not be contrary to the public interest to certify the applicant as a specialist; or
- (b) not certify the applicant as a specialist if,

- (i) the Board is not satisfied that the applicant meets the conditions set out in paragraphs 5 to 8 of subsection 16 (1); or
- (ii) the Board is satisfied that,
  - (A) the condition set out in subsection 16 (2) is present; or
  - (B) it would be contrary to the public interest to certify the applicant as a specialist.

#### Recommendation to not certify and determination by Board

(2) If the specialty committee recommends to the Board that the applicant not be certified as a specialist, the Board may,

- (a) certify the applicant as a specialist if,
  - (i) the Board is satisfied that the applicant meets the conditions set out in subsection 16 (1); and
  - (ii) the Board is satisfied that,
    - (A) the condition set out in subsection 16 (2) is not present; or
    - (B) it would not be contrary to the public interest to certify the applicant as a specialist; or
- (b) not certify the applicant as a specialist if,
  - (i) the Board is not satisfied that the applicant meets the conditions set out in subsection 16 (1); or
  - (ii) the Board is satisfied that,
    - (A) the condition set out in subsection 16 (2) is present; or
    - (B) it would be contrary to the public interest to certify the applicant as a specialist.

#### Étude des demandes par le Conseil d'agrément

21. Le Conseil d'agrément étudie chaque demande présentée en application du paragraphe 17.

#### Recommandation et décision d'agrément par le Conseil d'agrément

21.1 (1) Si un comité de spécialisation recommande au Conseil d'agrément d'agrément l'auteur de la demande à titre de spécialiste, le Conseil d'agrément peut:

- a) soit l'agrément à titre de spécialiste si les conditions suivantes sont réunies:
  - (i) le Conseil d'agrément est convaincu qu'il remplit les conditions énoncées aux dispositions 5 à 8 du paragraphe 16 (1),
  - (ii) le Conseil d'agrément est convaincu :
    - (A) soit que la condition énoncée au paragraphe 16 (2) n'existe pas,
    - (B) soit qu'il ne serait pas contraire à l'intérêt public de l'agrément à titre de spécialiste;
- b) soit ne pas l'agrément à titre de spécialiste si, selon le cas:

- (i) le Conseil d'agrément n'est pas convaincu qu'il remplit les conditions énoncées aux dispositions 5 à 8 du paragraphe 16 (1),
- (ii) le Conseil d'agrément est convaincu :
  - (A) soit que la condition énoncée au paragraphe 16 (2) existe,
  - (B) soit qu'il serait contraire à l'intérêt public de l'agrérer à titre de spécialiste.

Recommandation et décision de ne pas agréer par le Conseil d'agrément

(2) Si le comité de spécialisation recommande au Conseil d'agrément de ne pas agréer l'auteur de la demande à titre de spécialiste, ce dernier peut :

- a) soit agréer l'auteur de la demande à titre de spécialiste si les conditions suivantes sont réunies:
  - (i) il est convaincu qu'il remplit les conditions énoncées au paragraphe 16 (1),
  - (ii) il est convaincu :
    - (A) soit que la condition énoncée au paragraphe 16 (2) n'existe pas,
    - (B) soit qu'il ne serait pas contraire à l'intérêt public de l'agrérer à titre de spécialiste;
- b) soit ne pas agréer l'auteur de la demande à titre de spécialiste si, selon le cas:
  - (i) il n'est pas convaincu qu'il remplit les conditions énoncées au paragraphe 16 (1),
  - (ii) il est convaincu :
    - (A) soit que la condition énoncée au paragraphe 16 (2) existe,
    - (B) soit qu'il serait contraire à l'intérêt public de l'agrérer à titre de spécialiste.

11. Section 22 of the By-Law is deleted and the following substituted:

Notice

22. (1) If the Board does not certify the applicant as a specialist under clause 21.1 (2) (b), the Board shall notify the applicant in writing of its decision.

Decision final

(2) The decision of the Board on an application under this part is final.

Avis

22. (1) Si le Conseil d'agrément n'agrée par l'auteur de la demande à titre de spécialiste en application de l'alinéa 21.1 (2) b), le Conseil d'agrément avise l'auteur de la demande de sa décision par écrit.

Décision définitive

(2) La décision que le Conseil d'agrément rend à l'égard d'une demande présentée en vertu de cette partie est définitive.

12. Subsections 27 (2), (3) and (4) of the By-Law are amended by deleting "January 1" / "1er janvier" and substituting "January 31" / "31 janvier".

13. Subsection 28 (1) of the By-Law is amended by deleting “March 31” / “31 mars” and substituting “January 31” / “31 janvier”.
14. The By-Law is amended by deleting subsection 32 (3).

## APPENDIX 3

QUARTERLY BENCHMARK REPORT  
 PROFESSIONAL DEVELOPMENT & COMPETENCE DEPARTMENT  
 (Product Usage Statistics as at end September 2004)

## FOR INFORMATION ONLY

Prepared by:

Diana Miles  
 Director, Professional Development & Competence  
 (416) 947-3328  
 dmiles@lsuc.on.ca

October 2004

## BENCHMARKS AND KEY INDICATORS REPORT

Practice Management Guidelines

Web traffic report for Practice Management Guidelines (number of visits)

Guideline	November & December 2002	2003	As at September 2004
Executive Summary Page	741	5,085	2,283
Client Service & Communication	71	1,488	4,170
File Management	108	930	2,110
Financial Management	93	553	726
Technology	71	597	1,212
Professional Management	43	584	683
Time Management	83	924	1,461
Personal Management	33	423	857
Closing Down Your Practice	32	558	869
Total	1,275	11,142	14,371

Best Practices Self-assessment Tool

The Best Practices Self-assessment Tool was launched on June 25, 2004.

	As at September 2004
Registered Users	571

Specialist Certification

The Specialist Certification Program redesign was effective January 2004.

	2001	2002	2003	As at September 2004
Number of Specialists	617	611	609	670
Specialists in Toronto Area	349	344	341	373
Specialists outside Toronto	268	267	268	297
Number of Specialty Areas	10	10	10	13

Continuing Legal Education

	2001	2002	2003	As at September 2004
Number of CLE programs (all formats)	67	63	71	49
Attendance at CLE programs	8,539	11,788	18,269	13,014
Average attendance per program	127	187	262	266
Number of programs on ILN	-	-	35	30
Attendance at ILN locations	-	-	4,014	2,390
Average attendance at ILN locations per program	-	-	115	80
Number of Teleseminars	-	-	5	8
Attendance at Teleseminars	-	-	2,468	3,404
Average attendance at Teleseminars	-	-	494	426
Number of synchronous (live) webcast programs through BAR-eX	N/A	N/A	12	16
Attendance at synchronous webcast programs	N/A	N/A	213	375

through BAR-eX				
Average attendance at synchronous webcast programs through BAR-eX	N/A	N/A	18	23
Bursaries provided	140	151	444	178
Units/publications sold (paper, CD and PDF)	8,249	11,424	11,028	9,730

e-Transactions Site

	2003	As at September 2004
Number of visits on CLE page of e-Transactions	38,954	53,761

Web purchase report for CLE portion of e-Transactions site

Product	2003	As at September 2004
Book purchases	524	927
Program registrations	1,103	1,158
ILN program registrations	503	418
Teleseminar registrations	321	372
Video streams	27	29
PDF purchases	36	36
CD-ROM purchases	9	104

Practice Advisory

	2001	2002	2003	As at September 2004
Total member calls for advice	5,435	5,715	5,303	4,365

Breakdown of Callers

	2001	2002	2003	As at September 2004
Sole practitioners	2,363	2,465	2,399	1,808
Other members	2,150	2,354	2,372	1,735
Non-members*	922	896	532	822

\*non member category consists of the following: Articling students, Secretary or Bookkeeper at firm, Manager or Administrator at firm, Law Society staff, Law Clerk or Paralegal at firm and other (sales person, lawyer outside Ontario, etc.)

