MINUTES OF CONVOCATION

Thursday, 26th May, 2005
9:00 a.m.

PRESENT:

The Treasurer (Frank N. Marrocco, Q.C.), Alexander, Backhouse, Banack, Bobesich, Bourque, Campion, Carpenter-Gunn, Caskey, Chahbar, Chilcott, Coffey, Copeland, Curtis, Dickson, Doyle, Dray, Eber, Feinstein, Filion, Gotlib, Gottlieb, Harris, Heintzman, Hunter, Krishna, Lawrence, MacKenzie, Manes, Millar, Murphy, Murray, O'Donnell, Pattillo, Pawlitza, Porter, Potter, Robins, Ross, St. Lewis, Sandler, Silverstein, Simpson, Swaye, Symes and Wright.

…….

Secretary: Katherine Corrick

The Reporter was sworn.

…….

IN PUBLIC

…….

TREASURER'S REMARKS

The Treasurer extended best wishes to John Arnup on the occasion of his 94th birthday on May 24th.

The Treasurer congratulated Mary Louise Dickson on being named one of two recipients of the 2005 Women's Law Association of Ontario President's Award for "Inspirational Work as a Mentor and Educator in the Legal Profession". Ms. Dickson and The Honourable Madam Justice Susanne R. Goodman will receive their awards at a gala on June 1st.

The Treasurer congratulated Neil Finkelstein on an excellent conference – the Laskin Legacy event - held yesterday at Osgoode Hall.

DRAFT MINUTES OF CONVOCATION

The Draft Minutes of Convocation of April 28, 2005 were confirmed.

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.
ADMINISTRATION

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

B.1.1. (a) Bar Admission Course

B.1.2. The following candidates have completed successfully the Bar Admission Course, filed the necessary documents, paid the required fee, and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, May 26th, 2005:

Todd William Desourdie	Bar Admission Course
Michael Donald Dolphin	Bar Admission Course
Peter Timothy Faye	Bar Admission Course
Sudha Krishnan	Bar Admission Course
Éliane Marie Johanne Lachaîne	Bar Admission Course
Mary Samantha Elan Leach	Bar Admission Course
Susan Elizabeth Phillips	Bar Admission Course
Jillan Diana Sadek	Bar Admission Course
Ronald James Sexton	Bar Admission Course
Morli Shemesh	Bar Admission Course
Leslie Garry Smith	Bar Admission Course
Kathryn Beverley Stirling	Bar Admission Course
Katie Gwen Goldberg Zwick	Bar Admission Course

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

B.1.4. The following candidates have filed the necessary documents, paid the required fee and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, May 26th, 2005:

Jennifer Dawn Blackmore	Province of Newfoundland
Marian Elizabeth Bryant	Province of Alberta
Marie Chantal Richard	Province of Nova Scotia

ALL OF WHICH is respectfully submitted

DATED this 26th day of May, 2005

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

Carried

MOTION – ESTABLISHMENT OF TASK FORCE

It was moved by Mr. Wright, seconded by Ms. Ross, that a task force composed of Constance Backhouse, George Finlayson and Laura Legge be established to examine and make recommendations about the placement of portraits at Osgoode Hall.

Carried

NOMINATIONS FOR TREASURER

The Secretary announced the following candidates for the office of Treasurer of the Law Society of Upper Canada for the term commencing June 22, 2005:

Abraham Feinstein, nominated by Holly Harris, Ross Murray, Judith Potter and Gerald Swaye

George Hunter, nominated by Constance Backhouse, Peter Bourque, Abdul Chahbar, Mary Louise Dickson, Anne Marie Doyle, Sy Eber, Neil Finkelstein, Vern Krishna, Heather Ross and Robert Topp

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. Heintzman presented the candidates to Mr. Justice David G. Stinson to sign the rolls and take the necessary oaths.

Todd William Desourdie	Bar Admission Course
Michael Donald Dolphin	Bar Admission Course
Peter Timothy Faye	Bar Admission Course
Sudha Krishnan	Bar Admission Course
Éliane Marie Johanne Lachaîne	Bar Admission Course
Mary Samantha Elan Leach	Bar Admission Course
Susan Elizabeth Phillips	Bar Admission Course
Jillan Diana Sadek	Bar Admission Course
Morli Shemesh	Bar Admission Course
Leslie Garry Smith	Bar Admission Course
Kathryn Beverley Stirling	Bar Admission Course
Katie Gwen Goldberg Zwick	Bar Admission Course
Jennifer Dawn Blackmore	Transfer, Province of Newfoundland
Marian Elizabeth Bryant	Transfer, Province of Alberta
Marie Chantal Richard	Transfer, Province of Nova Scotia

TRIBUNALS TASK FORCE REPORT

Ms. Doyle presented the Tribunals Task Force Report and thanked the members of the Task Force for their work as well as Mark Sandler, Sophia Sperdakos and other staff who assisted.

Report to Convocation
May 26, 2005[1]

Tribunals Task Force – Final Report

TASK FORCE MEMBERS
Anne Marie Doyle (Chair)
Sydney L. Robins, Q.C. LSM (Vice-Chair)
Larry Banack
Carole Curtis
Holly Harris
George D. Hunter
Gavin MacKenzie
Gerald A. Swaye, Q.C.

Purpose of Report: Decision

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

OVERVIEW OF POLICY ISSUE

RECOMMENDATIONS RESPECTING TRIBUNALS PROCESS AND PROCEDURES

Request to Convocation

1. That Convocation approves the recommended enhancements to the Law Society's tribunals process and procedures, set out in Part III of this report and in Appendix 1.

2. That Convocation undertakes an examination of different models for the composition of the Law Society tribunals, as described in Part II of this report.

[1] Deferred from April 28, 2005 Convocation

Summary of the Issue

3. Convocation approved the establishment of a Tribunals Task Force in September 2004 and its Terms of Reference in November 2004.

4. In a preliminary way, the Task Force has canvassed a number of models available for the composition of regulatory tribunals. It considers that further discussion of these options is an important undertaking the Law Society must pursue. Substantially more discussion is necessary to fully explore these models.

5. The Task Force has analysed the current tribunals process and procedures and has developed recommendations to enhance them. These recommendations are set out in Part III of this report for Convocation's consideration and approval and are also set out in Appendix 1.

THE REPORT

RECOMMENDATIONS RESPECTING TRIBUNALS PROCESS AND PROCEDURES

Background

6. On September 23, 2004 Convocation established the Tribunals Task Force and on November 25, 2004 approved the Task Force's Terms of Reference, set out at Appendix 2. The Task Force anticipated reporting to Convocation in March 2005, but has required an additional month to complete its work.

7. The Task Force members are Anne Marie Doyle (Chair), the Hon. Sydney L. Robins (Vice-Chair), Larry Banack, Carole Curtis, Holly Harris, George Hunter, Gavin MacKenzie, and Gerald Swaye. Mark Sandler also participated in one meeting. Staff participants in the Task Force are Naomi Bussin, Katherine Corrick, Anne-Katherine Dionne, Grace Knakowski, Zeynep Onen, Lisa Reilly, and Lucy Rybka. Sophia Sperdakos is the secretary to the Task Force.

8. The Tribunals Task Force was mandated to examine the Law Society's tribunals process and procedures, "from Proceedings Authorization Committee authorization to the release of orders and decisions, including an examination of the hearings, appeals, decision-making and decision release process"[1] . Where appropriate, the Task Force was to develop recommendations to ensure that the process and decisions are timely, fair, transparent, consistent and accessible. The Task Force was also to identify other areas of the regulatory process that would benefit from further work.

9. The Task Force has considered,

   a. the principles that should underlie the Law Society's tribunals process and procedures;

[1] Terms of Reference. See Appendix 2.

b. in a preliminary manner, the various approaches other regulators and professions have taken to the composition of tribunals and the issues that would require addressing under the models described; and

c. the current Law Society tribunals process and the enhancements that would improve the current process.

10. Given the relatively short time frame in which the Task Force was to report, it determined that it could best complete its work by doing two things:

a. Provide Convocation with an overview to the various models available for tribunal composition, leaving further study of this issue for a future discussion.

b. Make recommendations on enhancements that should be made immediately to the current tribunals process and procedures.

PART I

PRINCIPLES THAT SHOULD UNDERLIE THE TRIBUNALS PROCESS AND PROCEDURES

11. As a first step in its work, the Task Force discussed the various principles that should underlie the Law Society's tribunals process and procedures. To do this, it first reviewed the context in which self-regulating legal professions currently function, as well as the current Law Society regulatory structure.

Context in which self-regulation functions

12. The Law Society regulates the legal profession in the public interest and has done so for over two hundred years. The government of Ontario has continued to support that role, even expanding the Law Society's decision-making authority as recently as 1999 in amendments to the *Law Society Act.*[2]

13. A positive public perception of the Law Society is essential to the government's continued support of self-regulation. The importance of public and governmental perceptions can be illustrated by examining the attitudes to self-regulation in other parts of the world.

14. Self-regulation is essential to safeguard the public's access to justice and to an independent profession and judiciary, and to protect the public from state interference. The value and strength of this principle is undermined, however, where a professional regulator's operations are seen to interfere with the best interests of consumers.

15. A catalyst for the radical reduction of self-regulation in England and Wales and Australia was regulators' inability to effectively and efficiently handle consumer complaints,[3] but these law societies had already had their discipline tribunals severed from their

[2] The Law Society's by-law making authority was substantially increased.

[3] It may not always be the case that a crisis is what motivates external interference or that a crisis can necessarily be foreseen. Imposed change does not have to be draconian, but can be significant nonetheless. The *Regulated Health Professions Act* imposes much greater government oversight on the health professions than lawyers face.

operations years earlier. The decision of the Law Society of England and Wales' Council some years ago to limit funds to be spent on its complaints system has been cited as indicative of a governance system that puts lawyers, not consumers, first.

16. In both England and Wales and jurisdictions in Australia the loss of consumer confidence in law society operations contributed to governments' willingness to significantly reduce the role of regulators in governing the profession. Inadequate law society handling of complaints has been a flashpoint for consumer and government discontent in those jurisdictions. These inadequate complaints processes raise larger questions about the way in which a self-regulating profession should operate.

17. Every branch of a law society's operation affects the public interest. The manner in which the Law Society discharges its conduct, capacity and competence responsibilities is critically important to how the public perceives it. The adjudicative process is an essential component of the Law Society's responsibilities.

Law Society Structure

18. The Law Society is what is known as an integrated regulatory body. It has responsibility for the complete range of regulatory activities, including standard setting, rule making, policy development and implementation, admission to the profession, investigating and prosecuting complaints against members, adjudicating conduct, competence and capacity matters and imposing and monitoring penalties.

19. Many self-regulating professions have integrated regulatory operations. Traditionally, few individuals or bodies raised concerns about the integrated approach, particularly where legislation specifically authorized it. New worldwide sensibilities about the transparency and fairness of adjudicative processes have led regulatory bodies to ensure, to the extent reasonably possible, that internal processes avoid or minimize complaints based on the appearance of bias or conflicts of interest.

20. The Law Society's own processes have undergone change in the last six years. Until the amendments to the *Law Society Act* in 1999, discipline hearings were conducted in a two-stage process. In general, a committee of benchers (usually three) presided over a hearing. The committee then made a written report and recommendations to Special Convocation on appropriate disposition and penalty. Special Convocation then considered whether to accept the recommendation or make its own determination. Appeals from Convocation's decisions went to the Divisional Court.

21. The amendments to the *Law Society Act* in 1999 established the Hearing Panel and the Appeal Panel. *Rules of Practice and Procedure* were developed to support the new process. In the years since the amendments, the Law Society has made some changes to enhance both the transparency of the tribunals process and the separation of the tribunals administration from that of investigations and prosecution. These have included,

    a. establishing a Tribunals Office;

    b. providing staff dedicated to the adjudicative process;

c. locating tribunals staff in offices within Osgoode Hall separate from those of investigative and prosecutorial department staff;

d. shifting the reporting function for tribunals from the Secretary to the Counsel-Legal Affairs and then to the Director of Policy and Tribunals; and

e. providing that the Chairs of the Hearing and Appeals Panels are available for assistance to tribunals staff on issues related to tribunals operations.

22. Some of the other professions, regulatory bodies and governments have gone even further in changing the integrated approach or creating further internal separations between the investigative/prosecutorial role and the adjudicative one. Some bodies have made changes voluntarily, while others have had them imposed upon them by government.

23. The Task Force considers that certain essential principles should underlie the Law Society's tribunals process and procedures. It has considered these principles in the context of both the conceptual discussions it has had about models for tribunal composition (Part II) and in developing the recommendations set out in this report (Part III). It has premised its analysis on a tribunals structure that preserves the system of peer adjudication, subject to appropriate participation by lay people.

24. The tribunals process and procedures must,

a. ensure an appropriate separation between investigative/prosecutorial functions and adjudicative functions;

b. be as free as possible from actual or perceived systemic bias;

c. be as transparent as possible, with open hearings, impartial adjudication (in action and appearance), public decisions and dissemination of information to the public;

d. operate efficiently, with both members of the public and affected lawyers able to understand how the process works, rely on its predictability and uniform application, and be informed of benchmarks for accomplishing certain steps;

e. operate fairly, keeping in mind the rights of both complainants and accused members, and balancing the public interest with procedural fairness;

f. ensure its adjudicators undergo ongoing education relevant to their functions;

g. include an adequate number of available adjudicators, competent to adjudicate a wide range of matters; and

h. develop a body of jurisprudence that is coherent, consistent and available to the public.

25. It is a given that the Law Society should regularly assess its process and procedures to ensure that they continue to reflect these principles.

PART II

POSSIBLE MODELS FOR COMPOSITION OF TRIBUNALS

Background

26. Self-regulation of the legal profession in Ontario is a long-standing privilege, but a privilege nonetheless. It rests on continued government and public acceptance that the profession, rather than government, or some other body, is in the best position to determine appropriate standards for admission, ethical rules of conduct and behaviour, and sanctions for those lawyers who breach the accepted rules and norms. In exchange for the rights that accompany self-regulation, the legal profession is expected to govern itself in the public interest.

27. As society changes so do the nature of the public interest and the perception of whether a profession is meeting its responsibilities. This is particularly true as consumers become increasingly well informed and the media more interested in professional standards and behaviour. To ensure that self-regulation remains relevant and viable in Ontario, the Law Society must be committed to regularly re-evaluating its approaches and monitoring changing norms for professions around the world.

28. By establishing the Tribunals Task Force, Convocation has demonstrated its recognition of the importance of the Law Society's adjudicative functions and the need to monitor their operation in the public interest. The Task Force has made recommendations it believes necessary to enhance the current tribunals operations.

29. Its discussion in this section, however, is intended to familiarize Convocation with the larger context within which the current system operates and to provide background information on the different models that exist for tribunals composition.

Law Society Current Tribunals Composition

30. The Law Society of Upper Canada's tribunals composition is currently established by statute. The Law Society Act provides,

> s.49.21 (1) There is hereby established a panel of benchers to be known in English as the Law Society Hearing Panel and in French as Comite d'audition du Barreau.

31. Section 49.29 (1) establishes the Law Society Appeal Panel, also to be made up of elected and lay benchers.

32. The current approach is premised on the principle that only benchers (including lay benchers) should adjudicate conduct, capacity and competence matters. It recognizes only a limited exception, where there are insufficient French-speaking benchers to allow a hearing to be held in French. In such a case, the Chair of the Hearing Panel may appoint one or more French-speaking members as temporary panelists.[4]

[4] s.49.24(2)

33. An examination of the provisions for tribunal composition in the legal profession in other parts of Canada, in other parts of the world and in other professions and regulatory regimes reveals a number of different approaches. In most cases their approach to tribunals composition is somewhat more flexible than the Law Society's. In a few instances their approach is radically different.

The Possible Models

34. In considering models from other jurisdictions and professions, the Task Force noted the following factors or concerns that are relevant in the consideration of which model to adopt:

a. Whether there is an inherent conflict of interest where the regulatory adjudicators are also the regulatory policy makers. This concern may be countered by the view that, in a self-regulatory system, those most able to render relevant and meaningful decisions are the governors who understand the intricacies of that system.

b. Whether there are increasing perceptions of systemic bias in a tribunals structure, even where there is no evidence of actual bias, which may be a drawback to the effectiveness of the process.

c. Possible limitations of a large volunteer adjudicative body whose members have different levels of adjudicative knowledge, skill, experience, writing ability and availability to sit on panel hearings and appeals.

35. Looking at the experience of other jurisdictions, the Task Force identified five possible models for tribunal composition. An overview of each is provided here, with some preliminary identification of the issues each raises. While collectively the models may address all the issues that are relevant to transparency, fairness and effectiveness of tribunals composition, each individually may have some disadvantages. The choice of model becomes a process of weighing the advantages and disadvantages of each in context and in the public interest.

36. The possible models are,

a. the continuation of the current Law Society model as set out in paragraphs 30-32. Within this model, the decision could be made to make no changes to the process and procedures (the status quo) or to enhance them to make the tribunals composition more effective. In Part III of this report the Task Force recommends such enhancements, regardless of whether the Law Society explores the other models at a future date;

b. a tribunal model made up of elected benchers, lay benchers and non-bencher lawyers, the latter either for general participation on panels or for selected cases;

c. a tribunal model with a permanent Chair and one or two permanent Vice-Chairs who occupy one seat on every panel; the remaining members of each panel to be either elected lawyer benchers and/or lawyer members, and lay benchers;

d. a model that establishes a tribunals unit within the Law Society made up entirely of non-bencher lawyers and lay people; and

e. a model that establishes a tribunal that is completely independent of the Law Society.

Discussion

Model One: The Law Society's Current Model

37. The first model is the Law Society's current one. Proposed enhancements to strengthen the current model will be discussed in the next section of the report. In this section the Task Force highlights the nature of the current model.

38. The current model is based on the belief that,

a. an integrated regulatory system;

b. imbued with the proper internal safeguards to ensure separation between the investigative/prosecutorial branch and the adjudicative branch;

c. in which benchers adjudicate;

is the most appropriate and balanced model and operates in the public interest.

39. This model operates on the basis that benchers are best suited to adjudicate competence, capacity, and conduct matters for a number of reasons including,

a. they have in-depth knowledge of the legislation, rules, by-laws and Rules of Professional Conduct that govern the profession;

b. bencher involvement with policy development enriches their knowledge, thereby assisting their adjudicative functions and *vice versa;*

c. they are elected by members of the profession to govern the profession in the public interest, including adjudicating issues of lawyer conduct, capacity and competence. The election process demonstrates the profession's confidence in the benchers' ability to perform this function; and

d. the presence of lay benchers ensures the adjudicative system is a balanced one of lawyers and lay people.

40. The system of bencher adjudication is well ingrained in the self-regulation of the profession and has not been the subject of rigorous complaint or attack.

41. The issues the model raises, however, are reflected in varying degrees in the other models set out below. These include whether,

a. a model in which the adjudicators are also the policy makers gives rise to systemic bias (perceived or actual);

b. a system premised on volunteers is increasingly less able to address issues such as timeliness, consistency, and subject expertise; and

c. in a world environment in which professions are increasingly scrutinized and consumers are less willing to accept the philosophy that professionals are best able to regulate their own, regulators should be proactive in enhancing quality and adapting their approaches.

42. Without deciding the issues, the Task Force nonetheless is of the view that, as currently structured, there is much the Law Society can do to enhance its current approach, as will be seen in the recommendations set out in Part III.

Model Two: Addition of Non-Bencher Lawyers on Panels

43. One of the issues raised under the current model (Model One) is whether an adjudicative system based entirely on bencher volunteer resources is sufficient in the 21st century as the issues that face tribunals become increasingly diverse and the demands on bencher time increases.

44. Model Two's main feature is the introduction of non-bencher lawyers to sit on panels, by way of the development of a roster of panelists.

45. Model Two could take a number of forms:

a. A mandatory system in which each panel has a lay bencher member, an elected bencher member and a non-bencher lawyer member.

b. A mandatory system in which each panel has a lay bencher member, but the lawyer members could be either elected benchers or non-bencher lawyers.

c. The development of a roster of non-bencher lawyers to whom the Chairs of the Hearing Panel and Appeal Panel could turn should they have scheduling difficulties or need particular expertise on a matter. This would mirror the current flexibility respecting French hearings.

46. A survey of other law societies and other professions demonstrates that the inclusion of non-governor members of the profession, or at least the authority to include such members, is quite common.

a. A number of other law societies[5] have authority to name non-bencher lawyers to sit on hearing panels. Some make use of these provisions; others do not. Some have determined that only lawyers who were former benchers should be invited to sit; others make regular use of non-bencher lawyers and, on occasion, have a non-bencher lawyer chair a panel.

b. Many other professions have adjudicative structures that include, for each hearing, a representative(s) of the governing board or council who is also a member of the profession in question, a member(s) of the profession who is not a

[5] These include British Columbia, Alberta, Saskatchewan, and Manitoba, Yukon, Northwest Territories, Nunavut, New Brunswick and Prince Edward Island.

member of the board or council, and a lay representative. Some of the professions are,

i. The College of Physicians and Surgeons of Ontario;
ii. The College of Nurses of Ontario;
iii. The Institute of Chartered Accountants of Ontario;
iv. The Certified General Accountants of Ontario;
v. The Ontario College of Teachers;
vi. The Professional Engineers of Ontario; and
vii. The Ontario Association of Architects.

47. In reviewing Model Two, the Task Force noted the following:

a. To the extent that finding benchers available to sit on hearings, continuations of hearings, or lengthy hearings is a problem, either currently or in the future, the availability of non-bencher lawyers to sit on panels could alleviate this problem.

b. A roster of non-bencher lawyers could enlarge the availability of panelists with particular practice area expertise and who represent regional and other diversity, as well as broaden the profession's direct experience with the issues that the Law Society must address.

c. The approach would bring the Law Society more into line with what is available to, or used by, other law societies and professions.

d. The model is a fairly modest addition to Model One. It would not address the issues the Task Force identified above under Model One concerning possible systemic bias, the possible conflict between benchers as adjudicators and policy makers or the issue of consistency of decision-making. It might, however, been seen as a further way to enhance Model One, while retaining its value as described in paragraphs 38 and 39.

48. Any further discussion of Model Two would necessitate a consideration of a number of issues, including,

a. appropriate recruitment of non-bencher lawyers;

b. whether adoption of this approach might increase inconsistency of decision making, given the increase in the number of adjudicators;

c. what form of the model should be adopted (see paragraph 45); and

d. remuneration for non-bencher lawyers.

Model Three: Appointment of a Permanent Chair and Vice-Chairs

49. Under a model that relies primarily on volunteer adjudicators, one of the criticisms might be that decision-making is not always consistent or timely. The development of jurisprudence upon which parties and counsel can rely is important to the integrity of the adjudicative system.

50. Model Three could retain the basic Model One structure, but would create the new positions of a permanent Chair and possibly one or two permanent Vice-Chair(s). Non-bencher lawyers would be appointed to these positions, probably in a part-time capacity, and would be paid. The Chair or a Vice-Chair would sit on all panels. The remaining panel members would be an elected bencher and a lay bencher. Model Three could be structured so that the Chair/Vice-Chair writes all decisions or, alternatively, other panel members might write decisions as well.

51. In reviewing Model Three the Task Force noted the following:

    a. This model would necessitate acceptance of non-bencher lawyers on the panels, however, the role of the non-bencher lawyers would be different from Model Two, both in terms of numbers and purpose. The number of non-bencher lawyers would be limited to two or three. The primary purpose for introducing this adjudicative change would be to further a decision-making process that is timely, coherent, consistent and a model of quality for the benefit of all parties.

    b. Given the consistent presence on all panels of either the Chair or Vice-Chair, the manner in which hearings were held would likely become fairly consistent.

    c. Given that one member of each panel would be either the Chair or a Vice-chair and a second member would be a lay bencher (as is currently the case) the demand on volunteer bencher time would be reduced. Bencher time would be freed up for other policy work.

    d. The Chair's/Vice-Chairs' roles could also include responsibility for adjudicator professional development.

    e. It is important to note, however, that this model would preclude the broader inclusion of non-bencher lawyers on panels, unless it was possible to constitute a panel without a bencher lawyer.

    f. This model would not address the issue the Task Force identified above under Model One concerning possible systemic bias and the possible conflict between benchers as adjudicators and policy makers. Like Model Two, it might be seen as a further way to enhance Model One, while retaining Model One's value as described in paragraphs 38 and 39.

52. Any further discussion of Model Three would necessitate consideration of a number of issues, including,

    a. appropriate recruitment of the Chair and Vice-Chairs;

    b. the scope of the job, including responsibility for adjudicator professional development;

    c. the implications of a "specialist" adjudicator in the form of the Chair or Vice-chair on the adjudicative process;

    d. the possible implications of reducing the range of practice experience and diversity on each panel; and

e. remuneration for the Chair and Vice-Chairs.

Model Four: Non-bencher Adjudicative Tribunal within the Law Society

53. One of the issues identified under Model One is the fact that benchers currently act as policy makers and adjudicators, a dual role that could raise the perception of bias. This issue was raised in the recent assessment of the regulatory structure of the Ontario Securities Commission. The assessment concluded that the particular scope and breadth of the policy-making role at the OSC rendered it advisable to separate the policy function from the adjudicative one.

54. Model Four would eliminate the dual bencher role, while still keeping the adjudicative function within the Law Society. Under this model, non-bencher lawyers and non-bencher lay representatives would adjudicate conduct, capacity and competence matters. On each panel the majority of members would be lawyers. A variation of this model would be to also adopt the Chair/Vice-Chair approach in Model Three. This variation would address the consistency of decision-making issues discussed above.

55. In reviewing Model Four the Task Force noted the following:

a. Such a model frees up benchers (both elected and lay) to focus on policy issues that affect the regulation of the profession. In so doing it addresses any concerns that exist that there is systemic bias in a system in which benchers who make policy decisions then adjudicate on issues that enforce those policies.

b. While retaining the Law Society's regulatory control over all aspects of self-regulation, Model Four goes further in enshrining separation of the adjudicative branch from the investigative/prosecutorial branch.

c. Model Four broadens the profession's direct involvement in self-regulation and has the potential to better highlight to members and educate them on the adjudicative process and its consequences to them.

d. If one of the goals is to enhance consistency in decision-making, there would likely be fewer adjudicators under this model than in Model One. Adoption of the Chair/Vice-Chair component could enhance consistency even further.

56. Any further discussion of Model Four would necessitate consideration of a number of issues, including,

a. whether there is a perception of systemic bias currently that would necessitate such a change;

b. whether there are reasons to make such a change even if a serious perception of systemic bias does not exist about the current structure;

c. assessing carefully the changes that would be made to the bencher role to accomplish this shift;

d. the need for two classes of lay representatives (policy-makers and adjudicators);

e. appropriate recruitment of panel members;

f. to whom appeals from hearing panel decisions would be taken;[6]

g. the possible effect of the model on the policy making and enforcement roles of the benchers;

h. the possible implications, financial and otherwise, for the Law Society of such a model; and

i. The possible financial implications to the Law Society and to government of a change in the lay representative role.

Model Five: An Independent Tribunal

57. The Law Society of England and Wales, the Bar Council and the Law Society of New South Wales are examples of regulatory bodies that have discipline tribunals that are independent of the regulator.

58. Where barristers in England and Wales are alleged to have committed professional misconduct, the Council of the Inns of Court is responsible for the tribunals process. The Bar Council acts as prosecutor before the Tribunal. The composition of the Tribunal is approximately 29 lay representatives and 100 barristers. A judge chairs each panel. An appeal lies to "visitors" who are High Court Judges appointed by the Lord Chief Justice. Inns' Council pays for the staff. Bar Council pays for lay representatives' fees and other tribunal expenses. Barrister members are not paid.

59. The Solicitors Disciplinary Tribunal in England and Wales is independent of, but funded by, the Law Society of England and Wales (with the exception of lay members who are paid by the Department for Constitutional Affairs). The Master of the Rolls appoints the members. Anyone may apply to the Tribunal, but currently the Law Society makes most applications, following investigations. Most hearings take place before three members: two solicitors and one layperson.

60. In New South Wales the Law Society does not hear discipline matters. Instead, the Legal Services Division of the Administrative Decisions Tribunal hears these matters. A District Court Judge is the head of the Tribunal. Other members include additional judges and magistrates, barristers, solicitors and lay members. Members of the New South Wales Law Society Council do not sit on the Tribunal. Panels are made up of three members – a judicial member, a legal practitioner and a lay member. Each panel is appointed administratively, with a presiding member, usually based on seniority, and is inevitably a legally qualified member. There is no permanent Chair. The Law Society does not fund the Tribunal. The Tribunal is an umbrella organization with divisions dealing with a number of professions. The legal division is funded by money from clients' trust account income.

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[6] Since January 2000 discipline panels in Newfoundland and Labrador consist of two lawyers who are not benchers and a lay representative. Currently, appeals from their decisions must go to a panel of benchers.

61. It has recently been recommended that the Ontario Securities Commission separate its policy and adjudicative functions through the creation of an independent securities adjudicative tribunal located in offices separate from those of the Commission. The Lieutenant Governor in Council would make appointments to the tribunal, which would have no more than 12 members. The tribunal would be accountable to a committee of the Legislative Assembly.

62. In reviewing Model Five the Task Force noted the following:

    a. Model Five preserves peer assessment of conduct, capacity and competence matters, which is important to the continued viability of self-regulation. Because of this, however, it may still be open to a conflict of interest argument.[7] Nonetheless it could display the greatest degree of adjudicative separation from the law society of any of the models.

    b. The model completely separates the policy and enforcement component from the adjudicative, such that there is no argument that the same people who determine rules and standards to govern the profession then enforce them against individual members.

    c. The model separates the investigators and the prosecutors of discipline matters from those who then adjudicate the matters. This separation is more than just a separation of departments within the same organization (ring-fencing). There is a structural separation. It is more difficult for anyone to allege that the regulator controls the process.

    d. Along with Model Four, Model Five can be designed to ensure,

        i. availability of panel members;
        ii. adjudicator attendance at education sessions;
        iii. substantive expertise on panels; and
        iv. establishment of decision timelines.

    e. Model Five is the most radical shift from Model One, requiring the greatest statutory and philosophical change.

    f. In the case of the recommended change to the Ontario Securities Commission, Model Five was recommended, among other reasons, because "the apprehension of bias has become sufficiently acute as to not only undermine the Commission's adjudicative process, but also the integrity of the Commission as a whole"[8]. This does not appear to be a concern about the Law Society's processes.

63. Any further discussion on Model Five would necessitate consideration of a number of issues, including,

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[7] This argument is based on the premise that no profession is capable of fair adjudication of its own members. The argument has not been generally accepted.

[8] *Report of the Fairness Committee to the Ontario Securities Commission*, March 5, 2004, p.32.

a. whether there is a perception of systemic bias currently that would necessitate such a change;

b. whether there are reasons to make such a change even if a serious perception of systemic bias does not exist about the current structure;

c. the possible implications for the Law Society's governance structure of such a model;

d. under whose auspices would such a Tribunal operate and to whom it would report;

e. whether moving the process to an outside body would result in greater formalization of that process, with more rigidity, longer hearings, and more challenges to the process;

f. to whom would appeals from tribunal decisions go;

g. the size of the tribunal;

h. appropriate appointment of panel members;

i. the impact of the model on the bencher role, both elected and lay bencher; and

j. the possible financial implications to the Law Society and to government of establishing an entirely separate entity.

Conclusion

64. There are, no doubt, other variations on the models identified here. This overview has merely skimmed the surface of the possible discussion. The Task Force's purpose here is not to recommend a new model. Rather, it is to place the recommendations it does make in the next section in context and to provide Convocation with information to form the basis of further discussions it recommends Convocation should have on the different models for tribunals composition.

65. The Task Force recommends that Convocation undertake an examination of the different models for the composition of the Law Society tribunals, as described in Part II of this report.

PART III

RECOMMENDATIONS FOR ENHANCEMENT TO LAW SOCIETY TRIBUNALS PROCESS AND PROCEDURES

Background

66. The Law Society's current tribunals structure was established in 1999 and its process and the *Rules of Practice and Procedure* that govern its procedures have not be comprehensively reviewed since that time. Some aspects of the *Rules of Practice and Procedure* are more appropriately within the purview of the Professional Regulation

Committee and that committee has been reviewing those aspects with a view to proposing some changes. A copy of the current *Rules of Practice and Procedure* is set out at Appendix 3.

67. If Convocation accepts the Task Force's recommendations the *Rules of Practice and Procedure* will be entirely redrafted for Convocation's consideration and approval to reflect these recommendations, and any recommendations the Professional Regulation Committee makes on those rules it is reviewing.

68. The Task Force's first step was to review the *Rules of Practice and Procedure* and the tribunals process to,

    a. identify those areas it considered within its mandate to address; and

    b. determine whether enhancements were needed.

69. The Task Force has identified the following areas for enhancement, discussed in detail below, with recommendations provided:

    a. Commencement of Proceedings

    b. Pre-hearing Case Management

        i. HMT/AMT decisions – appeals
        ii. Scheduling and adjournments
        iii. Pre-hearing conferences
        iv. Summonses
        v. Electronic hearings
        vi. Consolidation of proceedings

    c. *In camera* matters and non-publication orders

    d. Reasons

        i. Timing
        ii. Written or oral

    e. Appeals

        i. Time for appealing
        ii. Abandonment

    f. Establishing timeline benchmarks

    g. Ongoing tribunals related policy development

    h. Adjudicator Code of Conduct

    i. Adjudicator education/quality assurance

    j. Publication of hearing schedules and decisions

k. *In camera* nature of competence and capacity hearings

COMMENCEMENT OF PROCEEDINGS

70. In creating the Tribunals Office the Law Society has taken steps to create a clear line of distinction between its investigative/prosecutorial branch and its adjudicative branch. This is important to minimize any perception of bias to which an integrated approach might be vulnerable. However, current practices and the language of the *Rules of Practice and Procedure* hinder that separation in a number of areas.

71. Currently, under Rule 4 of the *Rules of Practice and Procedure* the discipline department prepares and issues the Notices of Application in conduct, capacity, competence and non-compliance matters. The Notice sets out a date returnable before the Hearings Management Tribunal to schedule the hearing. The discipline department assigns a file number, serves the application on the member and then files the application with proof of service in the Tribunals Office.

72. The procedure is the same under Rule 4.02 concerning admission and restoration applications, re-admission applications and requalification and reinstatement applications. This is true even though the applicant in these matters is not the Law Society, but a member or student member.

73. This process leaves the Tribunals Office in the anomalous position of being only partly responsible for the administration of its processes, which undermines its separation from the prosecutorial branch. The practice also places the discipline department in an anomalous position.

