MINUTES OF CONVOCATION

Thursday, 22nd June, 2006
9:00 a.m.

PRESENT:

The Treasurer (Gavin MacKenzie), Alexander, Backhouse (by telephone), Banack, Boyd, Campion, Carpenter-Gunn, Caskey, Chahbar, Cherniak, Coffey, Crowe, Curtis, Dickson, Doyle, Dray, Elliott, Feinstein, Filion, Finkelstein, Finlayson, Furlong, Gotlib, Gottlieb, Harris, Heintzman, Henderson, Krishna, Lawrence, Legge, Manes, Martin, Minor, Murray, O'Donnell (by telephone), Pattillo, Pawlitza, Porter, Potter, Ross, Ruby, St. Lewis, Sandler, Silverstein, Simpson, Swaye, Symes, Topp, Wardlaw, Warkentin and Wright.

…….

Secretary: Katherine Corrick

The Reporter was sworn.

…….

IN PUBLIC

…….

TREASURER'S REMARKS

The Treasurer announced that the Law Society will be conferring honorary degrees on the following people at the Calls to the Bar in July:

Dr. Emily Carasco
The Honourable Patrick LeSage
Diana Majury
Dr. Edward Ratushny
Clayton Ruby

Osgoode Hall received 7,200 visitors for the Toronto Doors Open program held on May 27th and 28th. The Treasurer thanked the curator, Elise Brunet, and all the volunteers who participated in this event.

The Treasurer reported on his activities during the past month on behalf of the Law Society.

DRAFT MINUTES OF CONVOCATION

The Draft Minutes of Convocation of May 25, 2006 were confirmed.

MOTION – BY-LAW 8 – RULES OF PROCEDURES FOR CONVOCATION

It was moved by Ms. Curtis, seconded by Mr. Wright, that

By-Law 8 [Convocation], made by Convocation on January 28, 1999 and amended by Convocation on February 19, 1999, March 26, 1999 and November 24, 2005 be revoked and the following substituted:

CONVOCATION

INTERPRETATION

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

"main motion" means a motion which is the subject of an amendment contained in a motion to amend;

"question of privilege" means a question about any right enjoyed at Convocation by the benchers present at Convocation collectively or by any bencher present at Convocation individually conferred by this By-Law or by practice, precedent, usage and custom;

"question of procedure" means a question about the procedure being followed at any time at Convocation;

"substantive motion" means a motion that is a self-contained proposal capable of expressing a decision of the benchers present at Convocation concerning a matter of import to the Society.

Interpretation: tabling a motion
(2) In this By-Law, "to table a motion" means to defer indefinitely debating the motion or putting the motion to a vote and "a motion which was tabled" has a corresponding meaning.

MEETINGS

Convocation conducted in accordance with By-Law
2. (1) Convocation shall be conducted in accordance with this By-Law.

Waiving compliance, *etc.*
(2) Despite subsection (1), the Treasurer may waive compliance with any requirement, alter any requirement and abridge or extend any time period mentioned in this By-Law in respect of Convocation.

Matters of procedure not provided for
(3) Any matter of procedure not provided for in this By-Law shall be determined by the Treasurer.

Place of Convocation

3. (1) Subject to subsections (2) and (3), Convocation shall be held in Osgoode Hall.

Same

(2) The Treasurer may convene Convocation at any place.

Convocation by telephone conference call, *etc.*

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

Convocation: when held

4. Convocation shall be held on the fourth Thursday of each month, except the months of July, August and December, unless otherwise directed by the Treasurer.

Convocation: special meetings

5. (1) The Treasurer may convene Convocation at any time by giving at least twenty-four hours notice, or by directing the Secretary to give such notice, to each bencher.

Same

(2) Upon the written request of ten benchers who are entitled to vote in Convocation, the Secretary shall convene Convocation by giving at least twenty-four hours notice to each bencher.

Convocation open to public

6. (1) Subject to subsection (2), Convocation shall be open to the public.

Public excluded

(2) Convocation shall be held in the absence of the public to deal with any of the following matters:

1. Matters relating to the Society's personnel.

2. Litigation in which the Society is involved.

3. Negotiations with a government.

4. Intimate financial or personal matters or other matters in respect of which, in the opinion of the benchers present at Convocation, the need for privacy outweighs the public interest in disclosure.

5. Any matter at the instance of the Treasurer.

Order of business

7. Subject to section 8, the business and the order of business at Convocation shall be determined by the Treasurer.

Order of business: special meeting

8. At Convocation convened under subsection 5 (2), the business of Convocation shall include the matters for which Convocation was convened.

Minutes
9. (1) Except when Convocation is resolved into a meeting of the benchers as a committee of the whole, minutes shall be kept for Convocation.

Confirmation of minutes
(2) At each Convocation, the minutes of the last Convocation shall be confirmed by the benchers present at Convocation and shall be signed by the Treasurer or the bencher who presided at the meeting of the Convocation to which the minutes relate.

Publication of minutes
(3) Except in the case of the minutes of Convocation held in the absence of the public, the minutes of Convocation shall be made available for public inspection.

Transcript
10. (1) A full court reporter service shall be provided for Convocation.

Publication
(2) The transcript of Convocation open to the public shall be made available for public inspection.

Adjournment for lack of quorum
11. (1) If at any time after Convocation has commenced, the Treasurer's attention is directed to the apparent lack of a quorum, the Treasurer shall determine whether a quorum is present and, upon determining that a quorum is not present, the Treasurer shall adjourn Convocation without motion.

Same
(2) The matter before Convocation immediately prior to an adjournment under subsection (1), and all matters listed on the agenda for Convocation that are not reached prior to the adjournment, shall be deemed to be deferred to the next Convocation to be held under section 4.

Removal of bencher from office for non-attendance
12. (1) The benchers present at Convocation may remove from office an elected bencher who fails to attend Convocation held under section 4 six consecutives times.

Failure to attend three meetings
(2) When an elected bencher fails to attend Convocation held under section 4 three consecutive times, the Secretary shall immediately send to the elected bencher a notice of the failure and of the benchers' authority under subsection (1) to remove him or her from office.

Failure to attend six meetings: report
(3) When an elected bencher fails to attend Convocation held under section 4 six consecutive times, the Secretary shall report the failure at the first Convocation held thereafter under section 4.

TREASURER

Treasurer to preside
13. The Treasurer shall preside over Convocation.

Appeal of Treasurer's rulings and decisions

14. (1) Two or more benchers who are entitled to vote in Convocation may together appeal to the benchers present at Convocation from a ruling or decision of the Treasurer made in Convocation.

(2) Despite subsection (1), the following rulings and decisions of the Treasurer made in Convocation are not subject to an appeal:

1. A decision on a question of privilege or procedure.

2. A ruling that a bencher's remarks are out of order for the reason set out in clause 26 (3) (e).

3. A ruling that a motion is out of order because it is a motion mentioned in subsection 18 (2).

4. A decision under subsection 27 (1) to put a motion to a vote.

5. A decision about a recorded vote.

Time for making appeal

(3) An appeal from a ruling or decision of the Treasurer shall be made immediately after the ruling or decision.

Debate

(4) Except in the case of an appeal of a ruling or decision of the Treasurer in respect of a bencher's language or behaviour, an appeal of a ruling or decision of the Treasurer may be debated and sections 24 to 26 apply, with necessary modifications, to the debate.

Same

(5) The debate on an appeal of the Treasurer's decision under paragraph 5 of subsection 6 (2) shall be conducted in the absence of the public.

Disposition

(6) An appeal of a ruling or decision of the Treasurer shall be disposed of by a vote on the question: "Should the ruling or decision of the Treasurer be upheld?"

Same

(7) Sections 27 to 31 apply, with necessary modifications, to a vote on an appeal of a ruling or decision of the Treasurer.

Same

(8) The vote on an appeal of the Treasurer's decision under paragraph 5 of subsection 6 (2) shall be conducted in the absence of the public.

Resolution: appeal of Treasurer's ruling

(9) A ruling or decision of the Treasurer shall be upheld if the majority of votes cast are in favour of upholding the ruling of decision of the Treasurer or if there is a tie vote on the appeal.

ORDER AND DECORUM

Treasurer to preserve order, decorum, *etc.*
15. At Convocation, the Treasurer shall preserve order, decorum, civility and courtesy and shall decide questions of privilege and procedure.

Benchers not to interrupt Treasurer
16. (1) Benchers shall refrain from interrupting the Treasurer when he or she is speaking, making a ruling or decision or putting a motion or question to Convocation for a vote.

Bencher not to interrupt other bencher
(2) Unless otherwise provided in this By-Law, when a bencher is speaking, no bencher other than the Treasurer shall interrupt the bencher speaking.

Questions of privilege and procedure
17. (1) A bencher may raise a question of privilege or procedure at any time during Convocation and may interrupt another bencher who is speaking to do so.

Discussion
(2) Apart from the bencher raising the question, there shall be no discussion or debate of a question of privilege or procedure.

Decision
(3) The Treasurer shall decide a question of privilege or procedure immediately after it is raised.

Taken up immediately
(4) If the Treasurer decides that a *prima facie* case of privilege exists, it shall be taken into consideration immediately.

MOTIONS

Motions to be made in accordance with by-law
18. (1) Motions made in Convocation shall be made in accordance with this By-Law.

Prohibited motions
(2) No motion shall be made concerning a matter,

(a) in respect of which a hearing may be conducted under the Act or by-laws; or

(b) that is pending before a court or tribunal for determination.

Who may make motion
19. (1) A motion may be made in Convocation by a bencher who is entitled to vote in Convocation.

Certain benchers to move certain motions
(2) A substantive motion of which notice has been given shall be made by the bencher who gave notice of the motion.

Notice required
20. (1) Notice is required for the following motions:

1. A substantive motion, other than a substantive motion contained in the report of a standing or other committee.

2. A motion to resume debating and to put to a vote a substantive motion which was tabled.

Method of giving notice
(2) Notice of a motion shall be given in writing by the bencher intending to make the motion by delivering a copy of the text of the motion, signed by the bencher intending to make the motion and the bencher intending to second the motion, to the Secretary at least twenty days before the day fixed for Convocation at which the bencher intends to make the motion.

Sending notice to all benchers
(3) The Secretary shall as soon as possible after receiving notice of a motion under subsection (2) send a copy of the text of the motion to all benchers.

Substantive motion without notice
(4) Despite subsection (1), a bencher may make a substantive motion, other than a substantive motion contained in a report of a standing or other committee, without notice at Convocation if the motion relates to a matter then being debated at Convocation.

Seconder required
21. (1) A motion must be seconded before it may be debated, if debate is permitted, and voted on.

Seconders
(2) Only benchers who are entitled to vote in Convocation may second a motion.

Same
(3) A substantive motion of which notice has been given shall be seconded by the bencher who signed the text of the motion as the bencher intending to second the motion.

Introduction of substantive motion
22. (1) Subject to section 7, a substantive motion may be moved at any time at Convocation provided that no other substantive motion is before Convocation at the time.

Same
(2) A motion to refer the subject matter of a substantive motion, other than a substantive motion contained in the report of a standing or other committee, to a standing or other committee, a motion to table a substantive motion or a motion to put a substantive motion to a vote may be moved at any time after the substantive motion has been moved and seconded, but before it has been voted on, at Convocation.

Same
(3) A motion to amend may be made at any time after a main motion is moved and seconded, but before it has been voted on, at Convocation, provided that no other motion to amend is before Convocation at the time.

Same

(4) A motion to adjourn Convocation may be made at any time.

Withdrawal

23. (1) A bencher who has given notice of a motion may withdraw the same at any time.

Same

(2) A bencher who has moved a motion may withdraw the same at any time with the consent of the bencher who seconded the motion.

DEBATE

Debate on motions

24. A motion before Convocation may be debated except in the following cases:

1. A motion to table a motion.

2. A motion to adjourn Convocation.

Who may participate in debate

25. Every bencher, the Chief Executive Officer and any other person with the prior permission of the Treasurer may take part in any debate at Convocation.

Order of speaking

26. (1) Subject to subsection (2), in a debate, benchers are entitled to speak to a motion in the following order:

1. The bencher who moved the motion.

2. The bencher who seconded the motion.

3. Any other bencher or person, in accordance with section 25, when recognized by the Treasurer.

Reserving right to speak

(2) The bencher who seconded the motion may reserve the right to speak to the motion until a later time in the debate.

Matters out of order in debate

(3) In a debate, a bencher shall be called to order by the Treasurer if he or she,

(a) subject to subsections (4), (5), (6) and (7) speaks to a motion more than once;

(b) directs his or her speech to matters other than the motion being debated;

(c) persists in needless repetition or raises matters that have already been decided at Convocation;

(d) anticipates a matter already on the agenda of Convocation for consideration;

(e) refers to a matter,

(i) in respect of which a hearing may be conducted under the Act or by-laws; or

(ii) that is pending before a court or tribunal for determination;

(f) makes allegations against another bencher;

(g) imputes false, improper or ulterior motives to another bencher;

(h) charges another bencher with uttering a deliberate falsehood; or

(i) uses abusive or insulting language of a nature likely to create disorder.

Speaking twice

(4) A bencher may speak to a motion a second time only to explain a material part of his or her first speech which he or she believes may have been misunderstood, and in so doing, the bencher shall not introduce any new points.

Same

(5) A bencher who moves a motion may speak to the motion a second time immediately before the end of the debate to reply to any comments or questions raised during the debate.

Questions on speeches and replies

(6) At any time during the debate on a motion, a bencher may ask a brief question about another bencher's speech and that bencher may, with the Treasurer's permission, reply briefly.

Treasurer's permission to speak second time

(7) A bencher may speak to a motion a second time, in circumstances not mentioned in subsections (4), (5) and (6), with the Treasurer's permission.

Special rules of debate: motions to amend

(8) Immediately a motion to amend is made during the debate on a main motion, the Treasurer shall interrupt that debate and call for a debate on the motion to amend.

Resumption of interrupted debate

(9) A debate that has been interrupted under subsection (8) shall be resumed immediately the motion to amend which caused the debate to be interrupted has been voted on.

VOTING

Putting debatable motion to vote

27. (1) Subject to subsection (2), the Treasurer shall put a motion which may be debated to a vote when he or she is of the opinion that debate on the motion has been reasonably completed.

Motion to amend accepted

(2) A motion to amend shall not be put to a vote if the benchers who moved and seconded a main motion consent to that motion being amended as proposed in the motion to amend.

Putting non-debatable motion to vote
(3) The Treasurer shall put a motion which may not be debated to a vote immediately after the motion has received a seconder.

Treasurer may not vote
28. The Treasurer shall not vote on a motion except in the case of a tie when the Treasurer may give a casting vote.

Proxy voting prohibited
29. Votes may not be cast by proxy.

Manner of voting
30. Voting shall be by a show of hands, or if Convocation is conducted by means of telephone, electronic or other communication facilities under subsection 3 (3), by oral response, unless a recorded vote is required by the Treasurer, or requested by a bencher entitled to vote in Convocation and permitted by the Treasurer, in accordance with section 31.

Recorded vote
31. (1) A recorded vote may be required by the Treasurer or requested by a bencher entitled to vote in Convocation before a motion is put to a vote.

Recorded vote requested by bencher
(2) When a recorded vote has been requested by a bencher, the Treasurer may, but is not required to, conduct a recorded vote.

Manner of conducting recorded vote
(3) When a recorded vote is being conducted, the Treasurer shall put the subject motion to the benchers present in Convocation and the Secretary shall then call out the names of all benchers entitled to vote in Convocation and upon hearing his or her name, a bencher shall state his or her vote or if wishing not to vote shall state his or her abstention from the vote.

Resolution
32. A motion shall carry if a majority of the votes cast are in favour of the motion.

COMMITTEE OF THE WHOLE

Committee of the Whole
33. (1) At any time, the Treasurer may require Convocation to resolve itself into a meeting of the benchers as a committee of the whole to consider any matter before Convocation at the time.

Appointment of chair
(2) Immediately after announcing his or her decision to require Convocation to resolve itself into a meeting of the benchers as a committee of the whole, the Treasurer may appoint a bencher as chair of the committee of the whole and, if the Treasurer does so appoint a bencher, the Treasurer shall then leave the chair.

Appointed bencher takes chair

(3) When the Treasurer leaves the chair in accordance with subsection (2), the bencher appointed as chair of the committee of the whole shall take the chair whereupon Convocation resolves itself into a meeting of the benchers as a committee of the whole.

Rules of procedure

(4) Section 24 of the Act and subsection 11 (1) and sections 13 to 32 of this By-Law apply with necessary modifications to proceedings of a committee of the whole.

Treasurer resumes chair

(5) When a committee of the whole has completed its proceedings,

(a) if the Treasurer had appointed a bencher as chair of the committee, the chair of the committee shall leave the chair and the Treasurer shall then resume the chair; and

(b) Convocation shall resume as such.

Report to meeting

(6) When Convocation resumes after the benchers present at Convocation have met as a committee of the whole, the Treasurer or the chair of the committee may report to Convocation on the proceedings of the committee.

LE CONSEIL

INTERPRÉTATION

Définitions

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

« motion de fond » Motion qui constitue une proposition autonome pouvant servir à exprimer une décision des conseillères et des conseillers présents à la réunion du Conseil quant à une question d'importance pour le Barreau.

« motion principale » Motion qui fait l'objet d'un amendement figurant dans une motion portant amendement.

« question de privilège » Question concernant tout droit dont les conseillères et les conseillers présents à la réunion du Conseil jouissent collectivement ou personnellement et qui leur est conféré par le présent règlement administratif ou par la pratique, les précédents, l'usage ou la coutume.

« question de procédure » Question concernant la procédure à observer lors des réunions du Conseil.

Interprétation : classement des motions

(2) Dans le présent règlement administratif, « classer une motion » signifie remettre indéfiniment le débat ou le vote auquel elle peut donner lieu. L'expression « motion classée » a un sens correspondant.

LES RÉUNIONS

Conformité au présent règlement administratif

2. (1) Les réunions du Conseil sont conduites conformément au présent règlement administratif.

Dispense

(2) Malgré le paragraphe (1), le trésorier ou la trésorière peut dispenser du respect de toute exigence du présent règlement administratif visant le Conseil, modifier une telle exigence ou abréger ou proroger tout délai qui y est mentionné à propos de celui-ci.

Problèmes de procédure non prévus

(3) Tout problème de procédure non prévu par le présent règlement administratif est décidé par le trésorier ou la trésorière.

Lieu de réunion

3. (1) Sous réserve des paragraphes (2) et (3), le Conseil se réunit à Osgoode Hall.

Idem

(2) Le trésorier ou la trésorière peut convoquer le Conseil en tous lieux.

Réunion par téléconférence

(3) Les réunions du Conseil peuvent avoir lieu par téléconférence ou par d'autres moyens de communication, notamment électroniques, permettant à tous les participants et à toutes les participantes de communiquer les uns avec les autres de façon simultanée et instantanée.

Moment des réunions du Conseil

4. Sauf décision contraire du trésorier ou de la trésorière, le conseil se réunit le quatrième jeudi du mois, à l'exception des mois de juillet, août et décembre.

Réunions extraordinaires du Conseil

5. (1) Le trésorier ou la trésorière peut convoquer le Conseil en tous lieux par avis de convocation donné, directement ou par l'intermédiaire du ou de la secrétaire, à tous les conseillers et à toutes les conseillères au moins vingt-quatre heures à l'avance.

Idem

(2) À la demande écrite de dix conseillers ou conseillères qui ont droit de voter au Conseil, le ou la secrétaire convoque celui-ci par avis de convocation donné à tous les conseillers et à toutes les conseillères au moins vingt-quatre heures à l'avance.

Débats publics

6. (1) Sous réserve du paragraphe (2), les réunions du Conseil sont publiques.

Huis clos

(2) Le Conseil se réunit à huis clos lorsqu'il délibère des questions suivantes :

1. Les questions relatives au personnel du Barreau.

2. Les litiges mettant en cause le Barreau.

3. Les négociations avec un gouvernement.

4. Les questions financières ou personnelles d'ordre privé ou toute autre question lorsque, de l'avis des conseillères et des conseillers présents à la réunion du Conseil, l'impératif du secret l'emporte sur les raisons d'intérêt public qui justifient la divulgation.
5. Toute autre question pour laquelle le trésorier ou la trésorière demande le huis clos.

Ordre des travaux
7. Sous réserve de l'article 8, les affaires et l'ordre des travaux, aux réunions du Conseil, sont établis par le trésorier ou la trésorière.

Ordre des travaux des réunions extraordinaires
8. Lors d'une réunion du Conseil convoquée en application du paragraphe 5 (2), l'ordre des travaux comprend les questions qui ont motivé sa convocation.

Procès-verbal
9. (1) Il est tenu un procès-verbal des réunions du Conseil, sauf si celui-ci se constitue en comité plénier.

Adoption du procès-verbal
(2) À chaque réunion du Conseil, le procès-verbal de la dernière réunion est adopté par les conseillères et les conseillers présents et signé par le trésorier ou la trésorière, ou par le conseiller ou la conseillère ayant présidé la réunion concernée.

Publication des procès-verbaux
(3) Les procès-verbaux des réunions du Conseil sont mis à la disposition du public aux fins de consultation, sauf dans le cas des réunions tenues à huis clos.

Transcription
10. (1) Un service complet de sténographie est mis à la disposition du Conseil.

Publication
(2) Les transcriptions des réunions publiques du Conseil sont mises à la disposition du public aux fins de consultation.

Ajournement pour défaut de quorum
11. (1) S'il lui est signalé, pendant une réunion du Conseil, que le quorum ne semble pas atteint, le trésorier ou la trésorière décide s'il y a quorum et, en cas de défaut, ajourne les débats du Conseil sans motion.

Idem
(2) La question qui faisait l'objet des débats de la réunion du Conseil juste avant l'ajournement visé au paragraphe (1) ainsi que toutes les questions figurant à l'ordre du jour de cette réunion qui restaient à traiter à ce moment-là sont réputées reportées à la prochaine réunion du Conseil qui doit être tenue en application de l'article 4.

Destitution pour cause d'absence
12. (1) Les conseillères et les conseillers présents à une réunion du Conseil peuvent destituer les conseillères et les conseillers élus qui n'assistent pas à six réunions consécutives du Conseil tenues en application de l'article 4.

Absence à trois réunions

(2) Le ou la secrétaire avise immédiatement les conseillères et les conseillers élus qui n'assistent pas à trois réunions consécutives du Conseil tenues en application de l'article 4 de leur absence et du pouvoir des conseillers et des conseillères de les destituer en vertu du paragraphe (1).

Communication de l'absence à six réunions

(3) Le ou la secrétaire communique, à la première réunion du Conseil tenue en application de l'article 4 qui suit, les noms des conseillers et des conseillères qui n'ont pas assisté à six réunions consécutives du Conseil tenues en application de l'article 4.

LE TRÉSORIER

Présidence assurée par le trésorier

13. Le trésorier ou la trésorière préside les réunions du Conseil.

Appel des décisions du trésorier

14. (1) Au moins deux conseillers et conseillères qui ont droit de voter aux réunions du Conseil peuvent conjointement interjeter appel d'une décision que le trésorier ou la trésorière a prise au cours d'une de ces réunions auprès des conseillères et des conseillers présents.

(2) Malgré le paragraphe (1), les décisions suivantes que le trésorier ou la trésorière prend au cours d'une réunion du Conseil ne sont pas susceptibles d'appel :

1. Les décisions sur les questions de privilège ou de procédure.

2. Les rappels au règlement, fondés sur l'alinéa 26 (3) e).

3. Les décisions portant irrecevabilité d'une motion, fondées sur le paragraphe 18 (2).

4. Les décisions de mettre une motion aux voix, fondées sur le paragraphe 27 (1).

5. Les décisions concernant les votes inscrits.

Délai d'appel

(3) Les appels d'une décision du trésorier ou de la trésorière sont interjetés immédiatement après la décision.

Débat

(4) Les appels d'une décision du trésorier ou de la trésorière peuvent faire l'objet d'un débat, sauf si la décision vise les paroles ou la conduite d'un conseiller ou d'une conseillère. Les articles 24 à 26 s'appliquent, avec les adaptations nécessaires, à ce débat.

Idem

(5) Le débat portant sur l'appel d'une décision que le trésorier ou la trésorière prend en application de la disposition 5 du paragraphe 6 (2) se déroule à huis clos.

Règlement

(6) Les appels d'une décision du trésorier ou de la trésorière sont réglés par un vote sur la question suivante : La décision du trésorier (ou de la trésorière) est-elle confirmée ?

Idem
(7) Les articles 27 à 31 s'appliquent, avec les adaptations nécessaires, aux votes tenus sur les appels d'une décision du trésorier ou de la trésorière.

Idem
(8) Les votes tenus sur les appels d'une décision que le trésorier ou la trésorière prend en application de la disposition 5 du paragraphe 6 (2) se déroulent à huis clos.

Décision : appel d'une décision du trésorier
(9) Les décisions du trésorier ou de la trésorière sont confirmées si la majorité des voix est en faveur ou en cas de partage des voix.

L'ORDRE ET LE DÉCORUM

Maintien de l'ordre et du décorum par le trésorier
15. Le trésorier ou la trésorière maintient l'ordre, le décorum la politesse et la courtoisie lors des réunions du Conseil et y décide des questions de privilège et de procédure.

Interdiction d'interrompre le trésorier
16. (1) Les conseillers et les conseillères ne doivent pas interrompre le trésorier ou la trésorière lorsqu'il ou elle parle, rend une décision ou met une question ou une motion aux voix.

Interdiction d'interrompre un conseiller
(2) Sauf disposition contraire du présent règlement administratif, aucun conseiller ni aucune conseillère, à l'exception du trésorier ou de la trésorière, ne doit interrompre celui ou celle qui a la parole.

Questions de privilège et de procédure
17. (1) Les conseillers et les conseillères peuvent soulever une question de privilège ou de procédure en tout temps au cours d'une réunion du Conseil et interrompre un autre conseiller ou une autre conseillère pour ce faire.

Discussion
(2) Une question de privilège ou de procédure ne fait l'objet d'aucune discussion ni d'aucun débat, le conseiller ou la conseillère qui l'a soulevée pouvant seul prendre la parole.

Décision
(3) Le trésorier ou la trésorière décide d'une question de privilège ou de procédure dès qu'elle est soulevée.

Prise en considération immédiate
(4) Lorsque le trésorier ou la trésorière juge qu'une question de privilège paraît fondée à première vue, la question est prise en considération immédiatement.

LES MOTIONS

Conformité des motions au présent règlement administratif
18. (1) Les motions présentées aux réunions du Conseil le sont conformément au présent règlement administratif.

Motions interdites

(2) Il est interdit de présenter une motion concernant une question qui, selon le cas :

a) peut faire l'objet d'une audience tenue en application de la Loi ou des règlements administratifs;

b) est en cours devant un tribunal judiciaire ou administratif pour décision.

Auteur de la motion

19. (1) Tout conseiller ou toute conseillère qui a droit de voter aux réunions du Conseil peut présenter une motion.

Proposition de certaines motions par certains conseillers

(2) Les motions de fond dont il a été donné avis sont présentées par le conseiller ou la conseillère qui a donné cet avis.

Avis obligatoire

20. (1) Un avis est requis pour les motions suivantes :

1. Les motions de fonds, à l'exception de celles qui figurent dans le rapport d'un comité permanent ou autre.

2. Les motions portant reprise des débats et mise aux voix d'une motion de fond classée.

Mode de remise des avis

(2) Le conseiller ou la conseillère qui a l'intention de présenter une motion en donne avis par écrit en remettant une copie de son texte, portant sa signature et celle du conseiller ou de la conseillère qui appuie la motion, au ou à la secrétaire au moins vingt jours avant la réunion du Conseil à laquelle il ou elle a l'intention de la présenter.

Envoi de l'avis à tous les conseillers

(3) Le ou la secrétaire envoie une copie du texte de la motion à tous les conseillers et à toutes les conseillères le plus tôt possible après en avoir reçu l'avis prévu au paragraphe (2).

Motion de fond sans avis

(4) Malgré le paragraphe (1), les conseillers et les conseillères peuvent présenter une motion de fond, à l'exception de celle qui figure dans le rapport d'un comité permanent ou autre, si elle concerne une question faisant l'objet d'un débat à la réunion du Conseil.

Second proposeur obligatoire

21. (1) Les motions doivent être appuyées avant de pouvoir être débattues, si cela est permis, et mises aux voix.

Seconds proposeurs

(2) Seuls les conseillers et les conseillères qui ont droit de voter aux réunions du Conseil peuvent appuyer une motion.

Idem

(3) Les motions de fonds dont il a été donné avis sont appuyées par le conseiller ou la conseillère qui en a signé le texte à titre de conseiller ou de conseillère ayant l'intention de l'appuyer.

Proposition d'une motion de fond

22. (1) Sous réserve de l'article 7, les motions de fond peuvent être proposées en tout temps au cours des réunions du Conseil à la condition que celui-ci ne soit alors saisi d'aucune autre motion de fond.

Idem

(2) Les motions portant renvoi à un comité permanent ou autre du sujet d'une motion de fond, à l'exception de celle qui figure dans le rapport d'un tel comité, les motions portant classement d'une motion de fond ou les motions portant mise aux voix d'une motion de fond peuvent être proposées en tout temps après la proposition avec appui de cette motion, mais avant sa mise aux voix, au cours d'une réunion du Conseil.

Idem

(3) Les motions portant amendement peuvent être présentées en tout temps après la proposition avec appui de la motion principale, mais avant sa mise aux voix, au cours d'une réunion du Conseil, à la condition que celui-ci ne soit alors saisi d'aucune autre motion portant amendement.

Idem

(4) Les motions d'ajournement des débats du Conseil peuvent être présentées en tout temps.

Retrait

23. (1) Le conseiller ou la conseillère qui a donné avis d'une motion peut la retirer en tout temps.

Idem

(2) Le conseiller ou la conseillère qui a proposé une motion peut la retirer en tout temps avec le consentement du conseiller ou de la conseillère qui l'a appuyée.

LES DÉBATS

Débats sur les motions

24. Les motions dont le Conseil est saisi font l'objet d'un débat, à l'exception des suivantes :

1. Les motions portant classement d'une motion.

2. Les motions d'ajournement des débats du Conseil.

Participants aux débats

25. Tout conseiller et toute conseillère, le ou la chef de la direction et quiconque a reçu au préalable la permission du trésorier ou de la trésorière peut participer aux débats lors des réunions du Conseil.

Ordre de prise de parole
26. (1) Sous réserve du paragraphe (2), au cours d'un débat, les conseillers et les conseillères ont le droit de prendre la parole dans l'ordre suivant :

1. Le conseiller ou la conseillère qui a proposé la motion.

2. Le conseiller ou la conseillère qui a appuyé la motion.

3. Tout autre conseiller, toute autre conseillère ou toute autre personne visés à l'article 25 à qui le trésorier ou la trésorière donne la parole.

Report de l'exercice du droit de prendre la parole
(2) Le conseiller ou la conseillère qui a appuyé la motion peut se réserver le droit de prendre la parole plus tard au cours du débat.

Infractions au règlement
(3) Pendant un débat, le trésorier ou la trésorière rappelle au règlement le conseiller ou la conseillère qui :

a) sous réserve des paragraphes (4), (5), (6) et (7), prend la parole plus d'une fois sur une même motion;

b) fait porter son discours sur des questions autres que la motion qui fait l'objet du débat;

c) persiste à répéter inutilement des choses déjà dites ou soulève des questions qui ont déjà été décidées pendant une réunion du Conseil;

d) anticipe sur une question qui figure déjà à l'ordre du jour d'une réunion du Conseil;

e) fait référence à une question qui, selon le cas :

(i) peut faire l'objet d'une audience tenue en application de la Loi ou des règlements administratifs;

(ii) est en cours devant un tribunal judiciaire ou administratif pour décision;

f) fait des allégations contre un autre conseiller ou une autre conseillère;

g) attribue à un autre conseiller ou à une autre conseillère des motifs erronés ou inavoués;

h) accuse un autre conseiller ou une autre conseillère de dire un mensonge délibéré;

i) profère des paroles injurieuses ou offensantes susceptibles de créer un désordre.

Prendre la parole deux fois

(4) Le conseiller ou la conseillère ne peut prendre la parole une deuxième fois sur une motion que pour expliquer une partie importante de son premier discours qui, à son avis, peut avoir été mal interprétée, auquel cas il ou elle ne peut apporter aucun nouvel élément dans la discussion.

Idem

(5) Le conseiller ou la conseillère qui propose une motion peut prendre la parole sur celle-ci une deuxième fois avant la fin du débat pour répondre à toute remarque ou question ayant surgi au cours du débat.

Questions portant sur les discours et les réponses

(6) Pendant le débat sur une motion, tout conseiller ou toute conseillère peut poser une brève question sur le discours d'un autre conseiller ou d'une autre conseillère, lequel ou laquelle peut, avec la permission du trésorier ou de la trésorière, répondre brièvement.

Permission du trésorier de prendre la parole une deuxième fois

(7) Le conseiller ou la conseillère peut prendre la parole une deuxième fois sur une motion dans des circonstances non prévues aux paragraphes (4), (5) et (6) avec la permission du trésorier ou de la trésorière.

Règles de débat spéciales : motions portant amendement

(8) Le trésorier ou la trésorière interrompt le débat sur une motion principale dès la proposition d'une motion portant amendement et soumet celle-ci au débat.

Reprise du débat interrompu

(9) Le débat qui a été interrompu en application du paragraphe (8) reprend immédiatement après la tenue du vote sur la motion portant amendement qui a causé cette interruption.

LES VOTES

Mise aux voix d'une motion pouvant faire l'objet d'un débat

27. (1) Sous réserve du paragraphe (2), le trésorier ou la trésorière met aux voix une motion qui peut faire l'objet d'un débat lorsqu'il ou elle estime que ce débat est raisonnablement terminé.

Acceptation d'une motion portant amendement

(2) La motion qui porte amendement ne doit pas être mise aux voix si les conseillers ou les conseillères qui ont proposé et appuyé la motion principale consentent à l'incorporation à celle-ci des amendements qu'elle prévoit.

Mise aux voix d'une motion ne pouvant faire l'objet d'un débat

(3) Le trésorier ou la trésorière met aux voix une motion qui ne peut faire l'objet d'un débat dès qu'elle est appuyée.

Non-participation du trésorier aux votes

28. Le trésorier ou la trésorière ne participe à aucun vote, sauf s'il y a partage, auquel cas il ou elle a voix prépondérante.

Interdiction du vote par procuration
29. Il est interdit de voter par procuration.

Mode de scrutin
30. Les votes sont à main levée ou oraux, si la réunion du Conseil se tient par téléconférence ou par d'autres moyens de communication, notamment électroniques, en vertu du paragraphe 3 (3), à moins qu'un vote inscrit ne soit exigé par le trésorier ou la trésorière, ou demandé par un conseiller ou une conseillère qui a droit de voter aux réunions du Conseil et permis par le trésorier ou la trésorière, conformément à l'article 31.

Vote inscrit
31. (1) Un vote inscrit peut être exigé par le trésorier ou la trésorière ou demandé par un conseiller ou une conseillère qui a droit de voter aux réunions du Conseil avant que la motion soit mise aux voix.

Vote inscrit demandé par un conseiller
(2) Le trésorier ou la trésorière peut, sans y être tenu, tenir le vote inscrit que demande un conseiller ou une conseillère.

Mode de scrutin lors d'un vote inscrit
(3) Lors d'un vote inscrit, le trésorier ou la trésorière met la motion concernée aux voix devant les conseillères et les conseillers présents à la réunion du Conseil et le ou la secrétaire prononce à voix haute le nom de tous les conseillers et de toutes les conseillères qui ont droit de voter aux réunions du Conseil, lesquels et lesquelles indiquent alors leur vote ou leur abstention, dans l'éventualité où ils ou elles ne souhaitent pas voter.

Décision
32. Les motions sont adoptées si la majorité des voix est en faveur.

COMITÉ PLÉNIER

Comité plénier
33. (1) Le trésorier ou la trésorière peut en tout temps exiger que le Conseil se constitue en comité plénier pour prendre en considération toute question dont il est alors saisi.

Nomination à la présidence
(2) Dès qu'il ou qu'elle a annoncé sa décision d'exiger que le Conseil se constitue en comité plénier, le trésorier ou la trésorière peut nommer un conseiller ou une conseillère à la présidence de ce comité, auquel cas il ou elle quitte le fauteuil.

Occupation du fauteuil par le conseiller nommé
(3) La conseillère ou le conseiller nommé à la présidence du comité plénier occupe le fauteuil dès que le trésorier ou la trésorière l'a quitté conformément au paragraphe (2) et le Conseil est alors constitué en comité plénier.

Règles de procédure
(4) L'article 24 de la Loi ainsi que le paragraphe 11 (1) et les articles 13 à 32 du présent règlement administratif s'appliquent, avec les adaptations nécessaires, aux délibérations du comité plénier.

Retour du trésorier au fauteuil

(5) Lorsque le comité plénier a terminé ses délibérations :

a) d'une part, le président ou la présidente du comité plénier nommé par le trésorier ou la trésorière, le cas échéant, quitte le fauteuil et le trésorier ou la trésorière le reprend;

b) d'autre part, le Conseil se constitue en tant que tel.

Rapport

(6) Lorsque le Conseil se reconstitue après que les conseillères et les conseillers présents à sa réunion ont siégé en comité plénier, le trésorier, la trésorière ou le président ou la présidente du comité peuvent lui faire rapport des délibérations de ce dernier.

Carried

MOTION – APPOINTMENT TO APPEAL PANEL

It was moved by Mr. Cherniak, seconded by Mr. Wright, that Alan Gold be appointed Chair of the Appeal Panel effective August 18, 2006, upon the expiry of Mark Sandler's term as Chair.

Carried

REPORT OF THE PROFESSIONAL DEVELOPMENT, COMPETENCE & ADMISSIONS COMMITTEE

Ms. Pawlitza presented the Professional Development, Competence & Admissions Committee Report.

REPORT TO CONVOCATION
June 22, 2006

Professional Development, Competence and Admissions Committee

Part of the Report is carried over from May 25, 2006 Convocation

Committee Members
Laurie Pawlitza (Chair)
Constance Backhouse (Vice-Chair)
Mary Louise Dickson (Vice-Chair)
Robert Aaron
Kim Carpenter-Gunn
James Caskey
Carole Curtis
Paul Henderson
Laura Legge
Daniel Murphy
Judith Potter
Bonnie Warkentin

Purpose of Report: Decision

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

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COMMITTEE PROCESS

1. The Committee met on May 11, 2006. Committee members Laurie Pawlitza (Chair), Mary Louise Dickson (Vice Chair), Robert Aaron, Kim Carpenter-Gunn, James Caskey, Carole Curtis, Laura Legge, Judith Potter and Bonnie Warkentin attended. Staff members Diana Miles, and Sophia Sperdakos also attended. A portion of the meeting was held jointly with the Professional Regulation Committee. Professional Regulation Committee members Clayton Ruby (Chair), Laurence Pattillo (Vice Chair), Heather Ross (Vice Chair) Anne Marie Doyle, George Finlayson, Allan Gotlib, and Ross Murray attended. Staff members Naomi Bussin, Lesley Cameron, Zeynep Onen, and James Varro attended.

FOR DECISION

PROPOSED CHANGES TO POLICY REQUIRING COMPETENCE AND CAPACITY PROCEEDINGS TO BE HELD IN THE ABSENCE OF THE PUBLIC

Joint Motion of the Professional Development, Competence and Admissions Committee and the Professional Regulation Committee

MOTION

2. That Convocation

   a. rescind its current policy that competence proceedings and capacity proceedings be held in the absence of the public;

   b. apply the current policy applicable to conduct hearings to competence and capacity hearings; and

   c. direct that amendments to the Rules of Practice and Procedure to reflect this change in policy be provided to Convocation for its approval.

INTRODUCTION

3. The Law Society's Rules of Practice and Procedure provide that conduct proceedings are generally open to the public, but competence and capacity proceedings are held in the absence of the public. The current rules are set out at Appendix 1.

4. In keeping with its mandate to regulate its members in the public interest, the Law Society periodically reviews its regulatory processes to ensure they continue to reflect that mandate.

5. A number of Task Forces have identified as an issue for discussion whether competence and capacity proceedings should continue to be conducted in the absence of the public. On May 26, 2005 Convocation approved the Tribunals Task Force's recommendation that the Professional Development, Competence and Admissions Committee and the Professional Regulation Committee discuss the issue and make recommendations for Convocation's consideration and decision. On May 25, 2006 the Investigations Task Force made a similar recommendation, which Convocation also approved.

6. To ensure a consistent discussion of the issue across the two committees the committees met together to consider it. They make joint recommendations to Convocation reflected in the motion set out above.

BACKGROUND

Discipline Proceedings

7. Until February 1986 conduct proceedings (then known as discipline proceedings) were generally held in the absence of the public. The exception to this was in circumstances in which the member who was the subject of the proceeding requested a public hearing.

8. In February 1986 Convocation reconsidered the policy and determined that discipline proceedings should be held in public. The exception to this would be where a panel was of the view that,

   a. matters involving public security might be disclosed; or

   b. intimate financial or personal matters might be disclosed of such a nature that the desirability of avoiding disclosure in the interests of any person affected or the public interest outweighed the desirability of adhering to the policy of open hearings.[1]

9. Convocation made it clear that panels were not to make an order to proceed in the absence of the public lightly and that the onus of establishing by credible evidence that the order was warranted would be on the party or parties seeking the order.

10. In considering such applications the 1986 Report stated that panels were to balance the following interests:

[1] Minutes of Convocation, vol. 65, February 27, 1986, Discipline Committee Report, Appendix, p.1.

a. The interest of the public at large in an open disciplinary process as expressed by the general principle that hearings be open to the public;

b. The interest of the Society in making it known to the public and the profession that the Society takes its disciplinary responsibilities seriously, and that it operates a fair and effective disciplinary process;

c. The right of the 'news media' and of members of the public to report on and be informed with respect to public events and institutions, in keeping with guarantees of freedom of expression in section 2 of the Charter;

d. The interest of members who are subject to disciplinary proceedings or who are called as witnesses or otherwise referred to in the proceedings to protection of their professional reputations which may be caused by public disclosure or publication of their involvement in the proceedings.[2]

11. In deciding both whether an order should be made and the scope of any order, the 1986 Report stated that panels were to consider, *inter alia*, the following specific matters:

a. Whether the matters which may be disclosed are privileged as between the solicitor and his client;

b. The likelihood that matters involving public security or intimate financial or personal matters will be disclosed in such a way that they will be broadcast to the public and will cause substantial harm and embarrassment to clients, the complainant, the solicitor or any other person;

c. The existence of any special public interest in the proceedings;

d. Whether the matters have already been published in the news media or in public documents, or involve conduct which took place in public;

e. Whether disclosure is likely to prejudice any person in respect of pending criminal proceedings;

f. Alternatives to ordering that the hearing in its entirety be held in camera, including,

i. limiting distribution of and access to documents, including psychiatric reports, which are tendered in evidence in a public hearing;

ii. making non-publication orders, either to prohibit any publication or to prohibit publication of names and other identifying information;

iii. exclusion of the public from portions of the hearing.[3]

[2] Ibid. Appendix, p. A-23.
[3] Ibid. Appendix, p. A-24.

12. It is important to note that until 1999 when amendments were made to the *Law Society Act* allegations of competence-related deficiencies were addressed in discipline proceedings and, accordingly, were generally heard in public.

Competence Provisions

13. In 1992 the second Report of the Reforms Implementation Committee made recommendations to seek statutory amendments to the *Law Society Act* for the regulation of professional standards of competence of the legal profession.

14. The Report stated that its proposals reflected two policies: "The Law Society should have the statutory authority to inquire into the competence of members of the profession" and "concerns about competence should generally be dealt with through remedial rather than disciplinary procedures, provided that such an approach will adequately protect the interest of clients."

15. The Report recommended the introduction of a definition of standards of professional competence and two types of practice review: *focused* where concerns have been raised about a member's competence and *random* to be initiated through the administration of a questionnaire. A member could either agree with the recommendations emerging from the focused review or the matter would proceed to a hearing with one elected bencher and two other members of the Law Society.

16. The Report proposed that notwithstanding section 9 of the *Statutory Powers Procedure Act*, which requires hearings to be open to the public, professional competence hearings should be held in the absence of the public.

17. The amendments to the *Law Society Act* ultimately included a different approach to competence hearings. The Act does not require that competence proceedings be held in the absence of the public, however in its Rules of Practice and Procedure the Law Society adopted the recommendations set out in the 1992 Report respecting the *in camera* nature of competence hearings.

18. Moreover, the fact that the Proceedings Authorization Committee has authorized a competence proceeding will only be disclosed outside the Law Society to the complainant.

19. The *in camera* nature of the proceeding reflects an approach in which the public's right to know about the existence of competence proceedings and their outcome is strictly limited. The focus on the confidential nature of competence proceedings is reflected in the *Rules of Practice and Procedure* in which a distinction is made between hearing outcomes in which a member's rights are "suspended" or "limited" and those in which they are not. In the former case "the decision and order are a matter of public record". In the latter the decision and order are not a matter of public record. The rationale for the policy is that competence proceedings are remedial in nature and correction of the member's deficiencies is best accomplished, to the ultimate benefit of both the member and the public, in a confidential remedial setting.

Capacity Provisions

20. In October 1990, Convocation adopted in principle the recommendations in the final report of the Special Committee on Discipline Procedures dealing with a member's "incapacity" to practise law. The proposed model provided for a one-member bencher panel to determine whether an investigation into a member's capacity to practise is warranted. After reviewing the investigation, the panel "if warranted, may refer the matter to the chair of the Professional Standards Committee for a hearing." The chair would appoint a three-member fitness to practise panel, "who may, [upon reasonable grounds] order that member to undergo a medical or psychiatric examination." After conducting a hearing and making a finding that the member is incapacitated, the panel "may by order limit or suspend the member's rights and privileges…"

21. The report's rationale for the new model was described as follows:

> *The current practice of treating questions of incapacity as matters to be dealt with in the discipline stream is no longer acceptable or appropriate. The goal of the proposals outlined above is to create a new process whereby questions of a member's capacity to practise law are treated exactly as that, and not as a matter for discipline. This is accomplished in part by transferring the responsibility of determining capacity to a panel appointed by the Chair of the Professional Standards Committee, a more appropriate Committee to determine this issue. The responsibility of the Society to protect the public is here coupled with the Society's obligation to locate those members demonstrating an incapacity to carry on the practice of law due to some form of infirmity. Further, those dispositions available to a Fitness to Practice Panel are meant to afford the Panel flexibility and creativity in assisting a member found to be working under an incapacity.*

22. Convocation referred the Special Committee's report to the Special Committee on Reforms Implementation. In May 1991 that Committee reported to Convocation that it had studied the capacity issue, as outlined in the 1990 report, and submitted a proposal to Convocation "predicated on the assumption that the Law Society's interest in a member's capacity is limited to protecting the member's clients and the public, and that intervention on the basis of incapacity should be narrowly designed to achieve those purposes." The Reforms Implementation Report, which was adopted by Convocation, elaborated on the model in the 1990 Report, and included the following provision:

> 4. (1) Notwithstanding section 9 of the Statutory Powers Procedure Act, R.S.O. 1980, c. 484, a hearing held with respect to the capacity of the member to practise law shall be held in camera, but if the member requests that the hearing be public, it shall be open to the public, except as provided in subsection (2).
>
> (2) Where the panel is of the opinion that intimate financial or personal matters pertaining to the member's clients may be disclosed at the hearing, and that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of disclosure, the panel may hold the hearing concerning any such matter in camera.
>
> …

> 12. The fact that a member is the subject of an inquiry pursuant to this part shall not be made public by the Society, except to the extent provided in section 4. Where a hearing into a member's capacity has been open to the public, the findings, order and reasons of the panel shall be made public. Where a hearing has been held in camera, and a member's rights and privileges have been suspended or limited, the Society shall make public the order of the panel of benchers, but not the findings or reasons with respect thereto.