## Practice Advisory Mentor Program

	2001	2002	2003	As at September 2004
Number of new mentors	N/A	N/A	6	13
Number of matches	N/A	30	91	71

Spot Audit

## Number of Audits Conducted

	2001	2002	2003	As at September 2004
Books and records audits	718	506	529	368
Complex audits	319	401	528	429
Total audits	1,037	907	1,057	797

Audits referred to Investigations/undertakings obtained	42	70	56	32
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Practice Review

	2001 (first year of new process)	2002	2003	As at September 2004
Number of authorizations into program	16	20	19	33
Number of authorizations through internal referrals	3	8	11	10
Total	19	28	30	43

Total Practice Reviews Conducted*	18	50	45	28
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\* A portion represents follow-up practice reviews for members that volunteered into the program prior to mandatory reviews being enacted in 1999. As a result, more reviews are being shown as conducted than authorized. A significant number of reviews in 2002 & 2003 fall within this category.

Bar Admission Course

	2001	2002	2003	As at September 2004
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Enrolment	1,247	1,312	1,317	1,477
Average attendance skills phase (May-June)	80%	72%	74%	60%
Average attendance substantive phase (July - Aug)	48%	42%	48%	39%
Tuition Fees	\$4,400	\$4,400	\$4,400	\$4,400
National Mobility Agreement transfer candidates	-	-	41	64
Non-National Mobility Agreement transfer candidates	-	-	26	2
Total Transfer candidates	61	93	67	66

### BAC e-Learning Site

#### Web traffic report for BAC e-Learning Site

	2003	As at September 2004
Number of visits	55,660	65,295

### Articling and Placement Services

	2001	2002	2003	As at September 2004
International Articles	29	16	11	12
National Articles		14	16	9
Part time Articles		5	8	7
Joint Articles		0	2	4
Biographic paragraphs posted	53	62	99	77
Job postings	163	129	104	63
New Articling Mentors	N/A	N/A	N/A	5
New Articling Mentees	N/A	N/A	N/A	43

### Articling Placement

	2001	2002	2003	2004
Students actively seeking placement as at September of each year	N/A	N/A	179	209
Number of BAC students	N/A	N/A	1,257	1,332

Education Support Services

	2001	2002	2003	As at September 2004
Distance education - number of locations	15	29	71	50
Distance education - number of students	28	46	103	241
Number of students who have received Accommodation*	11	29	127	203
Number of students who have been assisted with a special needs accommodation**	47	33	56	267
Number of students who have received tutoring	60	72	45	43
OSAP - number of applicants	333	258	342	365
Repayable Allowance Program approvals	47	57	37	74
Repayable Allowance Program amount awarded	\$170,700	\$213,395	\$117,167	\$258,258

\* Accommodation requests cover issues such as bereavement, pregnancy and time conflicts

\*\*Special Needs Accommodation requests cover issues such as disabilities, medical conditions, dyslexia, hearing and vision impairments

Great Library

	2001	2002	2003	As at September 2004
Materials catalogued and classified	1,806	2,005	2,179	1,120*
Number of visits on the Great Library Web site	N/A	651,826	608,781	513,321
Catalogue searches on Web site	N/A	132,923	199,191	127,814
Number of information requests	71,000	47,000	48,800	34,188
Pages copied in custom copy service	68,437	56,159	43,815	30,666
Pages copied on self-copiers	481,473	397,957	337,313	229,801
Seminars held	4	6	12	8
Attendance at seminars	N/A	N/A	43	121

Attendance at orientation tours and general instruction	413	350	360	443
Corporate Records and Archives new entries into records database	N/A	2,157	5,199	4,212

\*Low number due to processing the migrating records into the new electronic catalogue

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Re: Amendments to By-law 38 – Specialist Certification

It was moved by Mr. Hunter, seconded by Mr. Simpson that the amendments to By-law 38 set out at Appendix 2 of the Report be approved.

Carried

Amendments to By-law 38

APPENDIX 2

THE LAW SOCIETY OF UPPER CANADA

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

BY-LAW 38  
[SPECIALIST CERTIFICATION]

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4. Section 1 of the By-Law is amended by adding the following:  
  
“certification” means certification as a specialist;  
  
«agrément» L’agrément d’un membre comme spécialiste. («certification»)
5. Clause 5 (e) is amended by deleting “section 22,” / “de l’article 22,”.
6. Paragraph 2 of subsection 10 (3) is amended by deleting “three years” / “trois ans qui suivent” and substituting “one year” / “l’année qui suit”.

7. Subsection 12 of the By-Law is deleted and the following substituted:

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12. It is the function of the specialty committee,
- (a) to develop for the Board's approval standards for the certification of members as specialists;
  - (b) to review and accredit continuing legal education programs for purposes of sections 16 and 29;
  - (c) to review applications from members for certification as specialists; and
  - (d) to recommend to the Board members for certification as specialists.

Fonctions des comités de spécialisation

12. Les comités de spécialisation ont les fonctions suivantes:
- a) élaborer les normes d'approbation du Conseil d'agrément aux fins de l'agrément des membres à titre de spécialistes;
  - b) examiner et agréer les programmes de formation professionnelle pour l'application des articles 16 et 29;
  - c) étudier les demandes d'agrément à titre de spécialiste présentées par les membres;
  - d) recommander au Conseil d'agrément les membres à agréer à titre de spécialistes.
8. Subparagraphs i and ii of paragraph 4 of subsection 16 (1) and clauses 29 (a) and (b) of the By-Law are amended by deleting "specialty committee established in respect of the area of law" / "comité de spécialisation constitué à l'égard du domaine" and substituting "Committee" / "Comité".
9. Clause 17 (3) (b) of the By-Law is deleted and the following substituted:
- (b) written references from four members not one of whom is,
    - (i) a person whose membership is in abeyance under subsection 31 (1) of the Act,
    - (ii) a partner, an associate, a co-worker, an employer or an employee of the applicant,
    - (iii) an individual who is counsel to the applicant, to the applicant's employer or to the applicant's firm or company;
    - (iv) a relative of the applicant,
    - (v) a member of a specialty committee established in respect of the area of law in which the applicant wishes to be certified as a specialist;
    - (vi) a member of the Board,
    - (vii) a bencher, or
    - (viii) an employee of the Society; and
  - b) des références écrites données par quatre membres dont aucun n'est une des personnes suivantes :