74. The Task Force recommends that,

a. the Tribunals Office should issue all originating processes and assign file numbers;

b. Rule 4 should be amended to clarify and enhance the role of the Tribunals Office. The role of the Tribunals Office in administratively managing proceedings from beginning to end, should be made clear in Rule 4;

c. in particular, it should be made clear that the Tribunals Office opens and maintains the file of the proceedings and performs an administrative case management role until the final decision is released.

PRE-HEARING CASE MANAGEMENT

Background

75. The *Rules of Practice and Procedure* refer to four “tribunals”: the Hearing Panel, the Appeal Panel, the Hearings Management Tribunal (HMT) and the Appeals Management Tribunal (AMT). The *Law Society Act* creates only the Hearing and Appeal Panels. The *Rules of Practice and Procedure* establish the HMT and AMT and define each as “the bencher to whom jurisdiction is assigned in procedural matters”. The Task Force is satisfied that despite the language of the current *Rules of Practice and Procedure* there

are only two Law Society tribunals. To avoid confusion, the HMT and AMT functions should be renamed “Hearings Management” and “Appeals Management”.

76. The HMT is currently used for scheduling and pre-hearing adjournment requests. The *Rules* do not, however, specify the role of the HMT or whether there is any appeal from decisions of the HMT.

77. The AMT is granted specific authority in Rule 15.05 (2) of the *Rules of Practice and Procedure* to hear certain procedural motions pertaining to appeals. These include,

a. abridgement or extension of time prescribed in the *Rules of Practice and Procedure*;

b. location of the hearing, appeal or a motion;

c. the form of the hearing, including a request to hold a hearing in written or electronic form;

d. the consequences of non-compliance with a previous AMT order;

e. materials to be filed with the Appeal Panel;

f. procedural issues regarding motions; and

g. requests to strike out notices of appeal.

78. While decisions in some of these matters would be interlocutory, others might finally dispose of a matter.

79. The *Rules of Practice and Procedure* do not indicate whether there is any appeal from decisions of the AMT.

80. The AMT’s role in interlocutory matters is intended to facilitate case management without unduly tying up full Appeal Panels. To the extent that the matter on which the AMT is adjudicating is interlocutory, that decision should be final. However, where the decision has the potential to finally decide the matter, there should be an appeal to the Appeal Panel.

81. The Task Force recommends that,

a. the *Rules of Practice and Procedure* clarify that there are two tribunals: the Hearing Panel and the Appeal Panel;

b. there continue to be the Hearings Management function (HM) and the Appeals Management function (AM), both renamed to remove the word “Tribunal” from the title;[9]

c. it be stated in the *Rules of Practice and Procedure* that there is no appeal from a decision of the HM; and

[9] From this point forward in this report HMT and AMT will be referred to as HM and AM.

d. it be stated in the *Rules of Practice and Procedure* that the AM's order is final, except where it finally disposes of the matter, in which case there is an appeal to the Appeal Panel. The Appeal Panel's decision is final.

SCHEDULING AND ADJOURNMENTS

82. Currently, Rule 9 of the *Rules of Practice and Procedure* provides that in most instances a proceeding is first returnable before the HM to schedule a hearing date. Rule 15 requires scheduling of appeals to go before the AM. Concern has been expressed that this is not the best use of adjudicative resources, particularly given the volunteer nature of Law Society adjudicators. At a number of other tribunals and courts, scheduling in the first instance is a staff function.

83. Under a revised approach, scheduling would, in the first instance, be a staff function of the Tribunals Office, with guidelines developed for staff to apply when setting dates. Only where there were scheduling disagreements would the matter go before the HM or AM. This approach would reflect the view that the Tribunals Office should perform the administrative case management function, while at the same time preserving the parties' rights to have more contentious issues addressed by an adjudicator

84. The scheduling issue is inextricably linked with the adjournment policy, since most scheduling issues arise because of disagreement over appropriate hearing dates. The Task Force has identified a number of problems in this area, including,

a. no clearly articulated grounds upon which the HM should grant adjournments;

b. no clearly articulated grounds upon which panels should grant an adjournment, even when the HM or AM has recently denied it;

c. no disincentive (or rule) against adjournment requests on the date of hearing;

d. excessive deference, on occasion, to counsel's unavailability for months; and

e. failure of panels to require parties to proceed on a hearing date that is marked peremptory.

85. In determining scheduling and adjournment issues the most important underlying goal is to ensure that the adjudicative process operates in a fair and timely manner. To further this goal, many tribunals have established guidelines on adjournments. Provided the panels apply these guidelines consistently, parties and counsel accept the policies and govern themselves accordingly.

86. Developed guidelines would set out the factors to be taken into account in considering an adjournment request, including,

a. prejudice to any parties by granting or denying the adjournment;

b. the timing of the adjournment request;

c. the number of prior requests for, or actual, adjournments and by whom;

d. the public interest;

e. the costs of rescheduling;

f. the availability of witnesses;

g. evidence that the party requesting the adjournment has made all reasonable efforts to avoid the need for the adjournment; and

h. whether the adjournment is necessary to allow for a fair hearing.

87. Clearly articulating the factors to be considered on adjournment requests would assist all parties in knowing how to proceed and may reduce delay. In addition, such an approach might make it easier for adjournment requests to be more comprehensively addressed as part of a whole picture, with a view to avoiding a proceeding simply dragging on.

88. Parties should be on notice from the outset of the process that it is expected that a matter will proceed on the scheduled date. It should be clear that adjournments would be considered only in exceptional circumstances. Parties should be put on early notice that an adjournment request would be treated as a serious matter, even in some situations where the parties consent to the adjournment. Guidelines would make it clear that parties seeking adjournments might be questioned about whether a solution other than an adjournment might address the problem.

89. Guidelines could also articulate the appropriate timing for requests for adjournments. In the criminal courts there is a requirement that adjournment requests be made before the date of hearing (one week or more), on notice to all parties and in writing. This approach injects greater certainty into the process and avoids witnesses attending on the hearing date only to be sent away when the matter is adjourned. Parties are entitled to seek leave to bring the adjournment request on shorter notice in certain circumstances.

90. The Task Force believes this is a sensible approach for the Law Society to adopt. So, for example, an adjournment request would be made to the HM at least ten days prior to the hearing date. In exceptional circumstances the request could be made to the Hearing Panel on the case. The Task Force is of the view that it should be made clear to parties that inadequate notice or excessive delay of proceedings could be met with cost consequences.

91. The Task Force recommends that,

a. Rules 9 and 15 of the *Rules of Practice and Procedure* be amended to provide that as a general rule the Tribunals Office will schedule hearings and appeals;

b. only where there is disagreement that cannot be resolved should scheduling be referred to the HM or AM (or in some instances a Hearing Panel seized with the matter). The HM and AM will retain a case management role that would be articulated in the *Rules of Practice and Procedure.* An appearance before the HM or AM would be done on request, as necessary;

c. to the extent that the HM and AM make scheduling determinations these should be endorsed on the record and subsequent Hearing Panels and Appeal Panels shall be made aware of and consider such decisions before they entertain any further requests;

d. guidelines for the scheduling of hearings and appeals and considering adjournment requests along the lines set out in paragraph 86-89 should be developed for the use of staff, HM, AM and Hearing and Appeal Panels;

e. as a general rule, adjournment requests should be brought no later than 10 days before a scheduled date.

PRE-HEARING CONFERENCES

92. Rule 10 of the *Rules of Practice and Procedure* currently provides for either party to request a pre-hearing conference. Materials for use at the conference are to be filed two days before the conference. The member is not required to file any materials.

93. The goals of the conference are to resolve as many issues as possible, narrow the remaining issues and, where possible, obtain an Agreed Statement of Facts (ASF) and other undertakings that will shorten the proceeding. The earlier in the process this conference is scheduled, the more useful it is in the effective management of the process.

94. Currently, the *Rules of Practice and Procedure* do not encourage either the early scheduling of conferences, the early exchange of hearing conference memoranda or an ASF and do not contemplate the pre-hearing conference as a meaningful component of the process.

95. There are a number of ways in which the pre-hearing conference might be used to improve the adjudicative process, including,

a. formally empower the pre-hearing conference bencher to continue to case manage a case and, where appropriate, require parties to return for a second or third conference with the goal of narrowing issues;[10]

b. where parties at the pre-hearing conference come to an agreement on the finding and/or penalty, with their consent, have the pre-hearing conference bencher become a panel of one to make the appropriate order;[11]

c. where an adjournment is unavoidable on the date of a hearing and the panel is not seized with the matter, efforts should be made to use the occasion for a pre-hearing. One of the panel members could preside over the conference to attempt to further narrow the issues or discuss the completion of an ASF. The bencher would not sit on the hearing when the matter went ahead.

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[10] Although this happens informally under the current process, it is not specified in the current Rules of Practice and Procedure.

[11] Although this happens informally under the current process, it is not specified in the current Rules of Practice and Procedure.

96. The Task Force believes that to the extent practical and useful, greater use should be made of the pre-hearing process. In certain types of cases, the pre-hearing conference should be a mandatory component of the process. This is particularly true in the case of hearings that are expected to take longer than two days. The Task Force recognizes that increased use of the pre-hearing process may have both human (staff and bencher) and financial resource implications that will need to be monitored.

97. In addition, the Task Force does not consider it appropriate to require members to file materials as part of the pre-hearing conference. It does believe that the Law Society should be required to file such materials, without which the pre-hearing conference's usefulness would be further limited.

98. The Task Force recommends that,

a. the *Rules of Practice and Procedure* be amended to reflect the importance of holding pre-hearing conferences as early as possible in the proceeding;

b. where appropriate, parties should be made aware of the availability of pre-hearing conferences and encouraged to participate in such a conference;

c. the processes set out in paragraph 95 should be included in the pre-hearing provisions of the *Rules*;

d. a pre-hearing conference should be mandatory where the hearing of a matter is expected to take longer than two days. It should be held prior to the hearing date, as early in the process as reasonable;

e. for matters that do not fall within (d), the *Rules of Practice and Procedure* should provide that a pre-hearing conference may be ordered in the discretion of the HM or the Hearing or Appeal Panel or at the request of the parties;

f. the Law Society should be required to file materials for use on the pre-hearing conference one week before the conference. The member should not be required to file material; and

g. any agreements reached on the pre-hearing conference should be endorsed on the record and available to subsequent adjudicators.

SUMMONSES

99. Rule 1.11 of the *Rules of Practice and Procedure* provides that,

> the Secretary *shall* provide a summons to a witness in blank form and the party may complete the summons and insert the name of the witness. [emphasis added]

100. Currently, the Director of Professional Regulation performs this role.

101. Given the Law Society's efforts to separate the investigative/prosecutorial functions from the adjudicative functions, the Task Force believes it is preferable to have the Tribunals

Office assume the summonses role currently exercised by the Director of Professional Regulation.

102. The Task Force therefore recommends that,

a. the issuing of summonses should fall within the responsibility of the Tribunals Office, not the Director of Professional Regulation;

b. the Tribunals Office may issue summonses upon request;

c. where the Tribunals Office refuses to issue a summons a party may, on motion, request that the Hearing Panel or Appeal Panel issue the summons.

ELECTRONIC HEARINGS

103. The Rules permit electronic hearings, but, somewhat inconsistently, require the motion seeking leave for an electronic hearing to be argued in person.

104. The Task Force recommends that the Rules be amended to eliminate, where appropriate, the requirement that a motion to seek an order for an electronic hearing must be argued in person and instead permitting submissions to be made in writing.

CONSOLIDATION

105. Currently, if the Law Society has different proceedings ongoing against a single member, there is no provision to allow counsel to seek to join both matters, unless there is consent. Under section 9.1 of the *Statutory Powers Procedure Act* (SPPA), where proceedings involve the same or similar questions of fact, law or policy and the parties consent, proceedings can be combined or heard at the same time and evidence admitted in one proceeding can be used in the other proceeding being heard at the same time. Without consent, proceedings can be heard one after the other or one proceeding can be stayed until the determination of another.

106. Where the *Rules of Practice and Procedure* of a tribunal are silent, the SPPA excludes *in camera* hearings from this type of order, meaning, for example, that a conduct and competence matter could not be joined.

107. There may, however, be circumstances in which the Law Society wishes to join two proceedings, for example where a number of complaints have accumulated against a member at different times and are authorized at different times. It may be important for a panel to see the full extent of the allegations. This approach may also be the most efficient use of resources.

108. It is also possible that a member may wish to consolidate proceedings.

109. To ensure the greatest flexibility in the tribunals process, the Rules should provide the opportunity for a party to seek to consolidate proceedings where there is no consent.

110. While typically the types of matters for which consolidation would be sought would be conduct matters, there should be the opportunity to seek leave to consolidate any types

of proceedings, subject, of course, to satisfying the decision maker why this is appropriate.

111. It is important that motions for consolidation be brought as early in the process as possible, not on the date set for the hearing of the matter. It should be made clear to parties that timeliness is a factor to be considered in any motion for consolidation and if granting the motion results in unreasonable delay, there may be cost consequences to a party.

112. The Task Force recommends that,

a. the Rules be amended to allow for a motion to consolidate multiple proceedings against a single member even in the absence of consent;

b. such motion should be brought as early in the proceeding as possible and not, except in exceptional circumstances, on the date set for hearing; and

c. there may be cost consequences for unreasonable delay caused by the timing of the motion.

IN CAMERA MATTERS AND NON-PUBLICATION ORDERS

113. The public, the profession and the media have become increasingly interested in matters that Law Society panels hear and in their orders and reasons.

114. Law Society conduct hearings are held in public as a matter of course. This has been the case since 1987. The orders and reasons delivered at the conclusion of the hearings are also made available to the public through publication on CanLII, QuickLaw and the Ontario Lawyers Gazette.

115. The Law Society adopted this policy of openness to reflect its public interest mandate and the requirements of the *Statutory Powers Procedure Act*. The profession has been given the authority to discipline its members, and must do so in a manner that the public can observe. This commitment to transparency is one of the principles the Task Force has determined is essential to the tribunals process and procedures.

116. Panels have not correctly or uniformly applied the current Rules dealing with *in camera* and non-publication orders.

117. *In camera* orders apply only to the hearing. They have no application once a hearing is completed.[12] An *in camera* order does not alter the fact that the order and reasons of a Law Society tribunal are a matter of public record. Many panels incorrectly believe that once an order is made to hold a hearing or part of a hearing *in camera,* the reasons of the tribunal are not to be made public. This is not the case.

118. The Law Society does not have authority to withhold documentary evidence, an order or reasons from a member of the public, including the media, in the absence of a non-publication order. This is so even where the evidence is received *in camera* or the order or reasons are given following an *in camera* hearing.

[12] The transcript of the *in camera* hearing is, however, also *in camera.*

119. A panel that wants to conduct a hearing in the absence of the public and to ensure that its reasons are not made available to the public must make two separate orders – one ordering that the hearing be held in the absence of the public, and one ordering that all or part of its reasons not be made public.

120. The Rule that conduct hearings are to be held in public is only to be departed from in exceptional circumstances. It is important that panels pay particular attention to the importance of an open and transparent process when assessing whether any portion of a hearing or any aspect of the evidence should be received in the absence of the public.

121. So, for example, panels should not automatically assume that a psychiatric report is necessarily to be received in the absence of the public.[13]

122. Eliminating the use of the term *in camera* and replacing it with clear terminology, as described below, will assist in eliminating panels' and parties' confusion about the difference between a hearing in the absence of the public and a non-publication order.

123. The Task Force recommends that,

a. the *Rules of Practice and Procedure* no longer refer to *in camera* orders. Instead they should speak of orders that a hearing, or part thereof, be conducted "in the absence of the public". This is in contrast to orders that affect publication.

b. conduct matters should continue to be held in public;

c. this principle should be derogated from only in exceptional circumstances that should be enumerated in the *Rules of Practice and Procedure*. In assessing whether any portion of a hearing or any aspect of the evidence should be received in the absence of the public, panels must pay particular attention to the importance of an open and transparent process.

d. the current exceptions set out in Rule 3.01(b) of the *Rules of Practice and Procedure* should be reviewed to ensure that they are not overly broad.

e. panels must be educated on the limited circumstances under which a conduct hearing may be held in the absence of the public;

f. requests for a hearing to be held in *the absence of the public* should only be made by way of a formal motion, in public, subject to an order by the Hearing Panel that the motion or any part of it be held in the absence of the public.[14] The Hearing Panel should deliver reasons for its decision on the specific motion, in writing;

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[13] Currently, panels often accept psychiatric reports *in camera*. Then they either refer to the report in their reasons, so the report becomes public, or they determine that their reasons cannot be made available to the public. In fact, a panel should receive the psychiatric report *in camera* if it wishes to discuss it in the absence of the public. If the panel then wishes to ensure that the report is not made available to the public, it must make a separate non-publication order.

[14] This mirrors the current Rule, the importance of which the Task Force is emphasizing.

g. counsel for the Law Society should ensure that upon any motion that a proceeding be heard in the absence of the public or that a non-publication order be made, the Hearing Panel is informed of the relevant provisions of the *Rules*;

h. if a Panel believes that exceptional circumstances have been demonstrated, its order should cover only so much of the hearing as is necessary to address those exceptional circumstances;

i. panels should also be entitled to order that while the hearing will be in public, distribution or publication of information is prohibited. Written reasons must be given, explaining the basis for the decision;

j. a Hearing Panel may make an order that a hearing or some aspect of it is to be held in the absence of the public and it may make a non-publication order respecting some or all of the evidence, but it may never order that its order not be public; and

k. wherever possible, reasons should be public information, so that a body of jurisprudence develops and is available to all.

ORDERS AND REASONS FOR DECISION

124. The *Law Society Act* and the *Rules of Practice and Procedure* make use of three terms related to a panel's disposition of a matter. They are "decision", "order" and "reasons". These terms are not defined.

125. Operationally the Tribunals Office applies the terms as follows:

a. A Panel's determination that an allegation has been made out or not made out is considered to be its "decision".

b. If the decision is that the member is guilty of misconduct, the Panel's "order" sets out the consequences of its decision for the member (e.g. suspension, a fine, etc.)

c. The Panel's "reasons" explain its decision and/or order.

126. The Task Force considers it important for the *Rules of Practice and Procedure* to define these terms and ensure there is no conflict with the language of the *Law Society Act.*

127. Hearing and Appeal Panels do not follow a consistent approach to making orders and producing reasons for decision. Moreover, the *Rules of Practice and Procedure* are not currently structured to ensure that the most effective, fair and transparent processes are in place. In addition, the quality of written decisions varies from panel to panel.

128. A practice has grown up in which some panels give oral reasons and then, at a later date, give more extensive written reasons. There is a growing trend in the case law emerging from the courts that supports the issuing of written reasons in every case. Indeed case law has now held that tribunals such as the Law Society's have a duty to give reasons, the failure to do so being a ground at common law for review. The giving

of written reasons engenders a better appeal process and is fair to all parties. It allows for the development of a body of jurisprudence upon which staff, members and future panels can obtain guidance for future actions.

129. At the same time, it is important that orders and reasons be given in a timely fashion, because fairness to the parties requires promptness.

130. The melding of these two considerations (written reasons and timeliness) is possible, but only if there is greater commitment to the timely production of reasons.

131. Appeal periods and timing benchmarks for the tribunals process will be discussed further in sections that follow.

132. The Task Force also discussed the problem of quality of decisions. It agreed that although there should not be mandatory templates that panel members are required to follow, there should continue to be education programs on decision writing that all benchers are required to attend.

133. The Task Force recommends that,

a. written reasons should be required in all cases. Oral reasons should no longer be given;

b. there should be a benchmark for the delivery of written reasons, specified as number of days following the end of hearing (e.g. 60 days). Panelists should be advised of this fact before they schedule themselves for hearings so that in considering their availability they include the time line for delivery of reasons. Panel members would determine which member will write the decision;

c. where is it urgent for the Hearing Panel to make a decision immediately (e.g. disbarment or suspension), it may do so at the conclusion of the hearing, but without giving any oral reasons. The appeal period will run from the announcement of the disposition of the case (e.g. if the Panel announces the disposition of disbarment on January 1 and releases its reasons for decision on February 1, the appeal period would run from January 1);

d. adjudicators should be provided with suggested subject areas to be covered in their decisions, but not be required to follow mandatory templates; and

e. the *Rules of Practice and Procedure* should be reviewed to ensure that the terms “decision”, “order” and “reasons” are clearly explained and in keeping with the language of the Act (section 49.32).

APPEALS

134. There are a number of issues that arise respecting appeals, including timing of appeals and abandonment of appeals.

135. Currently, parties must file a notice of appeal within 30 days of service of an order. The appeal period is not linked in any way to the delivery of reasons, hence the dilemma of parties having to file notices of appeal, on occasion, without the benefit of reasons.

136. This mirrors the approach used in the courts and, although it does result in the possibility that a Notice of Appeal will have to be filed before the reasons for decisions are issued, the Task Force believes the Law Society should follow the approach used in the courts. At the same time, however, it should be made clear that a party may amend its Notice of Appeal, if necessary, once the reasons are issued.

137. The Task Force is of the view that modes of service on the member and the Law Society should be harmonized. Service on the member should be able to be effected by fax, where appropriate, to shorten the length of time it takes for service. The Law Society and the member should be served at the same time and in the same manner.

138. Moreover, the time limitation for filing a cross-appeal should be specified in the *Rules of Practice and Procedure* as a specified number of days following service of the Notice to Appeal.

139. Another issue in managing appeals is raised by the fact that currently, the Tribunals Office has no clear authority to deem an appeal abandoned. The Task Force believes this should be part of the Tribunals Office's administrative case management of files from beginning to end. Such a process would,

    a. authorize the Tribunals Office to extend any time limits on consent;

    b. provide a formal procedure for parties to seek leave to extend any time limits where there is no consent;

    c. authorize the Tribunals Office to send a notice to appellants in the form of a copy of the relevant Rule in the *Rules of Practice and Procedure* setting out that an appeal shall be deemed abandoned if any time limit for filing material is not met; and

    d. authorize the Tribunals Office to deem an appeal abandoned where the time limits are not met.

140. The Task Force recommends that,

    a. the time for filing an appeal should be 30 days from the date of the announcement of the disposition of the case;

    b. the time for filing a cross-appeal should be expressed in the *Rules of Practice and Procedure* as a specified number of days following service of the Notice of Appeal;[15]

    c. the member and the Law Society should be served at the same time and in the same manner;

    d. the Tribunals Office should have the authority to deal with appeal time limits as follows:

[15] The Task Force leaves it to the Rules drafter to specify the appropriate number of days.

i. Extend any time limits on consent.
ii. Administer the process where a party seeks leave to extend time limits where there is no consent.
iii. Upon receipt of a Notice of Appeal or Cross-Appeal, send the appellant the relevant Rule in the *Rules of Practice and Procedure* on the required time limits for filing materials on appeals. In this way appellants would be advised that failure to file any material within the required time limits would result in the appeal being deemed abandoned.
iv. Send out confirmation that the appeal is deemed abandoned once the time has passed with no consent or order for an extension.

ESTABLISHING TIME LINE BENCHMARKS

141. The Task Force has discussed the issue of delay in scheduling matters and issuing orders and reasons. It has discussed a number of ways of addressing these delays, many of which are reflected in recommendations in this report.

142. A number of courts and tribunals have attempted to address the issue of delay by setting benchmarks for each component of a process. Benchmarks are not mandatory, but they do create expectations of behaviour for all those involved with the adjudicative process. If they are taken seriously, over time they can help change the attitudes and "culture" to better reflect the goals of the adjudicative process.

143. It is important to note when introducing benchmarks that they may not necessarily apply to all cases or situations, depending upon the particular circumstances.

144. The key to introducing benchmarks is that Law Society counsel and panels be ready and able to meet the benchmarks, otherwise there is little likelihood that the members and their counsel will take the benchmarks seriously.

145. The Task Force has identified two initial benchmarks it recommends be adopted and used as the foundation for developing additional ones, as set out below.

146. The Task Force recommends that,

a. the Law Society develop time line benchmarks to guide the case management process;

b. the first benchmarks to be developed should be,

i. the time from service of Notice of Application to the first hearing date (e.g. within 6 months);
ii. the time from completion of a hearing to issuance of written order and reasons (e.g. within 60 days).

ONGOING TRIBUNALS-RELATED POLICY DEVELOPMENT

147. It is important to the ongoing enhancement of the tribunals process that there be a forum for tribunals-related policy/rules to be developed for Convocation's consideration. While the majority of the Task Force recommends that a new standing committee on tribunals

should be established, the option put forward that this role is within the Professional Regulation Committee's mandate is also discussed here.

148. Pursuant to s.62 (0.1)1 of the *Law Society Act*, Convocation may make by-laws, relating to the affairs of the Society. More specifically, pursuant to section 62(1) by-laws may be made,

> 11.providing for the establishment, composition, jurisdiction and operation of standing and other committees…and delegating to any committee such of the powers and duties of Convocation as may be considered expedient.

149. The majority of the Task Force recommends that Convocation establish a Tribunals standing committee. Its mandate would be to provide Convocation with policy options respecting tribunals-related policy and rules. Its membership should include the Chairs of the Hearing and Appeal panels, as well as other benchers.

150. Another option discussed was that the Professional Regulation Committee address tribunals-related rules and policies. Prior to the amendments to the *Law Society Act* in 1999, the Professional Regulation Committee was known as the Discipline Policy Committee. Its role included policies related to investigation and prosecution as well as policies related to adjudication. The option the Task Force discussed is premised on the view that the Committee should continue to exercise this function, rather than be limited to investigative, prosecutorial policies. The separation between tribunals and discipline is at a staff level, but not required at the policy level.

151. The majority of the Task Force expressed the concern, however, that the Professional Regulation Committee and the Proceedings Authorization Committee are identified with the investigative and prosecutorial branch of the organization. The adjudicative process must be perceived to be as separate from the investigative/prosecutorial arm as possible. The rule and policy making function, as it relates to adjudicative matters, must be as neutral as possible.

152. The majority of the Task Force was of the view that, given the need to maintain a distance between the investigative/prosecutorial branch and the adjudicative branch of the organization it would not be appropriate for the Professional Regulation Committee to make ongoing decisions on tribunals-related matters.

153. The Task Force recommends that Convocation establish a standing committee to be known as the Tribunals Committee, whose membership should include the Chairs of the Hearing and Appeal Panels.

ADJUDICATOR CODE OF CONDUCT

154. The adjudication role is one that requires panel members to learn specialized skills and adhere to standards of behaviour intended to ensure that the process is fair, transparent and consistent.

155. The fact that most of the Law Society adjudicators are lawyers does not mean that they are automatically experienced with and can apply these specialized skills. In private practice, lawyers represent a particular client and make decisions or advocate on behalf of the client from a given perspective. Adjudicators must be neutral, not only in the

manner in which they receive the evidence before them, but also in the manner in which they conduct hearings and motions and render their decisions.

156. Adjudicator Codes of Conduct are widely used mechanisms for ensuring adjudicative consistency from panel to panel and from year to year and for providing guidance to adjudicators about the unique nature of their role and the importance of adhering to certain behaviours. Given the diverse range of experience Law Society panelists have, the value of a consistent code cannot be over estimated.

157. The Society of Ontario Adjudicators and Regulators (SOAR) has developed a model Code of Conduct to assist those tribunals seeking to develop such a code. Examples of bodies that have implemented a code for adjudicators include the College of Nurses of Ontario, the Professional Engineers of Ontario, the Ontario Municipal Board, the Immigration and Refugee Board and the Workplace and Safety Insurance Appeals Tribunal.

158. A code of conduct will address a number of discrete issues, the most typical of which are,

a. Purpose of the Code
b. Guiding Principles
c. Applicability
d. Conflict of Interest
e. Role of the Chair
f. Conduct of the Hearing/Responsibility of Panel members/Good Conduct
g. Duty of Confidentiality
h. Decision-making responsibilities/deliberations
i. Duty to provide written reasons
j. Adequacy of reasons
k. Collegial responsibilities
l. Post-term responsibilities/post-service conduct
m. Role of staff

159. Appendix 4 sets out, for information, the topics that might be included under each heading.

160. The Task Force recommends that the Law Society develop an Adjudicator Code of Conduct to guide panels in their responsibilities as adjudicators. If Convocation accepts the Task Force's recommendation for the establishment of a Tribunals Standing Committee, the Task Force recommends that that Committee develop the proposed code for Convocation's consideration and approval.

ADJUDICATOR EDUCATION/ QUALITY ASSURANCE

161. The role of an adjudicator requires special knowledge and education. This ongoing education is essential to ensure quality adjudication and decisions. Since benchers govern the profession in the public interest, the way in which they undertake the role of disciplining those members who fall below ethical standards is one of the most important tasks they do. The continued credibility of self-regulation requires that the adjudicative process be consistent, transparent and fair.

162. Given this high level of responsibility on benchers as adjudicators, a question arises as to the best way to ensure that there are quality assurance measures in place to meet that responsibility. While the Law Society makes ongoing adjudicator education available to benchers, benchers are not required to take it.

163. The Task Force believes that it is incumbent upon the Law Society to mandate ongoing adjudicative education for benchers as part of a tribunals system committed to quality.

164. If education is mandated, any lawyer interested in running for bencher or any potential lay appointee would be advised well in advance that part of their responsibilities as bencher included mandatory adjudicator training. This culture of education would become entrenched with little difficulty. Moreover, the Law Society could make it clear to the public that its adjudicative process included educated and ongoing professional development.

165. The Task Force recommends that all benchers undergo mandatory and ongoing adjudicator education, such education to include but not be limited to,

    a. conducting hearings and pre-hearing conferences;
    b. evidence;
    c. decision writing; and
    d. jurisprudential updates.

PUBLICATION OF UPCOMING HEARINGS SCHEDULE AND LAW SOCIETY DECISIONS

166. In analyzing publication issues it is important to consider the role that publication of tribunal matters plays in the Law Society's self-governance. The Law Society regulates the profession in the public interest. Today's public demands more openness and accountability from self-regulating professions.

167. One of the Law Society's most important public interest functions is ensuring that lawyers who commit acts of professional misconduct are held accountable for their actions. While it is essential to ensure that the tribunals process is fair, transparent and consistent, it is also important that information about matters before panels and their decisions are easily accessible by the public, whenever there is a public interest in having that information.

168. In response to lawyer misconduct, the Law Society must not only act, but must be seen to act. Otherwise, the public confidence in self-regulation is called into question. To the extent that the Law Society deviates from a policy of transparency and public information, there must be good cause for doing so.

Upcoming Hearings Schedule

169. In furtherance of the Law Society's public interest mandate, the Tribunals Office prepares monthly lists of the upcoming hearings and the Communications and Public Affairs Department distributes these lists by e-mail to about 120 media outlets.

170. A typical monthly list currently includes the following information:

    a. member's name and file number.

b. town or city in which the member practises.

c. date the matter is scheduled to be heard.

d. name of the Law Society's counsel and the member's counsel, where applicable.

e. an extract of the particulars of alleged professional misconduct or conduct unbecoming from the Notice of Application, Notice of Hearing or Notice of Appeal, whichever is relevant.

171. Media interest in the Law Society's regulatory processes, particularly its hearings, has increased significantly in recent years. In 2000, the Law Society distributed the monthly list by mail to between 10 and 20 media outlets. By 2002, 70 media outlets were receiving the list. Today, the lists are distributed to 120 media outlets. The number of media outlets interested in this list is expected to grow.

172. As more reporters and editors learn that this information is available to the public, they question why the information is not more easily accessible and widely available, particularly in view of the Law Society's public interest mandate.

173. Many reporters and editors track certain cases and expect the Communications and Public Affairs Department to inform them if and when a hearing is scheduled in a particular matter. Currently, this requires staff to track matters and contact the media.

174. This information is of interest to others as well. Currently, it is not distributed to Law Society staff, benchers, or other key stakeholders. Upon request, the Communications and Public Affairs Department has added others to the distribution list.

175. It is no longer efficient to continue to advise the public of upcoming hearings by distributing lists to the media. Making the list available on the Law Society's web site is recommended for the following reasons:

a. It levels the playing field among journalists with all media outlets by providing everyone with access to the same information, rather than only to those who know that this is public information. Currently, the information is public and yet not made widely available and easily accessible to all who may be interested in it.

b. It increases the transparency of the Law Society's regulatory process.

c. It makes the information easily available to a wider audience such as staff in the Professional Regulation Department, Call Centre employees, benchers, Law Society stakeholders, members of the public and the profession.

d. Since all hearing dispositions are already posted on the web site, it is a logical next step to make upcoming hearings lists available on line.

e. It makes more efficient use of staff time and resources in that staff will not have to continuously update media e-mail addresses, make regular additions,

distribute the materials electronically, fix problems when e-mails do not go through and track the matters as a service to the media.

f. It is one more service offered on the web site, enhancing its reputation as the "go to site" for news and information.

176. Many other professional regulators list their hearings schedules on their web sites, including the Law Society of British Columbia, the Law Society of Alberta, the College of Nurses of Ontario, the College of Physicians & Surgeons of Ontario and the Ontario College of Teachers.

177. A more flexible and transparent approach would be for upcoming hearings schedules to be published on the Law Society's web site as follows:

a. At the end of each month, the schedule of hearings for the upcoming month would be posted on the Law Society's web site in secure format;[16]

b. Each month the schedule on line would be replaced with the new schedule. Previous month's schedules would not be archived;

c. All hearings, appeals, and motions held in public, would be listed. The extract of the particulars from the Notice of Application, Notice of Hearing or Notice of Appeal would be set out unless a hearing panel has previously made an in the absence of the public order with respect to that matter or has made a non-publication order;[17]

d. File numbers, which are internal to the Law Society, would no longer be included in the schedule.

178. The Task Force recommends that the Law Society publish its upcoming hearings schedule on its web site in accordance with the proposal set out in paragraph 177.

Publication of Decisions

179. The Task Force has considered a number of issues related to the publication of panel decisions including,

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[16] Posting upcoming hearing schedules on line affects the privacy rights of members involved in the Law Society's tribunal process. Any publication policy must balance the privacy interests of the member with the responsibility of the Law Society to inform the public of the manner in which it governs the legal profession in the public interest. Posting the upcoming hearings schedule in PDF format allows the typical web site visitor to only read the text, and prevents the typical visitor from copying, downloading or changing the text.

[17] Currently the Rules of Practice and Procedure preclude publication of any information respecting competence or capacity matters. The Task Force's recommendation reflects the current strictures on publication. As will be seen in a subsequent section, however, the Task Force is recommending a review of the confidentiality policy relating to these matters. In the Task Force's view, notice of the hearings in all matters should be made available to the public on the Law Society website.

a. a consistent approach to identifying parties and witnesses; and
b. the time frame for posting decisions on the Law Society's web site.