23. The reforms with respect to capacity, as the language in s. 4(2) above indicates, borrowed from the policy decision made in 1986 with respect to the exception to public discipline hearings. The reforms also mirror those on competence to the extent that capacity proceedings were to be distinguished from disciplinary proceedings and given a more remedial focus.

24. As with the competence provisions, the Reforms Implementation Committee's proposals on capacity formed the basis for amendments to the *Law Society Act*. Section 40 of the Act includes the Society's authority, subject to the Rules of Practice and Procedure, to make a number of different orders when the Hearing Panel determines that a member has been incapacitated. They include suspension orders, orders for treatment or counseling, orders restricting practice and orders that the member report on compliance with any of the above orders.

25. The Act does not require that hearings dealing with capacity be held in the absence of the public, but the hearings are subject to the Rules of Practice and Procedure, which include procedural rules on hearings in the absence of the public and reflect Convocation's policy decision to hold capacity proceedings *in camera*. As with competence proceedings, there are Rules that determine what is and is not a matter of public record. Pending the outcome of the hearing, even the fact of the hearing is not public. Where the hearing has been held *in camera*, and an order has been made suspending or limiting the member's rights and privileges, the order, but not the reasons, is a matter of public record. This varies somewhat from competence proceedings, in which the decision and order resulting in a suspension or limitation on practice are a matter of public record, but the reasons are not to be made public.

26. Similar to the competence provisions, the Rules also provide that following an in camera capacity hearing, the Society must, where practicable, inform a complainant of the decision as to whether the capacity application was established. The Hearing Panel then determines which aspects of the order are to be disclosed to a complainant.

REGULATORY TRANSPARENCY

27. Public attitudes to self-regulation have changed since the Reforms Implementation Committee report in 1992 and the introduction of the amendments to the *Law Society Act* in 1999. Traditionally, there has been little government or consumer scrutiny of professions' approach to self-regulation, whether law or other professions. In recent years, however, it has become clear that public perception of a regulator's actions affects a government's continued support of self-regulation. The importance of public and governmental perceptions can be illustrated by noting the attitudes to self-regulation of the legal profession in other parts of the world where there has been a loss of confidence.

28. A catalyst for the radical reduction of self-regulation in England and Wales and Australia was regulators' inability to effectively and efficiently handle consumer complaints,[4] but these law societies had already had their discipline tribunals severed from their operations years earlier. The decision of the Law Society of England and Wales' Council some years ago to limit funds to be spent on its complaints system has been cited as indicative of a governance system that placed lawyers, not consumers, first.

29. In both England and Wales and jurisdictions in Australia the loss of consumer confidence in law society operations contributed to governments' willingness to significantly reduce the role of regulators in governing the profession. Inadequate law society handling of complaints in those jurisdictions was a flashpoint for consumer and government discontent. These inadequate complaints processes raise larger questions about the way in which a self-regulating profession should operate. Moreover, government perceptions that the law societies crossed the line from self-regulation in the public interest to aggressive advocacy on behalf of the profession, which undermines the public interest, affected their faith in self-regulation.

30. In the final report of his review of the regulatory framework for legal services in England and Wales Sir David Clementi noted, "there is an issue about whether systems for complaints against lawyers, run by lawyers themselves, can achieve consumer confidence. A large number of responses to the Consultation Paper expressed dissatisfaction with the current arrangements."[5]

31. Although Canadian professions have not engendered the disillusionment with self-regulation that has been observed elsewhere, they have not been free of occasionally critical scrutiny.

32. The College of Physicians and Surgeons of Ontario has recently been the subject of media and public attention over its secrecy in dealing with numerous complaints against one physician spanning many years. The case was the subject of a Fifth Estate documentary entitled "First Do No Harm." (See Appendix 2 for more information).

33. The Minister of Health for Ontario announced in 2005 that he would seek advice from the Health Professions' Regulatory Advisory Council on possible legislative reform that will address issues related to the handling of complaints, the speed with which problems are addressed, the confidentiality of investigations and other issues.[6]

34. It is clear that the media has become interested in stories about incompetent physicians who continue to practise without the public knowing they are subject to complaints, investigations and remedial requirements that may or may not be sufficient to resolve their competence issues. Appendix 3 contains two articles from the Toronto Star that

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

[5] Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales Final Report,* p.2.

[6] The Council just released its 339-page report on May 19, 2006. The Health Minister is seeking comments until June 30, 2006.

criticize the CPSO for the secrecy of its processes and for seeming to protect members of the profession rather than the public.

35. The Ontario legislature has recently passed Bill 78, *An Act to amend the Education Act, the Ontario College of Teachers Act, 1996 and certain other statutes relating to education, 2006*. Among other provisions the Act,

    a. requires every person elected or appointed to the Council to swear an oath or affirm in a manner and form prescribed by the regulations. In addition, it provides that every member of Council shall, in carrying out his or her duties, serve and protect the public interest, and act in accordance with such conflict of interest rules as may be prescribed by regulation. It eliminates the Council's current authority to make by-laws respecting conflict of interest rules for members of the Council; and

    b. establishes a Public Interest Committee, the members of which are to be appointed by the Minister. The members of this committee may not be members of the College of Teachers. Section 54 of the Act provides among other things that "the Committee shall advise the Council with respect to the duty of the College and the members of the Council to serve and protect the public interest in carrying out the College's objects; and perform such other duties as may be prescribed by regulations."

36. The Act demonstrates government's ability to impose conditions on self-regulated professions when it is concerned that they are not acting in the public interest.

37. In *Finney v. Barreau du Québec* [2004] 2 SCR 19 the appellant sued the Barreau du Québec in damages for breach of its obligation to protect the public in handling complaints against a member of the Barreau. The Barreau took the position that officers and staff were protected from such suits for acts engaged "in good faith in the performance of their duties." The Supreme Court held that,

> the conduct of the Barreau, when considered in its entirety, constitutes a fault for which it cannot claim immunity…Exceptional though the case may have been, the conduct of the Barreau was not up to the standards imposed by its fundamental mandate, which is to protect the public…The attitude exhibited by the Barreau, in a clearly urgent situation in which a practising lawyer represented a real danger to the public was one of such negligence and indifference that it cannot claim the immunity conferred by s.193. In spite of the necessary administrative separation between discipline and professional inspection, the Barreau had knowledge of everything [the lawyer] had done and of his record of professional misconduct. Neither the need to adhere to the statutory and procedural discipline framework and act with care and caution nor the complexity inherent in any administrative process can explain the slowness and lack of diligence in this case.[7]

38. Throughout Canada, law societies have begun to take note of the shifting attitudes to self-regulation and to consider ways to ensure that their approach to self-regulation has adapted to changing views and understanding of what is in the public interest.

[7] [2004] 2 SCR 19, pp. 3, 18.

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

40. The Law Society continuously engages in discussions about the processes by which it fulfills its regulatory mandate. In April 2002 Convocation made some changes to the confidentiality of practice review operations, in particular removing the barriers to communication between staff in the practice review department and other regulatory staff. Competence hearings continue, however, to be held in the absence of the public.

41. The Law Society has made some changes to its processes to enhance both the transparency of the tribunals process and the separation of the tribunals administration from that of investigations and prosecution. These have included,

    a. establishing a Tribunals Office;

    b. providing staff dedicated to the adjudicative process;

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

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

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

    f. establishing the Tribunals Committee as a standing Committee to address tribunal issues.

42. Most recently through its Tribunals Task Force, Convocation approved changes to its processes with a view to ongoing openness, transparency and accountability to the public. In particular, the Tribunals Task Force made a number of recommendations, which Convocation approved, designed to enhance the transparency of its adjudicative processes.

43. In this vein the Tribunals Task Force recommended, and Convocation approved, a review of the *in camera* nature of competence and capacity proceedings. The Task Force noted:

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

44. The Investigations Task Force also considered the importance of such a reexamination. In its report, approved by Convocation on May 25, 2006, it recommended that the Professional Development, Competence and Admissions Committee and the Professional Regulation Committee consider the issue of coordinating conduct, competence and capacity processes, the goal of such an approach being to "deal appropriately with both remedial and enforcement aspects of members' conduct and to avoid parallel proceedings and information 'walls' between departments that reduce the effectiveness of the Society's response to members' regulatory issues".

THE REMEDIAL FOCUS OF COMPETENCE AND CAPACITY STREAMS

The Competence Stream

45. The amendments to the *Law Society Act* recognized the importance of the Law Society's competence mandate by providing for both focused practice reviews and for competence hearings. By focusing on addressing deficiencies in service to clients the dual goals are to provide opportunities for the member to improve his or her skills, while at the same time giving the Law Society authority to restrict or limit a member's rights where necessary to protect the public.

46. The practice review program has a remedial focus. Its structure and philosophy, the training of practice reviewers, the staff approach to members, the locating of the program within the responsibility of the Professional Development and Competence department, rather than the Professional Regulation department, the focus of reviews on improving practice management skills, and the wide range of remedies available to assist the member to improve, all clearly point to the remedial nature of the program. Given that the Law Society is not required by the Act to conduct a practice review *before* it seeks authority to commence a competence hearing, the fact that its emphasis is on practice reviews, not hearings, demonstrates its commitment to the remedial approach.[8]

47. The practice review program and the competence stream are not, however, outside the regulatory structure that exists to protect the public. The regulatory features of the practice review program are illustrated by the fact that,

    a. there is legislative authority to require a member to participate in a practice review;

    b. practice reviews are treated as part of the regulatory structure, in the same manner as investigations and audits, with respect to such features as,

        i. the obligation on the member to provide documents and information; and

        ii. the Law Society's ability to seek an order for search and seizure;

    c. a formal procedure is set out in the legislation that must be followed;

[8] To date the Law Society has held only one competence hearing.

d. once entered, a proposal order is enforceable in the same way as any other Law Society order, including the provision that a Hearing Panel may suspend a member where there is a breach of the terms; and

e. where a member refuses to consent to a proposal order it is open to the Law Society to seek the authorization of the Proceedings Authorization Committee to commence a competence proceeding.

48. Convocation's initial view was that the remedial nature of the competence stream made it necessary that competence hearings be heard in the absence of the public. The implication was that there is no difference in the nature of the practice review process and competence hearings. This initial view has not been reviewed or reconsidered since it was approved. As indicated above, in making its recommendation that such a re-assessment of the policy be done, the Tribunals Task Force emphasized the possible implications of this approach for the Law Society's reputation respecting transparency, fairness and consistency.

The Capacity Stream

49. Based on the 1990 report discussed earlier, the Society recognized that an alternative to the discipline stream for members whose circumstances affected their capacity to practise law was needed so that appropriate remedies to assist the member could be applied. The implementation of the capacity stream defined these remedies more precisely, and pursuant to the amendments to the *Law Society Act* the Hearing Panel can now make a variety of orders that are intended to address the particular issue facing the member who is subject to a capacity proceeding.

50. The remedial measures, however, are coupled with public protection measures to ensure that the interests of clients and others with whom the lawyer has dealt are addressed. These include suspension of the member's right to practise, if warranted, and orders restricting the member's practice. While these sanctions are applied to deal with any risks that the member poses to the public because of his or her incapacity, they are necessary as a part of the broader remediation process. For example, a suspension order, which is effective until certain terms and conditions are met, may incorporate terms and conditions for a particular treatment or remedy focusing on the issue that caused the member's incapacity.

51. The definition of incapacity states "a member is incapacitated…if by reasons of physical or mental illness, other infirmity or addiction to or excessive use of alcohol or drugs, he or she is incapable of meeting obligations as a member." Rarely is there a bright line between capacity and conduct issues. At the time the Proceedings Authorization Committee considers which hearing stream is appropriate, it is not always possible to know the extent to which capacity issues were causative of the misconduct. Absent consent, there is no ability to force a member to participate in a medical assessment before a capacity application is issued. This issue may remain unclear even after hearing.[9]

52. As a result, the misconduct and the capacity issues of some members, taken together, fall into an area of overlap in which a member might reasonably be the subject of either

[9] Section 37 (1) of the *Law Society Act*.

a conduct or a capacity application. Similarly, some members who are the subject of a conduct proceeding might have been the subject of a capacity proceeding, and *vice versa*, if all of the information had been available to the Society at an early stage.

53. The introduction of psychiatric or other medical evidence concerning incapacity is not limited to capacity proceedings. Such evidence is frequently led by the defence in conduct proceedings and may or may not be the subject of an *in camera* order under Rule 3.01, which permits a Hearing Panel to protect intimate personal matters, following a balancing of the desirability of avoiding disclosure in the interests of the member or the public and the desirability of adhering to the principle that hearings be open to the public.

54. It may be that greater transparency around how the Society deals with capacity issues is warranted. If capacity hearings were open to the public, the Hearing Panel would still have the discretion under Rule 3.01 to protect intimate personal matters. Alternatively, a decision might be made to hold the hearings *in camera,* but make the fact of the application and the decision and order a matter of public record.[10]

OPERATIONAL IMPLICATIONS OF DUAL STREAM REGULATORY PROCESSES

55. From the public's perspective, the Law Society is a single entity that regulates in the public interest. Although the *Law Society Act* addresses conduct, capacity and competence as separate categories of regulatory behaviour, it is unlikely that members of the public categorize their complaints against lawyers in this way. The issues for the public are whether they are protected from lawyers who fall below acceptable standards, regardless of the reason, and whether the Law Society deals effectively with those lawyers.

56. Beyond the importance of transparency in the Law Society's dealings with specific complaints and complainants it is also important for the general public, including the media, to understand and observe that the Law Society's processes are open, transparent and reflective of its public interest mandate.

57. The current approach to competence proceedings raises a number of issues for the Law Society as regulator both in terms of transparency and effectiveness, including,

    a. the public is unlikely to accept or understand any rationale the Law Society might have for why conduct proceedings are public and competence proceedings are not. This could make the Law Society vulnerable to a perception that it favours the member over the public;

    b. the approach does not conform with the *Statutory Powers Procedure Act;*

    c. the Law Society cannot make the reasons for decision in a competence hearing public, even if the member's rights are limited or he or she is suspended. In

[10] In the case of both the Ontario Consent and Capacity Board (adjudicates matters of capacity, consent, civil committal and substitute decision making) and the Ontario Review Board (annually reviews the status of every person who has been found to be not criminally responsible or unfit to stand trial for criminal offences on account of a mental disorder) hearings are generally open to the public. The Boards have authority to close a hearing to the public in certain circumstances.

cases where the member is suspended or his or her rights are limited, only the decision and order can be made public. Where there is a lesser penalty not even the order or decision is public;

d. in general, the approach inhibits the development of jurisprudence in this area since members of the defence bar are not automatically entitled to the reasons for decision;[11]

e. despite the Law Society's general inability to make the reasons for decision public, the member is not restricted from speaking about the proceeding and characterizing the facts and the outcome as he or she chooses. If the description is inaccurate, the Law Society cannot correct it, because at most only the decision and order are public;

f. because conduct proceedings are held in public and competence proceedings are held in the absence of the public the Law Society cannot deal with a member against whom it alleges both misconduct and failure to meet standards of professional competence in a single proceeding. This may have negative implications for the Society, the complainants, and the member;

g. having made a commitment to transparency and openness for its conduct proceedings, including publishing information on hearings and findings, the Law Society cannot even indicate that a hearing is being held respecting a member's competence. The public may be left with the impression that the Law Society is doing nothing to address a problematic member unless and until an order is made that can be made public;

h. in certain circumstances, the Law Society must retain outside counsel to prosecute competence hearings to ensure the separation of certain information between the practice review program and professional regulation;

i. the confidentiality provisions create issues as to how to treat *in camera* evidence, submissions and reasons in the event a member, who is subject to a competence hearing order, breaches the order. In such cases the non-

[11] In 1999 Convocation adopted a policy respecting the treatment of *in camera* decisions in conduct matters. At that time staff member, Steven Traviss, prepared compilations of decisions. Convocation's policy stated: *a. If a synopsis of the case which was held in camera in whole or in part is recorded in Steven Traviss' compilation, it may be provided to counsel or a member for the purposes of precedent relating to the issues arising in a current case; b. If a synopsis is not available and the public part of the report is not adequate, the Law Society may, if practicable, provide a copy of the entire report or rasons, including the blue pages containing the in camera portion of the hearing with all identifying words or language deleted; c. If a. or b. are not satisfactory to counsel, the member, the Law Society or the Hearing Panel, a motion may be made to the Hearing Panel, with appropriate notice to the parties to the original hearing and persons affected, for disclosure of the requested in camera information, but the information shall be heard in camera if it is to be considered*. It is not clear, given the restrictive language in the Rules for competence and capacity proceedings, that this policy would apply to those proceedings. Even if the policy does apply it is cumbersome and the compilations are no longer prepared.

compliance or conduct hearing is presumptively held in public. This illustrates the difficulty in trying to maintain a seamless regulatory process.

58. Nearly all the same issues arise in the capacity stream. The issues described in paragraph 57 are all relevant to capacity proceedings. The publication issue varies slightly, in that in cases where the member is suspended or his or her rights are limited, only the order can be published.

59. In considering whether it is appropriate for competence hearings to continue to be held in the absence of the public, the following factors are relevant:

a. Unlike a practice review, the competence hearing is not an investigation. Rather, it is the consequence of an investigation and has only come about because the Proceedings Authorization Committee, the members of which are all benchers, is satisfied that there is sufficient evidence to go forward to a hearing.

b. By and large, a competence proceeding would be authorized not because of a single incident but because of a course of continuing behaviour that demonstrates serious and ongoing competence-related deficiencies and an inability or unwillingness to rectify the problems. In all likelihood the proceeding would follow a practice review process in which efforts to implement remedial solutions have been exhausted without positive result.

c. It may be argued that the remedial character of competence proceedings is illustrated by pre and post-hearing features, not by the hearing *per se*. The practice review process has important remedial features designed to assist a member to improve his or her practice and thereby avoid a competence hearing. Then, once a hearing is authorized and the Hearing Panel finds that the member is failing or has failed to meet standards of professional competence, the remedies available to the Panel are broad and largely remedial rather than disciplinary in nature.

d. If a competence proceeding were held in public, it would still be possible, in appropriate circumstances, to hold part of the hearing in the absence of the public and to designate part of the reasons *in camera,* given the sensitive nature of some material relevant to a determination of a member's competence.

e. A member's reputation is not potentially less harmed by the fact of a conduct proceeding being made public as opposed to a competence proceeding. No finding against the member has yet been made in the conduct hearing, yet the proceeding is nonetheless a public matter. Moreover, the Law Society regularly posts on its website information about upcoming conduct hearings and the conduct allegations against members long before any finding of guilt has been made.

60. In considering whether it is appropriate for capacity hearings to continue to be held in the absence of the public, the following factors are relevant:

a. A capacity proceeding in many cases results from conduct that meets the threshold requiring a disciplinary response from the Society. There is an area of

overlap between capacity and conduct hearings and the "mix" of capacity and conduct issues may call for both remedial measures and disciplinary sanctions.

b. Capacity issues are frequently raised in conduct proceedings, in which panels have the power to impose remedial terms.

c. Similar to competence proceedings, the remedial character of capacity proceedings may be illustrated by post-hearing features, not by the hearing per se. The scope of the orders available to Hearing Panels is broad and largely remedial rather than disciplinary in nature.

d. If a capacity proceeding were held in public, it would be possible to hold part of the hearing in the absence of the public and to designate part of the reasons *in camera*, given the sensitive nature of some material relevant to a determination of a member's capacity.

e. As with competence proceedings, a member's reputation is not potentially less harmed by the fact of a conduct proceeding being made public as opposed to a capacity proceeding. No finding against the member has yet been made in the conduct hearing, yet the proceeding is nonetheless a public matter. Moreover, the Law Society regularly posts on its website information about upcoming conduct hearings and the conduct allegations against members long before any finding of guilt has been made.

CONCLUSION

61. In 1986 Convocation weighed competing interests when it assessed whether to change its policies and begin to hold discipline hearings in public. Although it decided that in the interests of transparency, discipline hearings would generally be held in public, it did not ignore the importance of reserving to a panel the right to determine otherwise in certain circumstances. Paragraphs 9, 10 and 11, above, set out the process Convocation put in place at that time. A similar approach could be adopted for competence and capacity hearings to ensure that in appropriate circumstances and based on credible evidence a competence or capacity hearing or some portion of it could be held in the absence of the public.

62. The Professional Development Competence and Admissions Committee and the Professional Regulation Committee agree that the current policy that competence and capacity proceedings be held in the absence of the public should be rescinded and the current policy applicable to conduct hearings should be applied to them.

Appendix 1

EXCERPT FROM THE RULES OF PRACTICE AND PROCEDURE

Proceedings other than Capacity and Professional Competence Proceedings

3.01 Subject to rules 3.04 and 3.04.1, hearings shall be open to the public except where the tribunal is of the opinion that,
(a) matters involving public security may be disclosed;

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

Reasons and Order of the Tribunal

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

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

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

Capacity Proceedings

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

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

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

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

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

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

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

Professional Competence Proceedings

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

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

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

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

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

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

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

Appendix 2

The Fifth Estate – First Do No Harm

Extract from web site

In March, 2004 the Ontario College of Physicians and Surgeons of Ontario announced that it was revoking the license of Dr. Errol Wai-Ping, a gynecologist accused of mistreating, misdiagnosing and castrating dozens of women who were his patients.

DEFINITION OF AN ADVERSE EVENT
An adverse event is an unintended injury or complication that results in disability at the time of discharge, death or prolonged hospital stay and that is caused by health care management rather than by the patient's underlying disease process.

This announcement signaled the end of one of Canada's most serious and longest running cases of medical error.

It came on the heels of the Canadian Adverse Events Study which revealed one in thirteen Canadians is harmed by the medical care that is supposed to help them.

The fifth estate's documentary *First, Do No Harm* examines the story of Dr. Wai-Ping, the cases of some of his patients, and investigates the official process that allowed Dr. Wai-Ping to continue practicing almost a decade after complaints had first been made about his competence as a surgeon. "Clearly this wasn't a good doc having a bad day. This was a pattern of conduct that frightened me because knowing what I know, the little I know about infection, I wonder what could possibly happen to somebody else that didn't know." - Nicole Harder

One of those patients is Nicole Harder of Cobourg, Ontario. In 1995, when Nicole was 31, she complained to both the Ajax-Pickering hospital and the College of Physicians and Surgeons of Ontario about Dr. Wai-Ping, claiming that he performed an unnecessary hysterectomy and causing a potentially life-threatening infection.

For seven years, Nicole Harder fought the Ontario College of Physicians and Surgeons and the hospital where he worked to reveal what, if any, measures were being taken to investigate her complaint or discipline Dr. Wai-Ping.

She learned that the College referred her complaint to a confidential committee called Quality Assurance. Although the proceedings of this committee are kept secret, Harder obtained documents that showed the QA committee determined there were "significant" breaches in Dr. Wai-Ping's standard of care. For that, he was ordered to take a remedial communications course. Eventually Harder settled a malpractice suit against Dr. Wai-Ping.

In the past serious complaints about a doctor's clinical care usually went to a disciplinary board, which has the power to take a doctor's license away. In most provinces disciplinary hearings are open to the public.

FIRST, DO NO HARM
It is a widely held misconception that "First, Do No Harm" comes from the Hippocratic Oath. Although the oath expresses a similar sentiment it does not contain those words.

In fact, Hippocrates came closest to issuing this directive in his treatise Epidemics, in an axiom that reads, *"As to diseases, make a habit of two things -- to help, or at least, to do no harm."*

The fifth estate's investigation reveals that across Canada there is a new trend to retrain doctors, not blame them. In Ontario it's called Quality Assurance. The disturbing thing is, everything that happens in Quality Assurance is secret.

The College received at least 12 complaints about Dr. Wai-Ping between 1994 and 2001. In all of that time he had a spotless record so far as any patients could find out and there were no restrictions on his surgery.

Dr. Wai-Ping continued to perform surgery until a Toronto Star investigation made the matter public in 2001. Weeks later, the College finally referred the case to the Disciplinary Committee and Dr. Wai-Ping was forced to resign.

More than 300 of Dr. Wai-Ping's patients are now launching a class action lawsuit against the doctor, the College of Physicians and Surgeons and Rouge Valley Ajax-Pickering Hospital.

THE DECISION

PROPOSED INTEGRATED PRACTICE REVIEW PROGRAM

MOTION

63. That Convocation adopt an expanded practice review model with two components:

    a. one with the goal of preventing competence deficiencies (*practice management review*) and

    b. one with the goal of addressing existing competence deficiencies (the current *focused* practice review).

64. That Convocation approve the following program structure:

    a. As with the focused practice review the emphasis will be on practice management. The Basic Management Checklist, currently used for focused practice review will be used as the basic guide for both components of the program.

    b. The indicia for selection for the preventive component will be:

        i. one to eight years from call to the bar.

        ii. in private practice (category A).

    c. In-house and external reviewers will conduct the reviews.

    d. Members will be advised in advance of the review that they have been selected and be provided with the name of the reviewer. An appointment will be scheduled, wherever possible at the member's convenience. If a member is selected for both an audit and a practice review, with the *member's consent,* the two appointments may be scheduled at the same time. Following the review the reviewer will prepare a report for the member and review it with him or her.

    e. The goal will be to conduct approximately 420 practice management reviews per year. Coupled with approximately 80 focused reviews, this will result in approximately 500 practice reviews per year. The goal of 500 reviews should be reached in three years:

        i. 250 reviews conducted in 2007.

        ii. 400 reviews in 2008.

        iii. 500 reviews in 2009 and thereafter.

    f. The cost of the program will be borne by all members as part of the annual fee.

g. The possible dispositions at the conclusion of a practice management review will be:

i. Close the review file – occurs where there are no deficiencies or they have been addressed in the review report.

ii. Send a follow-up letter (monitoring) – requires member to submit proof that the deficiencies identified have been addressed to the Society's satisfaction.

iii. Require the member to provide an undertaking to remedy deficiencies within a given time.

iv. Schedule a re-review – if the deficiencies are serious enough to warrant a further review to ensure they are remedied.

v. Refer the member to focused practice review – where remedial assistance is necessary to address the competence deficiencies.

vi. Refer the member to professional regulation for a formal investigation - if the review reveals possible professional misconduct or failure to meet standards of professional competence.

h. Observations gathered over the course of a year's reviews will be evaluated to determine whether the profession as a whole could benefit from being advised of areas for improvement.

i. The performance measures adopted for the spot audit program will be adapted to apply to practice management reviews.

j. The development of the model will include a communication plan to inform members about the program and its goals and the benefits it can provide to members.

I. Introduction and Background

65. The Professional Development, Competence and Admissions Committee's mandate includes the development for Convocation's approval of "policy options on all matters relating to the professional competence of members."[12]

66. The existence of a standing committee whose focus is on competence demonstrates the importance the profession and its regulator place on the development and maintenance of quality service for the public. Juxtaposed against disciplinary policy options, the Committee's policy options are predominantly preventive, supportive and remedial in focus. The importance of this focus cannot be over-estimated.

67. The Law Society's responsibility to govern the legal profession in the public interest includes upholding and advancing the principles that justify self-regulation. The methods used to discharge this responsibility have evolved over the decades to reflect the

[12] By-law 9.

changing societal context in which the profession exists. In the 1980s and 1990s the Law Society began to focus on the importance of active, preventive and remedial tools as components of an effective approach to lawyer competence.

68. In 1999 legislative amendments to the *Law Society Act* authorized the Law Society to conduct a review of a member's practice in accordance with Law Society by-laws for the purpose of determining whether a member is meeting standards of professional competence as defined in the Act. The legislative amendments gave the Law Society authority to apply to a Law Society Hearing Panel for a determination of whether a member is failing or has failed to meet standards of professional competence.[13]

69. It has been clear to the Law Society, however, that its competence mandate goes beyond the statutory focus on competence deficiencies. Between 1997 and 2001 the Law Society undertook a number of policy initiatives to develop a rational approach to implementing its overall competence mandate. This included the establishment in 2001 of a Professional Development and Competence department, with a Director, to implement competence policies and to monitor the changing needs of the profession and public expectations in this area to enlighten further policy development.

70. The various task force and committee reports on competence related policies all reflect a commitment to a number of underlying principles that should guide the Law Society's ongoing work in this area. In particular, it was agreed that policies should,

    a. address the Law Society's statutory mandate;

    b. contain both quality assurance (QA) and quality improvement (QI) components;

    c. address a range of professional needs and responsibilities with respect to competence;

    d. support members= obligations and efforts to maintain their own competence;

    e. be adaptable to the ever-evolving nature of the legal profession in Ontario and to rapidly changing laws and requirements;

    f. maintain flexibility of choice for individual lawyers in the selection of competence-enhancing techniques;

    g. address issues of accessibility and relevance;

    h. be responsive to the evolving needs of the public for competent and accessible legal services;

    i. recognize and support the use of technology;

    j. reflect a long-term commitment to, and view of, competence;

    k. reflect realistic resource and cost factors;

[13] See sections 41, 42, 43, 49.4 of the *Law Society Act*.

l. be developed and implemented in appropriate stages; and

m. be evaluated periodically for effectiveness and improvement.[14]

71. These principles reflect an understanding that competence is not a static concept and that assurance of professional competence evolves with public needs, expectations and demands for competent service. They also reflect a Law Society commitment to periodic evaluation of competence initiatives for effectiveness and improvement.

72. In September 2005, at a strategic planning session in Niagara-on-the-Lake, benchers undertook a discussion of quality assurance initiatives and the role of such measures in the Law Society's governing focus. They identified further action on quality assurance measures as a Law Society priority. Keeping this policy directive in mind and with the knowledge it has gained in its ongoing consideration of competence issues the Committee has undertaken a detailed analysis of practice review as a quality assurance initiative and presents a program proposal for Convocation's consideration.

II. Quality Assurance and Quality Improvement

73. To place practice review in regulatory context it is first important to identify the two broad approaches to competence that regulators typically employ and consider the differences in their goals and methods.

74. Quality assurance and quality improvement are the terms many professions use to describe their methods for promoting competence. These concepts are not new in either the public or private sector. In the private sector, the interest in quality service has resulted in the development of a variety of international quality standards to which companies must conform if they wish to receive internationally recognized ratings of excellence, such as ISO ratings.[15]

75. Quality assurance focuses on ensuring compliance with clearly established standards. Quality assurance measures are planned and systematic actions developed to provide the user of a service with adequate confidence that the service will satisfy requirements for quality. It involves a retrospective review or inspection of services intended to identify problems and provide tools to address them.

76. Quality improvement involves the continuous study and improvement of processes and practices. Applied to professions, it entails continuous analysis and improvement of the components that make up professional practice or work. Its success is dependent upon members of a profession voluntarily undertaking self-improvement *and* doing so in a manner that positively affects performance.

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[14] Report of the Professional Development and Competence Committee, March 2001.

[15] These ratings, developed by the Geneva-based International Organization for Standardization, consist of a set of 20 internationally recognized standards for quality assurance. These standards are general statements in a variety of areas such as management, client relations, staff relations, and training. They can be adopted to whatever industry or profession seeks to apply them. The major task for those seeking the rating is to examine their operation, agree on the appropriate standards for each of the areas and then comply with those standards.

77. Both types of measures focus on creating systems for promoting quality and developing techniques that can be applied repeatedly to minimize the risk of inadequate performance. The purpose of such measures is to support a professional environment in which,

    a. the vast majority of members provide quality service and work within the ethical framework that underlies the profession;

    b. fewer members fall below acceptable levels of service and professionalism;

    c. those who do fall below acceptable levels are identified as early as possible and are quickly and efficiently provided with remedial measures; and

    d. members who are unable or unwilling to change are removed from areas of practice or positions in which they can do harm.

78. Consideration of quality assurance and quality improvement measures in the context of the Canadian legal profession is not new. The 1996 report of the Canadian Bar Association National Task Force on Systems of Civil Justice, adopted by the National Council of the CBA in early 1997, made specific recommendations with respect to quality assurance, few of which have been implemented.[16]

79. While professions use different combinations of approaches to promote, monitor and assess the competence of their members, there is a common range of quality improvement and quality assurance activities from which most of them choose. [17] Which activities regulators choose depends on both external and internal influences, in particular the extent to which they have adopted the view that a regulator's competence regime must include objective and measurable monitoring tools (quality assurance).

80. In emphasizing quality assurance as a priority at Niagara-on-the-Lake benchers considered the changing context in which the legal profession exists and the need to consider additional tools for ensuring the continued viability of self-regulation.

III. The Changing Attitudes to Self-Regulation

81. Public attitudes to self-regulation have changed significantly in recent years. Traditionally, there has been little intense government or consumer scrutiny of professions' approach to self-regulation, whether law or other professions. In recent years, however, it has become clear that a positive public perception of a regulator's actions is essential to a government's continued support of self-regulation.

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[16] The recommendations: Lawyers to develop quality assurance programs and standards so that clients are able to evaluate the legal services provided; the CBA to provide analysis and information to establish quality assurance programs and standards, and develop model quality assurance programs and standards; and law societies to take the necessary steps to place greater emphasis on the enforcement of competence standards and, where necessary, seek legislative amendments to permit them to do so.

[17] Common QI measures: CLE, MCLE, certified specialist programs, reflective practice and self-assessment tools, publication of standards and guidelines for practice, voluntary practice standards accreditation; Common QA measures: practice review, spot audit, limited licensing, re-testing or requalification, discipline/competence proceedings.

82. In England and Wales and several Australian states, the legal profession's self-regulation has been seriously curtailed by governmental limits on its authority over complaints and discipline of members. The catalysts for reduced authority were public and government discontent with the status quo, based on the belief that the profession was failing to regulate in the public interest. This perception was bolstered by evidence of failures in addressing complaints. The result has been imposition of external controls on the professions, particularly respecting complaints and discipline measures.

83. Self-regulation of the legal profession in Canada has not generated government concern; however there have been some judicial pronouncements. The Supreme Court of Canada carefully scrutinized the actions of the Barreau du Québec in *Finney v. Barreau du Québec* [2004] 2 SCR 19 and held that, "Exceptional though the case may have been, the conduct of the Barreau was not up to the standards imposed by its fundamental mandate, which is to protect the public."

84. Other professions in Ontario also face increasing government, public and media scrutiny. The College of Physicians and Surgeons of Ontario (CPSO) has been the subject of media attention that has led to a governmental review of regulated health profession systems. Similarly, the Ontario legislature has recently passed an Act to amend the legislation governing the College of Teachers. Among other features the Act establishes a Public Interest Committee, the members of which are to be appointed by the Minister and may not be members of the College of Teachers. The Act provides that "the Committee shall advise the Council with respect to the duty of the College and the members of the Council to serve and protect the public interest in carrying out the College's objects; and perform such other duties as may be prescribed by regulations."

85. The *Ontario Legal Aid Services Act, 1998* requires that Legal Aid Ontario establish a quality assurance program "to ensure that it is providing high quality legal aid services in a cost-effective and efficient manner." The Corporation is given the authority to conduct quality assurance audits, but in the case of audits of lawyers who provide legal services the Act indicates that Legal Aid Ontario "shall direct the Law Society to conduct those quality assurance audits."[18]

86. Throughout Canada, law societies have begun to take note of the shifting attitudes to self-regulation and to consider ways to ensure that their jurisdiction's approach to self-regulation has adapted to changing views of what is in the public interest. Every branch of a law society's operation affects the public interest. The manner in which the Law Society of Upper Canada discharges its competence mandate is as important to its continued viability as the way in which it addresses complaints and discipline.

87. It is arguable that the more attention that a governing body pays to effective preventive tools designed to enhance competence, the more likely the public is to be satisfied with self-regulation. Through preventive initiatives and tools the Law Society demonstrates its commitment to quality service for the public. These approaches also support the vast majority of lawyers who are committed to competence and quality and address those whose practices need closer attention and improvement.

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[18] *Ontario Legal Aid Services Act, 1998* section 92. To date, Legal Aid Ontario has not directed the Law Society to conduct any audits.

IV. Practice Review Initiatives

88. In the last five years the Law Society has made significant strides in its quality improvement initiatives, including professional development, practice guidelines, specialist certification and other practice resources.[19] The Sole Practitioner and Small Firm Task Force Report and recommendations, approved by Convocation in March 2006, made further suggestions for additional quality improvement measures that a Professional Development, Competence & Admissions Committee working group will now address.

89. The Committee believes, however, that it is time to focus further attention on quality assurance measures and their role in governing Law Society members. In adhering to benchers' direction to consider quality assurance measures the Committee considered how other professions address the issue. It became immediately evident that practice review is among the most widely used and accepted quality assurance approaches. To that end the Committee undertook research on practice review to determine whether it is a viable option for the Law Society.

V. Other Professions'/Jurisdictions' Approaches to Practice Review

90. Practice review goes by a variety of names in different professions, but its essential features are the same. The College of Physicians and Surgeons of Ontario (CPSO) calls its program "peer assessment." The Institute of Chartered Accountants of Ontario (ICAO) and the Barreau du Québec (Barreau) call their programs "practice inspection." In its discussion of this quality assurance measure the Law Society has always referred to "practice review". The Committee recommends that the proposed program name reflect the emphasis on practice management, by using the term "practice management review".

91. The goal of these programs is to enhance the quality of practitioners'[20] service to clients by providing constructive feedback on the quality of their practices. The review applies accepted standards or guidelines as the measurement tool against which a practice is assessed. These programs also allow for collection of data and dissemination of guidance intended to be helpful to both the individual practitioner reviewed and members of the profession generally.

92. Although most practice review programs include a program component to address members who have demonstrated competence deficiencies (focused practice review), the preventive/proactive component is the main focus of the program and is primarily educational in nature.

93. In considering potential new policies, initiatives and programs Committees and Convocation's decision-making benefits from considering information on how other professions implement similar initiatives. As mentioned above, the Committee was particularly interested in the programs that the CPSO, ICAO and the Barreau operate. Information on these programs is set out at Appendices 1, 2, and 3 for Convocation's assistance.

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[19] For access to the Law Society's extensive list of QI tools go to: http://mrc.lsuc.on.ca/jsp/home.
[20] Generic term to include doctors, dentists, accountants, lawyers and the members of any other profession who provide service to clients.

94. The Committee has noted the following important features of all three programs that have influenced both its consideration of a practice review program as an option for the Law Society and have affected the type of proposal it has developed for Convocation's consideration:

a. The programs are all designed to be educational and separate from the regulator's discipline/conduct stream;

b. The programs include a "focused" component to address more serious competence deficiencies, but still outside the discipline stream. The Law Society already has such a program in its focused practice review, thereby allowing the seamless development of an integrated review program;

c. Although all the programs include the possibility of referral to the discipline stream, this is,

i. reserved for the most extreme situations and used extremely sparingly; and

ii. usually requires a separate and different investigation;

d. The reviews are designed to be as unobtrusive and beneficial as possible: the members/firms are told well in advance that they have been chosen to participate; a mutually agreeable date is chosen; the reviewer is sensitive to the members having to operate their practices while the review is underway, etc.;

e. Members/firms are provided with the checklists and other information that will guide the review and given the opportunity to correct deficiencies before the appointment. This is an important feature to assure those reviewed that the process has a pre-defined scope, is not open-ended or vulnerable to the whims of the reviewer and is not designed to "catch" practitioners out;

f. The actual review follows a process with pre-defined goals, again ensuring that there is consistency from review to review;

g. There is an opportunity for members to reveal a concern with the appointed reviewer, which if reasonable will result in another person being appointed;

h. The pool of those subject to review is pre-defined so that all members know how or if they will be subject to inspection.

95. In its analysis the Committee also benefited from additional material it considered about the CPSO's peer assessment program, which is included for Convocation's information at Appendix 4.

VI. The Law Society's Audit Program

96. In considering the development of its proposal for practice management review the Committee also benefited from a close examination of the Law Society's spot audit

program, which is one of the Society's most effective competence programs and an important example of a quality assurance measure.

97. Convocation has received the Spot Audit Division's Status report for 2005, but it is worth highlighting those salient features the Committee believes contribute to its success. A copy of the report is set out at Appendix 5.

98. The spot audit program conducts audits to assess a law firm's compliance with the Law Society's financial filing, record keeping and money handling requirements and provides guidance to members. It has been in place since 1998 as an educational/remedial complement to the Law Society's adoption of the financial self-reporting model. It is a prime example of a public interest initiative that also supports members in their efforts to meet their professional and competence obligations.

99. Approximately 1000 audits are conducted per year. Each member who has been audited is surveyed for feedback on the member's view of the audit process, the auditor's conduct and the audit report and the internal control list or guide the member receives. The program has had a consistently high satisfaction rate, continued in 2005 as follows:

a. 93% found the spot audit process constructive.
b. 100% found the auditor's conduct to be professional and helpful.
c. 98% found the audit report to member useful.
d. 94% found the internal control list helpful.

100. The Committee believes these survey findings to be extremely important to Convocation's consideration of the Committee's practice review proposal for the following reasons:

a. Considered in the abstract, members of a profession can pre-judge all quality assurance programs to be any and all of bothersome, intrusive, draconian, inflexible, arbitrary, unnecessary, over-inclusive, and unevenly applied. Depending upon the nature of a program some or all of these descriptions could be accurate. But, in examining the success of the Law Society's spot audit program, the Committee is convinced that a properly designed practice management review program can be described in exactly the opposite terms and can become a truly useful component of a lawyer's professional development and education, while at the same time serving the public interest.

b. Ninety-four percent of all law firms in Ontario are made up of five or fewer lawyers. This means that inevitably, these sole and small firm practices will make up a proportion of the firms that spot auditors visit each year. The Sole Practitioner and Small Firm Task Force Report identified multiple pressures on such practitioners, among them concerns that administrative burdens and requirements have a disproportionate impact on this group. The Committee was therefore impressed by the fact that lawyers in sole and small firm practice, who are clearly included in the survey results, when asked about the spot audit process, give it such a high rating.

c. Lawyers benefit from receiving both generic practice tools, such as the internal control list, and personal guidance, such as the audit report and feedback from the auditor. Given the survey results, this also means that the Law Society is

capable of developing an effective structure for and operating a required program, such as the audit program, in a manner that does not attract member suspicion and is viewed in a positive light.

101. There are a number of other features of the spot audit program that the Committee believes are important to note:

a. When the program began in 1998 members were largely chosen for audits, randomly. It became clear to those administering the program that such an approach might not be the most effective way to proceed, since often audits were conducted on practices that were very low risk or had little activity in trust accounts. This also meant that resources were not being allocated as effectively as possible. In 2002 the program introduced a risk based approach in its selection of members, using a variety of indicia to identify and select potentially higher risk practices. Randomly chosen audits went from 63% of the audits to 23%. The benefits of this approach have been evident in a number of areas discussed below and at Appendix 5.[21]

b. One of the indicia the spot audit program has used since 2000 is newly formed sole practices. A comparison of sole practices created during the five years leading to the implementation of this selection approach in 2000 and the five years from 2000-2004 where spot audits were conducted on new sole practices illustrates the significant difference in the life expectancy of these types of firms. The statistics demonstrate that 42% of sole practices created in 1995 would become inactive within five years. Only 25% of those spot audited in 2000 would become inactive within five years.

c. An examination of the nature of complaints against members from 2001 to 2004 shows a decline in the percentage of financial-related complaints. Similarly Compensation Fund claims paid have declined since the spot audit program was introduced. The Committee is aware that there is no empirical evidence to link these trends directly to the spot audit program, but anecdotal evidence suggests there is a link. The survey results point to a connection as well, at least in so far as those members audited believe that the audits make a positive difference.

d. The spot audit program's available audit dispositions are a continuum of options including, at the far end of the scale referral to professional regulation for a formal investigation. The continuum of options are,

i. Close the audit file;

ii. Send a follow-up letter (monitoring)

iii. Schedule a re-audit;

iv. Require the member to provide an undertaking to remedy deficiencies within a given time;

[21] In the coming years it is likely the mix will level out somewhat, reflecting the reduction in deficiencies identified during audits.

v. Refer the member to focused practice review for remedial assistance with the practice;

vi. Refer the member to Professional Regulation for a formal investigation.

In 2001 39% of audits were "closed" after the first visit. In 2005 the percentage had risen to over 50%. The number of files with significant deficiencies also decreased from just fewer than 50% in 2001 to 35% in 2005. In 2005, of 1000 audits, only 21 files (2.1%) were referred to practice review and 44 (4.4%) to professional regulation.

It is important to note that although members understand that this continuum of options includes a possible focused practice review or discipline investigation in extreme circumstances, they continue to evaluate the program positively and accept that its overwhelming priority is educational not disciplinary.

102. Overall, the spot audit program's record is an important example of how a quality assurance measure can work effectively and fairly. The Committee believes that the features described above can be successfully adapted to a practice management review program.

VII. Framework for a Practice Management Review Program

103. Keeping in mind benchers' discussions about quality assurance at Niagara-on-the-Lake, the Committee's research into other examples of practice review, however named, and its examination of the Law Society's spot audit program the Committee is recommending the implementation of an expanded and integrated practice review program for the Law Society. Before describing the proposal in detail, however, it is important to articulate the basis for the proposal.

104. Since the 1999 amendments to the *Law Society Act*, the Law Society has had authority to conduct a review of a member's practice in accordance with the by-laws for the purpose of determining whether a member is meeting standards of professional competence. If the circumstances prescribed in the by-laws exist the Chair of the Committee "shall" direct that a review be conducted. Currently, the only circumstances prescribed in By-law 24 is a finding by the Chair or Vice-chair of the Committee that there are reasonable grounds for believing the that a member may be failing or may have failed to meet standards of professional competence. In determining that there are reasonable grounds the Chair may consider certain enumerated indicia, set out at Appendix 6.