- (i) une personne dont la qualité de membre est en suspens en application du paragraphe 31 (1) de la Loi,
- (ii) un associé, un collègue, un employeur ou un employé de l'auteur de la demande,
- (iii) une personne qui est conseillère juridique pour l'auteur de la demande, pour son employeur ou pour son cabinet ou sa compagnie,
- (iv) un parent de l'auteur de la demande,
- (v) un membre du comité de spécialisation constitué à l'égard du domaine du droit dans lequel l'auteur de la demande souhaite être agréé à titre de spécialiste,
- (vi) un membre du Conseil d'agrément,
- (vii) un conseiller élu ou une conseillère élue,
- (viii) un employé ou une employée du Barreau;

10. Section 21 of the By-Law is deleted and the following substituted:

**Application to be considered by Board**

21. Every application under section 17 shall be considered by the Board.

**Recommendation to certify and determination by Board**

21.1 (1) If the speciality committee recommends to the Board that the applicant be certified as a specialist, the Board may,

- (a) certify the applicant as a specialist if,
  - (i) the Board is satisfied that the applicant meets the conditions set out in paragraphs 5 to 8 of subsection 16 (1); and
  - (ii) the Board is satisfied that,
    - (A) the condition set out in subsection 16 (2) is not present; or
    - (B) it would not be contrary to the public interest to certify the applicant as a specialist; or
- (b) not certify the applicant as a specialist if,
  - (i) the Board is not satisfied that the applicant meets the conditions set out in paragraphs 5 to 8 of subsection 16 (1); or
  - (ii) the Board is satisfied that,
    - (A) the condition set out in subsection 16 (2) is present; or
    - (B) it would be contrary to the public interest to certify the applicant as a specialist.

**Recommendation to not certify and determination by Board**

(2) If the speciality committee recommends to the Board that the applicant not be certified as a specialist, the Board may,

- (a) certify the applicant as a specialist if,
  - (i) the Board is satisfied that the applicant meets the conditions set out in subsection 16 (1); and
  - (ii) the Board is satisfied that,
    - (A) the condition set out in subsection 16 (2) is not present; or
    - (B) it would not be contrary to the public interest to certify the applicant as a specialist; or
- (b) not certify the applicant as a specialist if,
  - (i) the Board is not satisfied that the applicant meets the conditions set out in subsection 16 (1); or
  - (ii) the Board is satisfied that,
    - (A) the condition set out in subsection 16 (2) is present; or
    - (B) it would be contrary to the public interest to certify the applicant as a specialist.

#### Étude des demandes par le Conseil d'agrément

21. Le Conseil d'agrément étudie chaque demande présentée en application du paragraphe 17.

#### Recommandation et décision d'agrément par le Conseil d'agrément

21.1 (1) Si un comité de spécialisation recommande au Conseil d'agrément d'agrément l'auteur de la demande à titre de spécialiste, le Conseil d'agrément peut :

- a) soit l'agrément à titre de spécialiste si les conditions suivantes sont réunies :
  - (i) le Conseil d'agrément est convaincu qu'il remplit les conditions énoncées aux dispositions 5 à 8 du paragraphe 16 (1),
  - (ii) le Conseil d'agrément est convaincu :
    - (A) soit que la condition énoncée au paragraphe 16 (2) n'existe pas,
    - (B) soit qu'il ne serait pas contraire à l'intérêt public de l'agrément à titre de spécialiste;
- b) soit ne pas l'agrément à titre de spécialiste si, selon le cas :
  - (i) le Conseil d'agrément n'est pas convaincu qu'il remplit les conditions énoncées aux dispositions 5 à 8 du paragraphe 16 (1),
  - (ii) le Conseil d'agrément est convaincu :
    - (A) soit que la condition énoncée au paragraphe 16 (2) existe,
    - (B) soit qu'il serait contraire à l'intérêt public de l'agrément à titre de spécialiste.

#### Recommandation et décision de ne pas agrément par le Conseil d'agrément

(2) Si le comité de spécialisation recommande au Conseil d'agrément de ne pas agrément l'auteur de la demande à titre de spécialiste, ce dernier peut :

- a) soit agréer l'auteur de la demande à titre de spécialiste si les conditions suivantes sont réunies :
  - (i) il est convaincu qu'il remplit les conditions énoncées au paragraphe 16 (1),
  - (ii) il est convaincu :
    - (A) soit que la condition énoncée au paragraphe 16 (2) n'existe pas,
    - (B) soit qu'il ne serait pas contraire à l'intérêt public de l'agréer à titre de spécialiste;
- b) soit ne pas agréer l'auteur de la demande à titre de spécialiste si, selon le cas :
  - (i) il n'est pas convaincu qu'il remplit les conditions énoncées au paragraphe 16 (1),
  - (ii) il est convaincu :
    - (A) soit que la condition énoncée au paragraphe 16 (2) existe,
    - (B) soit qu'il serait contraire à l'intérêt public de l'agréer à titre de spécialiste.

11. Section 22 of the By-Law is deleted and the following substituted:

Notice

22. (1) If the Board does not certify the applicant as a specialist under clause 21.1 (2) (b), the Board shall notify the applicant in writing of its decision.

Decision final

(2) The decision of the Board on an application under this part is final.

Avis

22. (1) Si le Conseil d'agrément n'agréé par l'auteur de la demande à titre de spécialiste en application de l'alinéa 21.1 (2) b), le Conseil d'agrément avise l'auteur de la demande de sa décision par écrit.

Décision définitive

(2) La décision que le Conseil d'agrément rend à l'égard d'une demande présentée en vertu de cette partie est définitive.

12. Subsections 27 (2), (3) and (4) of the By-Law are amended by deleting "January 1" / "1er janvier" and substituting "January 31" / "31 janvier".

13. Subsection 28 (1) of the By-Law is amended by deleting "March 31" / "31 mars" and substituting "January 31" / "31 janvier".

14. The By-Law is amended by deleting subsection 32 (3).

REPORT OF THE GOVERNANCE TASK FORCE

Report to Convocation – Terms of Reference

Purposes of Report: Decision

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

OVERVIEW OF POLICY ISSUE  
TERMS OF REFERENCE

Request to Convocation

1. Convocation is requested to approve the terms of reference for the Governance Task Force, appearing at paragraph 11 on page 5.

Summary of the Issue

2. On September 23, 2004, Convocation approved the creation of the Governance Task Force. At its first meeting on October 20, 2004, the Task Force agreed on terms of reference for its work, which are reported to Convocation in this report for approval.

THE REPORT

Terms of Reference/Committee Process

3. The Task Force held its first meeting on October 20, 2004. Task Force members in attendance were Clay Ruby (chair), Sy Eber, Abraham Feinstein, George Hunter, Vern Krishna, Laura Legge and Harvey Strosberg (by telephone). Jim Varro, Law Society staff, also attended.
4. The Task Force is reporting on the following matter:

For Decision

- Terms of Reference

*A. INTRODUCTION*

5. On September 23, 2004, in recognition of the merits of conducting a review of governance issues and determining ways to enhance the effectiveness of the Law Society's corporate governance, Convocation approved the creation of the Governance Task Force ("the Task Force") to undertake this review. The members of the Task Force are Clayton Ruby (chair), Sy Eber, Abraham Feinstein, George Hunter, Vern Krishna, Laura Legge and Harvey Strosberg.
6. The Task Force met on October 20, 2004 and prepared terms of reference for Convocation's approval.