Identification of Parties and Witnesses

180. In considering the publication of decisions the Task Force has noted that the mandate of the Law Society is to govern the legal profession in the public interest. It is in the public interest that all decisions the Law Society's tribunals make are accessible to the profession and the public. Publication of decisions promotes the accessibility, transparency and accountability of the hearing process. The Law Society should publish all decisions that are the result of hearings of the Law Society's tribunals.

181. At the same time, however, the reasons should, where appropriate, protect the identity of certain witnesses or complainants where there is no public interest in identifying them. The Task Force recommends that in considering when it is appropriate to anonymize, there be presumptions against anonymization in the following instances:

a. The name of the member who is the subject of the proceeding will not be anonymized unless exceptional circumstances warrant this.

b. The name of certain categories of witnesses will not be anonymized, namely,

i. Law Society staff;
ii. expert witnesses;
iii. institutional witnesses; and
iv. lawyer witnesses.

182. Panels should, in each hearing, consider whether it is appropriate to anonymize the names of some of the witnesses. Guidelines should be developed to assist Panels in making such decisions. Without limiting guideline development, the Task Force suggests that one of the considerations should be the public interest in encouraging the reporting of allegations of professional misconduct, incapacity or incompetence and the participation of witnesses. Some witnesses or complainants may be reluctant to proceed if their names will be made public in written reasons.

183. The Task Force recommends that,

a. panels should, in each hearing, consider whether it is appropriate to anonymize the names of some of the witnesses;

b. guidelines should be developed to assist Panels in making such decisions;

c. in considering when it is appropriate to anonymize witness names there should be presumptions against anonymization in the following instances:

i. The name of the member who is the subject of the proceeding will not be anonymized unless exceptional circumstances warrant this. Guidelines should identify the nature of those exceptional circumstances.

ii. The name of certain categories of witnesses will not be anonymized, namely Law Society staff; expert witnesses; institutional witnesses; and lawyer witnesses.

d. where it is concluded that there should be anonymization, the identity of persons whose identification might reasonably reveal the identity of another person whose identity is protected shall also be protected – for example, parents, guardians, siblings, spouses, and other relatives or friends;

e. in deciding whether exceptional circumstances exist to protect a member's identity, the Hearing or Appeal Panel shall consider the public interest and any potential harm to the member, the complainant, a witness or any other party to the proceeding;

f. facts that tend to identify a person whose name is to be anonymized, shall not be included in the decision. For example, references to the person's occupation, particular dates, particular locations or other particular circumstances of the case that would reasonably lead to the identification of a victim, complainant, witness or other protected person;

g. persons whose identity is to be anonymized shall not be identified by the initials of their names. This might tend to identify them to some persons. Rather, guidelines will set out the various ways in which they may be identified, such as " the victim"; "the complainant"; "the witness"; "the member". If there is more than one person in any category numbers may be added, such as "victim 1," "victim 2," "witness 1," "witness 2" etc;

h. reasons may be edited to correct typographical, spelling and grammatical errors, and to achieve consistency of formatting.

Time Frame for Posting Decisions

184. It is appropriate for the Law Society to post its tribunals decisions on its web site. The policy question raised by the issue is whether there is a public interest in making that information available without time limit. The Task Force weighed whether the actual tribunal reasons should remain on the website indefinitely or whether it would be sufficient, after a period of time, to provide only information on the finding and penalty against the member.

185. Currently, what is on the Law Society web site is the case digests that are printed in the Ontario Lawyers' Gazette (the Gazette). These remain on line indefinitely because the Gazette issues remain in the Archives section of the web site. Law Society decisions are also available on CanLII and QuickLaw, and as with all jurisprudence, are available indefinitely. Given the increasing demand for regulator accountability, transparency and information, it is appropriate that the actual decisions be available on the website. To do otherwise is to open the Society to the argument and perception that it is delaying, hiding or otherwise impeding the public's "right to know". However, the Task Force is of the view that after a period of time, it is not necessary for the Law Society web site to include the actual decision, which is available elsewhere, provide the finding and penalty against the member remain posted.

186. The Task Force recommends that,

a. the Law Society post tribunal decisions on its web site for a period of three years; and

b. after three years the finding and penalty against the member remain on the website, with a link to the CANLII or QuickLaw sites where the decision may be found. The decision itself would no longer be available on the Law Society web site.

IN CAMERA NATURE OF COMPETENCE AND CAPACITY HEARINGS

187. Pursuant to Rule 3.04.1 of the *Rules of Practice and Procedure,* professional competence hearings are to be held in the absence of the public. Only the complainant is entitled to know that an application has been issued. No other member of the public is entitled to know about the application. The rationale for this approach is that the competence stream is intended to be remedial, not punitive, and members are to be given a chance, if possible, to correct the deficiencies in their practice.

188. Where the tribunal makes an order suspending or limiting the member's rights and privileges, however, the *Rules of Practice and Procedure* provide that "the decision and order are a matter of public record". That information is to be published before the expiry of the time for filing an appeal

189. The Professional Development and Competence Committee's mandate includes consideration of competence-related issues. In the past the Committee has considered changes to the manner in which practice reviews and competence provisions are addressed and Convocation has removed some of the confidentiality provisions that surround practice reviews and competence hearings.

190. Pursuant to Rule 3.04(1) of the *Rules of Practice and Procedure*, a proceeding in respect of a determination of incapacity is to be held in the absence of the public. The application is not to be made public, except to the complainant. Where the tribunal makes an order suspending or limiting a member's rights and privileges, however, the *Rules* provide that "the order is a matter of public record, but the reasons shall not be made public".

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

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

REQUEST TO CONVOCATION

193. That Convocation approves the recommended enhancements to the Law Society's tribunals process and procedures, set out in Part III of this report and in Appendix 1.

194. That Convocation undertakes an examination of different models for the composition of the Law Society tribunals, as described in Part II of this report.

APPENDIX 1

TASK FORCE RECOMMENDATIONS

COMPOSITION OF TRIBUNALS

1. The Task Force recommends that Convocation undertake an examination of the different models for the composition of the Law Society tribunals, as described in Part II of this report.

COMMENCEMENT OF PROCEEDINGS

2. The Task Force recommends that,

   a. the Tribunals Office should issue all originating processes and assign file numbers;

   b. Rule 4 should be amended to clarify and enhance the role of the Tribunals Office. The role of the Tribunals Office in administratively managing proceedings from beginning to end, should be made clear in Rule 4;

   c. in particular, it should be made clear that the Tribunals Office opens and maintains the file of the proceedings and performs an administrative case management role until the final decision is released.

PRE-HEARING CASE MANAGEMENT

3. The Task Force recommends that,

   a. the *Rules of Practice and Procedure* clarify that there are two tribunals: the Hearing Panel and the Appeal Panel;

   b. there continue to be the Hearings Management function (HM) and the Appeals Management function (AM), both renamed to remove the word "Tribunal" from the title;

   c. it be stated in the *Rules of Practice and Procedure* that there is no appeal from a decision of the HM; and

   d. it be stated in the *Rules of Practice and Procedure* that the AM's order is final, except where it finally disposes of the matter, in which case there is an appeal to the Appeal Panel. The Appeal Panel's decision is final.

SCHEDULING AND ADJOURNMENTS

4. The Task Force recommends that,

   a. Rules 9 and 15 of the *Rules of Practice and Procedure* be amended to provide that as a general rule the Tribunals Office will schedule hearings and appeals;

   b. only where there is disagreement that cannot be resolved should scheduling be referred to the HM or AM (or in some instances a Hearing Panel seized with the matter). The HM and AM will retain a case management role that would be articulated in the *Rules of Practice and Procedure.* An appearance before the HM or AM would be done on request, as necessary;

   c. to the extent that the HM and AM make scheduling determinations these should be endorsed on the record and subsequent Hearing Panels and Appeal Panels shall be made aware of and consider such decisions before they entertain any further requests;

   d. guidelines for the scheduling of hearings and appeals and considering adjournment requests along the lines set out in paragraph 86-89 should be developed for the use of staff, HM, AM and Hearing and Appeal Panels;

   e. as a general rule, adjournment requests should be brought no later than 10 days before a scheduled date.

PRE-HEARING CONFERENCES

5. The Task Force recommends that,

   a. the *Rules of Practice and Procedure* be amended to reflect the importance of holding pre-hearing conferences as early as possible in the proceeding;

   b. where appropriate, parties should be made aware of the availability of pre-hearing conferences and encouraged to participate in such a conference;

   c. the processes set out in paragraph 95 should be included in the pre-hearing provisions of the *Rules*;

   d. a pre-hearing conference should be mandatory where the hearing of a matter is expected to take longer than two days. It should be held prior to the hearing date, as early in the process as reasonable;

   e. for matters that do not fall within (d), the *Rules of Practice and Procedure* should provide that a pre-hearing conference may be ordered in the discretion of the HM or the Hearing or Appeal Panel or at the request of the parties;

   f. the Law Society should be required to file materials for use on the pre-hearing conference one week before the conference. The member should not be required to file material; and

g. any agreements reached on the pre-hearing conference should be endorsed on the record and available to subsequent adjudicators.

SUMMONSES

6. The Task Force therefore recommends that,

a. the issuing of summonses should fall within the responsibility of the Tribunals Office, not the Director of Professional Regulation;

b. the Tribunals Office may issue summonses upon request;

c. where the Tribunals Office refuses to issue a summons a party may, on motion, request that the Hearing Panel or Appeal Panel issue the summons.

ELECTRONIC HEARINGS

7. The Task Force recommends that the Rules be amended to eliminate, where appropriate, the requirement that a motion to seek an order for an electronic hearing must be argued in person and instead permitting submissions to be made in writing.

CONSOLIDATION

8. The Task Force recommends that,

a. the Rules be amended to allow for a motion to consolidate multiple proceedings against a single member even in the absence of consent;

b. such motion should be brought as early in the proceeding as possible and not, except in exceptional circumstances, on the date set for hearing; and

c. there may be cost consequences for unreasonable delay caused by the timing of the motion.

IN CAMERA MATTERS AND NON-PUBLICATION ORDERS

9. The Task Force recommends that,

a. the *Rules of Practice and Procedure* no longer refer to in camera orders. Instead they should speak of orders that a hearing, or part thereof, be conducted “in the absence of the public”. This is in contrast to orders that affect publication.

b. conduct matters should continue to be held in public;

c. this principle should be derogated from only in exceptional circumstances that should be enumerated in the *Rules of Practice and Procedure*. In assessing whether any portion of a hearing or any aspect of the evidence should be received in the absence of the public, panels must pay particular attention to the importance of an open and transparent process.

d. the current exceptions set out in Rule 3.01(b) of the *Rules of Practice and Procedure* should be reviewed to ensure that they are not overly broad.

e. panels must be educated on the limited circumstances under which a conduct hearing may be held in the absence of the public;

f. requests for a hearing to be held *in the absence of the public* should only be made by way of a formal motion, in public, subject to an order by the Hearing Panel that the motion or any part of it be held in the absence of the public. The Hearing Panel should deliver reasons for its decision on the specific motion, in writing;

g. counsel for the Law Society should ensure that upon any motion that a proceeding be heard in the absence of the public or that a non-publication order be made, the Hearing Panel is informed of the relevant provisions of the Rules;

h. if a Panel believes that exceptional circumstances have been demonstrated, its order should cover only so much of the hearing as is necessary to address those exceptional circumstances;

i. panels should also be entitled to order that while the hearing will be in public, distribution or publication of information is prohibited. Written reasons must be given, explaining the basis for the decision;

j. a Hearing Panel may make an order that a hearing or some aspect of it is to be held in the absence of the public and it may make a non-publication order respecting some or all of the evidence, but it may never order that its order not be public; and

k. wherever possible, reasons should be public information, so that a body of jurisprudence develops and is available to all.

ORDERS AND REASONS FOR DECISION

10. The Task Force recommends that,

a. written reasons should be required in all cases. Oral reasons should no longer be given;

b. there should be a benchmark for the delivery of written reasons, specified as number of days following the end of hearing (e.g. 60 days). Panelists should be advised of this fact before they schedule themselves for hearings so that in considering their availability they include the time line for delivery of reasons. Panel members would determine which member will write the decision;

c. where is it urgent for the Hearing Panel to make a decision immediately (e.g. disbarment or suspension), it may do so at the conclusion of the hearing, but without giving any oral reasons. The appeal period will run from the announcement of the disposition of the case (e.g. if the Panel announces the disposition of disbarment on January 1 and releases its reasons for decision on February 1, the appeal period would run from January 1);

d. adjudicators should be provided with suggested subject areas to be covered in their decisions, but not be required to follow mandatory templates; and

e. the *Rules of Practice and Procedure* should be reviewed to ensure that the terms "decision", "order" and "reasons" are clearly explained and in keeping with the language of the Act (section 49.32).

APPEALS

11. The Task Force recommends that,

a. the time for filing an appeal should be 30 days from the date of the announcement of the disposition of the case;

b. the time for filing a cross-appeal should be expressed in the *Rules of Practice and Procedure* as a specified number of days following service of the Notice of Appeal;

c. the member and the Law Society should be served at the same time and in the same manner;

d. the Tribunals Office should have the authority to deal with appeal time limits as follows:

i. Extend any time limits on consent.

ii. Administer the process where a party seeks leave to extend time limits where there is no consent.

iii. Upon receipt of a Notice of Appeal or Cross-Appeal, send the appellant the relevant *Rule in the Rules of Practice and Procedure* on the required time limits for filing materials on appeals. In this way appellants would be advised that failure to file any material within the required time limits would result in the appeal being deemed abandoned.

iv. Send out confirmation that the appeal is deemed abandoned once the time has passed with no consent or order for an extension.

ESTABLISHING TIMELINE BENCHMARKS

12. The Task Force recommends that,

a. the Law Society develop time line benchmarks to guide the case management process;

b. the first benchmarks to be developed should be,

i. the time from service of Notice of Application to the first hearing date (e.g. within 6 months);

ii. the time from completion of a hearing to issuance of written order and reasons (e.g. within 60 days).

ONGOING TRIBUNALS-RELATED POLICY DEVELOPMENT

13. The Task Force recommends that Convocation establish a standing committee to be known as the Tribunals Committee, whose membership should include the Chairs of the Hearing and Appeal Panels.

ADJUDICATOR CODE OF CONDUCT

14. The Task Force recommends that the Law Society develop an Adjudicator Code of Conduct to guide panels in their responsibilities as adjudicators. If Convocation accepts the Task Force's recommendation for the establishment of a Tribunals Standing Committee, the Task Force recommends that that Committee develop the proposed code for Convocation's consideration and approval.

ADJUDICATOR EDUCATION/QUALITY ASSURANCE

15. The Task Force recommends that all benchers undergo mandatory and ongoing adjudicator education, such education to include but not be limited to,

a. conducting hearings and pre-hearing conferences;

b. evidence;

c. decision writing; and

d. jurisprudential updates.

PUBLICATION OF UPCOMING HEARINGS SCHEDULE AND LAW SOCIETY DECISIONS

16. The Task Force recommends that the Law Society publish its upcoming hearings schedule on its web site in accordance with the proposal set out in paragraph 177.

17. The Task Force recommends that,

a. panels should, in each hearing, consider whether it is appropriate to anonymize the names of some of the witnesses;

b. guidelines should be developed to assist Panels in making such decisions;

c. in considering when it is appropriate to anonymize witness names there should be presumptions against anonymization in the following instances:

i. The name of the member who is the subject of the proceeding will not be anonymized unless exceptional circumstances warrant this. Guidelines should identify the nature of those exceptional circumstances.

ii. The name of certain categories of witnesses will not be anonymized, namely Law Society staff; expert witnesses; institutional witnesses; and lawyer witnesses.

d. where it is concluded that there should be anonymization, the identity of persons whose identification might reasonably reveal the identity of another person whose identity is protected shall also be protected – for example, parents, guardians, siblings, spouses, and other relatives or friends;

e. in deciding whether exceptional circumstances exist to protect a member's identity, the Hearing or Appeal Panel shall consider the public interest and any potential harm to the member, the complainant, a witness or any other party to the proceeding;

f. facts that tend to identify a person whose name is to be anonymized, shall not be included in the decision. For example, references to the person's occupation, particular dates, particular locations or other particular circumstances of the case that would reasonably lead to the identification of a victim, complainant, witness or other protected person;

g. persons whose identity is to be anonymized shall not be identified by the initials of their names. This might tend to identify them to some persons. Rather, guidelines will set out the various ways in which they may be identified such as " the victim"; "the complainant"; "the witness"; "the member". If there is more than one person in any category numbers may be added, such as "victim 1," "victim 2," "witness 1," "witness 2" etc;

h. reasons may be edited to correct typographical, spelling and grammatical errors, and to achieve consistency of formatting.

18. The Task Force recommends that,

a. the Law Society post tribunal decisions on its web site for a period of three years; and

b. after three years the finding and penalty against the member remain on the website, with a link to the CANLII or QuickLaw sites where the decision may be found. The decision itself would no longer be available on the Law Society web site.

IN CAMERA NATURE OF COMPETENCE AND CAPACITY HEARINGS

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

APPENDIX 2

TERMS OF REFERENCE
(approved November 2004)

The Law Society strives to fulfil its mandate in the most fair, efficient and transparent manner possible.

In September 2004, Convocation established the Tribunals Task Force to examine the Law Society's tribunals process and procedures, from Proceedings Authorization Committee authorization to the release of orders and decisions, including an examination of the hearings, appeals, decision-making and the decision release process.

Where appropriate, the Task Force will develop recommendations to ensure that the process and decisions are timely, fair, transparent, consistent and accessible. The Task Force may also identify other areas of the regulatory process that would benefit from further work.

In undertaking this examination the Task Force will consider, among other issues,

- The current tribunals process and procedures, including
  - The composition of tribunals;
  - The decision-making and decision release process;
  - The timeliness, effectiveness and transparency of the process;
  - The *Rules of Practice and Procedure;*
- Any gaps and issues these reveal;
- Best practices in place in other regulatory bodies.

The Task Force anticipates reporting to Convocation in March 2005.

APPENDIX 3

RULES OF PRACTICE AND PROCEDURE

MADE UNDER SECTION 61.2 OF THE *LAW SOCIETY ACT*

As amended, April 25, 2003

THE LAW SOCIETY OF UPPER CANADA

RULES OF PRACTICE AND PROCEDURE

(MADE UNDER SECTION 61.2 OF THE *LAW SOCIETY ACT*)

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THE LAW SOCIETY OF UPPER CANADA

RULES OF PRACTICE AND PROCEDURE

(MADE UNDER SECTION 61.2 OF THE *LAW SOCIETY ACT*)

RULE 1 GENERAL RULES

1.01 Application

Rules 1 through 15 apply to hearings before tribunals under sections 27, 28.1, 30, 31, 32, 34, 38, 43, 45, 49.1, 49.32(1), 49.32(2), 49.42, and 49.43 of the *Law Society Act* (hereinafter "the Act").

Definitions

1.02 (1) In these Rules, unless the context requires otherwise, words that are not defined in subrule (2) have the meanings defined in the Act or the *Statutory Powers Procedure Act*.

(2) In these Rules,

"appeal" means an appeal under subsections 49.32(1) and (2) of the Act;

"Appeals Management Tribunal" or "AMT" means the bencher to whom jurisdiction is assigned in procedural matters;

"complainant" means a person who has made a complaint to the Society regarding a member or student member which is relevant to the application;

"Hearings Management Tribunal" or "HMT" means the bencher to whom jurisdiction is assigned in procedural matters;

"holiday" means a holiday as defined in the *Rules of Civil Procedure;*

"interim order" means an interlocutory order suspending the rights and privileges of a member or student member or restricting the manner in which a member may practice law;

"motion" means a request for a ruling or decision by a tribunal on a particular issue at any stage in the proceeding which is subject to these Rules, other than a request for an adjournment;

"originating process" means a notice of application, a notice of hearing, or a notice of motion for an interim order where a notice of application has not yet been served;

"party" means the Society, the person who is subject to the proceeding, and any other person added as a party by the tribunal in accordance with the Act;

"person subject to a proceeding" means a member, student member, former member or non-Ontario lawyer as the context may require;

"proceeding" means a proceeding under the Act that commences with the service of an originating process;

"tribunal" means whichever of the HMT, Hearing Panel, AMT, or Appeal Panel that is or will be hearing the applicable part of a proceeding;

Interpretation of Rules

1.03 (1) These Rules shall be liberally construed to secure the just and expeditious determination of proceedings.

(2) Where matters are not provided for in these Rules, the practice shall be determined by analogy to them.

Substantial Compliance

1.04 (1) Substantial compliance with a form or notice required by or under these Rules is sufficient.

(2) No proceeding is invalid by reason only of a defect or other irregularity in form.

Compliance with a Rule

1.05 (1) Any provision of these Rules may be waived with the consent of the parties and leave of the tribunal.

(2) The tribunal may, where it is in the interests of justice, dispense with compliance with any Rule at any time and upon such terms as are just.

Computing Time

1.06 Subject to Rule 1.07, in computing time periods specified in these Rules or in an order of a tribunal,

(a) where there is a reference to a number of days between two events, they shall be counted by excluding the day on which the first event happens and including the day on which the second event happens;

(b) where a period of less than seven days is prescribed, holidays shall not be counted;

(c) where the time for doing an act under these Rules expires on a holiday, the act may be done on the next day that is not a holiday; and

(d) where, under these Rules, a document would be deemed to be received or service would be deemed to be effective on a day that is a holiday, it shall be deemed to be received or effective on the next day that is not a holiday.

Extension or Abridgment of Time Periods

1.07 (1) A tribunal by order may extend or abridge any time prescribed by these Rules on such terms as are just.

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

Withdrawal of Counsel

1.08 Where counsel for a party seeks to be removed from the record of a proceeding, counsel shall bring a motion for leave to withdraw before the tribunal.

Removal of Counsel

1.09 Where a party seeks to remove a counsel from the record of a proceeding, the party shall bring a motion before the tribunal.

Communication with a Tribunal

1.10 Communication with a tribunal outside of the hearing shall be in the presence of all parties or their counsel, or in writing through the Clerk of the tribunal with a copy served on all parties.

Summons

1.11 (1) A summons to witness may be signed by the Secretary.

(2) On the request of a party, the Secretary shall provide a summons to a witness in blank form and the party may complete the summons and insert the name of the witness.

(3) Service of a summons on a witness is the responsibility of the party who obtained the summons.

(4) The party who obtained the summons shall pay attendance money to a witness in accordance with Tariff A under the *Rules of Civil Procedure.*

(5) Notwithstanding subrule (4), if a person is in attendance at the hearing, it is unnecessary to serve the person with a summons or to pay attendance money to call the person as a witness.

Form of Proceeding

1.12 (1) Subject to subrule (2), hearings shall be held orally with the parties, and their counsel if applicable, appearing in person.

(2) The tribunal on motion by any party may order that some or all of a hearing be held as an electronic hearing.

(3) On a motion under subrule (2), the tribunal may consider, on balance,

(a) the suitability of the subject matter;
(b) the nature of the evidence and whether credibility is in issue;
(c) whether the matters in dispute are questions of law;
(d) the convenience of the parties;
(e) the cost, efficiency and timeliness of the proceeding;
(f) the avoidance of delay or unnecessary length;
(g) the fairness of the process;
(h) public accessibility to the hearing;
(i) the fulfilment of the Society's statutory mandate; and
(j) any other matter which the tribunal considers relevant in order to secure the just and expeditious determination of the proceeding.

(4) On consent, a party may move for an order that some or all of a hearing be held as a written hearing.

Location of Hearings

1.13 (1) Subject to this rule, all hearings shall be held at the offices of the Society in Toronto.

(2) The tribunal, on motion by any party, may order that a hearing be held at a place other than the offices of the Society in Toronto.

(3) On a motion under subrule (2), the tribunal may consider, on balance,

(a) the convenience of the parties;
(b) the cost, efficiency and timeliness of the proceeding;
(c) the avoidance of delay or unnecessary length;
(d) the fairness of the process;
(e) public accessibility to the hearing;
(f) the fulfilment of the Society's statutory mandate; and
(g) any other matter which the tribunal considers relevant in order to secure the just and expeditious determination of the proceeding.

(4) The tribunal may set the location of a hearing in a place other than the offices of the Society in Toronto only after consultation with the Hearings Coordinator and the Secretary.

(5) The Hearings Coordinator shall be informed forthwith where there is a request for an adjournment of a hearing scheduled to be held in a location other than the offices of the Society in Toronto.

Adjournments

1.14 (1) Where the grounds for a request for an adjournment are known in advance of the date scheduled for the hearing, the adjournment request shall be made,

(a) to the HMT, where a hearing before a Hearing Panel is pending and a Hearing Panel is not seized of the proceeding; or

(b) to the AMT, where an appeal to the Appeal Panel is pending and an Appeal Panel is not seized of the proceeding,

where a sitting of the HMT or AMT is scheduled, or can be scheduled, before the date scheduled for the hearing.

(2) In circumstances to which subrule (1) does not apply, a request for adjournment shall be made to the tribunal on the date scheduled for the hearing.

RULE 2 JOINDER AND NON-PARTY PARTICIPATION

Joinder of Parties

2.01 Where permitted under the Act, the Hearing Panel may add any person as a party to a proceeding.

Non-Party Participation

2.02 (1) A tribunal may allow a person who is not a party to participate in a proceeding if the participation of the person would, in the opinion of the tribunal, be of assistance to the tribunal, or is required in the interests of justice.

(2) The tribunal shall determine the extent of such participation, when granted, and without limiting the generality of this, the tribunal may allow the person to make oral or written submissions, to lead evidence, and to cross-examine witnesses.

RULE 3 ACCESS TO HEARINGS AND NON-PUBLICATION ORDERS

Proceedings other than Capacity and Professional Competence Proceedings

3.01 Subject to rules 3.04 and 3.04.1, hearings shall be open to the public except where the tribunal is of the opinion that,

(a) matters involving public security may be disclosed;

(b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public; or

(c) it is necessary to maintain the confidentiality of a privileged document or communication.

Reasons and Order of the Tribunal

3.02 (1) Subject to subrule (2), the order and reasons of a tribunal, including any written disposition, are a matter of public record.

(2) Where a proceeding, or part of a proceeding, before a tribunal has been held in the absence of the public, the tribunal may order that all or part of its reasons, except for those referred to in subrule (3), are not to be made public.

(3) Where a proceeding, or part of a proceeding, before a tribunal has been held in the absence of the public, the tribunal shall issue with its decision a written statement of the reasons for holding the proceeding, or applicable part of the proceeding, in the absence of the public but shall do so without disclosing any matters which, in the opinion of the tribunal, ought not to be disclosed.

Procedure Where Party Seeks *In Camera* Order

3.03 (1) A party seeking an order that any part of a proceeding be held in the absence of the public shall bring a motion in public before the tribunal in accordance with rule 7 with necessary modifications.

(2) Where a party is of the view that it will not be possible to argue the motion without disclosing specific matters which are the subject of the motion, that party may seek an order that the motion be heard in the absence of the public.

(3) Where a party requests that the motion be held in the absence of the public, the party shall state in public the general grounds upon which the motion is brought without disclosing the specific matters which the party wishes to be received in the absence of the public.

(4) Where a party requests that the motion be heard in the absence of the public, the tribunal may grant leave to a non-party to participate in the motion.

(5) In considering whether to permit a non-party to participate in the motion, the tribunal shall consider the nature of the non-party's interest, whether there is any reason for concern that the non-party may fail to maintain the confidentiality of matters which are disclosed in the absence of the public, and whether the interests of the public will otherwise be adequately represented.

(6) The tribunal shall advise a non-party who is permitted to participate in the absence of the public that, unless otherwise ordered, the non-party may not publish or otherwise communicate or disclose to anyone outside the hearing room anything that has been disclosed in the absence of the public.

(7) The tribunal shall advise the non-party that if the confidentiality of the proceeding is breached, in appropriate cases, the tribunal or any party to the proceeding may state a case to the Divisional Court for an order punishing that person for contempt.

(8) In circumstances where the motion is held in the absence of the public and is dismissed, the tribunal may, in public, following the motion, order that the motion be treated as if the motion had been held in public.

Varying, Setting Aside or Suspending an *In Camera* Order

3.03.1 (1) Following the completion of a conduct or discipline hearing, a motion may be made to a Hearing Panel at any time to vary, set aside or suspend the operation of an order made in that conduct or discipline hearing pursuant to rule 3.01 or section 9 of the *Statutory Powers Procedure Act* that all or part of a conduct or discipline hearing be held *in camera*, but where the order is made by the Appeal Panel, the motion shall be made to the Appeal Panel.

(2) A motion under sub-rule (1) shall be made in accordance with rule 7 except that the notice of motion shall be served on all parties and any person who will be affected by the order sought, at least ten days before the motion is to be heard and shall be filed with proof of service at least seven days before the hearing date with the Clerk of the tribunal.

Capacity Proceedings

3.04 (1) A proceeding shall, subject to subrules (2), (5) and (6) be held in the absence of the public if it is a proceeding in respect of a determination of incapacity.

(2) At the request of the person subject to the proceeding, the tribunal may order that the proceeding be open to the public.

(3) Unless the proceeding before the tribunal is open to the public as provided by subrule (2), an application for a determination of incapacity shall not be made public by the Society except as required in connection with a proceeding, except as provided for in the Act and except as provided for in subrule (3.1).

(3.1) After the member or student member is served with the application, the Society shall, where practicable, inform a complainant of the fact of the application.

(4) Where the hearing of an application for a determination of incapacity has been open to the public in accordance with subrule (2), the decision, order and reasons of the tribunal are a matter of public record.

(5) Subject to subrule (6), where the hearing of an application for a determination of incapacity has been closed to the public, and where the tribunal has made an order suspending or limiting the member or student member's rights and privileges, the order is a matter of public record but the tribunal's reasons shall not be made public.

(6) Where the hearing of an application for a determination of incapacity has been closed to the public, the Society shall, where practicable, inform a complainant of the tribunal's decision as to whether the application was established and the tribunal shall determine which aspects of the order shall be made available to a complainant.

Professional Competence Proceedings

3.04.1 (1) A proceeding shall, subject to subrules (2), (5) and (6) be held in the absence of the public if it is a proceeding in respect of a determination of whether a member is failing or has failed to meet standards of professional competence.

(2) At the request of the person subject to the proceeding, the tribunal may order that the proceeding be open to the public.

(3) Unless the proceeding before the tribunal is open to the public as provided by subrule (2), an application for a determination of professional competence shall not be made public by the Society except as required in connection with a proceeding except as provided for in the Act, and except as provided for in subrule (3.1).

(3.1) After the member is served with the application, the Society shall, where practicable, inform a complainant of the fact of the application.

(4) Where the hearing of an application for a determination of professional competence has been open to the public in accordance with subrule (2), the decision, order and reasons of the tribunal are a matter of public record.

(5) Where the hearing of an application for a determination of professional competence has been closed to the public and where the tribunal has made an order suspending or limiting the member's rights and privileges, the decision and the order are a matter of public record.

(6) Where the hearing of an application for a determination of professional competence has been closed to the public and where the decision and order of the tribunal are not otherwise a matter of public record, the Society shall, where practicable, disclose to a complainant the decision of the tribunal and the parts of the order permitted to be disclosed by the tribunal.

Application to Appeals

3.05 (1) Where an appeal arises from a decision or order of a tribunal in respect of a conduct, admission, or readmission proceeding, the provisions of rules 3.01, 3.02 and 3.03 apply, with necessary modifications.

(2) Where an appeal arises from a decision or order of a tribunal in respect of a capacity proceeding or a professional competence proceeding the provisions of rules 3.04 and 3.04.1 apply, with necessary modifications.

Non-publication Orders

3.06 (1) A tribunal may order that information disclosed in the course of a proceeding open to the public is not to be published or otherwise made public by any person, provided that the tribunal is satisfied that the information discloses,

(a) matters involving public security;

(b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public; or

(c) matters for which it is necessary to maintain the confidentiality of a privileged document or communication.

(2) A motion for a non-publication order shall be made in accordance with rule 3.03 with necessary modifications.

Varying, Setting Aside or Suspending a Non-publication Order

3.07 (1) A motion may be made to a Hearing Panel at any time to vary, set aside or suspend the operation of an order made pursuant to rule 3.06, but where the order is made by the Appeal Panel, the motion shall be made to the Appeal Panel.

(2) A motion under sub-rule (1) shall be made in accordance with rule 3.03.1(2).

RULE 4 COMMENCEMENT OF PROCEEDINGS

Conduct, Capacity, Professional Competence and Non-Compliance Proceedings

4.01 (1) A notice of application shall be issued by the Society in Form 4A in respect of conduct, capacity, professional competence and non-compliance proceedings.

(2) A copy of the notice of application shall be filed with the Clerk of the Hearing Panel and served on the person subject to the proceeding.

Admission, Restoration, Requalification, Reinstatement, and Readmission Proceedings

4.02 (1) A notice of hearing shall be issued by the Society in Form 4B,

(a) in respect of admission and restoration applications where a hearing is required by the Society;

(b) in respect of readmission applications, in every case;

(c) in respect of requalification and reinstatement applications where the person the subject of the proceeding requests, in writing, a hearing.

(2) A copy of the notice of hearing shall be filed with the Clerk of the Hearing Panel and served on the person subject to the proceeding.

Abandonment of a Proceeding

4.03 (1) Prior to the hearing of a conduct, capacity, professional competence or non-compliance proceeding on its merits, the Society may abandon a notice of application by delivering a notice of abandonment in Form 4C.

(2) Prior to the hearing of an admission or restoration proceeding on its merits, the Society may abandon the requirement of a hearing by delivering a notice of abandonment in Form 4C.

(3) Prior to the hearing of an admission, restoration, requalification, reinstatement or readmission proceeding on its merits, the person subject to the proceeding may abandon his or her application by delivering a notice of abandonment in Form 4C.

RULE 5 SERVICE OF DOCUMENTS

Service of Documents on Parties

5.01 (1) An originating process shall be served on the person subject to the proceeding,

(a) personally;

(b) by mailing a copy thereof in a registered letter addressed to the person's last known residence or office address as shown by the records of the Society; or

(c) where a person subject to a proceeding is represented by counsel prior to issuance of an originating process, on counsel where counsel endorses on the originating process or a copy of it an acceptance of service and the date of the acceptance.

(2) An originating process shall be served at least ten days before it is first returnable before a tribunal.