105. It is evident upon reviewing the list of indicia that this type of review occurs only after the member has demonstrated sufficient competence deficiencies to attract attention from various departments within the Law Society, from client complaints or from Hearing or Appeal Panels. The focused program is therefore entirely reactive. Moreover, based on the nature of the indicia currently approved in the by-law, focused reviews will be directed to a very limited number of members. By the time a member meets the indicia for selection for a focused review of his or her practice, not only is it likely that clients have been inadequately served, but the member has often reached a point of serious distress, unsure how to correct the practice deficiencies and unable or unwilling to seek assistance.

106. In 2005 the focused practice review program conducted 79 reviews, the highest number since the inception of the program, representing only 1% of all law firms and only .04% of lawyers in private practice. While the Committee is of the view that the vast majority of lawyers in the province will quite properly never be the subject of a focused review, it is likely that there are more members with deficiencies that are affecting client service who would benefit from focused review of their practices.

107. In any event, the Committee is of the view, and staff in the focused review program agrees, that this type of focused program will always be designed to address a very small percentage of members who have demonstrated the most serious competence deficiencies.

108. The Committee is satisfied, however, that the time has come for the Law Society to implement an expanded practice review program that would combine both a proactive or preventive practice management review with the focused remedial approach currently in place. Together these two components of the program would create an integrated practice management quality assurance program to complement the audit program, which assesses the financial health of a practice. Like the spot audit program it would assist members to evaluate their practices and improve their skills and competencies while at the same time fulfilling the Law Society's mandate to protect the public interest.

109. As will be seen in the detailed proposal set out below, the Committee's recommended approach seeks to implement an integrated program that can accomplish for the practice management component of practices much of what the spot audit program does for books and records.

VIII. The Proposed Model for a Practice Review Program

Considerations Underlying the Model

110. The Committee's proposed model reflects the following considerations or factors:

a. The program should focus on a practice management review of practices, as is currently the approach followed in the focused practice review program.

b. It should be clear to members the exact tool that is being used to evaluate the practice. Currently, for example, focused practice reviewers employ the basic management checklist, set out at Appendix 7. It is anticipated this would be used for the practice management review program as well.

c. The review approach should be flexible. In very few cases is there only one way to ensure a practice is managed competently. So for example, while it is important for a firm to have a limitation "tickler" system, there may be many different ways to meet that expectation.

d. As with the spot audit program and the reviews undertaken by the CPSO, the ICAO and the Barreau the reviews should be developed to be primarily educational, but with the recognition that in a limited number of cases additional remedial options and, in very few cases, disciplinary options may be necessary. This is essential to any such quality assurance program and the Committee is

satisfied, as discussed above, that the profession can and will accept a well thought out program that is well communicated to them.

e. To begin the program there should be a limited number of indicia for selection into the program. This will allow the program to develop gradually, providing the profession with a gradual introduction to the program so that its value can be observed. This will also make evaluation of the indicia possible to ensure they are appropriate.

f. Implementation should be phased in over a number of years. This means that the number of audits conducted would gradually approach the goal over a period of years.

g. The cost of the program should be absorbed by the profession overall, as is done with the spot audit program. This is the prevalent practice, (the ICAO is an exception) in other professions the Committee examined and the Committee considers it to be a valid approach.[22] Self-regulation and the rights and obligations that come with that status are applicable to all members. The cost of regulation of the profession should wherever possible be shared by all.

h. As with the spot audit program the reviewers should be both in-house and external. This has worked well in spot audit and the Committee sees no reason to change this. It does consider it important for in-house reviewers to have had practice experience. Having said that, however, the Committee re-iterates that the reviews are practice management oriented and will not focus on how a member practises substantive law, except to the extent that there is overlap with practice management issues; and

i. the program should be evaluated periodically as has been the case with the spot audit program and it should be accepted that there might be changes to the program as a result of that evaluation.

The Indicia for Selection

111. In considering the indicia that would effectively address the goal of prevention staff examined 1,480 discipline files recorded in the AS400 database from 1965 to 2006. Given that until 1999 discipline files addressed competence issues as well as conduct issues this database was considered to be a useful tool.[23]

112. The files were examined to track the number of years from the member's year of call to the opening of their first discipline file. The data revealed a significant increase (spike) in the number of discipline files at six to eight years after call. This increase continued through the nine to 14 year period when it peaked and was maintained until the 20th year of practice when it began to decline. Since it usually takes one to two years from a

[22] The CPSO does charge members for re-reviewing a practice (typically occurs when deficiencies are such that another visit is advisable to ensure recommendations are implemented) and for taking PREP (a hands-on program for those demonstrating serious competence deficiencies).

[23] Complaints information is not as useful a tool because it includes complaints that have not yet been, and may not be, authorized by PAC.

complaint being filed and investigated to a matter being referred to discipline it was assumed from the data that the triggering events typically occur in the fourth to sixth year after call to the bar. An analysis of discipline files for the five-year period from 2000 to 2005 revealed a similar pattern.

113. Similarly, an analysis of the LawPRO database reveals that the typical reporting point for members' first errors and omissions reporting is eight to 10 years from the date of call, with the triggering incident occurring at an earlier point.

114. Given this information the Committee is of the view that the early years of private practice pose a risk for the development of practice difficulties. The discipline and LawPRO data illustrate this. The Committee also notes that the spot audit program focuses on the early years of practice and has seen positive ameliorative results in doing so.[24]

115. It is the Committee's view that beginning the practice management review program with a focus on members who have been called to the bar for the formative one to eight years and who are in private practice is both justified by the data and by common sense.

116. The Committee has also considered how best to structure the reviews for this group and has focused attention on practice areas. Further analysis of the 1,480 discipline files was undertaken to identify whether there were any other patterns worth noting. A review of the Members' Annual Report for these files revealed that there were four major areas of law these lawyers reported as a substantial area of practice (more than 30% of their practice activities): real estate, civil litigation, family and criminal. LawPRO statistics also reveal higher claims in real estate and civil litigation. This is not unexpected since a substantial percentage of all members in private practice concentrate in these areas.

117. In considering how best to allocate reviews within the one to eight year called to the bar period for those in private practice the Committee is of the view that the number of reviews should be allocated in the same proportion as the number of practising members in each of the major areas of practice. Appendix 8 illustrates how this would be accomplished.

The Model

118. Based on the observations set out above and paying particular attention to the manner in which the spot audit program is structured the Committee recommends the adoption of an expanded practice review model with two components:

    a. one with the goal of preventing competence deficiencies (*practice management review*) and

    b. one with the goal of addressing existing competence deficiencies (the current *focused* practice review).

119. The program should be structured as follows:

[24] See paragraph 101 (b) above.

a. As with the focused practice review the emphasis will be on practice management. The Basic Management Checklist currently used for focused practice review will be used as the basic guide for both components of the program.

b. The indicia for selection for the preventive component will be:

   i. one to eight years from call to the bar.

   ii. in private practice (category A).[25]

c. In-house and external reviewers will conduct the reviews.

d. As is the case with the spot audit program and the focused practice review members will be advised in advance of the review that they have been selected and the name of the reviewer. An appointment will be scheduled, wherever possible at the member's convenience. If a member is selected for both an audit and a practice review, *with the member's consent*, the two appointments may be scheduled at the same time. Following the review, the reviewer will prepare a report for the member and review it with him or her.

e. The goal should be to conduct approximately 420 practice management reviews per year. Coupled with approximately 80 focused reviews, this will result in approximately 500 practice reviews per year. Although fewer reviews would be conducted than audits, this reflects a realistic approach to a new program. The goal of 500 reviews should be reached in three years:

   i. 250 reviews conducted in 2007.

   ii. 400 reviews in 2008.

   iii. 500 reviews in 2009 and thereafter.

   This gradual approach will allow time to communicate information about the program to members, ensure the program operates effectively and make any necessary changes. To draw out implementation any longer would undercut the proactive value of the program and make it very difficult to communicate it effectively and positively to the profession and to the public. This is because the number of reviews per year would be too low to be noticeable.

f. The cost of the program will be borne by all members as part of the annual fee.

g. As with the spot audit program the possible dispositions at the conclusion of a practice management review will be:

   i. Close the review file – occurs where there are no deficiencies or they have been addressed in the review report.

[25] The indicia for selection for focused reviews are already set out in By-law 24.

ii. Send a follow-up letter (monitoring) – requires member to submit proof that the deficiencies identified have been addressed to the Society's satisfaction.

iii. Require the member to provide an undertaking to remedy deficiencies within a given time.

iv. Schedule a re-review – if the deficiencies are serious enough to warrant a further review to ensure they are remedied.

v. Refer the member to focused practice review – where remedial assistance is necessary to address the competence deficiencies.

vi. Refer the member to professional regulation for a formal investigation - if the review reveals possible professional misconduct or failure to meet standards of professional competence.

h. As with the spot audit program, observations gathered over the course of a year's reviews will be evaluated to determine whether the profession as a whole could benefit from being advised of areas for improvement.[26]

i. The performance measures adopted for the spot audit program will be adapted to apply to preventive practice reviews, currently as follows:

Effectiveness (achievement of objectives)

- Membership survey response on such topics as the value provided by the practice review, benefit of resource materials, professionalism of the Reviewer
- Reduction in complaints and claims
- Longevity of firms (especially sole practitioners) in comparison to firms that have not undergone a practice review
- Implementation of practice review recommendations
- Number and type of practice management findings to identify areas for educational emphasis and the development of further practice resources for the general member population

Efficiency (maximum use of resources)

- Relative stability in the cost per review
- Amount of time to provide timely feedback to members
- Number of Practice Reviews and Spot Audits conducted in tandem, creating efficiencies for both the member and the Law Society
- Reduction in the age of inventory of monitored files, demonstrating that members are addressing reported deficiencies on a timely basis

[26] The Bookkeeping Guide was developed in some part from what was observed in conducting spot audits.

j. The development of the model will include a communication plan to inform members about the program and its goals and the benefits it can provide to members.

Budget and Timeframe

120. The following chart sets out the budget figures and timeframe for a phased implementation. For comparison purposes the 2006 Spot Audit and Practice Review budget figures have been included.

121. If approved, the practice review program will be fully integrated with approximately 80 to 100 focused reviews. For purposes of this analysis, it is assumed that full implementation will mean 500 reviews per annum.

	Spot Audit	Focused Practice Review	Phased Implementation Integrated Practice Review		
Year	2006 Budget	2006 Budget	2007	2008	2009
Number of Reviews	1,100	100	250	400	500
FTE Staff	19	2	5.5	7	8
Salaries & benefits	1,699,900	151,500	515,000	652,000	766,000
Common expenses	146,200	20,500	50,000	64,000	76,000
Program expenses	151,100	231,000	72,000	86,000	95,000
Indirect expenses	686,700	123,500	191,000	241,000	281,000
Total expenses	2,683,900	526,500	828,000	1,043,000	1,218,000
Cost per review	$2,440	$5,265	$3,312	$2,608	$2,436
Cost per Member*	$87	$17	$27	$34	$39
Increase in membership fee+	n/a	n/a	$10	$17	$22

* based on 2006 FTE members of 31,000
+ cost per member, less the cost of the original Practice Review program per member of $17 because this cost will be subsumed

122. In 2005, there were 79 focused practice reviews conducted by external legal counsel. The cost of these focused practice reviews was approximately $5,300 each (based on actual expenditures at year end). The majority of this expense in the current focused practice review program relates to the costs of retaining external lawyer reviewers. Through economies of scale and efficiencies obtained by using a combination of in-house and external reviewers, the implementation of an integrated practice review program will result in a reduction in the average cost of a review to approximately $2,400 at the final stage of implementation.

123. There may also be additional cost savings to the Law Society as a result of the possible decline in complaints and insurance claims. Although it is difficult to directly attribute these savings to any specific Law Society initiative, it is reasonable to suggest that an integrated practice review program will have a positive impact, reducing expenditures in the complaints, investigation and discipline areas of the Law Society.

IX. Conclusion

124. Professional competence is the hallmark of a profession. The Committee's mandate focuses on policies to enhance and support members' competence. The Committee is satisfied that the practice review proposal described here and recommended to Convocation continues the Law Society's commitment to professional excellence in a manner that will be useful, fair and reasonable for Law Society members. The Committee believes that, as with the spot audit program, this model of practice management review will be of significant benefit to the members reviewed, to the profession in general and to the public the profession serves.

Appendix 1

COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO
PEER ASSESSMENT PROGRAM

Membership and Active Members
Membership: Between 27,000 and 28,000
Active Members: 21,793

Number of Peer Assessments per Year
Approximately 700 peer assessments are done each year. Of that 700, approximately 500 are truly random and approximately 200 will be of physicians who have turned or are over the age of 70. From the 700 peer assessments, between 15 and 25 doctors may be chosen for a more comprehensive, focused practice review, based on serious deficiencies in their practices. These reviews are known as Physician Review Program (PREP) and the Specialists Assessment Program (SAP).

Brief Description
The College's Quality Assurance Program mainly consists of a Peer Assessment Program in which doctors are evaluated by a colleague who has him- or herself been peer assessed and who has the same scope of practice as the doctor chosen to be assessed. The stated purpose of the assessment program is "to help physicians provide high-calibre healthcare by providing constructive feedback on the quality of their patient care and record keeping." The program is educational in nature.

Selection for Assessment
There are four ways in which a physician is chosen to be peer assessed:[1]

- *Random* - Physicians who have been in independent practice for at least five years and under the age of 70 are eligible.
- *Age-Related Assessment* - Physicians who turn 70 will be selected if they have not been randomly selected in the past five years. Physicians over 70, who are assessed, will be assessed every five years thereafter.
- *Referral from another College committee* - Where College Committees (Complaints, Executive) identify clinical practice issues that suggest a physician would benefit from a broad practice review, the Quality Assurance Committee may direct that a peer assessment be conducted of the physician's practice.
- *Physicians Interested in Becoming Assessors* - All peer assessors must first successfully complete a peer assessment.

Selection Process and Exceptions
Each year, the College's Information Technology Department is asked to generate a random list of 800 members from the College's register to be assessed. All doctors who turn 70 in a given year (approximately 250 in 2006) and have not undergone peer assessment in the last 5 years will be assessed unless they have a very small practice.

[1] There are some areas of specialty where there are no peer assessors available (for example, paediatric cardiology). Doctors practising in these specialty areas would not be assessed, unless the College has been alerted to a potential deficiency in that doctor's practice.

Doctors who practise in obscure specialties where the College does not have a peer who can perform the assessment will not be assessed. Also, doctors under the age of 70 with very small practices, those who do administrative medicine (such as those who work for OHIP), or those who only conduct research are not reviewed.

Procedure for the Assessment
Once a physician is selected for review, the physician must complete a questionnaire telling the College about his or her practice. Based on this information, the College will select an assessor. The doctor is provided with information about the Peer Assessment process, the basis for being selected (random, age, etc.) and a copy of a sample assessment report. Doctors are encouraged to use the sample assessment report to conduct a self-assessment.

Once the assessor is assigned, the College notifies the doctor of the assessor's name. It is incumbent on both the assessor and the doctor being assessed to alert the College to potential conflicts. The College may or may not assign a new assessor, depending on the nature of the conflict cited. Within two weeks, the assessor contacts the physician to arrange a convenient date for the review.

Assessors are assigned according to the scope of the practice of the physician being reviewed. Although it is not always possible, every effort is made to match the assessor's scope of practice with that of the physician being reviewed. All assessors are practising physicians.

The assessor attends the doctor's office on the agreed upon date. The assessor reviews some of the doctor's patients' charts. The charts are selected as follows: the doctor may be asked to provide a chart that the doctor believes shows his or her best care of a patient who is, for example, diabetic, or charts may be chosen based on the doctor's appointment book from the proceeding two weeks. Where the charts are not representative of the doctor's overall practice, the assessor will ask to see some that are. (For example, where a doctor has indicated on the pre-assessment questionnaire that the doctor's family practice focuses mainly on geriatric medicine and general gynaecology, but the charts pulled for review based on the doctor's appointment book are all upper respiratory related issues, the assessor will ask to see some recent geriatric and gynaecology files.)

In most cases, the doctor may continue seeing patients while the assessor is at the office. Following the record review, the assessor and the doctor meet for a 20 to 60 minute interview to discuss the assessor's observations.

Following the assessment, the assessment report is usually sent, along with the Committee's decision letter, within 12 weeks. The doctor is not given an opportunity to respond to the report before it is sent to the Committee.

If significant problems are identified, the doctor may be sent for a focused practice review (either the PREP or SAP). These are standardized programs run out of McMaster University. They are one day in length and include multiple choice testing and diagnostic exercises involving (actor) patients. Doctors would only be sent to one of these programs after they had gone before the Quality Assurance Committee for a final interview. The physician bears the cost of the PREP program, which is $3700. The PREP program is not part of the general Peer Assessment Program, but as mentioned above is for those members who demonstrate serious problems.

Cost
The Peer Assessment Program is funded from general fees. This would cover the first visit and a follow-up Peer Assessment, where one is recommended. The physician pays for subsequent assessments (i.e. where it is necessary for an assessor to return to monitor the physician's improvement.) Each subsequent visit in these cases costs $1400.

Procedure for Moving from Assessment to Discipline Process
Under the *Regulated Health Professions Act*, information from a Peer Assessment may not be disclosed to other streams within the College or elsewhere. However, if the Quality Assurance Committee believes that a physician is incompetent or has committed professional misconduct, it has authority to make an allegation (without information from the assessment) to the Executive Committee, which may then report it to the Complaints Committee. A new investigation would then occur. In practice, this only happens where the member is uncooperative and in being so, is a risk to patient safety.

Training
The College provides training, designed "in-house", for its Peer Assessors. The training includes a review of relevant legislation, direction on how to choose charts for review, practice reviewing a chart and practice writing a mock assessment.

Appendix 2

Institute of Chartered Accountants of Ontario

Membership and Practising Members
Membership: 31,000
Practising Members: 17,000

Number of Reviews per Year
The ICAO conducts practice inspections by firm (practice) for those engaged in public accounting. The cycle used to be four years in length but has recently been shortened to three years. When the cycle was four years long, between 650 and 700 firms were inspected each year. It is anticipated that now the cycle is shortened, approximately 800 firms will be inspected each year. Approximately 1/3 of all offices will be inspected each year, over a three-year cycle.

The Program
The stated purpose of the program is educational. It is designed so that all practices are inspected within their first year of operation and then every three years thereafter unless problems with the practice have been identified. Applications to become an office in which students are trained or to increase the number of students to be trained may trigger closer scrutiny of the Practice Inspection Department.

Selection for Inspection
All members engaged in public accounting will be inspected over a three-year period. Exempted from this are:

- Members who complete a certificate certifying that the member has not engaged in public accounting during the preceding 12 months
- Members who certify that they will be discontinuing the practice of public accounting in the immediate future (a max. of three months from the selection date) may be exempted.

Selection Process and Exceptions
Selection is made on on-going, cyclical basis. New firms are selected within the first year of their operation. Most others are selected every three years from the date of their last inspection.

Exceptions:

- Based on the findings in an inspection, the Practice Inspection Committee may decide that a practice unit should be inspected again in approximately one year from the initial inspection, or within six months of a reinspection. A "practice unit" can be either one accountant or a group of accountants who work together.
- If an office is a CPAB (Canadian Public Accountability Board) participant, the frequency of inspections to ensure that professional standards are being maintained may vary. This is because CPAB has its own inspection cycle and its standards are high. Large firms that belong to CPAB tend to be inspected yearly.
- The Practice Inspection Committee may determine such investigative procedures as it finds necessary to ensure that an office seeking approval to employ a student or to increase the number of students it may employ meets the required standards. Such investigative procedures may include a practice inspection if the office has not previously been inspected.
- Two of more offices of the same firm that are approved as one unit to train students will be inspected at the same time to facilitate the reappraisal of the approval of train students.
- Where the professional conduct committee is investigating a member or where the member has been charged with professional misconduct, a practice inspection will usually be postponed until after the hearing of the charges. The policy rationale behind this procedure is to ensure that the practice inspection program is separate and distinct from the discipline process.

Procedure for the Inspection
Full-time practices
A notice of selection is sent to the practice unit. The unit is asked to complete and return an inspection planning questionnaire, which is available on the Institute's website. (This helps determine whether a desk inspection might be more appropriate than a visit.)

A desk inspection may be warranted where the member's practice comprises a limited number of audit, review and/or compilation engagements.[1] In that case, the member must complete and submit a Practitioner's Client Listing and a Compilation Engagement Questionnaire, instead of the planning questionnaire referred to above.

Where a practice will be visited, the practice is asked to indicate its preference for the type of inspector to attend: either a full-time or a part-time inspector. Full-time inspectors are employed by the ICAO and are Chartered Accountants with public accounting experience. A part-time inspector is a member of the Institute, contracted by the Institute to perform between 20 and 30 days of inspections per year. Typically, a part-time inspector is engaged in public accounting at a senior level on a full-time basis.

[1] In a compilation engagement, the CA reviews the client's financial statements and considers whether the statements are in keeping with the client's industry standards. The CA must also determine that the statements are free of material errors. The procedures to be followed by the CA are limited and as a result, a compilation report includes a disclaimer from the CA, indicating that the report cannot be used as any sort of assurance.

Written confirmation of the inspection date and the name of the inspector are sent to the practice unit. Generally, an office is notified of the date and name at least 30 days before the inspection is to begin.

Part-time practices
Members with part-time practices (or practices with a limited number of assurance engagements[2]) are asked to complete a Client Listing Form and a quality control and procedures questionnaire. Where the practice is limited to 20 or fewer compilation engagements, the procedure is the same as noted above.

Usually, smaller practices are inspected by way of a desk inspection. The member submits quality control documentation, selected current engagement files and related financial statements for the Institute to review. The Director of Practice Inspection or a full-time inspector (as designated by the Director) selects the client files for review from a listing submitted by the member.

The member is notified in writing of the files that have been selected and of the name of the inspector. Part-time inspectors conduct desk inspections.

In cases where the practice is restricted to compilation engagements and it does fewer than 20 each year, an inspection may not be necessary, depending on the member's responses to the compilation engagement questionnaire, the standard engagement letter, and a "notice to reader" communication from one of the member's compilation engagements.

Within ten days of receiving the notice of assigned inspector, members and inspectors may object in writing to the Director of Practice Inspection. Acceptable grounds for objection include that the assigned inspector may be biased or for any other valid reason. The Director will appoint another inspector, if satisfied that there is a reasonable basis for doing so.

The inspector will review the office's quality control system to determine the type and number of representative client engagement files to be inspected on a substantive basis. (The inspector will look at the degree of reliability of the office's quality control systems and at the size of the practice.) This decision is based on guidelines established by the Practice Inspection Committee. The inspector determines the specific files to be inspected.

Where an office's quality controls are not documented, or if documented, and the results of compliance testing indicate they are not reliable, each member within the office is considered one practising unit for the purposes of inspection. Where the office has quality controls that can be relied upon, the entire office is treated as a unit for inspection purposes. In the latter case, the number of files per member inspected is reduced.

A practice inspection is also used to reappraise the approval of the office for training students.

Following the inspection, the inspector prepares a draft report that includes the findings, suggestions for improvement and the inspector's recommendations to the Practice Inspection Committee. The draft report is discussed with the practising unit and the practising unit's comments are drafted into the report. The report is submitted to the Institute for submission to

[2] Assurance engagements include audits and reviews.

the Practice Inspection Committee. The Institute forwards a copy of the report to the practising unit for any further comments (to be made within 21 days).

The report is submitted to a "detailed reviewer, " who is appointed by the Director to ensure consistency within the practice inspection program. Things may be added to or deleted from the report, in consultation with the inspector. Where the detailed reviewer makes a suggestion that is more rigorous than the inspector, if the inspector agrees, it may be added to the report. If the inspector does not agree, the recommendation is unchanged at that time. In either scenario, another copy of the report is sent to the practising unit, which is advised of the detailed reviewer's recommendation. The practising unit has 14 days to make additional comments.

The inspection report and inspection file are sent to a Practice Inspection Committee member for review. (Sometimes it is sent to a second Committee member as well.)

Where the inspector, detailed reviewer and Committee member are in agreement, the inspection is considered compete, and a decision letter is issued.

Where one or more of the parties reviewing the file recommends a more severe sanction, namely reinspection or a referral to the Professional Conduct Committee, the file is sent to a second Committee member. If one or both of the Committee members makes a recommendation more rigorous than that of the detailed reviewer, the practising unit is advised in writing and given 14 days to make additional comments. After that, the report is sent to the entire Committee. The Committee will review the report and relevant correspondence and will either recommend no further action, reinspection in approximately one year, or referral to the Professional Conduct Committee.

There is no appeal of the decision of the Practice Inspection Committee decision.

Cost
Practising units are charged for the planning, the inspection, the completion of the final report and the consistency review. The hourly rate is $160.00

Procedure for Moving from Inspection to Discipline Process
The practice inspection program cannot result in a sanction or other disciplinary measures. Where the Practice Inspection Committee is of the opinion that the practice unit has a competence issue, it may refer the unit to the Professional Conduct Committee. The practice unit's name and the files reviewed are anonymized. If the Professional Conduct Committee decides to launch an investigation, the Practice Review Department then sends a report to the Professional Conduct Committee identifying the unit and particular files.

Inspectors and Training
The ICAO employs 3 full-time practice inspectors and 22 contract (part-time) inspectors. The College has its own training process that includes an annual update day spent at the ICAO and memos sent to the reviewers from time to time.

Appendix 3

BARREAU DU QUÉBEC
PRACTICE INSPECTION

Membership and Practising Members
Approximately 5000 law firms

Number of Inspections per Year
The Barreau does approximately 770 random practice inspections (inspection professionelle) per year. Additionally, there are approximately 15 focussed inspections (enquête spéciale) performed each year.

Brief Description
The random practice inspection program is designed to proactively assist members to achieve and maintain competency in their substantive law practice and in practice management. It is designed to have an educational value for the members. Where a random inspection suggests that a member is struggling significantly with substantive knowledge, the member may be required to participate in an enquête spéciale. The random practice inspection program is separate from the Barreau's discipline department.

Selection for Inspection
Firms that have not been inspected within the prior four to five years are selected. Lawyers from a selected firm may be exempted where the member has joined another law firm or the member has become an in-house counsel or government lawyer.

Selection Process and Exceptions
The Barreau's Information Technology Department generates a list of between 1000 and 1500 law firms that have not been inspected within the last four or five years. A self-evaluation guide is sent to each member in the firm to be completed and returned to the Barreau. The guide is a set of questions on which members are asked to reflect in relation to their own law practices. Based on the responses, the Barreau makes recommendations for the firm. The Barreau then chooses between 750 and 800 lawyers to visit.

Procedure for the Inspection
Once the members are chosen for an office visit, approximately six to eight weeks before the date of the visit, the Professional Inspection Department sends a letter confirming the name of the inspector and the date of the inspection.

Attempts are made to match the approximate age of the inspector and the area(s) of practice with those of the member. With the exception of one inspector on staff, either a member or an inspector may ask for a new inspector to be assigned without disclosing the reason to the Barreau. (The Barreau has only one inspector who is an immigration law specialist and because this is an area of law of great concern for the Barreau, the inspector will not be reassigned unless the Barreau is convinced there is truly a conflict.)

There are currently 21 practitioner inspectors who do the random practice inspections. The Barreau is hoping to add three more inspectors to the roster in the immediate future. The inspectors are paid $300 for each review. A review consists of a three to four hour office visit

and a written report that the inspector submits to the Professional Inspection Department. The random practice inspectors are permitted (and in fact, encouraged) to attend as many CLEs as they desire, free of charge.

The inspector conducts a physical tour of the office and then meets with the member to discuss the answers in the self-evaluation questionnaire. The inspector will then review the member's files, looking for evidence of the member's legal knowledge: evidence of the ability to identify legal issues, of appropriate client communications, of an awareness of recent legal developments, and an ability to formulate an appropriate legal strategy for the file. Additionally, the inspector will review the member's management practices and books and records keeping to ensure that the member is following all of the positive practice obligations provided for in the Barreau's regulations.

Some of the files reviewed are chosen by the member as being representative of the member's practice, while the inspector chooses the others. The member is present while the file inspection takes place so that he or she may respond to the inspector's questions.

Following the visit, the inspector writes a report for the Professional Inspection Department. The format of the report is such that the inspector chooses from "set" answers to specific questions. The inspector may make comments but may not submit a narrative report.

The Barreau forwards the recommendations stemming from the report to the member, who has six months to remedy any deficiencies. The lawyer must provide the Barreau with confirmation that the recommendations have been implemented in the allotted time or the Director of Practice Review will visit the member's office. If, after a visit the "must do" recommendations are not implemented or remedied, the file will be forwarded to the Syndic.

Where an inspector identifies serious issues, the Barreau may launch an enquête spéciale. In this case, two inspectors (one staff inspector and one from a list of 50 to 100 lawyers who are former members of the Comité and who have a specialization in the same area of practice as the member) are sent to the member's office.

The inspectors are paid $400 per half day. Enquête spéciales usually last a minimum of two days. he inspectors review all (or most) of the member's open files and several of those that were recently closed. Again, the member is present to answer questions about the course of action taken on a file or to discuss the limitations of his or her knowledge. The inspectors submit a report to the Barreau, commenting on each file and evaluating the lawyer's competence in pre-determined areas. The report may also contain the inspector's recommendations.

The report is reviewed by the Barreau's Professional Inspection Committee. The member may make submissions to the Committee, which then makes a determination of the member's competence. The Committee has the authority to recommend that the member take remedial action, such as returning to law school or passing certain bar exams. The Committee may also order that a member be suspended until such time as the member passes the recommended exams or courses are passed.

If the member's practice poses no risk to the public, no further action is taken. Where there is a risk to the public/clients, limits may be placed on the member's practice. The limits are not meant to be punitive, but rather are put in place to protect the public while the member undertakes remedial education.

In very rare cases, such as where the member refuses to engage in recommended remedial activity, the member's file is sent to the Syndic (discipline department). This has only happened once in the recent past.

Procedure for Moving from Inspection to Discipline Process
In the rare case that a member does not implement the practice inspection recommendations, the file may be turned over to the Syndic. Section 112 of the Professional Code obliges the Professional Inspection Committee to bring a file to the Syndic's attention where it has reasonable grounds to believe that a member has committed an infraction against the Professional Code.

Appendix 5

SPOT AUDIT DIVISION

STATUS REPORT FOR 2005

Prepared for:
The Lawyers Fund for Client Compensation

Prepared by:
Leslie Greenfield, Manager
Spot Audit Division
Professional Development & Competence
416-947-5264

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Executive Summary

The Law Society of Upper Canada implemented the Spot Audit Program (Program) in 1998 as a remedial/educational complement to the Law Society's adoption of the self-reporting model, and also as a means to maintain public confidence in the Law Society's governance of lawyers' trust accounting compliance. It achieves this objective by conducting compliance audits to assess a law firm's financial filing, record keeping and money handling to the Law Society's requirements, and providing guidance to members. The Spot Audit Division has been successful in achieving its objectives and targets by implementing a more focused audit approach and improving operational efficiencies.

The Program conducts approximately 1,000 audits a year. Initially, the majority of the spot audits were randomly selected. This approach often resulted in audits being conducted on practices that were low risk or had very little activity in trust accounts. In 2002, the Program introduced a risk management approach in their selection of members for an audit. A variety of indicia were used to identify and select potentially higher risk members.

Program Effectiveness
The merits and benefits of Spot Audit's risk based strategy, in combination with its remedial approach, has been evident in the following areas:

- reduction in the number of financial type complaints,
- increase in the proportion of closed audit files,
- increase in the longevity of new firms,
- increase in the number of files being escalated to Investigations

The benefits of the Program are also evidenced in the reduction in the amount of claims paid from the Lawyers Fund for Client Compensation since 1999. While the Lawyers Fund for Client Compensation and other compensation funds in North America could not directly correlate spot audit program results and the impact on claims, anecdotal evidence indicates that the efforts of a spot audit program mitigates the risk to a compensation fund.

Program Efficiencies

In early 2003, we identified areas of improvements in the program's operations and audit processes. Changes were implemented to capitalize on operational enhancements. Some of our major accomplishments include:

- Cost control of audits
- Reduction in the audit cycle times
- Aging of monitored files (2002: 8 months vs 2005: 2 months).

As a result, audits are completed and issues dealt with on a timelier basis.

Membership Feedback
The survey results from members who were audited in 2005 continue to be very positive and indicate that the members appreciate and find value in the remedial approach that is utilized to assist them in their record keeping practices. Our surveys indicate a very high percentage (93%) of the members found the spot audit process to be constructive. Almost 100% of the members responded that they found the spot auditor's conduct to be professional and helpful, and the audit report to be useful (98%).

In summary, the Law Society's Spot Audit Program has been recognized as a successful program and provides many benefits to the membership and public through its remedial/educational approach. This approach has resulted in the reduction of claims and complaints, and has improved the longevity of new firms, while providing these services in an economical fashion.

Audit Selection Indicia

The Spot Audit Program has used several indicia in the selection of audits that were approved by Convocation at the commencement of the program in 1998. These selection criteria were:

- Random
- Firms with estate practices or private mortgages (M&E)
- Newly formed practices (NF)
- Referrals from other Law Society departments
- Reaudits
- Late filings of Member's Annual Report (MAR) (Fail to File or FF)
- Complaints History
- MAR financial information indicating potential risk factors

Since inception of the spot audit program, the majority (62%) of audits have been randomly selected.

Selection Criteria of Audits

Selection Criteria of Audits Conducted (1998 – 2002)

(see chart in Convocation Report)

In 2002/2003, Spot Audit enhanced its risk management approach and improved the selection process using specified indicia in conjunction with a data extraction/analysis tool. This allowed Spot Audit to extend its analysis over all MAR's recorded in the AS400, and reduced the risk of omitting higher risk members from being selected.

As a result, the percentage of audits randomly selected declined from 62% of total number of audits conducted during the 1998-2002 period to 23% in the 2003 to 2005 period, while the percentage of focused audits increased. Mortgages & estates (M&E) and newly formed sole practitioners (NF) are the primary indicia used in the focused audit selections.

Selection Criteria of Audits Conducted (2003 – 2005)

(see Chart in Convocation Report)

The graph below demonstrates that since 2002 the ratio of focused and random audits has recently changed as a result of concentrating our efforts on potentially higher risk members.

Random vs Focused Audits

(see Graph in Convocation Report)

Escalated Audit Files

Indicia of Escalated Files

In 2002, Spot Audit saw a significant increase in the number of escalated audit files. This was due to a change in our selection approach and a higher proportion of focused audits. As a result, we have seen a doubling of the number of escalated files since 2001.

Raltionship between Audit Type & Escalated Files

(see Graph in Convocation Report)

Our recent efforts in the application of indicia in the audit selection process of potentially higher risk members, has resulted in these audits engagements gaining predominance as escalated files. For example, in the chart above, we see that in 2000 and 2001 the majority of escalated files were selected through the random process. Since the implementation of a risked based

approach in the selection process, indicia have now emerged as the selection basis for escalated files and, additionally, has resulted in an overall increase in the number of files escalated or undertakings prepared by members.

Survey Results

The survey responses from members audited in 2005 were extremely favourable. Members found the spot audit process to be constructive, the Audit Report to Member to be useful and the spot auditors to be very professional and helpful.

From the 227 surveys received in 2005, the members responded that:

Spot audit process was constructive	93%
Auditor's conduct was professional and helpful	~100%
The Audit Report to Member was useful	98%
The Internal Control List was useful	94%

See Appendix 1 for survey results and member comments.

Program Effectiveness

The effectiveness of the Program was defined as the ability to mitigate the risk to the Lawyers Fund for Client Compensation and reduce the number of financial type complaints. This was to be accomplished through a remedial/educational approach in conducting a review of a firm's financial records to ensure compliance with the Law Society's authorities, rules and regulations.

This assessment of the Program's effectiveness was conducted using the following criteria:

- Claims to the Lawyers Fund for Client Compensation
- Financial type of complaints
- Longevity of newly formed sole practices
- Audit dispositions

Claims to the Lawyers Fund for Client Compensation

Our contact with assurance compensation funds of other jurisdictions have found that they could provide no evidence to link their spot audit programs to the reduction of claims to their compensation funds. The Law Society's Lawyers Fund for Client Compensation (CompFund) recent report on claims also concurred with the findings from other jurisdictions. However, CompFund did make reference to anecdotal evidence suggesting that there are a number of factors that contributed to the reduction in claims.

One of these factors was the Spot Audit Program and its objective of auditing every firm on a 5-year cycle. The member's expectation that their financial records could be audited at any time has a deterrent effect on claims. The New Jersey State Bar Random Audit Program also reported the importance of this deterrence and acknowledged it to be a factor in all random type programs.

Since the inception of the Program in early 1998, claims paid have steadily declined from a high of $6.9 million (1999) to $3.3 million (est.) in 2005. The Spot Audit program, plus other Law Society initiatives and economic factors, all had an influence in the reduction of claims.

While it is difficult to quantify the reduction in claims due specifically to the Program's efforts, logic dictates that deterrence is an important element.

Trends of Claims Paid

(see Graph in Convocation Report)

Financial type of complaints

A review of the nature of complaints from 2001 to 2004 shows a decline in the percentage of financial type complaints. As in the reduction of CompFund claims, anecdotal evidence suggests that a variety of Law Society programs and efforts have had a cumulative positive impact in the reduction in these types of complaints.

Trends of Selected Complaint Types

(see Graph in Convocation Report)

Longevity of newly formed sole practices

One of the selection criteria used by the Program to select audit candidates is newly formed sole practices. The goal of the Program is to conduct an audit 9 to 12 months after a member becomes a sole practitioner. The objective is to provide the member with sufficient time to implement their financial and record keeping practices, but conduct an audit early enough for deficiencies to be identified and rectified before they become systemic and result in serious problems. This is an important approach implemented by the Program, as over 74% of the firms in Ontario are sole practitioners.

A comparison of sole practices created during the five years leading to the implementation of this selection approach in 2000 and the five years from 2000-2004 where spot audits were conducted on new sole practices, found a significant difference in the life expectancy of these firms. The graph below shows that 42% of sole practices created in 1995 would become inactive within 5 years. While only 25% of sole practices that were spot audited in 2000 would become inactive within 5 years.

The graph demonstrates the benefits of a spot audit, and the impact it has had in significantly increasing the life expectancy of sole practice firms.

Longevity of Sole Practices (SP)

(see Graph in Convocation Report)

Audit Dispositions

After reviewing the audit working papers and report completed by the auditor, the Society will do one of the following:

1. close the audit file, if there are no deficiencies noted or if the deficiencies are minor and have been addressed in the Audit Report to Members;

2. send a follow-up letter (monitoring) requiring the member to submit documentation, or proof that the deficiencies identified in the Audit Report to Members - such as trust reconciliations - have been completed to the Society's satisfaction.

3. schedule a re-audit, if the deficiencies are serious enough to warrant further review to ensure they are remedied;

4. require the member to provide an undertaking setting out the obligations the member must honour to remedy deficiencies identified during the audit and avoid more formal proceedings;

5. refer the member to the Practice Review Program of the Society for remedial assistance with their practice;

6. refer the member to Professional Regulation for a formal investigation, if the audit discovers possible professional misconduct (i.e., a serious breach of the Rules of Professional Conduct/By-Laws.)

From 2001 to the present, the percentage of “closed” audits increased from 39% in 2001 to over 50% in 2005. This shift towards findings of less significant deficiencies uncovered during a spot audit is a reflection of the remedial and advisory emphasis of the Program and the proactive approach of auditing newly formed sole practices. In addition, the number of audits with significant deficiencies decreased, requiring fewer files to have follow-up and monitoring to ensure that a firm’s books and record keeping deficiencies were satisfactorily addressed. The Random Audit Program of the New Jersey State Bar has also noted similar trends in their 20-year report.

Trends of Audit Dispositions

(see Graph in Convocation Report)

Program Efficiencies

Audit Costs

The direct costs of audits were controlled through enhancements in the efficient use of external and internal audit resources through:

- Negotiation of audit contracts and closer monitoring of external audit resource usage
- Reduction in use of more expensive external audit resources
- Establishment of audit cycle time targets
- Re-allocation of audit review tasks to a wider pool of resources
- Increase in the number of audits

- Development of in-house expertise in delivery of audits

As a result, the Program has effectively controlled its audit costs. The cost per audit from 2002 to 2004 only increased 1%, and then declined to approximately the same level as in 2002. This is lower than the market increase during this period for Law Society's operating costs and also the rate of inflation (2002-2005: 6.4%)

Cost per Audit & Inflation

(see Graph in Convocation Report)

Audit Cycle Times

Since 2002, Spot Audit commenced several initiatives to streamline the audit approach and processes. This included the incorporation of performance metrics for reporting purposes and target setting, migration to electronic forms of audit tools and reporting, enhanced scheduling procedures, and others.

As a result of these operational initiatives, the number of days from the initial audit date to the submission date of the file declined 42%, from 31 days in 2001 to 18 days in 2005. These operational efficiencies permitted the Program to increase the total number of audits by 9%, from 1,037 (2001) to 1,127 (2005), and allowed existing resource levels to apply their efforts to doubling the number of focused audits conducted from 400 audits in 2001 to 910 audits in 2005.

Audit Cycle Times

(see Graph in Convocation Report)

APPENDIX 1

Member Survey Results & Comments

Audit Report Useful?	Internal Control List Useful?	Comments on Spot Audit Program	Audit Process Constructive?	Comments on Audit Process	Comments on Spot Auditor's Conduct
Y	Y	I found it very useful and was glad to have been selected, shortly, after opening my	Y		Friendly and courteous.

		office			
Y	Y		Y	It's nice to have confirmation that I have complied with all of the Rules and Regulations.	Clear, concise, professional
Y	Y		Y	The auditors were very helpful in giving us useable ideas for improving our procedures.	The auditors were very nice, very helpful and approachable. We discussed areas where we could make improvements in our system to avoid common mistakes in procedures.
Y	Y		Y		Very professional.
Y	Y	Discussion of solutions, not just problems proves the benefit of the program.	Y	My one problem area was a case of not seeing the forest for the trees. The auditor gave simple solution to the estate accounting case that has been vexing me for some time.	Extremely helpful, very constructive and very professional.
Y	Y		Y	It reminds us of how important the paper trail is.	He was polite and unobtrusive.
Y	Y		Y		Professional, courteous, helpful.
Y	Y		Y		Exemplary conduct-very helpful-not intimidating. A very pleasant person.
Y	Y	It is always useful to be advised of any new requirements.	Y	Overall, a positive experience.	Very courteous, competent, and helpful comments were done in a positive manner.
Y	Y		Y		Very professional and helpful.
Y	Y		Y		Helpful.
Y	Y		Y	The last Spot Audit was 1984 and that is too long if problems exist--guidance received was	The auditor was most helpful to both me and my staff--polite, direct and constructive.

				constructive and kindly given.	
Y	Y		Y		The auditor explained things very well which made the process very constructive.
Y	Y		Y		Excellent,very professional and helpful.
Y	Y		Y	Audit required due to retirement of former partners. The auditor did a Spot Audit a few years ago.	The auditor appeared to be professional and thorough and the first review was helpful.
Y	Y		Y		Very professional.
Y	Y		Y		Very helpful.
Audit Report Useful?	Internal Control List Useful?	Comments on Spot Audit Program	Audit Process Constructive?	Comments on Audit Process	Comments on Spot Auditor's Conduct
Y	Y		Y	Specifically, the receipts requirements for cash, and recording the form in which funds are reviewed (i.e.cheques, bank draft, money order)	The auditor was courteous, knowledgeable , thorough and helpful. I was pleased with the constructive time of the spot audit process and found it very useful.
Y	Y		Y		Pleasant and helpful
Y	Y		Y	Very helpful.	Very professional and cordial.
Y	Y	The audit was very educational and provided many useful suggestions.	Y	It provided ways to assist us in becoming more efficient and effective.	Very professional, considerate, and knowledgeable.
Y	Y		Y		Helpful.
Y	Y		Y	Feedback is always useful.	Very professional. Considerate of our time.
Y	Y	See letter.	Y		Courteous, knowledgeable,pleasant manner.
Y			Y		Polite and helpful.

Y		The discussion of the deficiencies with the accounting personnel and partners was instructive to ensure an understanding and steps required to avoid future mistakes.	Y	It identified procedures that we were not aware of and which have now been adopted.	We were impressed with the thoroughness of the auditor. She was very knowledgeable, clear in the explaining the errors and polite.
Y			Y		Very pleasant and professional.
Y	Y		Y		Polite.
Y	Y		Y		
Y		Very useful to explain changes in the requirements.	Y	I think its a good process to ensure your financial records are being kept correctly.	Excellent. She was very efficient, courteous and informative as to the recent exchanges in requirements.
Y	N	I do not think I received a list of internal control considerations. The audit report to member was useful.	Y	My record keeping is in compliance with the requirements.	The auditor as courteous and professional throughout the audit.
Y	Y		Y		Excellent.
Y	Y	The suggestions were very useful.	Y		I was impressed the level of professionalism she displayed.
Y	Y		Y		The auditor was well informed.
Y	N		Y		Very professional, courteous and pleasant.
Y	Y		Y		A very professional and thoughtful manner. Was very considerate of my practices and clients.
Y	Y		Y		Auditor was very

					professional.
Audit Report Useful?	Internal Control List Useful?	Comments on Spot Audit Program	Audit Process Constructive?	Comments on Audit Process	Comments on Spot Auditor's Conduct
Y	Y		Y		The auditor was very professional, very courteous, a pleasure to work with.
Y	Y		Y	The auditor was just great.	The auditor conducted a most professional audit, while she probed she was always most helpful and constructive.
Y	Y		Y		The auditor was very pleasant and made me feel very comfortable. She also provided me with useful tips.
Y	Y		Y		Courteous and helpful suggestions.
Y	Y		Y		Courteous and professional.
Y	N		Y		
Y	Y		Y		Very professional and understanding.
Y	Y		Y		Informative.
Y			Y		Friendly.
Y	Y	We found the tips we received to be invaluable and hopefully will assist us in not making errors in the future.	Y	Definitely.	Very professional.
Y	Y	The audit report is summary document of requirements as well as a benchmark.	Y	It brought us up to date terms of the requirements and some changes in policy which we were not aware off.	Very polite, congenial, made a good effort not to interfere with daily practice routines, helpful with explanations, reasonable with requests. Good post-audit communication.
Y	Y		Y		Courteous,punctual, and professional.
Y	Y		Y		Very pleasant.