*B. BACKGROUND*

7. The Law Society has determined that there is merit in pursuing proactive strategies to ensure that its self-governance of the legal profession is sound and continues to focus on the public interest. The Law Society continually monitors its governance and the efficacy with which its mandate is fulfilled.
8. In this context, one area identified for study is the Society's own corporate governance, and this has led to creation of the Task Force. The Task Force will effectively continue the work undertaken previously by

the Strategic Planning Committee, which made a number of recommendations in 2001 related to corporate governance.<sup>1</sup>

9. The Law Society's effectiveness as a regulator is linked to its effectiveness at the board (Convocation) level. Good governance is important to the Society's ability to improve as a self-regulating body. On this basis, the Task Force is undertaking a study on the need for improvements to the Society's corporate governance.

### *C. PROPOSED TERMS OF REFERENCE*

10. The Task Force considered the following in framing its terms of reference:
- The Society is not faced with a governance "crisis" and Convocation ensures that its business is done. The questions are whether changes to improve the Society's corporate governance are needed, and if so, what those changes should entail;
  - The Law Society's governance structure is a functional response to its legislative mandate, and any changes to the structure must continue to be informed by and consistent with this mandate;
  - Improvements in governance, if warranted, should be made in ways that acknowledge the value of the Law Society's history, culture and traditions, which have influenced its governance structure;
  - The Law Society is a unique institution and while successful governance practices of other institutions and organizations may be instructive, the Society's governance must be considered within its own context;
  - A review of governance at this stage, given the Law Society's previous studies and reviews on the subject, should forego a broad scope in favour of a focus on practical considerations around governance, identified by Convocation and benchers and in previous reports.
11. Based on the above considerations, the following terms of reference are presented for Convocation's approval:
- a. The Task Force will study specific issues related to governance, including the following:
    - i. The bencher qualification process and how Convocation is constituted;
    - ii. The size of Convocation as a board;
    - iii. The role of the Treasurer as chair of the board (Convocation);
    - iv. The notion of an executive committee;
    - v. The frequency and the procedural and substantive efficacy of Convocation;
    - vi. Benchers in the dual roles of directors of a corporation and representatives in what has been characterized as a parliamentary assembly;
    - vii. Benchers in the dual roles of policy makers and adjudicators;
    - viii. A bencher code of conduct.

The Chair invites benchers to advise him within the next month of any other discrete issues that should be included in the Task Force's study.
  - b. As the Society has received a number of reports on governance based on previous studies and reviews, the Task Force will use these existing reports in its study and does not propose to commission further reports for its use on the subject of Law Society governance.
  - c. If necessary, the Task Force will conduct additional research and consultation on the issues it has identified for study. This may include consultation with other benchers and non-benchers, as appropriate, to obtain the views of those who have an interest in and are able to contribute to the Task Force's study.

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<sup>1</sup> Some of the recommendations of the Strategic Planning Committee were adopted and have since been implemented, including a reconfiguration of the role of the Secretary and establishing a task force to study issues relating to sole practitioners and small firms. More recently, the recommendation that rules of procedure for Convocation be drafted, adopted in principle in January 2001, was revisited, and the April 2003 report with proposed rules was returned to Convocation's agenda in June 2004.

- d. The Task Force anticipates that its expenses for research or consultation will be such that funds allocated for such purposes within the budget of Policy and Tribunals (\$100,000 annually) will be sufficient.
- e. The Task Force will provide interim reports to Convocation as needed.
- f. The Task Force will aim to conclude its work and prepare a final report to Convocation by June 2005.

Mr. Ruby moved that the words “including the process of setting the priorities of Convocation” be added to the terms of reference at roman numeral v. as set out on page 6 of the Report.

Not Put

The Report was deferred.

#### *REPORTS FOR INFORMATION ONLY*

#### EQUITY & ABORIGINAL ISSUES COMMITTEE/COMITI SUR L’IQUITI ET LESAFFAIRES AUTOCHTONES REPORT

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- Report by Professor Michael Ornstein *The Changing Face of the Ontario Legal Profession, 1971 – 2002, A Report to the Law Society of Upper Canada*
- Sponsorship of External Equality Related Events
- 2004 – 2005 Equity Public Education Events

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

October 28, 2004

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Report to Convocation

Purpose of Report: Information

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

#### THE REPORT

##### Terms of Reference/Committee Process

1. The Committee met on October 14, 2004. Committee members Joanne St. Lewis (Chair), Mary Louise Dickson, Dr. Sy Eber, Thomas Heintzman, Mark Sandler and William Simpson attended. Benchers Andrea Alexander, Abraham Feinstein and Judith Potter also attended. Invited members Daniel Boivin (President of Association des juristes d’expression française de l’Ontario (AJEFO)) and Senka Dukovich (Chair of the

Equity Advisory Group (EAG)) attended. Professor Michael Ornstein made a presentation to the Committee. Staff members Josée Bouchard, Katherine Corrick, Sudabeh Mashkuri, Marisha Roman, Rudy Ticzon, Nabila Majidzadeh and Elizabeth Parenteau also attended.

2. The Committee is reporting on the following matters:

Information

- Professor Michael Ornstein, *The Changing Face of the Ontario Legal Profession, 1971-2001*, October 2004
- Sponsorship of equality related events
- 2004-2005 Equity Public Education Events

INFORMATION

STUDY BY PROFESSOR MICHAEL ORNSTEIN  
THE CHANGING FACE OF THE ONTARIO LEGAL PROFESSION  
1971 - 2001

3. Recommendation 2 of the *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession*<sup>1</sup> (the *Bicentennial Report*) states that “[...] the Law Society should continue to conduct research on the changing demographics of the profession and the impact on the profession of barriers experienced by members of our profession for reasons unrelated to competence”.
4. In 2001, the Law Society commissioned Professor Michael Ornstein, York University, to undertake an analysis of the 1996 Canadian Census data. As a result, Professor Ornstein produced the report entitled *Lawyers in Ontario: Evidence from the 1996 Census*.<sup>2</sup>
5. In 2003, the Law Society created the Bicentennial Report Working Group to review and report on the implementation status of the recommendations contained in the *Bicentennial Report*. The Bicentennial Report Working Group proposed that a research plan be developed and include the analysis of Canadian Census data to be undertaken within a reasonable period of time following each release of the data by Statistics Canada.
6. In 2003, the Law Society retained Professor Ornstein to undertake a demographic analysis of the legal profession based on the 2001 Canadian Census data and to compare the 2001 Canadian Census data with Canadian Census data published since 1971.
7. On October 14, 2004, Professor Ornstein presented his report entitled *The Changing Face of the Ontario Legal Profession, 1971-2001, A Report to the Law Society of Upper Canada*, October 2004, to the Committee. Findings of the report will inform the work of the Committee.
8. Professor Ornstein’s report is presented to Convocation for information under separate cover.