(3) Service of any document other than an originating process may be effected,

(a) by personal delivery to the party or the party's counsel;

(b) by regular or registered mail to the last known address of the party or the party's counsel;

(c) by facsimile transmission to the last known facsimile transmission number of the party or the party's counsel but, where the recipient is the person subject to the proceeding or his or her counsel, the consent of the recipient is required;

(d) by courier, including Priority Post, to the last known address of the party or the party' counsel; or

(e) by any other means authorized or permitted by the tribunal.

(4) Service is deemed to be effective when delivered,

(a) by personal delivery or facsimile transmission before 4 p.m., on the day of delivery or facsimile transmission, and after that time, on the next day;
(b) by regular or registered mail, on the fifth day after mailing;

(c) by courier, on the second day after the document was provided to the courier; or

(d) by any means authorized or permitted by the tribunal, on the date ordered by the tribunal.

RULE 6 DISCLOSURE

Obligations of the Society

6.01 (1) The Society shall make such disclosure as is required by law and without limiting the generality of this requirement, the Society shall provide a person subject to a proceeding with, at least ten days before the hearing,

(a) a copy of any document upon which it intends to rely and the opportunity to examine any other document;

(b) a summary of the oral evidence of all witnesses; and

(c) the list of witnesses which the Society intends to call.

(2) Subject to rule 6.05, evidence against a person subject to a proceeding is not admissible unless disclosure of that evidence has been made at least ten days before the hearing.

Obligations of the Person Subject to a Proceeding

6.02 (1) In admission, requalification, restoration, and reinstatement proceedings, evidence upon which the person subject to the proceeding intends to rely is not admissible unless the person has provided to the Society, within 60 days of receipt of the notice of hearing,

(a) a copy of any documents upon which the person intends to rely;

(b) a summary of the oral evidence of all witnesses upon which the person intends to rely; and

(c) the list of witnesses which he or she intends to call.

(2) In readmission proceedings, evidence upon which a person subject to the proceeding intends to rely is not admissible in that proceeding unless he or she has provided to the Society, with the prescribed application form, the material listed in subrule (1)(a) through (c) within 60 days of receipt of the notice of hearing.

Summaries of Evidence

6.03 Where parties are required to disclose a summary of the oral evidence of a witness, the summary shall be in writing and contain,

(a) the substance of the evidence of the witness;

(b) a list of documents or things, if any, to which the witness will refer; and

(c) the witness' name and address or, if the witness' address is not provided, the name of a person through whom the witness can be contacted.

Expert Reports

6.04 Evidence of an expert led by any party or non-party participant is not admissible unless the party or non-party participant gives all parties in the proceeding, at least ten days before the hearing, the expert’s curriculum vitae, and a copy of the expert's written report or, if there is no written report, a summary of the evidence.

Discretion of Tribunal

6.05 A tribunal may, in its discretion, allow the introduction of evidence that is not admissible under rules 6.01, 6.02 and 6.04 and may make such directions as it considers necessary to ensure that no party is prejudiced.

RULE 7 MOTIONS

Scheduling the Motion

7.01 (1) The party bringing a motion to be heard on a date, other than the date scheduled for the hearing of the proceeding on its merits, shall obtain available dates and times for the hearing of the motion from the Hearings Coordinator.

(2) The party bringing a motion, on a date other than the date scheduled for the hearing of the proceeding on its merits, shall inform the Hearings Coordinator of the estimated length of time it will take to argue the motion when obtaining the available dates and times.

Making a Motion

7.02 (1) A motion shall be made by a notice of motion in accordance with Form 7A unless the nature of the motion or the circumstances make a notice of motion unnecessary.

(2) The notice of motion shall be served on all parties and, in the case of motions for disclosure, any person who will be affected by the order sought, at least ten days before the motion is to be heard and shall be filed with proof of service at least seven days before the hearing date with the Clerk of the tribunal.

(3) The moving party shall serve on any person or party served with the notice of motion and file with the Clerk of the tribunal, at least seven days before the hearing date,

(a) a motion record containing the notice of motion and all affidavits and other material to be relied upon; and

(b) a factum, if desired by the moving party, and a book of those authorities referred to in the factum.

Responding to a Motion

7.03 The responding party may serve on the moving party and any person or party served with the notice of motion and file with the Clerk to the tribunal, at least three days before the hearing date,

(a) a responding record containing any materials not contained in the motion record to be relied upon; and

(b) a factum, if desired by the responding party, and a book of those authorities referred to in the factum.

Materials on the motion

7.04 (1) A motion record and responding motion record shall have consecutively numbered pages and a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter.

(2) Where this rule requires materials to be filed with the Clerk to the tribunal, a party shall file with the Clerk,

(a) four copies of the materials where the motion is before a three member Hearing Panel;

(b) two copies of the materials where the motion is before a one member Hearing Panel, the HMT, or the AMT; or

(c) six copies of the materials where the motion is before the Appeal Panel.

Evidence on the Motion

7.05 Subject to rules 11.01 (3) and 11.02, evidence on a motion shall be given by affidavit unless the tribunal orders otherwise.

Abandoning a Motion

7.06 (1) A party who makes a motion may abandon it by delivering a notice in Form 4C to that effect to any person or party served with the notice of motion and the Clerk of the tribunal.

(2) A party who serves a notice of motion and does not file it or appear at the hearing of the motion shall be deemed to have abandoned the motion unless the tribunal orders otherwise.

(3) Where a motion is abandoned or is deemed to have been abandoned, a responding party on whom the notice of motion was served is entitled to the costs of the motion forthwith, unless the tribunal orders otherwise.

Motions on Consent

7.07 Where a motion is on consent, the motion may be heard in writing without the attendance of the parties or persons affected, unless the tribunal orders otherwise, and the written consent of the motion participants and a draft order shall be filed with the notice of motion.

Disposition of Motions

7.08 When a motion is heard by a tribunal prior to the hearing of the proceeding on its merits, the tribunal may grant the relief sought, dismiss or

adjourn the motion, in whole or in part and with or without terms, or may adjourn the motion to be disposed of by the tribunal hearing the proceeding on its merits.

Written Order

7.09 (1) Immediately after a motion has been determined, the successful party shall and any other party or person served with the notice of motion may, deliver a draft of the formal order.

(2) An order shall be in accordance with Form 7B.

(3) An order delivered in accordance with subrule (1), or rule 7.07, shall be reviewed, amended if necessary and signed by the chair of the tribunal which heard the motion.

(4) This subrule does not apply to orders made on the record during the hearing of a proceeding on its merits or to motions in writing in accordance with rule 7.07.

Costs and Adjournments

7.10 All motions shall be brought in a timely fashion having regard to all of the circumstances, and the moving party's failure to do so, may be taken into account in awarding costs on the motion and any related adjournment which may be necessary.

RULE 8 INTERIM ORDERS

General

8.01 Rule 7 applies with necessary modifications to this rule.

Making the Motion

8.02 (1) Subject to subrule (2), the Society may bring a motion before the Hearing Panel for an interim order.

(2) Where a motion for an interim order is brought prior to the authorization of a notice of application or the Hearing Panel has not commenced a hearing to determine the merits of a proceeding, the Society shall bring the motion with the authorization of the Proceedings Authorization Committee.

Materials to be Served

8.03 (1) The Society shall serve on the member or student member, at least three days before the date on which the motion is to be heard,

(a) a motion record which shall contain the notice prescribed in rule 7, all affidavits and any other material to be relied upon; and

(b) a factum, if desired by the Society, and a book containing any authorities referred to in the factum.

(2) Four copies of the materials referred to in subrule (1) shall be filed with the Clerk of the Hearing Panel with proof of service the day before the hearing of the motion.

Responding to the Motion

8.04 (1) The member or student member may serve on the Society, no later than 2:00 p.m. the day before the hearing of the motion,

(a) a responding motion record containing any materials not contained in the Society's motion record; and

(b) a factum, if desired by the member or student member, and a book of those authorities referred to in the factum.

(2) Four copies of the materials referred to in subrule (1) shall be filed with the Clerk of the Hearing Panel with proof of service by 4:00 p.m. the day before the hearing of the motion.

Order to Specify Duration

8.05 An interim order continues in force until a further order of a tribunal sets aside or varies the interim order, or the final order on the merits of the proceeding.

RULE 9 PRE-HEARING PROCEDURES

Tribunal to which proceedings are first returnable

9.01 (1) Subject to subrules (3) and (4), a proceeding shall be first returnable before the HMT to set a date for a hearing on its merits.

(2) When the originating process is served, notice shall be given of the time and place at which the proceeding shall be returnable before the HMT.

(3) A proceeding which originates by notice of application shall be first returnable before a Hearing Panel for the purpose of proceeding with a hearing on its merits where the hearing of another proceeding has already been scheduled or the nature of the allegations in the notice of application requires that the hearing be expedited.

(4) A proceeding which originates by notice of motion for an interim order where a notice of application has not yet been served shall be first returnable before the Hearing Panel for the hearing the motion on its merits.

Setting Hearing Dates

9.02 (1) Subject to subrule (2), a hearing into a proceeding shall be set only on regularly scheduled hearing dates obtained from the Hearings Coordinator.

(2) Where the parties estimate that the hearing will require more than one day,

(a) the parties shall request special dates for the hearing at the HMT; and

(b) the HMT, at its discretion, may direct that the parties to attend a pre-hearing conference as prescribed by Rule 10.

(3) Prior to requesting the HMT to set special dates for the hearing, the parties shall first obtain available dates from the Hearings Coordinator.

RULE 10 PRE-HEARING CONFERENCES

Party to Request

10.01 (1) Prior to the hearing of a proceeding on its merits, commenced by either a notice of application or a notice of hearing, any party may request that a pre-hearing conference take place before a bencher.

(2) There shall not be more than one pre-hearing conference in a proceeding except by order of the pre-hearing conference bencher or the HMT or on the consent of the parties.

(3) The pre-hearing conference bencher shall not sit on the tribunal at the hearing of a proceeding on its merits unless the parties consent in accordance with rule 12.01.

Attendance at Pre-Hearing

10.02 (1) Where a party refuses to attend a pre-hearing conference, an order that a pre-hearing conference be held may be obtained on motion to the HMT.

(2) Unless otherwise ordered, written notice of the time and place of a pre-hearing conference shall be given by the Hearings Coordinator to the parties and the pre-hearing conference bencher.

(3) Unless otherwise ordered or the parties consent, the parties and their counsel are required to attend in person.

Preparation for Pre-hearing Conference

10.03 Unless otherwise ordered, the parties shall exchange pre-hearing conference memoranda and any related documents and provide copies to the pre-hearing conference bencher, at least two days prior to the pre-hearing conference.

Electronic Pre-hearing Conference

10.04 A pre-hearing conference may be held by conference telephone with the consent of the parties and leave of the pre-hearing conference bencher or the HMT.

Procedure at Pre-hearing Conference

10.05 At the pre-hearing conference, the presiding bencher shall discuss with the parties, among other things,

(a) whether any of the issues can be settled;
(b) whether the issues can be simplified;
(c) whether the parties are able to enter into an agreed statement of facts concerning all or part of the subject matter of the proceeding; and
(d) the advisability, in appropriate cases, of attempting other forms of resolution.

Closed and Without Prejudice

10.06 A pre-hearing conference shall not be open to the public and all discussions at the pre-hearing conference shall be without prejudice.

Documents

10.07 Documents provided to the pre-hearing conference bencher shall,

(a) at the conclusion of the pre-hearing conference, be returned by the pre-hearing conference bencher to the party who provided them ; and

(b) not be considered to be filed in the proceedings.

Agreements and Undertakings

10.08 (1) Agreements and undertakings made at a pre-hearing conference may be recorded in a memorandum prepared by or at the direction of the pre-hearing conference bencher.

(2) Copies of the memorandum referred to in subrule (1) shall be provided to the parties.

(3) Agreements and undertakings in the memorandum referred to in subrule (1) are binding upon the parties to the proceeding unless otherwise ordered by the Hearing Panel.

RULE 11 EVIDENCE

Rules of Evidence

11.01 (1) The rules of evidence applicable in civil proceedings apply in proceedings under the Act.

(2) Notwithstanding subrule (1), with leave of the tribunal, an affidavit or statutory declaration of any person is admissible in evidence as proof, in the absence of evidence to the contrary, of the statements made therein.

(3) An affidavit for use in a proceeding may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit but where, in the opinion of the tribunal, better evidence should be adduced through direct evidence of a witness, the tribunal may require the party to file or call such direct evidence and strike out the evidence filed.

Cross-Examination before Official Examiner

11.02 (1) A tribunal may order, on its own motion or on the motion of a party, that the cross-examination of the deponent of an affidavit or statutory declaration be conducted before an official examiner.

(2) Where the cross-examination of the deponent of an affidavit or statutory declaration is conducted before an official examiner, it shall be conducted in a manner analogous to the procedure under the *Rules of Civil Procedure* and, where necessary, the parties may seek direction from the tribunal.

Documentary Evidence

11.03 In addition to providing a copy to the other party, any party tendering a document as evidence shall provide to the Clerk of the tribunal,

(a) four copies of each document where the hearing is before a three member Hearing Panel; or,

(b) two copies of each document where the hearing is before a one member Hearing Panel, the HMT, or the AMT.

Certain information not admissible

11.04 Notwithstanding subrule 11.01 (1), information obtained by the Discrimination and Harassment Counsel as a result of the performance of his or her duties under clause 4 (1) (a) of By-Law 36 shall not be used and is inadmissible in a proceeding before the tribunal.

RULE 12 CONDUCT OF HEARINGS

Consent

12.01 Where the member or student member and the Society consent to a hearing before a one member Hearing Panel, a consent in Form 12A, must be filed with the Hearing Panel prior to the commencement of the hearing.

Pre-hearing Conference

12.02 Where a pre-hearing conference has been held in relation to a proceeding, and the member or student member and the Society consent to the proceeding being heard before the pre-hearing bencher sitting as a one member Hearing Panel,

(a) the hearing shall not commence until after the conclusion of the pre-hearing conference;

(b) the hearing shall be conducted in accordance with the same rules applicable to any other proceeding before a Hearing Panel; and,

(c) consent, in Form 12B, shall be executed after the pre-hearing conference by both the member or student member and the Society and filed with the Hearing Panel prior to the commencement of the hearing.Exclusion of Witnesses in Proceedings

12.03 (1) A tribunal may order that one or more witnesses be excluded from the hearing until called to give evidence.

(2) An order under subrule (1) may not be made in respect of a party to the proceeding or a witness whose presence is essential to advise counsel for the party calling the witness, but the tribunal may require any such party or witness to give evidence before other witnesses are called to give evidence on behalf of that party.

(3) Where an order is made excluding one or more witnesses from the hearing, there shall be no communication to an excluded witness of any evidence given during the witness' absence from the hearing, except with the leave of the tribunal, until after the witness has been called and has given evidence.

Visual or Audio Recording of Proceedings

12.04 Subsections 136 (1), (2) and (3) of the *Courts of Justice Act* apply to proceedings with necessary modifications.

Transcripts

12.05 (1) All oral and electronic hearings shall be recorded to permit the production of a transcript.

(2) The first party to order a transcript shall pay the cost of transcribing and shall file a copy of the transcript as part of the record.

Interpreters

12.06 (1) Where a witness requires an interpreter, the Society shall provide the interpreter, subject to an order to the contrary by the tribunal.

(2) An interpreter shall be competent and independent and, before the witness is called, shall swear or affirm that he or she will interpret accurately the

administration of the oath or affirmation to the witness, the questions put to the witness and his or her answers.

Special Needs

12.07 Parties shall notify the Hearings Coordinator as early as possible of any special needs of the parties or their witnesses.

RULE 13 ORDERS

Admonitions and Reprimands

13.01 (1) Unless the right of appeal is waived by the Society and the member or student member, a reprimand or admonition shall not be administered before the time for serving a notice of appeal has expired.

(2) A reprimand or admonition may be administered by any member of the tribunal.

(3) Where an order of reprimand or admonition is appealed and where the Appeal Panel decides that a reprimand or admonition is the appropriate disposition, the reprimand or admonition may be administered by any member of the Appeal Panel.

(4) A reprimand or admonition may be administered in writing.

(5) Except where a reprimand or admonition is administered in writing, it is to be administered at a sitting of the Hearing Panel or the Appeal Panel, as the case may be, that is open to the public.

(6) An admonition shall be a matter of public of record but shall not be published in the Ontario Lawyers Gazette or in any formal media release by the Society except where the admonition is referred to in subsequent or other proceedings.

Orders issued by One Member Hearing Panel in Conduct Proceedings

13.02 A one member Hearing Panel may not make an order under subsections 35(1) 1 or 35(1) 2 of the Act.

Written Reasons

13.03 (1) Subject to subrule (2) and subrule 15.07, a tribunal is required to give reasons in writing if the request for written reasons is made within thirty days after the day on which the panel makes its final decision or order.

(2) A Hearing Panel shall issue written reasons for decisions in relation to capacity applications in every case.

Incapacity Orders made in the absence of the Member or Student Member

13.04 (1) Where the Hearing Panel has proceeded in the absence of the member or

student member and has determined that there are reasonable grounds for believing that the member or student member is, or has been, incapacitated, the Hearing Panel may make an interim order.

(2) An interim order becomes final on the thirty-first day after the day on which notice of the interim order is served on the member or student member unless, before that day, he or she moves before the Hearing Panel to have the interim order of suspension set aside and the issue of incapacity determined.

(3) The member or student member named in the order may appeal a final order of suspension made under this rule.

RULE 14 COSTS

Security for Costs

14.01 (1) In admission, readmission, reinstatement, restoration or requalification proceedings, or an appeal arising from any of these proceedings, the tribunal, on motion by the Society, may make such order for security for costs as is just where it appears that,

(a) the person subject to the proceeding has an order for payment of costs made against him or her in the same or another proceeding under the Act which remains unpaid in whole or in part; and

(b) there is good reason to believe that the proceeding is unwarranted and the person subject to the proceeding has insufficient assets in Ontario to pay the costs of the Society where ordered.

(2) A person subject to a proceeding against whom an order for security for costs has been made may not, until the security has been given, take any step in the proceeding except with leave of the tribunal.

(3) Where a person subject to a proceeding defaults in giving the security required by an order, the tribunal, on motion by the Society, may dismiss the proceeding and any stay obtained no longer applies.

Motions for Costs

14.02 A request for costs shall be made by motion to the tribunal which heard the proceeding on its merits or where otherwise appropriate.

Costs against the Society

14.03 In admission, conduct, capacity, professional competence or non-compliance proceedings, where it appears that the proceedings were unwarranted, the tribunal may order that such costs as it considers just be paid to the person subject to the proceeding by the Society and any other party to the proceeding.

Costs to the Society

14.04 (1) In appropriate cases, where a tribunal has made a determination in a proceeding that is adverse to a party other than the Society, the tribunal may make an order requiring that party to pay all or part of,

(a) the Society's legal costs and expenses;
(b) the Society's costs and expenses incurred in investigating the matter; and
(c) the Society's costs and expenses incurred in conducting the proceeding.

(2) In awarding costs and expenses, the tribunal shall apply any tariff which may be approved by Convocation from time to time.

Wasted or Unreasonable Costs

14.05 (1) Where a party or non-party participant has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the tribunal may make an order awarding such costs as are just.

(2) An order under subrule (1) may be made by the tribunal on its own motion or on the motion of any party in the proceeding.

RULE 15 APPEALS

General

15.01 Subject to the Act, there is no appeal from an interlocutory order of a Hearing Panel other than an interim order.

Stay Pending Appeal

15.02 A party seeking a stay of a final order of a Hearing Panel shall bring a motion to the Appeal Panel in accordance with Rule 7 with necessary modifications.

Commencement of Appeals

15.03 (1) An appeal shall be brought by a notice of appeal in accordance with Form 15A.

(2) The notice of appeal shall be served on all other parties and filed with the Clerk to the Appeal Panel:

(a) within 30 days of service of the order;

(b) after 30 days on consent of the parties, or with leave of the Appeal Panel.

Materials on the Appeal

15.04 (1) A party delivering a notice of appeal shall contemporaneously serve and file a certificate of the contents of the record book, in accordance with Form 15B, listing the contents of the record book necessary for that party’s purposes.

(2) Within five days of delivery of a certificate of the contents of the record book, the other party shall serve and file a certificate of the contents of the record book in accordance with Form 15B.

(3) Subject to subrule (5), the contents of the record book shall contain the documents listed in the certificate(s), as the case may be, unless ordered otherwise by the AMT.

(4) Within thirty days of delivery of the first certificate of the contents of the record book, the party delivering a notice of appeal shall serve a record book on the opposing party or counsel for that party and shall file 6 copies of the record book with the Clerk to the Appeal Panel.

(5) Where a party fails to deliver a certificate of the contents of the record book, that party shall be deemed to accept the other party's certificate of the contents of the record book, unless the party obtains the consent of the other party or an order from the AMT.

(6) The record book shall contain, in consecutively numbered pages, the following,

(a) a table of contents describing each document by its nature and date and, in the case of an exhibit, by exhibit number or letter;

(b) a copy of each notice of appeal;

(c) a copy of each document required;

(d) all relevant transcripts or a list of all relevant transcripts together with a certificate of the court reporter confirming that such transcripts have been ordered and any deposit required for preparation of transcripts has been paid; and

(e) a copy of each certificate of the contents of the record book.

(7) The party delivering a notice of appeal shall serve a factum on all other parties within 15 days of the delivery of the record book.

(8) Within 15 days of receipt of a factum, a party shall serve a responding factum on all other parties.

(9) Each factum shall contain a concise statement, without argument, of the facts, issues to be argued, a concise statement of law, and authorities relating to each issue and the order sought.

(10) Each party shall serve with their factum, a book of authorities unless the authorities to be relied upon are contained in the standard book of authorities.

(11) Each party shall file 6 copies of that party's factum and book of authorities with the Clerk to the Appeal Panel.

(12) Where the party who files a notice of appeal fails to file a certificate of content of the record book, record book, factum or book of authorities in the time prescribed by this rule or by the AMT, the notice of appeal shall be deemed to be abandoned, unless the party obtains the consent of the other party or an order from the AMT.

Appeal Management Tribunal (AMT)

15.05 (1) The AMT shall schedule hearings before the Appeal Panel.

(2) The AMT shall hear motions with respect to,

(a) the abridgement or extension of any time prescribed by these Rules or by a previous order of the AMT;

(b) the location of the hearing of an appeal or a motion;

(c) the form of the hearing, including a request to hold a hearing as an electronic or written hearing;

(d) the consequences of non-compliance with a previous order of the AMT;

(e) the materials to be filed with the Appeal Panel;

(f) procedural issues regarding motions before the Appeal Panel including the contents of any affidavit or the record book of further evidence, the scope or conduct of a cross-examination, and the costs of transcripts and appointments before an official examiner; and

(g) requests to strike out a notices of appeal for failure to comply with these rules or any order of the AMT or the Appeal Panel.

(3) The AMT may, on request of a party or on its own motion, transfer the hearing of a motion to the Appeal Panel hearing the proceeding on its merits.

Motion to Tender Fresh Evidence

15.06 (1) If a party seeks to tender evidence to the Appeal Panel which was not before the Hearing Panel, the party shall bring a motion before the Appeal Panel in accordance with Rule 7 with necessary modifications.

(2) Both parties shall be prepared to proceed with the Appeal Panel's consideration of the appeal on its merits following a motion to tender fresh evidence, in any event of the result of the motion.

(3) Where the party who files a notice of motion to tender fresh evidence fails to file supporting materials in the time prescribed by this rule or by the AMT or fails to attend for cross-examination if required or fails to obtain transcripts of any cross-examinations in accordance with these rules, the notice of motion to tender fresh evidence shall be deemed abandoned, unless the party obtains the consent of the other party or an order from the AMT.

Reasons

15.07 The Appeal Panel shall give written reasons for its decision in every case.

RULE 16 SUMMARY ORDERS

Application

16.01 (1) Rule 16 applies to matters concerning sections 46, 47, 48, 49, 49.1 and 49.32(3) of the Act.

(2) Rules 1, 5, 6, 7, 10, 11, 12 and 14 apply with necessary modification to Rule 16.

Definitions

16.02 In this Rule,

"summary disposition bencher" means an elected bencher appointed by Convocation, pursuant to sections 46, 47, 48, 49 or 49.1 of the Act, to make summary orders.

"Asummary order" means an order prescribed by sections 46, 47, 48, 49 or 49.1 of the Act.

"summary order appeal" means an appeal prescribed by subsection 49.32(3) of the Act.

Summary Orders

16.03 A summary order issued by the summary disposition bencher shall be in accordance with Form 16A.

Service of Notice of Summary Orders

16.04 (1) Notice to a member or former member of a summary order having been made shall be served personally or by mailing a copy thereof in a registered letter addressed to the person's last known residence or office address as shown by the records of the Society.

(2) Where notice is given by registered mail it shall be deemed to have been given on the fifth day after the mailing.

Appeal of a Summary Order

16.05 (1) An appeal of a summary order on any question of fact or law shall be brought by a notice of appeal in accordance with Form 16B.

(2) The notice of appeal shall be served on the Society and filed with the Clerk to the Appeal Panel:

(a) within 30 days of service of notice of the order on the member;

(b) after 30 days on consent of the Society, or with leave of the Appeal Panel.

Disclosure of Documents by Society

16.06 Where a notice of appeal is served on the Society, it shall make disclosure to the member or former member, within 10 days of receipt of the notice of appeal, of all relevant documents in its possession, power or control.

Appeal Record

16.07 (1) The member or former member shall serve on the Society within 30 days of service of the notice of appeal,

(a) an appeal record which shall contain the summary order, the notice of appeal, all affidavits, and any other material to be relied upon; and

(b) a factum, if desired by the member or former member, and a book containing any authorities referred to in the factum.

(2) The member or former member shall file six copies of the materials referred to in subrule (1) with the Clerk of the Appeal Panel with proof of service within 5 days of service of the materials on the Society.

Responding to an Appeal

16.08 (1) The Society shall serve on the member or former member, within 10 days of the receipt of an appeal record,

(a) a responding appeal record containing any materials not contained in the appeal record upon which it intends to rely; and

(b) a factum, if desired by the Society, and a book of those authorities referred to in the factum.

(2) The Society shall file six copies of the materials in subrule (1) with the Clerk of the Appeal Panel with proof of service no more than 5 days after the service of the material upon the member or former member.

Evidence on the Appeal of a Summary Order

16.09 Subject to Rules 11.01 (3) and 11.02, evidence on the appeal of a summary order shall be given by affidavit unless the Appeal Panel orders otherwise.

Scheduling the Appeal

16.10 After the member or former member has complied with Rule 16.07, the member or former member shall contact the Hearings Coordinator within 30 days to obtain available dates and times for the hearing of the appeal.

Abandoning a Summary Order Appeal

16.11 (1) The member or former member may abandon a summary order appeal by serving a notice of abandonment in Form 4C on the Society and the Clerk of the Appeal Panel.

(2) The member, or former member, who,

(a) fails to comply with the provisions of Rule 16.07;

(b) fails to comply with the provisions of Rule 16.10; or

(c) fails to appear at the hearing of the appeal,

shall be deemed to have abandoned the summary order appeal unless the Appeal Panel orders otherwise.

(3) Where an appeal is abandoned or is deemed to have been abandoned, the Society is entitled the costs of the appeal unless the Appeal Panel orders otherwise.

Appeals on Consent

16.12 Where an appeal is on consent, the appeal may be heard in writing without the attendance of the Society or the member or former member unless the Appeal Panel orders otherwise. The written consent of the parties and a draft order shall be filed with the Clerk of the Appeal Panel.

Adopted by Convocation: January 28, 1999
Amended: February 19, 1999, March 26, 1999, April 30, 1999, May 28, 1999, September 24, 1999, January 27, 2000, June 23, 2000, February 21, 2001, June 22, 2001 and April 25, 2003.

These Rules can be found at www.lsuc.on.ca

APPENDIX 4

ADJUDICATOR CODE OF CONDUCT
(headings and possible topics)

Purpose of the Code

- to establish rules of conduct governing the professional and ethical responsibilities of tribunal members
- to set out the responsibility of tribunal members to maintain the integrity, competence and effectiveness of the tribunal

If Code is made available to the public:

- to inform the public of the decision-maker's obligation to act fairly
- to contribute to public confidence in the tribunal

Guiding Principles

Decision-maker's responsibility to:

- regulate in the public interest
- promote the principles of accountability, respect, integrity and openness by leadership and example

Applicability of the Code

- to all Hearing and Appeal Panel members from commencement to completion of term, including participation in on-going responsibilities after the completion of the term

Conflict of Interest

- definitions
  - pecuniary vs. non-pecuniary conflict of interest
  - test for conflict of interest
  - bias
  - apprehension of bias

- rules of conduct
  - prohibition on:

  -acting where conflict of interest exists
  -acting where bias does or may be seen to exist
  -taking partisan position in public with respect to issue before the tribunal
  -accepting money or gifts from someone affected by tribunal decision
  -appearing before tribunal as expert witness
  -acting as a consultant in the preparation of a case before the tribunal
  -using information obtained through official duties for personal gain
  -using tribunal property for anything other than tribunal activity
  -using letterhead and business cards for anything other than tribunal responsibilities

- procedural protocol/ steps to take when the question of bias or conflict of interest is raised
  - duty to inquire where there may be a possible conflict
  - duty to disclose immediately upon realization of conflict

- conflict of interest affecting the Chair

Role of the Chair

- ensure hearing is fair and that both sides get opportunity to present their case

Conduct of the Hearing/ Responsibilities of Discipline Panel Members/ Good Conduct

- approach the hearing with open-mind and avoid action that could lead any person to think otherwise
- avoid body language/ tone of voice that is indicative of pre-judgment of the issue
- avoid contributing to unnecessary delay in the proceedings
- minimize undue interruption of submissions/ testimony and limit questions to only those that are necessary to seek clarification
- demonstrate sensitivity to gender, cultural, ability and religion issues that could affect the conduct of the proceedings
- ensure unrepresented parties are not unduly disadvantaged
- refrain from communicating with parties unless in the presence of all parties and, preferably, on the record
- comment on competence of counsel only if, at the end of the hearing, the tribunal is pleased with the assistance of both
- refrain from discussions of tribunal business outside the hearing
- respect formality of proceedings; comport one's self formally; avoid using first names
- refrain from informal discussions; casual chit-chat
- avoid collecting information outside of the hearing
- redirect media inquiries to Chair, counsel of the Law Society Communications Department, without comment on the case
- refrain from socializing and dining with a party unless all parties are present and there is no discussion of the subject matter of the hearing
- follow guidelines for granting adjournments
- avoid relying on hearing panel members' own expertise
- comply with duty to meet timelines that are based on reasonable expectations

Duty of Confidentiality

- prohibition on discussion of case in the presence of anyone other than panelists hearing the issue before the tribunal

Decision-making Responsibilities/ Deliberations

- made on merits, based on evidence put before hearing panel
- made without regard to the opinions and criticism of others
- made in consideration of tribunal's jurisprudence
- prepared in format set out by the tribunal
- completed in a timely manner
- written to reflect clear, logical reasoning
- discussed only in the absence of others who are not adjudicating the issue before the tribunal

Duty to Provide Written Reasons

[self-evident]

Adequacy of Reasons

- outlines the elements of well-crafted reasons

Collegial Responsibilities

- to other members
- when sitting as a Hearing Panel
- to the Tribunal Chair
- to the Tribunal

Post-term Responsibilities/ Post-service Conduct

- appearances before the tribunal to be limited except as a witness or consultant for a specified period of time from ceasing to be a Member or after the release of outstanding decisions
- bound by Code where matter before the tribunal is on-going
- prohibition on taking improper advantage of past office
- obligation to ensure maintenance of integrity of the Tribunal

Role of the Tribunal Staff

- distinguish between role of Law Society Discipline Counsel and role of Tribunal Office staff
- set out roles of each staff member of the Tribunals Office

It was moved by Ms. Doyle, seconded by Mr. Robins, that Convocation approve the recommended enhancements to the Law Society's tribunals process and procedures, set out in Part III of this report and in Appendix 1 and further, that Convocation undertake an examination of different models for the composition of the Law Society tribunals, as described in Part II of this report.

Not voted on

It was moved by Mr. Gottlieb, seconded by Mr. Bobesich, that the profession be consulted on the recommendations in the Tribunals Task Force Report before Convocation votes on them.

Lost

ROLL-CALL VOTE

Alexander	Against	Hunter	Against
Backhouse	Against	Krishna	Against
Banack	Against	MacKenzie	Against
Bobesich	For	Manes	Against
Bourque	Against	Millar	Against
Campion	Against	Murray	Against

Carpenter-Gunn	Against	O'Donnell	Against
Caskey	Against	Pattillo	Against
Chahbar	Against	Pawlitza	Against
Chilcott	Against	Potter	Against
Coffey	Against	Robins	Against
Copeland	Against	Ross	Against
Curtis	Against	St. Lewis	Against
Dickson	Against	Sandler	Against
Doyle	Against	Silverstein	Against
Dray	Against	Simpson	Against
Eber	Against	Swaye	Against
Feinstein	Against	Symes	Against
Filion	For	Wright	Against
Gotlib	Against		
Gottlieb	For		
Harris	Against		
Heintzman	Against		

Vote: 39 Against, 3 For

It was moved by Mr. Murray, seconded by Mr. Gottlieb, that the Task Force Report go back to the Committee for review.

Lost

ROLL-CALL VOTE

Alexander	Against	Hunter	Against
Backhouse	Against	Krishna	Against
Banack	Against	MacKenzie	Against
Bobesich	For	Manes	Against
Bourque	Against	Millar	Against
Carpenter-Gunn	Against	Murray	For
Caskey	Against	Pattillo	Against
Chahbar	Against	Pawlitza	Against
Chilcott	Against	Porter	Against
Coffey	Against	Potter	Against
Copeland	Against	Robins	Against
Curtis	Against	Ross	Against
Dickson	Against	St. Lewis	Against
Doyle	Against	Sandler	Against
Dray	Against	Simpson	Against
Eber	Against	Swaye	For
Feinstein	Against	Symes	Against
Filion	For	Wright	For
Gotlib	Against		
Gottlieb	For		
Harris	Against		
Heintzman	Against		

Vote: 34 Against; 6 For

It was moved by Mr. Sandler, seconded by Mr. Campion that the Report be amended to eliminate the requirement that written reasons be provided in every case as set out in the recommendation at paragraph 133 on page 37.