Y	Y		Y		Excellent.
Y	Y		N		Very punctual, efficient and cordial. Professional conduct and knowledgeable.
Y	Y		Y		The auditor was quite polite and made me feel at ease.The experience was quite pleasant.
Y	N		Y	Good advice regarding alternatives to a trust account.	Excellent. Personable, non-threatening and helpful. Well versed in small practice issues.
Y		The act of preparing for the audit was probably the most educational part of this process.	Y		No complaints--he was professional and approachable.
Y		I have no staff, so internal controls are pretty simple for me.	Y		The auditor was polite, friendly, and helpful.
Y	Y		Y		Excellent.
Audit Report Useful?	Internal Control List Useful?	Comments on Spot Audit Program	Audit Process Constructive?	Comments on Audit Process	Comments on Spot Auditor's Conduct
Y	Y		Y	Good to have confirmation of procedures.	The auditor was polite, considerate and helpful.
Y	Y	As a new sole practitioner, it was very helpful to learn what I was doing right and how I could improve.	Y	The auditor was very helpful.	He was super!
Y	Y		N		Quite pleasant and professional.
Y	Y		Y		She was completely professional and friendly.

Y	Y		Y		
Y	Y		Y		Polite and efficient.
Y	Y		Y	But most of my questions were regarding aspects that did not apply to my practice.	Courteous, objective, informative, helpful
Y	Y		Y		Very professional and co-operative. Helpful and friendly during the entire process.
Y	Y		Y		Pleasant; professional.
Y	Y		Y		Courteous, knowledgeable and professional.
Y	Y		Y		She was very courteous and helpful. It was a pleasure to have met the auditor.
Y	Y		Y		See notes.
		Our limited use of the trust account is not conducive to the auditor generating many suggestions so the question is really not relevant.			Just fine.
Y	Y		Y		
Y	Y		Y		The auditor was a treasure to deal with. Knowledgeable, courteous and very professional in her approach. She taught and suggested methods of improving bookkeeping and records.
Y	Y		Y		See notes.
Y			Y		Very professional and thorough.
Y	Y		Y		Professional and helpful.

Y			Y		The auditor was professional, courteous and made some good suggestions. The auditor worked quickly and efficiently to complete the audit.
Audit Report Useful?	Internal Control List Useful?	Comments on Spot Audit Program	Audit Process Constructive?	Comments on Audit Process	Comments on Spot Auditor's Conduct
Y	Y	It is very helpful to be prompted to tidy up small areas of non-compliance and to have an independent assessment of internal controls.	Y	Updates on recent changes were very good--e.g. how to document cash receipts.	He was excellent-clear, concise, and positive. You had the sense he was out to assist and not just find faults.
Y	Y		Y		The auditor was very professional and extremely knowledgeable.
Y	Y		Y	We were unaware of some recent changes to Cash Handling and found the guidance in other areas helpful.	Auditor was very helpful with practice management advice and advice concerning computerized bookkeeping.
Y	Y		Y	Very helpful.	Very courteous and helpful.
N	N		N		She was courteous and a good listener.
Y	N		Y		Very professional,courteous, and accommodating and helpful.
Y	Y	Very constructive process.The review was thorough and the suggestions	Y	Yes--office process has changed with electronic records, and the audit process helped to identify issues that had been overlooked by me.	Very professional. She was thorough in her review, knowledgeable about the process--made practical and specific suggestions.

		made were practical.			
Y	N	I hope to retire later this year.	Y		Excellent.
Y	Y		Y	It is always useful to review the proper methods. I found the auditor very helpful and knowledgeable and overall it was a useful exercise.	Very non-intrusive and non-disruptive. Overall, I found her pleasant and the offered good guidance.
Y	Y		Y		I found the auditor very professional and helpful in her comments regarding recordkeeping, and as a result I will be making changes to remain in strict compliance of the by-laws.
Y	Y		Y		Painless.
Y	Y		N		The auditor was extremely polite and helpful.
Y	Y		Y		Excellent
N	Y	The auditor was unfamiliar with legal clinic reporting but offered useful suggestions for internal.	N		Very pleasant.
Y	Y		Y		Efficient. Polite. Did not cause any disruptions. Helpful.
Audit Report Useful?	Internal Control List Useful?	Comments on Spot Audit Program	Audit Process Constructive?	Comments on Audit Process	Comments on Spot Auditor's Conduct
Y	Y		Y		Very professional, focused and helpful regarding alterations to recordkeeping details.
Y	Y		Y		Pleasant and competent. Practical

					suggestions and answers to my questions.
Y	Y		Y		Very professional, polite, and courteous.
Y	Y		Y		It was difficult to imagine how the auditor could improve on the way he went about the process. Polite, courteous, respectful and most helpful.
Y	Y		Y		Excellent.
Y	Y	The auditor was very helpful and very knowledgeable.	Y	Especially new regulations.	Very pleasant and knowledgeable.
N	N		N		
Y			Y		He was very helpful in suggestions.
Y			N	Was well aware	Fine and fair.
Y	Y	Somethings have changed--eg.receipts for cash to be signed by client and a summary of other fine points	Y	I wasn't sure what to do with old trust moneys that was unclaimed.	She was helpful, constructive including on items she felt needed some "tweaking". I didn't feel I was "put on the spot"--I felt the criticism were well intended and helpful.
Y	Y	I found both of the above quite useful.	Y	I found the auditor's comments very useful in terms of improving existing procedures in our office.	The auditor's overall conduct was quite exemplary. She was both professional and thorough, but also quite sensitive to the impact of the audit to our office.
Y	Y		Y		
Y	Y		Y		
Y	Y		Y		Exemplary.
Y	Y	As thorough outline and easy to follow.	Y	Absolutely, it forced me to devise time and attention to both remedying deficiencies and	Efficient, considerate, very pleasant, helpful--a very constructive approach.

				achieving clarity on my responsibilities.	
Y	Y		Y		The auditor was a model of diplomacy, clarity, and courtesy. She has an exceptional talent for making accounting requirements seem simple, and doing it in a tactful, friendly manner.
Y	Y		Y	A good update on some recent changes.	Extremely polite, very professional and informative, organized and concise. Very pleasant to deal with. Top Marks!
Y	Y		Y		Professional and courteous.
Audit Report Useful?	Internal Control List Useful?	Comments on Spot Audit Program	Audit Process Constructive?	Comments on Audit Process	Comments on Spot Auditor's Conduct
Y			Y		Firm--but polite. Was able to assist me with respect to areas in which I was uncertain of my obligations.
Y	Y		Y		Particularly patient, helpful and clear in all comments and requests.
Y	Y		Y		Very pleasant.
Y	Y	As By-laws change it is very helpful to attention drawn to what is current.	Y	The auditor was very helpful and up-to-date on recent changes and the rationale for these changes.	Professional, approachable, collegial. friendly, knowledgeable efficient and effective.
Y	Y	Very informative and helpful.	Y		Wonderfully professional, helpful, and informative.
Y	Y			I was pretty well aware before. There were a few new areas that were	Excellent.

				brought to my attention.	
Y	Y		Y		She was very professional, helpful and knowledgeable.
Y	Y		Y		Likeable, sensitive, sensible.
Y	Y		Y		Very polite and courteous.
Y	Y		Y	Interesting point regarding money laundering legislation and need to record source of frauds (e.g. cheques vs. bond drafts, etc.)	Professional, pleasant, respectful, efficient.
Y	Y	Very helpful.	Y	It was an excellent update.	First class--professional, courteous, and knowledgeable.
Y		A helpful tool in the one or two areas of non-compliance.	Y	Directions of the auditor in 'grey' areas of potential compliances or non-compliances would be helpful. (more comments)	Very pleasant and constructive in her criticisms.Co-operation in fixing audit date to accommodate court calendar--very much appreciated.
Y	Y		Y	It made me look at my files more carefully and make decisions that needed to be made on some of them.	She was really friendly and helpful.
Y	Y		Y		Very professional and personable.
Y			Y		She was pleasant and conducted herself in a very professional manner.
Y			N		Pleasant, industrious, knowledgeable and smart. A pleasure to have in the office. She explained her findings clearly and concisely.
Y	Y		Y		Very professional and candid--offered very constructive

					suggestions with pleasant demeanor. Very impressed.
Audit Report Useful?	Internal Control List Useful?	Comments on Spot Audit Program	Audit Process Constructive?	Comments on Audit Process	Comments on Spot Auditor's Conduct
Y	Y		Y		I thought the auditor was quite professional and friendly.
Y	Y	We discussed a lot of billings which we had overlooked. Helped us tighten up our real estate practice.	Y		
Y	Y		Y		Courteous, knowledgeable, helpful input.
Y	Y	It is always a useful exercise to review methods and procedures.	Y		Very pleasant. Provided some useful suggestions.
Y	Y	An objective look always is helpful.	Y		Courteous but business-like. Our shortcomings were pointed out professionally, but in a helpful way.
Y	Y		Y		Very professional, efficient, helpful comments given. It was a positive experience.
Y	Y		Y		He was very helpful, polite and professional.
Y	Y	The audit made us aware of things we didn't know and helped us develop more effective procedures.	Y	Very helpful.	Very professional and helpful. The auditor provided us with some very helpful advice. He was exceptionally pleasant.
Y	Y		N		Professional

Y	Y	I really welcomed this audit. It provides the needed level of practice protection and 'check', that instills public confidence in the profession.	Y		Courteous, efficient, and thorough.
Y	Y		Y		Courteous, pleasant, instructive, business-like.
Y	N		Y		
Y	Y	Both very useful and helpful to keep us alert as to LSUC's expectations and our internal practices. A second set of 'eyes' is usually of value.	Y	As above.	She was very professional.
Y	Y		Y		She was professional and very helpful.
Y	Y		Y		The auditor was very professional and courteous.
Y	Y		Y		
Audit Report Useful?	Internal Control List Useful?	Comments on Spot Audit Program	Audit Process Constructive?	Comments on Audit Process	Comments on Spot Auditor's Conduct
Y	Y		Y		We found the auditor to be very polite, knowledgeable, and professional. She treated our staff with great respect and was very informative and helpful in her recommendations. Excellent.
Y			Y		Pleasant and

					professional
Y	N	As the bookkeeper of this firm I was already aware of areas of non-compliance and have suggested areas of improvements on many occasions.	N	As the bookkeeper of this firm I was already knowledgeable on the record keeping requirements and handling of money and other property.	The auditor was very efficient and conducted herself in a professional manner. She was very thorough.
Y	Y		Y	Auditor was very helpful in explaining reasons for requirements.	Auditor was very pleasant and helpful and professional.
Y	Y		Y		She was very pleasant and careful.
Y			Y	Auditor was very helpful and co-operative--very professional.	Very professional.
Y	Y		Y		
Y	Y	Along with requirements, I also appreciated the "best practices" suggestions.	Y	It confirmed that we were basically correct while identifying some areas of improvement.	He was very professional, thorough and helpful.
Y	Y		Y		Efficient and very professional.
Y	Y	I appreciated the input and helpful suggestions from the auditor.	Y	I was nice to know that I am on the right track.	The auditor was a very pleasant representative--appreciated the friendly manner and helpful advice.
Y	Y	The audit report was useful and will be helpful as a guide.	Y	The process was informative and the auditor was able to answer all of my specific questions.	The auditor was excellent, specifically, he made the process as professional and helpful as possible. His patience was appreciated.
Y	Y		Y		Auditor was very positive and helpful.
Y	Y		Y		Very professional but

					congenial
Y			Y		
Y	Y		Y	It ensures that my records are up-to-date.	Professional.
Y	Y	Auditor was great--seemed interactive in helping to implement proper controls.	Y		Auditor was knowledgeable, professional, constructive, and made appropriate and useful comments.
Y	Y		N		The auditor was professional and helpful throughout the audit.
Audit Report Useful?	Internal Control List Useful?	Comments on Spot Audit Program	Audit Process Constructive?	Comments on Audit Process	Comments on Spot Auditor's Conduct
Y	Y	The auditor was extremely thorough and provided comprehensive suggestions and recommendations regarding suggestions for improvement.	Y	I became aware of a new regulatory requirement that a sole practitioner must not take cash transactions above $7500.00 and must keep a duplicate receipt book signed by client and member.	Again, the auditor was professional, courteous and thorough when conducting the audit. She was open to questions and feedback regarding the audit.
Y		The auditor was very helpful.	Y		Sara was extremely polite, pleasant, efficient and organized. She explained things very well.
Y	Y		N	I found the Spot Audit process informative, however, it did not enhance my knowledge of record keeping requirements. I however think that it is a very worthwhile process.	The auditor was very pleasant to deal with. She was respectful and made the process informative and useful.

Y	Y	Especially like the recommendation because we can refer the lawyers to the specified sections of the Law Society Act.	Y		The auditor is excellent. She's very pleasant and makes everyone feel comfortable.
Y	Y		Y		The auditor was professional and provided useful recommendations.
Y	Y		Y		Auditor was excellent. She was non-intrusive, respectful, knowledgeable, friendly and provided valuable information regarding procedures.
Y	Y		Y		
Y	Y		Y	The auditor was very helpful and clear.I now have a better understanding of how to keep my books clear.	Auditor was very professional and helpful.
Y	Y		Y		Professional and courteous.
Y	Y		Y		Very thorough, helpful, and knowledgeable.
Y	Y	Please see attached letter. In the future, I would appreciate receiving communications in the French language.	Y		
Y		The answers provided by the Auditors should be more detailed.	N	The auditor didn't know the answers to my questions.I informed her that I don't receive cash in trust, yet she still put that I was in	Very laissez-faire especially frustrating considering the importance of the audit to me and the LSUC.

				compliance & then amended it when I pointed out.	
Audit Report Useful?	Internal Control List Useful?	Comments on Spot Audit Program	Audit Process Constructive?	Comments on Audit Process	Comments on Spot Auditor's Conduct
Y	Y		Y		Professional in approach, patient, non-disruptive, positive attitude.
Y	Y	The entire process from the time of auditor's visit to the completion was excellent.	Y	There is no doubt it was very constructive. We are replacing our current software, bringing a new bookkeeper, and changing the standard of our reconciliations.	Brilliant, courteous, and patient. I was very impressed with the auditor and his managers at the LSUC.
Y	Y	Suggestions to rectify non-compliant matters were helpful.	Y		The auditor was professional. Respectful and reassuring in his approach. He created minimal disruption to our firm.
Y	Y		Y	The auditor was friendly, frank and very clear.	The auditor was very open and helpful in explaining what he was doing, and what good practices were.
Y	Y		Y		The auditor was very thorough and professional.
Y	Y		Y		Very professional, courteous and reasonable.
Y	Y		Y		Excellent.
Y	Y		Y	There was an aspect of trust transfers related to real estate transactions that I was previously unaware of--very helpful in this regard.	Very courteous and professional.

Y	Y		Y		Very professional
Y	Y		Y		Very professional.
N	N		N	My practice is primary mediation. Record keeping is done for me by my former firm.	Professional and polite.
Y	Y		Y	The explanation offered during the Audit Report Review was very helpful.	Extremely professional and courteous.
Y	Y		Y	As a new firm, it would have been very useful to have someone come in at the start up phase to assist with implementing the procedures. Would have saved us a lot of time and grief.	Very helpful and patient. A pleasure to work with. Answered all my questions and gave us helpful tips.
Y		There is no method required under 2(1) although you found non-compliance with the method.	Y		Cordial, friendly, helpful regarding my duplication of books.
Y	Y	Wasn't as painful as I thought it would be.	Y		Professional and friendly. She was helpful and patient.
Audit Report Useful?	Internal Control List Useful?	Comments on Spot Audit Program	Audit Process Constructive?	Comments on Audit Process	Comments on Spot Auditor's Conduct
Y			Y		The auditor was courteous and professional. She helped keep things relatively stress-free.
Y	Y		Y		Thorough and meticulous and very polite.
Y			Y		Professional, courteous, and helpful.

Y	Y	Brought focus to me on which areas I must demand tighter controls on secretary and bookkeeper.	Y	Allowed me to review areas of the rules.	Professional, friendly, very helpful attitude.
Y	Y		Y		Extremely thorough and meticulous but very polite.
Y	Y		Y		Professional, efficient, non-disruptive.
Y	Y		Y		Excellent.
Y	Y	The report is very helpful and informative. It also provide us with a clear guide of internal control.	Y	It provides us with better understanding of how to keep our books properly.	The spot auditor is very helpful and informative.
Y	Y		Y		Extremely helpful.
Y	N		Y	Department should advise how other firms are complying e.g. GIC's or on mortgages over $50,000.00.	My understanding of a spot audit is for the auditor to look at individual files. Auditor requested contents of file before audit. Staff spent 3 days assembling all files. (more comments)
Y	Y	This provides a guideline. However, the auditor useful advice are very helpful some we looked at examples.	Y		Very helpful and excellent.
Y	Y		Y		She was polite, informative and co-operative.
Y	N		Y		Professional and polite.
Y	Y		Y		The auditor was professional and thorough.

Y	Y		Y	The auditor was very helpful in improving my knowledge, streamlining my practice. I like the audit process.	Very good, with a professional manner, trying to help me and not accuse me.
Y	Y		Y		The auditor was a pleasure to work with.
Y	Y		Y	The auditor spent time and went through how we should manage the bank accounts better within the context of electronic registration and the theory behind the tools.	I'm very pleased with the audit. The auditor did manage to help me understand how my system could evolve better.
Audit Report Useful?	Internal Control List Useful?	Comments on Spot Audit Program	Audit Process Constructive?	Comments on Audit Process	Comments on Spot Auditor's Conduct
Y	Y	The auditor was very helpful in all aspects of the program. She was an effective communicator, was able to point out our defective sides and answer my questions.	Y	The auditor advised us that the LSUC has websites assisting members. She also assisted us to set up a new system. This audit was much more constructive than the one I had in 2003.	Very professional and experience.
Y	Y		Y		The auditor was professional, polite and a pleasure to talk and work with.
Y	Y		Y		I was not present due to prior commitments. However, my clerk/assistant has nothing but positive comments about the auditor.

Y	Y	The audit report is very useful as it points out areas that one might be overlooking.	Y	The auditor was knowledgeable about the rules and was able to provide a constructive advice and suggestions regarding record keeping, etc.	The auditor was very professional and a friendly through the process of the audit.
Y	Y		N		Satisfactory.
Y	Y		Y		Very professional, co-operative and informative; helpful; courteous.
Y	Y		Y		Very courteous, very helpful.
Y	Y	It identifies areas of improvement	Y	It greatly enhances my knowledge.	She is very thorough, knowledgeable and detailed.
Y	Y	Very informative	Y		She was very professional and provided constructive criticism.
Y	Y		Y		Auditor was professional and constructive in comments.
Y	Y		Y		Knowledgeable,informative,and polite--very helpful
Y	Y		Y		Professional, courteous, and pleasant.
Y	Y		Y		Fair and reasonable.
Y	Y		Y		I found the auditor to be helpful, professional, constructive in her comments, patient, pleasant taking all the stillness and unpleasantness out of being audited.

Audit Report Useful?	Internal Control List Useful?	Comments on Spot Audit Program	Audit Process Constructive?	Comments on Audit Process	Comments on Spot Auditor's Conduct
Y	Y	Having the auditor go through the problem areas and give suggestions was extremely helpful to me as a sole practitioner- his experience with PCLAW and guidance appreciated.	Y	It highlighted the weakness in my accounting systems that I did not know existed.	Very professional and very helpful with suggestions.
Y	Y		Y		He was courteous and professional.
Y	Y	Both are good resources for improving process.	Y	Helpful to see and review areas for improvement	Pleasant and helpful.
Y		In addition to providing a reminder regarding areas of non-compliance to be remedied, it also acts as a quick reference guide to other important reporting requirements.	Y		The auditor was very pleasant and professional, assuring that the Audit experience, which could have been very stressful, instead remained comfortable.
Y	Y		Y	However, I have a small and simple practice.	Very pleasant
Y		Would like improve areas of deficiencies	Y	We have followed through with the issues	He was good and helpful. Send him back in 3-6 months.
Y	Y		Y		Very respectful.

Y	Y	I like you system of presenting a report and reviewing it with--I know what to correct as a result of it.	Y	Especially since I wasn't aware of the January 27/05 requirements regarding deposits--i.e. identifying as either Cash or Cheque.	He was very professional and polite.
Y	Y		Y		Professional and courteous.
Y	Y		Y		Very professional

Appendix 6

Excerpt from By-Law 24

5(3) In determining that there are reasonable grounds for believing that the member may be failing or may have failed to meet standards of professional competence, the chair or vice-chair of the standing committee of Convocation responsible for professional competence or the Treasurer may consider the following:

1. The nature, number and type of complaints made to the Society in respect of the conduct and competence of the member.

2. Any order made against the member under section 35, 40, 44 or 47 or subsection 49.35 (2) of the Act.

3. Any undertaking given to the Society by the member.

4. Any information that comes to the knowledge of an officer, employee, agent or representative of the Society in the course of or as a result of considering a complaint which suggests that the member may be failing or may have failed to meet standards of professional competence.

5. Any information that comes to the knowledge of an officer, employee, agent or representative of the Society in the course of or as a result of an investigation which suggests that the member may be failing or may have failed to meet standards of professional competence.

6. Any information that comes to the knowledge of an officer, employee, agent or representative of the Society in the course of or as a result of a proceeding which suggests that the member may be failing or may have failed to meet standards of professional competence.

7. The result of an audit where the result suggests that,

a. the member is in default of the requirements of By-Law 18 [Record Keeping Requirements] or 19 [Handling of Money and Other Property];

b. the member is in default of the requirements of Rule 2.04 of the Rules of Professional Conduct;

c. there are deficiencies in the records, systems or procedures in the member's practice; or

d. there are deficiencies in the administration of the member's practice.

Appendix 8

A) Number of private practitioners 19,698

B) Number of private practitioners with date of call (DOC) 1-8 years 5,823 (30%)

Area of Practice – Detail Level

Major Areas of Law (>30%)	# Members	%	Rank
Civil	1780	33.1%	1
Corp Comm	792	14.7%	2
Family	529	9.8%	3
Real Estate	479	8.9%	4
Criminal	448	8.3%	5
Employment	251	4.7%	6
IP	216	4.0%	7
Immigration	135	2.5%	
ADR	6	0.1%	
Admin	101	1.9%	
Bankruptcy	73	1.4%	
Construction	28	0.5%	
Environmental	21	0.4%	
Securities	178	3.3%	
Tax	129	2.4%	
Wills & Estates	41	0.8%	
Workplace Safety	11	0.2%	
Other	166	3.1%	
Total	5384	100.0%	
No MAR Provided	439		
Total Members	5823		

Major Area of Law (>30%)	Population with DOC 1-8 Years	%	Selection from DOC 1-8 Years	Total Population of Private Practitioners	% of selection
Civil Litigation	1,780	33.1	139	4,214	3.3
Corp. Commercial	792	14.7	62	2,350	2.6
Family	529	9.8	41	1,459	2.8
Real Estate	479	8.9	37	2,476	1.5
Criminal	448	8.3	35	1,347	2.6

Employment	251	4.7	20	352	5.7
IP	216	4.0	17	2,927	0.6
Other areas of law	889	16.5	69	4,573	1.5
Total	5,384	100.0	420	19,698	2.1

Major Areas of Practice – Private Practitiners DOC 1-8 Years

(see Chart in Convocation Report)

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

(1) Copies of two articles from the Toronto Star Re: "Doctors are Failing at Self-Regulation" and Re: "Doctors Support Change in Rules".

(Appendix 3, pages 31 – 34)

(2) Copy of an article re: "Demystifying Peer Assessment".

(Appendix 4, pages 69 – 80)

(3) Copy of the Spot Audit Division's Status Report for 2005.

(Appendix 5, pages 81 – 107)

(4) Copy of an Excerpt from By-Law 24.

(Appendix 6, page 108)

(5) Copy of the Practice Review Basic Management Checklist.

(Appendix 7, pages 109 – 127)

Re: Proposed Integrated Practice Review Program

It was moved by Ms. Pawlitza, seconded by Mr. Caskey,

That Convocation adopt an expanded practice review model with two components:

a. one with the goal of preventing competence deficiencies (*practice management review*) and

b. one with the goal of addressing existing competence deficiencies (the current *focused* practice review).

That Convocation approve the following program structure:

c. As with the focused practice review the emphasis will be on practice management. The Basic Management Checklist, currently used for focused practice review will be used as the basic guide for both components of the program.

d. The indicia for selection for the preventive component will be:

   i. one to eight years from call to the bar.
   ii. in private practice (category A).

e. In-house and external reviewers will conduct the reviews.

f. Members will be advised in advance of the review that they have been selected and be provided with the name of the reviewer. An appointment will be scheduled, wherever possible at the member's convenience. If a member is selected for both an audit and a practice review, *with the member's consent,* the two appointments may be scheduled at the same time. Following the review the reviewer will prepare a report for the member and review it with him or her.

g. The goal will be to conduct approximately 420 practice management reviews per year. Coupled with approximately 80 focused reviews, this will result in approximately 500 practice reviews per year. The goal of 500 reviews should be reached in three years:

   i. 250 reviews conducted in 2007.

   ii. 400 reviews in 2008.

   iii. 500 reviews in 2009 and thereafter.

h. The cost of the program will be borne by all members as part of the annual fee.

i. The possible dispositions at the conclusion of a practice management review will be:

   i. Close the review file – occurs where there are no deficiencies or they have been addressed in the review report.

   ii. Send a follow-up letter (monitoring) – requires member to submit proof that the deficiencies identified have been addressed to the Society's satisfaction.

   iii. Require the member to provide an undertaking to remedy deficiencies within a given time.

   iv. Schedule a re-review – if the deficiencies are serious enough to warrant a further review to ensure they are remedied.

   v. Refer the member to focused practice review – where remedial assistance is necessary to address the competence deficiencies.
   vi. Refer the member to professional regulation for a formal investigation - if the review reveals possible professional misconduct or failure to meet standards of professional competence.

j. Observations gathered over the course of a year's reviews will be evaluated to determine whether the profession as a whole could benefit from being advised of areas for improvement.

k. The performance measures adopted for the spot audit program will be adapted to apply to practice management reviews.

l. The development of the model will include a communication plan to inform members about the program and its goals and the benefits it can provide to members.

A friendly amendment proposed by Messrs. Silverstein and Swaye to the motion was accepted, that a formal report on the program be presented to Convocation in the autumn of 2009.

It was moved by Mr. Wright, seconded by Mr. Silverstein, that paragraph 64. b.(i) on page 35 of the Report be amended so that the indicia for selection be that 85% of the practice management reviews be from one to eight years from call to the bar and 15% be from nine years and up.

Withdrawn

A friendly amendment proposed by Ms. Ross to paragraph 64. g. vi. was accepted. The paragraph will now read as follows:

vi. Refer the member to professional regulation for a formal investigation – if the review reveals possible professional misconduct, incapacity, or failure to meet standards of professional competence.

The main motion as amended was adopted.

ROLL-CALL VOTE

Alexander	For	Henderson	For
Backhouse	Against	Krishna	For
Banack	For	Legge	For
Campion	For	Manes	For
Carpenter-Gunn	For	Martin	For
Caskey	For	Minor	For
Chahbar	For	Murray	For
Cherniak	For	O'Donnell	For
Coffey	For	Pattillo	For
Crowe	For	Pawlitza	For
Curtis	For	Potter	For
Dickson	For	Ross	For
Doyle	For	Ruby	For
Dray	For	St. Lewis	For
Elliott	For	Sandler	For
Feinstein	For	Silverstein	For
Filion	Abstain	Simpson	For
Finkelstein	For	Swaye	For
Gotlib	For	Symes	For

Gottlieb	Against	Topp	Abstain
Harris	For	Warkentin	For
Heintzman	For	Wright	For

Vote: 40 For; 2 Against; 2 Abstentions

Re: Proposed Changes to Policy Requiring Competence & Capacity Proceedings to be Held in the Absence of the Public (JOINT REPORT WITH THE PROFESSIONAL REGULATION COMMITTEE)

It was moved by Ms. Pawlitza, seconded by Mr. Ruby, that Convocation

a. rescind its current policy that competence proceedings and capacity proceedings be held in the absence of the public;

b. apply the current policy applicable to conduct hearings to competence and capacity hearings; and

c. direct that amendments to the Rules of Practice and Procedure to reflect this change in policy be provided to Convocation for its approval.

Carried

REPORT OF THE PROFESSIONAL REGULATION COMMITTEE

Mr. Ruby presented the Report of the Professional Regulation Committee.

Report to Convocation
June 22, 2006*

Professional Regulation Committee

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

Purposes of Report: Decision and Information

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

*Includes decision items deferred from May 25, 2006 Convocation

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COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on May 11 and June 8, 2006. In attendance on May 11 were Clayton Ruby (Chair), Lawrence Pattillo and Heather Ross (Vice-chairs), Anne-Marie Doyle, George Finlayson, Allan Gotlib, Ross Murray, and Robert Topp. Staff attending were Naomi Bussin, Lesley Cameron, Terry Knott, Zeynep Onen and Jim Varro. Lynn Burns, Director of Pro Bono Law Ontario, attended part of the meeting. In attendance on June 8 were Clayton Ruby (Chair), Lawrence Pattillo and Heather Ross (Vice-chairs), George Finlayson, Allan Gotlib, Gary Gottlieb, Paul Henderson, Ross Murray and Syndey Robins. Staff attending were Naomi Bussin, Lisa Hall, Zeynep Onen and Jim Varro.

FOR DECISION

"EMERITUS" MEMBERSHIP STATUS FOR RETIRED LAWYERS PROVIDING PRO BONO LEGAL SERVICES THROUGH PRO BONO LAW ONTARIO

(JOINT REPORT WITH THE ACCESS TO JUSTICE COMMITTEE)

Motion

2. That Convocation

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

Introduction and Background

3. In the late spring of 2005, Lynn Burns, Director of Pro Bono Law Ontario (PBLO)[1] , began discussions with the Law Society about the possibility of creating an "emeritus status" for retired lawyers that would permit them to provide legal services *pro bono* through PBLO programmes, without paying Law Society fees.

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

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

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

7. A written proposal for the "emeritus" status lawyer was submitted to the Law Society by PBLO later in 2005, and was discussed at the Access to Justice Committee in September and October 2005. The Access to Justice Committee approved the concept in principle, but recognized that it raised several implementation issues. That Committee

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

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

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

asked Law Society staff to prepare a more detailed proposal for consideration by both the Access to Justice and Professional Regulation Committees.

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

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

The PBLO Proposal

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

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

j. An emeritus lawyer must perform all activities authorized by this rule under the supervision of a *pro bono* programme coordinator, supervising lawyer or Executive Director of an approved legal assistance organization, and
k. The application and certification of emeritus lawyers would be completed through the Law Society.

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

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

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

a. Eligibility for emeritus status should be restricted to retired lawyers as defined in By-Law 15 who are permanently retired from the practice of law. These are lawyers who fall within Category C in By-Law 13[4] (Members) ("Every member who is exempt from the payment of the annual fee under section 4 of By-Law 15, or who is exempt from the requirement to file an annual report under section 2 of By-Law 17, is a category C member"). This is intended to be an initial restriction, with the possibility of expanding the availability of emeritus status to lawyers at other points in their careers (e.g. lawyers on extended parental leave). Lawyers in this latter category enter a "retired or not working" status, and this group may include lawyers who have been unable to sustain a full time practice, who may raise quality control concerns and possible regulatory issues for the Society if eligible for emeritus status. At this stage, the Committees thought it appropriate to limit the availability of emeritus status to retired lawyers as defined in the By-Law;
b. As the proposal includes lawyers who have been practising for a minimum of 10 of the last 15 years, the question of the professional competence of lawyers who have not practised for the last five years arises. The Committees concluded that prospective emeritus lawyers should be subject to the requirements of the Law Society's Private Practitioner Refresher Program (PPRP) set out in By-Law 13[5] . The PPRP will require lawyers who have not been in private practice for five years or more to undergo a refresher programme prior to entering private practice. The PPRP will come into effect in early 2002, but will not affect lawyers until 2007. The requirements of the PPRP involve completing various modules to ensure lawyers have the practice skills required, and include time management, file management, financial management, client relationships/communication, technology and equipment, professional management, personal management and professional responsibility. In the case of lawyers moving from Category C

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

to Category A, the program would apply if, for 80 percent or more of the five years immediately preceding the date of the application for the change in status, the lawyer has been a category C member. This approach is proposed for applicants for emeritus status who fit this time frame, to address any issues about the competency of emeritus lawyers. The requirements of the PPRP would be tailored to the individual circumstances of the applicant;

c. Related to b., the Committees determined that an emeritus lawyer who only practices for a few hours in a year may lose practice skills. The Committees agreed that these lawyers should be subject to a cyclical review of the requirements for the PPRP on an individual basis, based on the number of hours practiced, if the emeritus lawyer remains in that status for longer than two years;

d. As the emeritus lawyers will be practising law, even if in a limited fashion, they should be expected to complete a minimum number of hours of professional development, in keeping with the general expectation of practising lawyers. The minimum expectation for professional development, currently set at 50 hours self-study and 12 hours of CLE for full time lawyers, should be set at three hours per year for emeritus lawyers, acknowledging that these lawyers will be providing at least 50 hours per year of *pro bono* legal services. PBLO offers free CLE for lawyers providing *pro bono services*, but the Committee agreed that a reduced price for emeritus status lawyers for CLE programmes beyond those offered by PBLO should be considered;

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

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

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

Committees also agreed that the Law Society should approve all supervisors of emeritus lawyers;

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

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

Implementation and Review of the Emeritus Status

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

a. By-Law amendments will be required to implement this proposal. The Committee will bring forward the required amendments at a later date if Convocation approves the proposal;

b. The Committee proposes that three years after implementation, Convocation review the emeritus status membership category, based on an analysis to be completed on its use, effectiveness and any regulatory issues that have arisen. This will also provide the Society with an opportunity to address the advisability of expanding the availability of emeritus status to lawyers in other non-practising membership categories.

APPENDIX 1

ABA STANDING COMMITTEE ON PRO BONO & PUBLIC SERVICE

State Bar Emeritus Rules Encourage Pro Bono

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

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

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

California, Delaware, Florida, Georgia, Idaho, South Carolina, Texas, and Washington. Other states are considering such a rule.

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

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

Stephanie Edelstein

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

State	Minimum Age	Required years of practice	Admitted in state?	Bar dues waived?	MCLE waived?	Court or Bar Certification?
Arizona 17A A.R.S. Sup.Ct Rules, Rule 39	No	10 of last 15	No	Yes	Yes	Yes
California CA St. Bar Rules Art.1 §12	No	10; 3 of last 8 in Cal.	Yes	Yes	No; fees waived	No
Delaware DE R S CT Rule 69	No; two levels - inactive or retired	Yes	I-reduced R-waived	Yes	Yes	No
Dist. Columbia	No	No	No	Yes		Yes, case by case

Ct App. Rule 49(c)(9)						
Florida FL Bar Rule 12-1	No	10 of last 15	No	Yes	No	Yes
Georgia GA R Bar Rule 1-202	70	25	Yes	Yes	Yes	No; confirm status annually
Hawaii RSCH 20	No	15	Yes	Reduced	No MCLE	Yes
Idaho ID Bar Rule 223	No	10 of last 15	No	Reduced	Yes	No
Montana Rule adopted by Bar 4/12/02	No	10 of last15	Yes?	Yes	No; fees waived	No
Oregon OSB BOG 15.7 BR 8.14; 3.2	No	Active Pro Bono 15; Active Emeritus 40, not Oregon	Yes?	Reduced	Yes	Active Pro Bono - 40 hours service per year
South Carolina SC R A CT Rule 415	No	10 of last 15	No	Yes	Yes	Yes; rules include form
Texas TX St. Bar Rules Art.13	No	5 of last 10	No	Yes	Yes	Yes

Utah UT Code II,Ch. 16 and USB Rules	No	No	Yes	Reduced	Yes	Yes
Washington WA R ADMIS APR 8 (e)	No	5 of last 10; 10 of 15 out-of-state	No	Reduced	Yes; but a training course	Yes; one year status may be renewed
July 2003 Draft						

Last Updated: 12/2/03

APPENDIX 2

PRO BONO SERVICES
INFORMATION SHEET

Background

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

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

Coverage under the Policy for pro bono legal services

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

Services are "sanctioned services" if:

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

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

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

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

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

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

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

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

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

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

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

General information for lawyers who do not buy the Policy

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

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

APPENDIX 3

BY-LAW 15

ANNUAL FEE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A ÷ 12) × B

where,

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

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

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

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

(a) an amount determined by the formula

(A ÷ 12) × B

where

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

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

(b) an amount determined by the formula

(C ÷ 12) × D

where

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

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

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

(a) an amount determined by the formula

$(E \div 12) \times F$

where

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

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

(b) an amount determined by the formula

$(G \div 12) \times H$

where

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

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

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

$(I \div 12) \times J$
where

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX 4

PRO BONO LAW
ONTARIO

DRAFT

PROPOSED EMERITUS RULES

Purpose

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

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

Definitions

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

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

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

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

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

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

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

<u>Activities</u>

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

- The emeritus member may appear in any court or before an administrative tribunal or arbitrator in Ontario on behalf of a client of an approved legal assistance organization if the person on whose behalf the emeritus lawyer is appearing has consented in writing to the appearance and has given written approval to the pro bono program manager.

- The emeritus member may prepare and sign pleadings and other documents to be filed in any court or with any administrative tribunal or arbitrator in Ontario in any matter in which the emeritus lawyer is involved.
- The emeritus lawyer may engage in such other preparatory activities as are necessary for any matter in which he or she is properly involved.
- The emeritus lawyer may provide legal opinions.
- The emeritus lawyer may provide summary advice in areas of law with which he or she is familiar.
- The emeritus lawyer may train or mentor other lawyers in areas of law with which he or she is familiar.
- The emeritus lawyer may write articles and draft and present public legal education workshops or seminars in areas of law with which he or she is familiar.

Supervision and Limitations

- An emeritus member must perform all activities authorized by this rule under the supervision of a pro bono program coordinator, supervising lawyer or Executive Director of an approved legal assistance organization.
- Emeritus members permitted to perform services under this rule are not and shall not represent themselves to be active members of the Law Society of Upper Canada licensed to practice law generally in Ontario.
- The prohibition against compensation for the emeritus member contained in this rule shall not prevent the approved legal assistance organization from reimbursing the emeritus member for actual expenses incurred while rendering services[6] .

Application & Certification

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

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

Withdrawal of Certification

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

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

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

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

Change of Membership Status

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

APPENDIX 5

By-Law 13

MEMBERS

HONORARY MEMBERS

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

LIFE MEMBERS

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

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

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

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

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

4. In the absolute discretion of the standing committee of Convocation responsible for admissions matters, a period of time during which the member's entitlement to practise law in

Ontario as a barrister, as a solicitor or as a barrister and solicitor is suspended for a reason other than failure to pay a fee or levy.

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

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

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

CATEGORIES OF MEMBERS

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

1. Category A members.

2. Category B members.

3. Category C members.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Time management.

2. File management.

3. Financial management.

4. Client relationships/communication.

5. Technology and equipment.

6. Professional management.

7. Personal management.

8. Professional responsibility

Interpretation: "Society official"

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

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

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

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

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

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

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

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

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

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

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

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

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

FOR DECISION

RETIRED LAWYERS AS ESTATE TRUSTEES

Motion

15. That Convocation approve the following:

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

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

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

i. declare to the Society such trusteeships or powers of attorney at the time of the change to a non-practising membership status, and

ii. file the appropriate exemption forms each year with LawPRO to confirm the member's continued status as exempt from payment of insurance premium levies.

Introduction and Background

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

17. The lawyers who have applied for but have been denied the exemption have raised concerns about the Law Society's interpretation of By-Law 15. They are of the opinion that it is unfair to require the payment of the annual fee (even at a reduced rate) in these circumstances. In all of these cases, the solicitor's work, if any, has been turned over to practicing members. The lawyers seeking exemption continue to act only as trustees. They rely on the law applicable to a trustee, not on the fact of their status as a practising lawyer and members of the Society, to define their duties in connection with the estate.[8]

18. As a consequence of the above policy, in some cases, lawyers who are trustees who otherwise meet the exemption requirements and wish to cease practicing, change their status to a non-practicing member category (for example, paying 25% of the annual fee). In order to change their status to non-practicing, members must merely notify the Society. Non-practicing members are generally not required to maintain professional liability insurance once their status has changed, as they are not actively engaged in the practice of law.

19. The definition of practicing law in By-law 15 does not specifically include trusteeships. Subsection 2(7) of the By-law provides that a member practices law if the member gives any legal advice respecting the laws of Ontario or Canada or provides any legal services. There is no definition in the By-law for "legal services".

20. The Committee reviewed this issue to determine whether these members should continue to pay the annual fee, and if not, what, if anything, the Law Society should require them to do.

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

[8] Eleven members have made inquiries about why they must pay the annual fee if they can retire under By-Law 15 but are estate trustees, and whose status with respect to retirement is pending with the Society.

Particulars of the Committee's Review

21. This matter has a long history with the Committee. The following outlines the information considered by the Committee, the efforts it took to obtain input from the profession on the issue in the early stages of its review and its proposal to address the matter.

What the Change in Status Means

22. Generally, lawyers who are retired from the practice of law are at least 65 years of age and

    a. do not engage in the practice of law,
    b. remain subject to the Society's regulatory jurisdiction (i.e. complaints, discipline)
    c. are not required to maintain LAWPRO coverage (run-off coverage is available for claims in the period prior to retirement),
    d. are exempt from payment of the annual fee under By-Law 15 and the levy for the Lawyers' Fund for Client Compensation ("the Compensation Fund"), and
    e. are not required to file the Member's Annual Report (MAR).

23. Lawyers in the 25% and 50% annual fee-paying categories (non-practicing status)

    a. do not engage in the practice of law (in the 50% category) and do not engage in the practice of law or any remunerative work (in the 25% category),
    b. pay a percentage of the Compensation Fund levy in the same percentage as the annual fee,
    c. are exempt from payment of the LAWPRO levy, with run-off coverage, as applicable, continuing (these members may purchase full insurance coverage if they wish), and
    d. are required to file the MAR.

Information on LAWPRO Coverage

24. The definition of "Professional Services" under the LAWPRO policy includes services for which the insured is responsible as a lawyer arising out of trustee, administrator, or executor activities. specific nature of each of the individual tasks performed.

25. A lawyer who is appointed as an estate trustee is covered in the ordinary course for errors and omissions occurring when he or she performs functions that are his or her responsibility as estate trustee, on the assumption that the lawyer is acting as estate trustee as part of his or her law practice.

26. The fact that a lawyer continues as an estate trustee after winding down the rest of his or her practice does not change the nature of service. Essentially, the service would continue to be seen by LAWPRO as a legal service. As such, under the current program, it would be open to the lawyer to continue to maintain his or her on-going practice coverage, and the policy would respond to claims arising out of these services in the ordinary course.

27. Where the lawyer concludes his or her role as estate trustee when winding down the rest of his or her law practice, claims subsequently arising out of these services would be covered in the ordinary course under the run-off coverage.

Alternatives to the Current Insurance Products

28. Given the cost of LAWPRO coverage for lawyers who are retired and only continue to act as estate trustees, inquiries were made of LawPRO in 2003 about other insurance products on the market for estate trustees. The Committee learned that of seven E&O insurers contacted by LawPRO, only one offers coverage to estate trustees. The minimum premium was approximately $3000 annually for a $2,000,000 limit. For fidelity bonds, the cost was $3.50 per $1000 subject to a minimum $375 premium per year for two years. In the Committee's view, these costs would be prohibitive for most estates.

29. The Committee also inquired of LawPRO about the possibility of LawPRO creating insurance coverage for lawyers who retire or discontinue practice while continuing to act as estate trustees. LawPRO advised that one possibility would be to provide a product whereby lawyers electing an option to limit their work to that of estate trustee would be provided with a premium discount equal to 60% of the base premium, subject to individual underwriting review. The lawyer would be provided with the full $1million per claim/$2 million aggregate limit practice coverage.

Information on Compensation Fund Claims

30. The Committee considered the possible exposure to the Compensation Fund of lawyers retired from the practice of law.

31. Payments from the Fund are always discretionary. If the lawyer performs trustee duties as a practising member and a claim is made, it will be treated as any other claim arising from the lawyer's practice of law and assessed accordingly. If the trustee duties are performed by a lawyer retired from the practice of law and a theft occurs, considerations of whether the activity was connected to or arose from the practice of law come into play, and the possibility exists that the claim arising from the theft may be denied.

Consequences of Resignation as Estate Trustee

32. The Committee requested information from staff on the practicality of a retired lawyer resigning as estate trustee upon retirement.

33. The Committee learned that there are costs and complications associated with resignation as estate trustee, if a member chooses not to pay an annual fee to the Society and wishes to resign the trusteeship.

34. If the member is the sole trustee, he or she cannot simply resign. The member must make an application to the court under the *Trustee Act*. This will result in a fairly large expense, which would likely be borne by the estate. The issue becomes more complex if there is no one willing or able to assume these duties, and the Public Guardian and Trustee must be enlisted to assume the role. The courts have historically been reluctant to interfere with a testator's or donor's choice of trustee, and will only do so in limited circumstances (i.e. where there is negligence, misconduct, a conflict of interest or a failure to maintain an even hand).

35. Unless the new trustee is himself or herself a member, the LAWPRO and Compensation Fund protections would be unavailable to beneficiaries in any event. An example would be where a member is the sole (or last surviving) trustee and dies with a will that appoints the member's spouse (a non-member) as trustee of the member's estate. Under Ontario law, in the absence of a specific clause in the will to the contrary, the spouse would also become the trustee of the estate for which the member had been acting as trustee.

36. It is possible that a member wishing to transfer signing authority over estate accounts may be found to have improperly delegated trustee powers, thereby breaching the trust position. As a general rule, trustees have a duty not to delegate responsibilities entrusted to them to others. This principle has been statutorily relaxed to permit limited powers of delegation in s. 20 of the *Trustee Act*, but it appears that delegation in respect of trust property is only permitted for short periods of time in order to facilitate the completion of specific transactions.

Estate Trustee Compensation

37. As a matter related to the costs to a retired member associated with paying the annual fee as an estate trustee, the Committee requested general information from staff on estate trustee compensation.

38. The Committee learned that compensation appears to be related entirely to the number of estates being administered and the value of the estate assets subject to administration, coupled with the complexity of the estate.

39. Information on how estate trustee compensation is determined was obtained from the 1997 text, *Compensation for Estate Trustees*, by Jennifer J. Jenkins. A Court of Appeal decision also provided helpful information on the tests the court will apply when determining compensation.