SPONSORSHIP OF EXTERNAL EQUALITY RELATED EVENTS

9. Every year, organizations that promote equality and diversity request the Law Society of Upper Canada’s financial support for equality related events and, from time to time, the Law Society sponsors such events. Law Society’s sponsorships of external equality related events are usually funded by the Equity Initiatives Department and expenses are deducted from its budget. However, there are no guidelines to assist the Equity Initiatives Department in making decisions to sponsor external equality related events.

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<sup>1</sup> (Toronto: Law Society of Upper Canada, 1997).

<sup>2</sup> (Toronto: Law Society of Upper Canada, 2001).

10. External equality related events that the Law Society sponsors are typically hosted or organized by non-profit organizations or associations. The events usually:
- a. Promote values that are aligned to the mandate of the Equity Initiatives Department and the Law Society of Upper Canada;
  - b. Address issues relevant to the members of the Law Society of Upper Canada;
  - c. Address issues or topics that are closely aligned with the mandate of the Equity Initiatives Department;
  - d. Promote access to justice and equality and diversity;
  - e. Promote the achievement of students from Francophone, Aboriginal or equality seeking communities;
  - f. Promote law as a career to Francophone, Aboriginal and equality seeking communities;
- or
- g. Celebrate or recognize the contribution of lawyers and judges in the promotion of access to justice and equality and diversity.
11. The Committee discussed whether the Equity Initiatives Department should continue to sponsor external events that promote equality and diversity. The Committee was of the view that it is appropriate for the Equity Initiatives Department to sponsor external equality related events if assessment criteria guidelines are adopted to guide the department in making sponsorship decisions. The Committee noted the following reasons for maintaining sponsorship of events:
- a. Such sponsorships strengthen the Law Society of Upper Canada's partnerships with stakeholders.
  - b. The Law Society already provides human and financial resources to various non-profit organizations and stakeholders by partnering with them in hosting events.
  - c. The Equity Initiatives Department's mandate is to promote access to justice and equality and diversity in the legal profession and within the Law Society by providing services and programs to lawyers, law firms and students at law and working closely with various stakeholders. Sponsorship of equality related events helps build and maintain strong relationships with stakeholders.
12. The Committee adopted the following assessment criteria guidelines for the sponsorship of equality related events:
- a. The Law Society recognizes the importance of public education programs and events that promote access to justice and equality and diversity. The Equity Initiatives Department has adopted the following criteria to guide the Equity Advisor in her or his decisions to sponsor equality related events and to ensure that external equality related events sponsored by the Equity Initiatives Department are consistent with its mandate:
    - i. The event is hosted by a non-profit or charitable association/organization;
    - ii. The goal of the event is consistent with the mandate of the Law Society of Upper Canada, to govern the legal profession in the public interest, and of the Equity Initiatives Department, to promote access to justice and equality and diversity in the legal profession and within the Law Society;
    - iii. The implementation of the event does not negatively impact on the Law Society of Upper Canada's credibility in carrying out its mandate as a regulator with a strong commitment to the promotion of access to justice and quality and diversity in the legal profession and within the Law Society.
  - b. When making a decision on sponsorship of external equality related events, the Equity Advisor will be guided by the criteria outlined above and by budget implications.

#### 2004-2005 EQUITY PUBLIC EDUCATION EVENTS SCHEDULE

13. The 2004-2005 Equity Public Education Events Schedule is presented at Appendix 1.

EQUITY PUBLIC EDUCATION EVENTS SCHEDULE  
2004-2005

*Louis Riel Day Commemoration 2004*

Event date: November 16, 2004

“I am Métis.”

Affirming Métis Rights Post Supreme Court of Canada Decision on *R. v. Powley*

In commemoration of Louis Riel Day 2004, the Law Society is proud to co-host a panel discussion and reception at Osgoode Hall in partnership with the Métis Nation of Ontario, the Métis National Council, Rotiio> tatives Aboriginal Advisory Group, and the City of Toronto.

Members of the profession and the public are invited to attend this public legal education event, which will explore the theme “I am Métis”.

Participants will hear from legal experts and participate in a discussion about legal developments since the Supreme Court of Canada’s landmark decision affirming Métis rights under s. 35 of *the Constitution Act, 1982*. The program will explore the legal definition of being Métis and how the issue of Métis identity has developed, and where it is going from a legal standpoint as a result of the *Powley* decision.

*Panel Discussion: 4:00 – 6:00 P.M.*

Confirmed panelists:

- Jean Teillet, Lawyer, Pape & Salter
- Jason Madden, Counsel, Métis National Council
- Victor Lytwyn, PhD, expertise in Métis title, traditional lands, agreements, treaties

*Reception: 6:00 – 8:00 P.M.*

Keynote speaker:

- The Honourable Mr. Justice Todd Ducharme  
Superior Court of Justice

Where: The Law Society of Upper Canada  
130 Queen Street West, Toronto  
(Entrance located at east doors)

Admission to this event is free and an RSVP is required. To attend, or to get more information, please call 416-947-3314, toll-free at 1-800-668-7380, ext.3314 or e-mail: [rticzon@lsuc.on.ca](mailto:rticzon@lsuc.on.ca). Visit the Law Society Web site at: [www.lsuc.on.ca](http://www.lsuc.on.ca) for more information and updates.

Other scheduled public education events:

*Black History Month*

Event date: February 23, 2005

Workshop: Lecture Hall - 3:00 p.m. to 5:30 p.m.

Reception: Convocation Hall - 5:30 p.m. to 8:30 p.m.

*International Women’s Day*

Event date: March 8, 2005

Workshop: Lecture Hall - 3:00 p.m. to 5:30 p.m.

Reception: Convocation Hall - 5:30 p.m. to 8:00 p.m.

*International Day for the Elimination of Racial Discrimination*

Event date: March 21, 2005

Workshop: Lecture Hall - 3:00 p.m. to 5:30 p.m.

Reception: Convocation Hall - 5:30 p.m. to 8:00 p.m.

*National Holocaust Memorial Day*

Event date: April 18, 2005

Workshop: Lecture Hall - 3:00 p.m. to 5:30 p.m.

Reception: Convocation Hall - 5:30 p.m. to 8:00 p.m.

*South Asian Heritage Month*

Event date: May 5, 2005

Workshop: Lecture Hall - 3:00 p.m. to 5:30 p.m.

Reception: Convocation Hall - 5:30 p.m. to 8:00 p.m.

*National Access Awareness Week*

Event date: May 31, 2005

Workshop: Museum Room – 3:00 p.m. to 5:30 p.m.

Reception: Convocation Hall - 5:30 p.m. to 8:30 p.m.

*National Aboriginal Day*

Event date: June 8, 2005

Workshop and reception: Convocation Hall: 3:00 p.m. to 8:00 p.m.

*Pride Week Reception*

Event date: June 23, 2005

Workshop and reception: Convocation Hall: 5:00 p.m. to 8:00 p.m.