Carried

ROLL-CALL VOTE

Alexander	Against	Hunter	Against
Backhouse	Against	Krishna	Against
Banack	Against	MacKenzie	Against
Bobesich	For	Manes	For
Bourque	For	Millar	Against
Carpenter-Gunn	For	Murray	For
Caskey	For	Pattillo	For
Chahbar	For	Pawlitza	For
Chilcott	For	Porter	For
Coffey	For	Potter	For
Copeland	For	Robins	For
Curtis	Against	Ross	Against
Dickson	For	St. Lewis	For
Doyle	Against	Sandler	For
Dray	For	Simpson	For
Eber	For	Swaye	For
Feinstein	Against	Symes	Against
Filion	For	Wright	For
Gotlib	Against		
Gottlieb	For		
Harris	Against		
Heintzman	Against		

Vote: 25 For; 15 Against

It was moved by Mr. Wright, seconded by Dr. Gotlib that paragraph 153 be amended to require that the Tribunals Committee include a lay bencher.

Lost

It was moved by Ms. Carpenter-Gunn, seconded by Mr. Silverstein, that paragraph 165 be amended to delete the word “mandatory”.

Lost

It was moved by Mr. Campion, seconded by Mr. Gottlieb, that there be no Adjudicator Code of Conduct as set out in paragraph 160 of the Report.

Lost

It was moved by Mr. Campion, seconded by Mr. Gottlieb, that paragraph 165 be amended to require that benchers undergo mandatory education at the beginning of their term and not on a continuing basis.

Lost

It was moved by Mr. Campion, seconded by Mr. Gottlieb, that the names of members should not be listed in the hearing schedule on the Law Society website.

Lost

It was moved by Ms. Curtis, seconded by Mr. Murray, that the recommendation set out in paragraph 153 that Convocation establish a standing committee known as the Tribunals Committee be deleted.

Lost

It was moved by Mr. Simpson, seconded by Ms. Carpenter-Gunn, that paragraph 133c be amended to permit Hearing Panels to give oral or written reasons in urgent circumstances.

Carried

It was moved by Ms. Doyle, seconded by Mr. Robins that Convocation approve as amended the recommended enhancements to the Law Society's tribunals process and procedures, set out in Part III of the Report and Appendix 1 and further, that Convocation undertake an examination of different models for the composition of the Law Society tribunals, as described in Part II of the Report.

Carried

ROLL-CALL VOTE

Alexander	For	Hunter	For
Backhouse	For	Krishna	For
Banack	For	MacKenzie	For
Bobesich	Against	Millar	For
Bourque	For	Murray	For
Carpenter-Gunn	For	Pattillo	For
Caskey	For	Pawlitza	For
Chahbar	For	Porter	For
Chilcott	For	Potter	For
Coffey	For	Robins	For
Copeland	For	Ross	For
Curtis	For	St. Lewis	For
Dickson	For	Sandler	For
Doyle	For	Simpson	For
Dray	For	Swaye	For
Eber	For	Symes	For
Feinstein	For	Wright	For
Filion	For		
Gotlib	For		
Gottlieb	Against		
Harris	For		
Heintzman	For		

Vote: 37 For; 2 Against

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REPORT OF THE PROFESSIONAL REGULATION COMMITTEE

The Report of the Professional Regulation Committee was deferred to the June Convocation.

REPORT OF THE FINANCE & AUDIT COMMITTEE

Mr. Chahbar presented the Report of the Finance & Audit Committee.

Finance and Audit Committee
May 26, 2005

Report to Convocation

All members of the Committee:
Clayton Ruby (c)
Abdul Chahbar (v.c.)
Peter Bourque
Andrew Coffey
Paul Dray
Neil Finkelstein
Allan Gotlib
Holly Harris
Allan Lawrence
Derry Millar
Ross Murray
Laurence Pattillo
Laurie Pawlitza
Alan Silverstein
Gerry Swaye
Beth Symes
Bradley Wright

Purpose of Report: Decision
Information

Prepared by the Finance Department

THE REPORT

1. The Finance and Audit Committee ("the Committee") met on May 12, 2005. Committee members in attendance were: Clayton Ruby (c.), Abdul Chahbar (vc.), Peter Bourque, Andrew Coffey, Holly Harris, Ross Murray, Alann Lawrence, Ross Murray, Lawrence Pattillo, Laurie Pawlitza, Alan Silverstein, Gerry Swaye, and Bradley Wright. Regrets: Beth Symes.

2. Staff attending were Malcolm Heins, Wendy Tysall, Terry Knott, Fred Grady and Derek Boyne.

3. The Committee is reporting on the following matters as indexed on the following page.

FOR DECISION:

The Committee discussed the report on the 2006 budget process and the issues it raised. The Committee reviewed the potential impact of these issues on the annual membership fee. The Committee requested that staff submit various scenarios producing no fee increase in 2006, including impacts on service and programmes, at its June meeting.

The Committee recommends approval of the 2006 budget process by Convocation as outlined.

BUDGET PROCESS - 2006 BUDGET

TAB A

The budget process is reviewed each year to adapt it to changing circumstances and to accommodate new ideas from staff, management and Convocation. The Finance and Audit Committee is requested to recommend the budget process to Convocation.

The purpose of this memorandum is to set out the proposed structure and timetable for the 2006 budget process so that all benchers understand the process and can provide the Finance and Audit Committee with input on policy and priorities in advance of developing the budget. The underlying philosophy of the budget process is to ensure that stakeholders have an opportunity to provide full and adequate input.

This memorandum also introduces some variables and issues for benchers to consider in preparation for the 2006 budget.

Current Budget Process

The Society's current budget process is consistent with the Society's existing by-laws, respecting the mandates of its various standing committees and recognizes the policy and oversight role of Convocation and the operational role of the CEO.

Convocation, in the course of its regular business, receives regular program reports from the Society's various standing committees as well as periodic updates from the CEO on how the policy objectives of Convocation are met and implemented and the relative merits and progress of the various initiatives and programs undertaken during the course of the year.

A comprehensive system of program review linked to the budget is also in place. It was approved by Convocation in January 2002 and has been carried out for the last three years (the 2003, 2004 and 2005 budgets). With Convocation's concurrence, it is staff's intention to continue the review program for the 2006 budget. If we continue the cycle, the 2006 budget would bring us back to presenting operational reviews of the Client Service Centre and the Lawyers Fund for Client Compensation.

The rotational review of activities has the benefits of:

- Restricting a sense of entitlement to cost increases
- Allowing a more meaningful, focused, analytical cost containment
- Increasing discipline in budget development
- Limiting resistance as the onerous and exhaustive examination of costs is not imposed every year in the absence of changing circumstances
- Reducing the length of the budget process
- Increasing bencher understanding of a number of specific activities each year.
- Increasing the accountability of management for the programs underlying the financial information contained in the annual budget.

Existing Corporate Governance

As assistance to benchers a summary of the applicable corporate governance is attached as Appendix 1.

History of Program Reviews

Program reviews commenced with the 2003 budget. For the 2003 budget, operational areas reviewed were:

- The Client Service Centre
- The Great Library and County Libraries combined with the business plan for LibraryCo.
- The Lawyers Fund for Client Compensation

For the 2004 budget operational areas reviewed were:

- Professional Development and Competence
- Communications

For the 2005 budget operational areas reviewed were:

- Professional Regulation
- Policy and Legal Affairs

Over the course of the three years, the operational reviews have cumulatively covered approximately 90% of the Law Society's budgeted expenditures.

The departments that support the core functions are also subject to periodic review. For instance the Human Resource, Payroll and Purchasing departments have all been the subject of expanded internal control reviews by our auditors. There is ongoing monitoring of all support functions by the CEO and Senior Management.

Operational Reviews for the 2006 Budget

As discussed above, the Senior Management Team is recommending the Client Service Centre and the Lawyers Fund for Client Compensation for operational review for the 2006 budget cycle. The Compensation Fund administrative staff is scheduled to return from LawPro's offices at 1 Dundas St. West, to Osgoode Hall in 2006 as one of the benefits of the North Wing renovation. This would be a good time for an operational review in light of the changes to its operations and the potential need for new systems to replace those in operation at LAWPRO. The Client Service Centre collects a wealth of information and statistical data that lends itself to an operational review. Therefore we believe it is reasonable to continue the process for 2006 using these two functions.

Library funding for 2006 could also be assessed. LibraryCo currently has an Integration Taskforce examining the relationships between the county library system, the Great Library, and CanLII. In addition, an assessment of the business plan that LibraryCo submitted, as part of the 2003 budget process should also be conducted, and a new business plan for 2006 and beyond presented.

It is intended that the operational reviews for the 2006 budget be completed and presented to the Finance and Audit Committee in June 2005 as set out in the timetable below. Presentations on LibraryCo would be conducted in September.

Date (2005)	Process
April	The Senior Management Team (SMT) commences the budget process by considering individual and collective budget assumptions, variables and objectives. This review also includes how the proposed 2006 budget fits into longer-term plans for the organization and departments.
May	Finance & Audit Committee and Convocation approve a process for preparing the 2006 budget.
June	Operational reviews for selected departments are presented to the Finance and Audit Committee and any other benchers who wish to attend. The Finance and Audit Committee reports results of the program reviews to Convocation and program review material is available to all benchers. Bencher's comments on the program reviews and budget process are invited. Last Convocation before summer. Opportunity for Convocation to convey policy objectives and budget priorities to the Finance and Audit Committee. LibraryCo submits preliminary submissions on 2005 activities and 2006 projections to the Finance and Audit Committee at this time. 2005 budget requests from external organizations such as CDLPA will have been requested and received by this time.
July, August, September	The components reviewed and approved above are compiled into an operating budget for the Law Society. Facilities and Information Systems compile a capital budget with the assistance of user departments. Further assessments of LibraryCo operations.
October	A draft organizational operating and capital budget is presented to the Finance and Audit Committee and Convocation for approval.

2006 Budget Issues

In each of the last five years the Society was able to reduce or maintain annual membership fees. 2006 will present a series of issues that will put upward pressure on the annual fee only slightly mitigated by growth in the annual membership. Some of the factors that may affect financial resources and ultimately the membership fee are set out below.

Preliminary Issues for Consideration during 2006 Budget Process

- Membership numbers in 2006 are expected to increase by approximately 1,000 members.
- The Law Society's property in Ottawa may be put on the market in 2005 with sale proceeds likely to be received in 2006.
- The 2005 operating budget used the surplus of $1.5 million carried forward from the 2004 financial year as a source of funding. There may not be a surplus in 2005 to support 2006 operations.

- The Bar Admission Course is changing to the new Licensing Process in 2006. The impact on the budget will depend on tuition fee and LFO funding levels, which are still to be finalised.
- In 2005 Convocation approved the expansion of office space rented at 393 University.
- The Sole and Small Firm Task Force presented its final report to Convocation in 2005. The report has been sent out for additional consultation.
- Capital expenditures on the rest of the building and Information System capital expenditures have been deferred to focus on the North Wing renovation.
- Interactions with members and the public continue to increase and these interactions can be facilitated by more electronic based interaction. Many initiatives that could be undertaken would generate long-term savings but implementation may require an increase in short-term costs. The current capital levy of $75 may be insufficient to support non-discretionary capital expenditures.
- LibraryCo will be entering its fourth full year of operation in 2006. The Elliot Reports on County Libraries, which initiated the formation of LibraryCo envisaged that this would be a new period in the development of LibraryCo and the county library system.
- The Compensation Fund is in a strong financial position but we have probably seen the last of levy reductions.
- The Law Society's non-membership revenue appears to be facing downward pressure.
- Annual market and merit adjustments for staff salaries.
- At this time it is envisaged that an additional $1 million will be requested in the 2006 budget to fund the ongoing mortgage fraud investigations/prosecutions.

MEMORANDUM ON 2006 BUDGET PROCESS

Appendix 1

Existing Corporate Governance

By-law 9 of the Law Society dictates the mandates of the Society's various standing committees. For example, the Professional Regulation Committee is mandated to develop for Convocation's approval
"policy options on all matters relating to regulation of the profession in the areas of professional practice and fitness to practice".

The Professional Development, Competence and Admissions Committee has a similar mandate relating to matters of competence. This standing committee structure develops policy options and choices by delegating the research and data collection responsibilities necessary for policy development across the Society's various standing committees with Convocation retaining ultimate decision-making authority.

Under By-law 9 the Finance and Audit Committee is mandated,
"to review the plans and projections of the annual budget of the Society, including the Lawyers Fund for Client Compensation, or any special or extraordinary budget required for the purpose of the Society, including the Lawyers Fund for Client Compensation, to provide comments and advice to Convocation thereon, and to recommend approval of the annual budget or any special or extraordinary budget item."

Section 8 of the *Law Society Act* provides that the CEO shall, under the direction of Convocation, manage the affairs and functions of the Society.

The by-laws also articulate the duties of the Chief Executive Officer. By-law 3 states:
"The Chief Executive Officer shall be responsible for the management and co- ordination of all phases of the operation, administration, finances, organization, supervision and maintenance of all activities of the Society."
In addition By-law 3 states,
"the Chief Executive Officer shall perform all the functions and duties ordinarily associated with the office of chief executive officer including,
(a) putting into effect all policies and procedures established by Convocation or a standing committee of Convocation;
(b) counseling and assisting Convocation or any standing committee of Convocation in the development, adoption and implementation and advancement of the various functions of the Society"

The by-laws clearly separate the policymaking and operational responsibilities of Convocation and the CEO. Convocation, supported by the guidance of its standing committees, establishes the policy objectives of the Society and delegates operational responsibility for the implementation of these policies to the CEO. On an annual basis, as mandated in By-law 3, the CEO prepares a budget that is "consistent with the activities planned by Convocation for the next fiscal year." This budget is reviewed by the Finance and Audit Committee and must be approved by the Committee and by Convocation.

FOR INFORMATION:

LAW SOCIETY SUPPORT OF OTHER ORGANIZATIONS

TAB C

The Committee created a working group to review outside organizations that are provided support by the Society.

At prior Committee meetings, the Committee has discussed the allocation of scarce Law Society resources such as office space. During the discussion it was noted that the Law Society provides various levels of support to a variety of related organizations. The Committee requested a review of this support.

The Law Society supports external organizations whose mandate is generally congruent with the Law Society's. Organizations currently receiving support include:

- The Osgoode Society for Canadian Legal History
- Ontario Justice Education Network ("OJEN")
- Pro Bono Law Ontario ("PBLO")
- Law Foundation of Ontario ("LFO")
- Law Society Foundation ("LSF")
- County & Districts Law Presidents' Association ("CDLPA")
- Federation of Law Societies of Canada
- Canadian Legal Information Institute ("CANLII")
- Lawyers Professional Indemnity Company
- LibraryCo Inc.
- Legal Aid Ontario
- Advocates Society

- Rotiio' taties
- Association des juristes d'expression francaise de l'Ontario (“AJEFO”)
- LINK – Lawyer’s Assistance Program
- Ontario Bar Assistance Program (“OBAP”)
- Volunteer Lawyer Services
- Association in Defence of the Wrongly Convicted
- Canadian Foundation for Children, Youth and the Law
- South Asian Legal Clinic (“SALCO”)
- Equality and Justice for People with Disabilities (“REACH”)
- ARCH – Legal Resource Centre for Persons with Disabilities
- Gale Cup Moot Committee
- Chief Justice of Ontario’s Advisory Committee on Professionalism
- Sporadic, one-off requests such as the funding of Law School tuition surveys and the current Laskin Legacy event

FOR INFORMATION:

INVESTMENT MANAGER – CHANGE IN OWNERSHIP

TAB D

Foyston, Gordon and Payne are the investment managers for the General and Compensation Fund’s long-term investment portfolios. First Asset Management Inc. (“FAMI”) is a major investor in Foystons. In April, Affiliated Managers Group (“AMG”) agreed to purchase 100% of FAMI.

FAMI is an independent asset management firm, with more than $29 billion in assets under management. Founded in 1993, AMG is a U.S. based asset management holding company with equity investments in mid-sized investment management firms that collectively manage over US$130 billion in assets. AMG is listed on the New York Stock Exchange and has equity market capitalization of US$2 billion.

Foystons have told us that they will continue to operate independently and their investment philosophy will not change. We are not intending to make any changes in response to Foyston’s ownership changes but will continue to monitor their management performance in line with LAWPRO.

FOR INFORMATION:

NORTH WING RENOVATION UPDATE

TAB E

The north wing renovation is progressing with a scheduled completion date of February 2006. Originally approved at an estimated cost of $9.028 million, we now anticipate that the actual cost to complete the project will be approximately $9.7 million. Of the $9.028 million estimate we have paid approximately $3.4 million to date.

Over the course of the renovation, several unforeseen costs have arisen. Most notable of these was encountering asbestos and the subsequent need for abatement. As well, additional costs were incurred to meet current code requirements in several locations within the north wing. Finally, the as is drawings for the original north wing, used to estimate the scope of work were

not completely accurate in identifying the location of mechanical and electrical services in several areas of the building.

Despite these developments that have contributed to the increase in the cost of the project, we are proceeding on schedule with construction completed and staff occupying the mezzanine and fourth floors. The sixth floor and lecture hall will be completed by July.

The anticipated overage of just under $700,000 can be funded from a variety of sources. These include our annual contingency allowance, deferment of other capital projects, allocation of year-end surplus from the unrestricted fund and/or dedicating a portion of the 2006 capital levy to offset the project's shortfall.

Ms. Terry Knott, Director of Membership and Complaints Services who is the senior manager responsible for the construction project attended the Committee meeting with Derek Boyne, the Construction Coordinator, to provide a more detailed report, outlining the costs and progress to date.

2006 Budget

It was moved by Mr. Chahbar, seconded by Mr. Murray that Convocation approve the 2006 budget process.

Carried

J. S. Denison Fund Application (in camera)

It was moved by Mr. Chahbar, seconded by Mr. Murray that Convocation approve the application to the J. Shirley Denison Fund.

Carried

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REPORT OF THE FINANCE & AUDIT COMMITTEE

Item for Information

- North Wing Renovation Update

REPORT OF THE GOVERNANCE TASK FORCE

Amendments to By-Law 6 (Treasurer) French Version

Professor Krishna presented the Report of the Governance Task Force.

Governance Task Force
May 26, 2005

Report to Convocation

Task Force Members
Clay Ruby, Chair
Andrew Coffey
Sy Eber
Abe Feinstein
Richard Filion
George Hunter
Vern Krishna
Laura Legge
Harvey Strosberg

Purposes of Report: Decision

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

AMENDMENTS TO BY-LAW 6 (TREASURER), FRENCH VERSION

Request to Convocation

1. Convocation is requested to make amendments to the French version of By-Law 6, based on amendments to the English version of By-Law 6 adopted by Convocation on April 28, 2005.

Summary of the Issue

2. On April 28, 2005, Convocation made amendments to By-Law 6 (Treasurer) with respect to procedures for the Treasurer's election. A copy of the motion with respect to these amendments is attached at Appendix 1. At that time, the French version of the amendments to the By-Law had not been prepared.

3. The French version of the amendments has now been drafted and appears in the motion below for Convocation's approval.

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

BY-LAW 6
[TREASURER]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON MAY 26, 2005

MOVED BY

SECONDED BY

THAT By-Law 6 [Treasurer], made by Convocation on April 30, 1999, and amended by Convocation on June 25, 1999, December 10, 1999, May 24, 2001, October 31, 2002 and April 28, 2005, be further amended as follows:

1. Subsection 1 (1) of the French version of the By-Law is amended by adding “Sous réserve du paragraphe (2),” at the beginning of the subsection.

2. Subsection 1 (2) of the French version of the By-Law is deleted and the following substituted:

Idem

(2) S’il y a au moins deux candidatures après la date de clôture des mises en candidature prévue au paragraphe 2 (3) ou (4) et que tous les candidats ou toutes les candidates, sauf un ou une, cessent de l’être, pour quelque raison que ce soit, avant le jour de l’élection du trésorier ou de la trésorière prévu au paragraphe (1), cette élection a lieu le dernier en date du jour de la réunion ordinaire du Conseil qui se tient en juin et de celui qui tombe dix jours ouvrables après la date de clôture des mises en candidature.

Premier article à l’ordre des travaux

(3) Si elle a lieu le jour de la réunion ordinaire du Conseil qui se tient en juin, l’élection du trésorier ou de la trésorière constitue, malgré le paragraphe 6 (1) du règlement administratif no 8, le premier article à l’ordre des travaux de cette réunion.

3. Section 2 of the French version of the By-Law is amended by adding the following:

Réouverture de la période de mise en candidature

(5) S’il y a au moins deux candidatures après la date de clôture des mises en candidature prévue au paragraphe (3) ou (4) et que tous les candidats ou toutes les candidates, sauf un ou une, cessent de l’être, pour quelque raison que ce soit, avant le jour de l’élection du trésorier ou de la trésorière prévu au paragraphe 1 (1) :

a) d’une part, la période de mise en candidature est réouverte;

b) d’autre part, le nouvelle date de clôture des mises en candidatures tombe le dixième jour ouvrable qui suit le jour où le ou la secrétaire envoie l’avis prévu à l’article 3.1, à 17 heures.

4. Section 3 of the French version of the By-Law is amended by deleting “17 heures le vendredi précédant immédiatement le premier jour de la tenue du vote par anticipation” and substituting “le jour de l’élection du trésorier ou de la trésorière”.

5. The French version of the By-Law is amended by adding the following:

Réduction du nombre de candidatures : avis
3.1 S'il y a au moins deux candidatures après la date de clôture des mises en candidature prévue au paragraphe 2 (3) ou (4) et que tous les candidats ou toutes les candidates, sauf un ou une, cessent de l'être, pour quelque raison que ce soit, avant le jour de l'élection du trésorier ou de la trésorière prévu au paragraphe 1 (1), le ou la secrétaire envoie aux conseillers et aux conseillères habilités à voter à cette élection, au plus tard cinq jours ouvrables après celui où il ne reste qu'une candidature, un avis énonçant ce qui suit :

a) la date de son envoi;

b) le fait que la période de mise en candidature est réouverte;

c) la nouvelle date de clôture des mises en candidature;

d) le fait que les bulletins de vote par anticipation reçus seront rejetés;

e) la date du début du vote par anticipation;

f) la date de l'élection du trésorier ou de la trésorière.

6. Section 4 of the French version of the By-Law is deleted and the following substituted:

Élection sans concurrent
4. S'il n'y a qu'une seule candidature le premier en date du jour de clôture des mises en candidature et du jour de l'élection du trésorier ou de la trésorière, le ou la secrétaire déclare le candidat ou la candidate en question élu à la charge de trésorier.

7. Subsection 5 (1) of the French version of the By-Law is amended by deleting "après la date limite du retrait des candidatures" and substituting "le jour de l'élection du trésorier ou de la trésorière".

8. Section 8 of the French version of the By-Law is deleted and the following substituted:

Annonce des candidatures
8. S'il y a au moins deux candidatures après la date de clôture des mises en candidature, le ou la secrétaire avise, le plus tôt possible après cette date, les conseillers et les conseillères habilités à voter à l'élection du trésorier ou de la trésorière du nom des candidats et candidates en lice, ainsi que de celui des conseillers et conseillères qui les ont mis en candidature.

9. Subsection 9 (1) of the French version of the By-Law is deleted and the following substituted:

Vote par anticipation
9. (1) A lieu un vote par anticipation :

a) qui débute à 9 heures le deuxième mercredi de juin et qui se termine à 17 heures la veille du jour de l'élection;

b) qui débute à 9 heures le troisième jour ouvrable suivant la date de clôture des mises en candidature prévue au paragraphe 2 (5) et qui se termine à 17 heures la veille du jour de l'élection, s'il y a au moins deux candidatures après la date de clôture des mises en candidature prévue au paragraphe 2 (3) ou (4) et que tous les candidats ou toutes les candidates, sauf un ou une, cessent de l'être, pour quelque raison que ce soit, avant le jour de l'élection du trésorier ou de la trésorière prévu au paragraphe 1 (1).

10. Subsection 9 (7) of the French version of the By-Law is deleted and the following substituted:

Idem

(7) Si le conseiller ou la conseillère vote par anticipation en vertu de l'alinéa (2)b), le ou la secrétaire, après s'être conformé aux paragraphes 9.1 (3) et (4), retire l'enveloppe de l'enveloppe-réponse, retire le bulletin de vote de l'enveloppe et le dépose dans la boîte de scrutin.

11. Section 9 of the French version of the By-Law is amended by adding the following:

Rejet des bulletins

(9) S'il y a au moins deux candidatures après la date de clôture des mises en candidature prévue au paragraphe 2 (3) ou (4) et que tous les candidats ou toutes les candidates, sauf un ou une, cessent de l'être, pour quelque raison que ce soit, avant le jour de l'élection du trésorier ou de la trésorière prévu au paragraphe 1 (1), le ou la secrétaire fait rejeter les bulletins de vote par anticipation reçus après cette date.

12. Subsection 10 (1) of the French version of the By-Law is amended by adding "à la charge de trésorier" after "candidates".

13. Subsection 10 (2) of the French version of the By-Law is amended by adding "à la charge de trésorier" after "candidats".

14. Subsection 11 (1) of the French version of the By-Law is deleted and the following substituted:

Dépouillement

11. (1) Le jour de l'élection, après que toutes les conseillères et tous les conseillers habilités à voter à l'élection du trésorier ou de la trésorière ont voté ou refusé de voter, le ou la secrétaire, en l'absence de toutes les personnes sauf du trésorier ou de la trésorière, ouvre la boîte de scrutin, en retire tous les bulletins, les ouvre et procède au décompte des voix exprimées par candidat.

15. Section 13 of the French version of the By-Law is deleted and the following substituted:

Voix prépondérante

13. Si au moins deux candidats ou candidates reçoivent un nombre égal de voix et qu'une voix supplémentaire permettrait à l'un ou à l'une d'eux d'être déclaré élu à la charge de trésorier, le trésorier ou la trésorière a voix prépondérante.

Nombre égal de voix

13.1 (1) Si au moins deux candidats ou candidates reçoivent un nombre égal de voix et qu'une voix supplémentaire permettrait à l'un ou à l'une d'eux de rester en lice dans l'élection du trésorier ou de la trésorière, un sondage a lieu afin de choisir les candidats et les candidates qui resteront en lice.

Scrutin secret

(2) Le sondage tenu en application du paragraphe (1) a lieu par scrutin secret.

Droit de vote

(3) Les conseillères et les conseillers habilités à voter à l'élection du trésorier ou de la trésorière ont le droit de participer au sondage prévu au paragraphe (1).

Bulletin

(4) Les conseillères et les conseillers habilités à participer au sondage prévu au paragraphe (1) reçoivent un bulletin où apparaissent les noms des candidats ou des candidates qui ont reçu un nombre égal de voix.

Comment remplir le bulletin

(5) Les conseillers et les conseillères votent pour le ou les candidats ou la ou les candidates qu'ils souhaitent conserver pour l'élection du trésorier ou de la trésorière, mais non pour la totalité de ceux-ci ou de celles-ci, en sélectionnant le nom de chaque candidat ou de chaque candidate de leur choix.

Boîte de scrutin

(6) Après avoir rempli leurs bulletins de vote, les conseillers et les conseillères les plient de façon que les noms des candidates et des candidats ne soient pas visibles et, en présence du ou de la secrétaire, les déposent dans la boîte de scrutin.

Dépouillement

(7) Après que toutes les conseillères et tous les conseillers habilités à participer au sondage prévu au paragraphe (1) ont voté ou refusé de voter, le ou la secrétaire, en l'absence de toutes les personnes sauf du trésorier ou de la trésorière, ouvre la boîte de scrutin, en retire tous les bulletins, les ouvre et procède au décompte des voix exprimées par candidat.

Annonce des résultats

(8) Immédiatement après avoir procédé au décompte des voix par candidat, le ou la secrétaire annonce les résultats du sondage au Conseil.

Idem

(9) Le candidat ou la candidate qui reçoit le nombre le moins élevé de voix dans le sondage prévu au paragraphe (1) est éliminé de la liste des candidats et candidates à l'élection du trésorier ou de la trésorière.

Sondages supplémentaires

(10) Si au moins deux candidats ou candidates figurant dans le sondage prévu au paragraphe (1) reçoivent le moins élevé et le même nombre de voix, d'autres sondages prévus à ce paragraphe sont tenus pour ces candidats et candidates jusqu'à

ce qu'une candidate ou un candidat visé par le premier sondage soit éliminé de la liste des candidats et candidates à l'élection du trésorier ou de la trésorière.

APPENDIX 1

THE LAW SOCIETY OF UPPER CANADA

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

BY-LAW 6
[TREASURER]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON APRIL 28, 2005

MOVED BY

SECONDED BY

THAT By-Law 6 [Treasurer], made by Convocation on April 30, 1999, and amended by Convocation on June 25, 1999, December 10, 1999, May 24, 2001 and October 31, 2002, be further amended as follows:

1. Subsection 1 (1) of the By-Law is amended by adding "Subject to subsection (2)," at the beginning of the subsection.

2. Subsection 1 (2) of the By-Law is deleted and the following substituted:

Same

(2) If after the close of nominations of candidates under subsection 2 (3) or (4), there are two or more candidates, and if before the day of the election of Treasurer under subsection (1), all of the candidates, but one, cease, for any reason, to be candidates, there shall be an election of Treasurer on the later of the day on which the regular meeting of Convocation is held in June and the day that is ten business days after the day of the close of nominations of candidates.

First matter of business

(3) If there is an election of Treasurer on the day on which the regular meeting of Convocation is held in June, despite subsection 6 (1) of By-Law 8, the election of Treasurer shall be the first matter of business at the meeting.

3. Section 2 of the By-Law is amended by adding the following:

Nominations reopened

(5) If after the close of nominations of candidates under subsection (3) or (4), there are two or more candidates, and if before the day of the election of Treasurer under subsection 1 (1), all of the candidates, but one, cease, for any reason, to be candidates,

(a) the period for nominations of candidates shall be reopened; and

(b) the new close of nominations of candidates shall be 5 p.m. on the day that is ten business days after the day on which the Secretary sends the notice under section 3.1.

4. Section 3 of the By-Law is amended by deleting “5 p.m. on the Friday immediately preceding the first day of the advance poll” and substituting “the day of the election of Treasurer”.

5. The By-Law is amended by adding the following:

Reduction in number of candidates: notice

3.1 If, after the close of nominations of candidates under subsection 2 (3) or (4), there are two or more candidates, and if before the day of the election of Treasurer under subsection 1 (1), all of the candidates, but one, cease, for any reason, to be candidates, not later than five business days after the day on which one candidate remains, the Secretary shall send to each bencher entitled to vote in an election of Treasurer a notice stating,

(a) the day on which the notice is sent;

(b) that the period for nominations of candidates has re-opened;

(c) the new time for close of nominations;

(d) that any ballots received at the advance poll shall be discarded;

(e) the time for the beginning of the new advance poll; and

(f) the day on which there shall be an election of Treasurer.

6. Section 4 of the By-Law is deleted and the following substituted:

Election by acclamation

4. If on the earlier of the time for the close of nominations of candidates and the day on which there shall be an election of Treasurer, there is only one candidate, the Secretary shall declare that candidate to be elected as Treasurer.

7. Subsection 5 (1) of the By-Law is amended by deleting “after the time for the withdrawal of candidates from the election has passed” and substituting “on the day on which there shall be an election of Treasurer”.

8. Section 8 of the By-Law is deleted and the following substituted:

Notice of candidates to benchers

8. If after the close of nominations of candidates, there are two or more candidates, the Secretary shall, as soon as practicable after the close of nominations of candidates, notify each bencher entitled to vote in an election of Treasurer of the candidates and of the benchers who nominated each candidate.

9. Subsection 9 (1) of the By-Law is deleted and the following substituted:

Advance poll

9. (1) An advance poll shall be conducted,

(a) beginning at 9 a.m. on the second Wednesday in June and ending at 5 p.m. on the day preceding election day; or

(b) if after the close of nominations of candidates under subsection 2 (3) or (4), there are two or more candidates, and if before the day of the election of Treasurer under subsection 1 (1), all of the candidates, but one, cease, for any reason, to be candidates, beginning at 9 a.m. on the day that is three business days after the day of the close of nominations of candidates under subsection 2 (5) and ending at 5 p.m. on the day preceding election day.

10. Subsection 9 (6) of the By-Law is amended by deleting “a ballot box” and substituting “the ballot box”.

11. Subsection 9 (7) of the By-Law is deleted and the following substituted:

Same

(7) If a bencher is voting at the advance poll under clause (2) (b), after complying with subsections 9.1 (3) and (4), the Secretary shall remove the ballot envelope from the return envelope, remove the ballot from the ballot envelope and put the ballot into the ballot box.

12. Section 9 of the By-Law is amended by adding the following:

Ballots to be discarded

(9) If after the close of nominations of candidates under subsection 2 (3) or (4), there are two or more candidates, and if before the day of the election of Treasurer under subsection 1 (1), all of the candidates, but one, cease, for any reason, to be candidates, the Secretary shall cause to be discarded the ballots received at the advance poll conducted after the close of nominations under subsection 2 (3) or (4).

13. Subsection 10 (1) of the By-law is amended by adding “for election as Treasurer” at the end of the subsection.

14. Subsection 10 (2) of the By-Law is amended by adding “of Treasurer” after “in the election”.

15. Subsection 11 (1) of the By-Law is deleted and the following substituted:

Counting votes

11. (1) On election day, after all benchers entitled to vote in an election of Treasurer have voted or declined on a ballot, the Secretary shall, in the absence of all persons but in the presence of the Treasurer, open the ballot box, remove all the ballots from the ballot box, open the ballots and count the votes cast for each candidate.

16. Section 13 of the By-Law is deleted and the following substituted:

Casting vote

13. If at any time an equal number of votes is cast for two or more candidates and an additional vote would entitle one of them to be declared to be elected as Treasurer, the Treasurer shall give the casting vote.

Equal number of votes

13.1 (1) If at any time an equal number of votes is cast for two or more candidates and an additional vote would entitle one or more of them to remain in the election of Treasurer, a poll shall be conducted to select the candidates to remain in the election.

Secret ballot

(2) A poll conducted under subsection (1) shall be conducted by secret ballot.

Right to vote

(2) Each bencher entitled to vote in an election of Treasurer is entitled to vote in a poll conducted under subsection (1).

Ballot

(3) Each bencher entitled to vote in a poll conducted under subsection (1) shall receive a ballot listing the names of the candidates who received the equal number of votes.

Marking ballot

(4) A bencher shall vote for the candidate or candidates, but not for all the candidates, whom he or she wishes to remain in the election of Treasurer and shall indicate his or her choice or choices by placing a mark beside the name of each candidate chosen.