40. The statutory backdrop is the Ontario *Trustee Act*, which permits for estate trustees " a fair and reasonable allowance for care, pains and trouble and time expended in or about the estate". (s. 61.1(1)). The Act also provides that "where a lawyer is a trustee, guardian or personal representative, and has rendered necessary professional services to the estate, regard may be had in making the allowance to such circumstance, and the allowance shall be increased by such amount as may be considered fair and reasonable." (s. 61(4)).

41. Percentage guidelines, or tariff guidelines as they are called, have developed in almost every Canadian jurisdiction. In Ontario, they are not sanctioned by statute or regulation but were developed by the estates bar and judges of the former Surrogate Court. Since 1975, the practice has been to award compensation on the basis of 2.5% against the four categories of capital receipts, capital disbursements, revenue receipts and revenue disbursements, along with a management fee of two-fifths of 1 percent per annum on the gross value of the estate in appropriate cases. In her book, Ms. Jenkins advises that while the courts consistently emphasize that the usual percentages are guidelines only, as a matter of practice, the guidelines have generally been relied upon.

42. The Ontario Court of Appeal discussed the factors that will determine the level of estate trustee compensation. In *Logan v. Hines*, (1998), 41 O.R. (3d) 571, the court dealt with the principles to be applied in determining fair and reasonable compensation under the *Trustee Act*. The court adopted the approach in *Re Jeffrey Estate* (1990), 39 E.T.R. 173. That case held that compensation claims should be tested against the percentages approach described above. The result should then be "cross-checked" or confirmed against the five factors set out in *Re Toronto General Trusts and Central Ontario Railway*, which are

    a. the magnitude of the trust,
    b. the care and responsibility springing therefrom,
    c. the time occupied in performing its duties,
    d. the skill and ability displayed, and
    e. the success which has attended its administration.

43. The court in *Re Jeffrey Estate* also found that the audit judge should also consider whether an extra allowance should be made for management, based on special circumstances. Overall, the court said that "it is a search for an award which reflects fairness to the executor: in a real sense, the search is for an appropriate *quantum meruit* award in a unique setting."

44. The court in Logan said the approach in *Re Jeffrey Estate* "achieves the appropriate balance between the need to provide predictability while, at the same time, tailoring compensation to the circumstances of each case".

Call For Input And The Results

45. In the fall of 2001, the Committee decided that input from the profession should be sought before a policy position is developed for Convocation's consideration. A notice requesting input from the profession was published in the *Ontario Reports,* in the *Ontario Lawyers Gazette* and on the Society's web site. At the time, two options were included for discussion, as indicated in the following notice:

> [The issue is] whether non-practising lawyers who continue to act as estate trustees must pay the Law Society's annual fee. Under By-Law 15, only lawyers who are permanently retired from the practice of law and 65 years of age or over, or permanently disabled, and therefore unable to practice law, are exempt from the fee payment. The Committee considered two options. Option 1 would require members who otherwise meet the criteria for exemption to pay the fee if they continue to act as estate trustees, permitting beneficiaries to continue to have the protection of the lawyer's professional liability insurance through LPIC and access to the Lawyers' Fund for Client Compensation. Option 2 would permit an exemption if members acting as estate trustees give notice to the beneficiaries of the intention to retire, the consequences of retirement, and options available to them, such as buying excess run off insurance coverage.

46. Responses were received from twenty-six members or member groups.[9]

[9] A summary of the responses, without attribution, appears at Appendix 2.

47. One respondent agreed with the proposals, calling them "reasonable". Ten respondents disagreed with both options for a number of reasons, including the following:

    a. Law Society fees will often exceed the compensation a trustee will receive from an estate;
    b. Option 1 will cause many lawyers to cease acting as trustees, putting an estate to considerable expense to replace the trustee;
    c. Compensation Fund payments are discretionary, and LAWPRO coverage would not be available for those acting as trustees only, as the view is that this is not the practice of law;
    d. the proposals do not distinguish between lawyers who are trustees before and after retirement;
    e. the *Trustee Act* will protect beneficiaries.

48. Eleven respondents agreed with Option 2 (no payment of the fee with advice to the beneficiaries of the effect of retirement). Many of these respondents raised the same issues about LAWPRO insurance coverage and Compensation Fund claims noted above. Other respondents within this group suggested that the proposal should be clarified as applicable to lawyers who are trustees of *inter vivos* trusts.

Questions The Committee Considered

49. In considering whether the annual fee should be paid by members in these circumstances, the Committee considered the following questions:

    a. Is a retired/non-practising lawyer practising law when acting as an estate trustee?
    b. Does the Society have an obligation to ensure that public protections are in place for beneficiaries of estates administered by retired/non-practising lawyer trustees?
    c. Is it appropriate or fair for retired/non-practising lawyer trustees to pay fees and levies, given the nature of many estates and the amount of compensation from such duties?
    d. Is it appropriate that retired/non-practising lawyer trustees not pay fees and levies when they are still subject to and may actively engage the Law Society as regulator (i.e. complaints investigation and discipline, Compensation Fund claims)?
    e. Should lawyers who are appointed trustees of inter vivos trusts and under powers of attorney be subject to the same treatment as estate trustees?
    f. Should lawyers who have no solicitor/client connection with a testator but who are named in a will as estate trustee be subject to the requirements that may ultimately be decided on this issue?

50. In the course of its deliberations the Committee, as it was formerly and is currently constituted, discussed various options, which evolved to two choices.

51. The first was the current practice of requiring lawyers to pay the fee if they continue to act as estate trustees. This would permit beneficiaries to continue to have the protection of the lawyer's professional liability insurance through LAWPRO and access to the Compensation Fund. Implicit in this view is recognition of a connection between the member's status as a practising lawyer and the fact of his or her appointment as a

trustee in a client's will. It would also assure the lawyer's financial contribution to the Society's regulatory operations. A major part of the Society's operations, funded by the annual fee, are devoted to regulatory compliance and enforcement. Although a lawyer may be retired or not practising, he or she may be subject to complaints or disciplinary action.[10]

52. The second option was to exempt such lawyers from payment of the fee but impose certain requirements on the member. This option acknowledges that many estates administered by lawyers that arise from the lawyer's professional or personal relationships have few assets, with correspondingly small remuneration for the trustee. As some respondents to the call for input indicated, the expense of paying the annual fee and insurance would often exceed the remuneration received from the estate for trustee duties. The need for regulatory controls remains, as a matter of protecting the public interest. The Society's regulatory requirements associated with the exemption would include declaring the trusteeships to the Society upon retirement, filing the MAR and continuing to be subject to the Spot Audit program.

The Committee's Proposal

53. Based on its review, the Committee concluded that a lawyer who qualifies for retirement and acts as an estate trustee should not be required to pay the annual fee, but should be subject to certain regulatory requirements. The Committee also felt that lawyers who are trustees of *inter vivos* trusts or who are given powers of attorney should be subject to the same requirements.

54. Similarly, as in practical terms, retirement and change to a non-practising status are identical for the purposes of this situation, those practising members who enter a non-practising status and act as trustees or who are given powers of attorney should be subject to the applicable requirements.

55. The recommendation agreed upon by the Committee is as follows:

    a. While the members in question are retired from practice, they should continue to be subject to the regulatory oversight of the Law Society, given that an estate matter that arises out of a lawyer and client relationship is residual work from the former law practice, and as such would be seen by the public as a matter falling within the Society's regulatory public protection responsibility for as long as the lawyer continues to be a member.[11] The Law Society's responsibilities in this respect include:

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[10] Statistical information on complaints involving retired or non-practicing lawyers acting as estate trustees shows that since 1985 there have been between 50 and 60 complaints about members in the wills/estates category who are tired or not working, life members/retired, or retired (By-Law 15) in Ontario. While this information does not provide detail on the allegations of lawyer misconduct in these complaints, it indicates that very few complaints have been made in circumstances in which a retired (non-practicing) lawyer is involved in estates work.

[11] An estate matter that occurs after the lawyer is retired or changes to a non-practising status (i.e. the lawyer is named as trustee in a will years after he or she has retired) would not be considered to have arisen from a lawyer and client relationship.

i. Obtaining information about the member and his or her activities through the Member's Annual Report (MAR);
ii. Monitoring the member's record-keeping and handling of client (i.e. estate) property through the Spot Audit program;
iii. Responding to complaints of professional misconduct of or conduct unbecoming a member;
iv. Responding to claims to the Lawyers' Fund for Client Compensation.[12]

b. The policy would apply to

i. members who are retired or retire from practice within the meaning of By-Law 15 (i.e. over 65 and permanently retired from practice or disabled and unable to practice) and who are estate trustees, powers of attorney or trustees under *inter vivos* trusts, and
ii. members who do not fall within the above category but are in a non-practising status or enter a non-practicing status and who are estate trustees, powers of attorney or trustees under *inter vivos* trusts.

c. Trusteeships of estates for members of a retired or non-practising lawyer's family are generally not considered to have arisen from the member's practice of law. Lawyers who have never been in practice can and do also become trustees of estates of their family members. A trusteeship of a family member's estate should not be considered a matter to which the proposal is applicable.[13]

d. The requirements include:

i. Requirement to Declare: The members described above would be required to declare to the Law Society their trusteeships or powers of attorney at retirement or upon change to a non-practicing status;
ii. Continuing Obligation to File the MAR: Retired members who continue to act as estate trustees, powers of attorney or trustees would continue to be required to file the MAR[14] ;

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[12] Subsection 51(5) of the Law Society Act states that "Convocation in its absolute discretion may make grants from the Fund in order to relieve or mitigate loss sustained by any person in consequence of dishonesty on the part of any member in connection with such member's law practice or in connection with any trust of which the member was or is a trustee..."

[13] As noted above, the Society may have a responsibility to consider Compensation Fund claims that arise from family estates or trusteeships, given the language in section 51 of the Act.

[14] By-Law 17, under which the MAR is authorized, does not permit a lawyer age 65 or older who no longer practices but continues to act as estate trustee to be exempt from filing the MAR. Subsection 2(3) reads: Exemption from requirement to submit annual report
(3) The following members may apply to the Society for an exemption from the requirement to submit a report under subsection (1):
1. A member who is over sixty-five years of age and who,
   i. does not practice law in Ontario,
   ii. is not an estate trustee, and
   iii. does not act as an attorney under a power of attorney for property given by a client or former client.
2. A member who is incapacitated within the meaning of the Act.

iii. Spot Audit: Retired members who continue to act as estate trustees, powers of attorney or trustees would continue to be subject to spot audit;

iv. Insurance: With respect to insurance, the program would be structured to provide an exemption from payment of the insurance premium levies for retired members or members in a non-practicing status who continue to act as estate trustees, powers of attorney or trustees. They would be required to file exemption forms each year to advise LAWPRO of the continuation of the exemption, to ensure that members provide the required insurance information annually.

56. The Committee was advised that subject to its board's approval, LAWPRO would arrange an exemption from the insurance requirement. LAWPRO would also arrange an insurance product on a voluntary basis for retired and non-practising status members who act as estate trustees, powers of attorney and trustees of inter vivos trusts, referenced earlier in this report. As the insurance product would be created to cover errors only, claims that arise from the dishonesty of the member would continue to flow to the Compensation Fund for assessment.

The Nature and Timing of the By-Law Amendments

57. To implement the above proposal, amendments would be required to By-Law 15, 16 and 17.

58. With respect to the amendments to By-Law 16, the LAWPRO insurance program for the year 2007 will be determined over this summer, and its report will be provided to September 2006 Convocation. If Convocation approves the Committee's proposal, the request can be made to LAWPRO to include in its 2007 program the exemption and to make arrangements for the optional insurance coverage described above. Thereafter, appropriate amendments to By-Laws 15, 16 and 17, can be prepared for Convocation's review. Their adoption and effective dates can be co-ordinated with the effective date of LAWPRO's insurance program (January 1, 2007).

APPENDIX 1

BY-LAW 15

ANNUAL FEE

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

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

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

Same: retired and incapacitated member

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

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

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

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

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

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

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

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

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

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

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

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

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

$(A \div 12) \times B$

where,

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

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

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

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

(a) an amount determined by the formula

$(A \div 12) \times B$

where

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

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

(b) an amount determined by the formula

$(C \div 12) \times D$

where

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

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

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

(a) an amount determined by the formula

$(E \div 12) \times F$

where

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

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

(b) an amount determined by the formula

(G ÷ 12) × H

where

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

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

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

(I ÷ 12) × J

where

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

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

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

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

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

(7) An application to the Society under subsection (6) shall be made before the end of the year in respect of which the member claims an entitlement to a refund under subsection (5).
No entitlement to refund
(8) A member who does not comply with subsection (7) is not entitled to receive a refund.

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

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

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

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

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

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

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

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

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

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

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

APPENDIX 2

SUMMARY OF RESPONSES TO CALL FOR INPUT ON THE ISSUE
OF RETIRED LAWYERS ACTING AS ESTATE TRUSTEES

1. Option 2 is better. Where relatively small life interests requiring continued involvement of the trustee, the Society fees might exceed the executor's compensation. In large estates, other forms of insurance or bonding would be preferable to the LPIC coverage.

2. Neither option is acceptable.

   - Option 1 would result in such lawyers ceasing to act as trustees - they could not command sufficient compensation to justify the fee. This would mean that the wishes of the clients would be thwarted, with significant costs to have a replacement trustee appointed. As compensation fund payments are discretionary, there may be no payment even though the lawyer has paid the fee, and this would only lower the profession in the public's eyes. How would lawyers have access to LPIC coverage if only the annual fee is paid? How would the lawyer only acting as trustee (in no legal capacity) have access to LPIC coverage that only covers lawyers in the practice of law?
   - For Option 2, in many estates, the beneficiaries want to get rid of the trustee (not necessarily for the best motive) as the trustee stands between them and the money. If the trustee is forced to retire, the beneficiaries could thwart the reason the trustee was appointed (i.e. judgment in the management of and access to the capital) by compelling the trustee's resignation and nominating someone of their own choosing. The option does not address the question of incapacitated beneficiaries or disagreements among beneficiaries (it would appear that all would have to agree to the trustee continuing).

   Both options signal to the public that lawyers are untrustworthy. Presumably, LPIC fears exposure from claims of beneficiaries who were dealing with lawyers who are supposed to be covered by insurance.

3. Neither option 1 or 2 should be implemented - they are inherently arbitrary and designed to address an issue more perceived than real. The proposal does not distinguish between lawyers who are trustees at the time of retirement and who become trustees after retirement, or lawyers who are trustees in an *inter vivos* trust or pursuant to a power of attorney for property. The policy will result in an undue burden on lawyers. Where lawyers act for friends or family members, these cannot be situations in which a lawyer should continue to pay the annual fee. In option 2, notice to beneficiaries who are unascertained or under a legal disability would be ineffective. Requiring a lawyer to pay fees for many years, e.g. where there is a life interest, is onerous. The fees could be larger than the trustee's compensation. The lawyer has all the fiduciary duties of a trustee and there are sufficient remedies and protections available.

4. LPIC run-off coverage does not cover embezzlement nor errors or omissions arising after retirement - thus, there would seem to be no protection to the beneficiaries in compelling the retiree to purchase additional insurance. Paying the fee to maintain a trusteeship for a life estate would be more than what is received as compensation. Who is going to pay for the process of the trustee applying to be removed? The proposal is

grossly unfair, and depends on the timing of the death of the testator. Trying to drag retired members who become trustees after retirement would be an administrative nightmare. The best course of action would be to require the trustee retiring as a lawyer to notify the beneficiaries, advising that he or she can no longer act as lawyer for the estate but can continue as trustee unless the majority of beneficiaries object.

5. I am opposed to the proposal. Reasons include
   - expensive and time consuming (to the estate) to change trustees
   - in smaller estates, the fee would exceed the trustee's compensation
   - beneficiaries would fight over deciding on a successor
   - the Children's Lawyer is involved (to protect unborn children) and accounts must be considered by her and passed

   There must be some other reasonable way to protect beneficiaries from unscrupulous lawyers without charging the fee for doing something at times almost non-compensatory or requiring them to resign.

6. If a lawyer retires when a trustee, under option 1, estates would be put to considerable expense to appoint another trustee, who would have to post a bond. The better option is to have the trustee inform the beneficiaries that their services are not covered by LPIC and that another lawyer in practice act as solicitor for the estate. An acknowledgement to this effect should be sought from all beneficiaries.

7. The assumption that a lawyer who has retired resumes practising law when acting as an estate trustee is fallacious. An estate trustee need not be a lawyer - as an estate trustee, a permanently retired lawyer will not be practising law. Professional liability is irrelevant because by definition the trustee is not practising law.

8. Agree with option 2.

9. To expect a retired member to continue to pay any fees out of retirement income is an unfair financial burden. Upon retirement, lawyers who are estate trustee should be able to arrange for a lawyer colleague to continue to hold and oversee the administration of the estate funds, where the practising member has some responsibility to insure that the instructions from the trustee are proper, and where the beneficiaries would appear to be protected by LPIC of the compensation fund if the practising member fails to meet obligations to prevent any impropriety.

   The report does not address members who may be suspended for non-payment of the fee or retired members who later become estate trustees.

   The rules are not necessary, given the minimal risk of a member mishandling or misappropriating estate funds after many years in practice.

10. If the policy is pursued, it should apply as well to non-practising lawyers who are trustees of inter-vivos trusts or directors of corporations where shares are owned by those estates or trusts. Insurance coverage should exist for retired members acting as estate trustees (reference is to By-Law 16, s. 8(2)) but it would not be fair to charge the full premium, but a reasonable proportion of the premium.

11. The proposal is not satisfactory because it does not affect existing retired lawyers who are trustees or who will become trustees after retirement, administrators of estates, nor does it require lawyers to explain to makers of wills the consequences of retirement. Further, the notice to the beneficiary is predicated on the assumption that a retiring lawyer can find good reason for "maintaining in place the additional safeguards". The explanation and advice referred to above should include:

    - LPIC coverage does not cover honest mistakes nor dishonest conduct, whether retired or not
    - a beneficiary has no claim against or likelihood of an *ex gratia* payment from the compensation fund
    - the maker of a will can require as a term of the will that the trustee purchase a bond of indemnity, but no bond can be purchased to eliminate the risk of loss

    While it is desirable that out of an abundance of caution, a trustee clarify the risks associated with administration of an estate by a retired lawyer, there is no merit to a beneficiary requesting from a retired lawyer as trustee that he or she purchase excess run-off coverage, which will not cover legal services after retirement or indemnify the lawyer for any loss as a result of negligent performance , whether before or after retirement.

12. Favour option 2. There should be no obligation to pay the annual fee once retired, even if a trustee, as any other non-member has no such obligation.

13. If estate trustees who are not lawyers are not paying fees, why should a former lawyer be treated differently? Possibly because the Society wants to find a way to get some money and have some say over people's lives?

14. Retired members as trustees should not have to pay the fee. A beneficiary is protected by the Trustee Act and has recourse under that legislation should something happen to the estate funds through the trustee. Because the trustee is a fiduciary, neither LPIC or the compensation fund will reimburse his clients because the liability did not arise through the law practice but through the fiduciary relationship.

15. Requiring a retired lawyer as trustee to pay thousands of dollars in LPIC levies and the annual fee is ludicrous. Advising the beneficiaries of intention to resign as executor because there is no insurance coverage and requiring them to obtain a court order for removal is an undo worry on the beneficiaries and an undo expense, given the minor insurance or Society exposure.

16. For option 1, on the understanding that LPIC does not cover liability for a lawyer acting as an estate trustee, the annual fee payment would only provide access to the compensation fund. For option 2, this would require payment of the fee or resignation. In small estates where no one would want to be appointed, and there is effectively no trustee compensation, it should be sufficient to inform the beneficiaries of the retirement and the meaning of this for their protection and the alternatives available.

17. The role of a trustee is not that of a lawyer and provided the non-practising lawyer is not providing legal advice, there should be no requirement for fee or liability insurance premium payment.

18. Two other options should be considered:

- the lawyer advises the principal beneficiaries that he or she is not in practice and is not covered by LPIC
- the lawyer should be able to obtain on a case by case basis E and O coverage

19. Option 2 is more appropriate. Lawyers are not always named as executor because of their legal role and the work is predominantly not legal work. The beneficiaries are sufficiently protected by being informed of alternate sources for such insurance. The same rules should probably apply to a lawyer acting as trustee of an *inter vivos* trust.

20. Estate trustees are bound by the *Trustee Act* and need not be lawyers, nor has the writer considered that estate administrative tasks are work done in the capacity of a lawyer. LPIC and compensation fund coverage would not apply. Should there be a distinction between being named in a will as trustee prior to retirement and named in a will not prepared by the lawyer after his retirement? Should there be a difference between a retired lawyer being an estate trustee with someone else (multiple trustees would have some control over a retired lawyer trustee)?

21. The wording may require clarification. It appears to only apply to cases where one is first appointed executor and then some time later retires.

22. The proposals are too broad, as they place an onerous requirement on someone who was not appointed a trustee because of professional status and who never had a lawyer client relationship with any of the testators (the writer is in legal education and has not practised law since 1980, but has been named as trustee in several wills for friends and relatives). The solution is to create an exemption for members whose trustee position has no relation to being a member of the Society.

23. Option 2 should be modified to allow the beneficiaries to consent to the continued action of a non-practising lawyer as trustee, provided the beneficiaries are advised of the consequences. Beneficiaries should be given the option so there is less disruption to the estate. The option fails to consider the wishes of the deceased in appointing the lawyer which may have had nothing to do with insurance coverage.

24. The options present a reasonable approach. If LPIC covers lawyers as executors, it is reasonable to expect a lawyer to pay the fees or get clear instructions from the beneficiaries to the contrary.

25. Lawyers are asked to act when literally there is no one else to do the job, and the writer cannot recall a case where the client wished the lawyer to act because he had insurance or because a compensation fund was in place. The office of estate trustee is separate and apart from that of solicitor, and this is recognized in law and in the tariffs of fees provided by the courts. With respect to the amount of the fee, many estates do not generate enough by way of trustee compensation to cover it. With respect to LPIC, run-off coverage was only available for five years. Further, the proposed rule does not consider the situation where testators die after the lawyer has retired, or a retired lawyer acting as attorney under a power of attorney that comes into effect after retirement.

Is there a problem with the status quo? Nothing in the report discloses a need, based on the proportion of the problem, to do this. It may be an attempt to kill a fly with a sledgehammer.

26. Option 2 is favoured. It would not be appropriate to force a member to continue to pay full LSUC fees if the member had for all intents and purposes stopped practising. Perhaps a clause could be inserted in the will which would in effect show that the testator had turned his mind to the fact that the lawyer might at some time retire, but despite that fact would want the lawyer to continue on as estate trustee. Such a clause would have to be carefully drafted however to ensure that it would not effect LPIC coverage for trustee work which would normally be in place if the trustee work was performed in the course of the lawyer's practice.

FOR DECISION

PROPOSED CHANGES TO POLICY REQUIRING COMPETENCE AND CAPACITY PROCEEDINGS TO BE HELD IN THE ABSENCE OF THE PUBLIC

(JOINT REPORT WITH THE PROFESSIONAL DEVELOPMENT, COMPETENCE AND ADMISSIONS COMMITTEE)

Motion

59. That Convocation

    a. rescinds its current policy that competence proceedings and capacity proceedings be held in the absence of the public;
    b. applies the current policy applicable to conduct hearings to competence and capacity hearings;
    c. directs that amendments to the Rules of Practice and Procedure to reflect this change in policy be provided to Convocation for its approval.

60. Please see the Professional Development, Competence and Admissions Report in the Convocation Materials for the report on this matter.

FOR INFORMATION

PROFESSIONAL REGULATION COMMITTEE QUARTERLY REPORT (JANUARY TO MARCH 2006)

61. The Professional Regulation Division's Quarterly Report (first quarter 2006), provided to the Committee by Zeynep Onen, the Director of Professional Regulation, appears on the following pages. The report includes information on the Division's activities and responsibilities, including file management and monitoring, for the period January to March 2006.

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

Copy of the Professional Regulation Division's Quarterly Report (first quarter 2006). (pages 59 – 104)

Re: "Emeritus" Membership Status for Retired Lawyers Providing *Pro Bono* Legal Services Through Pro Bono Law Ontario

It was moved by Mr. Ruby, seconded by Dr. Filion, that Convocation

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

b. review the emeritus lawyer membership category three years after implementation.

The following friendly amendments to the motion were proposed and accepted:

(1) That the requirement that emeritus lawyers pay a $300 administrative fee to cover costs related to the application for emeritus status be deleted; and

(2) That the second sentence of paragraph 10. i. on page 7 of the Report be deleted.

The main motion as amended was adopted.

Convocation took its morning recess.

REPORT OF THE INDEPENDENCE OF THE BAR TASK FORCE

Mr. Finkelstein presented the Report of the Independence of the Bar Task Force.

Report to Convocation
June 22, 2006

Task Force on the Independence of the Bar

Task Force Members

Neil Finkelstein (Co-Chair)
Earl Cherniak QC (Co-Chair)
Prof. Constance Backhouse
J. David A. Jackson
Honourable Jack C. Major
Honourable Michel Proulx
Sheila Block

Jack Giles, QC
Honourable Sydney Robins
David Scott, QC
Richard Simeon

Purpose of Report: Decision

Prepared by Policy Secretariat
Julia Bass 416-947-5228

COMMITTEE PROCESS

1. The Task Force met on May 3rd, 2006. Members in attendance were Neil Finkelstein and Early Cherniak (Co-chairs), Justice John Major, Justice Sydney Robins, Jack Giles and Richard Simeon, and Research Director Lorne Sossin. Law Society staff person Julia Bass also attended.

FOR DECISION

APPLICATION TO THE LAW FOUNDATION OF ONTARIO

MOTION

2. That Convocation approve the submission of a grant application to the Law Foundation of Ontario seeking funding for the publication of the Report and commissioned papers produced by the Task Force as a book.

THE ISSUE

3. The Task Force was established by Convocation in November 2005. The budget for the Task Force was set at $150,000, which is sufficient for the work of the Task Force including the holding of meetings and the commissioning of the necessary research, commissioned academic papers and final report.

4. It has now been determined that the report and papers could make a wider impact and would be easier to distribute if published as a trade-quality book and published in both official languages. The funding of this additional project would fall within the mandate of the Law Foundation of Ontario, and accordingly the Task Force recommends the submission of a grant application to the Law Foundation. A draft of the grant application is attached at Appendix 1.

5. This proposal would not involve the expenditure of any Law Society funds, although it would involve an in-kind contribution of staff time.

TAB 1

Law Society of Upper Canada

TASK FORCE ON THE INDEPENDENCE OF THE BAR

- Neil Finkelstein (Co-Chair), Toronto, Bencher of the Law Society of Upper Canada
- Earl Cherniak QC (Co-Chair), Toronto, Bencher of the Law Society of Upper Canada
- Prof. Constance Backhouse, Ottawa, Bencher of the Law Society of Upper Canada
- J. David A. Jackson, Toronto - leading litigation counsel
- Honourable Jack C. Major, Calgary, - retired justice of the Supreme Court of Canada
- Honourable Michel Proulx, Montreal - retired justice of the Quebec Court of Appeal
- Sheila Block, Toronto - leading litigation counsel
- Jack Giles QC, Vancouver, - leading litigation counsel
- Honourable Sydney Robins, Toronto - retired justice of the Ontario Court of Appeal
- David Scott QC, Ottawa - leading litigation counsel
- Professor Richard Simeon, University of Toronto Faculty of Political Science, expert on the politics of federalism

Research Director and Consultant: Professor Lorne Sossin, University of Toronto Faculty of Law.

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

(1) Copy of a grant application to the Law Foundation.

(Appendix 1, pages 4 – 8)

(2) Copy of the Budget Estimate and list of Law Society Senior Management.

(pages10 – 11)

Re: Law Foundation of Ontario Grant Application for Publication

It was moved by Mr. Finkelstein, seconded by Mr. Cherniak, that Convocation approve the submission of a grant application to the Law Foundation of Ontario seeking funding for the publication of the Report and commissioned papers produced by the Task Force as a book.

Carried

Mr. Pattillo and Mr. Banack abstained from voting.

The Treasurer thanked Mr. Finkelstein who appeared as counsel pro bono on behalf of the legal profession in the case before the Supreme Court of Canada involving security certificates.

REPORT OF THE PROFESSIONAL REGULATION COMMITTEE

Re: Retired Lawyers as Estate Trustees

It was moved by Mr. Ruby, seconded by Ms. Ross, that Convocation approve the following:

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

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

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

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

A friendly amendment proposed by Mr. Swaye was accepted, that the motion include the addition of a paragraph that reads that Convocation receive a report on the program in three years.

It was moved by Mr. Wright, seconded by Mr. Silverstein, that the words "or who is an attorney for personal care" be added after the word "property in paragraphs 15 (a) and 15 (b).

Lost

The main motion as amended was adopted.

ROLL-CALL VOTE

Alexander	For	Henderson	For
Backhouse	For	Krishna	For
Campion	For	Legge	For
Carpenter-Gunn	For	Manes	For

Caskey	For	Martin	For
Chahbar	For	Minor	For
Cherniak	For	O'Donnell	For
Coffey	For	Pattillo	For
Crowe	Against	Pawlitza	For
Curtis	For	Porter	For
Dickson	For	Potter	For
Doyle	For	Ross	For
Dray	For	Ruby	For
Feinstein	For	St. Lewis	For
Filion	For	Sandler	For
Finlayson	Against	Silverstein	Against
Gotlib	For	Simpson	For
Gottlieb	Against	Swaye	For
Harris	For	Symes	For
Heintzman	For	Topp	Against
		Warkentin	For
		Wright	Abstain

Vote: 36 For; 5 Against; 1 Abstention

Item for Information

- Professional Regulation Committee Quarterly Report (January to March 2006)

BY-LAW 5 – 2007 BENCHER ELECTION ISSUES

Professor Krishna presented the Report to Convocation.

REPORT TO CONVOCATION
June 22, 2006

Conduct of the Bencher Election and the
Provisions of By-law 5

Purpose of Report: Decision

Prepared by the Policy Secretariat
Katherine Corrick (416-947-5210)

FOR DECISION

CONDUCT OF THE BENCHER ELECTION AND THE
PROVISIONS OF BY-LAW 5

Motion

1. That Convocation approve the following recommendations set out in this report as follows:

Recommendation 1

Members be permitted to vote in the traditional way by paper ballot, or over the Internet.

Recommendation 2

The polling list be frozen on the fourth Friday in March.

Recommendation 3

Voters be required to return their ballots in accordance with the voting instructions distributed pursuant to section 28.

Recommendation 4

Convocation should consider eliminating the requirement of the presence of scrutineers in light of the fact that an independent third party will be counting and tabulating the votes.

Recommendation 5

The close of nominations and the deadline for submission of election statements be the second Friday in February rather than the fourth Friday in February.

Recommendation 6

Candidates be permitted to provide a photograph that accords with the Elections Officer's specifications.

Recommendation 7

Candidates be permitted to provide a biographical statement of not more than 120 words, including headings.

Recommendation 8

Candidates be permitted to provide an election statement of not more than 700 words, including headings.

Recommendation 9

A member whose business address, as indicated on the records of the Society, is in Ontario at the time of signing a nomination form be permitted to run as a candidate in the election.

Recommendation 10

That it be a condition precedent to being elected as a bencher that the candidate's business address, or where the candidate has no business address, home address, at the time of election be within Ontario.

Recommendation 11

A candidate is only eligible to be elected as a regional bencher, if at the time of the candidate's election, the candidate's business address, or where the candidate has no business address, home address, is within the electoral region.

Background

2. A number of issues related to the conduct of the bencher election and the provisions of by-law 5 require Convocation's attention. The Treasurer asked Professor Krishna to review the issues with Katherine Corrick, who is the Elections Officer, and report to Convocation.

3. This report deals with the regulatory aspects of the bencher election and recommends a number of amendments to by-law 5, which is attached as Appendix 1. There are other issues related to the mechanics of conducting the election that will be brought forward to Convocation at a later date.

4. The purpose of this report is to have Convocation consider the issues and make decisions. Amendments to the by-law reflecting those decisions will then be drafted.

Electronic Voting

5. By-law 5 does not permit electronic voting. It is drafted to implement a paper ballot voting scheme only. The time is right to at least permit voting by electronic means. The referendum on bencher remuneration held in February 2005 was conducted entirely by electronic means. No paper ballots were used. Of the 8,802 members who voted, 56% voted over the Internet and 43% voted using the telephone.

6. Telephone voting is not available for the bencher election because of the large number of candidates. Permitting voting over the Internet will require amendments to a number of sections of the by-law.

7. It is recommended that members be permitted to vote in the traditional way by paper ballot, or over the Internet.

The Polling List

8. Section 18 of the by-law permits changes to the polling list as late as noon on election day. It provides as follows:

> 18. The following persons are entitled to vote in an election of benchers:

1. A member, other than a temporary member, whose rights and privileges are not suspended on election day.
2. A member, other than a temporary member, whose rights and privileges are reinstated before 12 noon on election day.
3. A student member who is called to the bar and admitted and enrolled as a solicitor before 12 noon on election day.

9. The failure to freeze the polling list at a time specific prior to the distribution of the ballots significantly adds to the cost of administering the election, and increases the risk of error.

10. Section 25 of the by-law requires the Elections Officer to prepare a final polling list on or shortly after March 10. As soon as this is done, an electronic version of the polling list is provided to the third party vendor conducting the election. The polling list is a database of all members eligible to vote on March 10.

11. Between March 10 and election day (the last day of April that is not a holiday), there are many changes to the polling list. Each time a member is administratively suspended, suspended by a Law Society tribunal, called to the bar, or reinstated, the Law Society must communicate that change to the third party vendor, and the database must be changed. In a typical seven-week period (March 10 to the last day of April), there would be about 50 such changes to the Law Society's database.

12. Once election materials are distributed to members, changes to the polling list are particularly difficult. Members may vote and then be suspended before election day. That member's ballot must then be searched for and removed from the ballots to be counted. Similarly, members who are called to the bar immediately before election day must receive election materials and return their marked ballots before the specified date and time. In 1999, 20 members were called to the bar on election day. They were given election material at their call to the bar and were required to complete and submit their ballots by 5:00 p.m. that day.

13. Freezing the database of eligible voters at a date and time certain will facilitate electronic voting. The "frozen" database will be provided to the third party vendor conducting the election. The vendor will then generate PIN numbers for eligible voters. The PIN numbers allow voters to be anonymous. Maintaining a "live" voter list that changes until the day voting closes will add to the cost of conducting the election, and delay the generation of results. Manual changes to the database and vote tallying system are required to add and remove members who have become eligible or ineligible to vote throughout the voting period. It will also be difficult, if not impossible, to generate a voting package (including a PIN) for a member who becomes eligible to vote at the last moment.

14. In October 2004, Convocation approved freezing the polling list for the conduct of the referendum at a specific date prior to the distribution of the voting materials. The polling list was frozen on January 27, 2005, and the voting materials were distributed the first week of February 2005.

15. It is proposed that the polling list be frozen at a date that is as close to the time of the distribution of ballots as possible. The polling list would be frozen for the four-week

period during which voting is permitted. During that period, it is estimated that a possible 28 of a total of 40,114 members may be affected.

16. It is difficult to assess precisely the extra cost associated with a polling list that remains live throughout the voting period. The bulk of the cost relates to the human resources required to monitor the polling list.

17. In the event that a member's rights are reinstated during the voting period, the Membership Department must inform the Elections Officer of the change. The Information Systems Department must collect that member's data and transfer it to the third party vendor. The third party vendor must amend its database, assign a PIN number and distribute a voters package to the member.

18. In the event that a member's rights are suspended during the voting period, the Membership Department must inform the Elections Officer of the change, who must then advise the third party vendor to remove that member from the polling list. If the member has already voted, that ballot must be traced and set aside as invalid. The ballot cannot be destroyed because it is possible that the member may be reinstated by the time the voting period is over and the ballot would become valid once again.

19. It is recommended that the polling list be frozen on the fourth Friday in March.

Outsourcing the Election Process

20. Since 2003, the Law Society has outsourced the election process to a third party vendor. Section 30 of the by-law has made the process more complicated than necessary because voters are required to return their ballots to Osgoode Hall. This required the Law Society to ship the ballots from Osgoode Hall to the third party's premises, increasing cost and delay. Section 30 reads as follows:

> 30. Electors shall deliver their marked election ballots to the office of the Elections Officer at Osgoode Hall in the return envelopes distributed under section 28 so that the election ballots are received in the office not later than 5 p.m. on election day.

21. Section 28 of the by-law requires the Elections Officer to distribute the voting instructions to all eligible voters. This provision is broad enough to allow the Elections Officer to direct voters to return their marked ballots to the third party's premises.

22. It is recommended that voters be required to return their ballots in accordance with the voting instructions distributed pursuant to section 28.

Scrutineer Process

23. Section 31(2) of by-law 5 provides as follows:

> 31. (2) The Elections Officer shall ensure that at least two scrutineers are present when election ballots are being removed from the return envelopes and the votes for each candidate are being counted.

24. Prior to 2003, the Law Society hired data process operators to manually input the votes. Scrutineers were present throughout the entire process to observe the handling of the ballots.

25. In 2003, the Law Society outsourced the counting process to a company that scanned the ballots. The counting and tabulating was done electronically. The scrutineers performed no function, other than to observe the computer scanning and counting the ballots.

26. Other regulatory bodies that outsource their elections to third parties consider the independent third party to be the equivalent of a scrutineer process. During the bidding process in 2003, some vendors indicated their discomfort with the process of having scrutineers present. They considered themselves to be fulfilling that role as they are independent of the regulatory body and are required to certify the accuracy of the results.

27. It is recommended that Convocation consider eliminating the requirement of the presence of scrutineers in light of the fact that an independent third party will be counting and tabulating the votes.

Time for Preparation of Election Material

28. Currently, nominations close on the fourth Friday in February. Election material is distributed to electors by April 1. Ballots must be received on the last day of April. The timeline for the production of the Voters Guide is four weeks. This is insufficient time.

29. The candidates must submit their election statements by the fourth Friday in February. They must be read and approved by the Elections Officer, desktop published, proof read and printed by the end of March. If there is a dispute over the Elections Officer's ruling on a statement, it must go to a small committee of benchers for a ruling. More time is required between the close of nominations and the distribution of the voting materials for this process.

30. It is recommended that the close of nominations and the deadline for submission of election statements be the second Friday in February rather than the fourth Friday in February.

Candidate Material

31. Candidates are permitted under section 12 of the by-law to file the following material for inclusion in the Voters Guide:

> A black and white photograph, which may be reproduced, showing the candidate's head and shoulders, measuring at least 2 inches by 2 3/4 inches and no more than 8 inches by 10 inches.

32. With advances in technology, many types of photographs are acceptable, including electronic photographs. It would be more administratively efficient if the by-law provided that a candidate may file a photograph that is in accordance with the specifications of the Elections Officer.

33. It is recommended that the candidates be permitted to provide a photograph that accords with the Elections Officer's specifications.

34. Candidates are also permitted to file a statement of not more than 100 words containing biographical information about the candidate. One hundred words have not been enough for some candidates, and there is space for 120, including headings.

35. It is recommended that candidates be permitted to provide a biographical statement of not more than 120 words, including headings.

36. Finally, candidates may file a "typed election statement contained on one side of a sheet of paper measuring 8 1/2 inches by 11 inches."

37. The allowance of "one side of a sheet of paper" is too vague. It does not specify the font size or the margins required.

38. To be legible, the maximum number of words that can be accommodated on the page cannot exceed 700 in total. That number includes all headings within the election statement.

39. It is recommended that candidates be permitted to provide an election statement of not more than 700 words, including headings.

Residency Requirement

40. Section 9 of the by-law provides as follows:

> Every member, other than a temporary member, is qualified to be a candidate in an election of benchers if, at the time of signing a nomination form containing his or her nomination as a candidate, the member resides in Ontario [emphasis added] and the member's rights and privileges are not suspended.

41. In 2003, a member who lived in England complained that he was unable to run as a bencher because he did not reside in Ontario. Convocation may wish to consider this complaint and reconsider the residency requirement.

42. The word "resides" in section 9 is not defined in the by-law. The ordinary meaning of the word "resides" refers to a person's home address. It is, however, defined differently in section 2(3) for the purpose of determining a voter's electoral region:

> 2. (3) For the purposes of this By-Law, an elector resides in an electoral region if his or her business address, or, where an elector does not have a business address, home address, as indicated on the records of the Society on election day, is within the electoral region.

43. Defining the term "resides in Ontario" in section 9 to include candidates whose business addresses are in Ontario will also eliminate the possibility of prohibiting a candidate who lives, for example, in Hull, Québec and practises in Ottawa, from running in the bencher election.

44. It is recommended that the by-law be amended to permit a member whose business address as indicated on the records of the Society is in Ontario at the time of signing a nomination form to run as a candidate in the election.

Conditions Precedent to Being Elected as a Bencher

45. The only condition a candidate must meet before being elected a bencher is that her or his rights and privileges are not suspended. There is no requirement that a candidate reside or practise in Ontario at the time of election. Nor is there a requirement that a candidate reside or practise in the same electoral region that the candidate resided or practised in at the time of nomination.

46. This means that a candidate who practised in Ontario at the time of nomination, and moved to England before election day is eligible to be elected as a bencher. It also means that a candidate who practised and resided in the Central West Region at the time of nomination could move her or his practice and residence to the Central South Region and still be elected the Regional bencher for the Central West Region. The governing time in the current by-law is the close of nominations. This is set out in section 14(2) as follows:

> 14. (2) In an election under section 15 or 37, a candidate is eligible to be elected as bencher from an electoral region if his or her business address, or, where the candidate has no business address, home address, as indicated on the records of the Society at the time for close of nominations, is within the electoral region. [emphasis added]

47. It is possible, but not likely, that Convocation intended this result. If it did not, it is proposed that the by-law be amended to extend the "residence" requirements for candidates set out in section 9 and section 14(2) of the by-law to include the time at which the candidate is elected.

48. It is recommended that it be a condition precedent to being elected as a bencher that the candidate's business address, or where the candidate has no business address, home address, at the time of election be within Ontario.

49. It is also recommended that a candidate only be eligible to be elected as a regional bencher, if at the time of the candidate's election, the candidate's business address, or where the candidate has no business address, home address, is within the electoral region.

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

(1) Copy of amendments to By-Law 5.

(Appendix 1, pages 13 – 30)

It was moved by Professor Krishna, seconded by Mr. Heintzman, that Convocation approve the following recommendations set out in the report:

Recommendation 1
Members be permitted to vote in the traditional way by paper ballot, or over the Internet.

Recommendation 2
The polling list be frozen on the fourth Friday in March.

Recommendation 3
Voters be required to return their ballots in accordance with the voting instructions distributed pursuant to section 28.

Recommendation 4
Convocation should consider eliminating the requirement of the presence of scrutineers in light of the fact that an independent third party will be counting and tabulating the votes.

Recommendation 5
The close of nominations and the deadline for submission of election statements be the second Friday in February rather than the fourth Friday in February.

Recommendation 6
Candidates be permitted to provide a photograph that accords with the Elections Officer's specifications.

Recommendation 7
Candidates be permitted to provide a biographical statement of not more than 120 words, including headings.

Recommendation 8
Candidates be permitted to provide an election statement of not more than 700 words, including headings.

Recommendation 9
A member whose business address, as indicated on the records of the Society, is in Ontario at the time of signing a nomination form be permitted to run as a candidate in the election.

Recommendation 10
That it be a condition precedent to being elected as a bencher that the candidate's business address, or where the candidate has no business address, home address, at the time of election be within Ontario.

Recommendation 11
A candidate is only eligible to be elected as a regional bencher, if at the time of the candidate's election, the candidate's business address, or where the candidate has no business address, home address, is within the electoral region.

The Treasurer proposed that Recommendation 4 be voted on separately and that Recommendation 4 be amended to read as follows:

That Convocation eliminate the requirement of the presence of scrutineers in light of the fact that an independent third party will be counting and tabulating the votes.

Carried

The balance of the Recommendations were voted on and adopted.

REPORT OF THE INTER-JURISDICTIONAL MOBILITY COMMITTEE

Mr. Simpson presented the Inter-Jurisdictional Mobility Committee Report.

Report to Convocation
June 22, 2006

Inter-Jurisdictional Mobility Committee

Committee Members
William Simpson (Chair)
Anne Marie Doyle
Neil Finkelstein
Vern Krishna
Derry Millar

Purpose of the Report: Decision

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

COMMITTEE PROCESS

1. The Committee met on June 8, 2006. Committee members William Simpson (Chair), Anne Marie Doyle, Vern Krishna attended. Derry Millar considered the issues and provided input. Staff member Sophia Sperdakos attended the meeting.

PROPOSED APPROVAL OF TERRITORIAL MOBILITY AGREEMENT

Motion

2. That Convocation

   a. approve the Territorial Mobility Agreement set out at Appendix 3 and authorize the Law Society to become a signatory;

   b. direct that By-law amendments to implement the terms of the Territorial Mobility Agreement be prepared and provided to Convocation for its approval.

Introduction and Background

3. In December 2002 eight jurisdictions signed the Federation of Law Societies of Canada's (the "Federation") National Mobility Agreement (the "NMA") whose purpose is to enhance the mobility of lawyers within Canada. Information about the NMA is set out at Appendix 1. The Law Society of Upper Canada is one of the signatories and implemented the Agreement effective July 1, 2003 by amending its By-laws.

4. Since 2003 there have been ongoing discussions at the Federation aimed at encouraging the jurisdictions that have not yet signed the NMA (Nunavut, Northwest Territories, Yukon, Prince Edward Island and New Brunswick) to do so. [1]

5. In January 2006 three members of the National Mobility Task Force and representatives of the territories met and developed a proposal for a possible territorial mobility agreement for the Federation's consideration.

6. The territories' reluctance to sign the NMA in its entirety has been based on a number of concerns, in particular that the temporary mobility provisions would result in a significant loss of revenue that could adversely affect the law societies' ability to regulate. This is because, currently, lawyers wishing to provide occasional legal services in those jurisdictions must obtain Single Appearance Certificates for which fees are paid. In addition, the territories have non-resident memberships for which fees are paid. It is likely that if the temporary mobility provisions of the NMA applied to these law societies the Single Appearance Certificates would no longer exist and the number of non-resident members would diminish. The territorial bars are quite small and depend upon this additional income to operate.

7. Nunavut has also been concerned that there could be a negative effect on the development of an indigenous bar if lawyers could practise temporarily in Nunavut for up to 100 days per calendar year without having to become members.

8. To address these concerns, a proposal was developed that would allow each of the non-signatory territories to participate in the permanent mobility (transfer) provisions of the NMA only, for a five-year period. At the conclusion of that period they would either agree to implement the entire NMA or reach another agreement. If neither of these events occurs the agreement would expire.