## FEDERATION OF LAW SOCIETIES OF CANADA REPORT

Federation of Law Societies of Canada

Report to Convocation Regarding  
Council Meeting

September 11, 2004 – Montreal, Quebec

Prepared by George Hunter

September 23, 2004

George Hunter represents the Law Society of Upper Canada on the Council of the Federation of Law Societies of Canada. The Council most recently met in Montreal on September 11, 2004.

## Significant Matters Discussed and Decisions Taken

Proposed Plan by Newfoundland and Labrador Governments to Exempt Government Lawyers from Paying Fees

The Newfoundland and Labrador governments proposed regulation in this regard was reported withdrawn due to numerous letters received, including one from the Law Society of Upper Canada.

### SCC Appointment Process

The Minister of Justice has indicated interest in opening the process to include all Superior Court appointments. Ontario's position has been requested. The matter has been referred to Messrs. Porter and Caskey.

### Report of the Federation's Task Force on Money Laundering

Extensive negotiations have taken place between the Federation's Task Force on Money Laundering and representatives of the Department of Finance and the Department of Justice. Messrs. Heins and Hunter are members of the Federation's Task Force. The Task Force recommended to Council, and the Departments of Finance and Justice are prepared to recommend to their Ministers, resolution of matters via the adoption by societies of model rules dealing with cash receipts and related record keepings. The essence of the draft model rules is that lawyers would be prohibited from receiving in excess of \$7,500.00 in cash with respect to any transaction on behalf of the client save for certain exceptions including retainers. Council unanimously approved the report of the Task Force and its recommendations, albeit with the caveat that societies were urged not to pass by-laws until the current litigation in British Columbia was resolved.

Terms were not reached regarding resolution of the litigation and accordingly that subject was left to counsel.

### Committee on Budget and Resources

This committee will be making recommendations concerning administrative changes and per capita levies at the upcoming meeting of Council in November in Winnipeg. These recommendations are expected to include seconding the CEO of the society from which the President of the Federation comes. The presidency of the Federation is rotated between five regions with an annual change.

### Mobility Report

With the exception of Nunavut and New Brunswick, both non-signatories, all other Societies have adopted the proposal with respect to amendments to the protocol to deal with Department of Justice lawyers and which were made known and approved by Convocation in June 2004. Ongoing work includes a dispute resolution provision to the mobility protocol, the inclusion of the Chambre de Notaires, and appropriate provisions dealing with compensation funds. The territorial societies are anxious to join in the protocol however are currently prevented from doing so due to economic issues. It is anticipated that PEI will consider engagement under the protocol at its upcoming mid-winter meeting.

### Code of Conduct

The President was authorized to establish a Task Force to consider a model code of conduct for possible adoption by societies. Ontario will have a significant role to play in this regard.

### Working Group on Law Office Searches

The Working Group reported with a draft protocol which was unanimously endorsed to be utilized for the purposes of negotiation with the Attorney General of Canada. If those negotiations prove fruitful then similar negotiations are contemplated with provincial Attorneys General.

### Task Force on Compensation Funds

An extensive questionnaire has been sent to each Society. The Task Force contemplates developing an RFP eventually resulting in the engagement of consultants to advise it with respect to this matter.

### Litigation Intervention Policy

A new intervention policy was unanimously adopted by Council. Ontario played a major role in the drafting of this policy. A significant concept is that all requests of the Federation for intervention will require vetting by the Federation's Litigation Committee. Alan Gold is a member of that committee.

### Financials

For the previous fiscal period the Federation posted a loss on operations of \$20,000. For the current fiscal year there is a projected profit of \$100,000. Sufficient reserves are in place to cover the loss.

### National CLE Programs

The Federation's Family Law CLE program was conducted in La Malboie, Quebec in July with 400 lawyers participating. The Criminal Law program was conducted in Halifax where 550 lawyers participated. The combined Northern program was conducted in early September in Yellowknife

### Annual Meeting with Department of Justice

The agenda for the Annual Meeting of the Federation with the Department of Justice in Ottawa on September 13 was discussed. That meeting which is always of mutual benefit took place with the Minister present for some of the discussions.

### Annual Meeting with the CBA

The annual meeting of the Federation with the CBA took place on September 13, 2004 in Ottawa.

#### Next Meeting

The next meeting for Council will take place in Winnipeg on November 5 and 6, 2004 in Winnipeg. George Hunter will assume the Vice-Presidency at that time.

### LAWYERS FUND FOR CLIENT COMPENSATION COMMITTEE REPORT

- Fund Levy for 2005
- Insurance 2005
- Grants Paid

Lawyers Fund for Client Compensation Committee  
October 28, 2004

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### Report to Convocation

Purpose of Report:           Information

Prepared by the Lawyers Fund for Client Compensation

### REPORT TO CONVOCATION, SEPTEMBER 2004

1.       The Lawyers Fund for Client Compensation Committee ("the Committee") met on September 28, 2004.

Committee members in attendance were Robert Topp (Chair), Abraham Feinstein, Richard Filion and Bradley Wright.

Staff and others in attendance were Zeynep Onen (Director of Professional Regulation), Dan Abrahams (Acting Lawyers Fund Manager), Louis Bourgon (Lawyers Fund Counsel), Fred Grady (Manager of Finance), Michelle Strom (LawPRO President) and Craig Allen (LawPRO VP and Actuary).

2.       As a result of its meeting, the Committee is reporting on the following matters:

(A) ADMINISTRATION & POLICY

The Committee discussed the Fund's budget for 2005. In particular, issues surrounding the member levy, optimum Fund surplus, and the desirability of continued insurance coverage were reviewed. The Committee discussed the possibility and potential impact of a catastrophic claim or series of claims.

The Committee considered materials prepared by Fund Staff and the Finance Department and an actuarial analysis prepared by Craig Allen, LawPRO's Vice-President and Actuary. The various materials are attached as Appendix "A".

## i) 2005 Member Levy

*Decision of the Committee*

The Committee recommends that the current annual per member levy of \$ 230.00 remain unchanged for 2005.

## ii) Insurance

Since 2001, the Fund has been insured against catastrophic losses that could result in a substantial levy increase to members. Currently, the Fund has insurance to a maximum of \$10 million that attaches at a claims level of \$15 million. Barring a significant unfavourable event in the balance of the year, the Fund is projected to finish 2004 with an accumulated uncommitted surplus of nearly \$19 million.

Given the present position of the Fund, the Committee considered whether continued insurance coverage is warranted.

*Decision of the Committee*

The Committee recommends that the Fund's insurance coverage be maintained for 2005.

(B) INFORMATION

## i) Recoveries

At a previous meeting, the Committee requested information as to what the Fund had recovered over the last five years and from what sources.

The Committee was advised that total recoveries over the last five years amount to \$1,304,087.20. The bulk of these recoveries or \$875,981.11 were derived from the Members themselves, their Trustees in Bankruptcy or from the Trustee Services department. The balance of the recoveries or \$428,106.09 came from several sources as set out below.