Ballot box

(5) After a bencher has marked a ballot, he or she shall fold the ballot so that the names of the candidates do not show and, in the presence of the Secretary, put the ballot into the ballot box.

Counting votes

(6) After all benchers entitled to vote in a poll conducted under subsection (1) have voted or declined on a ballot, the Secretary shall, in the absence of all persons but in the presence of the Treasurer, open the ballot box, remove all ballots from the ballot box, open the ballots and count the votes cast for each candidate.

Report of results

(7) Immediately after counting the votes cast for each candidate, the Secretary shall report the results to Convocation.

Same

(8) The candidate who receives the least number of votes in the poll conducted under subsection (1) shall be removed as a candidate in the election of Treasurer.

Further polls

(9) If two or more candidates in a poll conducted under subsection (1) each receive the least and the same number of votes, additional polls shall be conducted under subsection (1), for the candidates with the same number of votes, until only one

candidate from all the candidates included in the initial poll conducted under subsection (1) is removed as a candidate in the election of Treasurer.

It was moved by Professor Krishna, seconded by Mr. Wright, that Convocation approve the French version of the amendments to By-Law 6 (Treasurer).

Carried

Professor Krishna thanked the Treasurer for his contribution to the Law Society over his tenure.

REPORT OF THE PROFESSIONAL DEVELOPMENT, COMPETENCE & ADMISSIONS COMMITTEE

Mr. Hunter announced the appointment of the following practice reviewers:

Nathalie Boutet
Susan Elliott
Ken Goodbrand
Chris Kostopoulos
Joseph Obagi
Dennis Tobin

Professional Development, Competence & Admissions Committee
May 26, 2005

Report to Convocation

Committee Members
George D. Hunter (Chair)
Gavin A. MacKenzie (Vice-Chair)
William J. Simpson (Vice-Chair)
Robert B. Aaron
Peter N. Bourque
Kim A. Carpenter-Gunn
E. Susan Elliott
Alan D. Gold
Gary Lloyd Gottlieb
Laura L. Legge
Robert Martin
Bonnie R. Warkentin

Purpose of Report: Decision

PRACTICE REVIEW PROGRAM

PRACTICE REVIEWER ROSTER

Request to Convocation

1. That Convocation approves the recommended list of new Practice Reviewers set out at page 8, which will be distributed separately in camera.

Summary of the Issue

2. Statutory revisions to the *Law Society Act* (Ontario), proclaimed in February of 1999 confirmed and expanded the Law Society's legislative authority to regulate competence. Under the statutory scheme, the Law Society is authorized to conduct a review of a member's practice.

3. Law Society staff administers and coordinates the Practice Review Program but the actual assessment and reporting is completed using a roster of seasoned lawyers (Practice Reviewers) who attend at the law practice in question and conduct the review.

4. Members who conduct practice reviews are appointed pursuant to section 4 of By-Law 24.

5. Convocation's approval of Practice Reviewers affords the reviewers the protection of section 9 of the *Law Society Act*, which reads in part:

   No action or other proceedings for damages shall be instituted against…[a] person appointed in Convocation for any act done in good faith in the performance or intended performance of any duty or in the exercise or intended exercise of any power under this Act…

6. The roster of Practice Reviewers has been reviewed and updated by staff in the Professional Development and Competence Department to ensure quality and relevance and to add new participants who meet the requirements of the program.

7. The roster of recommended new Practice Reviewers is set out at page 8, which will be distributed separately *in camera.*

PRACTICE REVIEW PROGRAM

PRACTICE REVIEWER ROSTER

Prepared for:
Professional Development, Competence & Admissions Committee

Prepared by:
Diana Miles, Director
Professional Development & Competence
416-947-3328
dmiles@lsuc.on.ca

May 2005

Introduction and Background

1. Statutory revisions to the *Law Society Act* (Ontario) (the "*Act*"), proclaimed in February 1999 confirmed and expanded the Law Society's legislative authority to regulate competence. The relevant amendments to the *Act* address the issue of professional competence and the actions the Law Society may take to determine if a member is meeting standards of professional competence.

2. Under the statutory scheme, the Law Society is authorized to conduct a review of a member's practice where there are reasonable grounds for believing that a member may be failing or may have failed to meet the standards of professional competence defined under the *Act*. The *Act* also authorizes the Law Society to conduct formal competence hearings to determine whether a member is failing or has failed to meet defined standards of competence.

3. The 1999 amendments to the *Act* effected two important changes to the Law Society's jurisdiction to regulate competence. First, the amendments set out a test for determining whether a member fails to meet standards of professional competence. Second, the amendments introduced statutory mechanisms for the enforcement of competence in the form of mandatory practice reviews and competence hearings.

Process

4. Participants in the Practice Review program are identified through a review of a member's regulatory history, including reference to the number and types of complaints, investigations, audits, and prior discipline record. From time to time, members may also be referred to Practice Review via any of the Law Society's regulatory units and from the Spot Audit unit.

5. Law Society staff administers and co-ordinates the Practice Review program, but the actual assessment and reporting is completed using a roster of 40-50 seasoned lawyers (Practice Reviewers) who attend at the law practice in question to conduct the review. The Practice Reviewers are matched according to type and size of practice and usually come from a different area of the province than the member whose practice is being reviewed.

6. The lawyer who is the subject of a practice review is expected to complete a Basic Management Checklist (BMC) designed to survey existing systems of client service, file management and financial management. Once the Practice Reviewer has attended at the lawyer's office he or she prepares a report containing an analysis and assessment of the practice, including recommendations, which the member is expected to implement. The outcomes of reviews can include proposals for consent orders or, in the case of failure to or inability to correct practice deficiencies, that the Law Society seek

authorization for a competence hearing, both of which may place restrictions or conditions on the lawyer's practice.

Policy Changes

7. In February 2004 Convocation approved an amendment to s.5 of By-law 24, which now articulates the indicia used for identifying members who may require a practice review. In determining if a member may be failing or may have failed to meet standards of professional competence the Chair of the PDC&A Committee can be guided by indicia, which include,

- the nature, number and type of complaints made to the Society;
- orders made against the member or undertakings given; and
- any information that comes to the Law Society in the course of considering a complaint or as a result of an investigation, proceeding or audit.

8. These changes have assisted members to understand the reasons they were identified as participants in Practice Review. They have also provided a more appropriate framework for referrals into the Practice Review program by staff in the Complaints, Audit and Investigations units. This framework has resulted in staff identifying, and the Chair of PDC&A approving, more candidates who would benefit from practice review.

Statistics for 2003 – 2005

Category	2003	2004	2005 (Estimated)
# of referrals from Discipline Orders/Undertakings	11	11	10
# authorizations by Chair of PDC&A	19	45	91
Subtotal	30	56	101
# of reviews conducted	45	50	113
# of Proposal Orders	2	3	6
# of Competence Hearings	N/A	N/A	2
# of active files at year end	50	83	90

Updated Roster of Practice Reviewers

10. The members who conduct practice reviews, are appointed pursuant to section 4 of By-law 24, which reads:

The standing committee of Convocation responsible for professional competence matters or Convocation on the recommendation of the committee shall appoint one or more persons to conduct reviews of members' practices under section 42 of the *Act*.

11. On April 12th, 2001 Convocation approved a roster containing the names of 72 Practice Reviewers. Convocation's approval of Practice Reviewers affords the reviewers the protection of section 9 of the *Law Society Act*, which reads:

> No action or other proceedings for damages shall be instituted against the Treasurer or any bencher, official of the Society or person appointed in Convocation for any act done in good faith in the performance or intended performance of any duty or in the exercise or intended exercise of any power under this Act, a regulation, a by-law or a rule of practiced and procedure, or for any neglect or default in the performance or exercise in good faith of any such duty or power.

12. It is important to periodically review the roster of practice reviewers to ensure quality and ongoing relevance of experience, and to add new participants who meet the requirements of the program. The Professional Development and Competence department has recently conducted such a review and developed an updated roster.

13. As is always the case, the department reviewed the roster by examining the record and evaluating the quality of previous reports of the existing Practice Reviewers. The list of members who have been authorized into the review process was analyzed in terms of their principal areas of practice, their geographic location and their gender. The same analysis was completed for the Practice Reviewers. Both lists were compared in order to isolate any "gaps" in geography, practice type and size.

14. It became clear that more Practice Reviewers were required for certain areas of law. This has been addressed by adding to the revised roster two practitioners in the area of real estate, one in family law, one in civil litigation, one in corporate commercial law and one who specializes in criminal law.

15. Finally, all lawyers on the revised roster were reviewed for acceptability with respect to their regulatory record at the Law Society (complaints, investigations and audits) and their LawPRO history.

16. An updated roster of 46 Practice Reviewers is set out in the attached chart.

Request to Committee

17. The Committee is requested to recommend to Convocation that it approve the updated roster of Practice Reviewers, which consists of both existing Practice Reviewers and recommended new Practice Reviewers. This approval will enable the program to match Reviewer expertise with the needs of the member participants and ensure that all Practice Reviewers are afforded the benefit of s. 9 of the *Law Society Act.*

Existing Practice Reviewers:

	Reviewer Name	Year of Call	Geographic Area	Area of Law
1.	Glenda Bishop	1981	Red Lake	Real Estate Corporate/Commercial
2.	Mark Castle	1978	Dundas	Real Estate Family/Matrimonial
3.	Michael Crane	1989	Toronto	Immigration
4.	Thomas Dart	1976	Barrie	Family/Matrimonial ADR/Mediation Services

5.	G. Ross Davis	1974	Toronto	Family/Matrimonial
6.	Carrol A. Dizenbach	1983	Newcastle	Family/Matrimonial Wills, Estates & Trusts
7.	Tilton Donihee	1975	Cornwall	Criminal Family/Matrimonial
8.	Mark Durward	1986	Hamilton	Real Estate Wills, Estates & Trusts
9.	Gordon Gauthier	1976	Cornwall	Real Estate Corporate/Commercial
10.	James Higginson	1977	Hamilton	Family/Matrimonial Bankruptcy/Insolvency Employment
11.	Roger Howson	1977	Peterborough	Real Estate Corporate/Commercial
12.	Jennifer Jenkins	1983	Whitby	Wills, Estates & Trusts
13.	Larry Konrad	1991	Brampton	Immigration
14.	Fred Knight	1958	Windsor	Civil Litigation
15.	James Little	1960	London	Real Estate Wills, Estates & Trusts
16.	David Lovell	1971	Owen Sound	Construction Corporate/Commercial Family/Matrimonial
17.	J. W. Makins	1973	London	Civil Litigation
18.	Wendy Malcolm	1982	Belleville	Family/Matrimonial
19.	Glenna McClelland	1981	Chesley	Family/Matrimonial
20.	Roderick McDowell	1976	Fort Erie	Immigration Family/Matrimonial
21.	Heather McGee	1991	Unionville	Family/Matrimonial Wills, Estates & Trusts
22.	M. James O'Grady	1963	Ottawa	Civil Litigation
23.	J. Richard Ottewell	1980	Goderich	Real Estate Corporate/Commercial
24.	Norman B. Pickell	1974	Goderich	Family/Matrimonial Real Estate Wills, Estates & Trusts
25.	John H. Reble	1972	Toronto	Other Administrative Civil Litigation
26.	Frank Ricci	1983	Leamington	Real Estate Corporate/Commercial
27.	Luigi Savone	1984	Nepean	Securities Wills, Estates & Trusts
28.	W.Graydon Sheppard	1972	Hamilton	Civil Litigation
29.	Rosemary Shoreman		St. George Brant	Systems Advisor
30.	E. Bruce Solomon	1979	Markham	Civil Litigation Family/Matrimonial
31.	B.P. Stelmach	1973	Whitby	Corporate/Commercial Wills, Estates and Trusts
32.	Donald V. Thomson	1973	Toronto	Real Estate Corporate/Commercial Wills, Estates & Trusts

33.	Thomas W. Troughton	1977	Kingston	Wills, Estates & Trusts Real Estate
34.	Anne Trousdale	1978	Kingston	Family/Matrimonial Wills, Estates & Trusts
35.	Peter Trousdale	1976	Kingston	Real Estate Wills, Estates & Trusts
36.	Thomas Uren	1974	London	Real Estate Wills, Estates & Trusts
37.	Victor Vandergust	1976	Collingwood	Real Estate Civil Litigation
38.	Bev Wexler	1979	Kenora	Criminal
39.	Roland J. Willis	1967	Mississauga	Family/Matrimonial Wills, Estates & Trusts
40.	Daniel L. Winbaum	1980	Windsor	Immigration Workplace Safety

EQUITY & ABORIGINAL ISSUES COMMITTEE/COMITÉ SUR L'ÉQUITÉ ET LES AFFAIRES AUTOCHTONES REPORT

Items for Information

- Guide to Developing a Law Firm Policy Regarding Accommodation Requirements – Update to Policy
- Public Education Events – 2005 Schedule

Equity and Aboriginal Issues Committee/
Comité sur l'équité et les affaires autochtones
May 26, 2005

Report to Convocation

Committee members:
Joanne St. Lewis (Chair)
Derry Millar (Vice-Chair)
Marion Boyd
Mary Louise Dickson
Dr. Sy Eber
Thomas G. Heintzman
Ronald D. Manes
Tracey O'Donnell
Mark Sandler
William J. Simpson

Purpose of Report: Decision and information

Prepared by the Equity Initiatives Department

(Josée Bouchard: 416-947-3984)

THE REPORT

Terms of Reference/Committee Process

7. The Committee met on May 12, 2005. Committee members participating were Joanne St. Lewis (Chair), Mary Louise Dickson, Dr. Sy Eber, Thomas G. Heintzman and Tracey O'Donnell. The following invited members also participated: Jonathan Batty (Member of the Equity Advisory Group (EAG)), Faisal Bhabha (Member of the EAG), Kelly Burke (Member of the EAG), Andrea Horton (Member of the EAG), Sonia Ouellet (Representative of the Association d'expression française de l'Ontario (AJEFO)), David Smagata (Chair of the EAG) and Katherine Hensel (Representative of Rotiio> taties Aboriginal Advisory Group). Staff members in attendance were Josée Bouchard, Katherine Haist, Sudabeh Mashkuri, Marisha Roman and Rudy Ticzon.

8. The Committee is reporting on the following matters:

Decision

- Appointment of Alternate Discrimination and Harassment Counsel (IN CAMERA)

Information

- Guide to Developing a Law Firm Policy Regarding Accommodation Requirements – Update of Policy
- Equity Public Education Events – 2005 Schedule

INFORMATION

GUIDE TO DEVELOPING A LAW FIRM POLICY REGARDING ACCCOMMODATION REQUIREMENTS

Background

31. In March 2001, Convocation approved the *Guide to Developing a Law Firm Policy Regarding Accommodation Requirements* (the March 2001 *Guide*). Based in part on the Ontario Human Rights Commission's Policy on Creed and the Accommodation of Religious Observances[1] and Policy and Guidelines on Disability and the Duty to Accommodate,[2] the March 2001 *Guide* sets out the legal duty to accommodate employees' creed and religious beliefs, disability, as well as gender and family status. The March 2001 Guide also presents a model policy or precedent that the legal

[1] *Policy on Creed and the Accommodation of Religious Observances* (Toronto: Ontario Human Rights Commission, October 20, 1996).
[2] *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: Ontario Human Rights Commission, March 22, 2001).

profession may use when developing procedures for requesting and granting accommodation.

32. The Equity Initiatives Department has recently updated the March 2001 Guide to include recent jurisprudence. The updated guide is entitled *Guide to Developing a Law Firm Policy Regarding Accommodation Requirements,* May 2005 (the May 2005 *Guide* is presented at Appendix 4). It has also restructured the document to make it consistent with other model policies adopted by the Law Society of Upper Canada. The model policy has also been revised to use plain language and modified to make it more practical to use.

33. On May 12, 2005, the Committee adopted the May 2005 Guide. The Committee presents the May 2005 Guide to Convocation for information.

EQUITY PUBLIC EDUCATION EVENTS 2005

34. The list of Upcoming Equity Public Education Events until June 2005 is presented at Appendix 5.

Appendix 1

BY-LAW 36

DISCRIMINATION AND HARASSMENT COUNSEL

Made: Amended:	June 22, 2001 July 26, 2001 September 28, 2001 March 25, 2004

DISCRIMINATION AND HARASSMENT COUNSEL

Appointment
1. (1) Convocation shall appoint a person as Discrimination and Harassment Counsel in accordance with section 2.

Same
(2) Convocation may appoint one or more persons as Alternate Discrimination and Harassment Counsel in accordance with section 2.1.

Term of office
(3) Subject to subsection (4), the Counsel and each Alternate Counsel hold office for a term not exceeding three years and are eligible for reappointment.

Appointment at pleasure
(4) The Counsel and each Alternate Counsel hold office at the pleasure of Convocation.

No appointment without recommendation
2. (1) Convocation shall not appoint a person as Counsel unless the appointment is recommended by the standing committee of Convocation responsible for matters relating to equity and diversity in the legal profession.

Vacancy in office
(2) When a vacancy exists in the office of Counsel, the committee shall conduct a search for candidates for appointment as Counsel in accordance with procedures and criteria established by the committee.

List of candidates
(3) At the conclusion of the search, the committee shall give Convocation a ranked list of at least two persons the committee recommends for appointment as Counsel, with brief supporting reasons.

Additional candidates
(4) If the committee gives Convocation a list of persons it recommends for appointment, Convocation may require the committee to give Convocation a list of additional persons who are recommended by the committee for appointment.

Recommendations considered in absence of public
(5) Convocation shall consider the committee's recommendations in the absence of the public.

No appointment without recommendation
2.1 (1) Convocation shall not appoint a person as Alternate Counsel unless the appointment is recommended by the standing committee of Convocation responsible for matters relating to equity and diversity in the legal profession.

Vacancy in office
(2) If the committee wishes Convocation to appoint another person as Alternate Counsel, the committee shall give Convocation, from the most recent list of persons the committee recommended to Convocation for appointment as Counsel, a ranked list of at least two persons the committee recommends for appointment as Alternate Counsel, with brief supporting reasons.

Same
(3) If the committee is not able to give Convocation, from the most recent list of persons the committee recommended to Convocation for appointment as Counsel, a ranked list of at least two persons the committee recommends for appointment as Alternate Counsel, the committee shall, conduct a search for candidates for appointment as Alternate Counsel in accordance with procedures and criteria established by the committee; and at the conclusion of the search, the committee shall give Convocation a ranked list of at least two persons the committee recommends for appointment as Alternate Counsel, with brief supporting reasons.

Additional candidates
(4) If the committee gives Convocation a list of persons it recommends for appointment, Convocation may require the committee to give Convocation a list of additional persons who are recommended by the committee for appointment.

Recommendations considered in absence of public
(5) Convocation shall consider the committee's recommendations in the absence of the public.

Application of ss. 2 and 2.1
3. If Convocation, on the recommendation of the committee, reappoints the Counsel, subsections 2 (2) to (4) do not apply; or reappoints an Alternate Counsel, subsections 2.1 (2) to (4) do not apply.

Function of Counsel
4. (1) It is the function of the Counsel,
(a) to assist, in a manner that the Counsel deems appropriate, any person who believes that he or she has been discriminated against or harassed by a member or student member;
(b) to assist the Society, as required, to develop and conduct for members and student members information and educational programs relating to discrimination and harassment; and
(c) to perform such other functions as may be assigned to the Counsel by Convocation.

No authority to conduct investigation
(2) Despite clause (1) (a), the Counsel has no authority to require an investigation to be conducted or to conduct an investigation under section 49.3 of the Act.

Access to information
(3) Except with the prior permission of the Secretary, the Counsel is not entitled to have any information in the records or within the knowledge of the Society respecting a member or student member.

Annual and semi-annual report to Committee
5. (1) Unless the committee directs otherwise, the Counsel shall make a report to the committee,
(a) not later than January 31 in each year, upon the affairs of the Counsel during the period July 1 to December 31 of the immediately preceding year; and
(b) not later than September 1 in each year, upon the affairs of the Counsel during the period January 1 to June 30 of that year.

Report to Convocation
(2) The committee shall submit each report received from the Counsel to Convocation on the first day following the deadline for the receipt of the report by the Committee on which Convocation has a regular meeting.

Confidentiality
6. (1) The Counsel shall not disclose,
(a) any information that comes to his or her knowledge as a result of the performance of his or her duties under clause 4 (1) (a); or
(b) any information that comes to his or her knowledge under subsection 4 (3) that a bencher, officer, employee, agent or representative of the Society is prohibited from disclosing under section 49.12.

Rules of Professional Conduct
(2) For greater certainty, clause (1) (a) prevails over the Society's Rules of Professional Conduct to the extent that the Rules require the Counsel to disclose to the Society the information mentioned in clause (1) (a).

Exceptions
(3) Subsection (1) does not prohibit,
(a) disclosure required in connection with the administration of the Act, the regulations, the by-laws or the rules of practice and procedure;
(b) disclosure of information that is a matter of public record;
(c) disclosure of information where the Counsel has reasonable grounds to believe that there is an imminent risk to an identifiable individual or group of individuals of death, serious bodily harm or serious psychological harm that substantially interferes with the individual's or group's health or well-being and that the disclosure is necessary to prevent the death or harm;
(d) disclosure by the Counsel to his or her counsel; or
(e) disclosure with the written consent of all persons whose interest might reasonably be affected by the disclosure.

Alternate Counsel: Counsel unable to act
7. (1) If the Counsel for any reason is unable to perform the function of the Counsel during his or her term in office, an Alternate Counsel shall perform the function of the Counsel.

Selection of Alternate Counsel
(2) The Alternate Counsel mentioned in subsection (1) shall be chosen by the Counsel or, if the Counsel is unable to do so, by the Chief Executive Officer.

Alternate Counsel: Counsel office vacant
(3) Despite subsection (1), if there is a vacancy in the office of the Counsel, an Alternate Counsel chosen by the committee shall perform the function of the Counsel until a Counsel is appointed under section 1.

Annual and semi-annual report to committee
(4) If the committee directs, an Alternate Counsel shall make any report mentioned in section 5.

Application of s. 6
(5) Section 6 applies to an Alternate Counsel while performing the function of the Counsel.

Appendix 2

CRITERIA FOR APPOINTMENT
DISCRIMINATION & HARASSMENT COUNSEL

The Committee approved the following criteria for appointment of the Discrimination and Harassment Counsel:

The ability to converse in French and English is an asset.

The Discrimination & Harassment Counsel will also have:

a. Knowledge of equality rights legislation (eg. *Ontario Human Rights Code*), the *Rules of Professional Conduct* and issues faced by Aboriginal, Francophone and equality-seeking communities in dealing with the legal profession.
b. Knowledge of alternative dispute resolution techniques including mediation, complaints investigations and legal actions through courts.
c. Ability to apply alternative dispute resolution techniques.

d. Knowledge of resources and options available to assist complainants who allege harassment or discrimination.
e. Experience in identifying trends and making recommendations about policies, programs and services to promote non-discrimination.
f. The ability to assist complainants to take action to resolve complaints.
g. Experience in providing services on a one-on-one basis.

Appendix 3

PROCEDURES FOR APPOINTMENT OF DHC

Pursuant to By-Law 36, the Committee approved the following procedures for the search of the Discrimination and Harassment Counsel and of Alternate Discrimination and Harassment Counsel:

a. The Law Society through Human Resources and Equity Initiatives acting jointly will initiate and carry out recruiting for this position.
b. The CEO may elect to participate in any aspect of the recruitment process, including the interview and the decision process.
c. Notice of the position will be posted through the Law Society website, the Ontario Reports and to the general public.
d. A Recruitment Committee composed of the following individuals will assist in identifying a shortlist of candidates, undertaking the first interview process and recommending candidates for the Committee's approval or for second interviews:

    i. One representative of the Committee;
    ii. One representative of the Equity Advisory Group;
    iii. One representative of the public, selected by the other members of the Recruitment Committee;
    iv. The Equity Advisor;
    v. At least one staff of the Law Society's Human Resources Department;
    vi. The CEO, at his or her discretion.

e. Where the Recruitment Committee so decides, the Second Interview Committee composed of the following individuals will assist in conducting second interviews with recommended candidates:

    i. One representative of the Committee (ideally a representative who is not a member of the Recruitment Committee);
    ii. One representative of the Equity Advisory Group (ideally a representative who is not a member of the Recruitment Committee);
    iii. One representative of the public, selected by the other members of the Second Interview Committee;
    iv. The Equity Advisor;
    v. At least one staff of the Law Society's Human Resources Department;
    vi. The CEO, at his or her discretion.

Appendix 4

THE LAW SOCIETY OF UPPER CANADA

GUIDE TO DEVELOPING A LAW FIRM POLICY REGARDING ACCOMMODATION REQUIREMENTS

May 2005

INTRODUCTION

Many barriers to the equal participation of members of Francophone, Aboriginal and equality-seeking communities[1] in the legal profession exist because of inadvertence or lack of awareness of special needs, and not because people have deliberately sought to discriminate. Law firms and the legal profession have the responsibility to remove barriers and to adopt proactive measures to attain equality and inclusiveness. The Ontario *Human Rights Code*[2] (the *Code*) and the *Rules of Professional Conduct*[3] require these changes in order to give meaning to the rights to equality and freedom from discrimination.

The duty to accommodate applies to all the grounds enumerated in the *Code*. However, in the context of employment and the provision of services, the most common requests for accommodation are based on disability, family responsibilities, pregnancy and/or creed.

Historically, persons with disabilities have borne virtually all the costs, both financial and personal, of their special needs. Accommodation means that law firms should adopt a proactive approach in undertaking systemic accessibility audits, developing action plans and implementing the necessary changes to make facilities, procedures and services accessible to members, staff and clients with disabilities. Accommodation can also be understood as a means of removing the barriers that prevent persons with disabilities from enjoying equality of opportunity in a way that is sensitive to their individual circumstances so that we all may benefit from their active participation in the community.

For persons with family responsibilities, male as well as female working parents increasingly expect to play an active role in child rearing. With the aging of the population, most employees face the likelihood that their parents will require some care. Advances in medicine and in technology allow for the practice of law by many who previously would have found this impossible. A firm that recognizes and responds to these new realities will enhance its ability to recruit and retain lawyers of its choice. The costs of recruitment and training can as a result be

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[1] The Law Society defines members of "Equality-seeking communities" as people who consider themselves a member of such a community by virtue of, but not limited to, ethnicity, ancestry, place of origin, colour, citizenship, race, religion or creed, disability, sexual orientation, marital status, same-sex partnership status, age, family status and/or gender.

[2] R.S.O. 1990, c. H.19.

[3] Adopted by Convocation of the Law Society of Upper Canada on June 22, 2000, effective November 1, 2000, available online: http://www.lsuc.on.ca/services/RulesProfCondpage en.jsp.

reduced, and lower turnover among lawyers means better realization of the firm's investment in its intellectual capital. The firm develops a reputation as progressive.

The duty to accommodate also arises in the context of religious and spiritual beliefs and practices. Requests for accommodation of religious and spiritual practices may affect break policies, flexible scheduling, rescheduling, religious leaves and dress codes. In March 2005, the Law Society of Upper Canada recognized the importance of respecting religious and spiritual beliefs by unanimously adopting *A Statement of Principles of the Law Society of Upper Canada on Respect for Religious and Spiritual Beliefs*. The statement of principles condemns all forms of religious intolerance and undertakes to promote and support religious understanding and respect both inside and outside the legal profession.

Benefits of adopting an accommodation policy include the following:

1. Systemic accessibility audits and implementation of action plans assist in promoting public relations with the community.
2. The firm states its commitment to address key barriers that affect equality in employment and in the provision of services.
3. The policy is an indication that the firm strives to provide a workplace and services free of discrimination.
4. The policy is a proactive way of providing the means for members, staff and clients who require accommodation, thereby enlisting the resources of a diverse workforce and providing services to a diverse community.
5. The firm gains from the improved morale and loyalty encouraged by the arrangements.
6. All members and staff of the firm can work to their full potential.
7. Absenteeism is reduced.
8. Members and staff of the firm can schedule their lives to facilitate family responsibilities or religious beliefs and practices.

The purpose of this Guide is to assist law firms in accommodating differences that arise from the personal characteristics enumerated in the Code and under Rule 5.04 of the *Rules of Professional Conduct.*

The document is divided into the following parts:

Part I –	Background information including why law firms need written policies and information about the legal profession.
Part II –	Effective implementation and review of the policy
Part III -	Model policy
Part IV -	Legal requirements and professional responsibility
Part V -	Glossary of terms
Part VI-	*Rules of Professional Conduct*

PART I – BACKGROUND

WHY LAW FIRMS NEED WRITTEN POLICIES

The Ontario Human Rights Commission has stated that "[t]he best defence against human rights complaints is to be fully informed and aware of the responsibilities and protections

included in the *Code*".[4] Law firms can achieve this by developing written policies on equality issues, including an accommodation policy and procedures that provide for accessibility audits and a process whereby individual needs can be identified and accommodated. It is advantageous to a firm to adopt written policies for a number of reasons:

1. Written policies encourage respect for the dignity of all individuals working at the law firm.
2. Written policies show that the law firm's management takes seriously its legal and professional obligations. They also minimize the risk of workplace harassment or discrimination and of harm to individuals working at the firm
3. Many firms provide benefits over and above those mandated by law but do so on an ad hoc basis. Relying on a discretionary system often causes concern among individuals working at the firm about whether decisions are being made on an even-handed, consistent basis. A written policy is indicative of a firm's commitment to transparency in the provision of employment and social benefits.
4. A written policy reflects the tenor of a firm's culture. It can signal to those working at the firm that inquiries about its policies and benefits are encouraged and may be made without risk of embarrassment.
5. Written policies on equality issues encourage respect for and acceptance of individuals from diverse groups, such as those protected under the Code and the Rules. In the context of employment, both the Code and the Rules protect against harassment and discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, same-sex partnership status or disability.[5] The Code and the Rules also impose a duty to accommodate.
6. The existence of written policies allows the law firm to communicate its commitment to equality principles to people outside of the law firm, such as prospective recruits and clients. Written policies may also have value as a recruitment tool that serves to signal the firm's commitment to a discrimination and harassment-free workplace.
7. A carefully drafted written policy may reduce the necessity of an individual seeking external legal remedies, as well as the risk that a law firm will be held liable for such unlawful harassment or discrimination.
8. Written policies may provide the necessary focus for education programs on preventing and responding to subtle or systemic workplace harassment and discrimination.

THE LEGAL PROFESSION

Tremendous progress has been made in the last decade to increase diversity and promote equality in the legal profession. However, studies undertaken by the law Society of Upper

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[4] *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: Ontario Human Rights Commission, November 23, 2000) at 41, available online: http://www.ohrc.on.ca/english/publications/disability-policy.pdf.

[5] While the *Code* does not specifically prohibit harassment on the ground of sexual orientation, the Ontario Human Rights Commission accepts such complaints as discrimination because of sexual orientation. See *Policy on Discrimination and Harassment Because of Sexual Orientation* (Toronto: Ontario Human Rights Commission, January 11, 2000) at 9, available online: http://www.ohrc.on.ca/english/publications/sexual-orientation-policy.pdf.

Canada and other organizations indicate that individuals from Francophone, Aboriginal, or equality-seeking communities still face challenges in the legal profession:

1. In 1991, Professor Fiona Kay published a survey of lawyers called to the Bar between 1975 and 1990.[6] Seventy percent of women respondents said they experienced sex discrimination in the course of their work as lawyers. Ten percent of the respondents reported having personally experienced racial or ethnic discrimination in the course of their work as lawyers and seventeen percent reported occurrences of racial or ethnic discrimination against others. Six years later, Professor Kay undertook a second survey with the same cohort of lawyers. Her report *Barriers and Opportunities Within Law* compared the success of male and female lawyers and once again confirmed the existence of inequality within the legal profession.[7] Professor Kay surveyed the same cohort of lawyers six years later. The report *Turning Points and Transitions*[8] , released in 2004, revealed considerable advancement in the career mobility of both men and women involved in the survey, but also noted that significant gaps remain between men and women in salaries, promotion opportunities, and levels of job satisfaction.

2. In 2001, the Law Society conducted a survey of students who had undergone articling recruitment for 2001-2002 to evaluate the frequency that firms asked inappropriate or discriminatory questions. Thirty percent of the students indicated a belief that their membership or association with a group influenced the questions asked during interviews. One-fifth of the respondents reported that they were asked questions and subjected to offensive remarks that constituted sexual harassment or discrimination on the basis of sex, marital status, socio-economic status and political affiliation among others. In order to address this issue, the Law Society publishes guidelines for the legal profession on hiring practices.[9]

3. Each year, a high percentage of candidates for articling find articling placements by the end of the articling term. For example, ninety seven percent of all 2003 Bar Admission Course students had secured an articling placement by the end of the articling term in June 2004. However, the articling placement rate for students who self-identified as being from a Francophone, Aboriginal and/or an equality-seeking community (Disability, Gay/Lesbian, Mature, Visible Minority) remained at 90%.[10]

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[6] F.M. Kay, *Transitions in the Ontario Legal Profession, A Survey of Lawyers Called to the Bar Between 1975 and 1990* (Toronto: Law Society of Upper Canada, 1991).
[7] F.M. Kay, N. Dautovich and C. Marlor, *Barriers and Opportunities Within Law: Women in a Changing Legal Profession. A Longitudinal Survey of Ontario Lawyers 1990-1996* (Toronto: Law Society of Upper Canada, November 1996).
[8] F.M. Kay, C. Masuch, & P. Curry, *Turning Points and Transitions: Women's Careers in the Legal Profession* (Toronto: Law Society of Upper Canada, September 2004). Available online: http://www.lsuc.on.ca/equity/pdf/oct2604 turning points.pdf.
[9] *Summary of Student Hiring Practice Guidelines*, May 2003, available online: http://education.lsuc.on.ca/Assets/PDF/apo/polSummaryStuHirePractGuidelines2003.pdf.
[10] *Placement Report 2003/2004 of Students Enrolled in the 46th BAC 2003* (Toronto: Law Society of Upper Canada, July 2004), available online: http://education.lsuc.on.ca/Assets/PDF/apo/repPlacementReport2003-04.pdf.