9. The proposal was provided to the National Mobility Task Force and the councils of the three territorial law societies, all of which approved it. The Report of the National Mobility Task Force; the Territorial Mobility Agreement reflecting the terms of the proposal; a model rule to assist law societies in drafting their rule or by-law; and a Resolution were provided to the Federation Council for its consideration at its meeting in Charlottetown in May 2006. These documents are set out at Appendices 2, 3, 4, and 5, respectively. The Council approved the resolution.

10. All signatory law societies must now indicate whether they approve the Territorial Mobility Agreement.

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[1] The Law Society of New Brunswick's Council has approved a motion to sign and implement the NMA. It is anticipated that this will take place in July 2006.

11. The Committee has considered the Report of the National Mobility Task Force supporting the Territorial Mobility Agreement and has considered the Territorial Mobility Agreement itself. The Committee is of the view that the Territorial Mobility Agreement's flexibility reflects an appropriate recognition of the unique circumstances of the territorial law societies.

12. In the Committee's view the Territorial Mobility Agreement is an important step in the development of national mobility and should be approved by all signatory law societies, including the Law Society of Upper Canada.

13. If Convocation approves the Territorial Mobility Agreement, the Committee will return to Convocation before November 2006 with By-law amendments for its consideration.

Appendix 1

INFORMATION ON THE NATIONAL MOBILITY AGREEMENT

Highlights of the Agreement

- In August 2001 the Federation of Law Societies approved the creation of a National Task Force on Mobility to develop recommendations for increased inter-provincial and territorial mobility of Canadian lawyers.

- In May 2002 the Federation accepted the Task Force's recommendations regarding enhanced mobility and in August 2002 accepted the Task Force's proposed National Mobility Agreement (NMA). It was then up to each jurisdiction to determine whether it would sign the NMA. If a jurisdiction chose to do so it would then implement the NMA by approving by-laws or rules.

- Eight jurisdictions signed the NMA in December 2002: BC, Alberta, Saskatchewan, Manitoba, Ontario, Quebec (the Barreau), Nova Scotia and Newfoundland. Seven of the signatories have fully implemented the Agreement. Quebec has not yet implemented it.

- The NMA is voluntary and reciprocal. No jurisdiction is required to become a signatory, but only those lawyers who are *entitled to practise* in signatory jurisdictions that have enacted rules or by-laws to implement the NMA may take advantage of its provisions.

- Pursuant to the NMA lawyers who

    - are *entitled to practise* in a signatory jurisdiction that has implemented the Agreement,

    - have liability insurance and defalcation coverage, and

- have no outstanding criminal or disciplinary proceedings, no discipline record, and no restrictions or limitations on the right to practise

may provide legal services in or with respect to the law of a reciprocating jurisdiction for up to 100 days in a calendar year without a permit. (Temporary Mobility) This means they do not have to advise the law society that they are providing legal services on a temporary basis in the jurisdiction.

- Should the need arise, law societies will be able to check on a lawyer's eligibility for inter-jurisdictional mobility through a National Database that lists the names of lawyers, their insurance status and their eligibility for mobility.

- Lawyers who are not eligible for mobility without a permit may apply for a permit.

- Lawyers practising pursuant to the temporary mobility provisions are subject to the legislation, by-laws, rules and the Rules of Professional Conduct of the jurisdiction with respect to which they exercise temporary mobility.

- If a lawyer establishes an "economic nexus" with a jurisdiction he or she becomes ineligible for temporary mobility, but may apply to transfer to the jurisdiction (Permanent Mobility). An economic nexus is established when the lawyer does anything inconsistent with temporary mobility including,

    - Providing legal services for more than 100 days
    - Opening an office from which to serve the public
    - Opening and operating a trust account
    - Becoming a resident in the jurisdiction

- Lawyers entitled to practise in a signatory jurisdiction that has implemented the NMA may transfer permanently to another reciprocating jurisdiction without having to write transfer examinations. In general, to be eligible to do so a lawyer must be entitled to practise in a home jurisdiction and be of good character. He or she is not required to write transfer examinations, but must certify that he or she has reviewed and understood reading materials required by the jurisdiction.

- Lawyers may be members of multiple jurisdictions.

- The signatory jurisdictions that have implemented the Agreement continue to meet monthly through a national staff group to discuss implementation issues; address areas of concern and consider ongoing issues that can then be referred back to the policy makers where necessary.

Appendix 2

NATIONAL MOBILITY TASK FORCE
Territorial Mobility Agreement
May 5, 2006

In August 2001 the Federation accepted the National Mobility Task Force's ("the Task Force") National Mobility Agreement to enhance mobility of lawyers within Canada. The resolution that the Federation approved acknowledged that the unique circumstances of the law societies of the Northwest Territories, Nunavut and Yukon necessitated special considerations that could not be addressed within the Task Force's original prescribed time frame, but should be addressed in the future.

Following several years of informal discussions, a Territorial Mobility Group ("the Group") was established in 2005 with representatives from the Task Force, the territorial law societies and the law societies of the provinces in western Canada. The Group developed a proposal respecting territorial mobility to reflect the territories' unique circumstances. The Group provided its proposal to the Task Force, which considered it and agreed that the proposal should be developed into an Agreement for the Federation's consideration.

On April 19, 2006 the Task Force finalized and unanimously approved the following attached documents for recommendation to the Federation Council:

- Resolution on Territorial Mobility
- Territorial Mobility Agreement
- Territorial Mobility Model Rules

As was the case with the adoption of the National Mobility Agreement, the Task Force resolution requests Council to approve the Territorial Mobility Agreement and Model Rules and to recommend that law societies also approve them. The Model Rules are prepared as a guide to assist law societies to implement the Territorial Mobility Agreement through their Rules or By-laws.

The documents have been drafted, wherever possible, to mirror the language of the National Mobility Agreement and its Model Rules. The Territorial Mobility Group has also approved the documents.

The Task Force believes that the proposed Territorial Mobility Agreement reflects the spirit of collaboration and flexibility that has been exhibited throughout the Federation's mobility discussions to date.

The Task Force further believes that the proposed Territorial Mobility Agreement continues the Federation's commitment to enhance mobility of lawyers in Canada in the public interest and in the interest of a strong and vibrant legal profession.

Appendix 3

TERRITORIAL MOBILITY AGREEMENT

Federation of Law Societies of Canada /
Fédération des ordres professionels de juristes du Canada
480 - 445, boulevard Saint-Laurent
Montréal, Québec
H2Y 2Y7
Tel (514) 875-6350
Fax (514) 875-6115
http://www.flsc.ca

FEDERATION OF LAW SOCIETIES OF CANADA

May, 2006
Charlottetown, Prince Edward Island

Introduction

The purpose of this Agreement is to extend the scope of the National Mobility Agreement in facilitating permanent mobility of lawyers between Canadian jurisdictions.

While the signatories participate in this Agreement voluntarily, they intend that only lawyers who are members of signatories that have implemented reciprocal provisions in their jurisdictions will be able to take advantage of the provisions of this Agreement.

The signatories recognize that

- they have a duty to the Canadian public and to their members to regulate the inter-jurisdictional practice of law so as to ensure that their members practise law competently, ethically and with financial responsibility, including professional liability insurance and defalcation compensation coverage, in all jurisdictions of Canada,
- differences exist in the legislation, policies and programs pertaining to the signatories, particularly between common law and civil law jurisdictions, and
- it is desirable to facilitate a nationwide regulatory regime for the inter-jurisdictional practice of law to promote uniform standards and procedures, while recognizing the exclusive authority of each signatory within its own legislative jurisdiction.

Background

In August, 2002, the Federation of Law Societies accepted the report of the National Mobility Task Force (“the Task Force”) for the implementation of full mobility rights for Canadian lawyers.

The resolution that the Federation adopted included an acknowledgement that “the unique circumstances of the law societies of Yukon, the Northwest Territories and Nunavut necessitate

special considerations that could not be undertaken within the time frame prescribed in the Task Force's terms of reference, but should be undertaken in the future."

Eight law societies signed the National Mobility Agreement ("NMA") on December 9, 2002. Since that time, seven law societies have fully implemented the NMA. None of the law societies of Yukon, the Northwest Territories and Nunavut were among the law societies signing or implementing the NMA.

Territorial Mobility Agreement

In 2005, an informal Territorial Mobility Group ("the Group") was formed with representatives of the Task Force, the law societies of the provinces in Western Canada and the law societies of the territories. The Group developed a proposal respecting territorial mobility to address the unique characteristics of the law societies of the territories, and the Task Force has approved the proposal. This Agreement is intended to give effect to the proposal of the Group as approved by the Task Force.

The purpose of this Agreement is to allow the law societies of the territories to participate in national mobility for lawyers to the extent possible for them at this time, given their current circumstances. Specifically, the signatories agree that the territorial law societies will participate in national mobility as reciprocating governing bodies with respect to permanent mobility, or transfer of lawyers from one jurisdiction to another, without a requirement that they participate in temporary mobility provisions.

The signatories agree that this arrangement may subsist for a period of up to five years. This period will allow the territorial law societies to evaluate their ability to become signatories to the NMA. On January 1, 2012 this Agreement will expire and the signatories will be under no further obligation and have no further rights under this Agreement.

During the subsistence of this Agreement, the Group will continue to assist in facilitating the implementation of this Agreement and consideration of full participation of the territorial law societies in the NMA.

The signatories to this Agreement who are not signatories to the NMA do not hereby subscribe to the provisions of the NMA, except as expressly stated in this Agreement and only for the period of time specified in this Agreement.

THE SIGNATORIES AGREE AS FOLLOWS:

Definitions

1. In this Agreement, unless the context indicates otherwise:

   "governing body" means the Law Society or Barristers' Society in a Canadian common law jurisdiction, and the Barreau;

   "home governing body" means any or all of the governing bodies of the legal profession in Canada of which a lawyer is a member, and "home jurisdiction" has a corresponding meaning;

"Inter-Jurisdictional Practice Protocol" means the 1994 Inter-Jurisdictional Practice Protocol of the Federation of Law Societies of Canada, as amended from time to time;

"lawyer" means a member of a signatory governing body;

"liability insurance" means compulsory professional liability errors and omissions insurance required by a governing body;

"National Mobility Agreement" or "NMA" means the 2002 National Mobility Agreement of the Federation of Law Societies of Canada, as amended from time to time;

"permanent mobility provisions" means clauses 32 to 36, 39 and 40 of the National Mobility Agreement;

"practice of law" has the meaning with respect to each jurisdiction that applies in that jurisdiction;

"Registry" means the National Registry of Practising Lawyers established under clause 17 of the National Mobility Agreement;

General

2. The signatory governing bodies will

   (a) use their best efforts to obtain from the appropriate legislative or supervisory bodies amendments to their legislation or regulations necessary or advisable in order to implement the provisions of this Agreement;
   (b) amend their own rules, by-laws, policies and programs to the extent they consider necessary or advisable in order to implement the provisions of this Agreement;
   (c) comply with the spirit and intent of this Agreement to facilitate mobility of Canadian lawyers in the public interest and strive to resolve any differences among them in that spirit and in favour of that intent; and
   (d) work cooperatively to resolve all current and future differences and ambiguities in legislation, policies and programs regarding inter-jurisdictional mobility.

3. Signatory governing bodies will subscribe to this Agreement and be bound by it by means of the signature of an authorized person affixed to any copy of this Agreement.

4. A signatory governing body will not, by reason of this Agreement alone,

   (a) grant to a lawyer who is a member of another governing body greater rights to provide legal services than are permitted to the lawyer by his or her home governing body; or
   (b) relieve a lawyer of restrictions or limits on the lawyer's right to practise, except under conditions that apply to all members of the signatory governing body.

5. Amendments made under clause 2(b) will take effect immediately on adoption with respect to members of signatory governing bodies that have adopted reciprocal provisions.

Permanent Mobility

6. The signatories that are signatories to the National Mobility Agreement agree to extend the application of the permanent mobility provisions of the National Mobility Agreement with respect to the territorial signatories to this Agreement.

7. The territorial signatories agree to adopt and be bound by the permanent mobility provisions of the National Mobility Agreement.

8. A signatory that has adopted regulatory provisions giving effect to the permanent mobility requirements of the National Mobility Agreement is a reciprocating governing body for the purposes of permanent mobility under this Agreement, whether or not the signatory has adopted or given effect to any other provisions of the National Mobility Agreement.

Transition Provisions

9. This Agreement is a multi-lateral agreement, effective respecting the governing bodies that are signatories, and it does not require unanimous agreement of Canadian governing bodies.

10. Provisions governing permanent mobility in effect at the time that a governing body becomes a signatory to this Agreement will continue in effect:

    (a) with respect to all Canadian lawyers until this agreement is implemented; and
    (b) with respect to members of Canadian law societies that are not signatories to this agreement.

Dispute Resolution

11. Signatory governing bodies adopt and agree to apply provisions in the Inter-Jurisdictional Practice Protocol in respect of arbitration of disputes, specifically Clause 14 and Appendix 5 of the Protocol.

Termination and Withdrawal

12. This Agreement will terminate and cease to be effective at 12:01 a.m. Newfoundland Standard Time on January 1, 2012.

13. A signatory may cease to be bound by this Agreement by giving each other signatory written notice of at least one clear calendar year.

14. A signatory that gives notice under clause 13 will immediately notify its members in writing of the effective date of withdrawal.

Signatures

LAW SOCIETY OF ALBERTA	per President
LAW SOCIETY OF BRITISH COLUMBIA	per President
LAW SOCIETY OF MANITOBA	per President
LAW SOCIETY OF NEWFOUNDLAND AND LABRADOR	per Treasurer
NOVA SCOTIA BARRISTERS' SOCIETY	per President
LAW SOCIETY OF THE NORTHWEST TERRITORIES	per President
LAW SOCIETY OF NUNAVUT	per President
LAW SOCIETY OF UPPER CANADA	per Treasurer
ARREAU DU QUÉBEC	per Bâtonnier
LAW SOCIETY OF SASKATCHEWAN	per President
LAW SOCIETY OF YUKON	per President

DATED: November , 2006.

Appendix 4

TERRITORIAL MOBILITY MODEL RULES

PART 1 – AMENDMENTS FOR NATIONAL MOBILITY AGREEMENT SIGNATORIES

1. Definitions

(a) Amend the definition of "reciprocating governing body" as follows:

"reciprocating governing body"
- (a) means a governing body that has signed the National Mobility Agreement and adopted regulatory provisions giving effect to the requirements of the National Mobility Agreement, and
- (b) in respect of [Rules/By-laws on Transfer] before January 1, 2012, includes a governing body that has signed the Territorial Mobility Agreement and adopted regulatory provisions giving effect to the requirements of the Territorial Mobility Agreement;

(b) Add the following definition of "Territorial Mobility Agreement":

"Territorial Mobility Agreement" means the 2006 Territorial Mobility Agreement of the Federation of Law Societies of Canada, as amended from time to time;

2. Application and interpretation

Amend this provision to refer to the Territorial Mobility Agreement as follows:

Application and interpretation

2(1) [This Part/These (mobility) Rules/By-Laws]
(a) [is/are] intended to implement the provisions of the National Mobility Agreement and the Territorial Mobility Agreement, and

3. Transfer under National Mobility Agreement

Amend the heading of this provision to refer to the Territorial Mobility Agreement as follows:

Transfer under National Mobility Agreement and Territorial Mobility Agreement

PART 2 – NEW RULES/BY-LAWS FOR SIGNATORIES ONLY TO THE TERRITORIAL MOBILITY AGREEMENT

Inter-jurisdictional practice

Definitions
1 In [this Part/these (mobility) Rules/By-Laws], unless the context indicates otherwise,

"entitled to practise law" means allowed, under all of the legislation and regulation of a home jurisdiction, to engage in the practice of law in the home jurisdiction;

"Executive Director" includes a person designated by the Executive Director to perform any of the duties assigned to the Executive Director in these Rules;

"governing body" means the Law Society or Barristers' Society in a Canadian common law jurisdiction, and the Barreau du Québec;

"lawyer" means a member of a governing body;

"liability insurance" means compulsory professional liability errors and omissions insurance required by a governing body;

"reciprocating governing body" means a governing body that has

(a) signed the Territorial Mobility Agreement and
(b) adopted regulatory provisions giving effect to the requirements of the Territorial Mobility Agreement.

"resident" has the meaning respecting a province or territory that it has with respect to Canada in the *Income Tax Act* (Canada);

"Territorial Mobility Agreement" means the 2006 Territorial Mobility Agreement of the Federation of Law Societies of Canada, as amended from time to time.

Application and interpretation

2 [This Part/These (mobility) Rules/By-Laws] [is/are] intended to implement the provisions of the Territorial Mobility Agreement and cease[s] to have effect on the expiry of that Agreement.

Transfer under Territorial Mobility Agreement

3 (1) This Rule applies to an applicant for transfer from another Canadian jurisdiction, provided that the applicant is entitled to practise law in the jurisdiction of a reciprocating governing body of which the applicant is a member.

(2) An applicant under this Rule must fulfill all of the requirements in [existing rule on transfer and any other qualifications that ordinarily apply for lawyers to be entitled to practise law in this jurisdiction] for call and admission on transfer from another Canadian jurisdiction, except that he or she need not pass any transfer examination.

(3) To qualify for call and admission, an applicant under this Rule must certify in a prescribed form that he or she has reviewed and understands all of the materials reasonably required by the [Executive Director/Call and Admission Committee].

(4) A lawyer called and admitted under this Rule has no greater rights as a member of the Society than

(a) the lawyer has as a member of the governing body of his or her home jurisdiction, or

(b) any other member of the Society in similar circumstances.

Liability insurance

4 (1) This Rule applies to a member of the Society who is entitled to practise law in the jurisdiction of a reciprocating governing body of which the lawyer is a member.

(2) A lawyer may apply to the Executive Director for exemption from the requirement for professional liability insurance in [existing Rule on compulsory insurance], if, in another Canadian jurisdiction in which the governing body allows a similar exemption for members of the Society, the lawyer

(a) is resident and

(b) maintains the full mandatory professional liability insurance coverage required in the other jurisdiction that is reasonably comparable in coverage and limits to that required of lawyers in [this jurisdiction] and extends to the lawyer's practice in [this jurisdiction].

Appendix 5

RESOLUTION ON TERRITORIAL MOBILITY

National Mobility Task Force
Territorial Mobility Group
May 5, 2006

WHEREAS the Federation of Law Societies of Canada (the "Federation") accepted the National Mobility Task Force's (the "Task Force") National Mobility Agreement in August 2002;

WHEREAS the resolution that the Federation approved in August 2002 acknowledged, among other considerations, that "the unique circumstances of the law societies of the Yukon, Northwest Territories and Nunavut necessitate special considerations that could not be undertaken within the time frame prescribed in the Task Force's terms of reference, but should be undertaken in the future";

WHEREAS eight jurisdictions signed the National Mobility Agreement on December 9, 2002 and seven jurisdictions have fully implemented the Agreement;

WHEREAS following informal discussions over a number of years a Territorial Mobility Group was formed in 2005 with representatives from the Task Force, the law societies of the provinces in western Canada and the territorial law societies to develop a proposal respecting territorial mobility that would address those unique circumstances;

WHEREAS the Territorial Mobility Group developed a proposal respecting territorial mobility that the Task Force has approved;

WHEREAS a Territorial Mobility Agreement has been prepared reflecting the Territorial Mobility Group's proposal and the Task Force's approval;

AND WHEREAS draft model rules have been prepared to facilitate implementation of the Territorial Mobility Agreement by territorial law societies and by signatory jurisdiction governing bodies.

THEREFORE BE IT RESOLVED

THAT the Territorial Mobility Agreement, approved by the Task Force on April 19, 2006 be approved.

THAT the draft model rules prepared to facilitate implementation of the Territorial Mobility Agreement by territorial law societies and by signatory jurisdiction governing bodies be accepted.

THAT the Territorial Mobility Agreement and draft model rules be recommended to affected governing bodies for their approval.

THAT there continue to be a Territorial Mobility Working Group to assist in facilitating the implementation of the Territorial Mobility Agreement and consideration of full participation of the territorial law societies in the National Mobility Agreement on or before January 1, 2012.

Moved by:

Seconded by:

It was moved by Mr. Simpson, seconded by Ms. Doyle, that Convocation

a. approve the Territorial Mobility Agreement set out at Appendix 3 of the Report and authorize the Law Society to become a signatory;

b. direct that By-law amendments to implement the terms of the Territorial Mobility Agreement be prepared and provided to Convocation for its approval.

Carried

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FINANCE & AUDIT COMMITTEE

Report to Convocation
June 22, 2006

Finance and Audit Committee

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

Purposes of Report: Decision and Information

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

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6. LawPro Financial Statements For The Quarter Ended March 31, 2006
7. 2007 Budget Options
8. Pension Fund Annual Financial Statements
9. 2007 Budget – Operational Reviews
10. Practice Management Review

COMMITTEE PROCESS

1. The Finance and Audit Committee ("the Committee") met on June 8, 2006. Committee members in attendance were: Beth Symes (v.c.), Brad Wright (v.c.), Abdul Chahbar, Marshall Crowe, Holly Harris, Ross Murray, Alan Silverstein and Gerry Swaye.

2. The Treasurer was also in attendance. Michelle Strom and Akhil Wagh of LawPro attended. Staff attending were Malcolm Heins, Wendy Tysall, John Matos, Laura Cohen, Fred Grady and Andrew Cawse.

FOR DECISION

CLARIFICATION OF BENCHER REMUNERATION GUIDELINES

Motion

3. That Convocation approve an amendment to the Bencher Remuneration Policy, to read:

> Eligible activities will include time spent as the Law Society's appointed representative to boards of external organizations, and other roles in external organizations.

4. The Bencher Remuneration Policy prescribes questions specific to attendance and eligible activity be directed to the CEO. Changes to the guidelines are to be approved by the Finance and Audit Committee.

5. An issue has arisen as to whether time spent by a bencher as a board member of organizations such as the LFO, the Law Society Foundation, CanLII and OJEN is eligible for bencher remuneration and/or the deductible period of 26 days. The by-laws of some of these organizations contain some form of prohibition against the remuneration of directors.

6. The bencher remuneration policy currently states:

   Eligible activities will include:

(F) (iv) time spent as the Law Society's appointed representative to boards of external organizations, and other roles in external organizations <u>where that external organization permits remuneration</u> (emphasis added).

(G) A bencher, other than a bencher appointed by the Provincial Government shall not accept compensation from an external organization to which he or she is appointed as a bencher, or otherwise accept compensation as a bencher, except in accordance with this policy.

7. A copy of the bencher remuneration policy approved by Convocation in September and November 2005 is attached.

8. Based on the CEO's recommendation after reviewing the legal opinions from Elliot Spears, Law Society Senior Counsel and Stikeman Elliot, the Committee requests Convocation to amend the policy which presently restricts compensation for benchers who are appointed as Convocation's representatives on external boards which prohibit remuneration. This restriction would be removed if the current motion is approved.

9. In their draft opinion, Stikeman Elliott's view is there is a good argument that there is no impediment in law to the remuneration of a bencher for time spent as the Law Society's representative on external boards even where the external organizations' by-laws or constating documents prohibit remuneration.

<u>Bencher Remuneration – as approved at Convocation, September 22, 2005 and November 24, 2005</u>

BENCHER REMUNERATION

1. That Convocation approves the definitions, processes, and reporting that will be used for the administration of bencher remuneration as summarized below.

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

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

C. Half and Full Days

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

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

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

F. Eligible activities will include

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

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

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

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

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

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

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

FOR INFORMATION

AMENDMENT TO BUSINESS CONDUCT POLICY

19. The Finance & Audit Committee concurs with the recommendation of the Audit Sub-Committee that the CEO expand the Law Society's Business Conduct policy.

20. The Law Society's current Business Conduct Policy, which is signed by all employees upon appointment imposes a contractual duty of confidentiality and currently includes a section on Compliance with Laws (Section 1). It states in part "If any Law Society employee should have reason to be concerned at any time that the Law Society is not operating in complete compliance with applicable laws and regulations or established policies, the employee should immediately report the concern to a superior or if necessary, to the Chief Executive Officer of the Law Society."

    (a) The Committee recommends the CEO amend the Policy so that any such concerns may also be reported to the Treasurer or the Chair of the Finance & Audit Committee, whom ever is preferred by the staff member.

    (b) The Business Conduct Policy should contain a clause prohibiting reprisals if such a complaint is made in good faith.

21. A copy of the current Business Conduct Policy is attached.

FOR INFORMATION

GENERAL FUND - FINANCIAL STATEMENTS FOR THE QUARTER ENDED MARCH 31, 2006

21. The Committee recommends the first quarter financial statements for the General Fund be received by Convocation for information.

Law Society of Upper Canada
General Fund
Financial Statement Highlights
For the three months ended March 31, 2006

22. The attached unaudited financial statements for the first quarter of 2006 have been prepared on a full accrual basis consistent with the annual financial statements. Known expenses have been accrued. Revenues are recognized when they are earned. For example, membership fees are recognized equally over the course of the year. Revenue for the Licensing Process is recognized in the second, third and fourth quarters of the year consistent with the duration of the course and the exam writing period.

Balance Sheet

- Cash and short-term investments have decreased by $5.06 million from the first quarter of 2005 as construction has been completed on the north wing.

- Accounts receivable are virtually unchanged from 2005.

- Portfolio investments have increased slightly over 2005 as realized gains from investments have been re-invested in the long-term portfolio. There is no significant difference between book and market value at the end of the quarter.

- Accounts payable and accrued liabilities have decreased by $2.1 million. This is largely due to the fact that the final pay period of the quarter was on the 31st of March. Therefore there is no accrued payroll charge in 2006. Also there was a general decline in the level of trade payables.

- The decrease in the capital allocation fund balance of $5.3 million from March 2005 reflects completion of the north wing project. This is offset by an increase in Capital Assets with the capitalization of the project.

- Deferred revenue of $37.4 million is comprised largely of members' fees billed but not yet earned, Licensing Process revenue billed but not yet earned and CLE revenues collected from programs offered in future periods.

First Quarter Revenue and Expenses

- Annual membership fee revenue is recognized on a monthly basis. Membership fees have increased from $8.9 million in 2005 to $9.8 million in 2006 with an increase in membership of approximately 900 members and a fee increase of $68 per member.

- Other revenues primarily comprise library revenues such as photocopying, mobility applications, professional corporation fees, LawPro funding of governance initiatives and costs recoveries by the monitoring and enforcement department.

- Overall, expenses are tracking close to 2005 with a few exceptions. Professional development and competence expenses are lower in 2006 consistent with reduced costs in the new licensing process. Professional regulation expenses have declined by $452,000 reflecting last year's accrual of $700,000 for the anticipated settlement of a long-standing claim against the Society and budgeted 2006 increases for expenses related to mortgage fraud.

- Other expenses primarily comprise CDLPA expense reimbursements, insurance premiums, audit costs and lease obligations. Included in the budget for other expenses is a contingency allowance of $300,000 (one quarter of the annual $1.2 million). To date $465,000 has been dedicated from the contingency for various task forces and studies.

- A potential merger between OBAP and LINK has resulted in a delay in the payment of funds to OBAP. If the merger proceeds, the funds budgeted for LINK and OBAP, approximately $205,000, will be available for the use of the merged entity.

- The unrestricted fund shows a deficit of $56,000. This compares to an anticipated budget deficit of $1.1 million in the first quarter. The 2006 budget was approved with an unrestricted fund deficit of $1.0 million to be covered by the $1.0 million fund balance from 2005. It is too early in the year to predict if the deficit will in fact approach that number by the end of the year.

- To the end of March 2006, $11,000 in grants to four individuals have been approved from the J.S. Denison Fund. The fund balance at the end of the first quarter is $268,000.

- To the end of March 2006, $12,000 in repayable allowances has been paid to 3 individuals.

- The balance in the special projects fund represents funds from Canada Life for the preservation of the grounds, funding for 2005 approved equity expenditures carried forward to 2006 and the residual funding approved for the Small Firm Task Force.

FOR INFORMATION

LAWYERS FUND FOR CLIENT COMPENSATION - FINANCIAL STATEMENTS FOR THE QUARTER ENDED MARCH 31, 2006

23. The Committee recommends the first quarter financial statements for the Lawyers Fund for Client Compensation be received by Convocation for information.

Law Society of Upper Canada
Lawyers Fund for Client Compensation - Financial Statement Highlights
For the three months ended March 31, 2006

24. The first quarter of 2006 has been completed and the financial position of the Lawyers Fund for Client Compensation ("the Fund") and the Fund's balance ($18.8 million) has increased from what was reported in March of 2005 ($18.4 million). The Fund's Financial Statements for the three months ended March 31, 2006 identify a surplus of $917,000 compared to a deficit of $1,162,000 for the first quarter of 2005.

25. An actuarial valuation of the reserve for unpaid grants was prepared as at March 2006 and the balance has decreased by $466,000 over its valuation at December 31, 2005. A significant matter has been processed by the Fund since first being notified of the matter in late 2004 resulting in a net grants expense of $4.5 million for the 2005 financial year. This matter involved multiple claims against one member. The matter is still being resolved, but Fund management believe the remaining reserve amount allocated to this matter of just over $1 million is consistent with the facts currently known about the matter.

26. Grants paid of $914,000 are in line with the first quarter of 2005. Net grants expense has improved to a surplus position of $81,000 compared to a deficit in the first quarter of 2005 of $1,909,000. This is a result of the downward revision of the reserve and the significant value of recoveries made during the quarter.

First Quarter Balance Sheet

- The only variances of any significance in the Balance Sheet from March 2006 to March 2005 are the decrease in cash and short-term investments of $825,000 to

$5,732,000, the year on year decrease in the reserve for unpaid grants of $311,000 to $10,212,000 and portfolio investments.

- Of note is the positive variance of $632,000 in the market value of the long-term portfolio when compared to its book value. The increase in the book value of the portfolio investments of $1.5 million is entirely related to the reinvestment of income and realized gains from the portfolio.

First Quarter Revenue and Expenses

- Fee revenues of $1.5 million have increased by $32,000 from the first quarter of 2005. The annual levy of $200 per member is consistent between the years with slightly more members in the current quarter. Annualized fee revenue for the Fund will approximate $6 million.

- Investment income has increased from $322,000 to $450,000, primarily because of realized capital gains of $191,000.

- Grants paid of $914,000 are similar to the first quarter of 2005. However, these payments relate largely to claims previously reserved and unlike 2005 there is no additional increase in the provision for unpaid grants.

- An actuarial valuation of the claims reserve was prepared as at March 2005 resulting in an increase at that time of $861,000. This increase was largely due to one solicitor that generated multiple claims against the Fund. There is no indication of a similar pattern in 2006.

- Recoveries of claims paid has increased from $9,000 in the first quarter of 2005 to $529,000 this year. Recoveries do not follow any pattern and are difficult to predict. The high value of this quarter's recoveries arose after court approval of transfers of $360,000 and $100,000 from the frozen trust accounts of two disbarred members.

- As detailed in the General Fund, expenses totaling $994,000 have been allocated from the General Fund to the Compensation Fund comprising $471,000 in Spot Audit expenses, $274,000 in Investigation and Discipline Expenses and $249,000 in allocated administration expenses.

FOR INFORMATION

LIBRARYCO INC. - FINANCIAL STATEMENTS FOR THE QUARTER ENDED MARCH 31, 2006

27. The Committee recommends Convocation receive the first quarter financial statements for LibraryCo Inc. for information.

FOR INFORMATION

INVESTMENT COMPLIANCE REPORTS

28. The Committee recommends the investment compliance reports for the General Fund and Compensation Fund long-term and short-term portfolios be received by Convocation for information.

FOR INFORMATION

STATEMENT OF COMPLIANCE – SHORT TERM PORTFOLIO

FOR INFORMATION

STATEMENT OF COMPLIANCE – LONG TERM PORTFOLIO

FOR INFORMATION

COMPLIANCE REPORT – COMPENSATION FUND - FOYSTON, GORDON & PAYNE

FOR INFORMATION

COMPLIANCE REPORT – GENERAL FUND - FOYSTON, GORDON & PAYNE

FOR INFORMATION

LAWPRO FINANCIAL STATEMENTS FOR THE QUARTER ENDED MARCH 31, 2006

29. The Committee recommends the first quarter financial statements for the Errors & Omissions Insurance Fund and the Lawyers' Professional Indemnity Company be received by Convocation for information.

FOR INFORMATION

2007 BUDGET OPTIONS

30. The Committee reviewed possible options for the 2007 operating budget orientated towards the membership fee not being increased.

31. To better explore the deployment of resources, the Committee is recommending that a special Committee meeting be held in September. The day recommended is September 13, the day prior to Committee day and all Committee Chairs, are invited. This will allow input into the full operating budget and provide an opportunity to explore funding options.

FOR INFORMATION

PENSION FUND ANNUAL FINANCIAL STATEMENTS

32. In June 2005, Convocation resolved to delegate the administrative oversight duties set out in the Pension Fund Governance Guidelines to the Finance & Audit Committee. The Committee reviewed the financial statements of the Fund of the Pension Plan for the Employees of the Law Society of Upper Canada for the year ended December 31, 2005 to be filed with the Ministry of Finance.

FOR INFORMATION

2007 BUDGET – OPERATIONAL REVIEWS

33. Mr. John Matos, Director of Information Services, presented the operational review for Information Systems to the Committee.

34. The process for the compilation of the 2007 budget was approved at Convocation in April 2006. Included in this process is the provision to benchers of two operational reviews, for Professional Development and Competence and Information Systems. The operational review for Professional Development and Competence was presented to the Committee in May.

FOR INFORMATION

PRACTICE MANAGEMENT REVIEW

35. The Committee reviewed a letter from Laurie Pawlitza, Chair of the Professional Development, Competence and Admissions Committee addressing future budgetary requirements for the implementation of an expanded practice review program.

36. While the Committee noted the practice reviews were well within the Law Society's core mandate and had significant merit, it was noted that the further requested expenditures were coming at a time when there was considerable competition for Law Society resources. The Committee suggested that implementation be considered as part of the 2007 budget process.

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

(1) Copy of the bencher remuneration policy approved by Convocation in September and November 2005.

(pages 6 – 7)

(2) Copy of the current Business Conduct Policy.

(pages 11 – 15)

(3) Copy of the Law Society's General Fund Balance Sheet.
(pages 20 – 22)

(4) Copy of the Law Society's Lawyers Fund for Client Compensation Balance Sheet.
(pages 26 – 27)

(5) Copy of LibraryCo's Financial Statements for 3 months ended March 31, 2006.
(pages 29 – 36)

(6) Copy of LAWPRO Financial Statements for the quarter ended March 31, 2006.
(pages 43 – 57)

Re: Amendment to Bencher Remuneration Guidelines – deferred to September Convocation.

Items for Information

- Amendment to Business Conduct Policy
- First Quarter Financial Statements
- First Quarter Investment Compliance Reports
- Pension Fund
- Additional Meeting regarding 2007 Budget Scenarios
- Practice & Operational Reviews

CONVOCATION ADJOURNED FOR LUNCHEON AT 1:20 P.M. AND RECONVENED AT 2:55 P.M.

PRESENT:

The Treasurer (Gavin MacKenzie), Alexander, Boyd, Caskey, Coffey, Crowe, Curtis, Dickson, Feinstein, Heintzman, Henderson, Minor, O'Donnell (by telephone), Pattillo, Pawlitza, Porter, Potter, Swaye and Symes.

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REPORTS NOT REACHED

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

Report to Convocation
June 22, 2006

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

Committee Members
Joanne St. Lewis, Chair
Paul Copeland, Vice-Chair
Marion Boyd
Richard Filion
Holly Harris
Thomas Heintzman
Tracey O'Donnell
Mark Sandler

Purposes of Report: Decision and Information

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

TABLE OF CONTENTS

COMMITTEE PROCESS

1. The Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones ("the Committee") met on June 8, 2006. Committee members Joanne St. Lewis (Chair), Dr. Richard Filion, Holly Harris, Thomas Heintzman and Tracey O'Donnell participated. David Smagata, member of the Equity Advisory Group ("the EAG"), attended part of the meeting. Staff members Josée Bouchard, Marisha Roman and Rudy Ticzon also attended.

FOR DECISION

PREGNANCY AND PARENTAL LEAVES AND BENEFITS FOR PROFESSIONAL LEGAL STAFF AND LAW FIRM EQUITY PARTNERS – MODEL POLICY

Motion

2. That Convocation approves the model policy for law firms and legal organizations entitled *Pregnancy and Parental Leaves and Benefits for Professional Legal Staff and Law Firm Equity Partners*, presented at Appendix 1.

Background

3. The *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession*[1] recommends that the Law Society develop resources for the profession. Recommendation 5 reads as follows: "In order to support the profession in its pursuit of equity and diversity goals, the Law Society should, in co-operation with other

[1] (Toronto: Law Society of Upper Canada, 1997).

organizations, develop and maintain the tools to function as a resource to the profession on the issue of equity and diversity."

4. In the last decade, the Law Society has adopted a number of model policies and produced resources to promote equality and diversity within the legal profession. The following resources are available:

   a. *Guide to Developing a Policy Regarding Workplace Equity in Law Firms*[2] ;
   b. *Guide to Developing a Law Firm Policy Regarding Accommodation Requirements*[3] ;
   c. *Accommodation of Creed and Religious Beliefs, Gender Related Accommodation and Accommodation for Persons with Disabilities- Legal Developments and Best Practices*[4] ;
   d. *Guide to Developing a Policy Regarding Flexible Work Arrangements*[5] ;

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[2] *Guide to Developing a Policy Regarding Workplace Equity in Law Firms* (Toronto: Law Society of Upper Canada, updated March 2003). This guide includes a model policy for the promotion of workplace equity. Topics discussed include recruitment practices, interviewing candidates, hiring and promotion, the right to equal opportunities at work, professional development, the duty to accommodate, mentoring and compensation.
Available at http://www.lsuc.on.ca/about/b/equity/model-policies/
Also available in French at http://www.lsuc.on.ca/fr/about-the-society/b/promoting-equity-and-diversity/model-policies/

[3] *Guide to Developing a Law Firm Policy Regarding Accommodation Requirements* (Toronto: Law Society of Upper Canada, March 2001). This document sets out an employer's legal duty to accommodate employees' creed and religious beliefs, disability, as well as gender and family status. It includes examples and model procedures for requesting and granting accommodations.
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[4] *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, updated December 2004). This document is a companion piece to the *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 on request from equity@lsuc.on.ca

[5] *Guide to Developing a Policy Regarding Flexible Work Arrangements* (Toronto: Law Society of Upper Canada, updated March 2003). One way 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 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/about/b/equity/model-policies/
Also available in French at http://www.lsuc.on.ca/fr/about-the-society/b/promoting-equity-and-diversity/model-policies/

e. *Preventing and Responding to Workplace Harassment and Discrimination: A Guide to Developing a Policy for Law Firms*[6] ;
f. *Sexual Orientation and Gender Identity: Creating an Inclusive Work Environment- Model Policy for Law Firms and Other Organizations*[7] ;
g. *Respect for Religious and Spiritual Beliefs: A Statement of Principles of the Law Society of Upper Canada*[8] ;
h. *Dialogue with Lawyers: Religious and Spiritual Beliefs and the Practice of Law*[9] .

5. The *Pregnancy and Parental Leaves and Benefits for Professional Legal Staff and Law Firm Equity Partners* model policy for law firms and legal organizations was developed to complement other resources available to the legal profession.

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[6] *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). This document was adopted to guide law firms in taking a proactive approach and having an effective complaints mechanism in place to address 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.
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[7] *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, May 2004). The Law Society published this model policy for law firms and other legal organizations as an initiative to promote equality for gay, lesbian, bisexual, Two-Spirited and transgender individuals within the legal profession.
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[8] *Respect for Religious and Spiritual Beliefs: A Statement of Principles of the Law Society of Upper Canada* (Toronto: Law Society of Upper Canada, March 2005). The Statement of Principles presented in this document promotes respect for religious diversity and condemns religiously motivated hatred and discrimination based on religion. The report includes a discussion of the meaning of "religion" and "creed", the religious demographic profile of Canada and Ontario, legal developments in Ontario and Canada, and the international position on this issue. The report also presents the Law Society's statement of principle.
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[9] *Dialogue with Lawyers: Religious and Spiritual Beliefs and the Practice of Law* (Toronto: The Law Society of Upper Canada, April 2005). This document is a companion piece to the *Respect for Religious and Spiritual Beliefs: A Statement of Principles of the Law Society of Upper Canada* and includes interviews with a cross-section of the legal profession about the relationship between their faith/spiritual belief(s) and practices, the rule of law and legal practice.
Available at http://www.lsuc.on.ca/about/b/equity/publications-and-reports/

6. The Equity Advisory Group, a number of partners and associates of large, medium and small law firms, and law firm directors of students and associates have reviewed the policy. The model policy was revised to incorporate proposed changes.

7. On June 8, 2006, the Committee adopted the model policy presented at Appendix 1.

APPENDIX 1

THE LAW SOCIETY OF UPPER CANADA

PREGNANCY AND PARENTAL LEAVES AND BENEFITS FOR PROFESSIONAL LEGAL STAFF AND LAW FIRM EQUITY PARTNERS

A MODEL POLICY FOR LAW FIRMS AND LEGAL ORGANIZATIONS

June 22, 2006

INTRODUCTION

This document includes a model policy that has been drafted to guide law firms and legal organizations in providing leaves and benefits to professional legal staff[1] and equity partners wishing to spend time with their newborn or newly adopted children.

The availability of pregnancy[2] and parental leaves, as well as related benefits, varies greatly within the legal profession. Some lawyers are eligible for benefits provided under federal and/or provincial legislation while others are not. Some firms have policies that exceed statutory minimum standards, while others require that individual lawyers negotiate leaves and benefits with management on a case-by-case basis. The Law Society encourages law firms and organizations to provide pregnancy and parental leaves and benefits to their professional legal staff and equity partners, and to adopt policies that clearly define the extent of the leaves and benefits and outline processes for requesting and granting such leaves and benefits.

Without a written pregnancy and parental leaves and benefits policy (hereinafter "pregnancy\parental leave policy"), decisions are more likely to be made arbitrarily and on an ad hoc basis, resulting in inconsistent decision-making processes, lack of transparency and even discriminatory practices.

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[1] Although this document focuses on professional legal staff and equity partners, law firms and legal organizations are encouraged to provide pregnancy and parental leaves and benefits to staff who are not professional legal staff or equity partners.

[2] In this document, unless otherwise specified, the term "pregnancy leave" has the same meaning as "maternity leave" and the term "pregnancy benefits" has the same meaning as "maternity benefits".

Since the late 1990's, over half of the province's law school graduates are women. Yet women continue to leave the profession at a much higher rate than men. Studies have noted that women in the legal profession often delay having children because of the impact it might have on their careers.[3] Research findings also show that lawyers with children encounter a lack of workplace support to accommodate childcare responsibilities, which has a greater impact on women who still assume the greater share of those responsibilities.[4] To this end, law firms are encouraged to be proactive in adopting pregnancy/parental leave policies that provide pregnancy leaves and benefits to female lawyers and parental leaves and benefits to lawyers of either sex. Such policies promote equality for men and women in the legal profession and assist parents with family responsibilities.

The *Ontario Human Rights Code*[5] and Rules 5.03 (Sexual Harassment) and 5.04 (Discrimination) of the *Rules of Professional Conduct* [6] promote equality in the workplace by prohibiting discrimination and harassment. The Code and the Rules outline the following legal obligations, which are described in this report:

a. Law firms and legal organizations, like all Ontario employers, must ensure a workplace where all are treated equally without discrimination and harassment, including discrimination and harassment on the grounds of pregnancy and/or sex;
b. Law firms and legal organizations have a duty to accommodate, up to the point of undue hardship, differences that arise from personal characteristics enumerated in the Code, including pregnancy and/or sex.

This document provides information for law firms and legal organizations about their legal obligations to provide leaves and benefits to new parents, and to accommodate the needs of professional legal staff and equity partners. The document also includes a model policy that may be used as a precedent by law firms and legal organizations. Firms and organizations may adapt the principles and procedures proposed in the model policy to reflect their own organizational needs, culture and practices.

This report is divided as follows:

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[3] Fiona Kay et al., *Turning Points and Transitions: Women's Careers in the Legal Profession* (Toronto: Law Society of Upper Canada, 2004) [*Turning Points and Transitions* report].

[4] See for example Fiona Kay, *ibid.* and Fiona Kay et al., *Diversity and Change: The Contemporary Legal Profession in Ontario* (Toronto: Law Society of Upper Canada, 2004) [*The Contemporary Legal Profession* report].

[5] *Ontario Human Rights Code*, R.S.O. 1990, c.H.19 [the *Code*].

[6] *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, November 1, 2000) [the *Rules*].

VI. MODEL POLICY FOR PREGNANCY AND PARENTAL LEAVES AND BENEFITS FOR PROFESSIONAL LEGAL STAFF AND EQUITY PARTNERS

I. 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*."[7] It is now well established that the adoption of effective policies and procedures to promote equity and diversity and the design and delivery of education programs for employees of organizations such as law firms have the potential of limiting harm and consequently reducing the liability of employers.[8]

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 professional legal staff and equity partners of the law firm.
2. Written policies show that the law firm's management takes seriously its legal and professional obligations.
3. Many firms provide pregnancy and parental leaves and benefits over and above those mandated by law, but do so on an *ad hoc* basis. The lack of established criteria and process in the decision-making process might cause concern among professional legal staff and equity partners. Written policies increase the likelihood the decision-making process will be fair, objective and transparent.
4. Written policies on equity issues encourage respect for members of diverse communities, such as those protected under the *Code* and the *Rules*. In the context of employment and contractual agreements, such as partnership agreements, the *Code* and the *Rules* promote equality and protection against harassment and discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (not protected in the context of contracts), marital status, family status and/or disability.
5. The existence of written policies allows the law firm to communicate its commitment to equity principles to people outside of the law firm, such as prospective recruits and clients.
6. Written policies minimize the risk of workplace harassment or discrimination and of harm to individual employees, as well as the risk that a law firm will be held liable for such unlawful harassment or discrimination.
7. Written policies may provide the necessary focus for education programs on preventing and responding to overt, subtle or systemic workplace harassment and discrimination.

II. CHALLENGES FACED BY MEMBERS OF THE LEGAL PROFESSION

Many parent lawyers who assume childcare responsibilities face challenges in managing their personal responsibilities and maintaining fulfilling legal careers. A recent Catalyst Canada report notes "Today, across many industries, men and women report greater instances of work-life

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[7] *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: Ontario Human Rights Commission, November 23, 2000) at 41.