\$391,752.09	Subrogation rights
\$ 17,355.00	Legal Aid
\$ 18,000.00	LawPRO contributions to the settlement of two claims to Fund
<u>\$ 999.00</u>	Criminal Code Restitution Order
\$428,106.09	

As concerns LawPRO, the Fund has not recovered anything from the innocent partners of disbarred Members, however, this is likely due to the fact any such payments would have been made by LawPRO directly to the Claimants without advice to the Fund.

## ii) Grants Paid

The Committee wishes to report that, since its last Report to Convocation, grants have been paid from the Fund in the amounts shown. (Only members whose discipline proceedings are completed or who are deceased are identified by name.)

Member (Status if Disciplined)	Number of Claimants	Total Grants Paid (\$)
McInenly, William T (Disbarred June 5, 2002)	1	\$ 2,100.00
Sinclair, James W. (Disbarred April 24, 2003)	11	\$339,569.25
Tran, Eric G. (Disbarred April 22, 2003)	2	\$ 15,095.63
Howard, Graham I (Disbarred May 1, 2003)	6	\$ 7,022.06
McMullen, Philip B (Disbarred June 4, 2003)	1	\$ 3,871.96
Mosser, Herbert C. (Deceased June 11, 2004)	1	\$ 67,500.00
Sussman, Frederick (Deceased November 11, 1999)	1	\$ 9,162.81
Buie, Donald M. (Permitted to Resign Nov 21, 1985)	1	\$ 532.00
Forrester, James (Retired Oct 1, 1994)	1	\$ 5,424.27
Gahan, Jeffrey (Disbarred June 2, 2004)	1	\$ 788.00
Solicitor #99 (Suspended October 21, 2002)	2	\$100,000.00
Solicitor #111 (Suspended September 5, 2003)	2	\$ 69,970.42
Solicitor #128 (Suspended October 2003)	3	\$ 10,474.14
Solicitor #120 (Pending Trusteeship)	1	\$ 1,387.95
Solicitor #127 (Pending Discipline June 30, 2004)	3	\$ 3,950.00
Solicitor #129 (Suspended December 2003)	3	\$ 2,150.00
Solicitor #130 (Suspended November 29, 2002)	1	\$ 217.90
Solicitor #131 (Suspended May 28, 2004)	4	\$ 7,191.41
Solicitor #132 (Suspended May 25, 2004)	1	\$ 600.00
TOTAL	46	\$647,007.80

## APPENDIX A:

## PROPOSED BUDGET 2005

The major proposed change in the draft budget for 2005 is the elimination of the cost of purchasing insurance. This cost has been in the range of \$500,000 since 2002. In 2004, insurance was purchased to cover up to \$10 million in grants in excess of a threshold of \$15 million in a single budget year. There has never been a claim against the insurance.

The Committee has discussed the insurance issue at previous meetings, notably in May and June 2004. The Finance Department has prepared a draft budget that would eliminate the purchase of insurance and would also presume payment of roughly \$2.7 million in grants in 2005. The expected impact of the proposed budget would be a reduction in the levy from \$230 per member in 2004 to \$200 per member in 2005.

Barring a significant unfavourable event in the balance of the year, the Fund is expected to finish 2004 with an accumulated, uncommitted surplus of close to \$19 million.

Attached are the draft budget, with an explanation, plus a revised actuarial analysis prepared by Craig Allen, LawPRO's Vice-President and Actuary. Mr. Allen's updated analysis tends to support both the elimination of the insurance and the reduction of the levy, unless the Committee wishes to see further growth in the size of the Fund balance.

The Committee is asked to consider whether to endorse the attached draft budget, in particular the elimination of insurance coverage and reduction of the levy.

LAW SOCIETY OF UPPER CANADA  
DEPARTMENT OF FINANCE  
Inter-Office Memorandum

TO: The Lawyers Fund for Client Compensation Committee  
FROM: Fred Grady  
DATE: September 21, 2004  
SUBJECT: 2005 Draft Budget

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This memo is intended to address the current draft budget for the Fund as attached. Since 1997 the Fund's accumulated fund balance will have grown from \$8.9 million to a projected \$18.6 million at the end of 2004. This has occurred despite reductions in the annual Fund levy in each of the last three years. The draft budget attached proposes a further levy reduction of \$30 from \$230 to \$200.

Overall total expenses for the Fund are budgeted at \$7.1 million down from \$7.7 million in 2004. The major reductions are the elimination of insurance coverage for claims over \$15.0 million and a modest reduction (\$300,000) in the provision for grants paid. 2004 projected grants of \$2.1 million are below the budgeted 2005 allowance of \$2.6 million. Since 1994 small-scale claims have never exceeded \$2.7 million. Therefore, the 2005 budget provision should be adequate to provide for normal small-scale claims activity. If the Fund was to experience a large-scale defalcation, the fund balance is sufficient to provide for such an occurrence.

On the revenue side the proposed reduction in the levy will be offset by an increase of 1,000 full fee paying members for a net reduction of \$662,000 in fee revenue. Investment income is budgeted at \$1.1 million unchanged from 2004. Despite the impressive investment returns projected for 2004 no change in the budget is recommended given the potential for fluctuations in rates of return.

The proposed 2005 budget is based on conservative estimates required to meet the normal operations of the Fund as described in Craig Allen's September 17 memo under scenario one. As Mr. Allen indicates, "this claims scenario is the most likely: results similar to this have appeared in seven of the last ten years." Mr. Allen's analysis assumes that investment income and operating expenditures for 2005 are consistent with the approved 2004 budget. The proposed 2005 budget also assumes investment income at the 2004 level with some relatively minor changes in operating expenses. These changes do not materially impact the forecast made by Mr. Allen.

If the results of the Fund's operations in 2005 match the projected 2004 results the Fund's year-end balance will increase to approximately \$19.6 million.

THE LAW SOCIETY OF UPPER CANADA  
Lawyers Fund for Client Compensation  
Statement of Revenues and Expenses  
Draft 2005 Budget (\$'000)

	Budget 2004	Projected 2004	Proposed Budget 2005
1 REVENUES			
1 Membership fees	6,662	6,670	6,000

2	Investment income	1,100	1,540	1,100
3	Total revenues	7,762	8,210	7,100
	EXPENSES			
4	Grants paid	2,925	2,150	2,625
5	Spot audit expenses	1,891	1,890	1,989
6	Share of investigations and discipline	920	950	977
7	Administrative	1,136	1,063	1,094
8	Insurance	500	494	-
9	Salaries and benefits	390	475	415
10	Total expenses	7,762	7,022	7,100
11	Surplus	-	1,188	-
12	Beginning Fund balance	17,437	17,437	18,625
13	Ending Fund Balance	17,437	18,625	18,625
	Projected 2005 Fund Balance if claims and investment experience match 2004 results			
	Impact of increased investment income			440
	Impact of reduced grants expense			475
	Potential 2005 Fund Balance			19,540

#### Fund Balance, Claims and Levy Comparison

(see graph in Convocation file)

LAWPRO

TO: Lawyers' Fund for Client Compensation Committee

FROM: Craig Allen  
Vice President & Actuary

DATE: September 17, 2004

RE: Considerations Re Compensation Fund Levy 2005

Beginning in 2001, the Compensation Fund undertook a sustained program to increase its Fund Balance (the net worth of the Fund net of amounts earmarked for claims in progress). In each year from 2001 through 2003, the Compensation Fund levy provided roughly \$2.6 million for smaller incidents and an additional amount for large-

scale defalcations. In 2003, the additional amount was \$1.5 million, based on the average large-scale defalcation over the time since 1990. As there was no major defalcation during this period, the Fund Balance grew from \$9.3 million at December 2000 to \$17.4 million at December 2003.