4. In 2004, the Law Society released the results of a study that looked at evidence from the Canadian Census for the purpose of comparing the representation of various communities in the legal profession as compared to the general population. This study documented the increasing diversity of the legal profession, but noted at the same time that a number of issues remain. The representation of Aboriginal and visible minority lawyers within the Ontario legal profession is still below their representation in the Ontario population. In addition, although women are now entering the legal profession in larger numbers than ever before, some gender disparity continues, especially at later points in the careers of lawyers.[11]

5. In 2004, the Law Society released a report, *Diversity and Change: The Contemporary Legal Profession in Ontario*[12] , which focused on the entry and advancement of diverse groups into the legal profession. The report noted that racialized community members remain underrepresented across work settings relative to their representation in the Canadian population. The report indicated that racialized lawyers are slightly more likely to practice criminal, immigration and poverty law. However, racialized lawyers had approximately the same likelihood of practicing civil litigation and corporate and commercial law as non-racialized lawyers. The same report noted that women and racialized lawyers are less likely than men and non-racialized lawyers to have earnings at the higher end of the income range, and that men and non-racialized lawyers are more likely to occupy senior positions and to be partners. Both reports highlighted concerns around the need for better work-life balance and flexible workplaces.

6. The Discrimination and Harassment Counsel (DHC) Program was established by Convocation in 1999 to provide services to individuals who allege harassment or discrimination by a lawyer. In her Semi-Annual Report to Convocation for the period of July 1 to December 31, 2004, the DHC noted that 234 individuals contacted the DHC. Sixty-seven per cent of contacts (157 contacts) were within the mandate of the DHC, and of those, 50 per cent were complaints regarding harassment or discrimination. Members of the public accounted for 53 per cent of complaints received by the DHC, and lawyers accounted for 47 per cent. Women accounted for 65 per cent of complaints received by the DHC.[13]

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[11] M. Ornstein, *The Changing Face of the Ontario Legal Profession,* 1971-2001 (Toronto: Law Society of Upper Canada, October 2004), available online: http://www.lsuc.on.ca/news/pdf/convoct04 ornstein.pdf. See also earlier report: Michael Ornstein, Director of the Institute for Social Research of York University, *Lawyers in Ontario: Evidence from the 1996 Census, A Report for the Law Society of Upper Canada* (Toronto: Law Society of Upper Canada, January 2001).

[12] F.M. Kay, C. Masuch, & P. Curry, *Diversity and Change: The Contemporary Legal Profession in Ontario* (Toronto: Law Society of Upper Canada, September 2004), available online: http://www.lsuc.on.ca/equity/pdf/oct2604 diversity and change.pdf.

[13] C. Petersen, *Report of the Activities of the Discrimination and Harassment Counsel for the Law Society of Upper Canada for the Period of July 1 to December 31, 2004* (Toronto: Law Society of Upper Canada, 2004). Semi-Annual Reports available online: http://www.dhcounsel.on.ca/.

In light of the above-noted studies, the Law Society has undertaken initiatives to promote equality and diversity within the legal profession. The position of the Law Society is summarized in the *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession.*[14]

MODEL POLICIES DEVELOPED BY THE LAW SOCIETY

In the last decade, the Law Society has adopted a number of model policies to promote equality within the legal profession. All model policies are available on hard copy in French and English by contacting the Equity Initiatives Department at (416) 947-3300 ext 2153 or 1-668-7380 ext. 2153 or equity@lsuc.on.ca. These include:

- GUIDE TO DEVELOPING A POLICY REGARDING WORKPLACE EQUITY IN LAW FIRMS[15]

To assist law firms in meeting their obligation to avoid discrimination in employment practices, this guide outlines a model policy for the promotion of workplace equity. The guide includes reference to employment practice topics in the areas of recruitment, interviewing job candidates, hiring and promotion, the right to equal opportunities at work, professional development, accommodation, evaluation, mentors and compensation.

Available at http://www.lsuc.on.ca/equity/models.jsp

Available in French at http://www.lsuc.on.ca/equity/pdf/policy1_fr.pdf

- ACCOMMODATION OF CREED AND RELIGIOUS BELIEFS, GENDER RELATED ACCOMMODATION AND ACCOMMODATION FOR PERSONS WITH DISABILITIES: LEGAL DEVELOPMENTS AND BEST PRACTICES[16]

This document is a companion piece to this Guide to Developing a Law Firm Policy Regarding Accommodation Requirements. It includes a summary of best practices and a comprehensive legal analysis of the duty to accommodate.

Available online:
http://www.lsuc.on.ca/equity/pdf/mar1705_developments_best_practices.pdf

- GUIDE TO DEVELOPING A POLICY REGARDING FLEXIBLE WORK ARRANGEMENTS[17]

One means of fulfilling an employer's legal duty to accommodate employees with family responsibilities or disabilities is through the adoption of flexible work arrangements. This guide

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[14] *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession* (Toronto: Law Society of Upper Canada, 1997), available online: http://www.lsuc.on.ca/equity/pdf/bicentennial nov0503.pdf.
[15] *Guide to Developing a Policy Regarding Flexible Work Arrangements* (Toronto: Law Society of Upper Canada, updated March 2003).
[16] *Accommodation of Creed and Religious Beliefs, Gender Related Accommodation and Accommodation for Persons with Disabilities: Legal Developments and Best Practices* (Toronto: Law Society of Upper Canada, March 2001).
[17] *Guide to Developing a Policy Regarding Workplace Equity in Law Firms* (Toronto: Law Society of Upper Canada, updated March 2003).

outlines various alternate work arrangements for both associates and partners of law firms in addition to outlining responses to the challenges presented by each option.

Available at http://www.lsuc.on.ca/equity/models.jsp

Available in French at http://www.lsuc.on.ca/equity/pdf/policy2_fr.PDF

- PREVENTING AND RESPONDING TO WORKPLACE HARASSMENT AND DISCRIMINATION: A GUIDE TO DEVELOPING A POLICY FOR LAW FIRMS[18]

The Law Society published this document in 2002 to guide law firms in taking a proactive approach and having an effective complaints mechanism in place so that they, as employers, can limit their vicarious liability for discrimination and harassment in the workplace. The guide includes an overview of legal requirements, a discussion of policy and implementation issues, a sample model policy for law firms, and step by step complaints procedures for both medium/large and small law firms. Model forms are provided for convenience.

Available at http://www.lsuc.on.ca/equity/models.jsp

Available in French at http://www.lsuc.on.ca/equity/pdf/modelharassment3_fr.pdf

- SEXUAL ORIENTATION AND GENDER IDENTITY: CREATING AN INCLUSIVE WORK ENVIRONMENT, A MODEL POLICY FOR LAW FIRMS AND OTHER ORGANIZATIONS[19]

The Law Society published this document in 2004 to assist law firms in fostering a work environment in which employment and pension benefits are conferred in a non-discriminatory manner and in which participation in the social culture of the firm is a viable option for all individuals working there. The Law Society of Upper Canada envisions that adoption and implementation of this policy will contribute to law firms becoming a place in which an individual's choice to keep confidential or to disclose information about his or her sexual orientation or gender identity neither results in discrimination or harassment nor detracts from either the individual's dignity and self-worth or value to the firm.

Available at http://www.lsuc.on.ca/equity/models.jsp

Available in French at http://www.lsuc.on.ca/equity/pdf/aug0604_samesexmodel_fr.pdf

PART II- EFFECTIVE IMPLEMENTATION AND REVIEW OF THE POLICY

ESTABLISHING A DRAFTING COMMITTEE

The starting point is to establish a committee to draft the policy. The membership of the committee should be diverse. To the extent possible, the committee should be composed of partners and employees of both sexes and of differing age, ability, ethnic origin, marital and partnership status, gender identity and sexual orientation. If there are lawyers or individuals in

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[18] *Preventing and Responding to Workplace Harassment and Discrimination: A Guide to Developing a Policy for Law Firms* (Toronto: Law Society of Upper Canada, March 2002).
[19] *Sexual Orientation and Gender Identity: Creating an Inclusive Work Environment, A Model Policy for Law Firms and other Organizations* (Toronto: Law Society of Upper Canada, 2004).

the law firm with expertise in the relevant employment and discrimination law, one or more should be included.

It is most important that the committee include respected individuals of the law firm who appreciate the importance of the issues to be addressed and who will be able to communicate these matters to others within the law firm. The composition of the committee is critical to the credibility of the process and the policies that are produced.

DEVELOPING A POLICY

Committee members should educate themselves about the applicable law and become familiar with existing firm practices and policies that may be relevant.

A consultative process should be followed.

The committee should circulate a draft policy throughout the law firm for comments. This step is important because it generates support and allows for useful insight. It is important to explain the rationale for introducing such a policy, as well as the effect of the proposed policy on existing arrangements.

IMPLEMENTING THE POLICY

The initial presentation of the policy and a clear statement of management support are critical to its success.

Once the policy is adopted, it should be distributed to all individuals working at the law firm with a covering memorandum emphasizing the strong support of management. The letter should outline that the right to be free from harassment or discrimination in the workplace is protected by human rights legislation, and is an important value within Canadian society. It is essential that individuals working at the law firm understand the negative impact that harassment and discrimination has on the dignity of employees as well as on workplace productivity and the importance of accommodating differences.

Factors that may cause opposition within the workplace should be identified, and discussed frankly. One example may be the misconception that such policies outlaw personal relationships between members of the law firm, and create a “chilling” anti-social atmosphere or that accommodations are always costly measures. These concerns should be recognized and addressed at the outset through discussion of the purposes and goals of workplace policies.

The initial presentation of the policy combined with a clear statement of senior and managing partners’ support are critical to its success.

COMMUNICATING THE POLICY

If the law firm has a handbook of policies or if policies are available on-line, the law firm’s accommodation policy should be included. If the law firm does not have a handbook of policies, or if it does not make its policies available on-line, the law firm may wish to distribute copies of the policy directly to each individual working at the firm, and/or post copies of the policy in a common area.

The policy should be made available to all individuals who are interviewed for a position at the firm. Such a practice will make a strong statement about the firm's support for the policy and its objectives. Further, the Code applies to the provision of terms and conditions of employment, recruiting, application forms, interviews and promotions. Firms may also wish to publicize the existence of the policy in their recruitment materials.

REVIEWING, EVALUATING AND REVISING THE POLICY

A committee of the law firm should have the responsibility to review and revise the policy on a periodic basis. The committee will also attempt to identify barriers that might affect members of the Aboriginal, Francophone and equality-seeking communities. The first review should take place after there has been sufficient time to evaluate its operation. The committee should maintain a confidential accommodation-related information collection process.

The mandate of the committee should include an evaluation of whether the policy has been fairly implemented.

The goal of the review process is to ensure that the policy meets the needs of the law firm and of its members, staff and clients.

Individuals in the law firm should be encouraged to communicate their comments on the policy to the committee, either on an ongoing basis, or during the course of the review.

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The pages that follow are a precedent for a policy that firms may adapt for their own use. In some cases, a firm may wish to add details or examples from the endnotes to the actual text of its own policy.

The precedent addresses the most common situation: a firm composed of partners, associates, and other staff who are not subject to a collective agreement. Where a workplace is governed by a collective agreement, modifications may need to be made to the policy, and possibly to the collective agreement.

The Accommodation Policy is simply that: a precedent. It is intended to provide guidance, rather than to represent the ultimate or ideal policy. A firm will need to design its own policy, tailoring the recommended model to its own circumstances.

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PART III – MODEL POLICY

ACCOMMODATION POLICY FOR [NAME OF FIRM][1]

STATEMENT OF PRINCIPLES

1. The firm is committed to providing services and a working environment in which all individuals are treated with respect and dignity. Each individual has the right to

[1] When drafting its own policy, a legal organization may wish to substitute "the Organization", "the Non-Profit Organization": "the Legal Clinic" or other relevant terminology where the words "the firm" appear throughout the document.

receive services and to work in a professional atmosphere that promotes equal opportunities and prohibits discriminatory practices.

2. Discrimination in employment or in the delivery of services on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status, same-sex partnership status or disability is illegal. The Ontario *Human Rights Code* and Rules 5.03 (Sexual Harassment) and 5.04 (Discrimination) of the Law Society of Upper Canada *Rules of Professional Conduct* prohibit discrimination.

3. The firm acknowledges that treating people identically is not synonymous with treating them equally. Substantive equality requires the accommodation with dignity of differences that arise from the personal characteristics cited in the *Code*. If a requirement, qualification or practice creates difficulty for an individual because of factors related to the grounds listed in the *Code*, the duty to accommodate arises up to the point of undue hardship.

4. The *Code* views the firm as a single employer, and "undue hardship" will be assessed in a manner consistent with the resources of the entire firm.

PURPOSES

5. The purposes of this policy are to:
   a. Set the principles and the practice guidelines in respect of accommodation;
   b. Set out in written form the procedures and strategies for accommodation for the firm as an employer and as a service provider;
   c. Ensure conformity with other firm policies and procedures.

APPLICATION OF THE POLICY

6. This policy applies to all members and staff of the firm, persons seeking services and persons applying for employment.

7. For the purpose of this policy, "members of the firm" includes associates, partners, articling students and law clerks.

8. For the purpose of this policy, "persons seeking services" will be referred to as "clients of the firm".

9. This policy applies to all firm locations. The nature of the specific accommodations may vary from site to site.

10. The policy applies to the workplace (including recruiting, application forms, interviews, promotions and leaves of absence) and to services offered by the firm.

SCOPE OF THE DUTY TO ACCOMMODATE

11. The duty to accommodate applies to all grounds of discrimination under the *Code*: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex,

sexual orientation, age (in the context of employment, between age 18 and 65), record of offences (in the context of employment only), marital status, family status, same-sex partnership status or disability.

12. The following grounds are raised more frequently in the context of accommodation and are defined below:

a. Disability
b. Creed/religion
c. Pregnancy
d. Family responsibilities or family status

13. Creed or religion means the sincerely held and/or observed religious or spiritual beliefs and practices. It is a professed system of faith, beliefs and observances or worship. A belief in a God or gods, or a single Supreme Being or deity is not a requisite.

14. Family status means the status of being in a parent and child relationship.

15. Disability means that the person has or has had, or is believed to have or has had:

a. Any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness;[2]
b. A condition of mental impairment or a developmental disability;
c. A learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language;
d. A mental disorder; or
e. An injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*.

16. Accommodation will not be provided if it imposes undue hardship on the firm. This determination will be made on a case-by-case basis, by following the procedures established below.

17. A one-time expenditure for some forms of accommodation may be too onerous on the firm. Therefore, in certain situations, accommodation may be provided on an interim basis or may be phased-in, providing the time frame is reasonable. The appropriateness of an interim or phased-in accommodation depends on an undue hardship analysis of the particular case.

CONFIDENTIALITY

18. To protect the interests of the requester, all those considering requests for accommodation will hold in strict confidence all information concerning the

[2] Includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device.

request for accommodation, including records of the request, contents of meetings, interviews and other relevant material and shall not divulge any information relating to the request unless expressly authorized by the requester or required by law to do so.

THE ACCOMMODATION COMMITTEE

19. An Accommodation Committee is appointed by [the Executive Committee of the law firm]. The members of the Accommodation Committee is appointed for a term of [3] years, renewable by the [Executive Committee of the law firm]. The Accommodation Committee has [no less than three members of the firm. To the extent possible, the committee should be composed of partners, associates, and other staff of both sexes and of differing age, race, ethnic origin, family status, sexual orientation, and religion, as well as individuals with disabilities.]

20. The Accommodation Committee will, when necessary, consult with the [name of health and safety committee of the law firm], or other concerned third party, in its implementation of the policy. The Accommodation Committee will uphold the duty of confidentiality as required by this policy.

ORGANIZATIONAL STRATEGIES

21. The Accommodation Committee of the firm will undertake regular systemic accessibility audits of the firm including its policies, procedures and practices, its structural, architectural and environmental elements and its equipment (including technological and communication equipment).

22. The firm will implement the necessary changes to make facilities, procedures and services accessible to members, staff and clients of the firm by developing and implementing accessibility plans.

23. The Accommodation Committee of the firm will maintain written records concerning its planning sessions and its accommodation practices.

PROCEDURE TO REQUEST AN INDIVIDUALIZED ACCOMMODATION
Responsibilities of the Individual Requesting an Accommodation

24. To make a request for an accommodation under this policy, an individual must follow the following procedure:
    a. An employee will make the request for accommodation to his or her immediate manager. A client will make the request for accommodation to the service provider.
    b. Whenever possible, the requester will provide the notice of the request in writing and allow a reasonable time for reply.
    c. The requester is encouraged to identify the ground or grounds, for example disability, religion or family responsibility/status, under which he or she is requesting the accommodation.

d. The requester will explain why the accommodation is required and provide enough information to confirm the existence of a need for accommodation and the measures of accommodation required.[3]
e. The requester will provide suitable verifiable information concerning the ground(s) at issue (e.g. appropriate documentation and assessment of a disability), as requested by the immediate manager or service provider.
f. A requester who requests an accommodation because of a disability and believes that he or she is capable of doing the essential requirements of the position or function should indicate this to the immediate manager or service provider.
g. The requester will act in good faith and cooperate in obtaining necessary information and will participate in discussions about solutions.
h. The requester will meet agreed upon performance standards once accommodation is provided.

Responsibilities of Individuals who Consider the Request

25. When someone requests an accommodation under this policy, the person considering the request has the responsibility to assess the need for accommodation. He or she will follow the procedures listed below.
    a. The person considering the request will respect the dignity of the employee requesting the accommodation. This means acting in a manner that recognizes the privacy, confidentiality, comfort, autonomy, and self-esteem of the employee.
    b. The person considering the request will accept an employee's request for accommodation in good faith unless there are legitimate reasons for acting otherwise.
    c. The person considering the request will consult the employee and consider any suggestions offered by him or her in arriving at a strategy for accommodation.
    d. The person considering the request will request only information that is reasonably necessary to make the accommodation.
    e. The person considering the request will deal with accommodation requests in a timely way.
    f. The person considering the request will consider alternatives if the request cannot be fully accommodated.
    g. The person considering the request will obtain expert opinion or advice when required.
    h. When a person with a disability indicates that he or she is capable of doing the essential requirements of the position or function, the person considering the request, with the input of the requester, will determine what is "essential" to the position or function and identify possible alternatives to perform the position in a satisfactory way. The person considering the request will establish on an objective basis whether the person's disability renders him or her incapable of fulfilling the essential

[3] There may be circumstances where a person is unable, due to the nature of his or her disability, to identify or communicate accommodation needs. This issue sometimes arises with respect to persons with mental illnesses. In circumstances where a person is clearly unwell, it may be appropriate to offer assistance and accommodation, even in the absence of an accommodation request.

requirements of the position or function. If the requester cannot perform the essential requirements, the person considering the request will explore how to accommodate the requester to enable performance of the essential requirements of the position or function.

i. The person considering the request will maintain confidentiality as defined in this policy.
j. The person considering the request will maintain a record of accommodation requests and actions taken.
k. The person considering a request may dispense or alter a requirement or practice of the firm if it was adopted for a purpose that is not connected to the function, it is not imposed honestly or in good faith or it is not reasonably necessary to the accomplishment of the function.

26. The person considering the request will refer the accommodation request, with the consent of the requester, to the Accommodation Committee in the following circumstances:

    a. When the person considering the request is of the opinion that the accommodation request should be rejected;
    b. When the person considering the request is uncertain as to whether the accommodation should be granted; or
    c. When the person considering the request requires advice on how to accommodate the requesting individual.

27. The requester may refer, at any stage of the process, his or her request for accommodation to the Accommodation Committee.

28. All requests presented to the Accommodation Committee should be made in writing.[4] All documentation and information collected by the person considering the request will be transferred, with the express consent of the requester, to the Accommodation Committee.

29. The Accommodation Committee may grant a request, deny a request or propose an alternative to the request.

Undue Hardship

30. Accommodation will be offered to the point of undue hardship.

31. The Managing Partner will make all decisions regarding whether the accommodation creates undue hardship for the firm. In such cases, all documentation and information collected by the person considering the request and/or the Accommodation Committee will be transferred, with the express consent of the requester, to the Managing Partner.

[4] While it is preferable that accommodation requests be made in writing, an accommodation request should not be disregarded if the person seeking accommodation is not able to communicate it in the preferred format.

32. If the Managing Partner believes there is undue hardship, he or she must present evidence showing that the financial cost of the accommodation (even with outside sources of funding) or health and safety risks would create undue hardship. In that case he or she will provide details, in writing, of the cost of accommodation or the health and safety reasons that have lead her or him to conclude that there is undue hardship. The evidence required to prove undue hardship must be objective, real, direct, and, in the case of cost, quantifiable.

33. If the accommodation is not possible because of undue hardship, the Managing Partner will explain this clearly to the requester and be prepared to demonstrate why this is so.

34. If the Accommodation Committee or the Managing Partner denies a request, the requester may file a complaint under the firm's discrimination and harassment policy [5].

[5] If a complaint cannot be settled through the internal procedure, the requester should be informed that a complaint may be filed with the Ontario Human Rights Commission.

PART IV – LEGAL REQUIREMENTS AND PROFESSIONAL RESPONSIBILITIES

THE LEGAL DUTY TO ACCOMMODATE

Under the Ontario *Human Rights Code* (the *Code*)[1], every person has a right to equal treatment with respect to employment or the provision of services without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age[2] , record of offences[3] , marital status, same-sex partnership status, family status or disability.

Although the *Code* does not explicitly identify "language" as a prohibited ground of discrimination, the Commission does accept complaints under a number of related grounds, such as ancestry, ethnic origin, place of origin and in some circumstances, race. In the Commission's experience, language can be an element of a compliant based on any of these grounds.[4]

In 2000, the Law Society of Upper Canada adopted Rule 5.04 of the *Rules of Professional Conduct* that provides that law firms have a legal and professional duty not to discriminate (on any of the prohibited grounds enumerated in the Code and in Rule 5.04):

> A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (as defined in the *Code*), marital status, family status, or disability with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other members of the profession or any other person.[5]

Rule 5.04 provides that discrimination in employment or in professional dealings fails to meet professional standards. The terms "employer" and "employment" are defined broadly; pursuant to both human rights legislation and Rule 5.04 of the *Rules of Professional Conduct,* law firms have a duty to accommodate that extends to professional employment of other lawyers, articled students, or any other person, from administrative staff to partners. Although the *Code* does not

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[1] R.S.O. 1990, c. H. 19, section 1 (services) and subsection 5(1) (employment).
[2] In the context of employment, age means the age of 18 or more and less than 65 years old. In the context of services, age means the age of 18 or more.
[3] Applies in the context of employment but not in the provision of services. "Record of offences" is defined in the *Code, supra* note 1, as a conviction for a criminal offence for which a pardon has been granted or a conviction under any provincial enactment.
[4] *Discrimination and Language (1996),* Ontario Human Rights Commission Policy.
[5] The personal characteristics noted in the *Code, supra* note 1, are: "race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status, or disability". Rule 5.04 does not include same-sex partnership status but specifies that a lawyer has a special responsibility to respect the requirements of human rights law.

refer specifically to volunteers, the Human Rights Commission is of the view that "equal treatment with respect to employment" in section 5 of the *Code* can be interpreted to protect anyone in a work context.[6] This would include volunteers and co-op students. The term "employment" covers recruitment, interviewing, hiring, promotion, evaluation, compensation, professional development and admission to partnership.

The *Code* also provides the right to equal treatment, without discrimination, with respect to services, goods and facilities.[7] Rule 5.04 states that a lawyer shall ensure that no one is denied services or receives inferior service on the basis of the grounds set out in Rule 5.04.

The commentary to Rule 5.04 imposes a duty to accommodate:

> The Supreme Court of Canada has confirmed that what is required is equality of result, not just of form. Differentiation can result in inequality, but so too can the applications of the same rule to everyone, without regard for personal characteristics and circumstances. Equality of result requires the accommodation of differences that arise from the personal characteristics cited in rule 5.04.[8]

The nature of accommodation as well as the extent to which the duty to accommodate might apply in any individual case are developing areas of human rights law. For years, courts and tribunals have defined discrimination in terms of "direct", "adverse effect"[9] or "systemic".[10]

"Direct discrimination" exists where an employer or serviced provider adopts a practice or rule that on its face discriminates on a prohibited ground.

"Adverse effect discrimination" means that an employer or service provider, for genuine business reasons, adopts a rule or standard which is on its face neutral, and which will apply equally to all employees or service user, but which has a discriminatory effect upon a prohibited ground on one employee or service user or a group of persons in that it imposes, because of some special characteristic of the person or group, obligations, penalties or restrictive conditions not imposed on other persons.

"Systemic discrimination" means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics.

The *Code* prohibits adverse effect discrimination. However, under section 11 of the *Code*, an employer may justify a workplace rule that has the effect of discriminating against a person or group of persons on a prohibited ground, including disability, by showing that the rule is a bona fide occupational requirement and that the needs of the person or group cannot be accommodated without undue hardship.[11]

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[6] *Human Rights at Work* (Toronto: Ontario Human Rights Commission, 1999) at 35, available online: http://www.ohrc.on.ca/english/publications/hr-at-work.shtml.
[7] Section 1 of the *Code, supra* note 1.
[8] See Appendix A of this *Guide* for Rule 5.04 of the *Rules of Professional Conduct*.
[9] Adverse effect discrimination has also been termed "indirect" or "constructive" discrimination.
[10] The terms have usually been defined in the context of employment. It is recognized that the definitions also apply to the service-provision context.
[11] Section 11 of the *Code, supra* note 1, imposes a duty to accommodate:

Section 17 of the *Code* also creates an obligation to accommodate persons with disabilities. Section 17 states that there is no violation of the *Code* if a person with disabilities is incapable of performing or fulfilling the essential duties or requirements of a function. However, this defence is not available unless it can be shown that the needs of the person cannot be accommodated without undue hardship.[12]

Section 17 recognizes that discrimination based on disability can be based on society's failure to accommodate actual differences and emphasizes the need for individual accommodation.

The Supreme Court applies the following three-step analysis when considering whether a standard is discriminatory[13] :

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(1)A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a)the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or

(b)it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

(2)The Commission, the board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

[12] Section 17 of the *Code* imposes a duty to accommodate persons with disabilities:

(1)A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.

(2)The Commission, the board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Section 17 applies to cases involving services as well as employment. See *Youth Bowling Council of Ontario v. McLoed* (1991), 14 C.H.R.R. D/120 (Ont. Div. Ct.).

[13] *British Columbia (Public Service Employee Relations Commission)* v. *B.C.G.S.E.U.,* [1999] 3 S.C.R. 3 (the Meiorin case). The test in Meiorin was developed in the employment context. In *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (the Grismer case), the Supreme Court of Canada confirmed that the unified approach to adjudicating discrimination claims adopted in Meiorin applied to all claims of discrimination, including claims related to the provision of services.

Once a plaintiff establishes that the standard is *prima facie* discriminatory, the onus shifts to the defendant to prove on a balance of probabilities that the discriminatory standard is a *bona fide* occupational requirement or has a *bona fide* and reasonable justification. In order to establish this justification, the defendant must prove that:

- It adopted the standard for a purpose or goal rationally connected to the function being performed;
- It adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal ; and
- The standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.[14]

In Ontario, the Court of Appeal has adopted the three-step analysis set out by the Supreme Court of Canada, which means that, in cases of *prima facie* discrimination based on disability, an individual may rely on section 11 or 17 of the *Code*. In cases of *prima facie* discrimination based on other grounds, an individual may rely on section 11 of the *Code*. Under either section, to justify the workplace or service related rules, the three steps of the analysis must be satisfied.[15]

RESPONSIBILITIES WHEN REQUESTING AN ACCOMMODATION

A person who is seeking an accommodation should make the request to the person responsible for considering requests for accommodation within the organization. Such request should, whenever possible, be made in writing. The requester should, when necessary, provide suitable verifiable information concerning the personal characteristic or ground at issue, explain why the accommodation is required and provide enough information to confirm the existence of a need for accommodation and the measures of accommodation required.[16]

When the person seeking accommodation (the requester) is a person with a disability and he or she believes that he or she is capable of doing the essential requirements of the function being performed, the person considering the request will determine what is “essential” to the function, with the input of the requester.[17] The requester should be given an opportunity to provide input

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[14] See Grismer, *ibid*. at par. 20 (the test is applied in the context of the provision of services) and Meiorin, *ibid*. at par. 54 (the test is applied in the employment context).

[15] *Entrop* v. *Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18 (Ont. C.A.).

[16] The Ontario Human Rights Commission suggests that the person seeking accommodation should:

- Advise the accommodation provider of the disability (although the accommodation provider does not have the right to know what the disability is);
- Make her or his needs known to the best of his or her ability;
- Answer questions or provide information regarding relevant restrictions or limitations, including information from health care professionals, where appropriate, and as needed;
- Participate in discussions regarding possible accommodation solution; and/
- Work with the accommodation provider on an ongoing basis to manage the accommodation process.

See *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: Ontario Human Rights Commission, November 23, 2000).

as to the essential requirements of the function and be allowed to identify possible alternatives to perform the function in a satisfactory way. If necessary, the person considering the request may re-assign non-essential requirements to someone else, or use some alternate method.

The person considering the request will establish on an objective basis, for example by testing the requester or by giving him or her an opportunity to try to perform the function, whether the person's disability renders her or him incapable of fulfilling the essential requirements of the function. The person considering the request will make those decisions based upon a fair and accurate assessment of the ability of the requester and not based upon a stereotype or misconception.

If the requester cannot perform the essential requirements, the person considering the request will explore how to accommodate the requester to enable performance of the essential requirements of the function.

When a requirement or practice results in exclusion or restriction and it was not adopted for a purpose rationally connected to the function being performed, it was not adopted in an honest and good faith belief that it was necessary to the fulfillment of the purpose; or it is not reasonably necessary to the accomplishment of the legitimate purpose, the requirement or practice may be dispensed or altered.

If the requirement or practice was adopted for a purpose rationally connected to the function being performed, was adopted honestly and in good faith and is reasonably necessary to the law firm's purpose, or if a person with a disability cannot perform the essential requirement of the function, the next step is to consider whether the individual who experiences disadvantage because of the requirement or practice can be accommodated without imposing undue hardship on the law firm.

The person considering the request has the duty to assess the need for accommodation based on the needs of the individual or of the group of which the person is a member, keeping in mind that not all members of a group have the same needs.[18]

The person considering the request will consult with the requester and consider any suggestions offered by the requester, in arriving at a timely individual-based strategy.[19] The

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[17] The Human Rights Commission has interpreted the term "essential" to mean that which is needed to make a thing what it is; very important; necessary. Synonyms are indispensable, requisite, vital. Thus peripheral or incidental, non-core or non-essential aspects of a function are not essential. *Policy and Guidelines on Disability and the Duty to Accommodate, ibid*. at 19.

[18] Individuals may seek accommodation for reasons such as religious practices or observances that do not conform to established dogma, or they may seek to observe practice, which is not shared by all members of the creed. Dress codes, dietary laws, etc. are examples of religious practices that are sincerely observed but may not be followed by all practitioners of a creed. [Name of firm] has a duty to reasonably accommodate such requests.

[19] The Human Rights Commission states that the person responsible for considering the request should:

- Take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated, and canvass various forms of possible accommodation and alternative solutions, as part of the duty to accommodate;
- Keep a record of the accommodation request and action taken;
- Maintain confidentiality;

person considering the request may consult more widely in attempting to devise the most suitable strategy for any accommodation that may be offered more generally.

A number of accommodation strategies may be used to fulfill a law firm's obligation. In the interest of both prompt attention to the needs of an individual, and the need to explore the utility of various accommodation strategies, an interim or experimental strategy may be implemented.

THE DUTY TO ACCOMMODATE APPLIES TO THE POINT OF UNDUE HARDSHIP

An employer or service provider has a duty to accommodate to the extent of undue hardship. The definition of "undue hardship" has been the subject of much debate. Some follow the definition of undue hardship adopted by the Ontario Human Rights Commission's Guidelines on accommodation[20] others follow the three-step procedure adopted by the Supreme Court of Canada in Meiorin[21] .

The *Code* states, "undue hardship on the employer or on the service provider will be assessed by considering the cost, outside sources of funding, if any, and health and safety requirements".[22]

The *Code* specifically sets out three considerations. Several factors are therefore excluded from considerations that are frequently raised by respondents. These are business inconvenience[23] , employee morale[24] , customer preference[25] , and collective agreements or contracts[26] .

- Grant accommodation requests in a timely manner.

Each person should be assessed according to his or her own personal abilities instead of being judged against presumed group characteristics. The following non-exhaustive factors should be considered in the course of the analysis:

- Whether the person responsible for accommodation investigated alternative approaches that do not have discriminatory effect;
- Reasons why viable alternatives were not implemented;
- Ability to have differing standards that reflect group or individual differences and capabilities;
- Whether persons responsible for accommodation can meet their legitimate objectives in a less discriminatory manner;
- Whether the standard is properly designed to ensure the desired qualification is met without placing undue burden on those to whom it applies; and
- Whether other parties who are obliged to assist in the search for accommodation have fulfilled their roles.

See *Policy and Guidelines on Disability and the Duty to Accommodate, supra* note 17 at 18 and at 24.

[20] See *Policy and Guidelines on Disability and the Duty to Accommodate, supra* note 16.
[21] Meiorin, *supra* note 13.
[22] Sections 11 (constructive discrimination) and 17 (accommodation for persons with disabilities) of the *Code, supra* note 1, both use the same factors in assessing undue hardship: cost, outside sources of funding and health and safety requirements.
[23] The Ontario Human Rights Commission is of the view that:

Although “cost”, “outside sources of funding” and “health and safety requirements” are not defined in the *Code*, the Human Rights Commission has interpreted those terms.

“Costs” will amount to undue hardship if they are:

- Quantifiable;
- Shown to be related to the accommodation; and

> “Business inconvenience” is not a defence to the duty to accommodate. If there are demonstrable costs attributable to decreased productivity, efficiency or effectiveness, they can be taken into account in assessing undue hardship under the cost standard, providing they are quantifiable and demonstrably related to the proposed accommodation.

See *Policy and Guidelines on Disability and the Duty to Accommodate, supra* note 16 at 28.

[24] The Ontario Human Rights Commission is of the view that:

> In some cases, accommodating an employee may generate negative reactions from co-workers who are either unaware of the reason for the accommodation or who believe that the employee is receiving an undue benefit […] However, it is not acceptable to allow discriminatory attitudes to fester into workplace hostilities that poison the environment.

See *Policy and Guidelines on Disability and the Duty to Accommodate, supra* note 16 at 28.

[25] Third-party preference does not constitute a justification for discriminatory acts. (See *Policy and Guidelines on Disability and the Duty to Accommodate, supra* note 16 at 28).
[26] Collective agreements or contractual arrangements cannot act as a bar to providing accommodation. (See *Policy and Guidelines on Disability and the Duty to Accommodate, supra* note 16 at 28.

Taken from *Policy and Guidelines on Disability and the Duty to Accommodate, supra* note 16 at 30.