[8] For example, see *Ferguson v. Meunch Works Ltd.* (1997), 33 C.H.R.R. D/87 (B. C. H. R. T.).

conflict and role overload, along with higher rates of stress, burn-out, and absenteeism. Reasons for these trends include growing competition and client demands, lean staffing and the advent of a 24/7 mentality that often accompanies new technology."[9]

With the greater number of women in the profession, firms must address the reality that women joining private practice must often manage the demands of the most critical years of career development with their optimal childbearing years. Both male and female members of the legal profession who wish to have families and a fulfilling career face serious challenges. Studies reviewed and undertaken by the Law Society since 1989 indicate that a significant source of dissatisfaction in the profession is the lack of support and benefits for lawyers who take time off for pregnancy and parental leaves:

1. The 2004 *Turning Points and Transitions* report[10] provides the findings of a longitudinal study of lawyers called to the Ontario Bar between 1975 and 1990. The findings reveal that sizable gaps remain between men and women in salaries, promotion opportunities and job satisfaction. The study indicates that women in private practice are likely to delay having children. They also assume a larger share of childcare responsibilities than men and they encounter a lack of workplace supports to accommodate family responsibilities. Men are also more likely to be partners and more likely to be senior partners than women, while women are more likely to be in alternative forms of partnerships.[11]
2. Catalyst Canada, a research and advisory organization working to advance women in business, has studied the issue of work life balance within the legal profession. Key findings of Catalyst Canada indicate that, of associates surveyed, 62% of women and 47% of men intend to stay with their firms for five years or less. Respondents indicate that the top factors for choosing to work at another firm are an environment more supportive of family and personal commitments, and more control over work schedules.[12] Catalyst also found that female partners, female associates, and male associates perceive and experience the law firm work environment differently than male partners. Female lawyers feel the challenge of managing work and personal/family disproportionately, especially female associates. Catalyst also notes "Fourty-two percent of men lawyers with children report they have spouses who do not work outside the home, in comparison to ten percent of women lawyers with children. Of those male lawyers with children and a spouse who does not work outside the home (76 percent of whom are partners), 49 percent express difficulty managing the demands of work and personal/family life, in comparison to 74 percent of female lawyers with children and a spouse employed full-time (48 percent of whom are partners).[13]

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[9] Catalyst Canada, *Beyond a Reasonable Doubt: Creating Opportunities for Better Balance* (Toronto: Catalyst Canada, 2005) at 38 [*Creating Opportunities*].

[10] Fiona Kay, *Turning Points and Transitions, supra* note 3.

[11] *Ibid.*

[12] *Creating Opportunties, supra* note 9.

[13] *Ibid.* at 15.

3. In 2001, the Law Society conducted a survey of students who had undergone articling recruitment for 2001-2002 to evaluate whether firms ask inappropriate or discriminatory questions during the recruitment process.[14] Twenty percent of the respondents stated that they were asked inappropriate questions during at least one interview. Students reported being asked about their marital status and plans to have children. It was also insinuated that female lawyers are a liability when they take pregnancy leaves.
4. Convocation established the Discrimination and Harassment Counsel program in 1999 to confidentially assist anyone who may have experienced harassment or discrimination by a lawyer or within a law firm. Nine percent (9%) of harassment and discrimination complaints between January 1, 2003 and December 31, 2005 were made on the basis of pregnancy.[15] Incidents reported include being asked at an interview for an associate's position whether the candidate is pregnant; being told that one's partnership prospects would be detrimentally impacted by taking too many pregnancy leaves; being pressured to work while on leave; being asked to return to work before the end of the leave; being told to hire a full-time nanny or the individual's partnership prospects would be adversely impacted. Women who are articling students, associates and partners have raised these concerns.

In light of these findings, the Law Society has undertaken initiatives to promote equality in the legal profession.

III. MODEL POLICIES AND RESOURCES PROVIDED BY THE LAW SOCIETY

In the last decade, the Law Society has adopted a number of model policies and produced resources to promote equality within the legal profession. Some of these model policies may be used to complement a pregnancy/parental leave policy. These include:

Guide to Developing a Policy Regarding Workplace Equity in Law Firms[16]

This guide includes a model policy for the promotion of workplace equity. Topics discussed include recruitment practices, interviewing candidates, hiring and promotion, the right to equal opportunities at work, professional development, the duty to accommodate, mentoring and compensation.

Available at http://www.lsuc.on.ca/about/b/equity/model-policies/

Also available in French at http://www.lsuc.on.ca/fr/about-the-society/b/promoting-equity-and-diversity/model-policies/

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[14] *Summary of Students Hiring Practice Guidelines* (Toronto: Law Society of Upper Canada, May 2003).

[15] *Report of the Activities of the Discrimination and Harassment Counsel for the Law Society of Upper Canada – July 1, 2005 to December 31, 2005* (Toronto: Law Society of Upper Canada, 2005).

[16] *Guide to Developing a Policy Regarding Workplace Equity in Law Firms* (Toronto: Law Society of Upper Canada, updated March 2003).

Guide to Developing a Law Firm Policy Regarding Accommodation Requirements[17]

This document sets out an employer's legal duty to accommodate employees' creed and religious beliefs, disability, as well as gender and family status. It includes examples and model procedures for requesting and granting accommodations.

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Accommodation of Creed and Religious Beliefs, Gender Related Accommodation and Accommodation for Persons with Disabilities- Legal Developments and Best Practices[18]

This document is a companion piece to the *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 at http://www.lsuc.on.ca/about/b/equity/model-policies/

Guide to Developing a Policy Regarding Flexible Work Arrangements[19]

One way 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 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.

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Preventing and Responding to Workplace Harassment and Discrimination: A Guide to Developing a Policy for Law Firms[20]

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[17] *Guide to Developing a Law Firm Policy Regarding Accommodation Requirements* (Toronto: Law Society of Upper Canada, March 2001).

[18] *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, updated December 2004).

[19] *Guide to Developing a Policy Regarding Flexible Work Arrangements* (Toronto: Law Society of Upper Canada, updated March 2003).

[20] *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).

This document was adopted to guide law firms in taking a proactive approach and having an effective complaints mechanism in place to address 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.

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The Law Society published this model policy for law firms and other legal organizations as an initiative to promote equality for gay, lesbian, bisexual, Two-Spirited and transgender individuals within the legal profession.

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Respect for Religious and Spiritual Beliefs: A Statement of Principles of the Law Society of Upper Canada[22]

The Statement of Principles presented in this document promotes respect for religious diversity and condemns religiously motivated hatred and discrimination based on religion. The report includes a discussion of the meaning of "religion" and "creed", the religious demographic profile of Canada and Ontario, legal developments in Ontario and Canada, and the international position on this issue. The report also presents the Law Society's statement of principle.

Available at http://www.lsuc.on.ca/about/b/equity/publications-and-reports/

Also available in French at http://www.lsuc.on.ca/media/mar1005antisemitismfre.pdf

Dialogue with Lawyers: Religious and Spiritual Beliefs and the Practice of Law[23]

This document is a companion piece to the *Respect for Religious and Spiritual Beliefs: A Statement of Principles of the Law Society of Upper Canada* and includes interviews with a

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[21] *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, May 2004).

[22] *Respect for Religious and Spiritual Beliefs: A Statement of Principles of the Law Society of Upper Canada* (Toronto: Law Society of Upper Canada, March 2005).

[23] *Dialogue with Lawyers: Religious and Spiritual Beliefs and the Practice of Law* (Toronto: The Law Society of Upper Canada, April 2005).

cross-section of the legal profession about the relationship between their faith/spiritual belief(s) and practices, the rule of law and legal practice.

Available at http://www.lsuc.on.ca/about/b/equity/publications-and-reports/

IV. LEGAL REQUIREMENTS - AN OVERVIEW[24]

While law firms should take into account economic considerations when developing policies for their professional legal staff and equity partners, they should also consider the value of adopting policies that provide pregnancy and parental leaves and benefits. Catalyst Canada's findings show that "the average total cost of an associate's departure is $315,000, approximately twice the average associate's salary."[25] Catalyst also notes that numerous studies across industries have shown that "the exit of employees impacts organizations in terms of out-of-pocket expenses, loss of intellectual capital, and, ultimately, an organization's bottom line."[26] Adopting policies to support women during their childbearing years, and to assist women and men in balancing the demands of their career and family responsibilities, have long-term benefits for law firms and legal organizations, and promote equality, human dignity and respect.
The following outlines legal obligations in the employment context, and in the context of contractual agreements between equity partners, that relate to pregnancy and parental leaves and benefits.

1. Human Rights Obligations

Law firms and legal organizations have legal obligations under provincial and/or federal human rights legislation and case law, and lawyers are bound by rules that promote human rights under the Law Society's Rules of Professional Conduct. The following provides an overview of these obligations.

a. *Ontario Human Rights Code, Canadian Human Rights Act and Rules of Professional Conduct– Who is Covered?*

The *Canadian Human Rights Act (CHRA)*[27] applies to federally regulated employers or service providers. These include federal departments, agencies and Crown corporations, chartered banks, airlines, television and radio stations, inter-provincial communications and telephone companies, buses and railways that travel between provinces, First Nations and other federally

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[24] The legal developments are accurate at the date of writing. However, employment legislation and the accompanying regulations change frequently. It is important that firms monitor legal changes to ensure that the information contained in their policy remains accurate and current.

[25] *Beyond a Reasonable Doubt: Building the Business Case for Flexibility* (Toronto: Catalyst Canada, 2005) at 9 [the *Business Case* study].

[26] *Ibid.* at 9. Catalyst refers to the NALP Foundation for Law Career Research and Edcucation, *Keeping the Keepers*, 2003 and Abraham Sagie, Assa Biranti, and Aharon Tziner, "Assessing the Costs of Behavioral Psychological Withdrawal: A New Model and Empirical Illustration" (2002) 51 *Applied Psychology: An International Review* 67-89.

[27] *Canadian Human Rights Act,* R.S. 1985, c. H-6 [*CHRA*].

regulated industries, such as certain mining operations. The *CHRA* also applies to some private sector employers under federal jurisdiction. Therefore, the provisions of the *CHRA* bind federally regulated legal organizations, such as federally regulated legal clinics.

The *Code* applies to everyone in Ontario with respect to services, goods and facilities, occupancy, contracts, employment, vocational associations and accommodations, unless the *CHRA* applies.[28] All employment relations, including those governed by a collective agreement, are subject to the *Code*. Therefore, law firms and legal organizations in Ontario are subject to the *Code*, and the *Code* applies to all employees of the law firm or legal organization, including associates, salaried lawyers, in-house counsel, and articling students. The *Code* also applies to partnership agreements or contractual agreements between law firm partners.

In addition to the CHRA and the *Code*, members of the Law Society of Upper Canada are bound by the obligations outlined in the *Rules*.

b. Discrimination because of Pregnancy is Illegal

The Supreme Court of Canada (S.C.C) has clearly established, in *Brooks v. Canada Safeway*[29] , that discrimination because a woman is, or may become, pregnant is discrimination on the ground of sex and is illegal. In that case, a group of pregnant women were not entitled to receive sickness benefits for the ten-week period before giving birth and ending the sixth week after giving birth. During that seventeen-week period, pregnant women, even if they suffered from an ailment totally unrelated to pregnancy, were not entitled to any compensation under the plan. The S.C.C held that the women's disentitlement during the seventeen weeks of pregnancy leave resulted in unfavourable treatment when compared to other employees' entitlements to receive benefits for other health-related reasons. The Court found that pregnancy, while not properly characterized as a sickness or an accident, is a valid health-related reason to be absent from work and the pregnant employees should have been entitled to benefits under the employer's plan. The Supreme Court of Canada held that discrimination on the basis of pregnancy is sex discrimination.

The decision in *Brooks* was extended in the Alberta Queen's Bench decision *Alberta Hospital Association v. Parcels* [30], and later in the Ontario Court of Appeal decision *Ontario Secondary School Teachers' Federation, District 34 v. Essex County Board of Education*[31] . The courts in those cases found that pregnancy leaves have both health-related and non-health-related components and that treating the portion that is health-related as though it were different from any other absence from work for a health-related cause is discriminatory. Employers have a duty to compensate employees as they would be compensated if absent for any other health-related cause.

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[28] Part I, Sections 1, 2, 3, 4, 5, and 6 of the *Code, supra* note 5.

[29] *Brooks v. Canada Safeway*, [1989] 1 S.C.R. 1219 (S.C.C)

[30] *Alberta Hospital Association v. Parcels,* [1992] A.J. No. 320 (Alta Q.B.) [*Parcels*].

[31] *Ontario Secondary School Teachers' Federation, District 34 v. Essex County Board of Education* [1998] O.J. No. 3368 (C.A.).

Provincial and federal human rights legislations expressly prohibit discrimination based on pregnancy. The *Code* states "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".[32] Therefore, discrimination in employment or in the context of partnerships, because a woman is or may become pregnant is clearly illegal. Discrimination in employment or in the context of partnerships on the grounds of sex, sexual orientation, marital status and family status is also prohibited under the *Code*.[33]

The provisions of the *CHRA* in the context of employment are similar to those found in the *Code*. The *CHRA* specifies that where there is discrimination on the ground of pregnancy or childbirth, the discrimination is deemed to be on the ground of sex.[34] The *CHRA* prohibits discrimination on enumerated grounds, including sex, sexual orientation, marital status, and family status.[35] The *CHRA* also makes employer policies, practices or agreements illegal if they deprive an employee or a class of employees from any employment opportunity on a prohibited ground.[36]

The *CHRA* outlines exceptions to the prohibition to discriminate, including the exception that "it is not discrimination where an employer, employee organization or employer organization grants a female employee special leave or benefits in connection with pregnancy or childbirth or grants employees special leave or benefits to assist them in the care of their children."[37] Therefore, employers may adopt workplace pregnancy leave policies that entitle women to special leaves and benefits in the context of pregnancy, childbirth and care of their children.

As mentioned above, the *Rules of Professional Conduct* apply to members of the Law Society of Upper Canada. Rule 5.04 places a special responsibility on lawyers to adhere to the tenets of human rights law and in particular to respect the obligation not to discriminate on a ground enumerated in the *Rules* and the *Code*.[38] Lawyers must not sexually harass or discriminate on the grounds of, for example, sex, sexual orientation, marital status or family status.

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[32] *Code, supra* note 5, s. 10(2).

[33] *Code*, *supra* note 5, s. 5(1).

[34] Section 3(2) of the *CHRA, supra* note 27.

[35] See sections 3(1) and 7(b) of the *CHRA, ibid.*

[36] Sections 10(a) and 10(b) of the *CHRA, ibid.*

Section 10 provides: It is discriminatory practice for an employer, employee organization or employer organization
(a) to establish or pursue a policy or
(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

[37] S. 15 (1)(f) of the *CHRA, ibid.*

[38] Rule 5.04(1) states " 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

A significant number of complaints made to the Discrimination and Harassment Counsel Program each year are complaints of discrimination or harassment on the basis of pregnancy. Between January 1, 2003 and December 31, 2005, nine percent (9%) of harassment and discrimination complaints were made on the basis of pregnancy. [39]

c. Employers Have a Duty to Accommodate

The *Code* imposes a duty to accommodate, to the point of undue hardship, differences that arise from personal characteristics enumerated in the *Code*. Section 11 of the *Code* indicates that where a requirement, qualification or factor exists that results in the exclusion, restriction or preference of a group of persons, the requirement, qualification of factor is not a violation of the *Code* if it is reasonable and *bona fide* in the circumstances.[40] The Human Rights Commission, in its *Policy on Discrimination Because of Pregnancy and Breastfeeding*[41] , explains "In order for a requirement to be reasonable and bona fide in the circumstances, it must be shown that the needs of the particular group protected under the *Code* cannot be accommodated "short of undue hardship". "Short of undue hardship" is a standard that applies to the person required to make the accommodation, and takes into consideration costs, outside sources of funding, and health and safety factors."

The commentary to Rule 5.04 also discusses the 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.

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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". *Rules, supra* note 6.

[39] The *Report of Activities of the Discrimination and Harassment Counsel, January 1, 2005 to December 31, 2005, supra* note 15. Available on-line at: http://www.lsuc.on.ca/media/convfeb06_equity_report.pdf

[40] Section 11(1) of the *Code, supra* note 5, provides as follows:

> 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

[41] (Toronto: Human Rights Commission, revised 2001). Available on-line at www.ohrc.on.ca.

The *CHRA* also imposes a duty on employers to accommodate, to the point of undue hardship, differences that arise form personal characteristics enumerated in the Act.[42]

> 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.
>
> 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 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.[43]
>
> Section 17 of the *Code* 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.[44]

The Supreme Court applies the following three-step analysis when considering whether a standard is discriminatory[45] :

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[42] See section 15 1 (a) and (2) of the *CHRA, supra* note 27.
Section 15**.** (1) It is not a discriminatory practice if (*a*) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement […]

(2) For any practice mentioned in paragraph (1)(*a*) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in paragraph (1)(*g*) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

[43] *Code, supra* note 5.

[44] Section 17 of the *Code, ibid.,* 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.).

[45] *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.[46]

In Ontario, the Court of Appeal has adopted the three-step analysis set out by the Supreme Court of Canada.[47]

The Human Rights Commission provides the following examples of how special needs during the pre-natal and post-natal period can be accommodated, short of undue hardship:[48]

- An employee may be temporarily relocated to another work station or location or re-assigned to alternative duties.
- A flexible work schedule can be provided to accommodate medical appointments, including treatment for infertility.
- Breaks can be allowed as necessary. It is a general human rights principle that persons should not experience disadvantage owing to needs related to prohibited grounds of discrimination. Therefore, employees who require breaks, such as for pumping or breastfeeding, should normally be accorded those breaks, and not be asked to forgo normal meal breaks as a result, or work additional time to make up for the breaks, unless the employer can show undue hardship.
- A supportive environment can be provided for a woman who is breastfeeding. Accommodation may mean allowing the care-giver to bring the baby into the workplace to be breastfed, making scheduling changes to permit time to express milk or breastfeed at work, and providing a comfortable, dignified and appropriate area so that a woman can breastfeed, or express and store breast milk at work. In some special cases, it may involve permitting a leave of absence.
- A supportive environment can be created with minimum disruption.

Section 5 of the *Code*[49] prohibits discrimination on the basis of family status within employment, and section 10 of the *Code* defines 'family status' as "the status of being in a parent and child relationship". Case law has interpreted these provisions to include an obligation

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[46] 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).
[47] *Entrop v. Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18 (Ont. C.A.).

[48] *Policy on Discrimination because of Pregnancy and Breastfeeding*, *supra* note 41.

[49] *Supra* note 5.

for employers to accommodate employees' significant family responsibilities. It should be noted however, that not every aspect of care in a parent and child relationship is entitled to accommodation at work, and that the exact accommodation required can vary greatly depending on the exact context. Three cases that have applied provisions related to accommodation for employees with family responsibilities are summarized below.

In *Brown v. Canada (Department of National Revenue, Customs and Excise)*[50] , the complainant could not find a babysitter to look after her newborn child overnight. Both her and her husband were required to work shifts, and her husband could not regularly adjust his shift work to fit in with hers. The complainant requested that she be accommodated by being put on straight day shifts or by being allowed to go on an unpaid care and nurturing leave. The tribunal noted the obvious dilemma facing the modern family where present socio-economic trends find both parents in the work environment, often with different rules and requirements. More often than not, the female parent is the one required to strike a balance between family needs and employment requirements. Family status means a parent's right and duty to strike a balance coupled with a duty on the part of the employer to facilitate and accommodate that balance.

In the case of *Wight v. Ontario (Office of the Legislative Assembly)*,[51] a new mother at the end of her pregnancy leave had difficulty securing a day care placement in the regulated day care centre of her choice. She made no substantial efforts to secure alternate child care arrangements and refused to return to work until getting a day care placement at the facility of her choice. Although the employer offered her another two weeks of leave, it would be months before she could get the daycare placement. The board found that it is not unreasonable for an employer to expect an employee to return to work at the end of a leave, and to expect the employee to do what is necessary to ensure return. In this case, the complainant steadfastly refused to take any alternate steps or change her plans to seek an alternative daycare. The complainant was seeking accommodation that would relieve her of her obligation to return to work at the end of the leave, and this is not required under the law. Accommodation in such a case is meant to assist a person returning to work. There are obligations on the employee, not just the employer, to cooperate in the accommodation process and show some willingness to be flexible.

Most significantly, a British Columbia Court of Appeal case[52] has confirmed that the protected ground of 'family status' means that at least some family care obligations will be protected under human rights legislation. Therefore, employers have a duty to accommodate parents and children with those family care obligations that are protected.

Although the court in *Campbell River* found that the enumerated ground of 'family status' does not refer only to the status of being a parent or child per se, it also ruled that 'family status' does not necessarily encompass all of the everyday obligations of care in the relationship between parent and child. The appropriate determination of what falls under 'family status' is somewhere

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[50] [1993] C.H.R.D. No. 7, No. T.D. 7/93

[51] [1998] O.H.R.B.I.D. No. 13.

[52] *Health Services Assn. of British Columbia* v. *Campbell River and North Island Transition Society,* [2004] B.C.J. No. 922, 2004 B.C.C.A. 260 [hereinafter *Campbell River*]. Although this case is decided under British Columbia legislation, the wording of the statute with regards to family status is substantially the same as that under the Ontario *Human Rights Code*.

between these two extremes. Specifically, the court noted that 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."[53] The court stated that the determination of whether a family duty meets this standard will vary from case to case, but noted that on the facts of that particular case, the employer had a duty to accommodate the parent whose child had a major psychiatric disorder that required the mother's attendance during after school hours.

These three cases mean that any employee in a parent and child relationship may seek accommodation from their employer with regards to their substantial parental or other family duty or obligation. The exact form of the accommodation however will vary greatly from case to case. Examples of typical accommodation for persons with substantial duties of care may include arrangements such as flexible work schedules, compressed workweeks, reduced hours, and flexible leave policies.

Although an employee may have a right to accommodation on the basis of their substantial care obligations arising from an event such as the care of a newborn, that employee is not necessarily entitled to the accommodation of their choice. As with all other forms of accommodation, the employee has an obligation to remain engaged with the employer in the discussion about the most appropriate form of accommodation. In many cases, the exact terms of the accommodation are often something that will have to be negotiated between the parties.

2. Obligations to Provide Leaves and Benefits

Employers' obligations to provide pregnancy and parental leaves and benefits are found under the *Employment Standards Act, 2000* [*ESA*][54] and the *Employment Insurance Act, 1996 [EIA]* .[55] The rights and obligations under the *ESA* and the *EIA* are described below.

a. <u>Employment Standards Act</u>

Employed lawyers are subject to Part XIII ("Benefit Plans") and Part XIV ("Leaves of Absence")[56] but exempt from Parts VII to XI of the *ESA*.[57] Subject to these exceptions, the *ESA* applies to an employee and his or her employer if the employee's work is performed in Ontario, or the work performed outside of Ontario is a continuation of work performed in Ontario.

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[53] *Ibid.* at para. 39.

[54] S.O. 2000, c. 41.

[55] 1996, c. 23.

[56] *Exemptions, Special Rules and Establishment of Minimum Wage,* O. Reg. 285/01 (amended to O. Reg. 401/03) exempts members of the legal profession from Parts VII to XI of the *ESA*. Section 3(2) of the *ESA, supra* note 54, exempts employees whose employment is within the legislative jurisdiction of the Parliament of Canada. Section 3(4) exempts Crown employees from many portions of the Act, however, they are subject to Parts XIII ("Benefit Plans") and XIV("Leaves of Absence").

[57] Part VII is Hours of Work and Eating, Part VIII is Overtime Pay, Part IX is Minimum Wage, Part X is Public Holidays, and Part XI is Vacation with Pay. *ESA, ibid.*

The *ESA* does not apply to employees employed in organizations that fall within the legislative jurisdiction of the Parliament of Canada, and employees of embassies or consulates of foreign nations. Furthermore, the *ESA*[58] exempts persons in Ontario who hold political, judicial or religious office, are members of quasi-judicial tribunals, who hold an elected office in an organization including a trade union.

The *ESA* sets out the minimum threshold for employment standards. It is expressly prohibited to contract out of the standards of the *ESA*.[59]

Part XIV of the *ESA* governs leaves of absence from the workplace, including pregnancy and parental leaves. The purpose of the legislation is to protect an employee's position while on leave. An employer is statutorily obligated to grant qualifying employees a pregnancy and/or parental unpaid leave if such is requested. The employer has no obligation to provide for paid leaves under Part XIV of the *ESA*.

The *ESA* guarantees reinstatement for those returning to work at the end of the leave to the position the employee held prior to taking the pregnancy or parental leave.[60] In *Elementary Teachers Federation of Ontario v. Toronto District School Board* [61], the Ontario Court of Appeal held that the duty to reinstate an employee to her previous position does not extend to the type of subject she was assigned to teach. In this case, the teacher's position as a Senior French teacher was filled while she was on pregnancy leave. When the teacher returned to work, she was informed that she would teach Senior Science instead of Senior French. Although qualified to teach Science, she declined the assignment and remained on leave until she was reassigned to teach Senior French. The Court held that the *ESA* can be interpreted to mean that, upon the return to work, the employer has a duty to assign the teacher to a position she is qualified to perform, but does not have a duty to assign her to teach the same subject. Because principals of schools generally have the discretion to assign subject matters taught by teachers, an

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[58] *Ibid*. Part III, ss. 3 (1)(2)(3)(4) (5) (6) ss 4(1)(2)(3)(4)(5) and 5(1).

[59] See section 5(1) of the *ESA., ibid.* Where an employment agreement offers a greater benefit to an employee than the standards set out in the *ESA,* s. 5(2) is paramount to the agreement.

[60] Section 53 of the *ESA, ibid.* states the following:

53(1) Upon the conclusion of an employee's leave under this Part, the employer shall reinstate the employee to the position the employee most recently held with the employer, if it still exists, or to a comparable position, if it does not.

The section does not apply if the employment of the employee is ended solely for reasons unrelated to the leave. 2000, c.41, s. 53(2).
Wage rate (3) The employer shall pay a reinstated employee at the rate that is equal to the greater of

(a) the rate that the employee most recently earned with the employer; and

(b) the rate that the employee would be earning had he or she worked throughout the leave.

[61] *Elementary Teachers Federation of Ontario v. Toronto District School Board*, [2005] O.J. No. 4368 (C.A.).

employee on pregnancy leave does not have the right to choose her teaching assignments when other employees do not have that right.[62]

Section 53 of the *ESA* has been interpreted by courts to emphasize the importance of being reassured that by taking a pregnancy or parental leave one's employment is not in danger of being eliminated.[63]

When calculating an employee's seniority, length of service to the employer and length of employment, the employer must include the length of the leave.[64] While on leave under Part XIV ("Leaves of Absence"), an employee continues to participate in benefit plans unless he or she elects otherwise and notifies the employer in writing.

Where employee benefit plans are paid for in part by the employer and in part by the employee, the employer is obligated to continue to pay the employer's contributions for benefit plans unless the employee gives the employer written notice indicating his or her intention to not pay his or her contributions.[65]

Pregnancy Leave

Entitlement to a pregnancy leave under the ESA is automatic unless the employee's due date falls fewer than 13 weeks after she began employment.[66]

If also entitled to parental leave, an employee's pregnancy leave will be 17 weeks in length.[67] An employee who is not eligible to parental leave is entitled to pregnancy leave that ends the later of either 17 weeks after the pregnancy leave began or six weeks after a birth, stillbirth or miscarriage.[68]

Section 46(4) of the *ESA* provides procedures for giving notice and changing the date of the notice, along with contingent procedures in the event of unforeseen complications related to the pregnancy.[69]

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[62] *Ibid.*

[63] In *Ontario Public Service Employees Union, Local 458 v. Open Hands Inc.*, [2000] O.J. No. 1651, the Ontario Superior Court of Justice held that section 43(1) (as it was then), was not satisfied by returning an employee to the same classification at a different location and facility.

[64] *ESA, supra* note 54, s. 52(1).

[65] *Ibid*. s.51 (1)-(3).

[66] *Ibid*. s. 46(1).

[67] *Ibid*. s. 47(1)(a).

[68] *Ibid.* s. 41(1)(b)(i) and (ii).

[69] S. 47(2) of the *ESA, ibid.,* provides: "An employee may end her leave earlier than the day set out in subsection (1) by giving her employer written notice at least four weeks before the day she wishes to end her leave".

Parental Leave

The following outlines parental leave entitlements under the *ESA*. An employee who has been employed by his or her employer for at least 13 weeks is entitled to take a parental leave.[70] A parental leave may be taken following either the birth of a child or the coming of the child into the employee's custody, care and control for the first time.[71]

The length of the parental leave is contingent on whether or not the employee took a pregnancy leave. When that is the case, the parental leave is limited to 35 weeks. If no pregnancy leave has been taken, the employer must allow the employee to take up to 37 weeks of leave of absence.[72]

If an employee has taken a pregnancy leave, she must commence her parental leave when the pregnancy leave ends, unless the child has not yet come into her custody, care and control for the first time.[73]

In the event that an employee has not taken pregnancy leave, the commencement of parental leave is restricted to no later than 52 weeks after the day the child is born or comes into the custody, care and control of the employee for the first time.[74]

As with pregnancy leaves, procedures for parental leaves, such as giving notice, changing the date of notice and dealing with unexpected arrivals of the child, are proscribed.[75]

An employee may not terminate his or her employment before the end of the parental leave or when it expires without giving the employer at least four weeks written notice, unless the employee is constructively dismissed.[76]

b. Employment Insurance Act[77]

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[70] S. 48(1) of the *ESA, ibid.*

[71] Employees who have step children coming into their custody, care and control may be eligible for parental leave under s. 48(1). The definition of "parent" is found in s. 45 of the *ESA, ibid.*, which states that "parent" includes a person with whom a child is placed for adoption and a person who is in a relationship of some permanence with a parent of a child and who intends to treat the child as his or her own, and "child" has a corresponding meaning."

[72] S. 49(1) of the *ESA, ibid*.

[73] S. 48(3) of the *ESA, ibid.*

[74] S. 48(2) of the *ESA, ibid.*

[75] Section 48(4) of the *ESA, ibid.,* sets out that the employer is entitled to written notice at least two weeks before the leave is to begin. Subsection (5) and (6) govern the procedures for changing the date of commencement of the leave while s. 49(2) and (3) explain how an employee can amend final date of the leave.

[76] *Ibid*. s. 49(4) and (5).

Employees in Ontario that meet the minimum hours requirements of employment under the *EIA* are covered by the Act. It should be noted that the *EIA* does not cover self-employed workers. Therefore, lawyers who are equity partners[78] or sole practitioners are not eligible for parental/pregnancy benefits under the *EAI*. Firms who are drafting pregnancy/parental leave policies should consider the benefits available to employees under the *EIA*.

The *EIA* provides three types of special benefits relevant to birth mothers and/or new parents: pregnancy, parental and sickness benefits.

The *EIA* requires an employee to have accumulated 600 or more hours of insurable employment in order to qualify for the "special benefits" set out in ss. 21 ("Sickness"), 22 ("Pregnancy") and 23 ("Parental Benefits"). Six hundred hours is the equivalent of 15 weeks, assuming a forty-hour work week.

Pregnancy benefits are available to birth mothers only. Parental benefits are available in addition to pregnancy benefits. Either or both parents of a newborn child or of an adopted child may be eligible for parental benefits.

A birth mother may be eligible for sickness benefits in addition to pregnancy and parental benefits. [79]

Since March 3, 2002, a claimant may be eligible to receive benefits for up to a maximum of 65 weeks.[80] Benefits are paid at a rate of 55% of a claimant's weekly earnings.[81] Maximum weekly earnings are set out in s. 14.[82]

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[77] *Supra* note 55.

[78] Non equity partners may be covered by the *ESA* or the *EIA* depending on the agreement with the firm.

[79] Under s. 21 of the *EIA*, *ibid.,* a birth mother may be eligible to claim benefits for up to 15 weeks for either pregnancy or non-pregnancy-related illness.

[80] *Ibid*, s. 23(3.2), (3.21), (3.22), and (3.23). For example, where a birth mother claims benefits for the 15 weeks of pregnancy leave, 35 weeks of parental leave and less than the maximum of 15 weeks sickness benefits, the claimant may claim the unused weeks of sickness benefits. Similarly, where the claimant receives 15 weeks sickness benefits, 15 weeks pregnancy benefits and fewer than the 35 weeks parental benefits entitlement; she may apply to receive benefits for the unclaimed portion of maternity benefits. These examples do not reflect the mandatory, unpaid 2 week waiting period set out in s. 13.

[81] *EIA*, s. 14(1), *idid*.

[82] *EIA, ibid,* s. 14(1.1) (a) states the maximum weekly insurable earnings is $750 if the claimant's benefit period begins during the years 1997 to 2000; and s. 14(1.1)(b) states it the claimant's benefit period begins in a subsequent year, the maximum yearly insurable earnings divided by 52.

The following sections describe the benefits available for pregnant employees as well as new parents of either sex.

Pregnancy Benefits

Following a two week unpaid waiting period,[83] a pregnant employee is entitled to 15 weeks of paid pregnancy benefits.[84]

Pregnancy benefits are to be collected within 17 weeks of the later of the week of expected confinement or the actual confinement. Where the newborn child is hospitalized, a claimant can delay receiving maternity benefits for up to 52 weeks.

Parental Benefits

Parental benefits are available for a maximum of 35 weeks.[85] They may be claimed by one of the parents or both may share them. Where the benefits are divided between both parents, only one has to serve the two-week waiting period.[86]

Parental benefits must be taken within 52 weeks of the birth of the child or of the arrival of the child/children into the home. An exception is made in the event of hospitalization of the child, in which case, the benefit period is extended by one week for each week the child is in the hospital, to a maximum of 104 weeks.

Claimants who wish to work part-time while receiving parental benefits may earn the greatest of $50 or 25% of their weekly benefits without a reduction of benefits.[87] Reductions of earnings are made by matching dollar for dollar. [88]

Sickness Benefits

Under the *EIA* a pregnant woman may be entitled to receive up to 15 weeks of sickness benefits in addition to pregnancy and parental benefits.[89]

Employer Supplemental Income Benefits

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[83] This waiting period is similar to a deductible found in most insurance policies.

[84] The waiting period provision is set out in s. 13 while the maximum number of weeks of paid maternity leave is stated in s. 12(4).

[85] *EIA*, *ibid.,* s. 14(1.1)(b).

[86] *Ibid*. s. 23(4) & (5).

[87] *Ibid.* s. 19(2).

[88] *Ibid.* s. 19(3).

[89] S. 22 of the *EIA.*

Since 1993, employers can pay supplemental benefits to the employee, without a reduction of the employee's benefits under the *EIA* (employer supplemental income benefits). The supplemental income benefits paid by the employer are not deemed to be earnings. To avoid a reduction of benefits under the *EIA*, the following two conditions must be met:

- the combined employment insurance benefits plus the supplemental income benefits cannot exceed the employee's normal weekly earnings; and
- the employer supplemental income benefit does not reduce the employee's accumulated sick leave, vacation leave, severance pay or any other accumulated credits.[90]

Additionally, it is essential that the employee's record of employment state that the employer is supplementing the benefits under the EIA.

V. ISSUES TO CONSIDER WHEN DRAFTING POLICIES

1. Firm structure

When drafting a pregnancy/parental leave policy, the firm should take into account factors such as: firm size, types of partnership agreements (equity vs. non-equity partnerships) and contractual agreements with professional legal staff.

2. Compensation and client work

When drafting a pregnancy/parental leave policy, law firms should take into account the compensation schemes for equity partners and professional legal staff to ensure that women and men on leave are not disproportionately economically disadvantaged because they are taking leaves.

The pregnancy/parental leave policy may also explicitly list the employment benefits that will be provided to the equity partner or professional legal staff while on leave.[91] In addition to benefits provided under the *EIA* and *ESA*, law firms are strongly encouraged to provide benefits and support during pregnancy and parental leaves that will ensure that the person on leave is treated with dignity and equality. A maternity/parental leave policy could, for example, include the following:

- Provisions assuring that equity partners and professional legal staff will return to the same level of responsibilities and be reassigned to his or her clients and files;
- Provisions for adequate remuneration/compensation during the leave;
- Provisions for adequate benefits during the leave.

Although a policy should outline minimum entitlements to pregnancy and parental leaves and benefits, employers should also take an individualized approach with each request for leave and

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[90] Section 38 of *Employment Insurance Regulations* SOR/96-332.

[91] Examples of benefits can include medical benefits, pension contribution, and other benefits covered under the employment contract of the professional legal staff.

benefits. Under human rights legislation, and the *Rules of Professional Conduct*, employers have a duty to accommodate special needs of its equity partners and professional legal staff. Each professional legal staff and equity partner who is entitled to benefits under the pregnancy/parental leave policy has needs that should be considered individually in order to determine the support required to ensure that the person will return to a productive career while balancing work and life demands. The firm should consult with the person to determine what he or she needs and how best to accommodate. The firm should always act in a manner that recognizes the privacy, confidentiality, comfort, autonomy and dignity of the professional legal staff or equity partner. There are also obligations on the professional legal staff and the equity partner covered under the policy to cooperate in the accommodation process and show willingness to be flexible. The firm should discuss and agree upon issues such as:

a. the process by which client files, if applicable, are transferred and handled during the professional legal staff or equity partner's leave of absence;

b. the process by which professional legal staff or equity partners will continue to have up-to-date information on the development of files;

c. the process for the return of client files to the professional legal staff or equity partner upon the return to work;

d. support or assistance that may be required by the professional legal staff or equity partner during the leave;

e. support or assistance that may be required by the professional legal staff or equity partner upon return from the leave, such as availability of rooms to breastfeed, flexibility of work schedule, opportunities to work from home;

f. alternative work schedules;

g. timelines for partnership considerations if extended leave of absence or repeated leaves of absence are taken ;[92]

h. other reasonable accommodation which would not cause undue hardship, requested by the equity partner and/or professional legal staff returning to work after pregnancy/parental leave;

i. staffing requirements that would ensure continuity of service during the leave.

When flexible work arrangements are made between the firm and the professional legal staff or the equity partner, the firm and the professional legal staff or equity partner will agree on the following:

a. length of flexible work arrangement;

b. target of billable and non-billable hours;

[92] A firm should be aware that it may be illegal to refuse admission to the partnership because a person has taken pregnancy or parental leaves.

c. proposed work schedule indicating the days when the professional legal staff or the equity partner will generally be available;

d. a proposal responding the use of the firm's facilities and resources, including office space and secretarial support, and other relevant administrative matters; and

e. the economic consequences of the proposed arrangements to the Firm based on overhead, hourly billing rate and targeted billable hours.

3. Importance of management support

The successful implementation of any law firm policy is contingent on the support of the firm's senior lawyers and partners. It is their leadership and attitude that influence the values and goals of the firm. A policy drafted with a positive tone signals that the firm promotes work-life balance for its professional legal staff and equity partners. One of the most persuasive rationales for supporting this policy is the retention of lawyers in whose training and education the firm has greatly invested.[93]

[93] As stated previously, Catalyst has calculated the costs of associates' departure from law firms at an average of $315,000. See *Business Case* report, *supra* note 25.

VI MODEL POLICY FOR PREGNANCY AND PARENTAL LEAVES AND BENEFITS FOR PROFESSIONAL LEGAL STAFF AND LAW FIRM EQUITY PARTNERS

NOTE FOR LAW FIRMS:

The following pages provide a precedent that firms may adapt for their own use. The Model Policy is a precedent for law firms and legal organization of any size. However, firms and legal organizations should take into account economic considerations, the size of their firm, types of partnership agreements (equity vs. non-equity partnerships) and contractual agreements when adapting this precedent.

The Model Policy addresses the most common legal work environment: a firm composed of partners, associates, articling students and other staff or a professional corporation, not subject to a collective agreement. Where a workplace is governed by a collective agreement, modifications may need to be made to the policy.

The Model Policy incorporates pregnancy and parental leave and benefit entitlements for professional legal staff under the *Employment Standards Act (ESA)* and the *Employment Insurance Act (EIA)*. The Model Policy recommends that law firms adopt standards that are more generous than entitlements under the *ESA* and the *EIA*. The Model Policy explains in the text or in footnotes entitlements that are provided under the *ESA* or the *EIA* and those provided by the firm.

The Model Policy is only up-to-date as at the date of writing. When drafting a policy, one should ensure that it takes into account any legislative or jurisprudential changes.

PREGNANCY AND PARENTAL LEAVES AND BENEFITS POLICY FOR _____ (HEREINAFTER "THE FIRM")

APPLICABLE LEGISLATION

1. The Ontario *Human Rights Code*[1] and the *Rules of Professional Conduct* apply to the Firm and prohibit sexual harassment and discrimination based on enumerated grounds, including sex, marital status, family status and sexual orientation. Discrimination because a woman is pregnant or may become pregnant, is prohibited. Unless an accommodation creates undue hardship for the Firm, human rights legislation imposes a duty to accommodate the needs of Professional Legal Staff and Equity Partners that arise from personal characteristics enumerated in the *Code* or the *Rules.*

2. The *Employment Standards Act, 2000 (ESA)* and the federal *Employment Insurance Act (EIA)* outline minimum pregnancy and parental leave and benefit entitlements for Professional Legal Staff. The *ESA* applies to Professional Legal Staff of the Firm who have fulfilled the eligibility requirements under the Act. The EIA applies to Professional

[1] A federally regulated employer is bound by the *Canadian Human Rights Act* and should replace the term Ontario *Human Rights Code* with *Canadian Human Rights Act.*

Legal Staff of the Firm who have fulfilled the eligibility requirements and qualifying period under the *EIA*.

3. This policy outlines the pregnancy and parental leave and benefit entitlements of Professional Legal Staff and Equity Partners that are provided by the Firm, in addition to their rights under the *ESA* and the *EIA*.

DEFINITIONS

4. "Equity Partners' compensation"[2] is the financial compensation provided under this policy to the Firm's Equity Partners during their parental and pregnancy leaves.

5. "Parent" includes a biological mother or father, or a person with whom a child is placed for adoption or a person who is in a relationship of some permanence with a parent of a child and who intends to treat the child as his or her own, and "child" has a corresponding meaning.

6. "Partnership parental leave" means, for the purpose of this policy, a leave taken by an Equity Partner who is a parent, including an adopting parent, from his or her practice when a baby is born or a child first comes into their care.

7. "Partnership pregnancy leave" means, for the purpose of this policy, a leave from her practice taken by an Equity Partner because she is pregnant or she has given birth.

8. "Professional Legal Staff" means associates, employed lawyers and articling students of the Firm.[3] Equity Partners of the Firm are not Professional Legal Staff.

9. "Spouse" means either of two persons who, are married to each other, or either of two persons who live together in a conjugal relationship.

OBJECTIVES

10. The objectives of this policy are as follows:

    a. to advance the principles of equality and human rights in the workplace and to comply with the Firm's human rights obligations;

    b. to recognize the Firm's commitment to the family lives of its Professional Legal Staff and Equity Partners;

    c. to provide for consistent treatment of the Firm's Professional Legal Staff and Equity Partners;

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[2] A firm should use the terminology most commonly used by the firm, such as "income entitlement" or "draw".

[3] A firm could extend this policy to make it applicable to all employees of the firm. Non Equity Partners may, depending on the terms of their contract with the firm, be included under the term Professional Legal Staff.

d. to clarify the expectations of the Firm and its Professional Legal Staff and Equity Partners regarding pregnancy and parental leave and benefits;

e. to minimize the effect of the absence of the Firm's Professional Legal Staff and Equity Partners on client services; and

f. to create an opportunity for a working environment during transition periods before and after taking a leave, which facilitates the maximum productivity of the Professional Legal Staff and Equity Partner and the objective of pregnancy and parental leaves.

APPLICATION OF POLICY

11. This policy applies to all eligible Professional Legal Staff and Equity Partners of the Firm.

12. This policy applies to the offices of the Firm located in Ontario.

PROFESSIONAL LEGAL STAFF

Pregnancy Leave Eligibility and Entitlement

13. The Firm allows 17 weeks[4] pregnancy leave to Professional Legal Staff who are pregnant or who have given birth.

14. A pregnant Professional Legal Staff is entitled to pregnancy leave whether she is a full-time, part-time, permanent or contract staff.[5]

15. A Professional Legal Staff may begin her pregnancy leave 17 weeks before the baby's due date. The latest a Professional Legal Staff may begin her pregnancy leave is the earlier of either the baby's due date or the day on which she gives birth. Once started, the pregnancy leave has to be taken all at one time.[6]

16. If a Professional Legal Staff has a miscarriage or stillbirth, she is eligible for pregnancy leave so long as the miscarriage or stillbirth occurred no more than 17 weeks before the due date.[7]

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[4] The *ESA* provides that employees are entitled to 17 weeks pregnancy leave if they are are pregnant or have given birth. The *ESA* also specifies that to be eligible for pregnancy leave, employees must have been employed at least 13 weeks before the baby's expected birth date. This Model Policy recommends a more generous entitlement by waiving the "13 week period of employment prior to the baby's expected birth date" as a criteria for eligibility for pregnancy leave.

[5] The *ESA* provides that full-time, part-time, permanent and contract staff are entitled to pregnancy leaves.

[6] This is provided in the *ESA.*

[7] This is provided in the *ESA.*

Parental Leave Eligibility and Entitlement

17. The Firm allows parental leave for a Professional Legal Staff who is a birth parent, an adopting parent (whether or not the adoption has been legally finalized), or a person who is in a relationship of some permanence with a parent of a child and who plans on treating the child as his or her own.[8]

18. A parent is entitled to parental leave whether he or she is a full-time, part-time, permanent or contract Professional Legal Staff.[9]

19. The Firm allows parental leaves for the period prescribed by provincial legislation, currently 35 weeks if the person has taken a pregnancy leave, and 37 weeks otherwise.[10] Once a Professional Legal Staff has started parental leave, he or she must take it all at once. A birth mother who takes a pregnancy leave must usually begin her parental leave right after the pregnancy leave ends.[11]

20. Parental leaves, other than the parental leave of the birth mother, must begin and end within the 52 weeks immediately following the date of birth of the child or the date the adopted child comes into the custody and care of the adoptive parents.[12]

21. A Professional Legal Staff who has a miscarriage or stillbirth, or whose spouse has a miscarriage or stillbirth is not eligible for parental leave.[13] However, the Professional Legal Staff is eligible for compassionate leave in accordance with the Firm's policies.[14]

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[8] This is consistent with the *ESA.*

[9] The *ESA* provides that full-time, part-time, permanent and contract staff members are entitled to parental leaves.

[10] The *ESA* provides that employees are entitled to parental leaves if they have been employed at least 13 weeks before the date the leave is going to start. This Model Policy recommends a more generous entitlement by waiving the "13 week period of employment prior to the leave" as criteria for eligibility for parental leaves. Under the *ESA,* law firms have an obligation to provide to eligible employees 35 or 37 weeks of parental leave.