The growth of the Fund Balance over that period created an opportunity to reduce the member levy from \$280 for 2003 to \$230 for 2004. With the lower levy, the provision for large-scale defalcations was reduced from \$1.5 million to \$400,000. Thus, the levy would roughly cover the Fund's costs for a year without a large-scale defalcation – however, if there were such a large-scale incident, its claims would reduce the Fund Balance. In the absence of a large-scale incident, the Fund Balance would remain at the same level.

Protection for worse-than-expected results is provided both by the Fund Balance and by the insurance of the Fund underwritten by LAWPRO. The insurance, to a maximum of \$10 million, attaches at a claims level of \$15 million.

Through June 30, 2004, the value of claims reported to the Fund in 2004 is roughly \$650,000, which is well below the \$1.5 million budgeted for the period. Furthermore, the claims experience through September 15 continues to be favourable. This favourable variance, along with better-than-expected investment results has increased the Fund Balance to \$18.8 million.

In light of the continued growth of the Fund Balance, the question arises whether the Fund Balance is high enough to justify

- eliminating the insurance, and/or
- subsidizing a reduction of the levy.

The following table presents the annual claims experience since 1991 for small-scale and large-scale defalcations. These claims are re-stated to the current limit of \$100,000 per claimant. For 2004, it is assumed that claims for the remainder of the year will equal the amount budgeted for those two quarters.

(\$000s)

Year	Small-Scale	Large-Scale	Total
1991	4,000	4,800	8,800
1992	4,400	0	4,400
1993	2,800	900	3,700
1994	2,500	1,600	4,100
1995	2,500	500	3,000
1996	2,400	3,800	6,200
1997	1,700	600	2,300
1998	1,500	2,200	3,600
1999	2,300	0	2,300
2000	1,700	4,000	5,800
2001	2,700	0	2,700
2002	2,000	0	2,000
2003	2,700	0	2,700
2004 (est.)	2,150	0	2,150

For the purpose of evaluating the consequences of continuing the insurance and reducing the levy, the following claims scenarios are presented. They are tested against four options with respect to the 2005 levy and the insurance coverage:

1. Levy \$200, without Insurance

2. Levy \$215, with Insurance
3. Levy \$230 (same as 2004), without Insurance
4. Levy \$230, with Insurance (status quo)

#### Scenario 1:

Under this scenario, claims for the year are valued at \$2.7 million. This is the level of claims experienced in 2003, and is roughly equal to an average year of claims (in the absence of a large-scale defalcation).

The current Fund Balance of \$18.8 million changes to the following, under each of the options, in this scenario:

Option	Fund Balance, Dec 2005
\$200, without Insurance	\$18.7 million
\$215, with Insurance	\$18.7 million
\$230, without Insurance	\$19.6 million
\$230, with Insurance	\$19.1 million

We see that, under all of these options, the Fund Balance increases slightly. This claims scenario is the most likely: results similar to this have appeared in seven of the last ten years.

#### Scenario 2:

Under this scenario, claims for the year are valued at \$5.7 million. This is the level of claims experienced in 2000, which is representative of a year in which a large-scale defalcation comes to light.

The current Fund Balance of \$18.8 million changes to the following, under each of the options, in this scenario:

Option	Fund Balance, Dec 2005
\$200, without Insurance	\$15.7 million
\$215, with Insurance	\$15.7 million
\$230, without Insurance	\$16.6 million
\$230, with Insurance	\$16.1 million

Under this scenario, the Fund Balance returns roughly to its March 2003 level of \$16.3 million. The insurance has little effect at this level.

#### Scenario 3:

Under this scenario, claims for the year are valued at \$11.5 million. This scenario is constructed by beginning with the value of claims experienced in 1991, \$7.5 million. This is the year where the Fund's claims reached their peak value.

While some of the claims reported in 1991 were limited by \$100,000 per-claimant limit now in place, many were limited to \$60,000. It is projected that the 1991 claims would have been valued at \$8.8 million had the \$100,000 limit been in place uniformly.

In addition, there were only 15,200 lawyers in private practice in Ontario in 1991, compared to the 20,000 currently in practice. If the count of 1991 claims were adjusted in line with the increased number of lawyers, the \$8.8 million of limits-adjusted claims would rise to \$11.5 million.

The current Fund Balance of \$18.8 million changes to the following, under each of the options, in this scenario:

Option	Fund Balance, Dec 2005
\$200, without Insurance	\$9.9 million
\$215, with Insurance	\$9.9 million
\$230, without Insurance	\$10.8 million
\$230, with Insurance	\$20.3 million

Under this scenario, the Fund Balance reaches a level slightly above its December 2000 level of \$9.3 million. It is notable that such an extreme scenario (a level of claims experienced only once in fourteen years) only returns the Fund back to its status at the time that the sustained program to increase the Fund Balance was started.

#### Scenario 4:

Under this scenario, claims for the year are valued at \$15.0 million. This is the highest level of claims at which the Fund is not indemnified by the insurance coverage.

The current Fund Balance of \$18.8 million changes to the following, under each of the options, in this scenario:

Option	Fund Balance, Dec 2005
\$200, without Insurance	\$6.4 million
\$215, with Insurance	\$6.4 million
\$230, without Insurance	\$6.8 million
\$230, with Insurance	\$6.3 million

#### Scenario 5:

Under this scenario, claims for the year are valued at \$21.4 million. This is the level of claims that would exhaust the Fund's financial resources, in the absence of insurance.

The current Fund Balance of \$18.8 million changes to the following, under each of the options, in this scenario:

Option	Fund Balance, Dec 2005
\$200, without Insurance	\$0
\$215, with Insurance	\$5.6 million
\$230, without Insurance	\$0.4 million
\$230, with Insurance	\$6.0 million

#### Inferences:

The impact on the Fund Balance of reducing the levy is minor, in comparison to the impact of various claims scenarios. In addition, there would be a minimal impact from eliminating the insurance, unless claims exceed \$15.0 million.

The attached chart shows the historical claims experience of the Fund since 1990, stated in probability format. This experience is shown in the context of a probability curve. It can be seen that in no year has the claims level exceeded \$7.5 million – this is well short of the \$15 million threshold at which the current insurance attaches. Furthermore, claims have not exceeded \$2.7 million since 2000. That said, the absence of a large-scale defalcation in the last four years does not indicate that there is no possibility of another such defalcation arising in the next year - the experience of other Canadian jurisdictions points to the continued threat.

Probabilities of Claims Outcomes  
Lawyers Fund for Client Compensation

(see graph in Convocation file)

CONVOCATION ROSE AT 12:35 P.M.

Confirmed in Convocation this 25<sup>th</sup> day of November, 2004

Treasurer