> The Human Rights Commission initially produced guidelines in 1989 after the ground of disability was included in the *Human Rights Code* in 1982. In April 1999, the Commission undertook consultations with stakeholders to review the *Guidelines for Assessing Accommodation Requirements for Persons with Disabilities*. In November 2000, the Commission adopted its new policy document (released on March 22, 2001), which reiterates and explains the Commission’s interpretation of the concept of “undue hardship”.
>
> The 1989 guidelines and the *Policy and Guidelines on Disability and the Duty to Accommodate* are influential on adjudicators and have been adopted by the Ontario Workers’ Compensation Board and by the Ontario Workers’ Compensation Appeals Tribunal.

- So substantial that they would alter the essential nature of [the law firm], or so significant that they would substantially affect its viability.[27]

Law firms should make use of outside resources, such as funds available to an individual requesting an accommodation; funds that would assist employers and service providers defray the cost of accommodation or funding programs to improve accessibility, in order to meet the duty to accommodate. Law firms must demonstrate that they have made use of outside resources before claiming undue hardship.

Undue hardship may also exist where an accommodation creates a potential conflict with a "health or safety" requirement. The health or safety requirement may be contained in a law or regulation, or it may be a rule, practice or procedure. The Human Rights Commission suggests that:

> Where a health and safety requirement creates a barrier for a person with a disability, the accommodation provider should assess whether the requirement can be waived or modified [...] The employer is required to show an objective assessment of the risk as well as demonstrate how the alternative measure provides equal opportunity to the person with a disability [...] Health and safety risks will amount to undue hardship if the degree of risk that remains after the accommodation has been made outweighs the benefits of enhancing equality for persons with disabilities.[28]

Although the duty to accommodate arises in respect of every personal characteristic noted in Rule 5.04 and the *Code*, the most common requests for accommodation are based on the following grounds: creed and religious beliefs, gender, family status and disability.

ACCOMMODATION OF CREED AND RELIGIOUS BELIEFS

The Ontario Human Rights Commission has adopted the following definition of creed:

> The term creed is interpreted to mean "religious creed" or "religion". It is defined as a professed system and confession of faith, including both beliefs and observances or worship. A belief in a God or gods, or a single supreme being or deity is not a requisite [...] Religion [includes] non-deistic bodies of faith, such as the spiritual faiths/practices of Aboriginal cultures, as well as *bona fide* newer religions [...] religions that incite hatred or violence against other individuals or groups or practices and observances that purport to have a religious basis but which contravene [...] criminal law [are not protected].[29]

The definition of creed encompasses the faith of a community but also that of an individual. Personal religious beliefs, and practices or observances, even if they are not essential elements of the creed, provided they are sincerely held.

The Supreme Court of Canada has recently affirmed that an expansive definition of freedom religion under human rights legislation that focuses on personal choice, individual freedom, and

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[28] *Policy and Guidelines on Disability and the Duty to Accommodate, supra* note 16 at 34.
[29] Taken from *Policy on Creed and the Accommodation of Religious Observances* (Toronto: Ontario Human Rights Commission, October 20, 1996) at 2, available online: http://www.ohrc.on.ca/english/publications/creed-religion-policy.shtml.

autonomy is appropriate. "It is the religious or spiritual essence of an action, not any mandatory or perceived as mandatory nature of its observance that attracts protection."[30]

Typically, in the context of creed, issues of accommodation arise with regard to break policies[31] flexible scheduling[32] , rescheduling, religious leave[33] and dress codes[34] .

Law firms are encouraged to allow employees holy days off for religious observance without suffering any financial loss, unless this would result in undue hardship on the firm. This approach is consistent with the understanding that accommodation is a means of removing the barriers that prevent persons from enjoying equality of opportunity in a way that is sensitive to their individual circumstances.[35] An employee who is required to use vacation days, unpaid

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[30] *Syndicat Northcrest v. Amselem,* [2004] S.C.J. no. 46, 2004 S.C.C. 47.

[31] For example,some religions require that their members observe periods of prayer at particular times during a day. This practice may conflict with an employer's regular work hours or daily routines in the workplace. The employer has a duty to accommodate the employee's needs, short of undue hardship, by providing accommodations such as modified break policies, flexible hours and/or providing a private area for devotions.

[32] The purpose of this measure is to allow a flexible work schedule for employees, or to allow for substitution or rescheduling of days when an employee's religious beliefs do not permit him or her to work certain hours. For example, Seventh Day Adventists and members of the Jewish faith observe the Sabbath from sundown Friday to sundown Saturday. Observant members of these religions cannot work at these times.

Flexible scheduling may include: alternative arrival and departure times on the days when the person cannot work for the entire period, or use of lunch times in exchange for early departure or staggered work hours. Where the person has already used up paid holy days to which he or she is entitled, the employer should also consider permitting the employee to make up lost time or to use floating days off.

[33] When an employee requests time off to observe a holy day, the employer has an obligation to accommodate the employee. The extent of the accommodation required is an issue that comes up frequently. The Supreme Court of Canada has suggested that equality of treatment requires *at a minimum* that employees receive paid religious days off, to the extent of the number of religious Christian days that are also statutory holidays, namely two days (Christmas and Good Friday) and three days when the employer makes Easter Monday a holiday (*Chambly v. Bergevin*, [1994] 2 S.C.R. 525).

[34] Dress codes include cases where an employer insists that its employees be clean-shaven and wear a cap. That condition may discriminate on the basis of creed if an employee is a Sikh and his religion requires him to wear a turban and has a rule against cutting body hair.

[35] However, tribunals have accepted that employers can fulfil their duty to accommodate the religious needs of employees by providing appropriate scheduling changes in lieu of leave with pay, without first demonstrating that a leave of absence with pay would result in undue hardship. See *Ontario* v. *Grievance Settlement Board* (2000), 50 O.R. (3d) 560 (Ont. C.A.).

Although the Court of Appeal reversed the Divisional Court and the Grievance Settlement Board in *Ontario v. Grievance Settlement Board,* the decision of the Board is more in line with the right to equality entrenched in the *Human Rights Code*. The Board was of the view that the employee had a right to have recognized holy days off for religious observance without suffering any financial loss:

leave or who has to change his or her work schedule in order to observe his or her holy days is suffering a burden for observing his or her religion, something members of the majority religion are not required to do.

Law firms are also encouraged to adopt policies that allow for flexibility in the number of days off for religious observance. Case law has suggested that employers should, *at a minimum,* provide employees with paid religious days off to the extent of the number of religious Christian days that are also statutory holidays.[36] However, it is not necessary to limit the number of days off for religious observance to the same number of religious Christian days already allowed by the firm. The fact that the dominant Christian religion has only two or three mandatory holy days does not mean that equal treatment without discrimination will follow if every other religion is given two or three days off with pay to observe only some of their holy days.

In order to accommodate an individual, the needs of the individual and of the religious group to which an individual belongs to should be determined. Law firms should look to the accepted religious practices and observances that are part of a given religion or creed and individual beliefs that are sincerely held.

ACCOMMODATION BASED ON GENDER OR FAMILY STATUS

Family responsibilities arise mainly out of the parent-child relationship. The responsibilities that most affect the workplace arise from the birth or adoption of children, and the need to care for children and elderly parents and other relatives.

Historically, lack of accommodation of family responsibilities in the legal profession has had a great adverse impact on women. The "culture" of lawyers' workplaces was shaped for and by a profession exclusive of women. The components of the culture include: long and irregular hours of work; assumptions about the availability of domestic labour to support a lawyer's activities at work; and promotional policies based on an extremely long working day and the maintenance of large numbers of billable hours as well as increased responsibility. The culture of the workplace assumed that a lawyer would not have family responsibilities requiring significant time commitments. In turn, that workplace culture reflected a surrounding culture in which women were expected to take responsibility for all of the domestic labour arising out of family responsibilities. The hidden corollary to these assumptions was that women would not be lawyers.

The Ontario Human Rights Commission, in a document entitled *Human Rights at Work*,[37] considers the meaning and scope of 'family status' under the *Code*. With regards to family care obligations, the Ontario Human Rights Commission states "employers have a corollary duty to

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To the extent that the Grievor has been subjected to adverse effect discrimination so as to be entitled to accommodation by the Employer, in the absence of a demonstration that granting the days requested for religious observance with pay would have imposed undue hardship on the Employer, the Grievor would not be required to use vacation days, unpaid leave etc. in order to be able to observe his holy days […]Requiring the Grievor to use his vacation benefits would have had the effect of imposing a financial burden on him to observe his holy days, something members of the majority religion were not required to do. (Quoted by the Court of Appeal in *Ontario v. Grievance Settlement Board* (2000), 50 O.R. (3d) 560 at para. 24.)

[36] *Chambly* v. *Bergevin*, [1994] 2 S.C.R. 525.

[37] *Human Rights At Work* (Toronto: Ontario Human Rights Commission and the Human Resources Professional Association of Ontario, 2004), *Supra* note 6.

accommodate employees, short of undue hardship, because of their child-care and/or eldercare responsibilities. Employers share social responsibility to provide a workplace that is reasonably flexible to meet the needs of employees with family responsibilities."[38]

Although there have been relatively few reported cases that discuss the scope of protected family care obligations under the Ontario *Code*, the British Columbia Court of Appeal has recently considered this issue. In *Health Services Assn. of British Columbia v. Campbell River and North Island Transition Society,*[39] the British Columbia court confirmed that at least some family care obligations would be protected under the ground of 'family status', but at the same time also noted that not necessarily all of the everyday obligations of care within a parent and child relationship warrant protection. Specifically, a prima facie case of discrimination is present where a requirement or standard is imposed that results "in a serious interference with a substantial parental or other family duty or obligation of the employee".[40]

Although most case law has included family responsibilities under the category of family status[41], if the purpose of accommodating employees or clients is to redress inequalities, family responsibilities usually contribute to inequality based on gender. Even with the entrance of women into the workforce, it is recognized that women still disproportionately bear the burden of child-care in society.[42] While for most men the responsibility of children does not impact on the number of hours they work or affect their ability to work, a woman's ability even to participate in the work force may be completely contingent on her ability to acquire child care. Much of the burden remains on the shoulders of women. While this may not be as accurate when family responsibilities include taking care of other members of the family, such as parents, it nevertheless seems appropriate to discuss the issue of family responsibilities under the title of accommodation of gender.

The following are some of the negative consequences experienced by women in the legal profession who have children[43] *:*

- Loss of income;
- Limitations on advancement;
- Delay in promotion/admission to partnership;
- Segregation into less remunerative and "low profile" areas of practice;
- Difficulty in obtaining access to higher profile files;
- Unwillingness on the part of employers and colleagues to accommodate the demands of family responsibilities;
- Questioning and testing of commitment to work.

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[38] *Ibid*. at 26.
[39] [2004] BCJ No. 922, 2004 BCCA 260.
[40] *Ibid*. at para. 39.
[41] *Broere* v. *W.P. London and Associates Ltd.* (1987), 8 C.H.R.R. D/4189 (Ont. Bd. Of Inq.)
[42] *Symes* v. *Canada,* [1993] 4 S.C.R. 695
[43] For reports and surveys on women in the legal profession see: M. Ornstein, *The Changing Face of the Ontario Legal Profession, 1971-2001* (Toronto: Law Society of Upper Canada, October 2004) available online at http://www.lsuc.on.ca/news/pdf/convoc04 ornstein.pdf; F. M. Kay, C. Masuch, & P. Curry, *Turning Points and Transitions: Women's Careers in the Legal Profession* (Toronto: Law Society of Upper Canada, September 2004). Available online: http://www.lsuc.on.ca/equity/pdf/oct2604 turning points.pdf; F.M. Kay, C. Masuch, & P. Curry, *Diversity and Change: Thye Contemporary Legal Profession in Ontario* (Toronto: Law Society of Upper Canada, September 2004), available online: http://www.lsuc.on.ca/equity/pdf/oct2604 diversity and change.pdf.

There has been some societal change, to the extent that more men are taking on work that arises from family responsibilities. However, this change is slow to create real difference, and the burden of family responsibilities continues to fall predominately on women. Lack of accommodation therefore remains a sex discrimination issue, in addition to having a discriminatory impact on the ground of family status.[44]

There are many methods by which law firms can accommodate the needs of members who have family responsibilities. The methods may vary with the size and resources of a law firm. The adoption of a flexible work arrangement policy is one method. Other methods that law firms may wish to consider include:

- Family leave policies, which acknowledge and respect the need for leave of absence for reasons of childbirth or adoption, as well as other incidents of intensive family needs such as disability or serious illness within the family. Such policies provide appropriate time frames and compensation and permit members of the firm to return to work without reduction in compensation, seniority or quality of work assignments.

- Assistance with childcare, which may include provision of daycare at the workplace, child care referral services, assistance with child care fees and provision for emergency child care needs.

- Assistance with elder care, which may include elder care referral services, assistance with elder care fees and provision for emergency elder care needs.

ACCOMMODATION OF DISABILITY

Disability is defined in the *Code* as follows:

> (a) Any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
>
> (b) A condition of mental impairment or a developmental disability,
>
> (c) A learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
>
> (d) A mental disorder, or
>
> (e) An injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997; ("handicap")[45] .

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[44] "Family status" is defined in the *Code, supra* note 1, at s. 10 as "the status of being in a parent and child relationship."

[45] Section 10 of the *Code, supra* note 1. Rule 5.04 of the *Rules of Professional Conduct* adopted the *Code's* definition of disability.

Case law has found that the term disability includes alcoholism, cancer, AIDS, hypertension, back pains, diabetes, injuries, allergies and asthma, depression and anxiety, cerebral palsy, malformation of fingers and developmental disability. The term "disability" is interpreted:

- To recognize that discriminatory acts may be based as much on perceptions, myths and stereotypes as on the existence of actual functional limitations;
- To protect persons who have a disability, persons who had a disability but no longer suffer from it, persons believed to have a disability whether they do or not, and persons believed to have had a disability, whether they did or not may require accommodation;
- To include mental illness, developmental disabilities and learning disabilities;
- To include minor illnesses or infirmities if a person can show that she was treated unfairly because of the perception of a disability;
- To mean a physical disability, infirmity, malformation or disfigurement under the *Code* that is brought on by one of the named causes enumerated in the *Code*: bodily injury, illness or birth defect;
- To include a person who starts his or her employment career with a disability, or who becomes disabled at any time during that career. The need for accommodation of disability can arise at any time, for anyone in the firm;
- As an equality-based term that takes into account evolving biomedical, social and technological developments. The focus is on the effects of the distinction experienced by the person.

The definition of disability in the *Code* includes non-evident disabilities and mental disability. The Human Rights Commission talks about the particular issues raised by such disabilities:

> Regardless of whether a disability is evident or non-evident, a great deal of discrimination faced by persons with disabilities is underpinned by social constructs of "normality" which in turn tend to reinforce obstacles to integration rather than encourage ways to ensure full participation. Because these disabilities are not "seen", many of them are not well understood in society. This can lead to stereotypes, stigma and prejudice [...]
>
> Persons with mental disabilities face a high degree of stigmatization and significant barriers to employment opportunities. Stigmatization can foster a climate that exacerbates stress, and may trigger or worsen the person's condition. It may also mean that someone who has a problem and needs help may not seek it, for fear of being labelled.[46]

In the context of the legal profession, the Law Society of British Columbia has conducted a survey of lawyers and law students with disabilities regarding barriers related to entering and practising in the legal profession. The survey results indicate that lawyers with disabilities experience ongoing discrimination, prejudice, negative attitudes and physical access barriers in a profession that is largely driven by the economic bottom line. Respondents reported the following:

- They had great difficulty in finding employment;

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[46] *Policy and Guidelines on Disability and the Duty to Accommodate, supra* note 16 at 10.

- They had to work in settings where accommodations were not provided and the atmosphere was not supportive;
- Employers are usually reluctant to have a lawyer who has a disability on staff because of the economic bottom line that drives the legal profession;
- Disclosure of disability leads to discrimination;
- There are still various structural barriers throughout the judicial system that make it difficult to move in and around buildings, understand what is being communicated or read small-print documents;
- There are barriers that make it difficult for lawyers with disabilities to participate socially and network during events.

Respondents also noted that there are a number of barriers to legal services for members of the public, such as financial barriers, systemic access barriers and barriers in legal aid. Systems to help people needing legal services are usually designed for the able-bodied, and if any accommodations are made, it is as an afterthought. Respondents expressed concern about how prejudice against people with disabilities impacts on access to and fair treatment in the judicial system[47] . For example, ignorance of mental disability is still reflected in the legal system. Some respondents expressed concerns about access to and operation of legal aid and access to the right lawyers.

Discrimination based on disability results in part on the construction of a society based solely on "mainstream attributes".[48] Consequently, a fundamental rethinking of the able-bodied norm and design is necessary to truly attain substantive equality.[49]

Accommodations of persons with disability should focus on equal participation, maintaining the dignity of the person and inclusiveness:

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[47] *Lawyers with Disabilities: Identifying Barriers to Equality* (Vancouver: The Law Society of British Columbia, 2001).

[48] *Eaton* v. *Brant County Board of Education*, [1997] 1 S.C.R. 241.

[49] The Supreme Court of Canada has recognized that discrimination based on disability is mostly socially constructed:

The concept of disability must therefore accommodate a multiplicity of impairments, both physical and mental, overlaid on a range of functional limitations, real or perceived, interwoven with recognition that in many important aspects of life the so-called "disabled" individual may not be impaired or limited in any way at all […]

The bedrock of the appellant's argument is that many of the difficulties confronting persons with disabilities in everyday life do not flow ineluctably from the individual's condition at all but are located in the problematic response of society to that condition. A proper analysis necessitates unbundling the impairment from the reaction of society to the impairment, and a recognition that much discrimination is socially constructed […] Exclusion and marginalization are generally not created by the individual with disabilities but are created by the economic and social environment and, unfortunately, by the state itself. Problematic responses include, in the case of government action, legislation which discriminates in its effect against persons with disabilities, and thoughtless administrative oversight.

Granovsky v. *Canada* (*Minister of Employment and Immigration),* [2000] 1 S.C.R. 703 at para. 29 and para. 30.

> Accommodation with dignity is part of a broader principle, namely, that our society should be structured and designed for inclusiveness. This principle, which is sometimes referred to as integration, emphasizes barrier-free design and equal participation of persons with varying levels of ability. Integration is also much more cost effective than building parallel service systems, although it is inevitable that there will be times when parallel services are the only option. Inclusive design and integration are also preferable to "modification of rules" or "barrier removal", terms that, although popular, assume that the *status quo* (usually designed by able-bodied persons), simply needs an adjustment to render it acceptable. In fact, inclusive design may involve an entirely different approach. It is based on positive steps needed to ensure equal participation for those who have experienced historical disadvantage and exclusion from society's benefits.[50]

Law firm accommodation policies should provide for systemic accessibility audits as well as a process whereby individual needs can be identified and accommodated.

SYSTEMIC ACCESSIBILITY AUDITS AND ACTION PLANS

In order to be inclusive of persons with disabilities, it is important that law firms adopt proactive measures, such as:

- Undertaking systemic accessibility audits on a regular basis;
- Developing accessibility plans; and
- Implementing changes to make facilities, procedures and services accessible to persons with disabilities.

The systemic accessibility audits should be organizational wide and include a review of, at the very least:

- The law firm's policies and procedures, (such as performance appraisal process, criteria for partnership, recruitment practices and solicitor and client retainer forms and policies);
- The building design, structural elements, physical access, architectural and environmental elements, transportation and equipment; and
- The technological and communication equipment.

The systemic accessibility audits should be wide in scope and consider accessibility in employment and services. This means that law firms should be accessible even if there are no members or staff of the firm who are persons with disabilities. The audits should provide the basis for the development of long-term strategic action and implementation plans.

Accommodation in the context of disability often takes the form of physical modifications such as building design changes and equipment modifications, modified work duties, alternative work or relocation of work duties to another part of a building.[51] The following are examples of the types of accommodations provided by employers or service providers in this context:

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[50] *Policy and Guidelines on Disability and the Duty to Accommodate, supra* note 16 at 6.
[51] *Re Babcock and Wilcox Industries Ltd. And United Steelworkers of America, Local 2853a* (1994), 42 L.A.C. (4th) 209.

- Removal of physical barriers that make it more difficult for persons with disabilities to gain access to the law firm or function within it;
- Physical modifications ;[52]
- Modified work duties ;[53]
- Alternative work;
- Relocating work duties;
- Making all in-house communications (eg: policies, memos, manuals produced by the firm) accessible to all members of the firm ;[54]
- Providing staff to assist members, staff and clients of the firm with disabilities[55] ;
- Providing assistive devices[56] .

INDIVIDUAL ACCOMMODATIONS

Accommodating persons with disabilities also requires an individualized approach.[57] Each person's needs must be considered individually in order to determine what changes can be made to a situation. The law firm should consult with the person with disabilities to determine what he or she needs and how it can best be provided. The needs of persons with disabilities must be accommodated in a manner that most respects their dignity, if to do so does not create undue hardship.

Section 17 of the *Code*[58] provides that an employer has not infringed an employee's right under the *Code* if the individual is incapable of performing or fulfilling the essential duties or requirements of a position. However, if the employee can perform or fulfil the major functions of the position, the employer has an obligation to remove the marginal duties of the position. An individual will only be considered "incapable of performing the essential duties or requirements of a position" if the law firm cannot accommodate him/her without undue hardship.[59]

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[52] Such accommodation must be done in a manner that respects the dignity of the person with a disability. Physical modifications can include the installation of an elevator to make a building wheelchair accessible, adding wheelchair ramps, changing lighting for those with sight impairments, changing ventilation for those with allergies etc. For an overview of best practices see *Accommodation of Creed and Religious Beliefs, Gender Related Accommodation and Accommodation for Persons with Disabilities; Legal Developments and Best Practices* (Toronto: Law Society of Upper Canada, March 2001).

[53] Such as rearranging an employee's work assignments and schedule rotations in such a manner as to permit the employee to perform a suitable combination of jobs or modifying an employee's duties.

[54] They may include making documents available in electronic format that can be read by a computer to a person with a disability that affects his or her ability to read print.

[55] For example the services of a staff person to read documents, unpublished decisions etc., that might not otherwise be accessible to a lawyer, staff or client with a disability, assistance with off-site work related activities, such as attendance at a hearing.

[56] These may make it easier for persons with various disabilities to perform the tasks essential to a legal practice, at the workplace or at a home office.

[57] Emphasis will be placed here on individualized accommodation in the employment context although the law also applies to the provision of services.

[58] *Supra*, note 12.

[59] Section 17 applies to cases involving services as well as employment. See *Youth Bowling Council of Ontario* v. *McLoed, supra* note 12.

A law firm should determine what is essential to the performance of the job. The law firm should establish on an objective basis, by testing the employee or by giving the employee an opportunity to try to perform the job, whether the employee's disability renders her or him incapable of fulfilling the essential duties of the job. If a member or staff of the firm has a disability but is capable of performing the essential duties of the position, the law firm should re-assign the marginal duties or use an alternate method for having the duties fulfilled. If the member or staff of the firm cannot perform the essential duties, accommodation is to be explored. The person will not be incapable if she or he can be accommodated without undue hardship.

The following standards for accommodation should be considered:

- Recognition that the needs of persons with disabilities must be accommodated in the manner that most respects their dignity, to the point of undue hardship;
- There is no set formula for accommodation - each person has unique needs and it is important to consult with the person involved;
- Taking responsibility and showing willingness to explore solutions is a key part of treating people respectfully and with dignity;
- Voluntary compliance may avoid complaints under the *Code*, as well as save the time and expense needed to defend against them.[60]

PART V – GLOSSARY OF TERMS

For the purposes of this policy:

"Age" means an age that is eighteen years or more and in the employment context an age that is eighteen years or more and less than sixty-five years.

"Creed or religion" means a professed system and confession of faith, including both beliefs and observances or worship. A belief in a God or gods, or a single supreme being or deity is not a requisite. The existence of religious beliefs and practices are both necessary and sufficient to the meaning of creed, if the beliefs and practices are sincerely held and/or observed.

"Cultural belief" means the totality of ideas, beliefs, values, knowledge, habits and way of life of a group of individuals who share certain historical experiences.

"Discrimination" means a distinction, whether intentional or not, but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.[61]

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[60] *Policy and Guidelines on Disability and the Duty to Accommodate, supra* note 16 at 7.

[61] Discrimination includes "direct discrimination" (where an employer adopts a practice or rule which on its face discriminates on a prohibited ground); adverse effect discrimination" (where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the work force) and "systemic discrimination" (practices or

"Family status" means the status of being in a parent and child relationship.

"Marital status" means the status of being married, single, widowed, divorced or separated and includes the status of living with a person in a conjugal relationship outside marriage.

"On the basis of a disability" means for the reason that the person has or has had, or is believed to have or have had:

(a) Any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
(b) A condition of mental impairment or a developmental disability,
(c) A learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
(d) A mental disorder, or
(e) An injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997.

Disability may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all these factors. The focus is on the effects of the distinction, preference or exclusion experienced by the person and not on proof of physical limitations or the presence of an ailment.

"Personal characteristic" or "ground" means any of the following personal characteristic: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status, same-sex partnership status or disability.

"Race, ancestry, place of origin, colour, ethnic origin, and citizenship" collectively describe personal characteristics of an individual associated with his or her nationality, race, and cultural or ethnic origin.

"Record of offences" means a conviction for an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked, or an offence in respect of any provincial enactment.

"Same-sex partnership status" means the status of living with a person of the same sex in a conjugal relationship outside marriage.

PART VI - RULES OF PROFESSIONAL CONDUCT

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attitudes that have, whether by design or impact, the effect of limited an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics).

Although these definitions were developed in the context of employment, they also apply to the provision of services.

5.04 DISCRIMINATION

Special Responsibility

5.04 (1) A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (as defined in the Ontario *Human Rights Code)*, marital status, family status, or disability with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other members of the profession or any other person.

Commentary

The Society acknowledges the diversity of the community of Ontario in which its members serve and expects members to respect the dignity and worth of all persons and to treat all persons equally without discrimination.

This rule sets out the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario.

Rule 5.04 will be interpreted according to the provisions of the Ontario Human Rights Code and related case law.

The Ontario Human Rights Code defines a number of grounds of discrimination listed in rule 5.04. For example,

Age is defined as an age that is eighteen years or more, except in subsection sixty-five years.

Disability is broadly defined in s. 10 of the Code to include both physical and mental disabilities.

Family status is defined as the status of being in a parent-and-child relationship.

Marital status is defined as the status of being married, single, widowed, divorced, or separated and includes the status of living with a person of the opposite sex in a conjugal relationship outside marriage.

Record of offences is defined such that a prospective employer may not discriminate on the basis of a pardoned criminal offence (a pardon must have been granted under the Criminal Records Act (Canada) and not revoked) or provincial offences.

<u>The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant.</u>

There is no statutory definition of discrimination. Supreme Court of Canada jurisprudence defines discrimination as including:

(a) Differentiation on prohibited grounds. Lawyers who refuse to hire employees of a particular race, sex, creed, sexual orientation, etc. would be differentiating on the basis of prohibited grounds.

(b) Adverse effect discrimination. An action or policy that is not intended to be discriminatory can result in an adverse effect that is discriminatory. If the application of a seemingly "neutral" rule or policy creates an adverse effect on a group protected by rule 5.04, there is a duty to accommodate. For example, while a requirement that all articling students have a driver's licence to permit them to travel wherever their job requires may seem reasonable, that requirement effectively excludes from employment persons with disabilities that prevent them from obtaining a licence. In such a case, the law firm would be required to alter or eliminate the requirement in order to accommodate the student unless the necessary accommodation would cause undue hardship.

Human rights law in Ontario includes as discrimination, conduct which, though not intended to discriminate, has an adverse impact on individuals or groups on the basis of the prohibited grounds. The Ontario Human Rights Code requires that the affected individuals or groups must be accommodated unless to do so would cause undue hardship.

A lawyer should take reasonable steps to prevent or stop discrimination by any staff or agent who is subject to the lawyer's direction or control.

Ontario human rights law excepts from discrimination special programs designed to relieve disadvantage for individuals or groups identified on the basis of the grounds noted in the Code.

In addition to prohibiting discrimination, rule 5.04 prohibits harassment on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status, or disability. Harassment by superiors, colleagues, and co-workers is also prohibited.

Harassment is defined as "engaging in a course of vexatious comment or conduct that is known or ought reasonable to be known to be unwelcome" on the basis of any ground set out in rule 5.04. This could include, for example, repeatedly subjecting a client or colleague to jokes based on race or creed.

Services

A lawyer shall ensure that no one is denied services or receives inferior services on the basis of the grounds set out in this rule.

Employment Practices

A lawyer shall ensure that his or her employment practices do not offend this rule.

Commentary

Discrimination in employment or in the provision of services not only fails to meet professional standards, it also violates the Ontario Human Rights Code and related equity legislation.

In advertising a job vacancy, an employer may not indicate qualifications by a prohibited ground of discrimination. However, where discrimination on a particular ground is permitted because of

an exception under the Ontario Human Rights Code, such questions may be raised at an interview. For example, an employer may ask whether an applicant has been convicted of a criminal offence for which a pardon has not been granted. An employer may ask applicants not yet called in Ontario about Canadian citizenship or permanent residence. If an employer has an anti-nepotism policy, the employer may inquire about the applicant's possible relationship to another employee as that employee's spouse, child or parent. This is in contrast to questions about applicant's marital status by itself. Since marital status has no relevance to employment within a law firm, questions about marital status should not be asked.

An employer should consider the effect of seemingly "neutral" rules. Some rules, while applied to everyone, can bar entry to the firm or pose additional hardships on employees of one sex or of a particular creed, ethnic origin, marital or family status, or on those who have (or develop) disabilities. For example, a law office may have a written or unwritten dress code. It would be necessary to revise the dress code if it does not already accept that a head covering worn for religious reasons must be considered part of acceptable business attire. The maintenance of a rule with a discriminatory effect breaches rule 5.04 unless changing or eliminating the rule would cause undue hardship.

If an applicant cannot perform all or part of an essential job requirement because of a personal characteristic listed in the Ontario Human Rights Code, the employer has a duty to accommodate. Only if the applicant cannot do the essential task with reasonable accommodation may the employer refuse to hire on this basis. A range of appropriate accommodation measures may be considered. An accommodation is considered reasonable unless it would cause undue hardship.

The Supreme Court of Canada has confirmed that what is required is equality of result, not just of form. Differentiation can result in inequality, but so too can the application of the same rule to everyone, without regard for personal characteristics and circumstances. Equality of result requires the accommodation of differences that arise from the personal characteristics cited in rule 5.04.

The nature of accommodation as well as the extent to which the duty to accommodate might apply in any individual case are developing areas of human rights law. However, the following principles are well established.

If a rule, requirement, or expectation creates difficulty for an individual because of factors related to the personal characteristics noted in rule 5.04, the following obligations arise:

> The rule, requirement or expectation must be examined to determine whether it is "reasonable and bona fide." If the rule, requirement, or expectation is not imposed in good faith and is not strongly and logically connected to a business necessity, it cannot be maintained. There must be objectively verifiable evidence linking the rule, requirement, or expectation with the operation of the business.
>
> If the rule, requirement, or expectation is imposed in good faith and is strongly logically connected to a business necessity, the next step is to consider whether the individual who is disadvantaged by the rule can be accommodated.
>
> The duty to accommodate operates as both a positive obligation and as a limit to obligation. Accommodation must be offered tot he point of undue hardship. Some hardship must be tolerated to promote equality; however, if the hardship occasioned by

the particular accommodation at issue is “undue”, that accommodation need not be made.

Appendix 5

Equity Public Education Events Schedule - 2005

National Access Awareness Week

Organized by the Law Society of Upper Canada and ARCH – A Legal Resource Centre for Persons with Disabilities.

When: Tuesday, May 31, 2005
Where: Law Society of Upper Canada

Panel Discussion: 4:00 – 6:00 P.M.
Museum Room

The Rights of Persons with Disabilities - Addressing Situations of Abuse

The panel will discuss issues of abuse of persons with disabilities and look at ways of supporting abuse victims in the justice system and the broader community.

Speakers:

- Nevina Crisante – Counsel, Ontario Victim Services Secretariat, Ministry of the Attorney General
- Lana Kerzner – Staff Lawyer, ARCH
- Fran Odette - Project Coordinator, Women with Disabilities and Deaf Women's Program, Education Wife Assault
- Speaker with consumer experience

Reception: 6:00 – 8:00 P.M.
Convocation Hall

Featuring the talent of Ontarians with disabilities in music and dance.

- Spirit Synott – Dancer – OMO Dance Company
- Heinz Klein - Singer, musician – Workman Theatre Project

National Aboriginal Day

Organized by the Law Society of Upper Canada in partnership with the Toronto Aboriginal City Celebration Committee, Aboriginal Legal Services of Toronto, Rotiio> taties Aboriginal Advisory Group, the Aboriginal aw Section of the Ontario Bar Association, Ontario Justice Education Network and the Association for Native Development in the Performing and Visual Arts.

When: June 8, 2005
Where: Law Society of Upper Canada

Panel Discussion: 4:00 – 6:00 P.M.
Convocation Hall

Status Report: Twenty Years of the Bill C-31 Amendments to the *Indian Act*

2005 marks the twentieth anniversary of the Bill C-31 amendments to the *Indian Act*. Although these amendments were introduced to repeal discriminatory sections of the *Indian Act*, they did not end the legal struggles for First Nation women and their children and First Nation communities. This program brings together an outstanding panel of speakers who represent a broad range of perspectives on the ongoing legal issues surrounding status and First Nation band membership under the *Indian Act*.

Speakers:

- Beverley Jacobs – President, Native Women's Association of Canada
- Lynn Gehl – PhD candidate in Native Studies at Trent University
- Mary Eberts – Lawyer and Counsel, Native Women's Association of Canada
- Ellen Monaque – Status Entitlement Worker – Aboriginal Legal Services Toronto
- Wayne Beaver – Member and Councilor for Alderville First Nation

Reception: 6:00 – 8:00 P.M.
Convocation Hall

Featuring CEO of the National Aboriginal Achievement Foundation, Roberta Jamieson, and the Métis Fiddler Quartet. The Neekawnisidok Fine Art Exhibit will also be open for viewing in Convocation Hall. The exhibit is organized by the Association for Native Development in the Performing and Visual Arts.

Pride Week Reception

Event date: June 23, 2005
Workshop and reception: Convocation Hall: 5:00 p.m. to 8:00 p.m.

CONVOCATION ROSE AT 1:15 P.M.

Confirmed in Convocation this 22nd day of June, 2005

Treasurer