[11] The *ESA* provides that if the baby has not come into her care for the first time by the time the pregnancy leave ends (for example, because the baby was hospitalized and remains in the hospital), she may choose to return to work and start her parental leave once the baby comes home. Law firms may wish to add this provision in their policy.

[12] This is consistent with the *ESA.*

[13] This is consistent with the *ESA.*

[14] The firm may wish to list the policies that apply.

Process to Request Pregnancy and/or Parental Leave

22. A Professional Legal Staff must provide the [Practice Group Leader [15]] and/or the [Director of Human Resources [16]] with reasonable written notice before beginning a pregnancy and/or parental leave. The notice letter includes,

    a. the starting date for the pregnancy or the parental leave; and
    b. on the request of the Firm, a certificate from a medical practitioner stating the baby's due date.[17]

23. A Professional Legal Staff may change the start date or the end date of the leave by giving a new written notice to the Firm at least two weeks before the day the requested change will happen.

24. Prior to departure on leave, the Professional Legal Staff must make appropriate arrangements to ensure files are adequately covered in their absence. The [Practice Group Leader [18]] will assist the Professional Legal Staff with reintegration into practice on return from leave, as described in this policy.

Process when Birth Mother Must Stop Working Earlier than Planned

25. Unless the pregnancy related illness occurs before or after the pregnancy leave period, if the birth mother must stop working earlier than planned because of complications caused by her pregnancy or because of a birth, stillbirth or miscarriage before the baby's due date, she must give the Firm:

    a. written notice, no later than two weeks after she stops working, indicating the day the pregnancy leave began, or will begin; and
    b. on the request of the Firm, a medical certificate supporting her inability to work and stating the baby's due date, or a medical certificate stating the due date and the actual date of birth, stillbirth or miscarriage.[19]

Pregnancy, Parental and Sickness Benefits under the EIA

26. Professional Legal Staff may be eligible for pregnancy, parental or sickness benefits under the *EIA*. An outline of *EIA* entitlements is attached to this policy. Professional Legal Staff are encouraged to contact their Service Canada Centre for further information about their entitlements.

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[15] A firm should use the terminology that is most commonly used by the firm.

[16] A firm should use the terminology that is most commonly used by the firm.

[17] This is a requirement under the *ESA.*

[18] A firm should use the terminology that is most appropriate for the firm.

[19] This is a requirement under the *ESA.*

The Firm's Income Benefits for Pregnancy Leave

27. The Firm will provide income benefits as a supplement to *EIA* pregnancy benefits such that Professional Legal Staff who are on pregnancy leave will continue to receive the equivalent of their [full salary[20]] for the [duration of the leave[21]]. The Firm will provide Professional Legal Staff with their [full salary[22]] for the [duration of the leave [23]] if they are not eligible to receive *EIA* pregnancy benefits.

28. Benefits for a pregnancy-related illness that occurs before or after the pregnancy leave period are available under the Firm's [sickness and disability plan] and/or through the *EIA*, but are not covered by this policy.

Firm's Income Benefits for Parental Leave

29. The Firm will provide income benefits as a supplement to *EIA* parental leave benefits such that Professional Legal Staff who are on parental leaves will continue to receive the equivalent of their [full salary[24]] for [17 weeks[25]]. The Firm will provide Professional

[20] The income benefits supplement to full salary is a recommended amount only. Firms do not have an obligation to provide income benefits supplement to their Professional Legal Staff. However, providing income benefits supplement is a practice that promotes equality in the workplace.

[21] The firm may provide income benefits supplement for a shorter period than the duration of the leave.

[22] Providing full salary to Professional Legal Staff who are not eligible to receive *EIA* benefits is a recommended amount only. Firms do not have an obligation to provide income to their Professional Legal Staff while on pregnancy leave. However, providing an income to Professional Legal Staff on pregnancy leave is a practice that promotes equality in the workplace.

[23] The firm may provide income to their Professional Legal Staff for a shorter period than the duration of the leave.

[24] The income benefits supplement to full salary is a recommended amount only. Firms do not have an obligation to provide income benefits supplement to their Professional Legal Staff on parental leave. However, providing income benefits supplement is a practice that promotes equality in the workplace. A firm may decide to provide any amount of income benefits supplement to *EIA* parental benefits.

[25] The firm may provide income benefits supplement for a period that is different than the 17 week period recommended in this Model Policy.

Legal Staff who are not eligible to receive *EIA* parental benefits with their [full salary[26]] for [a period of 17 weeks[27]].

Continuation of Professional Legal Staff Benefits

30. Full and part-time Professional Legal Staff absent on pregnancy/parental leave will be reinstated upon their return to active employment to their most recently held position, if it still exists, or to a comparable position, if it does not exist.[28]

31. To ensure a smooth transition back to work, Professional Legal Staff on leave should contact the [Firm's human resources department or the relevant department] and their [Practice Group Leader] at least 4 weeks in advance of their return so that appropriate arrangements can be made.

Group Insurance Benefits

32. Professional Legal Staff on pregnancy/parental leave continue to participate in the [list of group benefit plans] unless they elect in writing not to do so.

33. [Long term disability[29]] insurance coverage continues throughout the leave.

34. [Life and accidental death and dismemberment[30]] coverage continues during the leave. Professional Legal Staff are responsible for continued payment of staff-paid coverage.

35. Access to the [employee assistance program[31]] continues and Professional Legal Staff are encouraged to use these services to assist with family life transitions, return to work transitions, childcare issues and any other concerns that may arise.

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[26] Providing full salary to Professional Legal Staff who are not eligible to *EIA* is a recommended amount only. Firms do not have an obligation to provide income to their Professional Legal Staff while on parental leave. However, providing an income to Professional Legal Staff on parental leave is a practice that promotes equality in the workplace.

[27] The firm may provide income supplement benefits to their Professional Legal Staff for a period that is less than the duration of the leave or for a longer period than what is recommended in this policy.

[28] This is prescribed by the *ESA.* Under the *ESA,* Professional Legal Staff who wish to resign before their return to work must give the Firm at least four weeks' written notice of their intention.

[29] The Firm may insert the type of disability insurance available at the Firm, if any.

[30] The Firm may insert the type of life and death coverage available at the Firm, if any.

[31] The Firm may insert the title of the employee assistance program used by the Firm, if any.

Pension

36. If the Professional Legal Staff on leave chooses to continue contributing to the [pension plan[32]] during the leave, the Firm will match the contribution.[33]

37. If the Professional Legal Staff on leave chooses not to contribute to the [pension plan], the Firm will not contribute the employer portion during the leave.

Vacation

38. All accrued vacation must be taken before or after the leave, but may be taken at the beginning or/and end of the leave. Vacation continues to accrue throughout the leave.

Performance Reviews

39. If the Professional Legal Staff is on leave during a performance review period, a performance review may be conducted prior to the Professional Legal Staff's departure or within two months following their return. The review covers the Professional Legal Staff's performance prior to the leave, but does not include a review of the performance during the one month period preceding the leave.

Salary Administration

40. If a Professional Legal Staff is on leave under this policy during a salary review process, any applicable salary adjustments will be effective on the date of return from the leave. The Professional Legal Staff will be entitled to the salary she or he would have been entitled to if actively at work during the period of pregnancy/parental leave.

Consideration for Admission to Partnership

41. The criteria used for eligibility for equity partnership, such as [superior legal and personal skills and potential to develop a sustainable practice[34]], shall not be modified because a Professional Legal Staff has availed himself or herself of leaves or benefits under the Firm's pregnancy/parental leave policy. However, candidates who have taken one or more leaves may require longer periods of time to establish the criteria necessary for admission to partnership.[35]

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[32] Insert information about pension plan of the Firm, if any.

[33] This is a legal obligation under s. 51(1)-(3) of the *ESA.*

[34] A firm should include the criteria its partnership uses to consider eligibility to partnership.

[35] Law firms should be aware of human rights obligations in this area. It may be discrimintory to deny partnership to someone because the person took one or more pregnancy or parental leaves.

LAW FIRM EQUITY PARTNERS

42. The Firm is committed to the consistent treatment and equality of its Equity Partners.[36] Therefore, the Firm applies the following principles to grant pregnancy and parental leaves and benefits to its Equity Partners not covered under the *ESA* or the *EIA*.

Partnership Pregnancy Leave Eligibility and Entitlement

43. Equity Partners who are pregnant or who have given birth may take up to [17[37]] weeks partnership pregnancy leave.

44. Partnership pregnancy leave is calculated around the baby's expected due date. An Equity Partner should not begin her partnership pregnancy leave more than 17 weeks before the baby's due date. The latest a partnership pregnancy leave can begin is the earlier of either the baby's due date or the day on which she gives birth. Once started, the partnership pregnancy leave has to be taken all at one time.

Partnership Parental Leave Eligibility and Entitlement

45. Partnership parental leave applies to a birth parent, an adopting parent (whether or not the adoption has been legally finalized), and a person who is in a relationship of some permanence with a parent of a child and who plans on treating the child as his or her own.

46. All Equity Partners who are new biological or adopting parents are entitled to take up to [35 weeks if the person has taken a pregnancy leave, and 37 weeks otherwise[38]] of partnership parental leave.

47. Equity Partners who are new biological or adopting parents and who wish to take a longer period of leave, may request such leave to the [Executive Committee[39]] of the Firm. The [Executive Committee], after consulting with the Equity Partner who is requesting the leave, has the discretion to grant, deny or vary the request.

48. Once an Equity Partner has started partnership parental leave, he or she must take it all at one time and can't split it up.

49. An Equity Partners who is a birth mother and took a partnership pregnancy leave should begin her leave right after the pregnancy leave ends.

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[36] Some partners (such as non equity partners) may be covered under the *ESA* and *EIA* depending on the partnership agreement.

[37] This is the suggested number of weeks for partnership pregnancy leaves based on the length of leave allowed for Professional Legal Staff under the *ESA.*

[38] This period is consistent with the parental leave period entitlement for Professional Legal Staff. A Firm may decide to modify the parental leave period entitlement for Equity Partners.

[39] The firm may wish to use terminology applicable to its organization.

50. Parents other than the birth mother must begin their partnership parental leave no later than 52 weeks after,

    a. the date the baby was born; or
    b. the date the child first came into their care.

51. An Equity Partner who has a miscarriage or stillbirth, or whose spouse has a miscarriage or stillbirth more than 17 weeks before the due date is not eligible for partnership parental leave. The Equity Partner shall be eligible for compassionate leave in accordance with the Firm's policies.[40]

Process for Requesting Partnership Pregnancy and/or Parental Leave

52. Equity Partners are required to give reasonable notice to their [Practice Group Leader [41]] and the [Director of Human Resources[42]] of their intention to take a leave under this policy and the expected date of return to work.

53. The Equity Partner may advise the [Practice Group Leader[43]] and the [Director of Human Resources[44]] of any changes to the start date or end of the leave by providing the Firm with a reasonable notice of the change.

Compensation during Partnership Pregnancy Leave

54. The Equity Partner's compensation will not be affected by the partnership pregnancy leave.[45]

55. If the Equity Partner is on partnership pregnancy leave prior to the assessment of compensation, the compensation in a given year shall be determined without regard to the leave. The Firm is aware of the fact that an Equity Partner who is taking a partnership pregnancy leave will have to wind down her practice prior to the leave and ramp up her practice upon her return from the leave. Therefore, the Firm will not take into account the practice of the Equity Partner during the month prior to the leave or the month following the leave, when assessing the Equity Partner's compensation. The period of one month to wind down and one month to ramp up the practice may be adjusted by agreement between the Equity Partner and the partnership. Consideration

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[40] The firm may wish to list the applicable policies.

[41] A firm should use terminology that is most commonly used at the firm.

[42] A firm should use terminology that is most commonly used at the firm.

[43] A firm should use terminology that is most commonly used at the firm.

[44] A firm should use terminology that is most commonly used at the firm.

[45] This is the suggested amount of compensation for a female partner on partnership pregnancy leave. The firm may decide to compensate at a different level than the full 100% of compensation.

should be given to the Equity Partner's type of practice and other relevant circumstances.[46]

56. The Equity Partner's contributions to the Firm for the period of the leave shall be based on a comparable period prior to the leave.

57. An Equity Partner who takes a partnership pregnancy leave will not be expected to increase her productivity or billable hours to compensate for her absence from practice.

58. An Equity Partner who experiences a pregnancy-related illness before or after her partnership pregnancy leave may avail herself of the partnership sickness benefits policy and will receive compensation as though she is on leave for any other health-related reason.

Partnership Parental Leave Compensation

59. An Equity Partner who is a biological or adopting parent is entitled to [17[47]] weeks of leave with no reduction in the compensation[48] paid to the Equity Partner during that period. The Equity Partner will not be compensated for the remainder of the partnership parental leave.

60. If the Equity Partner is on partnership parental leave prior to the assessment of compensation, the compensation shall be determined without regard to the leave.

61. An Equity Partner who takes a partnership parental leave will not be expected to increase his or her productivity or billable hours to compensate for his or her absence from practice.

Notice of Return to Work

62. To ensure a smooth transition back to work, Equity Partners on leave should contact the [managing partner of the Firm] at least 4 weeks in advance of their return so that appropriate arrangements can be made.

Group Insurance Benefits

63. Equity Partners on pregnancy/parental leave continue to participate in the [list of group benefits plans] unless they elect in writing not to do so.

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[46] Depending on the Equity Partner's practice, the period of one month the wind down the practice and to ramp up the practice may have to be extended. Firms should take that into account when drafting their policy.

[47] This is the suggested period of parental leave. A Firm may decide to modify this period for Equity Partners.

[48] This is the suggested amount of compensation for a woman on pregnancy leave. The firm may decide to compensate at a different level than the full 100% of compensation.

64. [Long term disability[49]] insurance coverage continues throughout the leave.

65. [Life and accidental death and dismemberment[50]] coverage continues during the leave. Any Equity Partner paid coverage requires continued payment.

66. Access to the [assistance programs for partners[51]] continues and Equity Partners are encouraged to use these services to assist with family life transitions, return to work transitions, childcare issues and any other concerns that may arise.

Vacation

67. All accrued vacation must be taken before or after the leave, but may be taken at the beginning or end of the leave. Vacation continues to accrue throughout the leave.

PROVISIONS TO SUPPORT THE PROFESSIONAL LEGAL STAFF OR EQUITY PARTNER

68. In addition to the rights outlined in this policy, the Firm takes an individualized approach with each request for leave and benefits under this policy. The Firm has a duty to accommodate Professional Legal Staff and Equity Partner's special needs arising because of personal characteristics enumerated in the *Code* or the *Rules*. Each Professional Legal Staff or Equity Partner who is entitled to benefits under this policy has needs that must be considered individually in order to determine the support required to ensure that the person will return to a productive career while balancing work and life demands. When a request for leave is made, the [Executive Committee[52]] will consult with the Professional Legal Staff or Equity Partner to determine the Professional Legal Staff's or Equity Partner's needs and how they can best be provided. The Firm will always act in a manner that recognizes the privacy, confidentiality, comfort, autonomy and dignity of the Professional Legal Staff or Equity Partner. The Professional Legal Staff or Equity Partner covered under this policy will cooperate in the accommodation process and show willingness to be flexible. The Firm will discuss and agree upon issues such as:

    a. the process by which client files, if applicable, are transferred and handled during the Professional Legal Staff or Equity Partner's leave of absence;
    b. the process by which Professional Legal Staff or Equity Partners will continue to have up-to-date information on the development of files;
    c. the process for the return of client files to the Professional Legal Staff or Equity Partner upon the return to work;
    d. support or assistance that may be required by the Professional Legal Staff or Equity Partner during the leave;

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[49] Firm may include title of disability insurance applicable to Equity Partners, if any.

[50] Firm may include title of life and death coverage applicable to Equity Partners, if any.

[51] Firm may include information of assistance programs available to Equtiy Partners, if any.

[52] The Firm should insert the title appropriate to its organization, such as section chair, department chair.

e. support or assistance that may be required by the Professional Legal Staff or Equity Partner upon return from the leave, such as availability of rooms to breastfeed, flexibility of work schedule, opportunities to work from home;
f. alternative work schedules;
g. timelines for partnership considerations if extended leave of absence or repeated leaves of absence are taken[53] ;
h. other reasonable accommodation which would not cause undue hardship, requested by the Equity Partner and/or Professional Legal Staff returning to work after pregnancy/parental leave;
i. staffing requirements that would ensure continuity of service during the leave.

69. When flexible work arrangements are made between the Firm and the Professional Legal Staff or the Equity Partner, the Firm and the Professional Legal Staff or Equity Partner will agree on the following:

a. length of flexible work arrangement;
b. target of billable and non-billable hours;
c. proposed work schedule indicating the days when the Professional Legal Staff or the Equity Partner will generally be available;
d. a proposal addressing the use of the Firm's facilities and resources, including office space and secretarial support, and other relevant administrative matters; and
e. the economic consequences of the proposed arrangements to the Firm based on overhead, hourly billing rate and targeted billable hours.

IMPLEMENTATION GUIDELINES

70. The Firm will communicate and make this policy accessible to all professional legal staffs and partners.

Attachment to the Pregnancy and Parental Leaves and Benefits Policy for The Firm

Outline of Professional Legal Staff's Entitlement under the EIA

Entitlement to pregnancy, parental or sickness benefits under the *EIA* is governed by that Act. This section sets out some of the basic benefits as at the date of this policy. However, Professional Legal Staff should contact their Services Canada Centre directly for further information about their entitlement and to apply for benefits.

Eligibility for Pregnancy, Parental or Sickness Benefits

To be eligible for pregnancy, parental or sickness benefits under the EIA, Professional Legal Staff must show that,

a. his or her regular weekly earnings have decreased by more than 40%; and
b. he or she has accumulated 600 insured hours in the last 52 weeks or since the last claim. This period is referred to as "the qualifying period".

[53] A firm should be aware that it may be illegal to refuse admission to the partnership because a person has taken pregnancy or parental leaves.

The qualifying period is the shorter of,

a. the 52 week period immediately before the start date of a claim; or
b. the period since the start of a previous EI claim if that claim had started during the 52 week period.

The eligible Professional Legal Staff must serve a 2-week unpaid waiting period before the EI benefits begin to be paid.

Entitlement to Pregnancy Benefits

Pregnancy benefits are payable to the birth mother for a maximum of 15 weeks.

Entitlement to Parental Benefits

To be eligible for parental benefits under the EIA, you must be a biological or adopting parent.

While the biological or adoptive parents are caring for a newborn or an adopted child, they may receive up to a maximum of 35 weeks of parental benefits. Parental benefits can be claimed by one parent or shared between the two parents, but will not exceed a combined maximum of 35 weeks.

Under the *EIA*, parental benefits for biological parents are payable from the child's birth date and for adopting parents are payable from the date the child is placed with the adopting parents. Parental benefits are only available within the 52 weeks following the child's birth, or for adopting parents, within the 52 weeks from the date the child is placed with the adopting parents. If the child is hospitalized during that period, the period is extended by the number of weeks during which the child is hospitalized (up to a maximum of 104 weeks).

Entitlement to Sickness Benefits under the EIA

Sickness benefits may be paid up to 15 weeks to a person who is unable to work because of sickness, injury or quarantine. The Professional Legal Staff must provide a medical certificate indicating how long the illness is expected to last.

Process to Apply for Pregnancy, Parental or Sickness Benefits under EIA

To receive pregnancy and/or parental benefits under EIA, the Professional Legal Staff must submit an application on-line or in person at a Service Canada Centre. The Professional Legal Staff should apply as soon as she or he stops working.

INFORMATION

INTEGRATED ABORIGINAL COMMUNICATIONS STRATEGY FOR THE ABORIGINAL COMMUNITY AND THE LEGAL PROFESSION

Background

8. The Aboriginal Working Group ("the AWG") is a working group created by the Equity and Aboriginal Issues Committee ("the Committee") to provide recommendations to the Committee regarding legal and access to justice issues relevant to the Aboriginal community and Aboriginal members of the profession. Bencher Tracey O'Donnell chairs the AWG and the membership consists of 29 Aboriginal members of the Law Society from throughout Ontario.

9. The AWG first met in January 2005 and subsequently met three more times in 2005. Since January 2006, the AWG has met on a monthly basis by teleconference.

10. At its February 2006 meeting, the AWG identified the development of a communications strategy as a priority for 2006/2007.

11. On June 8, 2006, the Committee approved the communications strategy entitled *Integrated Aboriginal Communications Strategy for the Aboriginal Community and the Legal Profession*, presented at Appendix 1.

12. The activities outlined in the communications strategy will be developed in increments and will be included within the budget of the Equity Initiatives Department in 2006 and 2007. It is not anticipated that additional allocation of funds will be required.

APPOINTMENT OF EQUITY ADVISORY GROUP MEMBERS

13. The Terms of Reference for the Equity Advisory Group ("the EAG") provide that EAG shall make recommendations for appointment as follows:

    a. between 8 and 12 members shall be recommended for appointment at its first meeting (in January 2005); and
    b. between 8 and 12 members shall be recommended for appointment every 18 months thereafter.

14. The membership of EAG consists of organizations and members of the legal profession, including law students. The term of membership is three years. Individual members serve for a maximum of two consecutive terms.

15. In April/May 2006, pursuant to its Terms of Reference, EAG began an appointment process for appointment of between 8 and 12 members in June 2006. A bilingual (French/English) invitation to apply for membership was posted in the Ontario Reports and on the Law Society website, and was widely distributed to stakeholders and communities. The deadline for applications was May 1, 2006.

16. EAG received applications from 3 organizations and more than fifty individuals.

17. Pursuant to its Terms of Reference, EAG appointed a selection committee comprised of three members of EAG, Andrea Horton, Faisal Bhabha and Julie Ralhan, and Vinay Jain, a lawyer who is not a member of the EAG.

18. Based on criteria established by the EAG, the selection committee recommended the appointment of 2 organizations and 8 individuals listed below. The EAG and the Committee approved the Selection Committee's recommendation that the following organizations and individuals be appointed to the EAG:

    a. Organizations:

        i. The Arab Canadian Lawyers Association: The Arab Canadian Lawyers Association was established in 2005 to promote and facilitate the social and professional interaction among its members; to advocate and increase public awareness of legal issues on behalf of the Arab Canadian community; to advance legal education and resources to the Arab Canadian community; to provide mentorship to lawyers and law students; and to assist all lawyers addressing matters related to Arab Canadians.
        ii. The Hispanic Ontario Lawyers Association: The Hispanic Ontario Lawyers Association was founded in 2005 to raise awareness about the Hispanic Legal Community in Canada. The objectives of the Association are to give back to the Hispanic Community and to the legal profession; to increase the number of Hispanic lawyers; to advance the standing of Hispanic lawyers in the community; to promote the cooperation and development of Hispanic lawyers; and to be involved in significant issues affecting the Hispanic community.

    b. Individuals:

        i. Ritu Bhasin, Director of Student and Associate Programmes at Stikeman Elliott LLP;
        ii. Zahra Binbrek, law student at the University of Windsor;
        iii. Joseph K. Cheng, Counsel with the Department of Justice, Public Law Section in Toronto;
        iv. Soma Choudhury, corporate/securities associate at Davies Ward Phillips and Vineberg LLP;
        v. Michelle Dagnino, graduating from Osgoode Hall Law School in 2006 with an LLB;
        vi. Amandi C. Esonwanne, completing his articles at the Ministry of Labour in Toronto and will be called to the Bar in July, 2006;
        vii. Milé Komlen, Senior Consultant in Employment Equity & Diversity at the Canadian Imperial Bank of Commerce (CIBC); and
        viii. Chantal Morton, Adjunct Professor and the Academic Director of the Intensive Program in Poverty Law at Parkdale Community Legal Services at Osgoode Hall Law School.

B'NAI BRITH CANADA – HATE ON THE INTERNET SYMPOSIUM

19. The League for Human Rights of B'nai Brith Canada will hold an international symposium on *Hate on the Internet* in Toronto on September 11 and 12, 2006. The international symposium aims at:

a. facilitating ongoing national and international cooperation on the issue of hate on the internet;
b. encouraging a best practices approach;
c. encouraging the development of proactive initiatives and public education campaigns;
d. ensuring a cadre of investigative law enforcement officers trained in fighting online extremism and cyber-terrorism;
e. encouraging advances in the area of new legal and legislative protection; and
f. increasing support for victims of hate crimes over the internet.

20. Workshops on September 11, 2006 will be held in the Law Society's Donald Lamont Learning Centre. Further information about the symposium will be provided when available.

EQUITY PUBLIC EDUCATION SERIES – 2006

21. Pride Week Event topic: Current Issues in Health Law Affecting Lesbian, Gay, Bisexual, and Transgender Communities

a. Event date: June 20, 2006
b. Location:

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

22. Access Awareness topic: TBD

a. Event date: New date: October 25, 2006
b. Location:

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

23. Louis Riel Day topic : TBD

a. Event date: November 16, 2006
b. Location:

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

APPENDIX 1

Integrated Communications Strategy for the
Aboriginal Community and the Legal Community

Background

In October 2003, Convocation of the Law Society of Upper Canada approved the Guidelines for Lawyers Acting in Cases Involving Claims of Aboriginal Residential School Abuse (Guidelines). These Guidelines were the culmination of a consultation by the Law Society with the Aboriginal community. As a document, the Guidelines identify and give purpose to the Law Society's mandate to regulate the profession in the public interest. They also express the Aboriginal community's goal of ensuring that lawyers acting on behalf of Aboriginal community members have a base level awareness of the potential issues facing their clients. The development of the Guidelines led to an increased understanding by the Law Society and Convocation of the legal as well as access to justice issues facing the Aboriginal community in Ontario.

The Aboriginal Working Group (AWG) of the Equity and Aboriginal Issues Committee (the Committee) was created in late 2004. The AWG consists of 29 Aboriginal members of the bar throughout Ontario, representing a full range of members in terms of their breadth of work and years of call. The members of the AWG identified a need to improve communication and education both within the legal profession and within Aboriginal communities regarding the provision of legal services to Aboriginal people. Their approach to discussing the importance of establishing an open communication line between the Law Society and the Aboriginal community has been driven by their commitment to adhering to the principles inherent in the Kaswentha. The Kaswentha, the two-row wampum belt, was presented to the Law Society at Convocation in October 1998 as a symbol of the Aboriginal community's understanding of the relationship between the Law Society and the community based in Aboriginal tradition. The members of the AWG determined that the development of a communications strategy for the Aboriginal community is a priority issue. The participation of the AWG on the Committee has led to an increased understanding by the Law Society and members of Convocation of the issues faced by Aboriginal members of the Bar and Aboriginal community members

In mid-2005, the Equity Initiatives Department worked with the Communications Department to begin developing a Communications Strategy for the Aboriginal community. Initiatives were implemented as an interim measure throughout 2005. These initiatives included:

- The Guidelines and information about the Guidelines are distributed through external communication channels by the Law Society and are also posted on the Law Society website.
- Ongoing promotion through press releases and notices to the media of events and news relating to Aboriginal initiatives and programs at the Law Society through the Communication Department's Equity and Diversity media contacts.
- The web-casting of all Public Legal Education events, including the National Aboriginal Day event at the Law Society on June 8, 2005 and Louis Riel day on November 16, 2005.
- Features in the Ontario Lawyers Gazette on the Aboriginal students called to the Bar in 2005. Particular focus was given to the London Call where 6 of the 84 students called were Aboriginal.
- Distribution of 1000 Law Society brochures on "How to Make a Complaint" through the Assembly of First Nations as part of the AFN's community educational initiative regarding the Indian Residential School Resolution Process of the federal government.
- Letter of congratulation and ad placement in Aboriginal media to recognize the achievement of member Bernd Christmas who was selected as a recipient for the 2006 National Aboriginal Achievement Award.

The consultations with the Aboriginal Working Group and the Communications Department revealed that there are two key audiences: the Aboriginal community, including the Aboriginal bar, and the legal community. Recognizing that these two audiences have both discrete and common requirements in terms of a strategic approach, this document outlines an integrated strategic proposal.

Objectives

- Build a stronger relationship between the Aboriginal legal community and the Law Society through on-going communication
- Enhance the profile of the Law Society within the Aboriginal community regarding the Law Society's role, access to the profession and the rights of clients in the client/lawyer relationship
- Increase awareness within the Aboriginal community of the Guidelines for Lawyers Acting in Cases Involving Claims of Aboriginal Residential School Abuse
- Increase awareness within the profession in Ontario of issues relevant to Aboriginal clients, the Aboriginal community and to members of the equality-seeking groups to enable members to competently serve their clients.
- Increase awareness and capacity within the Law Society of the legal and access to justice issues relevant to the Aboriginal community.

Key Messages

- Promote the position of Aboriginal Issues Coordinator and the programs of the Equity Initiatives Department to the Aboriginal bar, the Aboriginal community and the profession in general
- Promote the positive steps in the development of a relationship between the Law Society and the Aboriginal community with particular focus on the Kaswentha, the two-row wampum belt
- Disseminate information about the governance structure of the Law Society of Upper Canada, with particular focus on the Equity and Aboriginal Issues Committee and its agenda and initiatives related to equity, diversity and Aboriginal issues.
- Promote the role of the Law Society to regulate the profession in the public interest and apply this message in the context of Aboriginal issues and initiatives
- Promote the Aboriginal law student and Licensing candidate initiatives administered by the Aboriginal Issues Coordinator, the Equity Initiatives Department and the Education Support Services Unit of the Professional Development and Competence Department.
- Promote the Elders' program, a support program for Aboriginal Licensing candidates, Aboriginal articling students and Aboriginal members of the profession that is offered during the 5-week Skills and Professional Responsibility component of the Licensing Process.
- Promote the development of partnership opportunities between the Law Society and the Aboriginal bar, legal organizations and the community, with particular focus on public legal education projects.
- Promote access to justice and the profession to Aboriginal law students and Licensing candidates through the promotion of a mentoring and education support services

- Promote the Guidelines for Lawyers Representing Clients in Aboriginal Residential School Claims to the Aboriginal bar and the community and the profession in general.

Challenges

Communicating to the Aboriginal Community

- Technological – access to computers and the Internet is limited in some sectors of the Aboriginal community
- Lack of awareness of the function and public interest role of the Law Society
- Lack of familiarity with the role of the Aboriginal Issues Coordinator
- Possible negative perception of the Law Society and/or the profession

Communicating to the Legal Community

- Competition with a large volume of communication from the Law Society and other legal organizations and agencies
- Lack of basic knowledge about the Aboriginal community and issues relevant to the community
- Lack of basic familiarity with Aboriginal clients and their needs
- Lack of basic familiarity with issues relating to equity and diversity, specifically legal issues affecting Aboriginal peoples, Francophones and members of the equality-seeking groups
- Lack of awareness of the public interest role of the Law Society

Approach

Because this strategy presents an integrated approach to promoting the programs and initiatives of the Law Society in relation to the Aboriginal bar, the Aboriginal community and the legal community as a whole, the proposed approaches are categorized according to specific audience focus areas.

In all cases, when materials are prepared for distribution to either the Aboriginal community or the legal community or both as part of this strategy, the process of review of the materials prior to release will involve the Aboriginal Issues Coordinator as a mandatory first step and, where feasible, the members of the Aboriginal Working Group. The Aboriginal Working Group strongly recommends that the Law Society utilize both its internal as well as external resources when creating materials on Aboriginal issues to ensure that the diverse perspectives of the community are considered and respected and that the language used is appropriate.

Focus on the Aboriginal Community

- Disseminate information through First Nation band councils, friendship centres and other local service organizations in order to tap into existing and familiar communication networks
- Leverage communications resources available through Aboriginal communities and individuals, i.e. publications, Web sites, conferences, bulletin boards, who are familiar with the public interest function of the Law Society and/or the Aboriginal Issues Coordinator
- Information material will be print-based primarily but an electronic format

will also be available to ensure that information can be effectively distributed as broadly as possible

- Reformat and distribute existing information prepared by the Law Society to utilize existing resources effectively. For example, edit and distribute in print and in electronic format the Aboriginal Issues Coordinator's Operational Review report for 2005. The Operational Review outlines the activities undertaken by the Aboriginal Issues Coordinator during 2005 with respect to Aboriginal outreach and other Aboriginal program initiatives of the Law Society.

Focus on the Legal Community

- Disseminate information through existing Law Society Communication Department networks to effectively utilize existing communications networks
- Leverage communications resources currently available through the Law Society i.e. Equity Initiatives Department contact list, publications, public Web site, conferences, bulletin boards, continuing legal education programs, and public legal education programs
- Information material will be both electronic and print-based, but electronic primarily to optimize resources and existing communications networks
- Develop materials to engage specific audiences within the legal community. For example, create specialized materials for law students, Licensing students, new calls, and experienced members.
- Devote the Focus section of an edition of the Gazette to Aboriginal issues in order to communicate directly with members through existing channels. For example, features could include profiles of Aboriginal members of the bar and focus on their achievements, i.e., Bernd Christmas and the National Aboriginal Achievement Awards. Other features could include articles features on the progress that the Law Society has made and the challenges that lie ahead.

Areas of Combined Focus

- Leverage the existing public legal education program and promote it through Aboriginal community networks and Law Society Communication Department networks as an opportunity for both the Aboriginal community and the profession to interact and access up-to-date information on access to justice issues of importance to the Aboriginal community. Leverage the attendee list of these events to expand the communications database of the Equity Initiatives Department for all public legal education events. Promote the webcast of the public legal education events on the Law Society website through all available communications networks.
- Promote the Aboriginal Issues Coordinator through both Aboriginal community networks and Law Society Communications Department networks as the point of contact for members of the Aboriginal community and the profession to access the Aboriginal programs and initiatives of the Law Society. As part of the mandate, the Aboriginal Issues Coordinator represents the Law Society on a number of Aboriginal community groups and could act as a spokesperson for the Law Society

on Aboriginal issues for media purposes.

- Promote the achievements of Aboriginal members of the profession
- through both Aboriginal community networks and Law Society Communications Department networks.

Audiences

Immediate
- Aboriginal legal community
- Aboriginal articling students and Non-Aboriginal articling students
- First Nation, Métis and Inuit individuals and organizations
- Reserve, rural and urban Aboriginal communities, friendship centres and other Aboriginal organizations. List of Ontario First Nation communities attached at Appendix 1. List of Ontario Friendship centres attached at Appendix 2.
- Convocation of Law Society
- Lawyers
- New calls to the Bar
- Legal Aid Ontario
- Legal education institutions
- Other legal institutions
- Benchers of the Law Society

Secondary
- Stakeholder groups or organizations that provide services to Aboriginal individuals and communities
- Other stakeholders that provide legal services

Tactics

Focus on the Aboriginal Community:

1) Monthly bulletin

Develop a monthly bulletin/information sheet for Aboriginal lawyers and community members on key topics, timely issues. For example, the bulletin could announce upcoming public legal education events relevant to the Aboriginal community.

2) Article and notice placement

Develop articles and features on key topics for placement in Aboriginal publications
Material can also be provided to pertinent Web sites. Provide notices of upcoming events on websites catering to the Aboriginal community (e.g. AAMSA, 211Ontario.ca)

3) Speaking engagements

Develop a core speech to be used by Law Society representatives at forums, conferences hosted by Aboriginal organizations and agencies.

4) Law Society Web site

Dedicate a section of the Web site to Aboriginal issues/hot topics

5) Operational Review Report

Develop a print piece summarizing the Law Society services and supports available to the Aboriginal community and the Aboriginal initiatives and programs undertaken in 2005 (to be updated annually).

6) Service Information Brochure

Develop a brochure summarizing the Law Society services and supports available to the Aboriginal community.

7) Engagement of the Aboriginal Working Group (AWG)

Engage the AWG to guide in developing and distributing information on Aboriginal initiatives and programs provided by the Law Society. Engage the AWG to evaluate the strategy on an ongoing basis and recommend changes.

8) Video/DVD with a targeted message for distribution to Aboriginal communities, agencies and organizations

Produce a video/DVD or a video/DVD series featuring Aboriginal lawyers and/or community members communicating a positive and targeted message to members of the Aboriginal community. Potential targeted messages include:

- A Client's Bill of Rights (what to expect when you hire a lawyer, explaining the retainer agreement etc.)
- How to hire and when to fire a lawyer (questions to ask yourself and the lawyer)
- The Law Society complaint process
- Equity and diversity in the profession
- Working with ALST to explain the Gladue Court and the Community Council project
- Primer on the Criminal Justice system or what happens when you go to court

9) Aboriginal Services and Program Information Booth

Create an information booth featuring information about Aboriginal programs and services at the Law Society that can be transported to events in the Aboriginal community.

10) Aboriginal Bar Survey

Promote the Aboriginal Bar Survey and Consultation through the Aboriginal Working Group and existing Aboriginal community contacts.

Focus on the Legal Community:

1) Ontario Lawyers Gazette

Create a semi-annual feature in the OLG highlighting what the Law Society is doing to serve the needs and interests of Aboriginal people. The feature could address such issues as: How much progress has been made? What else must be done?

2) Operational Review Report

Develop a print piece summarizing the Law Society services and supports available to the Aboriginal community and the Aboriginal initiatives and programs undertaken in 2005 (to be updated annually).

3) Service Information Brochure

Develop a brochure summarizing the Law Society services and supports available to the Aboriginal community.

4) Article placement

Develop articles and features on key topics for placement in legal publications
Material can also be provided to pertinent Web sites

5) Speaking engagements

Develop a core speech to be used by Law Society representatives at forums, conferences

6) Law Society Web site

Dedicate a section of the Web site to Aboriginal issues/hot topics for members.

7) Engagement of the Aboriginal Working Group (AWG)

Engage the AWG to guide in developing and distributing information on Aboriginal initiatives and programs provided by the Law Society. Engage the AWG to evaluate the strategy on an ongoing basis and recommend changes.

Evaluation

As part of an ongoing strategy, evaluation and re-assessment of priorities are important factors to determine the success of any program and to determine where opportunities exist for improvement in the delivery of services and programs. The Aboriginal Working Group strongly recommends that this Communications Strategy, particularly in its focus on the Aboriginal community, will benefit from exploring all options for requesting and receiving feedback from stakeholders.

Informal feedback

- Email
- Comments communicated by members and Aboriginal community members after release of communication piece and/or events

Formal
- Responses to direct request from Law Society for feedback (i.e. through feedback forms distributed along with materials)
- On-line survey through external website and/or Law Society website
- Response rates for Aboriginal public legal education events at the Law Society
- Accurate recording of requests for materials and invitations to speaking engagements and other events

TRIBUNALS COMMITTEE REPORT

Report to Convocation
June 22, 2006

Tribunals Committee

Committee Members
Larry Banack (Chair)
Mark Sandler (Vice Chair)
Carole Curtis
Sy Eber
Janet Minor
Derry Millar
Bonnie Warkentin

Purpose of Report: Decision
Information

Policy Secretariat
(Sophia Sperdakos 416-947-5209)

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COMMITTEE PROCESS

1. The Committee met on June 8, 2006. Committee members Larry Banack (Chair), Carole Curtis, Sy Eber, Janet Minor and Bonnie Warkentin attended. Staff members Grace

Knakowski, Sophia Sperdakos and Joe Zaffino also attended. A.K. Dionne participated in a portion of the meeting.

FOR DECISION
GUIDELINES FOR ADJUDICATORS RESPECTING
ORAL/WRITTEN REASONS FOR DECISION

MOTION

2. That Convocation approve the following as guidelines for adjudicators to consider when assessing whether written reasons are appropriate or mandatory, or oral reasons are appropriate:

WHEN WRITTEN REASONS MAY BE APPROPRIATE

1. The reasons will contribute to the Law Society's jurisprudence:

   a. The issue is novel (no jurisprudence exists or it is still developing).

   b. The law is unsettled (the existing jurisprudence is conflicting).

   c. The area of law is settled, but plausible distinctions were raised.

   d. Tribunal decisions are not technically binding in future cases, but it would be appropriate to explain a departure from existing jurisprudence.

2. The issue requires interpretation (not the mere application) of statutes, regulations, the *Rules of Practice and Procedure,* the *Rules of Professional Conduct* or Law Society by-laws.

3. Reasons will contribute to the parties' understanding of the decision (even if the decision may turn on the specific facts of the case, so that it may not be of great value as a precedent.) For example, written reasons might be considered in the following circumstances:

   a. The facts are complex.

   b. There will be dissenting reasons.

   c. The penalty will have a serious impact on the member (e.g. long suspension or disbarment).

   d. The evidence is conflicting or credibility issues must be resolved.

   e. The matter was highly contentious and vigorously pursued/defended or an appeal (or judicial review) is otherwise likely.

   f. The tribunal rejected the terms of an agreed statement of facts or a joint submission on penalty.

WHEN ORAL REASONS MAY BE APPROPRIATE

1. An expedited decision is required for fairness to a party or for protection of the public.

2. The member waives the right to appeal, for example, where the penalty is an admonition or a reprimand.

3. The matter proceeded under ss. 46 to 49.1 of the *Law Society Act* to be dealt with as a summary hearing, by a single bencher.

4. There is little involved in the way of valuable precedent either because,

   a. the matter was routine; or
   b. no issue was in dispute between the parties. For example, the tribunal accepted an agreed statement of facts and a joint submission on penalty.

5. The decision relates to a decision or order that does not finally dispose of the matter.

WHEN A HYBRID APPROACH MAY BE APPROPRIATE

In some limited circumstances, a matter may require an immediate decision, but may also be a proper (or even mandatory) subject for written reasons. In such circumstances, the appropriate course of action may be to render an oral decision with a brief explanation immediately, while reserving the right to provide complete written reasons later.

MANDATORY REQUIREMENTS FOR REASONS

Written Reasons Required

1. Rule 13.03(1) of the *Rules of Practice and Procedure* (the Rules) requires that a tribunal give reasons in writing, if the request is made within 30 days of a panel making its final decision or order.

2. Rule 13.03(2) of the Rules requires that the Hearing Panel issue written reasons for decisions in relation to capacity in every case.

3. Rule 15.07 of the Rules requires that the Appeal Panel give written reasons for its decision in every case.

Reasons Required (Oral or Written)

1. On May 26, 2005 Convocation approved a motion requiring that oral or written reasons should be given in urgent matters. The example cited, when the motion was introduced, was that some reasons should be given when a member is suspended or disbarred.

3. That Convocation review the guidelines in September 2007 to consider their effectiveness.

Introduction and Background

4. In May 2005 the Tribunals Task Force Report proposed that Law Society panels produce written reasons for their decisions and orders, in every instance. This recommendation was discussed extensively following which Convocation approved an amendment to delete the recommendation that there be written reasons in every case.

5. Despite the views that written reasons were not necessary in every case it was acknowledged that there are certain circumstances in which written reasons would be important and appropriate. Convocation suggested that guidelines be produced setting out circumstances when written reasons might be more appropriate than oral reasons.

Respective Advantages of Written and Oral Reasons

6. At the May 26, 2005 meeting of Convocation, the benchers who favoured the universal use of written reasons felt that written reasons would,

   a. lead to more fully considered reasons and enhanced quality;

   b. provide a more complete body of jurisprudence;

   c. enhance the appeal process;

   d. provide transparency to the disciplinary process (justice can be seen to be done); and

   e. increase the accountability of tribunals for the decisions that they make.

7. The benchers who felt that written reasons were not necessary in every case noted that not every case is of jurisprudential value. They pointed out that courts do not always provide written reasons.

8. Some benchers were of the view that when written reasons are not required in every case, this allows urgent cases to receive an immediate decision; the tribunals' time is used more efficiently; and backlogs are avoided.

9. The proposed guidelines, set out in paragraph 2 above, have been developed with a view to capturing the considerations raised in the discussion in Convocation in May 2005, balancing the differing principles behind written and oral decisions, and reflecting Convocation policies or rules on this issue that currently exist.

10. The Committee is of the view that the proposed guidelines will assist adjudicators to consider the most appropriate or required form for rendering their decisions. The Committee considers, however, that it would be useful to evaluate the effectiveness of the guidelines in the fall of 2007.

FOR INFORMATION

TRIBUNALS OFFICE STATISTICS

11. Appendix 1 sets out the Tribunal Office Statistics for the first quarter of 2006, for Convocation's information.

SOCIETY OF ONTARIO ADJUDICATORS AND REGULATORS (SOAR) TRAINING

12. Interested benchers are advised that the next session of SOAR training is tentatively scheduled for October 16-20, 2004 in Toronto. The dates and location are still to be confirmed. The relevant website is www.soar.on.ca/Attachments/Info-Flyer-2006.pdf.

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

Copy of the Tribunals Office statistics, First Quarter Report (January 1 to March 31, 2006).

(Appendix 1, pages 9 – 22)

CANLII BRIEFING

REPORT FOR INFORMATION ONLY

HERITAGE COMMITTEE REPORT
- Law Society's Website "Time Capsules"

Report to Convocation
June 22, 2006

Heritage Committee

Purpose of Report: Information

Committee Members
Constance Backhouse (Chair)
Andrea Alexander (Vice Chair)
Robert Aaron
Gordon Bobesich
Andrew Coffey
Patrick Furlong
Allan Lawrence
Laura Legge

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

COMMITTEE PROCESS

1. The Committee met on June 8, 2006. Committee members Constance Backhouse (Chair), Andrea Alexander (Vice Chair), Andrew Coffey, Patrick Furlong, Allan Lawrence and Laura Legge attended. Staff members Terry Knott, Susan Lewthwaite, and Sophia Sperdakos attended.

INFORMATION

LAW SOCIETY WEBSITE "TIME CAPSULES"

1. The Law Society's website includes information about the history of the Law Society and the Ontario legal profession. It includes information on Osgoode Hall, links to the Virtual Museum and Exhibition Hall, and "time capsules" that use documents and artifacts to tell the Law Society's and the profession's stories.

2. Susan Lewthwaite of the Corporate Records and Archives Department recently completed a new time capsule for the Law Society's website, the subject matter of which is "law school student life in the 'Gay 90s'". The time capsule is a lively narration of the social life of students, with illustrations of invitations, debates, annual dinners and dance cards. A copy of the time capsule is set out at Appendix 1. The actual artifacts are on display outside the Great Library.

3. This is the 15th time capsule in the series. For Convocation's information, examples from several other time capsules are included at Appendix 2. In addition all the time capsules can be accessed at www.lsuc.on.ca/about/a/history/time-capsule. A summary of the time capsule topics is set out at Appendix 3.

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

(1) Copy of a time capsule re: "law school student life in the 'Gay 90s'". (Appendix 1, pages 4 – 5)

(2) Copy of a time capsule re: Governors General of Canada and the Law Society. (Appendix 2, pages 6 – 10)

(3) Copy of a summary of the time capsules. (Appendix 3, pages 11 – 13)

CONVOCATION ROSE AT 4:00 P.M.

Confirmed in Convocation this 28th day of September, 2006.

Treasurer